

## **PUBLIC STATEMENTS PREJUDICIAL TO THE STATE**

### **Chilling freedom of expression to the bone with a chilling offence:**

#### **Case note on *Chimakure & Others v Attorney-General* 2013 (2) ZLR 466 (S)**

***Geoffrey Feltoe and John Reid-Rowland***

### **Overview**

This case note examines the reasoning of the Supreme Court leading to its conclusion that s 31(a) (iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the "Criminal Law Code") is unconstitutional and therefore null and void. The note also looks at the implications of this ruling in respect of the rest of s 31 of the Criminal Law Code, as well as other provisions in the Code.

### **Background to the Case**

Some human rights activists and some members of a political party were abducted from different places at different times, following a number of bomb explosions around Harare. The identities of the abductors and places where the abductees were taken were kept secret. No-one knew what had happened to the abductees. These abductions were widely reported in the media and the question of who had kidnapped the people concerned became a matter of public discussion. The law enforcement agencies claimed that they had no knowledge of who the abductors were and what their motive was.

After 27 days, the victims appeared at various police stations in Harare and were later charged with various security crimes. Indictments, lists of witnesses and summaries of their evidence were served on them. The witnesses were all members of law enforcement agencies.

The *Zimbabwe Independent* newspaper then published an article in which it stated that the Attorney-General's Office "... revealed the names of some members of the Central Intelligence Organisation

*[CIO]* and the police who were allegedly involved in the abduction of human right and MDC activists last November”, and went on to name the members. The Attorney-General was of the view that the articles contained false statements about the involvement of the law enforcement agencies and its members in the abduction of the human rights activists and members of the political party. He concluded that the articles contained statements which were materially false and prejudicial to the State, and authorised the institution of criminal proceedings against the applicants. On the other hand, the accused consistently denied that anything in the articles in question was false.

The *Zimbabwe Independent’s* editor and a senior journalist were arrested and charged, together with a representative of the newspaper company, under s 31 of the Criminal Law Code. Section 31 of creates an offence styled “*publishing or communicating false statements prejudicial to the State*”, and provides for the imposition of a fine of up to \$5000 or imprisonment of up to twenty years, or both, on anyone convicted.

The alleged prejudice to the State in this case was the undermining of public confidence in the police and the CIO, so the specific charge was contravening s 31(a)(iii), the part of s 31 dealing that particular type of prejudice to the State. Section 31(a)(iii) in effect prohibits the publication or communication to any other person of a wholly or materially false statement with the intention, or realising that there is a real risk or possibility, of undermining public confidence in a law enforcement agency (which would include the police force and the CIO), the Prison Service or the Defence Forces of Zimbabwe.

The provision did not (it has since been amended by Act 3 of 2016) require proof by the State that the false statement actually undermined public confidence in the security service institution concerned or that the accused had knowledge of the falsity of the statement.

### **Referral of case to Supreme Court**

The magistrate originally presiding over this matter referred it to the Supreme Court to determine

the constitutionality of s 31(a)(iii) of the Criminal Law Code.

## **Arguments**

The applicants sought a declaration from the court that the criminal provision in question was void because it was inconsistent with the freedom of expression guarantee in s 20 of the former Constitution (the 1980 Constitution.) They accepted that the right to freedom of expression is not absolute and that, in exercising this right, there is a duty not to infringe the rights of others or the public interests listed in s 20(2). They argued that the restriction imposed by s 31(a)(iii) of the Criminal Law Code on the exercise of freedom of expression exceeded what was reasonable in a democratic society.

The applicants further argued that, although the restriction was contained in a law passed by Parliament, the provision did not constitute a rule of law because the essential elements of the crime did not define the scope of the prohibited acts in a language which was sufficiently clear and adequately precise.

The prosecution defended the provision as constitutional, essentially arguing that the provision was reasonably required in a democratic society in the interests of defence, public safety and public order.

