

REPORTABLE (69)

ARTHUR MUTAMBARA
vs
1. THE ATTORNEY GENERAL OF ZIMBABWE
2. COMMISSIONER GENERAL OF POLICE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, 14 MAY 2014 & NOVEMBER 18, 2015

Z. T. Chadambuka, for the applicant

S. Fero, for the 1st respondent

No appearance for the 2nd respondent

GWAUNZA JA: This application followed a referral of the matter to this Court by the Magistrates Court in terms of s 24 (2) of the former Constitution of Zimbabwe (“the old Constitution”).

The applicant sought an order declaring s 31 (a) (iii) of the Criminal Law (Codification and Reform) Act, (*Chapter 9:23*) (“the Code,”) and his arrest in terms of that section, to be in violation of the Constitution, hence null and void. The applicant sought a similar order in relation to s 182 (1) of the Code, for its alleged violation of s 20 (1) of the Constitution. At the hearing of this matter, the applicant abandoned the relief relating to s 31

(a) (iii) of the Code on the basis that the section had already been struck down as being unconstitutional in the case of *Chimakure v Attorney General* SC 14/2013. As a result, no reference will be made in this judgment to the charges preferred against the applicant under this Section.

The facts of the matter may be summarised as follows. On 20 April 2008, the applicant, who was then involved in the country's politics and was a leader of an opposition party, wrote and caused to be published in an independent weekly newspaper, an article entitled "*A shameful betrayal of national independence.*" Jointly with a director and the editor of the newspaper in question, the applicant was arrested on 1 June 2008 on allegations that they had contravened s 182 (1) (a) of the Code, in addition to s 31 (a) (iii) of the same Act. In relation to the former, the applicant was alleged to have published an article that was contemptuous of the High Court of Zimbabwe. The offending words in the article were:

"In terms of the House of Assembly (sic), the agenda is to seize at least nine seats from the opposition through recounts and court action leading to re-runs. This explains the 23 recounts ZEC had instituted. There is clearly criminal collusion between ZEC and ZANU PF. To add insult to injury, this unlikely marriage is dutifully consummated by a compliant and pliable judiciary typified and exemplified by Judge Tendai Uchena's unreasonable and thoughtless decision not to order ZEC to release the Presidential results." (*my emphasis*)

It is the applicant's case that s 182(1), being unconstitutional, was not a "law" that would justify or constitute a permissible derogation from ss 20 (1), 21 (1) and 23 (2) of the old Constitution. He further contends that his prosecution in the Magistrates Court constituted a violation of his right to equal protection of the law as provided for under s 18 (1) of that Constitution. The applicant, however, seems to have abandoned this argument since no reference to it is made in his heads of argument.

He accordingly seeks a permanent stay of proceedings, alternatively or additionally that s 182 (1) of the code be declared null and void.

Section 182 (1) of the Code reads as follows:-

“182 Contempt of court

- (1) Any person who, by any act or omission, impairs the dignity, reputation or authority of a court,
- (a) intending to do so; or
 - (b) realising that there is a real risk or possibility that his or her act or omission may have such an effect; shall be guilty of contempt of court and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.”

The applicant submits that his arrest and prosecution resulted in the infringement of the following of his rights, guaranteed in terms of the old Constitution;

- (i) freedom of expression (s 20 (1))
- (ii) freedom of association (s 21 (1))
- (iii) protection from discrimination (s 23)

I will consider each of these rights in relation to the charges preferred against the applicant.

Freedom of Expression

Freedom of expression is a right which was protected under s 20 (1) of the old Constitution, which read as follows:

“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”.

