Judgment No. HB 87/2003
Case No. HC 1260/2003

BULAWAYO DIALOGUE INSTITUTE

Versus

CHIEF SUPERINTENDENT – P MATYATYA
OFFICER COMMANDING POLICE, BULAWAYO
CENTRAL DISTRICT

And

OFFICER IN CHARGE, LAW AND ORDER,
BULAWAYO CENTRAL POLICE

And

COMMISSIONER OF POLICE

And

MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 27 JUNE AND 7 AUGUST 2003

Ncube for the appellant
First respondent in person

Urgent Chamber Application

NDOU J: This is an urgent application seeking an order in the following terms:

"Interim Relief Granted

Pending the finalisation of the matter, the applicants be granted the following relief:-

1. That the 1st, 2nd, 3rd and 4th respondents be and (sic) are hereby interdicted from interfering in anyway with the holding of the Youth Conference by applicant at the Auditorium of the Natural History Museum, Bulawayo.
2. That service on the 1st respondent be deemed service on 2nd, 3rd and 4th respondents for purposes of this application.

Final Order

That the 1st respondent pay the costs of this suit on an attorney client scale."

I heard the application on 27 June 2003 and dismissed the application with costs. I indicated then that my reasons for doing so will follow. This judgment provides the said reasons. The brief facts are that the application is a *universitas* operating under the name of Bulawayo Dialogue Institute. On 12 June 2003 the applicant notified the first respondent of its intention to hold a Youth Conference on 28 June 2003 at the HB109-03DOC 2222222222¸¼R0–
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2222222222222222222222222222222222222222222222222222222222222222222ation was launched two days later on 27 June 2003. One of the reasons given by the applicant for the application is that the first respondent did not furnish the reasons for the refusal of the application. It was also submitted that it was wrong for the first respondent to purport to be vested with power of approving or disapproving the holding of the conference. It was submitted that all that POSA requires of the applicant is the notification of the first respondent of the intended conference and no more. I should point out that the letter addressed to the first respondent by the applicant had both elements of notification and application for authority as it read –

"Re: NOTIFICATION OF YOUTH CONFERENCE

I hereby notify you of our intention to hold a conference focusing on issues of youth development. This will focus on issues of HIV/AIDS, unemployment and scholarship among other things. This will be on 28 June 2003 … About 100 youths from in and around Matabeleland will participate in this event.

Kindly grant the authority." (Emphasis added)

The highlighted sentence shows that authority was being sought. The first respondent's response has to be viewed in this context. Further the applicant does not seek the review of the decision of the first respondent. This application for an interdict is launched "out of caution" as "there is a reasonable apprehension that first respondent may authorise his officers to violently break up the conference." The source of the apprehension is that applicant and the first respondent had previous dealings a week before. On that occasion the applicant had organised an event for school children. The first respondent did not approve. The applicant went ahead and the first respondent sent officers who broke up the meeting. The applicant's organisers ended up arrested and they paid deposit fines for organising the said meeting contrary to the directives of the regulating authority i.e. the first respondent.

Although the founding affidavit tried to explain the payment of admission of guilt fine as a way to "get our freedom" there is no evidence that they took steps to have the admission set aside by a magistrate in terms of applicable statutory provisions. With such a background it was foolhardy for the applicant to arrange another meeting with more or less the same obstacles as the previous one. The final prejudice was in a way self inflicted. The applicant cannot say it did not anticipate these financial losses in the face of such a background. Why invite speakers,

participants, hire services and a venue when it is clear that the "legal" requirements are still to be sorted out? This is unfortunately, a calculated risk taken by the

applicant and cannot be used in court as a basis for the urgency. The previous meeting arranged by the applicant a week before ended in circumstances of violence so it was irresponsible for the applicant to arrange another a meeting more or less along the similar lines and expose the youthful participants to violent disruption of the meeting. Concerned about this probability the applicant and the first respondent met on 25 June 2003. They discussed the positions of each side. The meeting centred around the reasons why the first respondent did not approve the application.

The applicant, in the founding papers did not disclose that this meeting took place. Applicant gave the impression that no reasons were given for the disapproval. The discussions in this meeting were relevant to this application. Whether the reasons were inadequate by reason of not being in writing is not an issue here. What is important is that when launching this application the applicant had been furnished with oral reasons for the police objection. The applicant, in such an urgent application should have disclosed the holding of this meeting. If I had accepted the averments in the founding affidavit without insisting on service on the respondents, I would have been unaware that reasons were given at a meeting between the parties. In urgent applications utmost good faith must be shown by the applicant to lay all relevant facts before the court, so that it may have full knowledge of all the circumstances of the case before making its order – *Barclays Bank* v *Giles* 1931 TPD 9; *De Jager & Ors* v *Heilbron & Ors* 1947 (2) SA 415 (W); *In re Leydsdorp and Pietersburg (Tv) Estates Ltd; In Liquidation* 1903 TS 254; *Estate Logie* v *Priest* 1926

