REPORTABLE (30)

Judgment No. SC 12/03
Civil Application No. 311/99

(1) ZIMBABWE LAWYERS FOR HUMAN RIGHTS
(2) THE LEGAL RESOURCES FOUNDATION v

(1) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
(2) THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, MARCH 17 & NOVEMBER 20, 2003

J B Colegrave, for the applicants

Y Dondo, for the respondents

CHEDA JA: The first applicant is a *universitas* which was established in February 1996. Its main purpose is to foster a culture of human rights in Zimbabwe and encourage the growth and strengthening of human rights at all levels of Zimbabwean society. In particular it strives to protect, promote, deepen and broaden the human rights provisions of the Constitution of Zimbabwe ("the Constitution").

The second applicant is a charitable and educational trust established according to the law of Zimbabwe in 1984.

The first respondent is the President of the Republic of Zimbabwe.

The second respondent is the Attorney-General of the Republic of Zimbabwe, who is cited in terms of s 24(6) of the Constitution of Zimbabwe ("the Constitution").

By Statutory Instrument 204A of 1981, the then President of Zimbabwe appointed a Commission of Enquiry into disturbances at Armed Encampments in Zimbabwe. The appointments were in terms of s 2(1) of the Commissions of Enquiry Act [*Chapter 10:07*]. The Commission of seven members, chaired by JUSTICE DUMBUTSHENA (as he then was), is referred to as "the Dumbutshena Commission".

The terms of reference for the Commission were –

(a) to inquire into the mutinous disturbances which took place during February 1981 at

Glenville Military Camp,

Ntobazinduna Military Camp, and

Entumbane ZANLA and ZIPRA Camps

for the purposes of determining the causes underlying, or which led to, the mutinous behaviour and of identifying, if possible, the persons and organisations responsible for planning or promoting the disturbances; and

(b) to make recommendations for the resolution of the problems identified.

The Statutory Instrument further directed that the Commission continue in full force and virtue until it had finally reported upon the matters aforesaid, that it report to the President with all convenient speed the information upon matters submitted for its consideration, and that it has the liberty to report to him its proceedings from time to time.

Subsequent to the appointment of the Dumbutshena Commission, and in 1984, Mr Chihambakwe, a legal practitioner, was appointed to head what has been referred to as a Committee of Inquiry ("Chihambakwe's Committee"). No instrument has been found to show if this Committee was appointed in terms of the Commissions of Inquiry Act or not.

There is no report from Chihambakwe's Committee and it has not been properly established what this Committee was appointed to do in the absence of the appointing instrument and the report.

As for the Dumbutshena Commission, the Report was never published.

The applicants now seek an order in the following terms:

"IT IS ORDERED THAT –

1. The President of the Republic of Zimbabwe cause to be made public through the Government Printer within sixty (60) days of the date of this order at a reasonable cost the reports made to him when he was Prime Minister of the Commission of Inquiry into events concerning Entumbane 1 and 2 known as the 'Dumbutshena Report 1982', and the Chihambakwe Committee of Inquiry into events between December 1982 and March 1983, known as the 'Chihambakwe Report 1984'.

2. If this application be not opposed there be no order as to costs.

3. If the application is opposed the costs be paid by the State. ”

The first applicant, being a *universitas*, has rights of its own apart from the rights of its individual members. It is a person in terms of s 113(1) of the Constitution (see also *Company Law in Zimbabwe* by Nkala and Nyapadi 1995 ed p 15). Its *locus standi* was not questioned by the respondents. Ms *Dondo*, for the respondents, said she was arguing the case on the basis that the applicants had a right to receive information. In other words, she accepts that the applicants have *locus standi*.

The application is based on s 24(1) of the Constitution, which reads as follows:

> “If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.”

The applicants contend that they are being hindered in the enjoyment of their constitutional rights to freedom of expression by the respondents’ failure or refusal to publish the Reports of the Dumbutshena Commission and the Chihambakwe Committee.

The right complained of is based on s 20 of the Constitution which reads as follows:

"**Section 20 Protection of freedom of expression**

(1) 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."

It is on this basis that the applicants want the first respondent to make the two Reports available to the public. No clear reason is given for this request. All that the applicants can say is that they are entitled to the reports, and that, since twenty years have passed, there is no good reason to refuse to publish the reports.

Generally, most Constitutions that have a Bill of Rights create those rights and at the same time provide exceptions or derogations. The following are examples:

"No person is to be deprived of his liberty except …". (Ghana Constitution);

"No person shall be deprived of personal liberty except according to procedures established by law." (Namibian Constitution);

"No person is to be deprived of his liberty except …". (Zambian Constitution);

"No person is to be deprived of life intentionally except …". (Kenya Constitution); and

"No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2)." (Section 13(1) of the Constitution of Zimbabwe).

The preamble to the Declaration of Rights in the Constitution of Zimbabwe reads as follows:

"**11 PREAMBLE**

Whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this *Chapter*, and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this *Chapter* shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons." (The emphasis is mine)

The above shows that while the rights created by the Constitution are protected, they are not absolute. They are subject to limitations.

