Judgment No. HB 15/05
Case No. HC 167/05

THOKOZANI KHUPHE

Versus

THE OFFICER IN CHARGE, LAW AND ORDER
SECTION Z.R.P. BULAWAYO CENTRAL POLICE STATION

And

THE COMMISSIONER OF POLICE

And

THE ATTORNEY GENERAL

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 AND 24 FEBRUARY 2005

J Sibanda for the applicant
B Ndove with J Mudenda for the respondent

Urgent Chamber Application

NDOU J: The applicant, an elected and sitting Member of Parliament for the Makokoba Constituency in Bulawayo seeks a provisional order in the following terms:

"Final Order sought

1. That it be and is hereby declared that section 24 of the Public Order and Security Act Chapter 11.17, as read with section 2 thereof, does not oblige the organiser or convenor of a meeting to notify the regulatory concerned, if such meeting or gathering be a private meeting or gathering.
2. For the avoidance of doubt, the organiser (sic) of such meeting as is referred to in (a) above, shall not be held to have contravened section 24 of POSA, as read with section 2 thereof, where the meeting or gathering concerned is not a public meeting or gathering.
3. The respondents pay the costs of this application jointly and severally, the one paying to absolve the others.

Interim order sought

Pending confirmation or the discharge of the order, that this order shall operate as a temporary order:

1. Restraining the 2nd respondent through his officers, from disrupting, breaking up or in any way interfering with the holding of any private meeting held by the applicant, whether such meeting be held at a private residence or other place.
2. Restraining the 2nd respondent through his officers from causing the arrest of the applicant for holing such meetings."

This matter was brought before me as an urgent matter. I directed that the parties file heads of arguments.

The facts giving rise to the applicant are that the applicant called a meeting of her constituents at her place of business, namely Fast Climber Restaurant, along Leopold Takawira Avenue, Bulawayo. The meeting was on 23 January 2005 on a Sunday. She concedes that her restaurant is open to the public Mondays to Saturday. It is, however, closed to the public on Sundays. With this background her case is that it is a public place Monday to Saturday and a private place on Sundays. She opined that the meeting of 23 January 2005, which was held on a Sunday, is therefore a private meeting. The meeting was open to people from various wards of her constituency. The purpose of the meeting was to integrate the new wards into the old and also to strategize and plan for the forthcoming elections. A total of 83 people attended the meeting. The meeting started uneventfully. Midway through the agenda, the police entered the building. Pandemonium of sorts ensued as some people thought they were under attack. People ran in all directions to escape what they perceived was an attack upon them by the police. The meeting was then broken up in that fashion. About twenty people managed to evade arrest. Sixty or so were then taken to the charge office, and were subsequently released without charge. The applicant, being

the convenor and organiser of the meeting, was charged with contravening section 24 of the Public Order and Security Act [Chapter 11:17] (hereinafter referred to as POSA). The applicant appeared in Bulawayo Magistrates' Court and was placed on remand to 10 February, 2005, she is on $100 000,00 bail.

Most of what the applicant says in her founding papers is sheer politics and this court, by design, will ignore the political issues and focus on the legal issues.

From the opposing papers and remand form it can be discerned that the view of the respondents is that the above meeting of 23 January 2005 was a public one. This issue is before the magistrates' court and I cannot determine it here. At the commencement of these proceedings the applicant had not challenged her being placed on remand for want of reasonable suspicion that she committed the offence. In other words, the matter is still *lis pendens*. In their opposing papers the 2nd and 3rd respondents authorised the 1st respondent to represent them. The applicant raised a point *in limine* in that regard. The basis is that the first respondent is a functionary of the 2nd respondent. His duties are to carry out duties delegated to him by the 2nd respondent. The applicant states that "this case seeks a policy u-turn on the point of the 2nd respondent, … (and) 1st respondent, for obvious reasons, can not respond … on current policy". Put in simply terms, the applicant's understanding is that the 1st respondent s a policy implementer, whilst the 2nd respondent is a policy maker. With respect, my understanding is that both 1st and 2nd respondents are policy implementers with the Minister of Home Affairs as the policy maker. Although the Attorney General is government's supreme legal advisor, his Civil Division office instructed the present legal practitioners to act on his behalf. The 3rd respondent mandated the 1st respondent to represent him. There is nothing legally wrong with the mandate.

