Inre Munhumeso 1994 (!) ZLR 49 SC
Judges: Gubbay CJ, McNally JA, Korsah JA, Ebrahim JA & Muchechetere JA
Subject Area: Application for an order declaring legislative provision to be unconstitutional
Date: 28 June, 2 November 1993 & 13 January 1994

Constitutional law — whether s 6 of Law and Order (Maintenance) Act [Chapter 65] is ultra vires ss 20 and 21 of the Constitution — principles for dealing with such a matter — effect of s 20(6) and s 21(4) of Constitution — whether restrictions imposed by provision on fundamental rights are reasonably justifiable in democratic society in the interests of public safety or public order
Constitutional law — s 11 of the Constitution — whether creates substantive rights or is merely a preamble to the Declaration of Rights provisions
Human rights — nature and scope of the rights of freedom of expression and of assembly and extent of derogations from those rights
Interpretation of statutes — construction of constitutional provisions protecting freedoms and of derogations from those rights — how legislation challenged as unconstitutional is to be construed
The six applicants were jointly charged in a magistrates court with contravening s 6(6) of the Law and Order (Maintenance) Act [Chapter 65]. The basis of the charge was that they had taken part in a public procession without obtaining the permit required under s 6(2) of the Act. The applicants pleaded not guilty. Counsel for applicants argued that s 6 was ultra vires ss 20 and 21 of the Constitution and that, therefore, the charge was bad in law. The presiding magistrate referred the question to the Supreme Court in terms of s 24(2) of the Constitution.

Held, that a litigant who challenges the constitutionality of legislation must show that it is unconstitutional. The court hearing the matter must interpret the pertinent constitutional provisions and the challenged legislation, determine the meaning of each and then decide whether the legislation violates the constitutional provisions. Where the legislation is capable of more than one meaning, and one meaning would offend against the constitution but others would not, the court will presume that the law makers intended to act constitutionally and uphold the challenged legislation. 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.
Held, further, that all provisions bearing upon a particular subject are to be construed together and as a whole in order to effect the true objective.
Held, further, s 11 of the Constitution is a substantive provision which confers rights on the individual and is not merely a preamble to the rights provided for in the Declaration of Rights section. The purpose of this section is to strike a necessary accommodation between the enjoyment of the freedoms and the potential prejudice resulting from their exercise both to others and to the public.
Held, further, that derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide, construction. Rights and freedoms

are not to be diluted or diminished unless necessity or intractability of language dictates otherwise.
Held, further, that freedom of expression and of assembly are vitally important rights. These rights lie at the foundation of a democratic society and are basic conditions for the progress of society and the development of persons. Freedom of expression serves four broad purposes, namely: it helps an individual to obtain self-fulfilment; it assists in the discovery of truth; it strengthens the capacity of an individual to participate in decision making; and it provides a mechanism for establishing a reasonable balance between stability and social change.
Held, further, the right of freedom of assembly is often exercised by persons taking part in public processions and protects. A procession is an assembly in motion and is a highly effective means of drawing public attention to an issue and involving them in discussion on the issue. Public places such a streets and parks have traditionally been used for processions.
Held, further, that the right to freedom of assembly is not absolute and must be balanced against the responsibility of government to maintain public order and protect public safety.
Held, further, that as s 20(6) and ss 21(4) of the Constitution interfere with