The applicant does not deny that he caused the statement in question to be published. He submits correctly, that there are a number of authorities in our jurisdiction and beyond that have emphasized the purpose of safeguarding freedom of expression, the fact that it lies at the very foundation of a democratic society and that, consequently, it is a right that is jealously guarded by the courts. (See *In re Munhumeso* 1995 (1) SA 551 (ZCC), *Woods and Others v Minister of Justice & Others* 1994 (2) ZLR 195 (S), *Madzingo & Others v Minister of Justice & Others* 2005 (1) ZLR 171 (S)). In contending, in his defence, that the statement in issue was one that was protected under the freedom of expression enshrined in the old Constitution, the applicant argues that;

- (a) the statement was “undoubtedly” one of a political nature, and therefore fell into the category of political speech which is ordinarily afforded highest protection against interference or restriction under the constitutional freedom of expression provisions;
- (b) since the comment was directed at the decision of the court, which had some political significance, any reference to the judiciary bordered on the incidental and therefore could not have been serious;
- (c) in other jurisdictions, statements concerning public officials and other individuals who perform public services are afforded greater protection and this was essential for the functioning of a truly democratic society;
- (d) criticism of public authority including the judiciary is a valuable element of the freedom of expression because the ability to criticise the courts promotes impartiality, accessibility and effectiveness, serves as a democratic check on the judiciary and promotes peace and stability (*S v Mamabolo* 2001 (2) SA 409 CC);

- (e) genuine, *albeit* ‘rigorous’ criticism of the judiciary is acceptable, as long as it stayed within the limits of reasonable courtesy and good faith¹
- (f) he should not have been charged under s 182 (1) since his comment was also ‘debate’ on the proper role of the judiciary, that is, whether it is best to have an activist or a deferential judiciary, and finally, that
- (g) nothing was in any case established on the facts as set out by the State, which suggests there was any impairment of the dignity, reputation or authority of the court.

The first respondent (“the respondent”) challenges all of the applicant’s arguments and submits that there were specific limitations to the right to freedom of expression provided in s 20 (2) (b) (iii) of the old Constitution. The purpose of the limitations, it is contended, was to maintain the independence and authority of the courts. The relevant provision read as follows:-

“20 Protection of Freedom of Expression

- (1) ---
- (2) 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-
 - (a) ---
 - (b) for the purpose of
 - (i) ---
 - (ii) ---
 - (iii) Maintaining the authority and independence of the courts or tribunals or the Senate or the House of Assembly
 - (iv) ---
 - (v) ---“

The respondent contends that, contrary to the applicant’s assertions in this respect, s 182 (1) of the Code complied with each of the requirements of permissible legislative

¹ *In re Chinamasa 2000(2) ZLR 322 (S) at 334 B-E*

limitation of the exercise of the right to freedom of expression. He submits that the questions to be posed in this respect are defined as follows in the case of *Retrofit (Private) Limited v Posts and Telecommunications and Anor*²;

Is the restriction on the exercise of the right of freedom of expression imposed under s 182(1) of the Criminal Code contained in law?

- 1) If yes, does the provision have as its primary objective the protection of a public interest in one or more of the matters listed in s 20(2)(a) of the old Constitution?
- 2) If the protection of a public interest listed in s 20(2)(a) is the primary purpose of the legislation, is there a rational connection between the restriction and the exercise of the right to freedom of expression and the objective pursued? (*in re Chinamasa, (supra); Chimakure and Others vs Attorney General (supra)*)

The respondent then addresses each of these questions in relation to the case at hand and submits as follows in his Heads of Argument;

“It is submitted that the restriction is contained in the law because it is provided for in s 182(1) of the Code. It is further submitted that indeed the offence of ‘contempt of court’ (“*scandalising the court*”) exists for purposes of protecting the administration of justice and is thus a permissible derogation from the freedom of expression. It is submitted, in answer to the last question, that there is a rational connection between the restriction on the exercise of the right to freedom of expression and the objective pursued. In other words the offence as provided for in s 182(1) of the Code was (reasonably) justifiable in a democratic society. There is need to protect the courts from being scandalised³”

The respondent added that the words uttered in reference to the judiciary were clearly not “within the limits of reasonable courtesy and good faith”.