The second and third respondents, in their wisdom, chose to mandate the first respondent to represent them. There is no legal bar to such authorisation and the point *in limine* must fail. In any event this court is not a forum for making policy.

Coming back to the main issue there are procedural challenges facing the applicant. These were pointed out and in the end, Mr *Sibanda*, for the applicant, confined the application to a prayer for a declarator that in essence one does not need police clearance to hold a private meeting. Put in another way, section 24 of POSA applies to public meetings and gathering only. It is sought that the police make a distinction between public and private meetings and gatherings. POSA does not contain a definition of a "private meeting". This is to be inferred from the wide definition of a public meeting. In the *Zimbabwe Congress of Trade Unions* vs *The Officer Commanding Police, Harare District and the Commissioner of Police* HH-56-02, CHINHENGO J, dealt extensively with the construction of section 24 of POSA in particular the definition of public gathering. At page 9 of his cyclostyled judgement the learned Judge said –

> "Another basis on which this matter may be examined are the definitions of "public gathering", "public meeting" and "meeting" in section 2 of POSA. POSA does not require that persons who intend to hold meetings which are not meetings as defined in that Act, or which are not public in nature, should give notice to the regulating authority in terms of section 24. In so providing Parliament appreciated that the law would be so draconian as to be a blatant contravention of the rights and freedoms enshrined in the Constitution, hence it did not require any notice to be given in respect of such meetings … These definitions (in POSA) put it beyond any doubt that the public gathering referred to in section 24 of POSA is a meeting held in a public place or one to which the public is permitted to attend and which is held to discuss matter s of public interest." (see also *R* v *Chisanga* 1964 RLR 575)

I associate myself with the above. Both counsel did not refer to foregoing judgment. It seems that they were under the impression that they were dealing raising

a novel legal issue. I do not think that the declaration sought should be granted on the facts of this matter as alluded to earlier on. The facts deal with whether or not the meeting convened by the applicant is a public one. The magistrates' court is seized with the matter and there is no legal basis for me to take over and determine the issues pending before another court. Mr *Sibanda* has suggested that I ignore the facts of the criminal charge and deal with the policy allegedly set out by the second respondent. Although couched as a declarator, this latter prayer is one for review. What the applicant seeks is that I review the decision of the second respondent that "the police have to be notified of all meetings by politicians, be they public or private." That being the case, the provisions of Rule 259 of the High Court Rules apply. A declaratory order is, in any event, merely one of a species of relief available and the applicant should not be able to get around the time limits for review proceedings by instituting proceedings for a declaratory order – *Kwete* v *Africa Community Publishing and Development Trust* HH-216-98; *Mutare City Council* v *Mudzime* 1999(2) ZLR 140 (S); *Marasha* v *Old Mutual Life Assurance Ltd* 2000(2) ZLR 197H at 198H-199C and *Mpofu and Anor* v *Parks and Wild Life Management Authority* HB-36-04. The applicant seeks judicial review of the above mentioned decision by the second respondent. It is trite that judicial review is the means by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies. This includes individuals charged with public functions. It is a specialised remedy in public law. In *casu,* it seems to me that review is based on illegality, i.e. the decision making authority, being the Commissioner of Police, is guilty of an error in law – *Secretary for Transport and Anor* v *Makwavarara* 1991(1) ZLR 18 (S); *Affretair (Pvt) Ltd & Anor* v *M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

and *Chief Constable of North Wales Police* v *Evans* [1982] I.W.L.R. 1155 at 1160. The difficult I have is that the papers do not show when the second respondent made the decision, so it is difficult to say whether the application is within the time limits set out in the rules. The policy was no filed of record. But, more importantly review cannot be sought by way of a chamber application. A wrong procedure was adopted.

From the foregoing, the application cannot succeed. Mr *Sibanda* urged me not to dismiss the application but instead decline to make the declarator. The respondents do not seem to oppose this but insist that the applicant bears the costs. I agree with this approach because as pointed out above, the applicant was not raising a novel question as the question was dealt with in HH-56-02 *supra*. The applicant cannot expect the respondents to carry the financial burden of her ignorance on the matter.

Accordingly, I decline to grant the declarator sought with the applicant paying the costs of the application.

Job Sibanda & Associates, applicant's legal practitioners
T Hara & Partners instructed by the Civil Division of Attorney General's Office for all respondents