fundamental rights and as there is an area of ambiguity in the meaning of these provisions, these provisions should be interpreted in favour of the liberty of the individual. They should not be interpreted as totally prohibiting freedom of assembly and expression on public roads and pavements, but only to mean that these rights should not be exercised so as to obstruct traffic in thoroughfares. Such an interpretation is in accordance with s 11 of the Constitution and it also avoids the withdrawal of protection from the most visible, effective and immediate means by which grievances can be brought to the knowledge of those in authority, by holding of public processions, provided those processions will not prevent or hinder free passage of persons or vehicles in places set aside for such traffic.
Held, further, that ss 20(2)(a) and 21(3)(a) of the Constitution permit the enactment of laws which derogate from freedom and assembly in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society. In terms of s 2(5) of the Constitution, the applicants had to show the court that s 6 of the Law and Order (Maintenance) Act was not reasonably justifiable in a democratic society.
Held, further, that what is reasonably justifiable in a democratic society is a concept which cannot be precisely defined by the courts and there is no legal yardstick to measure this except that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.
Held, further, that s 6 of the Law and Order (Maintenance) Act contains features which, taken cumulatively, show that it is a provision not reasonably justifiable in a democratic society in the interests of public safety or public order. These are:

(i) the discretionary power of a regulating authority is uncontrolled;

(ii) before imposing a ban on a public procession the regulating authority is not obliged to take into account whether the likelihood of a breach of peace or public order could be averted by attaching conditions upon the conduct of the procession;

(iii) the effect of the provision is to deny these primary rights unless it can be shown that the procession is unlikely to cause or lead to a breach of the public peace or public disorder;

(iv) the holding of a public procession with a permit is criminalised irrespective of the likelihood or occurrence of any threat to public safety or public order, or even of any inconvenience to persons not participating.

Held, further, that although it must be accepted that the power to prohibit or control a public procession is necessary in the interests of public safety or public order, the ensuing infringement or limitation of the freedoms of expression and assembly could be adequately achieved by less restrictive and authoritarian provisions.

Held, further, that a decree nisi should be issued calling on the Minister of Home Affairs to show cause why s 6 of the Law and Order (Maintenance) Act should not be declared ultra vires ss 20 and 21 of the Constitution.

Cases cited:

Dow v A-G [1992] LRC (Const) 623
Handyside v UK (1976) 1 EHRR 737
Whitney v California 274 US 357 (1926) at 375
Cox v Louisiana (2) 379 US 559 (1965)
S v Turrell & Ors 1973 (1) SA 248 (C)
Indian Express Newspapers (Bombay) v Union of India (1985) 2 SCR 287
Ezelin v France (1991) 14 EHRR 362
Christians Against Racism and Fascism v UK App No. 8440/78
H v Austria, App No. 15225/89; 15 EHRR CD 70
Hague v Cttee for Industrial Organisation 307 US 496 (1938)
Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S); 1984 (2) SA 778 (ZS)
Min of Home Affairs v Bickle & Ors 1983 (2) ZLR 431 (S); 1984 (2) SA 39 (ZS)
S v A Juvenile 1989 (2) ZLR 61 (S);1990 (4) SA 151 (ZS); 1990 (4) SA 151 (ZS)
Min of Home Affairs & Ors v Dabengwa & Anor 1982 (1) ZLR 236 (S); 1982 (4) SA 301 (ZS)
S v Ncube & Ors 1987 (2) ZLR 246 (S); 1988 (2) SA 702 (ZS)
African National Congress (Border Branch) v Chrmn, Council of State of Ciskei 1992 (4) SA 434 (CkG)
Dadoo Ltd & Ors v Krugersdorp Municipal Council 1920 AD 530
Sigaba v Min of Defence and Police & Anor 1980 (3) SA 535 (Tk)
Klass & Ors v Federal Republic of Germany 2 EHRR 214
Maluleke v Min of Law and Order & Anor 1963 R & N 554 (SR);1963 (4) SA 206 (SR)
CoT v CW (Pvt) Ltd 1989 (3) ZLR 361 (S); 1990 (2) SA 245 (ZS)
Shuttlesworth v Birmingham 394 US 147 (1969)
Collin v Smith 447 F Supp 676 (1978)

M J Gillespie for the applicants
J R Muganhu for the Attorney-General

GUBBAY CJ:

INTRODUCTION

The six applicants were jointly charged in a magistrates court with a contravention of s 6(6) of the Law and Order (Maintenance) Act [Chapter 65], it being alleged that they had taken part in a public procession for which a permit under s 6(2) of the Act had not been obtained. After pleas of not guilty had been tendered, counsel for the applicants sought to argue that s 6 was ultra vires ss 20 and 21 of the Constitution of Zimbabwe and that, in consequence, the charge was bad in law. The presiding magistrate, as he was entitled to do in terms of s 24(2) of the Constitution, referred the question to this court for determination.

