**REPORTABLE (1)**

**(1) NEVANJI MADANHIRE (2) NQABA MATSHAZI**
**v**
**ATTORNEY-GENERAL**

**CONSTITUTIONAL COURT OF ZIMBABWE**
**CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,**
**GWAUNZA JA, GARWE JA, GOWORA JA,**
**HLATSHWAYO JA, PATEL JA & GUVAVA JA**
**HARARE, OCTOBER 9, 2013 & JUNE 12, 2014**

*E. Morris*, for the applicant
*E. Makoto* with him *T. Mapfuwa*, for the respondent

**PATEL JA:** The applicants herein were jointly charged with the crime of criminal defamation as defined in s 96 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] (the Criminal Law Code). Pursuant to an application under s 24(2) of the former Constitution, the Magistrates Court sitting at Harare has referred the matter to this Court for the determination of certain constitutional questions.

**BACKGROUND**

The first applicant is the editor of *The Standard* newspaper, while the second applicant is employed by the same journal as a reporter. On 6 November 2011, they published an article concerning the complainant, Munyaradzi Kereke, who is the founder

and Chairman of the Green Card Medical Aid Society (the Society). The article stated that the Society was unable to pay its members and staff as well as its creditors and that it was on the brink of collapse as its expenditure outstripped its income.

The applicants were subsequently arrested and charged under s 96 of the Criminal Law Code. It was alleged that they published the foregoing statements knowing that they were false and intending to cause serious harm to the reputations of Kereke and the Society.

The application before this Court, as originally posited, was for the offence of criminal defamation as defined in s 96 of the Criminal Law Code to be declared unconstitutional and struck down as being null and void. The same relief was initially propounded by Adv. *Morris* at the hearing of the matter. However, after it was observed by the Court that the application in its original form did not address the relevant provisions of the new Constitution, the application was confined to the consistency of the offence with the former Constitution.

The relief now sought is for the perpetual stay of prosecution of the applicants in respect of the offence of criminal defamation allegedly committed under the aegis of the former Constitution. It was noted that the decision of the Court in this matter would also affect the prosecution of several other cases involving offences allegedly committed before the advent of the new Constitution.

**RELEVANT CONSTITUTIONAL PROVISIONS**

Section 18(1) of the former Constitution secures the protection of the law in crisp and concise terms:

> "Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

Section 18(9) guarantees the right to a fair hearing in the determination of civil rights and obligations:

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

Protection of the freedom of expression is enshrined in section 20(1) of the former Constitution in the following terms:

> "Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

Section 20(2) delineates permissible derogations from the freedom of expression under the authority of law:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –
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> (*a*) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;
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> (*b*) for the purpose of—
>
> (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
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> (ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or the Senate or the House of Assembly;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or

(*c*) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

**CRIMINAL DEFAMATION**

Our law of criminal defamation is essentially an amalgam of Roman-Dutch and English law. The original rationale of the crime of defamation under Roman and Roman-Dutch law is not readily ascertainable. According to Jolowicz: *An Introduction to Roman Law* (3rd ed.) at p. 171, its rationale may derive from the social insecurity of the patricians, who became increasingly threatened by the mounting power of the plebeians. In 17th and 18th century Holland, the *Groot Placaat Boek* abounds with enactments on the subject. The reason for such repeated restatements of the offence seems to have been the prevalence of defamatory lampoons, squibs, verses and scurrilous satires, pertaining in particular to persons in authority. See *Rex* v *Harrison and Dryburgh* 1922 AD 320 at 327-328.

In Zimbabwe, the offence of criminal defamation and its parameters are prescribed in s 96 of the Criminal Law Code as follows:

"(1) Any person who, intending to harm the reputation of another person, publishes a statement which –

(*a*) when he or she published it, he or she knew was false in a material particular or realised that there was a real risk or possibility that it might be false in a material particular; and

(*b*) causes serious harm to the reputation of that other person or creates a real risk or possibility of causing serious harm to that other person's reputation;

shall be guilty of criminal defamation and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding two years or both.

(2) In deciding whether the publication of a statement has caused harm to a person's reputation that is sufficiently serious to constitute the crime of criminal defamation, a court shall take into account the following factors in addition to any others that are relevant to the particular case –

(*a*) the extent to which the accused has persisted with the allegations made in the statement;

(*b*) the extravagance of any allegations made in the statement;

(*c*) the nature and extent of publication of the statement;

(*d*) whether and to what extent the interests of the State or any community have been detrimentally affected by the publication.

