REPORTABLE (54)

(1) DEMOCRATIC ASSEMBLY FOR RESTORATION AND EMPOWERMENT (2) STENDRICK ZVORWADZA
(2) COMBINED HARARE RESIDENTS ASSOCIATION (4) NATIONAL ELECTION REFORM AGENDA
v
(1) NEWBERT SAUNYAMA N.O. (2) COMMISSIONER GENERAL OF POLICE (3) THE MINISTER OF HOME AFFAIRS (4) THE ATTORNEY GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA DCJ, GARWE JCC,
MAKARAU JCC, GOWORA JCC, HLATSHWAYO JCC,
PATEL JCC, GUVAVA JCC & BHUNU JCC:
HARARE: 23 MAY 2018 AND 17 OCTOBER 2018

T. Biti, for applicants

O. Zvedi, for respondents

MAKARAU JCC:

INTRODUCTION

On 4 July 2017, the Supreme Court acting in terms of s 175(4) of the Constitution referred a constitutional matter to this Court. The essence of its order is to seek from this Court an answer to the question whether or not s 27 of the Public Order and Security Act [*Chapter 7.11*], (POSA) is constitutional.

THE FACTUAL BACKGROUND

The facts giving rise to the constitutional matter are common cause. I set them out hereunder.

On 1 September 2016, the first respondent published a statutory instrument in terms of which he, acting in his capacity as the regulating authority for the Harare Central Police District, banned for a period of two weeks, the holding of any public processions or demonstrations within the Harare Central Police District. In acting as he did, the first respondent relied on the provisions of s 27 of POSA which in subs (1) provides:

> "27 (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 demonstrations in the area or part thereof concerned."

On 2 September 2016, a day after the publication of the Statutory Instrument, the applicants approached the High Court at Harare on a certificate of urgency, seeking the suspension of the statutory instrument pending the determination of, among other issues, the constitutional validity of s 27 of POSA. The other challenges mounted by the applicants against the ban are not germane to the question before this Court.

The respondents opposed the application. They contended, in the main, that marches organised by the applicants in the past had not been peaceful and had led to the destruction of property. It was their position that the statutory instrument under challenge was published for the safety and security of the nation and was a fair and reasonable prohibition, balancing the rights of the applicants to demonstrate against the rights of those citizens who had lost their livelihood during the previous demonstrations.

On 23 September 2016, the High Court granted the provisional order sought thereby suspending the operation of the ban. Part of the terms of the final order sought by the applicants, to be confirmed on the return day, was the constitutional validity of s 27 of POSA.

Ten days prior to the handing down of the High Court judgment, on 13 September 2016 to be precise, the first respondent had published in the Government Gazette and in one newspaper enjoying national circulation, a notice proposing to ban, for a period of one month, processions and demonstrations within the Harare Central Police District. On 16 September, he had proceeded to publish the Notice and Proclamation banning all processions and demonstrations in the Harare Central Police District for a period of one month.

The applicants returned to the High Court on yet another certificate of urgency, seeking the suspension of the Notice and Proclamation and now also praying for the provisional order granted on 23 September 2016 to be set down on an urgent basis for its confirmation or discharge.

Another applicant, who is not a party to the application before this Court, also approached the court separately but similarly challenging the Notice and Proclamation and seeking similar relief.

Both applications were opposed.

The hearings of the two applications and the return day of the provisional order granted on 23 September 2016 were consolidated. At the hearing of the consolidated matters, the High Court, firstly, considered whether or not s 27 of POSA was constitutional, which it found to be, before proceeding to uphold the validity of the Notice and Proclamation. As a consequence, it dismissed the applications.

The applicants noted an appeal to the Supreme Court against the dismissal of the applications. During the hearing of the appeal, the Supreme Court referred to this Court the question I have set out above.

Against this factual backdrop, I will proceed to answer the question referred to this Court by the Supreme Court. In answering the question, I will confine myself to an analysis of the rights or freedoms that were limited by the first respondent using the powers granted to him by s 27 of POSA. I do so notwithstanding that counsel for the applicants has made broad submissions impugning the limitation in s 27 of POSA generally and against a number of other fundamental rights and freedoms enshrined in the Constitution.

THE CONSTITUTIONAL PROVISION

The fundamental rights whose enjoyment was limited by the first respondent are the freedom to demonstrate and to petition.

These rights are enshrined in s 59 of the Constitution in very precise and concise terms 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."

