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Worlds Apart: Conflicting narratives on the right to protest

By G. Feltoe, G. Linington and F. Mahere

Case Notes on

1. *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors* HH-554-2016

2. *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors*; *Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-2016

Introduction

On 1 September 2016 the police officer commanding the Harare district issued a notice in terms of section 27(1) of the Public Order and Security Act [*Chapter 11:07*] (POSA) which prohibited for two weeks the holding of all public processions and demonstrations in the Central Business District of Harare. This notice was published in the Government Gazette as Statutory Instrument 101A of 2016.

This case note deals primarily with the issue of whether section 27 of the Public Order and Security Act [*Chapter 11.17*] curtails the constitutional right to protest peacefully provided for in section 59 of the Constitution to an extent that is not reasonably justifiable in a democratic society. It deals only briefly with other issues arising from the processes used by the police when issuing the order.

Differing perspectives in Zimbabwe on the right to engage in public demonstrations

"Human Rights Commission statement torches storm" was the headline in the *Herald* newspaper on 20 August 2016. What had the Commission said that had allegedly torched this storm? All the Commission had done was to issue a temperate statement about the constitutional right to peaceful protest and the duty of the police force not to violate this right. The Commission's statement highlighted the constitutional provision in section 219 of the Constitution which imposes on the police the duty to protect people and enforce the law without fear or favour. The police, it said, had a duty to facilitate the conduct of undisturbed peaceful demonstrations and petitions but instead had used the excuse of security concerns to harass demonstrators and non-demonstrators alike. The Commission went on to express great concern about the recent violent conduct on the part of the police. It pointed out that it had received complaints of alleged police brutality which had caused injuries to some innocent persons including minors. It called for the prosecution of such human rights violators and encouraged complainants to make reports to the Commission. It also exhorted demonstrators to exercise their rights in a peaceful manner. The statement ended by urging the police and the respective arms of the Executive to ensure that citizens are permitted to demonstrate peacefully and utilize constructive dialogue to address genuine concerns

This statement was roundly condemned by the *Herald* in an editorial on 29 August 2016. The editorial quoted unnamed "analysts" who said that the Commission was acting like an armchair critic by failing to appreciate the situation on the ground. It accused the Commission of being partisan and of pushing the interests of opposition political parties. It pointed to the injury to persons, including police officers, and destruction of property caused in previous demonstrations. The editorial said that police were simply doing their duty by

responding to the situation and protecting people against such violence. It alleged that the Commission had not carried out a proper investigation into the situation before issuing its statement.

These diametrically opposed viewpoints illustrate the vastly different views about the nature and objectives of protest action in Zimbabwe. The version of the President and the ruling party is that the protests are aimed at illegal regime change and the demonstrations are being encouraged by hostile governments in the West that had imposed economic sanctions upon Zimbabwe to destabilize the country. They maintain that the demonstrators are engaging in violent protests and that the police and military forces are duty bound to suppress this illegal violence.

The protesters believe they are simply exercising their constitutional right to mount peaceful protests against the suffering emanating from the dire socio-economic situation within the country which they attribute to mismanagement of the economy and widespread corruption. They believe that the government has failed to redress the situation and that they have a right to publicly protest about this failure through public protests aimed at displaying public dissatisfaction with the situation. They consider that they are being prevented from exercising this constitutional right by a politically partisan police force and military which is using brutal force to break up these demonstrations, sometimes even after the courts have authorized the protests. They also believe that the Public Order and Security Act is being misused against the protestors.

The deteriorating economic situation has led to increased public protest action in the country and the response of the police has been to clamp down on protest action sometimes with brutal force which has led to protests against police behaviour.

A few days before the first case dealt with below was decided, President Mugabe had roundly condemned judges who had ruled that protests should be allowed to go ahead, saying that protests should not be permitted because they had turned violent. He accused these judges of being reckless. He said:

> "Our courts, our justice system, our judges should be the ones who understand even better than ordinary citizens. They DARE not be negligent in their decisions when requests are made by people who want to demonstrate."

The President told a conference of the ruling ZANU-PF's youth wing that "enough is enough" and that he would not allow violent protests to continue.[1]

From the Law and Order (Maintenance) Act to the Public Order and Security Act

After Independence in 1980 it was confidently expected that the new democratic government would move quickly to repeal the highly repressive Law and Order (Maintenance) Act of 1960. The white minority regime had used this legislation as one of its main weapons to try to suppress black nationalism, amending it frequently to make it even more repressive as the liberation struggle intensified. In addition to its many other draconian provisions, it had numerous provisions to prevent and criminalise protest action against the regime.

