DEMOCRATIC ASSEMBLY FOR RESTORATION &
EMPOWERMENT (DARE)
and
STENDRICK ZVORWADZA
and
COMBINED HARARE RESIDENCE ASSOCIATION
and
NATIONAL ELECTORAL REFORM AGENDA (NERA)
versus
NEWBERT SAUNYAMA N.O
and
THE COMMISSIONER GENERAL OF POLICE
and
THE MINISTER OF HOME AFFAIRS
and
THE ATTORNEY GENERAL OF ZIMBABWE

ZIMBABWE DIVINE DESTINY
versus
NEWBERT SAUNYAMA
and
COMMISSIONER GENERAL OF POLICE
and
THE MINISTER OF HOME AFFAIRS
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 19, 27, 28 September 2016 and 4 October 2016

T. Biti, for the 1st applicant
Adv *F. Mahere*, for the 2nd applicant
Attorney General Adv *P. Machaya*, for the respondents assisted by
Mrs *F. Chimbaru*

Opposed Matter

CHIWESHE JP: The background facts to this application are as follows:

On 1st September 2016, the 1st respondent, in his capacity as the police officer commanding Harare District, issued a notice in terms of section 27(1) of the Public Order and Security Act [*Chapter 11:07*] (commonly referred to as POSA) in terms of which he banned for a period of two weeks the holding of all public processions and demonstrations in the Central Business District of Harare. The notice was published in the Government Gazette as SI 101 A of 2016.

In response to that prohibition, the applicants filed an urgent chamber application under case number HC 8940/16 challenging the validity of the statutory instrument. The application was heard by my sister CHIGUMBA J who issued a provisional order in favour of the applicants. The terms of that provisional order were:

> **"Interim Relief**
>
> 1. That, forthwith, the operation of Statutory Instrument 101A of 2016 be and is hereby suspended.
>
> 2. That the 2nd respondent shall process and deal with all notifications for public gatherings and processions or meetings in the manner lawfully prescribed in section 12 of the Public Order Security Act [*Chapter 11:17*]
>
> 3. That the 2nd and 3rd respondents be and are hereby interdicted from unlawfully interfering with the rights of citizens to exercise their right defined by s 59 of the Constitution read together with s 12 of the Public Order Security Act [*Chapter 11:17*]
>
> **Terms of Final Order Sought**
>
> It is ordered or declared that:
>
> 1. Statutory Instrument 101A of 2016 is *ultra vires* the provisions of s 134 and s 27 of the Public Order Security Act (POSA) [*Chapter 11: 17*] and is therefore set aside.
>
> 2. Statutory Instrument 101A of 2016 is a breach of applicant's fundamental rights as protected by s 68, 59, 61, 66, 92 and 67(2) of the Constitution of Zimbabwe.
>
> 3. S27 of the Public Order Security Act is a violation of the applicant's rights as protected by s 58, 59, 61, 66 (2) and 67 (2) of the Constitution of Zimbabwe.
>
> 4. The 1st respondent shall personally pay the costs of this application in so far as they relate to the legality of Statutory Instrument 101A of 2016.

5. The 3rd and the 4th respondents each paying the other to be absolved, shall pay the costs relating to the legality of s27 of the Public Order Security Act [*Chapter 11: 17*]."

Following the grant of that provisional order, and, seemingly seeking to correct the invalidity referred to therein, the first respondent issued Government Notice No. 239 A of 2016 proclaiming his intention to ban for a period of one month that is, from 16 September 2016 to 15 October 2016, processions and demonstrations in the Central Business District of Harare. On 16 September 2016 he caused the publication in the Government Gazette of General Notice No. 245 of 2016, which notice brought the ban into effect.

Aggrieved by this development, the applicants under case number HC 9469/16 filed the present urgent chamber application challenging the validity of Government Notice No. 245 of 2016. A separate application was also filed by Zimbabwe Divine Destiny under case number HC 9470/16 seeking similar relief. The terms of the provisional orders sought in each case are as follows:

CASE NO. HC 9469/2016

"Terms of the Interim Relief Granted

1. That forthwith, the operation of the Notice and Proclamation issued on the 16th of September 2016, banning all marches and processions, in the Harare Central Business District issued by the 1st respondent in terms of Section 27 of the Public Order and Security act [Chapter 11:17] be and is hereby suspended.