Quite obviously, the rights that are guaranteed by the Constitution in s 59 are the right to demonstrate and the right to present petitions. Noteworthy however is that in the same provision that it enshrines these two rights, the Constitution also admonishes that the rights must be exercised peacefully.

I venture to hold that by the very manner in which the rights and the admonition are given not only in the same provision but literally in the same breath, both the rights and the admonition must be given equal primacy. In other words, the rights and the admonition must be placed on an equal footing and must be read together as giving the complete content of the rights. Taking this approach, the rights enshrined in s 59 of the Constitution then, in simple terms, become the right to demonstrate peacefully and the right to present petitions peacefully.

The approach I have taken to read the rights and the admonition together and as one is to be contrasted with an alternative approach where I could have given the rights supremacy over the admonition. Under such an approach, the rights would have been read separately with the admonition acting as a limitation, presumably an in-built one.

Taking the second approach would have resulted among other things in venerating the rights without qualification, and *prima facie*, venerating even violent demonstrations and the violent presentation of petitions.

It would have also resulted, as indicated above, in subjecting the rights firstly to an in-built limitation and thereafter, to the general limitation provided for in s 86(2) of the Constitution.

I have shied away from adopting the alternative approach as, in my view, and, in the main, one cannot imagine a law that would countenance the holding of violent demonstrations and the violent presentation of petitions as protected rights. Violence intrinsically has the effect of violating other persons' rights, either in their liberty, bodily integrity or in their property.

The enjoyment of fundamental rights and freedoms is universally subject to one general rule. The rule is that the fundamental rights and freedoms granted to every person must always be exercised with due regard for the rights and freedoms of other persons. This Rule, which has been part of our constitutional jurisprudence for decades, has been entrenched in s 86 (1) of our Constitution.

It therefore presents itself clearly to me that to grant an unqualified right to demonstrate and petition, thereby, on the face of it, constitutionally allowing for violent demonstrations and petitions, would be inimical to many of the rights enshrined in the Constitution. No constitution, properly constructed, can be read as granting a right or freedom that clearly affronts the rights and freedoms of others. Ours is no exception.

It is on this basis that I hold that the rights granted by s 59 of the Constitution and the accompanying admonition to exercise such rights peacefully must be read together as forming the contents of the rights.

An important consequence flows from reading the rights and admonition in s 59 as one. It is this. The rights granted and guaranteed by the section are the right to demonstrate and the right to petition peacefully. In other words, the rights are protectable only when exercised peacefully. Consequently, where the demonstration or petition is violent, the conduct of the demonstrators or petitioners loses the protection of the Constitution and becomes subject to the provisions of general law.

THE CONTENT OF THE RIGHTS

Accepting, as I do, that the rights that are protected under s 59 are the right to demonstrate peacefully and the right to peacefully present a petition, one issue that has exercised my mind is whether it is then necessary to further limit the rights.

In view of the position that has been taken by the respondents in this matter, this issue is largely an academic and idle question that does not require an answer for the purposes of this judgment. It was never the contention of the respondents that the measures taken by the first respondent were in response to peaceful demonstrations. To the contrary, the papers filed in the High Court, in opposition to all the applications, recalled and emphasised the violence that had accompanied the earlier demonstrations by some of the applicants as a basis for imposing the ban. Thus, in the collective view of the respondents, the first respondent was responding to the past violent demonstrations by imposing a ban on all future demonstrations for a period of one month. At no stage did the respondents contend that s 27 of POSA can be invoked to prohibit peaceful demonstrations and peaceful presentation of petitions.

That issue aside, the right to demonstrate and to present petitions was recognised by the High Court as one of the rights that form the foundation of a democratic state. I cannot agree more. I am also in full agreement with the observation of the High Court that the attainment of the right to demonstrate and to present petitions was among those civil liberties for which the war of liberation in this country was waged and that these two rights are included in the fundamental rights referred to in the preamble to the Constitution.

To these observations that are peculiar to this jurisdiction as observed by the High Court, I may add on a general note that protests and mass demonstrations remain one of the

most vivid ways of the public coming together to express an opinion in support of or in opposition to a position. Whilst protests and public demonstrations are largely regarded as a means of political engagement, not all protests and mass demonstrations are for political purposes. One can take judicial notice of, in the recent past, a number of public demonstrations that were not political but were on such cross cutting issues as the environment, and/or the rights of women and children. Long after the demonstrations, and long after the faces of the demonstrators are forgotten, the messages and the purposes of the demonstrations remain as a reminder of public outrage at, or condemnation or support of an issue or policy.