In considering the lengthy submissions of the parties on this matter, I find that there is no dispute as to the content and purpose of the right to the freedom of expression that was enshrined in the old Constitution. Nor is it disputed that such right is not absolute. I am, however, persuaded by the respondent’s submissions as outlined above.

² 1995(2) ZLR 199(S) at 220

³ See in this respect *Nyambirai vs National Social Security Authority and Another*, 1995 (2) ZLR (1) (S) at 13 D-F

A reading of the offending statement conveys the clear impression that the applicant's major grievance was the perceived collusion between the political party ZANU (PF) and the Zimbabwe Electoral Commission ('ZEC'). It appears that the applicant regarded the vote recount as the result of some pressure having been brought to bear upon ZEC to undertake the exercise, as part of a ZANU(PF) 'agenda' to 'seize' at least nine Parliamentary seats from the opposition political parties. Whatever the merits or demerits of this speculative comment, it is evident that the applicant made his meaning quite clear. The first part of the statement, in my view, had political overtones, the like of which one may expect and does in fact hear, from political opponents. The applicant however, did not stop there. He went on to draw the judiciary generally, and the High Court in particular, into the perceived conspiracy between ZANU (PF) and ZEC. From commenting on a factual situation, that is, the vote recounts, he proceeded to confidently 'predict' what would happen should any court challenge to the vote recounts be mounted by the opposition. Using strong language that, in my view, and as rightly submitted by the respondent, fell outside the limits of 'reasonable courtesy and good faith', he charged that the judiciary - accused by him of being 'compliant and pliable'- would dutifully 'consummate' the unlikely marriage between ZANU(PF) and ZEC. The applicant, even after this, was not done! In an apparent effort to substantiate his speculative charges against the judiciary, he went on to cite a real judgment of the High Court, which he described as "thoughtless," as an 'example' of the pliability and compliance that he had mentioned earlier in the statement.

While the part of the applicant's statement that cast aspersions on ZEC's recounting of the votes and alleged ZANU (PF) 'agenda' could, for the reasons given, fall within the ambit of a political statement, I am of the view that the same cannot be said of the part that denigrated the judiciary and the High Court. I do not doubt that it transcended the

‘political’ arena and became a direct attack on the judiciary. I therefore have difficulty in accepting the applicant’s averment that such a statement ‘bordered on the incidental’ and could therefore not have been serious. I am in this respect persuaded to the merit in the following submission contained in the respondent’s heads of argument;

“The applicant’s words about the judiciary not only impute improper and corrupt motives or conduct on those taking part in the administration of justice, but also excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office and such words indeed created a real or substantial risk of impairing public confidence in the administration of justice. The submission is also made that the crime committed in terms of s 182(1) of the Code falls in the category known as ‘Crimes Against the Administration of Justice’. The contempt charged was the type ordinarily referred to as ‘scandalising the court’. Such crime is described in *In re Chinamasa* 2000 - (2) ZLR 322, as one that is:

‘committed by publication either in writing or verbally of words calculated to bring a court, a judge or the administration of justice through the courts generally, into contempt’”

As already indicated, the applicant also sought to defend his utterances against the judiciary on the basis that they constituted ‘comment’ on the debate focussed on the ‘proper role’ of the judiciary. I do not find this rather ingenious submission to be persuasive. I have already commented that the applicant’s bone of contention was the perceived collusion between ZANU(PF) and ZEC to further the former’s ‘agenda’ of seizing some parliamentary seats from the opposition. This grievance was, evidently, what motivated his denigrating comments on the judiciary. There is nothing in the statement to suggest that it was motivated by, or aimed at contributing to, some unspecified past, current or future debate on the ‘proper’ role of the judiciary.

I therefore dismiss this argument to the extent that it was meant to justify the denigration of the judiciary on the basis of the statement being ‘incidental’ and therefore not seriously meant.