AD 312 and *Graspeak Investments (Pvt) Ltd t/a Faffy Bar* v *Delta Operations (Pvt) Ltd t/aNational Breweries and Ano* HH-223-01. In *The Civil Practice of the Supreme*

Court of South Africa (4th Ed) by L van Winsen, A C Cilliers and C Loots at page 367 the learned authors state-

> "Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his rights, when he is bringing en *ex parte* application in which relief is claimed against another party he must make full disclosure of all the material facts that might affect the granting or otherwise of an order *ex parte*. The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which might have influenced the decision of the court whether to make an order or not the court has a discretion to set the order aside with costs on the grounds of non-disclosure."

See also *Power N O* v *Bieber & Ors* 1955 (1) SA (SWA) and *Ex parte Madikiza et uxor* 1995(4) SA 433 (TK) at 436I – J.

The *audi alteram partem* rule as a principle of natural justice, applies in such urgent applications with merited exceptions. The respondents *in casu*, were served with application on the day of the hearing. This was indeed a very short notice. This short notice is a major constraint on the respondents' preparation of their response. The respondents did not have sufficient time to be heard from an informed position. An urgent application is an exception to the general rule and as such the applicant is expected to disclose fully and fairly all material facts known to him or her. This court has a discretion, even if the non-disclosure is material, to grant or dismiss the application – *Venter* v *Van Graan* 1929 TPD 435. The circumstances are normally so divergent and varied that it is not possible for me to lay any guideline save to say in

the instant matter there is need to dismiss the application as a seal of disapproval of such *mala fides* of the applicant.

I alluded to the issue of powers of the police, i.e. the regulating authority. As pointed out, the applicant makes no reference to any specific section of POSA. I will

deal with the matter without the benefit of detailed submissions by the applicant. As I understand it, section 24 requires the organiser of a public meeting to give the regulating authority, effectively, the police, at least *four clear days' written notice* of the holding of the gathering. Subsection (2) sets out the purpose of the giving of the notice. Under subsection (6), it is an offence not to give the required notice. Section 25 gives the police *powers to control the gathering*. Section 25 provides:-

> "(1) If a regulating authority, having regard to all the circumstances in which a public gathering is taking place or is likely to take place, has reasonable grounds for believing that the public gathering will occasion –
>
> (a) public disorder; or
> (b) a breach of the peace; or
> (c) an obstruction of any thoroughfare; he may, subject to this section, give such directions as appear to him to be reasonably necessary for the preservation of public order and the public peace and preventing or minimising any obstruction of traffic along any thoroughfare.
>
> (2) Without derogation from the generality of subsection (1) directions under that subsection may provide for any of the following matters:
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> (a) prescribing the time at which the public gathering may commence and its maximum duration;
> (b) prohibiting persons taking part in the public gathering from entering any public place specified in the directions;
> (c) precautions to be taken to avoid the obstruction of traffic along any thoroughfare;
> (d) prescribing the route to be taken by any procession;
> (e) requiring the organisers to appoint marshals to assist in the maintenance of order at the public gathering.
>
> (3) Whenever it is practicable to do so, before issuing a direction under subsection (1) a regulating authority shall give the organiser of the public gathering concerned a reasonable opportunity to make representations in the matter."

It seems to me that the meeting referred to above between the applicant's representative and the first respondent was conducted under subsection (3) I say so because what was discussed was how the applicant's meeting should be conducted. There is no provision in section 25 for the regulating authority to prohibit the meeting,

although he could, in practice, make it very difficult by for example, only allowing a meeting to take place over a very short period.

It is under section 26 that a regulating authority may *actually prohibit a public gathering,* if he believes on reasonable grounds that the gathering will occasion public disorder. The letter written by the first respondent does not clearly do so. It merely states that the application was "not approved by the office." The "streetwise" or man-in-the-street" approach towards this litigation adopted by the applicant's legal practitioner makes it difficult to appreciate the basis of the interdict. Without making reference to specific sections of POSA the applicant makes general remarks in the founding affidavit –

> "It is however wrong for the 1st respondent to purport to be vested with power of approving or disapproving the holding of the conference. I am informed by our lawyers that all the Act requires of the applicant is notifying the 1st respondent of its intended conference and no more".

