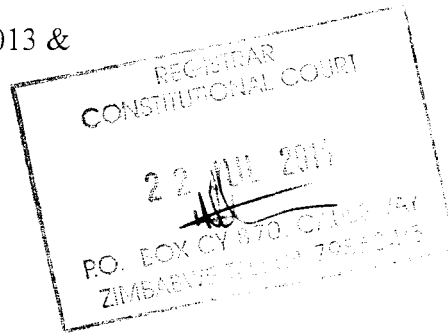


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(1) CONSTANTINE MUNYARADZI CHIMAKURE (2) VINCENT
KAHIYA (3) ZIMIND PUBLISHERS (PVT) LTD
v
THE ATTORNEY GENERAL OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,
GWAUNZA JA, GARWE JA, GOWORA JA, HLATSHWAYO JA,
PATEL JA & GUVAVA JA
HARARE, OCTOBER 30, NOVEMBER 20, 2013 &
JANUARY 15 & JULY 22, 2014

Z T Chadambuka, for the applicants
C Mutangadura, for the respondent



MALABA DCJ: On October 2013 the court issued a rule *nisi* pursuant to s 24(5) of the former Constitution. The rule *nisi* called upon the Minister of Justice, Legal and Parliamentary Affairs (“the Minister”) to show cause, on 20 November 2013, why s 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Code) should not be declared to be *ultra vires* s 20(1) of the former Constitution and accordingly invalid.

The court had found that s 31(a)(iii) of the Criminal Code had the effect of interfering with the exercise of the right to freedom of expression. It found that the applicants had discharged the onus of showing that s 31(a)(iii) of the Criminal Code was not

reasonably justifiable in a democratic society for the protection of the public interest in public order or public safety.

The Minister had not been a party to the proceedings. Under s 24(5) of the former Constitution, the Minister had a right to be given an opportunity to persuade the court that although s 31(a)(iii) of the Criminal Code infringed the fundamental right to freedom of expression it was reasonably justifiable in a democratic society.

On the return day no affidavit was filed by the Minister. What was filed was a lengthy document containing a critical review of the whole judgment of the court. The purpose of the document was to show that the court had misdirected itself in finding that s 31(a)(iii) of the Criminal Code had the effect of interfering with the exercise of the right to freedom of expression enshrined under s 20(1) of the former Constitution. The object was to show that the court also erred in holding the *prima facie* view that s 31(a)(iii) of the Criminal Code was not reasonably justifiable in a democratic society. There was no attempt to show the existence of factors, which were not brought to the attention of the court, consideration of which would have persuaded it not to accept the *prima facie* view that the enactment was not reasonably justifiable in a democratic society.

It was not the purpose of s 24(5) of the former Constitution to give to the executive, review powers over decisions of the court. The object of s 24(5) of the former Constitution was to give a Minister who was not party to the proceedings challenging the constitutional validity of an enactment, the administration of which is his or her

responsibility, an opportunity to put before the court facts within his or her knowledge, and of which the court was unaware, with the view of persuading it not to find that the enactment is not reasonably justifiable in a democratic society.

The reason is that the determination of the question whether an enactment is reasonably justifiable in a democratic society requires a court to take into account a variety of factors at play in a democratic society. Some of the factors may relate to the policy behind the enactment. The executive is responsible for the formulation of legislative policy as adopted by the legislature. It is because of this important position of the executive in the formulation of legislative policy that a Minister may have knowledge of factors that show that the legislation is reasonably justifiable in a democratic society. His or her task is to assist the court to arrive at a just decision on the question of the constitutional validity of the legislation.

The fact that no affidavit was filed by the Minister means that nothing said in the document satisfied the object of s 24(5) of the former Constitution. The matter was, however, postponed to 15 January 2014 to enable the respondents to respond to the Minister's submissions. The rule *nisi* was extended to that date.

On 15 January 2014 Mr *Mutangadura* who represented the Minister, indicated that it was no longer the intention of the Minister to oppose the confirmation of the rule *nisi*. There was, therefore, no need of hearing the applicants on the question of the confirmation of the rule *nisi*. The order of the court was reserved to allow the court time to prepare this

opinion, to give guidance on what is expected of a Minister who is called upon by the court to show cause why an enactment, the constitutional validity of which is challenged, should not be declared to be in contravention of a fundamental human right or freedom.

The order of the Court is as follows:-

1. It is order that s 31(a)(iii) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] was in contravention of s 20(1) of the former Constitution and therefore void.
2. The respondent is to pay the costs of the main application as well as the costs relating to the confirmation of the rule *nisi*.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

HLATSHWAYO JA: I agree

PATEL JA: I agree

GUVAVA JA: I agree

Messrs Atherstone & Cook, applicant's practitioners

Office of the Attorney-General, respondent's legal practitioners