

MOVEMENT FOR DEMOCRATIC CHANGE – T

Versus

**OFFICER COMMANDING BYO CENTRAL
DISTRICT POLICE N.O.**

And

**THE COMMISSIONER GENERAL
ZIMBABWE REPUBLIC POLICE N.O.**

And

THE MINISTER OF HOME AFFAIRS N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 19 & 26 MAY 2016

Urgent Chamber Application

K. Ngwenya for the applicant
Ms R. Hove with Mr Chivayo & Mr Dube for the respondent

MAKONESE J: The applicant is the Movement for Democratic Change (MDC-T), a political party led by Morgan Tsvangirai. The applicant is an opposition party with a substantial following in Zimbabwe and with branches in all the provinces of the country. In pursuit of its political objectives, the applicant is planning to hold a peaceful demonstration or protest march on the 28th May 2016 in Bulawayo. The planned demonstration is dubbed “*March against poverty and corruption*”. The stated objectives of this protest march are to bring to the fore applicant’s position on the deteriorating socio-economic and political conditions in the country through a peaceful demonstration. Top on the priority of the issues of the planned peaceful demonstration are the rampant and alarming levels of corruption, escalating poverty, astronomical levels of unemployment, acute cash shortage, poor service delivery amongst other pressing issues. The applicant hopes that the planned protest march will jolt the government into action and attend to the various issues affecting the general populace.

HB 126/16
HC 1236/16

On 5th May 2016 the applicant's organizing secretary for Bulawayo Province, in recognition of the provisions of the Public Order and Security Act (Chapter 11:17), extended the courtesy of informing the 1st respondent of the planned peaceful demonstration /march/protest in a letter worded in the following terms:-

"MDC-T Bulawayo Province
41 Fort Street
Bulawayo

5 May 2016

The Officer Commanding
Z R P Bulawayo Central District

Ref: INTENTION TO HOLD A PEACEFUL MARCH/PROTEST/DEMONSTRATION
ON 28 MAY 2016

I wish to notify your office of our intention to hold the above stated programme on the date given above. We will be merely exercising our right as provided for in the Constitution of Zimbabwe. Our protest will merely concern issues of non-employment, deteriorating economic conditions, political and social situation. We intend to bring these to the attention of government leadership.

The proposed route for the march is as follows: Gathering point, CITY HALL CAR PARK. The march will proceed along Robert Mugabe Way towards 10th Avenue, turn into 10th Avenue, proceed to Hebert Chitepo Street, pass through Mhlahlandlela Complex, proceed along Basch Street towards Manor Hotel, pass and proceed back into Hebert Chitepo through 9th Avenue, proceed along Hebert Chitepo up to 6th Avenue Extension, turn into 6th Avenue going towards Lobengula Street, turn into Lobengula Street, proceed up to Masotsha Ndlovu Avenue and the march will end at the open space called King Lobengula Kraal along Masotsha Ndlovu Avenue. Starting time approximately 10:00 am and finish around 2:00pm.

Thank you in advance for your usual co-operation.

Yours sincerely

J. Sithole
Organising Secretary"

Applicant's letter received prompt attention and response from 1st respondent on the same day. The response by 1st respondent is in the following terms:

“5 May 2016

Attention: JAMES SITHOLE

RE: NOTIFICATION OF INTENTION TO HOLD A
MARCH/PROTEST/DEMONSTRATION ON 28/05/2016

This office acknowledges receipt of your correspondence dated 5 May 2016 on the above captioned matter.

I regret to inform you that this office has serious reservations on the intended march/protest/demonstration due to the fact that a similar march/protest/demonstration that you conducted in the month of April 2016 in Harare was not peaceful.

Please take note that there are numerous challenges facing our national economy, making the environment not conducive for political demonstrations of any form or character.

Your intended demonstration will be infiltrated by bad elements considering the number of participants. Our office cannot guarantee the security of the participants.

As a result of the above, I regret to advise you that your march/protest/demonstration cannot be sanctioned by this office.

Thanking you in advance for your usual cooperation.

Regulating Authority
Bulawayo Central”

The applicant was evidently not satisfied with the response by the 1st respondent, leading to the filing of this urgent application. I caused the application to be served upon all the respondents. I heard the parties in chambers on 19th May 2016 and granted the application in terms of the draft order. I indicated that my full reasons would follow. These are my reasons for granting the order sought.

Everyone has the right to freedom of peaceful assembly. This is a right closely linked to the right to freedom of expression. The right to demonstrate provides a means for public expression and is one of the foundations of a democratic society. The right applies to protest

marches, demonstrations, public and private meetings, “sit-ins”, and “silent protests”. The right to demonstrate only applies to peaceful gatherings and does not protect intentionally violent protests. There will be interference with the right to demonstrate if the authorities prevent a demonstration from going ahead; halt a demonstration, take steps in advance of a demonstration in order to disrupt it; or store personal information on people because of their involvement in a demonstration.

