PATSON DZAMARA
and
LINDA MASARIRA
and
TATENDA MOMBEYARARA
and
PRIDE MKONO
and
DIRK FREY
versus
COMMISSIONER GENERAL POLICE NO
and
OFFICER COMMANDING HARARE PROVINCE NO
and
MINISTER OF HOME AFFAIRS NO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 27 June and 4 July 2016

Urgent Chamber Application

KE Kadzere with E Mandevere, for the applicants
T Tabani with T Gurajena, for the respondents

TSANGA J: The applicants filed an urgent chamber application seeking a provisional order to interdict the police from unlawfully interfering with their constitutional right to freedom of assembly, freedom from violence and freedom to demonstrate peacefully at Africa Unity Square, Harare. When they were arrested, they had been carrying out a continuous demonstration in protest against what they described as "the deteriorating socio-economic conditions in Zimbabwe in particular rampant state corruption, enforced disappearances, stifling of freedom of expression as well as cash shortages and unemployment". They wish to resume their occupation of Africa Unity Square until these grievances are addressed by the state.

The final order sought is to the effect that it be declared that the conduct by the Zimbabwe Republic Police on 20 June 2016, of assaulting and dispersing the applicants from Africa Unity Square is unlawful.

The certificate of urgency in the urgent chamber application was sworn to by Mr Obey Zimbodza as a legal practitioner. He averred that the applicants had been peacefully occupying Africa Unity Square in Harare. According to him, on June 20 at around 6:10pm, they were unlawfully rounded up, assaulted and forced to disperse by members of the Zimbabwe Republic Police. He indicated that this action amounted to a clear violation of applicants' right to freedom of association, freedom of assembly and the right to demonstrate. I reproduce below the two paragraphs which set out urgency since among other concerns, they raised contention as to whether the matter displays the necessary urgency for it to justify being heard as an urgent matter. They read as follows:

> 4. "The members of the police who dispersed the Applicants threatened further assaults should they attempt to occupy Africa Unity Square in the future. This is unlawful and constitutes a threat to Applicants' right and contempt of the Constitution deserving of remedy by this court on an urgent basis through an interdict.
>
> 5. Applicants would like to continue with their program imminently without interference from the police. The demonstration is continuous and Applicants cannot wait for the matter to be decided as an ordinary court application.
>
> I accordingly certify this matter to be urgent and deserving to be heard on that basis."

The reason why urgency should be clearly set out in an urgent application is for the judge to determine why a matter should be heard urgently and not on the normal roll. Our courts have also made it clear that a legal practitioner must conscientiously apply his mind to the facts and believe that a matter is urgent in preparing a certificate of urgency. It has also been highlighted that the issue of urgency must be a matter of substance rather than form. (See *Chidawu* v *Shah & Ors*[1] *Kambarami v Kambarami & Anor*[2]*; Kuvarega* v *Registrar-General & Anor)* [3] It must be clear why a party alleges that he cannot be afforded substantial redress in due course. In other words, the absence of substantial redress in due course is a key factor that is considered in determining whether a matter should be heard urgently.

In practice, where there is some nagging doubt as to urgency upon examining a certificate of urgency, a judge will often give the applicant a preliminary benefit of the doubt

[1] 2013 (1) ZLR 260
[2] HH-419-15
[3] 1998 (1) ZLR 188

by ordering that the matter be set down for hearing as an urgent application. This will be in order to make an informed assessment upon hearing the parties on urgency on whether the matter indeed deserves to be heard on an urgent basis.

This matter was set down for hearing on 27 June 2016. At the hearing, urgency was vehemently challenged by respondents through their counsel, Mr *Tabani* who appeared on behalf of the respondents. In his opposing affidavit, the second respondent, Assistant Commissioner Njodzi, being the officer commanding Police, Harare Province refuted urgency in the matter as articulated in the above certificate of urgency. He further averred that the application did not meet the requirements of an interdict as the applicants had not shown a clear legal interest nor had they shown that they had no other remedy. He additionally averred that it is not in the interests of the public's safety that they be permitted to go back to Africa Unity Square as they were arrested on 9 June for obstructing justice when the police tried to arrest some of the demonstrators in their midst who were said to have committed acts of robbery. He said they should not be allowed to occupy Africa Unity Square as a protective measure to members of the public who pass the Square. He further highlighted that the applicants do not state when their programme intends to end and asserted that an infinite demonstration would necessitate indefinite deployment of additional police resources over and above normal patrols covering that area. He indicated that this would put a strain on financial and human resources, which he said the police can ill afford. He therefore stressed that it is the police, and the public in general who use the park, who would suffer most from the order sought.

Mr *Tabani* therefore maintained that there was no reason for the matter to be heard on an urgent basis instead of the ordinary roll. He also emphasised that the applicants had not complied with s 25 of the Public Order and Security Act [*Chapter 11:17*] which requires notice to be given for processions, public demonstrations and public meetings. His assessment was that the various points *in limine* raised by the second respondent, were clearly dispositive of the matter without the need to go into merits.