In the case of In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) the court had to adjudicate upon whether section 6 of the Law and Order (Maintenance) Act which was still in operation at the time violated the provisions on freedom of assembly and freedom of expression in the pre-2013 Constitution. It decided that the section excessively invaded the enjoyment of the rights and was not reasonably justifiable in a democratic society in the interests of public safety and public order. The basis of this decision is instructive, although the provisions of the current provisions of the Public Order and Security Act are significantly different. The court

[1] *Zimbabwe Independent* 5 September, 2016

pointed to the following features of section 6 of the Law and Order (Maintenance) Act that cumulatively led the court to conclude that the fundamental rights in question had been excessively invaded:

1. The discretionary power of the regulating authority is uncontrolled.
2. 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.
3. The effect of the provision is to deny these primary rights unless it can be shown that the procession is likely to cause or lead to a breach of the public peace or public disorder.
4. The holding of a public procession with a permit is criminalized irrespective of the likelihood or occurrence of any threat to the public safety or public order, or inconvenience to persons not participating.

Surprisingly, however, it was only in 2002 that the notorious Law and Order (Maintenance) Act was repealed and replaced by the Public Order and Security Act [*Chapter 11.17*]. This new Act sought to replace the repressive provisions on assembly and protest in the Law and Order (Maintenance) Act with provisions that would supposedly allow peaceful assembly and protest subject to the police being notified of impending protests to allow the police to provide security during the protests to prevent outbreaks of violence. Section 26(3) provides that where the police receive credible information that a proposed public demonstration will result in public disorder or extensive property damage, the police may hold consultations with the organizers to arrive at an agreement on the taking of appropriate measures to avoid these consequences and thereafter to allow the demonstrations to go ahead.

However, the provisions of this Act have been frequently misinterpreted to mean that protests could only go ahead if prior permission has been granted by the police and whereas public demonstrations by supporters of the ruling party have been freely allowed, even without prior notification to the police, public demonstrations by persons protesting about government actions have been blocked or forcibly broken up.

Section 27(1) of this Act, goes much further and allows for the banning of public demonstrations. This provision reads:

> "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."

It is a criminal offence for a person to organise or assist in organising or take part in or attend any procession or public demonstration where public demonstrations have been banned. The maximum sentence for this offence is imprisonment for one year.

The other provisions in this section deal with what the police must do before issuing a banning order.

Where it is practicable to do so, the regulating authority must

- cause a notice of the proposed banning order 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 organize a procession or public demonstration that will be prohibited by the proposed order; and

- afford all interested persons a reasonable opportunity to make representations in the matter.

The regulating authority must also ensure that the order is published in the Gazette, a newspaper circulating in the area and in such other manner as, in his opinion, will ensure that the order is brought to the attention of persons affected by it.

The constitutional right to demonstrate and protest

Section 59 of the 2013 Constitution provides that everyone has the right to demonstrate and to present petitions, but these rights must be exercised peacefully. This right is a vitally important democratic right which allows citizens publicly to register their dissatisfaction with the performance of their government or particular policies of government and bring their grievances to the attention of government. In *The Bill of Rights Handbook* Iain Currie & Johan De Waal 6th ed (2014) at 378, the authors make the following observation about freedom of assembly:

> "Freedom of assembly creates the space both to speak and to be heard. A single voice is likely to be drowned out in our polity. A choir is far more likely to get its message across. Power in modern nation states invariably concentrates in and around large social formations. As a result, meaningful dialogue often requires the collective efforts of demonstrators, picketers and protesters."

Similarly, in the case of *S* v *Turrell* 1973 (1) SA 248 (C) 256, it was held that:

> "Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right to public assembly."

In the case of In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) the Supreme Court addressed extensively the constitutional right to assemble and protest. It highlighted that public assemblies and protests are a highly effective method of bringing grievances to the attention of the authorities and seeking redress for grievances. However, it pointed out there was a need to reconcile this important right with the governmental responsibility to ensure sound maintenance of public order to prevent members of the public from being harmed by violent protest action.

Section 58 of the Constitution also guarantees the right to assemble peacefully.