THE FACTUAL BACKGROUND

On 1 June 1992, the Zimbabwe Congress of Trade Unions applied, pursuant to s 6(2) of the Law and (Maintenance) Act, as read with s 4 of the Law and Order (Maintenance) (Holding of Public Processions and Public Gatherings) Directions 1981 (SI 727 of 1981), to a regulating authority, being the police officer in command for Harare Central District, for permission to stage a peaceful public procession on the morning of Saturday, 13 June 1992. The application met with the cryptic response:

"We must advise you that taking other factors into consideration the application was not successful."

No factors were disclosed.

Notwithstanding the denial of permission, from about 0900 hours on the aforementioned day a procession of worker-members commenced to move along Robert Mugabe Road towards the city centre of Harare. When the procession reached the intersection with Kaguvi Street, it was halted by officers of the Zimbabwe Republic Police. They advised that the procession was illegal and called upon everyone to disperse. Most did so. Only a small group of about thirty persons carried on with the procession. When informed that they were to be arrested all but six, who were carrying banners, fled. The six, the present applicants, were apprehended. Their banners proclaimed four of the demands of the Zimbabwe Congress of Trade Unions. These were the withdrawal of the Labour Relations Amendment Bill, the re-introduction of subsidies on basic commodities, the shelving of the Economic Structural Adjustment Programme and the ending of transport queues.

THE STRUCTURE OF THE CONSTITUTIONAL PROVISIONS

Since the right to demonstrate in the form of a procession touches directly upon the freedom of expression and the freedom of assembly, it is necessary at the outset to refer to the relevant provisions of the Declaration of Rights, being Chapter III of the Constitution, under which these fundamental freedoms are afforded protection. They are ss 11, 20 and 21.

Section 11 reads:

"Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely —

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation:

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 of 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 rights and freedoms of others or the public interest."

Similar wording, but in the form of a preamble to the Declaration of Rights, was contained in the Constitution of Southern Rhodesia 1961, the Constitution of Rhodesia 1965, the Constitution of Rhodesia 1969, and the Constitution of Zimbabwe-Rhodesia 1979. The up-graded status of s 11 in the present Constitution signifies that it is to be regarded as a substantive provision conferring rights on the individual. Although commencing with the word "Whereas", it underscores that "every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual", and stipulates in positive terminology that the provisions of Chapter III shall have effect for the purpose of affording protection to those rights and freedoms itemised as (a) (b) and (c), subject to such limitations as are contained in the whole of Chapter III being designed "to ensure that the enjoyment of the said rights and

freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

In Dow v Attorney-General [1992] LRC (Const) 623, a decision of the Appeal Court of Botswana, Amissah JP, at 636e-637b, considered the identically worded s 3 of the Constitution of Botswana. He viewed it, most aptly, as "the key or umbrella provision" in the Declaration of Rights under which all rights and freedoms must be subsumed; and went on to point out that it encapsulates the sum total of the individual's rights and freedoms in general terms, which may be expanded upon in the expository, elaborating and limiting sections ensuing in the Declaration of Rights.

This analysis of the scope and impact of s 3 is particularly apposite to that of s 11 in the Constitution of Zimbabwe, and I respectfully associate myself with it. Pertinently put, s 11 guarantees to the individual in para (b) freedom of conscience, of expression and of assembly and association, subject to their enjoyment and exercise not prejudicing the rights and freedoms of others or the public interest.

Section 20, in relevant part, reads:

"(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.

(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 interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

…

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

…

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

And s 21:

"(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of 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.