2. That the 1st respondent shall process and deal with all notifications for public gatherings, processions or meetings in the manner lawfully prescribed in the Public Order Security Act [Chapter 11:17].

3. That the respondents be and are hereby interdicted from unlawfully interfering with the rights of citizens to exercise their right defined by Section 58, 59, 60, 61, 66(2) and 67(2) of the Constitution of Zimbabwe.

4. That the applicants' application Case No. HC 8940/2016 shall be heard urgently and shall follow the following timelines:-
   (a) 22 September 2016 the respondents to file its opposing papers

   (b) 26 September 2016 the applicants to file their answering affidavit and Heads of Argument.

   (c) 29 September 2016 the respondents to file their Heads of Argument

(d) The Registrar is directed to set this matter down on any date in the first week of October that is between the 3rd to 7th October 2016.

Terms of the Final Order Sought

5. It is ordered and declared that:

(a) The Government Notice No. 239A of 2016 issued by the 2nd respondent on the 13th of September 2016 was issued *ultra vires* the provisions of the Administration of Justice Act [Chapter 10:28] as well as Section 68 of the Constitution and is therefore set aside.

(b) That the Notice and Proclamation issued by the 2nd respondent banning marches and processions in Harare Central District between 16 September 2016 and 15 October 2016 published on the 16th of September 2016 be and is hereby set aside for breach of Section 134 of the Constitution of Zimbabwe.

(c) The Notice and Proclamation of the 16th of September 2016 banning marches and demonstrations, be and is hereby set aside on the basis that it is breach of the applicants' fundamental rights as protected by Section 68, 59, 61, 66(2) and 67(2) of the Constitution of Zimbabwe.

(d) The 1st respondent in his personal capacity together with the 2nd and 3rd respondents shall pay the costs of suit on a scale calculated as between attorney and client."

CASE NO. HC 9470/2016

"**Terms of the Interim Relief Granted**

1. That forthwith, the operation of the Notice and Proclamation issued on the 16th of September 2016, banning all marches and processions, in the Harare Central Business District issued by the 1st respondent in terms of Section 27 of the Public Order and Security Act [Chapter 11:17] be and is hereby suspended.

2. That the 1st respondent shall process and deal with all notifications for public gatherings, processions or meetings in the manner lawfully prescribed in the Public Order Security Act [Chapter 11:17].

3. That the respondents be and are hereby interdicted from unlawfully interfering with the rights of citizens to exercise their right defined by sections 58, 59, 60, 61, 66(2) and 67(2) of the Constitution of Zimbabwe.

Terms of the Final Order Sought

4. It is ordered and declared that:
   (a) The proclamation and notice published by the 1st respondent on the 16th of September 2016 in respect of which all marches and processions were banned within the District of Harare Central District between 16th September 2016 and the 15th of October 2016 purportedly made in terms of Section 27 of the Public Order and Security Act [Chapter 11:17] be and is hereby set aside on the basis that it is in breach of the Constitution.

   (b) Section 27 of the Public Order Security Act is in breach of Sections 58, 59, 60, 61, 62, 66 and 67(2) of the Constitution of Zimbabwe.

   (c) The Government Notice No. 239A of 2016 issued by the 2nd respondent on the 13th of September 2016 was issued *ultra vires* the provisions of the Administration of Justice Act [Chapter 10:28] as well as Section 68 of the Constitution and is therefore set aside.

   (d) The respondents each paying the other to be absolved pay costs of suit."

At a case management meeting held with the parties on 19 September 2016, I directed that the three applications be heard together in one sitting and that the parties file heads of argument and that the matter be set down for hearing as an opposed matter. I indicated that a final order would be issued after the hearing.