Clearly, the right to demonstrate creates space for individuals to coalesce around an issue and speak with a voice that is louder than the individual voices of the demonstrators. As is intended, demonstrations bring visibility to issues of public concern more vividly than individually communicated complaints or compliments to public authorities. Demonstrations have thus become an acceptable platform of public engagement and a medium of communication on issues of a public nature in open societies based on justice and freedom.

THE INFRINGEMENT

It is beyond dispute that s 27 of POSA has the effect of infringing the rights granted by s 59 of the Constitution. The High Court correctly found so. One would venture to suggest that s 27 provides a classic example of a law whose effect infringes the fundamental rights in issue in this matter.

The test to determine whether a law infringes a fundamental right was laid out by GUBBAY CJ in *In re Mhunhumeso (supra)* at page 62F as follows:

> "The test in determining whether an enactment infringes a fundamental freedom is to examine its **effect** and not its object or subject matter. If the **effect** of the

> impugned law is to abridge a fundamental freedom, its object or subject matter will be irrelevant." (The emphasis is not mine).

Clearly, the effect of s 27 is to give wide discretion to a regulating authority to abridge the two rights. He or she can impose a blanket ban for up to one month if he or she believes on reasonable grounds that he will not be able to prevent violence from breaking out. During the currency of the ban, the two rights are completely negated. In my view, it matters not that the ban may be imposed only in relation to a class of demonstrations. The effect remains the same in relation to that class of demonstrations. They are all banned. This is regardless of the purpose, size or organisation of the demonstration. The ban has a dragnet effect and like most dragnets, it catches the big and the small, the innocent and the guilty. I shall revert to this point in greater detail below.

Having come to the inescapable conclusion that s 27 of POSA infringes the rights guaranteed under s 59 of the Constitution, the next inquiry to make is whether the section can be saved under s 86 (2) of the Constitution or must be declared constitutionally invalid.

The approach of the court

Before I proceed to consider whether or not s 27 of POSA can be saved under s 86 (2) of the Constitution, I will briefly discuss the relationship between the general approach that a court takes in considering the constitutional validity of a challenged piece of legislation and the specific test that the court must apply as directed in s 86 (2) of the Constitution. I am detained in this regard as it appears that there may be some confusion as to whether or not the general approach that was laid out in case law prior to the enactment of the Constitution remains applicable in light of the express provisions of s 86 (2) of the Constitution.

Counsel for the applicants argues that s 86 (2) has codified the approach that the court must take in construing a limitation and suggests that the court should look no further. I do not agree.

I am inclined towards the broad view expressed by PATEL JA in *James v Zimbabwe Electoral Commission and Others* 2013 (2) ZLR 659 (CC), wherein at p 666E he held that:

> "Section 86 (2) of the Constitution is essentially a restatement of the criteria for permissible derogation from constitutional rights as enunciated by the Supreme Court in *Nyambirai v National Social Security Authority & Another* 1995 (2) ZLR 1 (S))".

In *Nyambirai v NSSA* (*supra*), the court, relying on the Canadian case of *R v Oakes* (1986) 19 CRR 308, had held that:

> "In effect the court will consider three criteria in determining whether or not a limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:
>
> (i) The legislative objective is sufficiently important to justify limiting a fundamental right;
> (ii) The measures designed to meet the legislative objective are rationally connected to it; and
> (iii) The means used impair the right or freedom are no more than is necessary to accomplish the objective."

I read the view by PATEL JA as holding that the provisions of s 86(2) of the Constitution and the general approach to establishing permissible limitations to constitutional rights are complementary and not mutually exclusive and that both are applicable.

Thus, the general approach that has been discussed in cases such as *In re Mhunumeso and Others* 1994 (1) ZLR 49 (S), *Nyambirai v NSSA (supra), Retrofit (Private) Limited v PTC and Anor* 1995(2) ZLR 199 and *Chimakure and Others v AG* 2013 (2) ZLR 466

(S) which were decided before the promulgation of the Constitution remains valid as providing general guiding principles while s 86 (2) sets out in detail the factors that a court must take into account in determining whether or not a limitation of a fundamental right is constitutional.

I so hold.