Limitations on the right to protest

In terms of section 86(1) of the Constitution this right must be exercised reasonably and with due regard for the rights and freedoms of other persons in the Declaration of Rights.

Under section 86(2) the right to demonstrate may be limited only in terms of a law of general application. It may only be limited 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 and in deciding whether any limitation meets this criterion a number of relevant factors must be taken into account. These factors are–

- the nature of the right concerned;
- the purpose of the limitation and in particular whether it is necessary in the interests of such things as defence, public safety and public order;
- the nature and extent of the limitation;

- the need to ensure that the exercise of the right does not prejudice the rights of others;
- the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right concerned than are necessary to achieve its purpose; and
- whether there are less restrictive means of achieving the purposes of the limitation.

In re *Munhumeso & Others* 1994 (1) ZLR 49 (S) at 64B-C the court pointed out that:

> "What is reasonably justifiable in a democratic society is an elusive 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."

In *Nyambirai* v *National Social Security Authority & Another* 1995 (2) ZLR 1 (S) at 13C-F, GUBBAY CJ elaborated the test as follows:

"In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

1. the legislative objective is sufficiently important to justify limiting a fundamental right;
2. the measures designed to meet the legislative object are rationally connected to it; and
3. the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Section 86 of Zimbabwe's Constitution is headed "*Limitation* of Rights and Freedoms" (emphasis added). The word "limitation" also appears in the substantive portion of that section. According to the *Oxford English Dictionary* "limit" means "confining within limits, set bounds to, restrict." It is clear, therefore, that section 86 does not authorize the state to "eliminate" rights contained in the Declaration of Rights or to "hollow out such rights, so that they no longer have any meaningful content." Thus, the power to limit rights does not go beyond the power to restrict rights. Writing about the limitation provision in the *Canadian Charter of Rights*, Peter Hogg (2003:35-10) says that "… not every Charter infringement is a 'limit', and any infringement that is more severe than a limit cannot be justified." In *Ford* v *Attorney-General Quebec* [1988] 2 SCR 712 at 772 the Canadian Supreme Court drew a distinction between "the negation of a right or freedom and a limit on it." (A similar approach was put forward in an earlier Canadian case, *Attorney General Quebec* v *Quebec Protestant School Boards* [1984] 2 SCR 66 at 88).

Thus the courts must uphold the fundamental right to demonstrate and any limitations upon this right must be reasonable and must not take away completely or eliminate the right or remove the essential core of the right. In this regard the Constitution in section 46 (1) (c) provides that our courts "must take into account international law and all treaties and conventions to which Zimbabwe is a party."

Zimbabwe is a party to the International Covenant on Civil and Political Rights which guarantees various rights including freedom of assembly (Article 21). The Human Rights Committee established in terms of Article 28 of this Covenant has commented upon what limitations on rights are permissible. In its General Comment No 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant, it used the notion of

"the essence" of a human right and emphasized that restrictions on a right must never impair that essence. The question of core rights and the distinction between limiting and negating rights is discussed below in relation to the *DARE* case.

THE CASES ON THE POLICE BANNING OF DEMONSTRATIONS IN HARARE

Both the cases below were brought in to challenge the police order banning all public processions and demonstrations in the Central Business District of Harare.

Case before Chigumba J

Democratic Assembly for the Restoration & Empowerment (DARE) & Ors v *The Commissioner of Police & Ors* HH-554-16

In this case, the applicants, a political party, a political activist and chairperson of a national vendors union, a Harare residents association and a consortium of political parties formed to address the issue of electoral reform. The applicants had planned a series of peaceful demonstrations to air their grievances over a range of issues such as electoral reform and alleged police brutality. One applicant said that previous demonstrations mounted by the applicant had been peaceful except when the police had initiated violent attacks on the demonstrators. The applicants stated they had already notified the police about their impending demonstrations.

On the other hand, the respondents maintained that previous marches by the applicants had been violent and had led to unspecified destruction of property and looting of shops and some persons had been physically injured. They argued that the ban on demonstrations was necessary to protect the public and even argued that "the two week prohibition is actually inadequate to guarantee safety and to ward off the threat of terrorism."

The applicants then filed an urgent chamber application challenging the validity of the statutory instrument. Chigumba J who heard this application issued a provisional order in favour of the applicants. The court decided that the issue for determination by the court was whether section 27 of the Public Order and Security Act violated the constitutional right to engage in peaceful demonstrations and whether any such violation fell within the limitations provided for in terms of section 86(2) of the Constitution.