The issues to be determined in this matter are clear. Firstly I intend to interrogate the constitutionality of s 27 of POSA and, depending on my finding, determine the legality of the first respondent's actions in issuing notices temporarily banning public demonstrations in the Central Business District of Harare.

In terms of s 2 of the Constitution of Zimbabwe, the Constitution is the Supreme law of the country and any law, practice, custom or conduct inconsistent with the Constitution is invalid to the extent of the inconsistency. In the case of *Mudzuru and anor vs Minister of Justice and Others* CCZ 12/2015, the role of the courts was restated in the following terms:

> "The rule of invalidity of a law or conduct is derived from the principle of the supremacy of the Constitution……..
> In interpreting the Constitution the court must adopt a purposive and generous rather than a pedantic or restrictive interpretation".

A number of legal issues arise in this application. First and foremost is the question whether POSA and specifically s 27 thereof is unconstitutional. Section 27 provides as follows:

> **"27 Temporary prohibition of holding of public demonstrations within particular police districts**
>
> (1) If a regulating authority for any area believes on reasonable grounds that the powers conferred by section 26 will not be sufficient to prevent public disorder being occasioned by the holding of processions or public demonstrations or any class thereof in the area or any part thereof, he may issue an order prohibiting, for a specified period not exceeding one month, the holding of all public demonstrations or any class of public demonstration in the area or part thereof concerned.
>
> [Subsection amended by section 6 of Act 18 of 2007]
>
> (2) Whenever it is practicable to do so, before acting in terms of subsection (1), a regulating authority shall –
> (a) cause notice of the proposed order to be published in the *Gazette* and in a newspaper circulating in the area concerned and to be given to any person whom the regulating authority believes is likely to organise a procession or public demonstration that will be prohibited by the proposed order; and
>
> [Paragraph amended by section 6 of Act 18 of 2007]
>
> (b) afford all interested persons a reasonable opportunity to make representations in the matter.
>
> (3)The regulating authority for the area in respect of which an order has been made under subsection (1) shall ensure that the order and any amendment or revocation thereof is published –
> (a) in the *Gazette*; and
> (b) in a newspaper circulating in the area; and
> (c) in such other manner as, in his opinion, will ensure that the order or its amendment or revocation, as the case may be, is brought to the attention of persons affected by it.
>
> (4) …….
>
> [Subsection repealed by section 6 of act 18 of 2007]
>
> (5) Any person who organises or assists in organising or takes part in or attends any procession or public demonstration held in contravention of an order under subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment"

There can be no doubt that the provisions of s 27 constitute a derogation from the rights accorded citizens in terms of s 59 of the Constitution. That section reads as follows:

"**59 Freedom to demonstrate and petition**

Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully". (my underlining)

Any derogation from or limitation of such a clear right may be permissible only if it is consistent with the provisions of s 86 of the Constitution. That section provides 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;
(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.

(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them –
(a) the right to life, except to the extent specified in section 48;
(b) the right to human dignity;
(c) the right to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
(d) the right not to be placed in slavery or servitude;
(e) the right to a fair trial;
(f) the right to obtain an order of *habeas corpus* as provided in section 50(7) (a)".
(my own underlining)

Does section 27 of POSA pass the test set out in section 86(2) of the Constitution as a permissible derogation of the right and freedom to demonstrate and the right to present petitions as provided under section 59 of the Constitution?

The test comprises two stages. Firstly, is section 27 of POSA a law of general application? Secondly, are the provisions of section 27 (1) of POSA a fair, reasonable, necessary and justifiable derogation or limitation in a democratic society?

The answer to the first question must be in the affirmative. The parties agree with that view. I need not be detained by it. The parties are however fiercely divergent over the answer to the second question. The applicants argue that the limitation imposed by s 27 (1) of POSA is unreasonable, unfair, unnecessary and unjustifiable in a democratic society.