I am satisfied, however, that the statement falls into the category of ‘acts’ contemplated by s 182(1) of the Code. To the extent that this section had not been repealed or otherwise struck off the statute books, it was clearly ‘a law’ which, in terms of s 20 (2)(ii) of the former Constitution, had the objective of ‘maintaining independence and authority of the courts.’ Words like ‘pliable’ and ‘compliant’ connote the very opposite of judicial independence and authority.

The applicant bore the *onus* to prove his case, and it was incumbent upon him to discharge it. This point was reiterated in the *Retrofit* case (*supra*) thus;

“From a procedural aspect, the onus is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not”

Applied to the circumstances of this case, I do not find that the applicant has discharged the *onus* that he bore, to establish that s 182 (1) should be struck down because it violated his right to freedom of expression in the manner that he alleges.

2. Freedom of association

Section 21 of the old Constitution protected the right to freedom of association in the following terms:

“(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.”

The applicant contends that he was denied the right to publish opinions and thoughts to the persons he associated with. This assertion is premised on the fact that the editor of the newspaper that published his article and a director of the company owning the newspaper

were jointly arrested with and faced the same charges as him. He further argues that since these were the people he associated with for purposes of airing out his views, their arrest and detention amounted to an interference with his freedom of association. This was because the arrests instilled so much fear in them that they might not wish to associate further with him.

The respondent in response, argues correctly that the right to freedom of association was not absolute, given that there were permissible derogations in terms of s 21 (3) of the old Constitution, which read as follows:-

- “(3) Nothing contained 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 –
- (a) in the interests of defence, public safety, public order, public morality or public health;
 - (b) for the purpose of protecting the rights or freedom of other persons;
 - (c) for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions, or employers’ organisations; or
 - (d) that imposes restrictions upon public officers.

except in so far as that provision or, as the case maybe, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.” (*my emphasis*)

The respondent argues that the reason behind the right to freedom of association is to ensure that no individual is forced or coerced to associate with any group, organisation or entity. It is also meant to protect an individual in choosing whom he wants to associate with. In this particular case the question of the applicant being forced or coerced to associate with the editor and the company that owned the newspaper which published his article does not arise. His right to freely associate with the newspaper and editor in question was in my view properly ‘limited’ by s 182 (1). That limitation, as the respondent correctly contends, related to publication and communication that undermined public interest in the administration of justice

- in other words – communication and publication that amounted to a crime under s 182(1) of the Code, and not any other form of communication.

It hardly needs mention that no one is above the law. It was not because of their ‘association’ with the appellant, nor in order to discourage any such future ‘association’ that the newspaper and its editor were arrested and charged. They were arrested because they were suspected of having jointly committed a crime with him. The crime in question was created in a law that was properly passed in the interests of public order and for the purpose of protecting the rights or freedom of other persons, a law that, in effect, constituted an acceptable derogation from the right to freedom of association, as provided in s 21 (3) of the old Constitution. It goes without saying, that as long as one associates with others for purposes that do not constitute a violation of the law, one need not fear any arrest.

A pertinent consideration with respect to the enjoyment of fundamental rights and freedoms is the imperative for one to exercise his/her rights to such freedoms in a manner that does not injure or undermine the rights of others. Judges generally are not able to defend themselves against publication of statements like the one *in casu*, whose effect is to undermine public confidence in, and the authority of, the courts and the judiciary in general. This type of effect is not one that would manifest itself in easily measurable terms, and therefore in my view does not lend itself to the kind of ‘proof’ that the applicant argues should have been demonstrated. This, however, does not detract from the seriousness of the offence.

I am satisfied, in the result, that the limitation to freedom of association that is imposed by s 182(1) of the Code, is reasonably justifiable in a democratic society, is an acceptable derogation from the right to freedom of association and is not excessive or arbitrary in relation to the objective to be attained by virtue of the limitation.

Accordingly, I find that the arrest of the applicant, which was effected under the impugned law, did not translate into a violation of the applicant's right to freedom of association.

Freedom from discrimination

Section 23 of the old Constitution provided for protection against discrimination as follows:-

“23 Protection from discrimination on the grounds of race.