(3) Subject to subsection (4), a person accused of criminal defamation arising out of the publication of a statement shall be entitled to avail himself or herself of any defence that would be available to him or her in civil proceedings for defamation arising out of the same publication of the same statement.

(4) If it is proved in a prosecution for criminal defamation that the defamatory statement was made known to any person, it shall be presumed, unless the contrary is proved, that the person understood its defamatory significance."

**PROTECTION OF THE LAW AND RIGHT TO A FAIR TRIAL**

In his heads of argument, Adv. *Morris* submits that the requirement of serious harm in the crime of defamation is vague in that the word "serious" is a comparative adjective which is almost impossible of a benchmark or judicial definition. Consequently, the requirement is unduly subjective and its application will depend on the idiosyncratic views of the parties involved, the investigating officer, the prosecutor and, ultimately, the presiding judicial officer. For these reasons, the offence violates not only the right to protection of the law secured by s 18(1) of the former Constitution but also the right to a fair trial guaranteed by s 18(9).

In my view, these submissions, which were not pursued with any vigour in oral argument, are flimsy and highly unpersuasive. The use of adjectives to define the constituent elements of criminal offences is commonplace and can hardly be regarded as being remarkable. To cite a few examples relating to the *actus reus* of various offences, there are the crimes of possessing an "offensive" or "dangerous" weapon, causing "serious" or "grievous" bodily harm, and committing "aggravated" indecent assault or theft in "aggravating" circumstances. The interpretation and application of any such defining epithet forms part of the daily diet of judicial officers in the lower courts.

As I read it, the offence of criminal defamation is clearly formulated with sufficient precision in s 96 of the Criminal Law Code so as not to create any ambiguity or vagueness as to the conduct that is proscribed as being punishable. Moreover, the specific factors that may entail harm of a "serious" nature are succinctly articulated in s 96(2) to afford adequate guidance to the trial court in determining whether or not the alleged harm to a person's reputation is sufficiently serious to constitute criminal defamation. These include the extent to which the accused has persisted with the defamatory allegations, the extravagance of the allegations, the nature and extent of the publication, and whether and to what extent the interests of the State or any community have been detrimentally affected thereby. Although these factors are not exhaustive, they tend to enhance rather than diminish the prospect of the accused receiving a fair trial.

In the premises, I am satisfied that the challenge against the constitutionality of criminal defamation vis-à-vis the rights enshrined in ss 18(1) and 18(9) of the former Constitution is devoid of merit and cannot be upheld.

**FREEDOM OF EXPRESSION**

There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument. Indeed, at its first session in 1946, through Resolution 59(I) of 14 December 1946, calling for an international conference on freedom of information, the United Nations General Assembly declared that:

> "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."

This sentiment is echoed with specific reference to the media by the Human Rights Committee (established under Part IV of the International Covenant on Civil and Political Rights 1976). In General Comment No. 34, issued at its 102nd session in July 2011, the Committee observed as follows, at para. 13:

> "A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output."

This Court too has had occasion to recognise the freedom of expression as a core value of a free and democratic society. See *Retrofit (Pvt) Ltd* v *Posts and Telecommunications Corporation & Another* 1995 (2) ZLR 199 (S) at 211C-F; *United Parties* v *Minister of Justice Legal & Parliamentary Affairs* 1997 (2) ZLR 254 (S) at 269A-E. More recently, the South African Supreme Court of Appeal made the following pronouncement *per* Streicher JA, in the case of *Hoho* v *The State* [2008] ZASCA 98 at para. 29:

> "The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said 'that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man'."

It certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, it is also not in doubt that the offence of criminal defamation falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as being a provision designed to protect the reputations, rights and freedoms of other persons. What is in issue for determination by this Court is whether or not it is a limitation that is reasonably justifiable in a democratic society.

The test as to what is democratically reasonable and justifiable is not susceptible to precise legal formulation. In my own appreciation, the test may well vary from one

society to another depending upon its peculiar political organisation and socio-economic underpinnings. Nevertheless, as was recognised by Gubbay CJ in the oft-cited *In re Munhumeso & Others* 1994 (1) ZLR 49 (S) at 64B-C:

> "What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right."