The respondents are of the view that the new constitutional dispensation (Amendment (No 20) 2013 has not fundamentally changed the approach that the courts should take in interpreting the constitutional validity of s 27(1) of POSA, in particular with regards the right to demonstrate and the right to hold public processions. Under the old constitutional order (Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom, as amended) these rights were provided for under s 21, which read in part:

> "21. **Protection of freedom of assembly and association**
>
> (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.
>
> (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.
>
> (3) 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) in the interests of defence, public safety, public order, public morality or public health;
> (b) for the purpose of protecting the right 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 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".

It is argued that these provisions under the old Constitution covered the right under s 59 of the new Constitution, the difference being that the right to demonstrate is now provided for in a stand alone section. Further, the scope and extent of permissible derogations under the old Constitution is essentially similar to the provisions of s 86 of the present Constitution. I agree with that observation. If one accepts, as I do, that there are no fundamental differences in the rights sought to be protected under s 21 of the old Constitution and similar rights protected under sections 58, 59, 61, 66 and 67 of the present Constitution, then it should be held that cases decided by our courts under the old Constitution remain relevant in the interpretation of the present Constitution, including section 59.

Thus in the case of *In re Munhumeso & Ors* 1994 (1) ZLR 49 (5) it was held that sections 20 (2) (a) and 21 (3) (a) of the old Constitution permit the enactment of laws which derogate from freedom of assembly in the interests of public order to an extent which is reasonably justifiable in a democratic society. The pronouncement of the court in this regard is in sync with the provisions of s 86 of the present Constitution. The court went on to say that the Constitution should be interpreted positively and widely to give effect to the fundamental rights contained therein, and any purported derogations from these rights must be given a strict and narrow rather than a wide construction. It was further held in that case, and, again in a manner that is consistent with the provisions of s 86 of the present Constitution, that the right to freedom of assembly is not absolute and must be balanced against the responsibility of government to maintain public order and to protect public safety. It was further held that what is reasonably justifiable in a democratic society is a concept which cannot be precisely defined. There is no legal yardstick for this concept. The courts should examine and ascertain the quality of reasonableness of the provision under challenge, and determine whether it arbitrarily and excessively invades the enjoyment of a constitutional right. In other words, the ultimate test for validity is based on a value judgment as to what could be permissible in a democratic and open society. Put differently "There must be a compromise which will accommodate the exercise of the protected rights within a framework of public order which enables the ordinary people to go about their business without obstruction" - *Biti and Anor vs Minister of Home Affairs and Anor* 2002 (1) ZLR 197 (5)

In deciding whether a derogating provision is permissible in a democratic society it serves no purpose to adopt an armchair approach that is divorced from the realities of a

particular set of circumstances. In the South African case of *Fose vs Minister of Safety and Security* 1997 (3) SA 786 it was stated thus:

> "When courts give relief, they attempt to synchronize the real world with the ideal construct of a constitutional world. This means that a court should not only consider what is appropriate relief under the circumstances, but also what the effect of its order on the general public will be. It must take into account the interests of all persons affected thereby. It must also determine whether the declaration of invalidity will give rise to a situation less consistent with the constitution than the existing situation."

I now turn to the second part of the test set out in s 86 of the Constitution. Having come to the conclusion that s 27 of POSA is a law of general application within the meaning of s 86, I must now consider whether s 27 of POSA imposes a limitation that is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. In doing so I must give the provisions of s 59 of the Constitution a purposive and general interpretation, one that endeavours to give citizens the full measure of that fundamental right and freedom.

In the Canadian case of *R vs Big M Drug Mart Ltd* 1958 1 SCR 295 it was stated that;

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."

If one were to give section 59 of the Constitution "A liberal, generous and purposive interpretation" it would probably read as follows:

> "Every citizen has a right and freedom to demonstrate, alone or collectively with others, anytime, anywhere, anyhow for any cause or lack of it, silently or otherwise, in motion or static, in celebration or denunciation, without fear, let or hindrance whatsoever!"
> Whatever it is that may be done, must be done peacefully.