## **Judgment of Constitutional Court**

### **A. The Applicable Law**

#### **Vital Importance of freedom of expression**

Citing United Nations instruments and decided cases from the United States, Canada and India, as well as the leading Zimbabwean Supreme Court decision in *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S), the Court (per Malaba DCJ, with whom Chidyausiku CJ, Ziyambi JA, Garwe JA & Cheda AJA concurred) explained in detail the democratic importance of freedom of expression and why it must be constitutionally protected. The State must ensure that people are able

fully to enjoy their right to freedom of expression. What follows is a résumé of the unusually long (53 printed pages) judgment.

### **Does freedom of expression encompass the making of false statements?**

The Court decided that the protection provided by s 20(1) does not have regard to the truth or falsity of the meaning of the information published or communicated. Truth is not a required condition for the protection of freedom of expression. The content of a statement does not therefore determine whether it falls within s 20(1)'s protection. The Constitution recognises the fact that people tell lies in a variety of social situations for different reasons. Lies are not necessarily without intrinsic social value in fostering individual self-fulfilment and discovery of truth. The only limitation on the "freedom" or "liberty" is the duty not to injure the rights of others or the collective interests listed in s 20(2) (a). It is the rights of others or the public interests and actual or potential harm thereto that help to determine whether a restriction on the expression is valid.

The fact that a person has told lies to others on any subject matter should not be of concern to the State. The Government is not a monitor of truth. Anyone has a right to impart or receive ideas and information about the activities of security service institutions, regardless of the falsity or truth of the message conveyed, provided no harm or real likelihood of harm to the rights of others or public interest results in breach of law. No exercise of the right to freedom of expression can, without more, be restricted on the ground that the message conveyed is false, offensive or not favourable.

### **Permissible restrictions on freedom of expression**

Freedom of expression is not an absolute right and may be restricted if the objective of its enactment is the protection of a public interest listed in s 20(2)(a), which include the maintenance of public order and protection of public safety. The recognition of the power of Government to limit the exercise of freedom of expression arises from the fact that the constitutional freedom of expression can be abused for the purposes of harming the rights of others or the public interest.

**Restriction on freedom of expression necessary because of demonstrable direct, obvious and serious harm to public interest.**

Section 20(2) prescribes strict requirements for any measure in the exercise of State power which has the effect of restricting the exercise of the right to freedom of expression. The restriction may only be imposed if it is reasonably justifiable in a democratic society. The State may interfere with the exercise of freedom of expression only when the activity or expression poses a real danger of causing direct, obvious and serious harm to the rights of others or the public interests listed in s 20(2). The restriction must be narrowly drawn and specifically tailored to achieve the objective so as not to inhibit unduly freedom of expression. Restriction of the exercise of freedom of expression is a measure so stringent that it is inappropriate as a means for averting a relatively trivial harm to society.

It should be borne in mind that the State has sufficient resources to refute wrong statements and this means can be used by a public institution to effectively protect a public interest against the publication or communication of false statements about its activities without having to curtail freedom of expression.

**Rational connection between restriction and objective**

There must be a rational connection between the restriction and the objective for imposition the restriction. A restriction which is not rationally connected with the objective pursued is an unreasonable, unnecessary and arbitrary interference with the exercise of freedom of expression.

**Restriction must be proportionate**

Even if there is a rational connection, the restriction must be proportional to the objective sought to be achieved by it. The court will examine whether there are other less restrictive and intrusive means available which the legislature which would be equally effective to achieve the same objective. It will also examine whether the restrictive measure so severely affects the right to freedom of

expression that the legislative objective sought to be achieved is outweighed by the extent of the restriction. The law should not in its design have the effect of overreaching and restricting expression which is not necessary for the achievement of the objective concerned. Not every case of actual or potential harm to the public interests listed in s 20(2)(a) justifies the imposition of restrictions on the exercise of freedom of expression.