In *Nyambirai* v *National Social Security Authority & Another* 1995 (2) ZLR 1 (S) at 13C-F, Gubbay CJ elaborated the test as follows:

> "In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:
>
> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
> (ii) the measures designed to meet the legislative object are rationally connected to it; and
> (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

As regards the first two rungs of this test, I do not perceive any conceptual or practical impediment to the criminalisation of defamation. The objective behind s 96 of the Criminal Law Code, *viz.* to protect the reputations, rights and freedoms of other persons, is sufficiently important to warrant the limitation of freedom of expression, and the detailed provisions of s 96 are clearly rationally connected to that objective. What is contentious, in my view, is the proportionality of the means deployed in this instance. In other words, is it necessary to criminalise defamatory statements in order to accomplish what is otherwise an unquestionably legitimate objective? It seems logical to answer this question in two stages: firstly, what are the consequences of criminalising defamation

and, secondly, is there an appropriate and satisfactory alternative remedy to deal with the mischief of defamation?

The practical consequences that would ordinarily flow from a complaint of criminal defamation are as follows. The accused person would be investigated and face the danger of arrest. This would arise even where the alleged defamation is not serious and where the accused has an available defence to the charge. Thereafter, if the charge is prosecuted, he will be subjected to the rigours and ordeal of a criminal trial. Even if the accused is eventually acquitted, he may well have undergone the traumatising gamut of arrest, detention, remand and trial. Moreover, assuming that the accused has employed the services of a lawyer, he will also have incurred a sizeable bill of costs which will normally not be recoverable.

I would accept that the foregoing tribulations are not peculiar to the offence of criminal defamation and would potentially be encountered by an accused person charged with any serious criminal offence. However, what is distinctive about criminal defamation, though not confined to that offence, is the stifling or chilling effect of its very existence on the right to speak and the right to know. This, in my view, is the more deleterious consequence of its retention in the Criminal Law Code, particularly in the present context of newspaper reportage.

It cannot be denied that newspapers play a vital role in disseminating information in every society, whether open or otherwise. Part and parcel of that role is to unearth

corrupt or fraudulent activities, executive and corporate excesses, and other wrongdoings that impinge upon the rights and interests of ordinary citizens. It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.

The chilling effect of criminalising defamation is further exacerbated by the maximum punishment of two years imprisonment imposable for any contravention of s 96 of the Criminal Law Code. This penalty, in my view, is clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectre of imprisonment as a measure that is reasonably justifiable in a democratic society.

The fact that investigative journalism may on occasion involve the publication of erroneous or inaccurate information does not detract from the reciprocal rights to receive and impart information and ideas without interference. As was aptly observed in *Hoho's* case (*supra*) at para. 29:

> "Although false information will not benefit a society, democratic or otherwise, the right to freedom of expression is not restricted to correct or truthful information because errors are bound to be made from time to time and to suppress the publication of erroneous statements on pain of penalty would of necessity have a stifling effect on the free flow of information."

Another very compelling reason for eschewing resort to criminal defamation is the availability of an alternative civil remedy under the *actio injuriandum* in the form of damages for defamation. Although this remedy may not be as expeditious as criminal prosecution, it affords ample compensatory redress for injury to one's reputation. If this is correct, the invocation of criminal defamation to protect one's reputation would be unnecessary, disproportionate and therefore excessive.

One of the arguments proffered for the retention of criminal defamation is that injury to one's reputation may have more serious and lasting effects than a physical assault and that, as is the case with assault, there is nothing excessive about one injury attracting both a civil claim and a criminal penalty. See *Hoho's* case (*supra*) at para. 35. However, what this argument disregards is that an act of assault or malicious damage to property, unlike defamation, impinges upon the very fabric of society, *i.e.* by threatening the manner in which citizens are expected to interact in their daily lives without fear of physical violence. In the case of defamation, only the individual rights of the complainant are affected, and he has a clear alternative remedy in civil law, without subjecting the defamer to the distress attendant upon criminal arrest and detention.

