

JENNIFER WILLIAMS & 46 OTHERS

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 14 OCTOBER 16 DECEMBER 2004

K I Phulu for applicant
No appearance for respondent

Judgment

CHEDA J: Applicants applied for a declaratory order couched as follows:

- “1. That the arrest of the applicants by the police following their march for Mothers Day be and is hereby declared arbitrary and unlawful.
2. That the applicants paid the fines under duress.
3. That respondent be and is hereby ordered to cause a refund of each of the applicants’ fine to each of the applicants.
4. That respondent shall pay costs of this application.”

After hearing submissions by Mr *Phulu* for applicants I granted the application with my reasons to follow and these are my reasons.

The facts of this matter which are largely undisputed are that applicants are all members of a non-governmental organisation known as Women of Zimbabwe Arise (herein referred to as WOZA). On 10 May 2004 applicants were arrested for staging a street march procession without the sanction of the regulatory authority i.e. the police. Therefore, according to respondent, the said procession was both unlawful and unauthorised. After their arrest they were placed in the cells at Zimbabwe Republic Police Central Police Station, Bulawayo. They were later joined in by their legal practitioners and were then charged with contravening section 57(b) of the Miscellaneous Offences Act [Chapter

9:15]. They admitted the charges and were each invited to pay deposit fines of \$3 000,00 each which they duly paid.

Applicants have now challenged their admissions of guilt on the basis that they were not made freely and voluntarily as they were signed under duress. In their application they seek the following relief.

It is ordered that:-

- “1. A declaratory order be and is hereby issued declaring that:
 - 1.1 That the arrest of the applicants by the police following their march for Mothers Day be and is hereby declared arbitrary and unlawful.
 - 1.2 The applicants paid the fines under duress.
 - 1.3 Respondent be and is hereby ordered to cause a refund of each of the applicants’ fine to each of the applicants.
2. The respondent shall pay costs of this application.”

Respondent filed a notice of opposition on 25 July 2003 attached to the notice is what they termed grounds of opposition together with their heads of argument.

The matter was originally set down for hearing on 15 October 2004 but I ordered that it be heard on 14 October 2004 at 10am as an opposed court application. Both legal practitioners were duly notified by my clerk Mr K Sibanda. On the hearing date Mr *Gaibie* for respondent did not come to court. I was informed by the clerk that he had come earlier to advise the clerk that he was not properly dressed and he went away. Mr *Phulu* for applicants also confirmed that he had seen Mr *Gaibie* who also advised him that he was not properly dressed and therefore could not attend the court hearing.

Mr *Phulu* made both oral and written submissions. He raised a point *in limine* being that respondent’s opposing papers did not comply with the rules. As pointed

out *supra*, Mr *Gaibie* failed to appear in court and the only reason given for his failure was through Mr *Phulu*. I therefore propose to deal with that failure alone.

A legal practitioner has a duty to do his best in the service of his client. He equally has a duty to the court in as far as prosecution of his client's case is concerned before the court. He must at all times remain courteous to both his colleagues and to the court.

A lawyer who is seized with a matter in court has a duty to attend court throughout the hearing unless he is unable to do so by reason of inability (such as illness) or the leave of the court. A lawyer who merely absents himself other than in the above circumstances risks being charged with misconduct.

In *casu*, Mr *Gaibie* merely absented himself without lawful excuse. He was aware that the matter was opposed and is reasonably expected to know that such cases are heard in an open court but according to Mr *Phulu* appeared without proper attire. The reasonable steps to have been taken in the circumstances would have been for him to approach the Judge in chambers through the Judge's clerk to seek a postponement. But, for him to merely disappear without even appearing in chambers is to say the least very discourteous. These courts can not condone such behaviour by legal practitioners.

On the face of his documents he did not adequately prepare this matter in that he failed to comply with the rules of court. However, I am not making a decision on that as he has not been heard for a possible explanation. There was no appearance for and on behalf of the respondent.

In light of his absence without excuse I find that applicants must succeed on this technicality.

Accordingly, this application succeeds with costs.

Coghlan & Welsh, applicants' legal practitioners