The court decided the matter simply on the basis that the police had failed to follow the procedures set out in section 27 and had thereby violated the applicants' right to administrative justice in terms of section 68 of the Constitution, particularly the right to be heard before a decision is taken that affected them and the right to be given reasons for a decision that affected them. Before issuing a banning order the regulating authority had to formulate reasonable grounds for its belief that using the powers conferred in section 26 of the Act would not be sufficient to prevent public disorder and there must be evidence of the grounds upon which they held this belief and the evidence must be of public disorder in the district concerned. The authority must publish notice of its intention to ban demonstration in the district and if it claims that it was not practicable to publish such notice, there must be evidence to show why this was so. All interested parties must be given an opportunity to make representations about the proposed ban and those parties must be provided with reasons why the authority has decided to go ahead with the ban despite the representations that it has received.

The judge, therefore, held that the failure to follow these procedures rendered the notice invalid. In the interim relief it granted, the court declared the police banning order invalid but the declaration of invalidity would be suspended for seven days to allow the authority to correct these defects. At the end of the seven days the authorities must then process

notifications of intended demonstrations and the Commissioner of Police and Minister of Home Affairs will be interdicted from unlawfully interfering with citizens' rights to mount peaceful demonstration in terms of section 59 of the Constitution read with section 12 of the Public Order and Security Act.

This judgment was hailed by those who believed that it upheld the constitutional right to protest but utterly condemned by those who believed that protestors were bent on violently seeking to bring about "regime change."

A further challenge to the banning order

Another case was brought on the police banning order. This was the case of *Zimbabwe Divine Destiny* v *Newbert Saunyama N.O. & Ors* HH-589-16 the applicant was an ecclesiastical church that had never been involved in any violence nor had it ever partaken in political activism. On the 13 September 2016, the first respondent published a 'Notice of Proposed Prohibition Order' in the *Herald*. The notice was also published in the *Government Gazette* under Extraordinary General Notice No. 239A of 2016 (hereinafter referred to as "the Prohibition Order"). By way of this notice, the police officer commanding Harare indicated his intention to institute a blanket prohibition in respect of all public demonstrations and processions in the Harare Central Policing District for the period 16 September 2016 to 15 October 2016.

The notice did not state the purpose or reasons behind the prohibition. It further did not indicate that persons affected by the prohibition were entitled to make representations. Particularly, it did not state where and to whom any objections or representations could be lodged.

Also on 15 September 2016, the applicant wrote to the police officer commanding Harare, out of an abundance of caution, to notify him that its churches planned to carry out a march on the 23rd September 2016 between 10 am and 12 pm. The march was to start at Karigamombe Centre, along Sam Nujoma St proceeding onto Nelson Mandela St and ending at Parliament. The church highlighted that it was exempt from the provisions of the Public Order and Security Act [*Chapter 11:17*].

On 15 September 2016, the Church further wrote to the police in an effort to make representations in respect of the Prohibition Order. The applicant raised, among other things, the unconstitutionality of the notice.

The police officer did not furnish the Church with any opportunity to be heard following the 'Notice of Proposed Prohibition Order'. It did not respond to the Church's letter. The Police did not invite the applicant to a consultative meeting nor did it indicate that there existed any threat to public order. The police did not afford the Church an opportunity to explore options to avert any perceived threat.

On 16 September 2016, the first respondent gazetted a further ban on demonstrations in terms of section 26 of the Public Order and Security Act.

Consolidation of cases before Chiweshe JP

The Judge President dealt with the *DARE* case and the Divine Destiny cases together.

Democratic Assembly for Restoration and Empowerment (DARE) & Ors v *The Commissioner of Police & Ors*; *Zimbabwe Divine Destiny* v *Sauyama & Ors* HH-589-2016.

In this case the judge set aside the interim order by Chigumba J.

The matter then came before Judge President with the applicants seeking a final order setting aside the police banning order. The issue with which the court had to decide was whether section 27 of the Public Order and Security Act violated sections 58, 59, 60, 61, 62 and 67(2) of the Constitution. More specifically the issue was whether the power of the police to ban demonstrations in a district for up to one month was unconstitutional on the basis that it violated the right to engage in peaceful protest action guaranteed by section 59 of the Constitution. The second issue was whether the derogations from the right to protest fell within the permissible limitations provided for in section 86 of the Constitution.