- (1) Subject to the provisions of this section
 - (a) no law shall make any provision that is discriminatory either in itself or in its effect; and
 - (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law, or in the performance of the function of any public office or public authority
- (2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced-
 - (a) by being subjected to a condition, restriction or disability to which others of another such description are not made subject to.
 - (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first mentioned description ---“

The applicant's submissions in relation to the discrimination that he alleged are in my view woefully short on detail and substance. He charges that 'the public authority', by arresting and charging him while acting by virtue of a written law, (s 182(1)), treated him in a discriminatory manner. This was because, he averred, no such charges were brought against the incumbent presidential candidate who, in 2005, made some relatively 'tough' but similar comments on a member of the judiciary. He further argues that such selective treatment of members of the public constituted a violation of one's right to freedom from discrimination.

The applicant evidently relies for these contentions on the provisions of s 23(1)(b) of the old Constitution. Although this could be implied from the wording of part of the relief that he seeks, the applicant offered no further elaboration, nor has he specifically alleged, that s 182(1) of the Code was discriminatory either in itself, or in its effect. He alleges, instead, that the public authority, by arresting and prosecuting him while acting in terms of this provision - a written law – and in the performance of their public office, had treated him in a discriminatory manner, as already indicated.

I find these submissions to be flawed in two major respects, and therefore devoid of any merit.

Firstly, one cannot hope to escape arrest for committing a crime, on the basis that such arrest would violate his constitutionally guaranteed right to protection against discrimination, because another person who may have committed the same crime was not similarly arrested. In my view this would be to misconstrue the import of both the old Constitution and s 23 thereof. A reading of the Preamble to the Declaration of Rights in the old Constitution made this clear. On the one hand, it stressed the entitlement of every person in Zimbabwe to the fundamental rights and freedoms of individuals specified in the Declaration. On the other, it highlighted the fact that it was the duty of every person to ‘respect and abide by the Constitution and the *laws of Zimbabwe*’ (my emphasis) My reading of these provisions suggests that while one was entitled to the fundamental rights and freedoms guaranteed under the Constitution, such entitlement did not absolve one of the duty to respect and abide by the law.

Applied to the circumstances of this case, the applicant had a duty to respect the law that outlawed the conduct with which he was charged. It was because of this perceived breach of the law that he was arrested and charged. He would escape the consequences of his conduct only if a court absolved him of all guilt, and not because of any notion of discrimination arising out of the fact that another person who might have engaged in similar conduct was not likewise charged with the same offence. Clearly, this would not be a defence to the charge, since every person must face the consequences of his or her own actions. A constitution, by its nature, is not likely to offer immunity to people who violate the law.

Secondly and more to the point, however, is the fact that the applicant, by his own admission, accepts that the ‘incumbent’ presidential candidate concerned was, at the time he allegedly made the utterances, the President of the country. As correctly submitted for the respondent, the President was, as such, immune from prosecution. Section 30(1) of the old Constitution read as follows:

“30 Presidential immunity

(1) The President shall not, while in office, be personally liable to any civil or criminal proceedings whatsoever in any court”

It is evident in the light of this provision that the applicant cannot validly claim to have been treated in a discriminatory manner, when the ‘other person’ whom he claims should have been penalised the same way was, by operation of law, immune from such treatment.

When all is told I find that the applicant’s claim lacks merit in all respects, and ought to be dismissed.

It is accordingly ordered as follows;
‘The application be and is hereby dismissed’.

CHIDYAUSIKU CJ I agree

MALABA DCJ I agree

ZIYAMBI JCC I agree

GARWE JCC I agree

GOWORA JCC I agree

HLATSHWAYO JCC I agree

GUVAVA JCC I agree

MAVANGIRA AJCC I agree

Messrs Mtetwa and Nyambirai, Applicant's Legal practitioners

National Prosecuting Authority, First respondent's legal practitioners.