…

(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;

…

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.

(4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, sidewalk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

An equivalent limitation to that present in ss 20(6) and 21(4) was contained in the short-lived Zimbabwe-Rhodesia Constitution of 1979, ss 128(7) and 129(6), but not in any of the Constitutions which preceded it. Perhaps this was because under the 1961 and 1965 Constitutions the Law and Order (Maintenance) Act was saved from challenge as a law in force immediately before the appointed day and continued in force at all times thereafter (see ss 70(1)(b) and 79(1)(b) respectively); and under the 1969 Constitution the Declaration of Rights was not justiciable (see s 84).

The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are "one of the basic conditions for its progress and for the development of every man", per European Court of Human Rights in Handyside v United Kingdom (1976) 1 EHRR 737 at para 49. See also Whitney v California 274 US 357 (1926) at 375; Cox v Louisiana (2) 379 US 559 (1965) at 574; S v Turrell & Ors 1973 (1) SA 248 (C) at 256G–H.

Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve: (i) it helps an individual to obtain self fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv), it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See Pandey Constitutional Law of India 24 ed at p 118. In sum, what is at stake is the basic principle of the "people's right to know". See Indian Express Newspapers (Bombay) v Union of India (1985) 2 SCR 287.

The right to freedom of assembly is often exercised by persons taking part in public processions. See Ezelin v France (1991) 14 EHRR 362 at para 32; and freedom of assembly covers not only static meetings but public processions as well. See the judgments of the European Commission of Human Rights in Christians Against Racism and Fascism v United Kingdom App No. 8440/78, at p 148, para 4, and H v Austria, App No. 15225/89, 15 EHRR CD 70. A procession, which is but an assembly in motion, is by its very nature a highly effective means of communication, and one not provided by other media. It stimulates public attention and discussion of the opinion addressed. The public is brought into direct contact with those expressing the opinion. In an as yet unpublished article entitled "Order, The Daughter not the Mother of Liberty — Processions and the Constitution", D Matyszak expounds:

"Public assemblies do not only impact upon those who personally see the demonstration, but influence the broader community. Where the message is an unpopular one, or one that mainstream thought would prefer to ignore, the constant presence on the streets of processions promoting a contrary view has an unsettling effect which forces the opinion to be debated. The underlying problems giving rise to the procession are thus brought into the open and a redress of grievances may result. The very physical presence of the demonstrators is indicative of the possibility of violent consequences if the issues are not attended to.

Historically, the use of the public assembly and procession has proved itself indispensable as a technique for the propagation of unpopular minority views, from the demonstrations of the suffragettes in the United Kingdom to the Civil Rights movement in the United States. Important issues were brought to the public attention through these movements in a manner which could not be ignored and mass violence on the part of the demonstrators averted."

In Hague v Committee for Industrial Organisation 307 US 496 (1938) Justice Jackson was at pains to spell out the importance attaching to the right to freedom of expression in public places. He said at 515-516:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

The need to reconcile the rights of freedom of expression and assembly — being freedoms that shape a democratic regime — with governmental responsibility to ensure the sound maintenance of public order, was also graphically alluded to by Lord Scarman in the following passage in The Red Lion Square Disorders, Report of Enquiry (Cmnd 5919 of 1975):

"Amongst our fundamental human rights there are, without doubt, the rights of peaceful assembly and public protest, and the right to public order and tranquillity. Civilized living

collapses — it is obvious — if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. But the problem is more complex than the choice between two extremes — one a right to protest whenever and where ever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstructive pressure of the protesting procession. A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens, who are not protesting, to go about their business and pleasure without obstruction or inconvenience. The fact that those who at any one time are concerned to secure the tranquillity of the streets are likely to be the majority must not lead us to deny the protesters their opportunity to march: the fact that the protesters are desperately sincere and are exercising a fundamental human right must not lead us to overlook the rights of the majority.'"

See also Cox v Louisiana (1) 379 US 536 (1965) at 554-555.