### **Restriction must be imposed by law**

Section 20 of the Constitution requires that any restriction must be "*contained in ... any law*" or "*done under the authority of any law*", that is, that the restriction must have all the universally recognised characteristics of a legal norm. A criminal law must define its essential elements and the law must not be unconstitutionally vague. The rationale underlying the principle of unconstitutional vagueness of a statute is that it is essential in a free and democratic society that people should be able, within reasonable certainty, to foresee the consequences of their conduct in order to act lawfully. This is a fundamental element of law and order and therefore peace. If arbitrary and discriminatory enforcement of criminal law is to be preventable laws must provide explicit standards for those who apply them. The discretion of those entrusted with law enforcement should be limited by clear and explicit legislative standards. The standard is one of sufficient clarity. It is not one of absolute clarity. A criminal law imposing restrictions on the exercise of the right to freedom of expression will be unconstitutionally vague if it fails to provide a clear basis for deciding whether a particular conduct violates that law.

### **B. Application of law to offence in question**

#### **Does the offence in question serve to protect a public interest?**

The court held that the offence of making a false statement intended to undermine public confidence in a security service clearly restricts freedom of expression and therefore the issue was whether it fell under any of the permissible grounds for imposing restrictions.

The protecting public confidence in a security service institution is a means of ensuring that the

institution performs efficiently and effectively its constitutional mandate to maintain public order and protect public safety. The offence is rationally connected to this objective. Whilst the media are entitled to criticize unlawful activities on the part of security agencies, making of false statements about their lawful activities will impair their ability to carry out their mandate as this may lead to withdrawal of support for law enforcement. Therefore, although the offence does not state this explicitly, its legitimate aim is to protect the interests of public order and public safety and this falls within the scope of permissible restrictions listed in s 20(2). The public interest is in ensuring that the exercise of freedom of expression does not cause direct, serious and proximate harm to lawful performance by the security service institutions of the functions for which they were constitutionally established.

### **Alleged unconstitutionality vagueness of provision**

#### ***Real risk or possibility***

The applicants argued that the phrase "*real risk or possibility*" referred to anything which could scientifically happen without it necessarily being probable.

The Court found that the words "*real risk or possibility*" in s 31(a)(iii) of the Code denote a test to be used to establish a subjective state of mind accompanying the publication or communication of a false statement relating to the security service institution. The concept of "*realisation of a real risk or possibility*" of the occurrence of a specific event as a consequence of the proscribed conduct has been used in the definition of crimes for many years to denote a subjective state of mind of crimes to the extent that it has now acquired a special meaning in criminal law jurisprudence. It has a clear meaning.

#### ***Falsity***

The applicants argued that the word "*false*" was wide enough in meaning to embrace a statement which was merely incorrect or inaccurate. They maintained it is always difficult to conclusively determine total falsity. The Court found that this word was sufficiently precise in its meaning.

### ***Undermining public confidence***

The applicants argued that the concept of "*public confidence*" was nebulous and was so susceptible to change as to render the offence unconstitutionally vague. They contended that it was almost impossible to measure "*public confidence*" in a public institution, as it depended on such factors as the political and economic conditions of a country at any given time.

The Court decided that the words "*public confidence*" were not so vague as to be incapable of definition by the courts. These words were to be interpreted in the context of the performance by a security service institution of their constitutional functions and, in that context, refers to the trust reposed in the institution by the public. The basis of the trust is a belief that members of a security service institution will be able to execute their duties in accordance with the purposes for which the institution was established.

The Court therefore decided that the contention that the provision as framed is unconstitutionally vague as to fail the test of legality is clearly unsustainable. The concepts of "*false*"; "*real risk or possibility*" and "*public confidence*" do not in themselves cause insurmountable problems of interpretation. The meaning to be given to each word or phrase as used in the offence is clear. Thus, the restriction is contained "in law" within the meaning of s 20(2) of the Constitution.