On the other hand any provision derogating from such a clear and unfettered right must be interpreted narrowly and restrictively, such that only the barest minimum and necessary limitation may be brought to bear upon such fundamental right. A permissible derogation or limitation must be "fair, reasonable, necessary and justifiable in a democratic society". As already discussed there is no special, scientifically determinable yardstick for determining what is fair, reasonable, necessary and justifiable in a democratic society. The court must arrive at a value judgment, taking into account all relevant factors of the case at hand. Such factors must include those factors listed under section 86 (2) (a) – (f) of the Constitution. I shall endeavour to evaluate each of these factors with specific reference to the provisions of s 27 (1) of POSA.

a) the nature of the right or freedom concerned. There is no doubt that the right to demonstrate and petition, read together with the kindred rights of freedom of assembly (section 58), freedom of expression (section 61), freedom of movement (section 66) and political rights (section 67) form the foundation of any democratic society. As Mr *Biti* put it, the liberation struggle of this country was fought precisely to achieve these civil rights. They form the very core of our democracy – they are sacrosanct. The Preamble to the Constitution makes reference to our "desire for freedom, justice and equality" and "our heroic resistance to colonisation, racism and all forms of domination and oppression". It also adverts to "the need to entrench democracy, good, transparent and accountable governance and the rule of law" and reaffirms "our commitment to upholding and defending fundamental human rights and freedom".

The right to demonstrate and to petition is one of these fundamental human rights referred to in the Preamble.

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 general public interest.

The purpose of s 27 (1) of POSA is clearly to prevent public disorder or in

positive terms, to uphold public order and public safety. In this regard it is pertinent to observe that no democracy can function or thrive in an environment of public disorder and anarchy. The security and well being of any community is of paramount importance. History shows that the extent to which citizens and, communities, may enjoy their fundamental rights directly depends on the prevalence of peace, public order and security, without which democracy ceases to exist. The provisions of s 27 (1) seek, contrary to assertions by the applicants, to ensure the maintenance of public order and security and therefore promote an environment conducive to the enjoyment of fundamental human rights by citizens and the community at large. For these reasons, the courts are more likely than not to condone a reasonable derogation or limitation imposed in the interests of public order and public security.

c) the nature and extent of the limitation. Although s 27 (1) of POSA permits the regulating authority to impose a blanket ban on all demonstrations, the power to do so is curtailed by the limited duration of such ban and the defined geographical extent of the area in which the ban may take effect (a police district or portion thereof).

d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others.

This is a factor of fundamental importance. In *casu* evidence has been proffered proving that in previous demonstrations, violence had flared resulting in injury to innocent persons going about their normal business. Public and private property was destroyed in clear violation of the fundamental rights 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.

The purpose of the limitation imposed by s 27 (1) of POSA has been

canvassed above. It has the effect of imposing greater restrictions than are necessary to achieve its purpose but as already alluded to, its effect is limited in terms of the duration and the restricted geographical area in which the ban may be imposed.

f) whether there are any less restrictive means of achieving the purpose of the limitation.

The enabling legislation (POSA) does not give the regulating authority options other than those provided for under s 27.

It must be observed that s 27 (1) does not give blanket authority to invoke its provisions. The regulating authority's actions must be based "on reasonable grounds" upon which any action he may take must be justifiable.

Taking all these factors and considerations into account I am satisfied that based on a value judgment, the provisions of s 27 (1) of the Public Order and Security Act satisfy the requirements set out under s 86 (1) and (2) of the Constitution namely that the limitation it imposes on the right to demonstrate as enshrined under s 59 of the Constitution is fair, reasonable, necessary and justifiable in a democratic society based, on openness, justice, human dignity, equality and freedom. Accordingly, I would hold, as I hereby do, that s 27 (1) of POSA is not *ultra vires* the Constitution. It meets the requirements of constitutional validity.