In *Hoho's* case, the Supreme Court of Appeal dealt with the constitutionality of a conviction for criminal defamation. The court deemed civil and criminal liability for defamation to be equivalent in the extent of their limitation, as the onerous consequences of criminal liability are counterbalanced by an onerous burden of proof. It was accordingly held, at para. 36, that criminal defamation was not abrogated by disuse and

was perfectly consonant with the new South African Constitution. The offence was reasonably required to protect personal reputations and did not go further than was necessary to accomplish that objective. It was not too drastic a limitation on the right to freedom of association.

In an article written by Vinayak Bhardwaj and Ben Winks, in the *Mail & Guardian* of 1 to 7 November 2013, commenting on the decision in *Hoho's* case, the vital differences between criminal and civil liability are commendably highlighted. I take the liberty to quote extensively from this article and to associate myself with the propositions articulated therein:

> "Civil law exists to provide relief and restitution when one person harms or threatens to harm another's private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending.
>
> For assault, imposing imprisonment or supervision is essential to protect the victims and the public at large. For damaging speech, however, the civil law is as effective, if not more so, in providing the public with proportionate protection from offenders.
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> Crucially, freedom of expression is constitutionally enshrined and encouraged, as the lifeblood of democracy. The freedom to wield fists and firearms enjoys no similar status in our supreme law. Thus the analogy between assault and defamation breaks down. It is an unreliable guide to finding an appropriate balance between the rights to dignity and free speech.
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> It is also disputable that civil and criminal defamation impose equivalent limitations, and that the harsher consequences of criminal liability are neatly offset by the heavier burden of proof. There are important differences in practice and in principle. First, a prosecution targets the journalist rather than the journal. A civil suit is aimed primarily at the defendant with the deepest pockets,
>
> Furthermore, while civil liability may be discharged within days, through payment or some other performance, criminal liability endures long after the sentence has been served, or even if the sentence has been suspended. Criminal liability is permanent and pervasive. It brands the accused with a mark so deep and indelible, it can be expunged only by presidential pardon. It stains every sphere of that person's life. He becomes a criminal, and must disclose that every time he applies for a job, a visa or even a bank account.

> Even if the state does not discharge its onerous burden of proof, the very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal. These ills can barely be corrected on appeal, and thus the crime could easily be used to cow courageous journalists.
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> It is this brand of public disapproval that criminal law rightly casts on murderers, rapists and thieves, precisely for its deterrent potency. The same objective could not and should not apply to injurious speech, the borders of which are elusive and essentially subjective."

## THE INTERNATIONAL DIMENSION

On the international plane, it is not without significance that the United Nations Commission on Human Rights has decried recourse to criminal defamation in order to stifle free speech:

> "Detention as a sanction for the peaceful expression of opinion is one of the most reprehensible practices employed to silence people and accordingly constitutes a serious violation of human rights".

In similar vein, in General Comment No. 34 (*supra*) at para. 47, the Human Rights Committee stipulates the following guidelines on defamation laws vis-à-vis the application of Article 19 of the International Covenant on Civil and Political Rights:

> "Defamation laws must be crafted with care to ensure that they comply with paragraph 3 [the derogation clause in Article 19 of the Covenant], and that they do not serve, in practice, to stifle freedom of expression. …. Care should be taken by States Parties to avoid excessively punitive measures and penalties. …. States Parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."

The Committee endorsed and applied these strictures in a complaint by one Alexander Adonis against the Government of the Philippines. The complaint involved the imprisonment of a radio broadcaster for alleged defamation. In its decision in

Communication No. 1815/2008, adopted on 26 October 2011 at its 103rd session, the Committee found as follows, at paras. 7.7 to 7.10:

> "The Committee takes note of the author's allegation that his conviction for defamation under the Philippine Penal Code constitutes an illegitimate restriction of his right to freedom of expression because it does not conform to the standards set by article 19, paragraph 3, of the Covenant. The author maintains, in particular, that the criminal sanction of imprisonment established by the Philippine Revised Penal Code for libel is neither necessary nor reasonable ….
>
> Article 19, paragraph 3, lays down specific conditions and it is only subject to these conditions that restrictions may be imposed, i.e. the restrictions must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality ….
>
> In light of the above, the Committee considers that, in the present case the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the Covenant."