The general approach is based on two principles.

The first principle is a presumption in favour of constitutionality. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other outside the provisions of the Constitution, the court must uphold the one that falls within.

The correct approach of presuming constitutionality is to avoid interpreting the Constitution in a restricted manner in order to accommodate the challenged legislation. Instead, after properly interpreting the Constitution, the court then examines the challenged legislation to establish whether it fits into the framework of the Constitution.

This approach gives the Constitution its rightful place, one of primacy over the challenged legislation. The Constitution is properly interpreted first to get its true meaning. Only thereafter is the challenged legislation held against the properly constructed provision of the Constitution to test its validity. In other words, one does not stretch the Constitution to cover the challenged legislation but instead, one assesses the challenged law, and tries to fit it like a jigsaw puzzle piece into the big picture which is the Constitution. If it does not fit, it must be thrown away. (See *Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S)).

The second principle entails the adoption of a broad approach where any derogation from guaranteed rights and freedoms is given a very narrow and strict construction to avoid the diminishing or the dilution of the rights or freedoms. In this regard, the court venerates the fundamental right or freedom as primary while regarding the limitation as secondary.

This second principle was adverted to by MALABA DCJ (as he then was) in *Chimakure and Others v AG* (*supra*), where he was discussing the acceptable limitations to the freedom of expression. As he rightly observed at p491D-E:

> "It would not be an interference (limitation) within the meaning of the Constitution if the measure adopted by Government amounts to authorisation of the destruction or abrogation of the right to freedom of expression itself.
> **To control the manner of exercising a right should not Signify its denial or invalidation." (**The emphasis and insertion of the word "limitation" are mine**).**

He proceeded at page 494H to sum up the approach that the court should take and which approach I intend to take in this matter, as follows:

> "In the determination of the issues raised, it is ever so important to bear in mind that, every new legislative restriction on the exercise of the right to freedom of expression, has the effect of reducing the existing realm of freedom of expression whilst adding to and expanding the area of governmental control of the exercise of the fundamental right. It is the duty of the court as guardian of the constitution and fundamental rights and freedoms to ensure that only truly deserving cases are added to the category of permissible legislative restrictions of the exercise of the right…"

ANALYSIS

Having found that s 27 of POSA infringes the fundamental rights granted by s 59 of the Constitution, and being guided by the general approach described above, the ultimate test as stated above, is to establish whether or not s 27 can be saved by s 86 (2) of the Constitution.

Section 86 (2) provides:

"86 **Limitations of rights and freedoms**

(1)……

(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 or the 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."

It has been urged upon the court by counsel for the applicant that in considering whether s 27 can be saved under this section, the court must make a sequential inquiry, going through all the factors that are listed in the section *seriatim*. While this may be a logical and convenient manner of proceeding, I do not believe that the law directs the court to march its thought processes in this regimented manner.

Clearly, the law directs the court to test the infringing law under four specific heads. These are whether such a law is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. In testing the infringing law against these specific yardsticks, the court is enjoined to take into account **all relevant factors** including the factors spelt out in the section.

I would therefore venture to suggest that s 86 (2) simply gives the court an array of some of the factors to take into account before it comes up with what is essentially a value judgment. The list given is not exhaustive as the law enjoins the court to take into account all relevant factors including the ones that it spells out. Thus, the court must be holistic both in its approach and in its finding.

I now turn to assess the limitation under the four specific heads mentioned in s 86(2).

IS S 27 OF POSA FAIR, REASONABLE, NECESSARY AND JUSTIFIABLE IN A DEMOCRATIC SOCIETY BASED ON OPENNESS, JUSTICE, HUMAN DIGNITY, EQUALITY AND FREEDOM?

As stated above, s 27 of POSA grants wide power to the regulating authority to ban all or a class of public demonstrations for a period lasting up to one month.

The ban imposed is blanket in nature and has a dragnet effect. During the currency of the ban, the rights to demonstrate and to petition peacefully are completely nullified. This includes demonstrations already planned at the time the ban is imposed and those that are yet to be planned. This also includes mass demonstrations and small demonstrations. It includes demonstrations of all sizes and for whatever purpose without discrimination. Like a blanket or a dragnet, it covers or catches them all.