Whether the matter is urgent or not as averred hinges substantially in this case on an appreciation of the constitutional value that is in practice accorded the right to assemble and the right to demonstrate, alongside an understanding of the ambit of permissible restrictions. Being fundamental rights, they can only be interfered with for legitimate purposes which are set out explicitly in the Constitution.

On the issue of the certificate of urgency, what can be gleaned from the facts averred by the applicants, and in particular from the content of the above two paragraphs which distil urgency, is that the applicants locate the urgency of their matter in what they see as a violation of their constitutional right to demonstrate. Secondly, demonstrations being a way of political expression, they locate urgency in their need to exercise their right by resuming their demonstration which they describe as "continuous". They seek to do so without interference with their rights from the police. In essence, it is the breach of what they regard to be their fundamental rights to assemble and demonstrate that lies at the core of the urgency of their application. The police on the other hand, have averred lack of urgency on account of restrictions which they deem permissible.

The Legal Position

Section 58 (1) of the Constitution[4] accords everyone the right to freedom of assembly and association whilst s 59 accords the freedom to demonstrate and present petitions, which rights must be exercised peacefully. Though couched as separate rights, the right to demonstrate, is intrinsically linked to freedom of assembly. Of significance is that these are fundamental freedoms must, however, in terms of s 86 (1), be exercised with due regard to the freedoms of others. Secondly, they can only be limited in terms of a law of general application and to the extent that the law is reasonable, necessary, and justifiable in a democratic society taking into account among other things , the purpose of the limitation.

Section 86 (2) explicitly outlines factors such as whether the limitation is necessary in the interests of "defence, public safety, public order, public morality, public health, regional or town planning or general public interest."

Section 86 (1) and (2) which are of relevance put this as follows:

> **"86 Limitation of rights and freedoms**
> (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
>
> (2) The fundamental rights and freedoms set out in this Chapter **may be limited only in terms of a law of general application** and **to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society** based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
> (*a*) the nature of the right or freedom concerned;

[4] Constitution of Zimbabwe Amendment (No.20) Act 2013

(*b*) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general
public interest;
(*c*) the nature and extent of the limitation;
(*d*) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
(*e*) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions
on the right or freedom concerned than are necessary to achieve its purpose; and
(*f*) whether there are any less restrictive means of achieving the purpose of the limitation".

Our Constitutional provisions on freedom of assembly and permissible restrictions on fundamental rights echo those in international and regional instruments to which we are a State party. These include Article 20 of the Universal Declaration of Rights which provides for the right to peaceful assembly and association; Article 21 of the Covenant on Civil and Political Rights which equally provides for this right inclusive of permissible restrictions such as those to do with national security and public safety, public order, public health and protection of the rights and freedom of others. Article 11 of the African Charter on Human and People's Rights echoes the same freedom of assembly and these permissible restrictions. Like all other countries who are state parties to these treaties and international conventions, the State has a duty to respect, protect, promote and fulfil these rights.

The issue herein is whether urgency is indeed impacted on by the existence of facts which justify restrictions. What counts regarding any curtailment of the exercise of the right to freely assemble or demonstrate, is that those seeking to infringe that right must constitutionally show that it is justifiable to do so on any of the grounds that are clearly spelt out in s 86 (2) of the constitution. On account of s 86 (2), it is clearly the respondents who seek to restrict the exercise of rights who are required to show a lack of urgency on account of infringements they seek to impose being justifiable ones. It is the nature of the threat posed, as against necessity, and proportionality of action taken, which must be demonstrated by the respondents.

As regards these rights of freedom of assembly and the right to demonstrate, it is the Public Order and Security Act [*Chapter 11:17*], commonly referred to as POSA that is the law of general application in these matters. As is apparent from s 86 (2), such a law of general application may nonetheless fall foul of infringing constitutional rights if it is not justifiable in a democratic society. Section 25 of POSA deals w ith giving notice for

processions, public demonstrations and public meetings. Such notice is required to be given to a regulating authority. The notice should also include the names and particulars of the organisation on whose behalf the gathering is convened. The purpose of the gathering, its anticipated number of participants, the route of the processions are all to be included. The time and place where the procession will end or begin is also to be disclosed.

Legal Analysis

I deal first with the point raised regarding lack of notification by applicants of their demonstration. The requirement to give notice is there for reasons of public order and security. Notification also helps the police to put in place measures for the peaceful exercise of rights by demonstrators. Whilst there is no provision which addresses notice for a continuous demonstration, in my view this does not necessarily mean that such a demonstration is not permissible, given that freedom of assembly and the right to demonstrate are fundamental freedoms, which should be enjoyed with minimum hindrances whenever possible.

Where there has not been any unlawful conduct, dispersal of a demonstration held without notification may be a disproportionate restriction on freedom of peaceful assembly, given that s 25 talks of giving notice rather than seeking permission. Any dispersal of such meeting must meet the lawful proportionality test. From a human rights perspective, proportionality has been taken to mean that the nature and extent of interference must be balanced against the reason for interfering.[5]

For a demonstration that is intended to be indefinite it does make sense to liaise with the police for them to put in place measures for public order and security. This is particularly so given that even where demonstrations are intended to be peaceful as the applicants aver in their case, it is in reality often impossible to guard against infiltration by unruly elements. A long term demonstration must necessarily take into account risks of violence and engage lawful authorities to minimise such acts. To the extent that the applicants have not done so, in my view does impact on the urgency of their matter.