The applicants have contended that in gazetting the notices temporarily banning demonstrations, the 1st respondent acted unlawfully and *ultra vires* the provisions of POSA. Firstly it is argued that the 1st respondent should have followed the procedure outlined in s 27 (2) of POSA which requires a regulating authority to cause notice of the proposed order to be published in the Gazette and in a newspaper circulating in the area concerned and afford all interested persons a reasonable opportunity to make representations. That contention has no merit. A regulating authority need not follow that procedure when imposing a temporary ban in terms of s 27 (1) of POSA. Section 27 (2) does not make it mandatory for the 1st respondent to do so. It reads:

"Whenever it is practicable to do so, before acting in terms of subsection (1), a regulating authority shall –

a) cause notice of the proposed order to be published in the Gazette …….; and

b) afford all interested persons a reasonable opportunity to make representations in the matter." (my own underlining)

In *casu* the 1st respondent has averred that it had not been practicable to follow these procedures. Nothing turns on this. It must be pointed out that notices had been sent and that some parties had indeed given their responses. The point still remains that once the regulating authority had formed the opinion that the security situation rendered that process impracticable, he was not obliged to either commence it or see it through. Accordingly he need not, in that event, follow the principles set out in the administrative Justice act [*Chapter 10:28*]

The 1st respondent has also been criticised for not setting out clearly in his affidavit the reasons why it had become necessary to effect the temporary ban on demonstrations. I disagree. Although he may not have stated in categorical terms that he feared that violence would flare as had happened on two previous occasions on, the import of his general averments is to that effect. He states that memories of the events of the recent demonstrations were still fresh and that there was need to allow a period of healing. It cannot be denied that violence had flared leading to the destruction of property. The affidavits filed of record point to that fact.

It has also been argued that in publishing the notices temporarily banning demonstrations, the 1st respondent acted without legal basis and contrary to the provisions of section 134 of the Constitution and in particular subsections (b) and (f). These read

"b) Statutory instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of rights;"

"f) Statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny."

I am satisfied that there is no merit in the criticism levelled against the 1st respondent in this regard. Firstly the import of s 134 cannot be anything more than this, that a statutory instrument that is inconsistent with the provisions of the Constitution or the Act of Parliament under which it is made, is *ultra vires* and therefore null and void. I do not read s 134 to mean that a statutory instrument properly made in terms of a valid Act of Parliament may be struck

off on account of the provisions of s 134 (b). If POSA is constitutionally valid, why would a statutory instrument made in terms of its provisions, which is intra vires the parent Act, be deemed invalid? In any event how would a regulating authority communicate to the public his decision lawfully made in terms of s 27 (1) of POSA save by publication of the relevant notice?

The applicants under case number HC 9470/16 is a faith based organisation. It had intended to march to Parliament to present a petition against police brutality. It was unable to do so on account of the ban on demonstrations imposed by the 1st respondent. It has been contended that as a faith based organisation the applicant is exempt from the provisions of POSA, specifically sections 23, 24, 25 and 26.

The Schedule to POSA lists the classes of gathering to which the above sections do not apply. It reads in part:

"**Gatherings** –
a) held exclusively for bona fide religious, educational, recreational, sporting or charitable purposes or any two or more such purposes
b) held exclusively for the purpose of –
   i) baptism; or
   ii) wedding; or
   iii) funeral; or
c) of members of professional, vocational or occupational bodies held for purposes which are not political;
d) for the purposes of agricultural shows;
e) …….
f) …….
g) …….
h) …….
i) ……..
j) ……..
k) …….
l) ……..."

The purpose for which the applicant intended to march to parliament is conspicuous by its absence from the above list. Clearly the applicant cannot claim any exemption from the provisions of POSA when it engages in a gathering the purpose of which is not covered by the provisions of the schedule to the Act.

I now turn to case number HC 8940/16 in which a provisional order was granted by my sister CHIGUMBA J. Should that provisional order now be confirmed in terms of the

draft final order sought? Mr *Biti* is of the view that in the final analysis I am obliged to confirm the provisional order more so as my sister CHIGUMBA J has made certain declarations of invalidity, which declarations are final in nature. I disagree. All CHIGUMBA J did was to grant interim relief pending the full ventilation by the parties of the issues raised therein. It is trite that such relief, unless confirmed to be the final order granted, remains as such – temporary relief. The judge hearing submissions for or against confirmation is not bound by the terms of the interim relief granted on an urgent basis.