If one looks at section 24 in isolation the statement is correct. But it would wrong, in my view, to simply excise section 24 from the entire Act. The provisions of section have to be understood contextually. The objective of section 24 is to inform the regulating authority so that the latter can exercise his sections 25 and 26 powers. Once the regulating authority, first respondent, in *casu*, is aware of the details of the intended public gathering he may decided to *control* it using his section 25 powers. In such a case the regulating authority controls or gives directions based on the interests

public order, peace or fluid of traffic in any thoroughfare (subsections (1) and (2)). In other words, under section 25 the meeting takes place subject to the regulating authority's control and direction. Under section 26 the regulating authority may actually *prohibit* a public gathering it believes on *reasonable grounds that the gathering will occasion public disorder*. The effect of the provisions of sections 25

and 26 is that the regulating authority has a lot more powers than the applicant appreciates. Whether the first respondent's powers to control and direct and prohibit public gatherings amount to a power of approving or disapproving public gatherings seems immaterial to me. What is important is for me to acknowledge the existence of the said powers.

In *casu,* the applicant is not challenging the constitutionality of POSA by alleging a violation of a fundamental right. The basis of the applicant's claim arises from the interpretation of POSA. The applicant seeks a prohibitory final interdict. An interdict can be used to prevent the threatened commission or continued commission of an unlawful act. It is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm – *Bull* v *Minister of State (Security) & Ors* 1987(1) SA 422 (ZH) *Gosschalk* v *Roussow* 1966(2) SA 476(C); *Woods & Ors* v *Ondangwa Tribal Authority* 1975(2) SA 294(A); *A Guide to Zimbabwean Administrative Law* (3rd Ed)(1998) by G Feltoe at 62 and *The Civil Practice of the Supreme Court of South Africa* (4th Ed) *(supra)* ; AC Cilliers & C Loots at page 1063 *In Introduction to South African Law and Legal Theory* (2nd Ed) by W J Hosten; AB Edwards, F Bosman & J Church the learned authors at page 1074 describe an interdict as follows-

> "If an applicant fears that an administrative action or impending action will affect his rights or result in prejudice, he may apply for an interdict restraining the administrative organ from carrying out its action. He must show that he has a clear legal interest, that no other remedy is available to him and that the matter is so urgent that he will suffer irreparable prejudice if the interdict is not granted" – *Setlogelo* v *Setlogelo* 1914 AD 221.

In order to succeed in obtaining a final prohibitory interdict the applicant must establish, first, a clear right, second, an injury actually committed or reasonably

apprehended, and, third the absence of similar protection by any other ordinary remedy - *Setlogelo* v *Setlogelo (supra); Diepsloot Residents* v *Landowners Association & Ors* v *Administrator & Ors* 1993(3) SA 49 (T) at 60B-C; *Knox D'Arcy Ltd & Ors* v *Jamieson & Ors* 1995(2) SA 579 (W) at 592H-593C and *Sanachem (Pty) Ltd* v *Farmers Agri-Care (Pty) Ltd & Ors* 1995(2) SA 781(A) at 789B-D.

In this case the applicant does not seem to appreciate that it must establish the above requirements in order to succeed with its interdict. There is no attempt to establish a clear right. It is indeed difficult to see one in the body of this application. If I grant the relief sought in terms of the draft order I will effectively stop or prevent the regulating authority i.e the first respondent from exercising powers bestowed on him by virtue of the provisions of section 25 and 26. The mischief targeted by the remedy of an interdict is an unlawful act. Obviously the exercise of sections 25 and 26 powers by a regulating authority cannot be said to be unlawful in the normal scheme of things. The exception, however, are *ultra vires* actions. The administrative powers of the first respondent derive from POSA. The nature and extent of those powers are to be found in sections 25 and 26 of the Act. The first respondent's powers are not unlimited. If the first respondent purports to exercise a power he does not have, or acts in excess of a power he possesses, his action will be invalid on the basis that it is *ultra vires – A Guide to Zimbabwean Administrative Law*

(supra) at page 51. It appears that in this case the applicant has not claimed that the first respondent did the wrong thing, acted in the wrong manner or acted on the wrong grounds. The applicant seems to have based the application on the fact that first respondent does not have the sections 25 and 26 powers. I may be wrong but it is evident that this application was launched without the applicant appreciating the

provisions of POSA. In addition to what I said about sections 25 and 26 the applicant's founding affidavit fortifies my view in this regard –

> "10. In any event the meeting applicant intends to hold is one that is not of political nature …
> 14. The meeting is not of a political nature. The delegates will not sloganeer, *toyi-toyi*, wear political institutions regalia or sing political songs."

Surely if applicant read POSA it would have been apparent it refers to all public meetings with a few stated exceptions. The applicant should obviously not adopt a "I will take you to court" approach without articulating with some measure of precision the nature of legal right intended to be enforced. If the applicant's case is premised on judicial review of the first respondent's administrative actions a proper legal foundation must be laid for the relief sought. The relief sought here is an interdict so the applicant's founding papers should clearly make averment to establish the requirements of such relief as outlined above. From the applicant's papers the relief sought is, accordingly, not merited.

In the circumstances, I therefore dismissed the application as outlined above.

Hara & Partners, applicant's legal practitioners.