It is, then, with regard to this "framework of circumstances" that the true meaning of ss 20 and 21 is to be arrived at.

Two general interpretational principles are to be applied. The first was lucidly expressed by Georges CJ in Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S) at 382B-D; 1984 (2) SA 778 (ZS) at 783A-D, to this effect:

"Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution."

See also Minister of Home Affairs v Bickle & Ors 1983 (2) ZLR 431 (S) at 441E–H, 1984 (2) SA 39 (ZS) at 448F–G; S v A Juvenile 1989 (2) ZLR 61 (S) at 89C, 1990 (4) SA 151 (ZS) at 167G–H.

The second principle relates to the adoption of a broad approach. All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to effect the true objective. Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise. See Minister of Home Affairs & Ors v Dabengwa & Anor 1982 (1) ZLR 236 (S) at 244B–C, 1982 (4) SA 301 (ZS) at 306H; S v Ncube & Ors 1987 (2) ZLR 246 (S) at 264F, 1988 (2) SA 702 (ZS) at 715C; African

National Congress (Border Branch) v Chairman, Council of State of Ciskei 1992 (4) SA 434 (CkG) at 447G–I.

The thrust of the argument advanced by Mr Muganhu, who appeared for the Attorney-General, was that subss 20(6) and 21(4) were to be accorded a wide and not a restricted meaning; that they provide a definite restraint upon the enjoyment of the rights to freedom of expression and assembly; that in clear and unambiguous language they totally prohibit such freedoms in or on any place which exists for the free passage of persons or vehicles, and that it matters not that their exercise will cause no interference therewith. Accordingly, where legislation proscribes the enjoyment of these freedoms in roads, streets, pavements and other similar places, it must be taken to be intra vires the Constitution. And s 6 of the Law and Order (Maintenance) Act is just such a provision.

Per contra, Mr Gillespie, for the applicants, submitted that viewed in their contextual setting ss 20(6) and 21(4) are plainly susceptible of a restricted meaning which, he said, is to this effect: The exercise of the freedoms of expression and assembly is limited in public thoroughfares only to the extent that it prevents, or interferes with, the free passage of persons or vehicles in places existing for such traffic; that what is excluded from the asserted freedoms, is the consequent right to impede traffic in public ways, in the course of a public gathering or procession; but not the freedom of a person to express himself, or to foregather with others, without creating a public nuisance or obstruction. Stated otherwise, the purport of ss 20(6) and 21(4) is to preserve the freedoms of expression and assembly in the places specified, provided the right of access is reserved for traffic both pedestrian and vehicular. What has been removed is nothing more than a right to impede traffic in thoroughfares by forming a public gathering or procession.

The force of the opposing contentions demonstrate, to my mind, the existence of an area of ambiguity in the meaning to be assigned to ss 20(6) and 21(4). This being so, since the provisions in question interfere with fundamental rights, an interpretation which favours the liberty of the individual is to be given. See Dadoo Ltd & Ors v Krugersdorp Municipal Council 1920 AD 530 at 532; Sigaba v Minister of Defence and Police & Anor 1980 (3) SA 535 (Tk) at 541A. Klass & Ors v Federal Republic of Germany 2 EHRR 214 at para 48.

The adoption of a restricted meaning is, moreover, in accordance with the purpose of s 11 — the key or umbrella provision in the Declaration of Rights — which is to strike a necessary accommodation between the enjoyment of

the freedoms and the potential prejudice resulting from their exercise both to others and to the public interest. It also avoids the withdrawal of protection from the most visible, effective and immediate means by which grievances can be brought to the knowledge of those in authority, by the holding of a public procession, where such an exercise would not prevent or hinder free passage of persons or vehicles in places set aside for such traffic.

Finally, it is logical to suppose that if the intention of the framers of the Constitution had been to emasculate the freedoms protected in ss 20(1) and 21(1) in the manner suggested by Mr Muganhu, the limitations would have been contained in those subsections; for it is there that the freedom of expression, and that of assembly and association, are defined.