With respect, the Court's decision in regard to the concept of "*public confidence*" is questionable. As contended by the applicants, it is a very vague and elusive concept. It is difficult to ascertain and measure. How does the court ascertain whether a published statement has in fact weakened public confidence in a law enforcement agency to such an extent that it impedes the agency in fulfilling its duty to maintain public order and preserve public safety? Must the State prove that the statement undermined public confidence and trust in the agency to such an extent that it significantly and demonstrably prevented the agency from carrying out its duties? Must the statement have this effect in the public as a whole or simply a significant portion of the public?



**The restriction imposed by the offence is not necessary and proportionate to the achievement of its legitimate objective**

This offence is unconstitutional because it is overbroad and has an unacceptable chilling effect on freedom of expression.

**Over-broad nature of offence**

The offence is not narrowly drawn and carefully tailored to achieve the objective pursued. It substantially restricts freedom of expression and it is questionable whether it is effective in achieving its objective.

**Nature of offence**

The court held that for the protection of public confidence in a security service institution to have any connection with the legitimate aim of protecting the interests of public order and public safety, the false statement must relate to the performance by the security service institution of its functions. But the offence does not provide that the false statement must relate to an important aspect of the performance of the functions of the security service institution of its functions. There are many activities by security service institutions which are unrelated to their efficient performance of the functions of maintaining public order or preserving public safety. False news that is harmless to the effectiveness of a security service institution in maintaining public order or preserving public safety would be covered by the offence as long as it is accompanied by an intention to undermine public confidence in the security service institution.

**Offence does not require that statement must reach significant number of people**

The offence does not even require that the statement must reach a significant number of people. It would cover even a conversation between two people in a private home.

**Offence covers remote possibilities**

The offence is committed when the statement is not wholly but only materially false. "*Materially false*" denotes that the statement does not have to be completely false. The provision has the effect of shielding the public interest from every possibility of harm, even harm which is only remotely possible. A remote possibility of harm to the maintenance of public order or preservation of public safety cannot be a reasonable basis for the legislative imposition of a restriction on the exercise of freedom of expression.

**Offence does not require that conduct poses real danger to public interest**

The offence does not make reference to the maintenance of public order or protection of public safety. Thus the State has no obligation to prove that the conduct posed any real danger to the public interest concerned. Nothing in the language of the statute limits its applicability to situations where the prohibited acts directly and proximately cause harm to the maintenance of public order or preservation of public safety. An enactment which is capable of being construed and applied to cases where no danger to the listed public interests could arise cannot be held to be constitutional and valid to any extent.

**Criminalising statements made without knowledge of their falsity**

The offence does not require that the maker of the statement had knowledge of the falsity of the statement that is being made. The State should not penalise people who make false statements in good faith about a matter of public concern where the statement is published without knowledge of its falsity or without reckless disregard as to whether the statement is false or not. A person who, at the time of publication of the statement, sincerely believes that it is true does not have the state of mind justifying the imposition of criminal liability. Liability must be based on the notion of personal responsibility inherent in the concept of the exercise of freedom of expression.

The provision also covers a person who, at the time he or she publishes or communicates a statement,

sincerely believes that it is true, although it happens to be false. It is assumed in every case that the accused person had reasonable opportunity to investigate the accuracy of the statement and knowing that it was false, deliberately chose to publish it. This assumption ignores the fact that news media often work in situations in which information changes fast, denying even the most responsible journalist time to verify the accuracy of the information received.

An accused person may not be in a position to prove at the trial the facts that gave rise to his belief that the statement is true. This could lead to the inference that he knew or "*must have known*" that the statement was false and intended to use it to undermine public confidence in the security service institution concerned. A person who voices a genuine concern about selective or discriminatory enforcement of the law by the law enforcement agency may find himself charged and convicted of the offence because of the difficulty of proving the truth of the allegation in a court of law. Genuine criticism of the way law is enforced may be suppressed. The suppression may be justified by labelling the statement a false statement published or communicated with intent to undermine public confidence in the law enforcement agency. Information confirmatory of the truth of a statement may in some cases be in the possession of the institution, which may withhold the information, resulting in a situation where the statement is labelled as false. A statement may also be regarded as false because a journalist feels compelled to uphold the principle of confidentiality protecting the sources of his information within the institution from disclosure.