To the extent that the ban does not discriminate between known and yet to be planned demonstrations, the limitation in s 27 has the effect of denying the rights in advance and condemning all demonstrations and petitions before their purpose or nature is known. It

does not leave scope for limiting each demonstration according to its circumstances and only prohibiting those that deserve to be prohibited while allowing those that do not offend against some objective criteria set by the regulating authority to proceed.

The limitation in s 27 of POSA stereotypes all demonstrations during the period of the ban and condemns them as being unworthy of protection. Stereotyping is a manifestation of bias without any reasonable basis for that bias. To the extent that the limitation in s 27 stereotypes all demonstrations during the period of the ban, it loses impartiality and becomes not only unfair but irrational.

Counsel for the respondents conceded that the limitation in s 27 is excessive and is disproportionate to the purpose for which it is intended. This concession was well made. The excessive nature of the limitation has the effect that MALABA DCJ commented on in the *Chimakure* case of increasing the sphere of government control over the exercise of the right whilst decreasing the scope of the enjoyment of the right.

In conceding that the limitation in s 27 is excessive, counsel was in essence conceding that the limitation exceeded its purpose and, to that extent, becomes an unreasonable reaction to a situation that can be managed by other and less restrictive means.

In its judgment, the High Court also correctly found that the limitation in s 27 of POSA has the effect of imposing greater restrictions than are necessary to achieve its purpose. The High Court however felt that the law could be saved as its effect in this regard is limited "in terms of its duration and the restricted geographical area in which the ban may be imposed."

Once having found that the provisions of s 27 of POSA have the effect of imposing greater restrictions than are necessary to achieve their purpose, the High Court ought to have found the provision unconstitutional without qualification. It is the blanket or dragnet effect of the ban that is permissible under s 27 of POSA that taints the whole provision. It matters not that the ban may be limited both geographically and in terms of time, a blanket or dragnet ban is neither fair, reasonable nor necessary. It is irrational.

Whilst this is not germane to the answering of the question before the court, the concession by counsel and the finding by the High Court that the limitation was excessive and therefore not necessary, suggests that the respondents ought to have come up with other less restrictive measures to ensure that the right to demonstrate and petition peacefully was fully given effect to in circumstances where the exercise of these rights did not violate the rights of others.

As discussed above, the respondents contend that the purpose of the limitation was to assist the first respondent to police and contain violent demonstrations in the future, based on previous experiences. To this extent, the limitation was in my view misplaced. The right that the Constitution guarantees is the right to demonstrate and to present petitions peacefully. The limitation was therefore not only inappropriate but unnecessary to contain and police peaceful demonstrations and petitions.

Having found that the limitation in s 27 of POSA is not fair, reasonable or necessary, I have not been able to find any other basis upon which it can be justified.

In addition to failing to pass the test on fairness, necessity, and reasonableness, there is another feature of s 27 of POSA that I find disturbing. It has no time frame or limitation as to the number of times the regulating authority can invoke the powers granted to him or her under the section. Thus, a despotic regulating authority, could lawfully invoke these powers without end. This could be achieved by publishing notices prohibiting demonstrations back to back as long as each time the period of the ban is for one month or less. It thus has the potential of negating or nullifying the rights not only completely but perpetually.

DISPOSITION

On the basis of the foregoing, it is my finding that s 27 of the Public Order and Security Act [*Chapter 11:17*] is unconstitutional.

Section 175 (6) (b) permits a court declaring a law to be inconsistent with the Constitution to suspend the declaration of invalidity to allow the competent authority to correct the defect. It is just and equitable in my view that the second and third respondents be allowed time to attend to the defects in s 27 of the Public Order and Security Act if they are so inclined.

Regarding costs, while the declaration that I make has the effect of upholding the contentions of the applicants in the High Court, counsel for the respondent did concede that the challenged law was excessive in its effect. Further, the answer to the question referred to this Court by the Supreme Court is an important one to all the parties before this Court. An order that each party bears its own costs will in my view be appropriate.

In the result I make the following order:

1. The question referred to this Court by the Supreme Court is answered as follows:

"Section 27 of the Public Order and Security Act [*Chapter 7.11*] is unconstitutional."

2. The declaration of constitutional invalidity of s 27 of the Public Order and Security Act is suspended for 6 months from the date of this judgment.
3. The matter is remitted to the Supreme Court for the determination of the appeal.
4. Each party shall bear its own costs

MALABA CJ: I agree

GWAUNZA DCJ: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

BHUNU JCC: I agree

Tendai Biti Law, applicants' legal practitioners

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