It seems to me that the object of ss 20(6) and 21(4) is simply to underscore what is implicit in s 11; that whereas the freedoms exist and may be enjoyed, their exercise does not involve licence to interfere with or obstruct the free passage of persons or vehicles.

THE IMPUGNED LEGISLATION

The relevant provisions of s 6 of the Law and Order (Maintenance) Act are as follows:

"(1) A regulating authority may issue directions for the purpose of controlling the conduct of public processions within his area and the route by which and the times at which a public procession may pass.

(2) Any person who wishes to form a procession shall first make application in that behalf to the regulating authority of the area in which such procession is to be formed and if such authority is satisfied that such procession is unlikely to cause or lead to a breach of the peace or public disorder, he shall, subject to the provisions of section ten, issue a permit in writing authorizing such procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such procession as the regulating authority may deem necessary to impose for the preservation of public order.

(3) Without prejudice to the generality of the provisions of subsection (2), the conditions which may be imposed under the provisions of that subsection may relate to —

(a) the date upon which and the place and time at which the procession is authorised to take place;

(b) the maximum duration of the procession;

and to any other matter designed to preserve public order.

…

(6) Any person who convenes, directs or takes part in a public procession for which a permit under subsection (2) has not been obtained shall be guilty of an offence and may be arrested without warrant, and shall be liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding one year."

The omitted subsections deal with publication of the direction issued by the regulating authority; the penalties for contravening subss (1) and (2); and the power of a police officer to order persons taking part in a public procession, if any direction issued under subsection (1) or any condition of a permit issued under subsection (2), has been violated, and the penalty to which such persons are liable.

Counsel for the Attorney-General did not seek to argue that if, on a proper construction of ss 20 (6) and 21(4) of the Constitution, there remains to the person a freedom of expression and assembly in the places designated, the provisions of s 6 of the Act are, nonetheless, non-violative thereof. His opposition was based solely on the premise that a wide interpretation was to be assigned which denied absolutely the enjoyment of those freedoms in all such places. In my view the concession was properly made.

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.

Section 6 is plainly at variance with the enjoyment of the freedoms of expression and assembly protected under s 20 and 21 of the Constitution. It imposes a prohibition on the right to take out a public procession unless permission is first applied for and obtained from a regulating authority. It empowers a regulating authority, to whom such an

application has been made, to issue directions which may amount to an absolute ban, irrespective of any consideration of the procession causing an obstruction to the free flow of traffic; and by virtue of the definition of "public procession" and "public place" in s 2, the prohibition may be applied to places other than those

mentioned in ss 20(6) and 21(4), such as a recreation ground, a park,or an open space to which the public are permitted access. Permission will only be granted if the regulating authority is of the opinion that the procession is unlikely to cause or lead to a breach of the peace or public disorder and then on such restrictive conditions as he decides to set.

This is not the end of the matter however. Sections 20(2)(a) and 21(3)(a) of the Constitution permit the enactment of laws, or anything done under the authority thereof, which derogate respectively, from the right to freedom of expression and the right to freedom of assembly and association, in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society.

It was not part of the argument addressed by Mr Muganhu that the existence of s 6 of the Law and Order (Maintenance) Act is reasonably justifiable in a democratic society. Notwithstanding, I must deal with this aspect by virtue of the applicability of s 24(5) of the Constitution. It reads:

"If in any proceedings it is alleged that anything contained in or done under the authority of any law is in contravention of section 16, 17, 19, 20, 21 or 22 and the court decides, as a result of hearing the parties, that the complainant has shown that the court should not accept that the provision of the law concerned is reasonably justifiable in a democratic society on such of the grounds mentioned in section 16(7), 17(2), 19(5), 20(2) and (4), 21(3) or 22(3) (a) to (e), as the case may be, as are relied upon by the other party without proof to its satisfaction, it shall issue a rule nisi calling upon the responsible Minister to show cause why that provision should not be declared to be in contravention of the section concerned."