### **Draconian penalty for offence**

The maximum penalty for this offence (a fine of "*up to or exceeding [sic] level fourteen or imprisonment for a period not exceeding twenty years or both*") is, the Court said, draconian and disproportionate in relation to the harm to the public interest which the offence seeks to prevent. Every penalty imposed must be proportionate to the legitimate aim pursued and the seriousness of the offence. The only inference is that the punishment is intended to have a chilling effect on the exercise of freedom of expression, as opposed to merely deterring the occurrence of the prohibited acts. Because of the

severity of the punishment applicable it is bound to have a severe inhibiting effect on the exercise of freedom of expression. The level of the maximum penalty of imprisonment the law is not justified by the objective it is intended to serve. Freedom of expression is peculiarly more vulnerable to the "chilling effects" of criminal sanctions than any other fundamental right and the UN Special Rapporteur on freedom of opinion and expression has argued that penal sanctions, particularly imprisonment, should never be applied to offences of publishing false news.

### **Final ruling by Supreme Court**

The Constitutional Court unanimously declared unconstitutional s 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It decided that this provision was *ultra vires* s 20(1) of the 1980 Constitution that was in operation prior to the 2013 Constitution and it was therefore a nullity.

Pursuant to s 24(5) of the former Constitution, the Court issued a rule *nisi*, calling on the Minister of Justice to show cause, on the return day, why this provision should not be declared to be *ultra vires* s 20(1) of the former Constitution and accordingly invalid. The Minister submitted a document criticising the legal reasoning in the court's judgment, but failed to provide any evidence of factors, not previously brought to the court's attention, which might have shown that the provision was in fact justifiable in a democratic society. The court was subsequently informed that the Minister no longer opposed an order declaring the provision unconstitutional and void. The court therefore, in *Chimakure & Anor v A-G* 2014 (2) ZLR 74 (CC), made a final ruling that the provision was void.

### **Implications of judgment for other offences contained in s 31**

Section 31 deals with the making of wholly or materially false statements prejudicial to the State.

The ruling by the Constitutional Court that the maximum penalty of twenty years is draconian and will have a serious chilling effect of freedom of expression must surely apply to all the types of offence set out in s 31.

### **First sub-species**

The first sub-species is publishing or communicating a false statement to any other person intending or realising that there is real possibility of the prejudicial consequences occurring. This offence is committed whether or not the publication or communication actually results in the prejudicial consequences. The prejudicial consequences to the State intended are:

- inciting or promoting public disorder or public violence or endangering public safety; or
- adversely affecting the defence or economic interests of Zimbabwe; or
- undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or
- interfering with, disrupting or interrupting any essential service.

### **Implications for first sub-species of Constitutional Court ruling**

There are various grounds for concluding that as currently formulated this sub-species (apart from the provision relating to undermining public confidence in a security service agency) is unconstitutional. The following rulings by the Constitutional Court pertaining to the undermining public confidence provision would appear to apply with equal force to the provisions on the other prejudicial effects.

- a) The ruling that this offence must have the requirement that the maker of the statement must know that the statement being made is false.
- b) The ruling that the falsity requirement for this offence should be confined to a statement that is wholly false.
- c) The implied ruling that the offence should only be committed if the statement is published to a significant number of persons, rather than just one other person.

### **Second sub-species**

The second sub-species is publishing to any other person a wholly or materially false statement knowing that the statement is false or not having reasonable grounds to believe that it is true, if the publication of the false statement actually results in any of the prejudicial consequences. This

offence is committed both when the maker intended and realised that there is a real possibility of the prejudicial consequences occurring **and even when he or she had no such intention**. The prejudicial consequences that occur are these:

- promoting public disorder or public violence or endangering public safety; or
- adversely affecting the defence or economic interests of Zimbabwe; or
- undermining public confidence in a law enforcement agency, the Prison Service of the Defence Forces of Zimbabwe; or
- interfering with, disrupting or interrupting any essential service.