The starting point, as the court pointed out, was section 2 of the Constitution which provides that the Constitution is the supreme law of the country and any law that is inconsistent with the Constitution is invalid to the extent of the inconsistency.

It is laid down in section 46(1) of the Constitution that in interpreting the provisions of the Declaration of Rights a court *must give full effect to* the rights and freedoms that are enshrined in the Declaration of Rights and must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular the values and principles set out in section 3.

Chiweshe JP acknowledged that in interpreting constitutional provisions the court must employ a purposive and generous rather than a pedantic and restrictive interpretation. He later referred to the Canadian case of *R* v *Big M Drug Mart Ltd* 1958 1 SCR 295 where it was stated that the interpretation of a constitutional freedom:

> "… should be a generous rather than a legalistic one, aiming at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."

The judge might usefully also have quoted this dictum from the case of *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57 F-H where the Court held:

> "This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed."

Although the judge accepted that the right of peaceful protest was a fundamental constitutional right, he decided that section 27(1) of the Public Order and Security Act that empowers the police to ban all demonstrations for up to one month is not *ultra vires* the Constitution because it satisfies the requirements set out under section 86(1) and (2) of the Constitution in that the limitation it imposes on the constitutional right to demonstrate is "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."

His value judgment on the limitation issue was arrived at in the following manner. The purpose of s 27(1) of the Act is clearly to prevent public disorder and to protect public safety. No democracy can function if there is public disorder and anarchy and thus the security of any community is of paramount importance. Section 27(1) seeks to promote a peaceful environment conducive to the enjoyment of fundamental human rights by citizens and the community at large.

The blanket ban on all demonstrations upheld by Chiweshe JP clearly constitutes a negation of a right rather than a mere limitation. The judgment does not address the issue of negating the core of the right concerned. However, the Judge President did accept that the limitation imposed by section 27 (1) of POSA "has the effect of imposing *greater restrictions than are necessary* to achieve its purpose" (at page 13 of the cyclostyled judgment; emphasis added).

This in itself ought to be a decisive point in favour of the application. A restriction that goes beyond what is necessary to achieve its purpose must be unconstitutional. But CHIWESHE JP quickly qualified his finding on the effect of the limitation thus: "Its effect is limited in terms of the duration and the restricted geographical area in which the ban may be imposed" (at page 13 of the cyclostyled judgment). He held that the limited effect of the restriction in relation to duration and geographical area rendered constitutional a ban that would otherwise have been unconstitutional.

With respect, this kind of reasoning is faulty. If the restriction goes beyond what is necessary, it is unconstitutional. The fact that the restriction only applies in a limited area for a limited time does not change the position.

Implicit in the court's finding that the ban on demonstrations went beyond what is necessary is the idea that less stringent restrictions would have catered for the concerns of the police. Chiweshe JP decided that the imposition of lesser restrictions was an option. This was because (he said) "the enabling legislation (POSA) does not give the regulating authority options other than those provided for under section 27." If in fact no such options are available, then this too is a reason for striking down section 27.

The police stated that they opposed the holding of the demonstration because they believed it would result in violence. Section 27 (1) confers on a regulating authority a discretionary power to decide whether a demonstration should be prohibited on the ground that it might lead to public disorder. However, the regulating authority may only arrive at this decision if he "believes on reasonable grounds" (section 27 (1)) that disorder will result. This means that the regulating authority must act in good faith. Thus, he must sincerely and genuinely believe that disorder will result, but this is not enough. It is also necessary that reasonable grounds exist which underpin the belief. The regulating authority must be able to point to objective facts which justify and make explicable the belief held.

So, were the police able to point to facts which indicated that violence would arise if the demonstration went ahead? Did a dangerous situation in fact exist? In *Forum Party of Zimbabwe & Ors* v *Minister of Local Government* 1996 (1) ZLR 461 (H) ADAM J said at 486: "A situation cannot be said to have arisen if it is not so factually."

In the *DARE* case, Chiweshe JP decided that the possibility of violence was real, but only on the basis of an assertion to that effect by the police. No facts or evidence were presented to the court to justify this assertion apart from an assertion that violence had occurred at other demonstrations. Nevertheless the court held that this sufficed to satisfy the "reasonable grounds" requirement stipulated in section 27 (1) of POSA.