Thus, the applicants have to show that this court should not accept that s 6 is reasonably justifiable in a democratic society on the grounds of public safety or public order. If they succeed in doing so, the court must then give the responsible Minister the opportunity of producing proof to its satisfaction that the provision is reasonably justifiable in a democratic society. As observed by Beadle CJ in Maluleke v Minister of Law and Order and Attorney-General of Southern Rhodesia 1963 R & N 554 (SR) at 562H–I, 1963 (4) SA 206 (SR) at 215D–E:

"… the court may not deprive the Minister of his right to put proof before the court, simply because the court may think that it may not be possible

for the Minister in the particular circumstances of the case to place any proof before it which might satisfy it. The Minister is entitled, as of right, to be heard on this issue ..."

What is reasonably justifiable in a democratic society is an illusive concept — one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right. See, generally, Commissioner of Taxes v CW (Pvt) Ltd 1989 (3) ZLR 361 (S) at 370F–372C, 1990 (2) SA 260 (ZS) at 265B-266D.

At this stage of the proceedings, I would agree with Mr Gillespie that s 6 contains features which, taken cumulatively, show that it is a provision not reasonably justifiable in a democratic society in the interests of public safety or public order. The term "public safety" means the safety of the community from external and internal dangers. Public order is synonymous with public peace, safety and tranquillity. See Pandey op cit at pp 125-126. The adverse features are these:

First, the discretionary power of a regulating authority is uncontrolled. He may, under s 6(1), issue a direction prohibiting the right to form a public procession upon a ground not related in any way to conditions of public safety or public order. There is no definition of the criteria to be used by the regulating authority in the exercise of his discretion. It may be gravely misplaced and made the instrument for the arbitrary suppression of the free expression of views. See Shuttlesworth v Birmingham 394 US 147 (1969) at 153; Collin v Smith 447 F Supp 676 (1978) at 685 in fine.

Second, before imposing a ban on a public procession the regulating authority is not obliged to take into account whether the likelihood of a breach of the peace or public disorder could be averted by attaching conditions upon the conduct of the procession in the issuance of a permit relating, for instance, to time, duration and route. If the potential disorder could be prevented by the imposition of suitable conditions, then it is only reasonable that such a less stringent course of action be adopted than an outright ban.

Third, although the rights to freedom of expression and assembly are primary and the limitations thereon secondary, s 6(2) reverses the order. Its effect is to deny such rights unless a certain condition is satisfied, namely, that the public procession it is sought to form is "unlikely to cause or lead to a breach

of the peace or public disorder". If there is the slightest possibility of it doing so, permission is refused.

Fourth, the holding of a public procession without a permit is criminalised irrespective of the likelihood or occurrence of any threat to public safety or public order, or even of any inconvenience to persons not participating (see ss 6(5), (6) and (7)).

Accepting, as one must, that the power to prohibit or control a public procession is necessary in the interests of public safety or public order, the ensuing infringement or limitation of the freedoms of expression and assembly, could be adequately achieved, so it would seem, by less restrictive and authoritarian provisions than are contained in s 6. Compare, for instance, s 3 of the English Public Order Act 1936 (repealed) and s 12 of the English Public Order Act of 1986.

THE ORDER

In the result:

1. A rule nisi will issue calling upon the Minister of Home Affairs to show cause before this Court, at 0930 hours on 25 February 1994, why s 6 of the Law and Order (Maintenance) Act [Chapter 65] should not be declared to be ultra vires ss 20 and 21 of the Constitution of Zimbabwe and, accordingly, invalid.

2. The costs of the application are to stand over for determination on the return day.

McNally JA: I agree

Korsah JA: I agree

Ebrahim JA: I agree

Muchechetere JA: I agree

Honey & Blanckenberg, applicants' legal practitioners