### **Implications for second sub-species of Constitutional Court ruling**

The following rulings by the Constitutional Court pertaining to the undermining public confidence provision would appear to apply with equal force to the provisions on the other prejudicial effects.

- a) The ruling that the falsity requirement for this offence be confined to a statement that is wholly false.
- b) The implied ruling that the offence should only be committed if the statement is published to a significant number of persons rather than just one other person.
- c) This sub-species requires that the maker of the statement must know that the statement is false or not have reasonable grounds to believe that it is true. The ruling of the Constitutional Court requires that the maker of the statement **must know** that the statement is false. The offence should not be committed if the State proves simply that the maker did not have reasonable grounds to believe that the statement was true.
- d) To make the maker of the statement liable even where he or she had no intention to cause the prejudicial consequence is to make the maker strictly liable and cuts across the normal principles that there must be a blameworthy state of mind which for serious crimes must normally be intention; it is not sufficient to prove merely that he or she knew he or she was making a false statement.

### **Prejudicial effects of both sub-species**

The prejudicial effects that both sub-species purport to prevent are almost identical. As pointed out previously, the main differences between the two offences are:

- The first sub-species does not require that the maker of the statement should know that the statement is false and the State does not have to prove that the prejudicial consequences ensued, but only that the maker intended them to occur.
- The second sub-species requires the maker knew that the statement was false or had no reasonable grounds for so thinking and the prejudicial consequence in question must have ensued and will apply whether or not the maker had actual or legal intention to cause the prejudicial consequence.

The prejudicial consequences for both sub-species are almost identical and they will be dealt with together. In respect of the prejudicial effects other than undermining confidence in a security service agency, the Constitutional Court ruling will require a careful examination of

- whether the offence is defined with sufficient precision;
- whether the restriction on freedom of expression is rationally connected with one of the permissible constitutional grounds for imposing a restriction, the relevant grounds being the interests of defence, public safety and public order and the economic interests of the State;
- whether the restriction is strictly necessary to protect against a direct, obvious and serious harm to the public interest;
- whether the restriction on freedom of expression is disproportionate in respect to the objective and whether the objective can be achieved by less invasive means.

Each of the prejudicial consequences to the State will be examined in turn.

### **Promoting or inciting public disorder or public violence or endangering public safety**

This ground directly relates to the permissible restriction of freedom of expression in the interests of maintaining public order or protecting public safety. However, the section does not specify that the false statement must cause or must be intended to promote or incite public disorder or public violence on a scale that will significantly threaten public order or endanger public safety. Surely incitement of minor public disorder cannot be prejudicial to the State. The offence of public violence (s 36 of the Criminal Law Code) requires that the accused act in concert with one or more other persons, forcibly and **to a serious extent**, disturb the peace, security or order of the public. A person who incites public violence could be charged with incitement to commit the offence of public violence. The need for the offence in s 31 of the Criminal Law Code is highly questionable.

### **Adversely affecting the defence of Zimbabwe**

This ground directly relates to the permissible restriction of freedom of expression in the interests of defence. But "*defence of Zimbabwe*" covers a wide spectrum of matters and the offence does not specify that there must be direct, obvious and serious prejudice to Zimbabwe's defence interests. Without this limitation the chilling effect on the right to criticise aspects of the defence sector will be considerable.

### **Adversely economic interests of Zimbabwe**

This ground directly relates to the permissible restriction of freedom of expression in the economic interests of the State. Again, "*economic interests of Zimbabwe*" cover a wide spectrum of matters and the offence does not specify that there must be direct, obvious and serious prejudice to Zimbabwe's economic interests. Without this the chilling effect on the right to criticise aspects of such matters as the management of the economy will be considerable.