The provisions of s 20(2) make this even clearer:

"20 (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) in the interest of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of –

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) …

(iv) …

(v) …; or

(c) that imposes restrictions upon public officers;

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

These provisions make it clear that these rights can only be exercised subject to observation of, and respect for, other people's rights, or those rights stipulated in subs (2)(a) of s 20.

In *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 56 F-H this Court said:

> "The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are one of the basic conditions for progress and for the development of every man."

Even with the above in mind, one should not overlook the fact that whatever has to be done, the rights of others are equally as important and deserve protection. The interest of the State and other persons cannot be overlooked.

In this case, the Inquiries were ordered by the President. The Reports were to be made to him. It is he who is aware of the contents. He is the one who determined in the circumstances whether it was in the interests of defence, public safety or public order, or in the interest of the State, or not, to publish the Reports.

Section 7 of the Commissions of Inquiry Act provides as follows:

> "It shall be the duty of the Commissioners after taking the oath referred to in section 5 –
>
> (a) to make a full, faithful and impartial inquiry into matters specified in the proclamation; and
>
> (b) to conduct the inquiry in accordance with the directions, if any, in the proclamation; and

(c) in due course, to report to the President in writing the results of their inquiry; and

(d) when required to do so, to furnish to the President a full statement of the proceedings of the Commission and of the reasons leading to the conclusions arrived at or reported."

It should be recalled that in the Statutory Instrument the President asked the Dumbutshena Commission to even "identify the persons and organisations responsible for planning or promoting the disturbances". This could result in certain persons and organisations being named in the Report. In that case the President should certainly use his discretion if he deems it fit to protect the reputations, rights and freedoms of other persons or the private lives of persons concerned as well as preventing the disclosure of information received in confidence as provided in subs (2)(b) of s 20 of the Constitution.

In refusing to publish the Report, the first respondent relies on the following grounds:

"1. The Executive authority of Zimbabwe vests in the President and the powers of Executive authority are provided in s 31H of the Constitution.

2. After its inquiry the commission reports its findings to the President. The Act does not impose any obligation on the President to publish the Report.

3. The findings and recommendations were solely for use by the Government and Government had no legal duty to divulge the findings to the general public.

4. In any case, because of the sensitivity of the matter at the time the Report was presented to Government, it was not reproduced and as of now it has not been located."

These appear in the affidavit of Mr E D Mnangagwa, who deposed to the affidavit on behalf of the first respondent when he was Minister of Justice.

The extent to which exercise of the President's functions are justiciable is provided for in s 31K of the Constitution:

> "**31K Extent to which exercise of President's functions justiciable**
>
> (1) Where the President is required or permitted by this Constitution or any other law to act on his own deliberate judgment, a court shall not, in any case, inquire into any of the following questions or matters –
>
> (a) whether any advice or recommendation was tendered to the President or acted on by him; or
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> (b) whether any consultation took place in connection with the performance of the act; or
>
> (c) the nature of any advice or recommendation tendered to the President; or
>
> (d) the manner in which the President has exercised his discretion."

In my view, publication of the Reports would amount to disclosure of the above issues which in turn would be an infringement of these provisions.

There are prerogatives exercisable by the President which are conferred on the President by the Constitution and which the courts, all things being equal, cannot enquire into because the President, acting on the advice of Government, is the best judge on matters of policy covered by the prerogatives. (See *Patriotic Front – Zimbabwe African People's Union v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (S) at 315).

The applicants have neither shown nor alleged that there is any prejudice to any person resulting from the failure to make the Reports public, except that they are for the information of the public.

As long as the first respondent declines to publish the Reports on the basis of the interest of the State and safety of other persons, he cannot be compelled to publish the Reports.

The applicants submitted that after twenty years there is no longer any good reason to keep the Reports confidential. The decision to release the Reports on the basis of the period that has passed is a policy decision that can only be made by politicians or Parliament. It is not a legal decision to be made by the courts.

The derogations in the Constitution can be applied to the Reports by the President when he deems it necessary and he is therefore entitled to use his discretion as long as the need to do so is governed by the provisions in the Constitution.

The applicants have not given any reason for wanting the Reports to be published, other than that they are of public interest that they be published.

On the other hand, the first respondent argues that they were solely for the use of Government and was never intended for the public.

It is clear that in so saying the first respondent is relying on the provisions of s 20(2) and the derogations therein, which provides:

> "(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) in the interest of defence, public safety, public order …
>
> (b) for the purpose of –
>
> (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
>
> (ii) preventing disclosure of information received in confidence."

The first respondent also points out that the Dumbutshena Report cannot be located.

I am of the view that no good cause has been shown for the above Report to be published and that, in any case, it cannot be published when it cannot be found.

Accordingly, the application cannot succeed.

The applicants asked for costs in their draft order if the application was opposed. At the hearing no submissions were made by either side on the question of costs.

Since this is a matter of national interest, I do not intend to award costs to either party.

I therefore make the following order –

1. The application is dismissed.

2. There will be no order as to costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Kantor & Immerman, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners