TENDAI LAXTON BITI

versus

BARBARA CHIMBOZA N.O.

and

G. GWANGWAVA N.O.

and

AUGUSTINE CHIHURI N.O.

and

KEMBO MOHADI N.O.

and

THERESA MAKONE N.O.

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 19 March 2011

*B. Mtetwa*, with applicant and lawyers from ZLHR

*F. Chimbari*, for the respondents

CHIWESHE JP: In this urgent application for review the applicant sought an order couched in the following terms-

“ IT IS ORDERED THAT:-

1. The decision of the court a quo be and is hereby set aside.
2. The prohibition by the second respondent on 14 March 2011, against appellant’s intended rally be and is hereby set aside.
3. Consequently, applicant’s rally scheduled for 19 March 2011 be and is hereby allowed to proceed in terms of the notice given to second respondent on 11 March 2011.
4. Respondents, their agents or any person acting through them or on their behalf are hereby directed not to interfere with the proceedings at applicant’s rally held in terms of paragraph 3 above.
5. The rally referred to in paragraph 3 above shall proceed notwithstanding the noting of any appeal against this decision.
6. The costs of this suit shall be borne by the respondents jointly and severally, each paying the other to be absolved.”

I heard the application in chambers on Sunday 19 March 2011 around midday. At about two o’clock in the afternoon of the same day I handed down my decision. I dismissed the application with costs and indicated that my reasons would follow. These are they.

The background facts to this application are as follows. The applicant is the Secretary General of the Movement for Democratic Change, a political party with representation in the country’s legislature and the executive arm of government. The first respondent is the magistrates who heard the appeal lodged by the applicant against the decision of the second respondent. The second respondent is a police officer. He is the Officer Commanding Harare Central District and, for the purposes s 26 of the Public Order and Security Act [*Cap 11:17*], he is in that capacity, the Regulating Authority of Harare Central District.

On 11 March 2011 the applicant caused written notice to be sent to the Regulating Authority of his party’s intention to hold a rally on 19 March 2011 at the open space between Sheraton Hotel and Interpol Offices in Harare. The Regulating Authority responded by advising the applicant that the open space in question had already been booked by another organisation. The applicant then sent another notice advising the Regulating Authority of his party’s intention to hold a rally at the Glamis Arena on the same date, starting at 1000 hours and ending at 1600 hours.

In a letter dated 14 March 2011, the Regulating Authority advised the applicant that the proximity and timing of the intended rally was clashing with a ZANU PF rally which would be held on the same date, some 500 meters away from the Glamis Arena. On each of these two occasions the Regulating Authority did not invite the applicant for consultations, negotiations, amendment of the notice or any other issues as provided for under s 26 (1) of the Act. For these reasons the applicant avers that the Regulating Authority failed to comply with the provisions of that section. The applicant then filed an appeal with the Magistrates Court on 18 March 2011 under case number 3066/11.

At the hearing of the appeal the second respondent was called to give evidence on oath. He told the court that another rally had been booked for the same day and time by another political party in the vicinity of the intended venue and that the police would not have sufficient manpower to monitor the two rallies. It was the second respondent’s operational experience that where two opposing parties hold rallies at the same place and time violence was likely to flare between the rival supporters. It was on the basis of the evidence given by the second respondent that the magistrate dismissed the appeal and confirmed the notice of prohibition that had been issued by the Regulating Authority.

The applicant contends that in dismissing the appeal the magistrate misdirected herself in that the second respondent had failed to comply with the peremptory provisions of the Act. The resultant prohibitory order was therefore rendered null and void as a result of that failure by the second respondent. The magistrate therefore should have held accordingly and should have on that basis proceeded to grant the appeal.

The specific grounds of appeal were itemised as the failure by the second respondent to receive and furnish evidence on oath with regards the threat, if any, to public order and security in the event that the rally had been allowed to proceed, and, secondly the further failure by the second respondent to convene a meeting with the applicant to explore available options. Thirdly, the applicant contends that the second respondent also failed to call for a consultative meeting where interested parties would have been invited to make representations to the Regulatory Authority as to the fate of the rally. As a result, argues the applicant, the Regulatory Authority could not have properly assessed the threat, if any, to public order and security in the absence of the input from the applicant and other interested parties. Further, it is averred that the Regulatory Authority had not confirmed with the City of Harare whether indeed the venue or its environs had been booked for the same date and time by parties other than the applicant. The applicant also submitted that his party had incurred considerable expense in cash and kind all of which would go to waste in the event that the rally was not sanctioned.

The respondents opposed the application and sought confirmation of the decision of the first respondent. Whilst conceding that the second respondent had not abided by the relevant provisions of the Act, it was argued that the nature of the perceived threat was within the operational competency and experience of the Regulating Authority. The Regulating Authority had given evidence on oath in the court a quo. It was his experience that the holding of rallies by different parties at adjacent venues invariably led to violent clashes between supporters of rival parties. In the circumstances, therefore, the Regulating Authority was justified in dispensing with the holding of consultative meetings as the threat was capable of assessment without the input of third parties. In any event, the Regulating Authority did not have sufficient manpower to neutralise the perceived threat. For these reasons, the second respondent had decided to issue the prohibition order.

The applicant was adamant that the provisions of the Act did not give the Regulating Authority any discretion based on his experience or otherwise to dispense with the laid down procedures. It was argued that the legislature intended that the relevant provisions be mandatory and not merely directory, to be dispensed with at the discretion of the Regulating Authority.

Section 26 (3) of the Public Order and Security [*Cap 11:17*] (“POSA”) provides as follows:

“(3) If a regulating authority receives credible information on oath that there is a threat that a proposed procession, public demonstration or public meeting will result in serious disruption of, vehicular or pedestrian traffic, injury to participants in the procession, public demonstration or public meeting or other persons, or extensive damage to property or other public disorder, he or she shall forthwith advise the convener of the perceived threat and invite the convener to a consultative meeting at a time and venue specified by the regulating authority in order to explore options to prevent the threat, and shall afford an opportunity to the convener to make representation thereon to the regulating authority.

Provided…………………………………………………………….”

The provisions of this subsection are couched in positive language and, on the face of it, would appear to be intended to be mandatory provisions to be complied with strictly by the regulating authority. If that be the case, then the regulating authority erred in issuing a prohibitory order in the absence of any credible information given on oath. He also erred in failing to invite, as he would be required to do, the convener and other stakeholders to a consultative meeting to discuss the threat and the options available.

The magistrate to whom the appeal lay was alive to these requirements. By calling for evidence on oath by the regulating authority and hearing the parties, the magistrate cured in essence the defects or omissions inherent in the manner in which the regulating authority had initially proceeded. Having done so and no doubt having found the information given on oath to have been credible, the magistrate confirmed the prohibition order. The magistrate was satisfied at the end of the day that the nature of the threat was within the operational competency of the police. Evidence on oath would tend to show that the regulating authority had operational knowledge and experience of the threat that would arise when two or more rival parties hold rallies at adjacent venues. Violence was likely to ensue between the rival supporters. Given this operational experience the magistrate was of the view that it was not necessary for the regulating authority to call the meetings referred to under s 26 (3).

On that basis, namely that the regulating authority was justified in dispensing with the holding of such meetings, the magistrate upheld the prohibition order.

The magistrate’s decision appears proper in the circumstances. The applicant has attempted to introduce certain information as to whether there had been a double booking of the venue or its environs. It was sought to show that the other party had not booked the adjacent venue and that therefore the perceived threat would not have arisen. However, this additional information was not put before the magistrate who, needless to say, would not have taken it into account in arriving at that decision.

The respondents have raised a dimension that I must turn to. The opening sentence under s 26 (3) reads “If a regulating authority receives credible information on oath that there is a threat ……………..”. *Prima facie* therefore the procedures specified therein to be complied with by the regulating authority will only be set in motion if the regulating authority receives certain information. If no such information is received then it can reasonably be argued that the regulating authority need not proceed as prescribed. Indeed this position is in tandem with subsections 26 (1) and (2) where it is envisaged that where the regulating authority “is of the opinion that negotiations are not necessary” and that the demonstration / meeting can proceed, he shall notify the convener accordingly. In other words, he shall at his sole discretion approve the holding of the demonstration or meeting.

However the converse position has not been covered in the present provisions. This is the situation where the regulating authority, without receiving any adverse information from a source other than himself, is of the opinion that because of certain facts known to himself or drawn from his own operational experience as in the present case, it would be imprudent to authorise the demonstration, meeting or public procession. How does a regulating authority who has formed such an opinion on such reasonable grounds proceed? Does he invite the parties to consultations as presently envisaged? For what purpose? I ask this question because the whole procedure for consultation is designed to ensure that the information received is interrogated by the stakeholders. How reliable is it? Can it be verified? Is there any substance to it or is it a mere hoax? If it is credible, how should the regulating authority deal with it? Does it warrant the regulating authority’s action by way of prohibition, by way of placing certain conditions in the manner in which the meeting or demonstration should be conducted or by way of any other amendment to the convening notice? Ultimately, however, after all these procedures have been complied with it still remains within the discretion of the regulating authority to sanction, modify or prohibit the proposed public function.

In other words the import of these provisions would appear to be aimed at assisting the regulating authority to exercise his discretion reasonably and from an informed position.

I would hold therefore that where the exercise of that discretion is premised upon information within the regulating authority’s knowledge and experience, as in the present case, the consultation procedures cannot be triggered. That is so because the legislature has not said that is what should be done. In fact the legislature saw it wise not to do so. To fetter a regulatory authority’s discretion in the manner suggested by the applicant would, in my view, severely curtail the effective discharge by the Police of their constitutional mandate – to maintain law and order in the country.

In any event it would not be prudent in my view to require that a member of the police force be obliged to hold consultations in the manner prescribed to test the reasonableness or otherwise of any information known to him through operational experience or other source privy to him or the force at large. Such information might well be sensitive or privileged the disclosure of which might well be detrimental to public order and security.

In the result I hold that the regulating authority in the circumstances of this case was not obliged to follow the procedures prescribed under s 26 (3). If he was as the magistrate seemed to believe, I would hold that the taking of evidence on oath by the magistrate and the opportunity given to the parties to make representations cures the initial defects substantially. In that regard the decision ultimately reached by the magistrate on the basis of what was put before her appears to me to be logical, proper and reasonable.

Finally let me deal with a logistical issue. I heard this matter on an urgent basis and on the very day that the applicant sought to hold the rally. It would not have been practicable given the time constraints to grant the order sought in the event that I had embraced the applicant’s submissions. That is so because the respondents would have required much more time than could possibly be availed to marshall manpower and other resources required for a rally of the envisaged magnitude. I would therefore have still dismissed the application on that point alone.

It was for these reasons that I dismissed the application with costs.

*Zimbabwe Lawyers for Human Rights*, applicant’s legal practitioners

*Civil Division of the Attorney General’s Office,* respondents’ legal practitoners