The right to demonstrate is enshrined in section 59 of the Constitution of Zimbabwe (No. 20 of 2013) which provides as follows:

“Freedom to demonstrate and petition

Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully.”

In my view the right to demonstrate is clearly provided for under the Constitution. The constitutional provision is however unequivocal in stating the circumstances under which the right to demonstrate is to be enjoyed. The Constitution provides that the right to demonstrate “Must be exercised peacefully.”

The 1st respondent opposed the application on essentially three grounds. I shall proceed to consider each of them in turn.

(a) A similar demonstration held in Harare in April 2016 was not peaceful

The applicant contended that the demonstration in Harare was held under different circumstances. The proposed march in Bulawayo is being organised by the Bulawayo branch of the applicant. Steps had been taken to prevent any form of violence by the deployment of “marshalls” who shall have the role of ensuring that the demonstration is not hijacked by unruly elements. The applicant also expects the police to assist in the enforcement of law and order.

I am not inclined to agree that the respondents have established that a real threat exists if the demonstration were to be allowed. It is not sufficient to merely allege that there is an

apprehension that violence may break out. For this court to curtail the right to demonstrate, it must be established on a preponderance of probabilities that there is a real likelihood that the demonstration/march/protest will not be peaceful. The respondents have expressed reservations regarding the safety of the participants in the proposed demonstration. There are no cogent reasons, in my view given by respondents to show that the proposed march will not be held peacefully.

(b) The environment is not conducive for political demonstrations of any form or character

The respondents contend that due to the numerous challenges facing our national economy the environment is fluid and not conducive to any demonstration. It may very well be true that at this stage in the political history of the country there are several socio-economic challenges. The proposed march is intended to bring to the attention of the authorities, the problems surrounding acute cash shortages, high unemployment and corruption. It is my view, that the right to demonstrate is a right guaranteed under the Constitution. That right can only be curtailed if the demonstration/march/protest is likely to infringe on the rights of other citizens. I find that the fact that the economy faces numerous challenges is not in itself a sufficient ground to restrict the right to demonstrate.

(c) The demonstration will be infiltrated by bad elements

The respondents contend that the demonstration is likely going to be infiltrated by “bad elements” who will cause chaos and infringe on the rights of other citizens. The respondents asserted that they could not guarantee the safety and security of the participants. When I drew the attention of the respondents that they have a duty to ensure that the demonstration was conducted peacefully, the response was that there was inadequate manpower and resources to provide security. It seems to me that this excuse is a lame excuse. The respondents have a mandate and duty to protect members of the public. In terms of section 219 of the Constitution of Zimbabwe the police have amongst other duties, the responsibility of maintaining law and order and protecting and securing the lives and property of the people.

I am not persuaded, therefore that the respondents have any legal basis for denying the applicant its right to engage in a peaceful demonstration.

In re: *Munhumeso & Others* 1994 (1) ZLR 49 (5), the Supreme Court stated as follows, at page 56F – H:

“The importance of attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are one of the basic conditions for progress and for the development of every man.”

I have no doubt that the right to demonstrate and to participate in a protest march is a right recognized in the Constitution, subject to certain limitations. The right to demonstrate may be limited where this is:

- (a) prescribed by law
- (b) necessary and proportionate
- (c) in pursuit of a legitimate aim; namely
 - (i) in the interests of national security and public safety
 - (ii) necessary for the prevention of disorder or crime
 - (iii) in protection of health or morals or the protection of the rights and freedom of others

I observe that the applicant did give the requisite notice of the intention to demonstrate. The requirement to give notice of plans to stage an assembly or peaceful protest in advance will not necessarily breach the right to protest as long as the notification does not become a hidden obstacle to exercising the freedom of assembly.

I conclude, therefore that the respondent’s refusal to sanction the demonstration, breached the applicant’s rights to free expression and protest. As there was no imminent threat to a breach of peace, the respondent’s actions in limiting the right to protest was not done in accordance with the law and the Constitution. The decision by the respondent is an arbitrary,

indiscriminate and disproportionate restriction on the applicant's right to protest as there is no reason to view the applicant's proposed march as anything other than a peaceful demonstration.

It ought to be noted that the freedom to take part in a peaceful assembly was of such importance that the right could not be restricted in any way, on flimsy grounds. A fair balance has to be struck on the one hand, the general interest requiring the protection of public safety and, on the other, the applicant's freedom to demonstrate.

In the result, the application is granted in terms of the draft order.

Messrs T. J. Mabhikwa & Partners applicant's legal practitioners
Prosecutor General's Office, Civil Division respondent's legal practitioners