I am inclined to discharge that provisional order for the following reasons. Firstly having now heard full arguments I do not agree in principle with the import of paragraphs (a), (b) and (c) of the draft final order. My views on these issues have been canvassed in this judgment. Secondly, paragraph (a) seeks to saddle the 1st respondent personally with costs. There is no basis for doing so in view of my reluctance to confirm the provisional order. My sentiments in this regard apply equally with regards paragraph (e) where it is proposed without basis to award costs against the 3rd and 4th respondents.

The respondents sought to argue that the applicants' recourse to this court was improper in view of the provisions of section 27B of POSA, which read;

> "**27 B Appeals**
>
> 1) any convener who is aggrieved by –
> a) any prohibition;
> b) the contents of the directions issued in terms of section 26, …..
> c) order issued in terms of section 27;
>
> May appeal to the Magistrates Court in the area where the gathering is proposed to be held, and the magistrate may confirm, vary or set aside the prohibition notice, direction, condition or order and give such order or direction in the matter as he or she thinks just;
> Provided ……"

In response the applicants pointed to the very wide jurisdiction conferred on this court in terms of s 171 (1) (a) of the Constitution which provides that the High Court "has original jurisdiction over all civil and criminal matters throughout Zimbabwe". For that reason section 27B of POSA does not and cannot oust the jurisdiction of the High Court in the present matter.

Secondly the applicants point to the fact that the relief they seek pertains to the interpretation of constitutional provisions which provisions are beyond the jurisdiction of the

Magistrate Court. On the contrary s 171 (c) of the Constitution clothes this court with constitutional powers as it provides that the High Court "may decide constitutional matters except those that only the Constitutional Court may decide."

Although it is true that the applicants could have approached the Magistrate Court in the first instance, it is likely, given the nature of this application, that the Magistrate Court would have referred the matter to the Constitutional Court for determination. It is evident therefore that a direct approach to the High Court (which is a constitutional court of lesser jurisdiction) was the more prudent course to take. For that reason I take the view that it was proper for the applicants to seek recourse in this court notwithstanding the provisions of section 27B of POSA.

The applicants have referred me to a number of foreign cases dealing with the question of permissible limitations of or derogation from provisions dealing with fundamental human rights. My attention has also been drawn to several international instruments such as the Universal Declaration of Human Rights and the African Charter of Human and Peoples Rights. I am grateful for that input as in interpreting our Constitution the courts are enjoined to seek guidance from international law (section 46 (c) of the Constitution)

I found that in general the values and principles covered in these cases and international instruments have largely been domesticated under Part 2 of the Constitution which deals with fundamental human rights and freedoms. Our Constitutional Court has in many instances quoted with approval, cases from other jurisdictions within our region and beyond.

I must observe that what each jurisdiction has done is to develop the general principles upon which it may be permissible for a law to derogate from a given fundamental right and indicate the parameters within which such derogations may be acceptable in a democratic society. There are a lot of similarities in the endeavours of various systems. These similarities are also reflected in our Constitution and decided cases.

However, each jurisdiction has its own peculiarities. To suggest otherwise would be misleading. It has been argued that no other country in the region or beyond has a provision similar to section 27 (1) of POSA, and that for that reason that section must be struck out as an unreasonable restraint on fundamental human rights and freedoms. Firstly, it has not been proven that that assertion is entirely correct and, secondly, even if that assertion was accurate,

it would not on its own necessarily lead to the conclusion sought, that of invalidity. The legislature, in its wisdom, has seen it fit to so provide believing that such provision is desirable in the interests of public order and security.

I conclude therefore that this application cannot succeed.

Accordingly it is ordered as follows:

1) The application under case number HC 9469/16 be and is hereby dismissed with costs.
2) The application under case number HC 9470/16 be and is hereby dismissed with costs.
3) The provisional order under case number HC 8940/16 be and is hereby discharged with costs.

Tendai Biti Law, 1st applicant's legal practitioner
Zimbabwe Lawyers for Human Rights, 2nd applicant's legal practitioners
Civil Division of the Attorney General's office, respondents' legal practitioners