Turning to the regional sphere, the African Commission on Human and Peoples' Rights, in Resolution 169 adopted on 24 November 2010, condemns criminal defamation in the specific context of journalism and the media, by emphasising that:

> "criminal defamation laws constitute a serious interference with freedom of expression and impedes on [*sic*] the role of the media as a watchdog, preventing journalists and media practitioners to practice [*sic*] their profession without fear and in good faith;"

Accordingly, the Commission calls upon States Parties to the African Charter on Human and Peoples' Rights:

> "to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments."

**CONCLUSION**

Having regard to all of the foregoing, I take the view that the harmful and undesirable consequences of criminalising defamation, *viz.* the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. In short, it is not necessary to criminalise defamatory statements. Consequently, I am satisfied that the offence is not reasonably justifiable in a democratic society within the contemplation of s 20(2) of the former Constitution. Accordingly, it is inconsistent with the freedom of expression guaranteed by s 20(1) of that Constitution.

**FREEDOM OF EXPRESSION UNDER THE NEW CONSTITUTION**

As I have observed at the outset, the principal issue for determination *in casu* is the constitutionality of criminal defamation under the former Constitution. What has not and need not be considered for present purposes is the validity of that offence within the framework of the new Constitution. What I would simply note at this stage is that the freedom of expression and freedom of the media as secured by s 61 of that Constitution are framed differently in several material respects. Of particular significance is subs (5)(c) which expressly excludes malicious injury to a person's reputation or dignity from the ambit of the freedom of expression and freedom of the media guaranteed by subss (1) and (2). Also relevant is s 51 which declares that every person has inherent dignity and the right to have that dignity respected and protected.

Having regard to these provisions, taken together, it is arguable that the freedom of expression conferred by s 61 is to be more narrowly construed as being subordinate to the value of human dignity. It might also be argued that the offence of criminal defamation is a justifiable limitation on the freedom of expression as envisaged by s 86 of the new Constitution. In any event, as I have said, these are matters for argument and consideration as and when an appropriate case is brought for determination before this Court.

**DISPOSITION**

The relief sought herein is for the permanent stay of prosecution of the applicants on the charge of criminal defamation brought against them as being in contravention of s 20(1) of the former Constitution. They have succeeded in demonstrating that the offence of criminal defamation is not reasonably justifiable in a democratic society on any of the grounds mentioned in s 20(2) of the Constitution. However, before the declaratory relief that they seek can be granted, it is necessary to apply the rule *nisi* requirements of s 24(5) of that Constitution, which subsection provides as follows:

> "If in any proceedings it is alleged that anything contained in or done under the authority of any law is in contravention of section 16, 17, 19, 20, 21 or 22 and the court decides, as a result of hearing the parties, that the complainant has shown that the court should not accept that the provision of the law concerned is reasonably justifiable in a democratic society on such of the grounds mentioned in section 16(7), 17(2), 19(5), 20(2) and (4), 21(3) or 22(3)(*a*)to (*e*), as the case may be, as are relied upon by the other party without proof to its satisfaction, it shall issue a rule *nisi* calling upon the responsible Minister to show cause why that provision should not be declared to be in contravention of the section concerned."

In the result, the Minister of Justice, Legal and Parliamentary Affairs is hereby called upon, if he so wishes, to show cause why s 96 of the Criminal Law (Codification

and Reform) Act [*Cap 9:23*] should not be declared to be in contravention of s 20(1) of the former Constitution. The Registrar is directed to set the matter down for hearing on the earliest available date.

In considering his position in light of this judgment, the Minister's attention is drawn to the observations made by this Court in *Chimakure & Others* v *Attorney-General of Zimbabwe* Case No. CCZ 247/09 as to what is ordinarily expected in any Executive response to a rule *nisi* issued in terms of s 24(5). Thus, if the Minister intends to oppose the confirmation of the rule *nisi*, he is enjoined to canvass new facts and legal arguments rather than recapitulate those that have already been traversed and, in keeping with the intention behind s 24(5), to focus his submissions on the critical question of whether or not the impugned provision is reasonably justifiable in a democratic society.

**CHIDYAUSIKU CJ**: I agree.

**MALABA DCJ:** I agree.

**ZIYAMBI JA:** I agree.

**GWAUNZA JA**: I agree.

**GARWE JA**: I agree.

**GOWORA JA**: I agree.

**HLATSHWAYO JA**: I agree.

**GUVAVA JA:** I agree.

*Atherstone & Cook*, applicant's legal practitioners
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