### **Interfering with, disrupting or interrupting any essential service.**

This ground does not specifically fall under any of the permissible grounds for restricting freedom



of expression. It would have to be argued that interference or disruption of such essential services posed a threat to public safety or could result in public disorder. Additionally, the offence does not specify that the conduct caused serious interference or disruption and not just minor prejudice.

When deciding on the constitutionality of the first sub-species of this offence it must be borne in mind that this first sub-species does not require that the prejudicial consequences actually occur; all that is required is that the maker of the statement had actual or legal intention to cause these consequences. This in effect is an offence that can be merely an intentional attempt to cause the consequence. For the second sub-species, the prejudicial consequence must have occurred but the State does not have to prove that the maker intended such consequence; all that has to be proven is that the maker knew that the statement was false or did not have reasonable grounds for believing it to be true.

### **Section 177 of the Criminal Law Code**

A similarly vague offence – though admittedly the penalties are appreciable lower – is to be found in s 177, which reads:

#### ***"Undermining of police authority***

*Any person who*

*(a) in a public place and in the presence of*

*(i) a police officer who is present on duty; or*

*(ii) a police officer who is off duty, knowing that he or she is a police officer or realising that there is a risk or possibility that he or she is a police officer;*

*makes any statement that is false in a material particular or does any act or thing whatsoever; or*

*(b) in a public place and whether or not in the presence of a police officer referred to in subparagraph*

*(i) or (ii) of paragraph (a), makes any statement that is false in a material particular or does any act or thing whatsoever;*

*with the intention or realising that there is a risk or possibility of engendering feelings of hostility*

*towards such officer or the Police Force or exposing such officer or the Police Force to contempt, ridicule or disesteem, shall be guilty of undermining police authority and liable to a fine not exceeding level seven or imprisonment for a period not exceeding 2 years or both.”*

It is submitted that the constitutionality of this provision should also be considered on the basis of whether there is a real possibility of promoting or inciting public disorder or public violence on a scale that will significantly threaten public order or endanger public safety. The statement or act would also have to be made or done in the presence of a significant number of persons. Being abusive to a police officer in a police station would be very unlikely to have that effect: see *S v Jekanyika* HH-298-14. Here, the appellant and another person entered the complainant’s office. The complainant, who was the Officer Commanding Mutare Police District, greeted the two and offered them seats. Immediately upon taking his seat, the appellant hurled certain accusations against the complainant which included the allegations that the complainant had forced the appellant to give a statement to police. There was also an allegation that the complainant had sent his officers to arrest him instead of protecting him. The applicant is said to have accused the complainant of being a corrupt officer who wined and dined with thieves. He threatened to air his grievances against the complainant with the President. The appellant was drunk at the time. Hungwe J held that there had to be an intention to or realisation of the risk or possibility of engendering feelings of hostility towards such officer or the police force to contempt, ridicule or disesteem. In the circumstances, it could hardly be said that the appellant intended to engender feelings of hostility towards either the complainant or the police force or that he intended to expose the complainant or the police force in general to contempt or ridicule or disesteem.

The police are not delicate flowers that must be protected against the smallest of slights: they should be able to put up with fairly robust remarks and treat them with indifference.

## **Conclusion**

The judgment in the *Chimakure* case goes a long way in upholding the fundamental right to freedom

of expression. This freedom is vitally important as it is a sine qua non of the enjoyment of many of our other fundamental rights. The judgment exposes how the offence charged devastates the right to express views on security sector institutions. It shows systematically the disproportionate overreach of this offence. The grounds for criticising the specific offence charged apply with equal force to the other offences contained in s 31. As the Court pointed out, the UN Special Rapporteur on Freedom of Opinion and Expression has argued that penal sanctions, particularly imprisonment, should never be applied to offences of publishing false news because of the chilling effect that such provisions have on freedom of speech. There is much merit in this view. The whole of s 31 must be reconsidered and, if a penal provision is to be retained at all, it must not destroy the right to freedom of expression; it must be one which is justifiable in a democratic society where freedom of expression is greatly valued.