This conclusion is very difficult to support. The blanket ban on demonstrations was more than just a limitation of the right to demonstrate contained in section 59 of the Constitution: it was a complete negation of the core or essential essence of that right. But even if the ban were to be regarded as merely a severe limitation of the right, it would still be unconstitutional.

In *S* v *Manamela and Another (Director General of Justice intervening)* 2000 (5) BCLR 491 (CC), a decision of the South African Constitutional Court, O'REGAN J said at para 53: "The level of justification required to warrant a limitation upon a right depends on the extent of the

limitation. The more invasive the infringement, the more powerful the justification must be." This is undoubtedly the correct approach.

Thus, in *DARE,* Chiweshe ought not to have upheld a blanket ban in the absence of *serious evidence* that could *properly* satisfy the "reasonable grounds" requirement. (Of course if – as has been argued above – the ban was a negation rather than a limitation, then even the production of such serious evidence would not suffice to save the constitutionality of the ban).

To ban a demonstration simply on the basis of an unsupported assertion that violence will occur if it takes place would inevitably lead to abuse. The state would always be able to ban demonstrations without being under any real pressure from the courts to justify the ban. In a modern constitutional state courts must subject bans on demonstrations – particularly blanket bans on demonstrations – to intensive scrutiny. As Woolman (2013:389) notes, courts must "require the state to demonstrate that no other means of dealing with a threat of public order … is available."

The judge accepts that the provision allows the regulating authority to impose a blanket ban on all demonstrations and its effect is to impose greater restrictions than are necessary to achieve its purpose. Nonetheless, he decides the effect is limited because the ban is of limited duration and applied to a restricted geographical area. On the issue of whether there were less restrictive measures means of achieving the purpose of the limitation, the judge first makes the unhelpful remark that "the enabling legislation does not give the regulating authority options other than those provided for under s 27." He then goes on to point out that the authority is limited because the authority can only impose the ban where it has reasonable grounds for doing so. He implies that the authority had reasonable grounds for imposing the blanket ban because on two previous occasions that had been violence leading to destruction of property and the authority feared that such violence would recur unless demonstrations were disallowed to allow for a "period of healing". Thus every time some violence occurs even though the organisers of the public demonstration had planned only a peaceful demonstration, the police would be entitled to impose a ban on all demonstrations in a whole district for up to thirty days.

Additionally, this is clearly a case where the courts ought to have stepped in to prevent the state from exploiting the provisions of the Public Order and Security Act in order to suppress demonstrations which it disapproves – contrary to the Constitution. A more generous interpretation of "peaceful" should be applied to uphold the right to demonstrate when the organisers have organised a peaceful demonstration and most of the demonstrators remain peaceful but a few members of the assembly engage in violence. Such an approach finds support in *The Bill of Rights Handbook* Iain Currie & Johan De Waal[2], where the learned authors state that:

> "A generous interpretation of the 'peaceful' proviso is necessary to prevent the state from exploiting this requirement in order to suppress unpopular positions. This generous interpretation ensures that if some members of an assembly resort to violence, while the majority of the participants remain peaceful, the assembly remains protected. This result is necessary to prevent a peaceful assembly from being hijacked by violent supporters, opponents or agents provocateurs. When such a hijacking occurs, the police must attempt to act solely against the violent minority without depriving the rest of the assembly of protection."

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[2] Currie & de Waal, *op cit* note 3 at 384

Conclusion

It is respectfully submitted that the stated basis for the judgment by Chiweshe JP in the *DARE* case is tenuous and inconsistent. The learned judge upholds a blanket ban in the capital city on all demonstrations irrespective of whether the demonstrations are intended to be peaceful and of whether any likelihood of a breach of peace or public order could be averted by attaching conditions upon the conduct of protests and providing police security for the protests. The fact that some previous demonstrations have turned violent cannot justify banning *all* demonstrations. This approach in effect completely negates the right to engage in peaceful protest. It should be incumbent on the police to provide a sufficient police escort to forestall any outbreaks of violence. Once the judge conceded that the restrictions exceeded what was necessary to achieve their purpose, it became unavoidable to rule that these restrictions could not meet muster in terms of the provisions of section 86 of the Constitution.

It is long overdue that we abandon the ethos that was reflected in the Law and Order (Maintenance) Act. When people are disgruntled by what they consider to be failed governance and harsh socio-economic conditions, it is likely that they will seek to signify their dissatisfaction by protest action. The complete suppression of protest action will only worsen the situation.

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