[5] It is the European Court on Human Rights in particular which has articulated the meaning of the expression "margin of appreciation" from which the same concept of margin of proportion arises. Broadly speaking, it refers to the room of manoeuvre accorded national authorities. For a fuller discussion see Steven Greer., *The Margin of Appreciation and Discretion under the European Convention on Human Rights.* Human Rights Files No. 17 of 2000. This is accessible on the European's Commission's website www.echr.coe.int. For a comprehensive historical discussion of the right to demonstrate, see also Paul Harris SC., *The Right to Demonstrate* 2 UCL Hum Rts. Rev. 44 2010.

It is equally vital to express the reality that police reactions to demonstrations have often complicated the exercise of the freedom to demonstrate. Whilst acknowledging their crucial protective role in society, all too often they have earned a reputation for unleashing violence upon demonstrators which is generally not proportional to any threat faced. It is similarly such conduct which escalates violence. From the perspective of human rights standards, the police have not always used force as a measure of last resort. Overly aggressive police conduct therefore needs to be acknowledged and confronted, since it too continues to militate against the development a culture of peaceful expression of political ideas.[6]

I turn now to the various arguments that the matter lacks urgency because the restrictions that have been imposed are justifiable. The police averred that the demonstration was disbanded as a result of criminal activities that had already manifested among some of the demonstrators. From the police annexures, the applicants themselves did not commit the alleged robbery but as earlier highlighted, are said to have resisted the arrest of colleagues whom the police said had committed acts of robbery. The applicants are being charged with obstructing the course of justice as defined in s 184 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Mr *Kadzere*'s response as the applicant's counsel to these assertions by the police, was that the matter is urgent as outlined in the certificate of urgency and founding affidavit. The affidavit highlights that applicants have nowhere else to go, given that the police from whom they are supposed to seek sanctuary, are themselves perpetrating violence against them. As regards the allegations of criminal conduct the founding affidavit states that if in any criminal conduct was committed then the law will take its course. He also re-emphasised that their gathering is ongoing and an exercise of their right to demonstrate. The applicants applied their mind to the existence of their rights to freedom of assembly and freedom to demonstrate but were clearly less able at the hearing to counter the submissions that the reasons for the restrictions rendered their matter not urgent. What they emphasised was that

[6] Whilst the police have often reasoned that they cannot just stand and watch the country slide into lawlessness, suffice it to point out that even outside demonstrations, there have been cases which clearly point to an ingrained approach towards the use of disproportionate force by the police. For example, in *S v Moyo* HB 84/15, two police officers, one of whom was later convicted, were charged with murder for assaulting an accused detainee with a fan belt and baton stick to get him to confess to a charge of malicious damage to property. The judge had occasion in that case to admonish the police that courts will not countenance barbarism in the investigation of cases by law enforcement officers.

they had taken speedy action in coming before the courts upon realisation of the infringing of their right.

It cannot be said that overall police action in this case amounts to a disproportionate restriction on their freedom of assembly and their right to demonstrate, since prevention of crime, as part of public security is a legitimate reason for imposition of restrictions on a demonstration that has shown propensity for degenerating into unlawful activities.

Besides the safety issues they also did not engage in any depth the points raised *in limine* by the second respondent regarding the disbanding of the protest on account of the enormous pressure it would put on police resources. Even with the protest being touted by the applicants as "peaceful" indignation at the current state of affairs, with masses of discontented people for one reason or another, it would be very easily degenerate into a non peaceful protest.

Equally, they did not speak in their response to the concerns raised *in limine* regarding infringing the rights of others, given that Africa Unity Square is indeed extensively used on a daily basis by members of the public. Offices and business also surround the square. Continuous demonstrations do create potential health and safety issues, traffic problems sanitary problems, all of which cannot be overlooked by those who seek to take over such public spaces. These problems can justify limitations on the exercise of freedom of assembly and the right to demonstrate.

The applicants, furthermore, did not address in response the issue raised that they have alternative remedies and that they lack sufficient basis for seeking an interdict. They do not state for example, why in the face of a constitutionally elected government their concerns should not be challenged through the appropriate political representatives. This is important as it cannot simply be overlooked that on the continent, despite the legitimacy of citizens' grievances, these "occupy movements", have in reality turned out to be an outlet for the psychology of "collective anarchism". Bringing together as they have done people with a multiplicity of grievances, both legitimate and otherwise, less attention has been paid to the proposal of solutions. As a result, they have often left in their wake more problems than any lasting solution.[7]

[7] One can do no more than look at the consequences of the occupy movement for the citizens of Libya and Egypt in this regard.

Disposition

For all the reasons I have outlined above, I find that there is no basis for hearing the matter as an urgent application.

Accordingly, the matter is removed from the urgent roll.

Kadzere, Hungwe & Mandevere, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners