

SCZ NO. 5 OF 1994

APPEAL NO. 23 OF 1993

IN THE SUPREME COURT FOR ZAMBIAHOLDEN AT LUSAKA

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| B E TWEEN: | Alfred M'thakati Zulu | Appellant  |
|            | And                   |            |
|            | Attorney-General      | Respondent |

Coram: Gardner, Chirwa and Chaila JJJS.,  
9th February, 1994 and 30th June, 1994

Mr. R.M. Simeza of RMA Chongwe and Co., appeared for the appellant.  
Mr. C. Jayawardena Assistant Principal State Advocate appeared for the State.

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J U D G M E N T

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Gardner J. S. delivered the judgment of the court.

This is an appeal against a judgment of the High Court refusing a ~~grant of~~ a declaration that a cancellation of a police permit for a meeting was invalid, and, that the alleged cancellation was a violation of the constitutional freedoms of speech and association of the students concerned.

The facts of the case were that on the 1st of September, 1992 the appellant, as Secretary General of the University of Zambia Students Union, together with the President of the Union applied for a permit to hold a public rally on the 27th September, 1992. They went to Lusaka Division Police where they were directed to the room of Inspector Buchisa who said he was the Regulating Officer. A permit was issued by Inspector Buchisa for a meeting to be held consisting of a procession along the Great East Road to a rally at Kafue roundabout. The evidence of the appellant was that later a number of police officers told him that the person who issued the permit was not qualified to issue it; but he was never told that the permit has been cancelled. He treated the subject of cancellation as a rumour. On the 24th of September, 1992 the union representatives were called to State House where the President of the Republic, according to this witness, told them that they should hold the meeting at the University campus and not at Kafue roundabout.

On 27th of September the students went ahead with their meeting and were stopped by police at a road-block on the Great East Road. They were then told that the permit for the meeting had been cancelled. They were told to disperse, but they did not do so and were arrested.

In cross-examination the appellant said that the President of the Union learned from Assistant Commissioner Ndhlovu in the corridor of Central Police Station on the 22nd September, 1992 that the permit for the meeting had been cancelled. As to the change of venue of the meeting the appellant said that Mr. Ndhlovu had cancelled the meeting, not only the venue, and that it was the Vice Chancellor and Dean of Students who suggested that they change venue to the campus of the University of Zambia. The President of the union also gave evidence concerning the obtaining of the permit and said that on 22nd of September, he went to Lusaka Central Police Station where he met Mr. Ndhlovu who told him that he had cancelled the permit because the students were not a political party. Thereafter Mr. Kumanda the Deputy Commander of Lusaka Division Police asked the witness to change the venue to the University of Zambia. The witness replied that he needed time to consult his colleagues. The witness confirmed that on the 27th September, 1992 the students started marching and the procession was halted by the police. The third witness for the petitioner was Inspector Buchisa who gave evidence that he issued a permit for the meeting and that before doing so he looked for Mr. Ndhlovu whom he was required to inform before issuing any permit. He said Mr. Ndhlovu was not there so he issued the permit on the authority of Chief Inspector Nkhonje. The witness confirmed that he was Regulating Officer responsible for issuing permits. The witness went on to say:-

"I changed my mind, I followed the applicant, retrieved the permit and cancelled it. For all the time I was in that office I never cancelled any permits. This was the first case to be cancelled. I followed the applicant to cancel the permit. I issued it on 21st September, 1992 and I cancelled it on 22nd September, 1992."

Later in his evidence in chief he said:

"Mr. Ndhlovu asked me to cancel the permit. That was in the morning of 22nd September, 1992. On 21st September, 1992 no one queried me about the permit. My superior officer told me to cancel the permit." In cross-examination the witness confirmed that he had previously been instructed not to continue issuing permits without the consent of the Commanding Officer. He said that the students who came to see him told him that the Commanding Officer had advised them to see the witness and that he should issue the permit to them. He said:-

"On 22nd September, 1992 I was instructed to retrieve the permit from the students. He did that because he realised that he had been tricked by the students when they told me that they had seen him before they came to my office. The Commissioner (Mr. Ndhlovu) personally told the students saying:-

"Comrades since you did not see me before issuing the permit I now cancel the permit."

The first witness for the defence Senior Assistant Commissioner of Police Mr. Ndhlovu gave evidence that Inspector Buchisa was working with him in 1992 as Regulating Officer issuing permits for ceremonies which were not political. He said for a political meeting the power to issue permits was vested in him. He said he took over the power of issuing political meeting permits and that he was also a Regulating Officer. The witness said that he realised that Inspector Buchisa had issued the permit in question on the understanding that the witness had advised him to issue the permit because the two students had falsely told Buchisa that they had seen him. He said that when he met the two students' officials he told them that the permit had been cancelled because he did not have enough manpower to cover their meeting when he already had a UNIP Congress Meeting at Namayani Farm and a Shell BP Championship gathering. This he said made him cancel the permit. He confirmed that the issuing of the permit by Mr. Buchisa was legally done and said that he did not cancel the meeting completely because he allowed them to hold it at the University of Zambia campus.

In cross-examination he maintained that his conduct did not mean that the permit for the meeting was cancelled and said that he had only changed the venue.

The learned trial judge found that it was hairsplitting to argue that because the permit was issued by inspector Buchisa Mr. Ndhlovu as superior officer had no right to attach conditions to it. He found that the permit had not been cancelled but that only the venue had been changed. He held therefore that the appellant was not entitled to a declaration that the cancellation was invalid. The learned trial judge also found that there has been no violation of the fundamental rights of the students.

On appeal Mr. Simeza, on behalf of the appellant, submitted a number of grounds of appeal and heads of arguments. The first ground was that the learned trial judge erred in finding that Mr. Ndhlovu, because he was the most superior officer, had power to attach to or change conditions in the permit issued by inspector Buchisa. He argued that in terms of section 5 of the Public Order Act, the only person who can change the venue or conditions in a permit earlier issued is the Regulating Officer referred to under section 5 (4) of the Act, who in this case, as was admitted by both parties, was Inspector Buchisa. It was his contention that neither Mr. Ndhlovu nor any superior had the right to order a change of venue or attach any conditions to the permit. Mr. Simeza argued that, whilst it was admitted that a Regulating Officer had a wide discretion to grant or refuse the grant of a permit or to attach conditions to it, the exercise of such discretion rested entirely upon the Regulating Officer concerned, namely Inspector Buchisa, and he should not exercise those powers under dictation or instruction from his superior or higher authorities. He should have exercised his discretionary powers individually and without any interference from any quarter whatsoever. He argued that Mr. Ndhlovu's cancellation or alteration of the issued permit was an attempt to interfere with the discretion vested solely in Inspector Buchisa. Mr. Simeza indicated that it was his argument that Inspector Buchisa, to whom the application was made, was the one who should consider whether or not there was sufficient manpower in the police force to deal with the meeting for which the permit was obtained taking into

account any other commitments of the police force.

In reply, after the learned State Advocate had addressed the court with his arguments, Mr. Simeza was adamant in arguing that, if a Regulating Officer received an order to cancel or attach conditions to a permit already issued by him, he should not obey such an order even if he agreed with it and realised that he had made a mistake in granting the first order. Mr. Simeza, also put forward a number of other grounds of appeal which related to whether the original permit had been cancelled or whether it had been varied by the imposition of another condition as to venue. However, these were withdrawn because they depended solely on whether or not the cancellation or alteration of the original permit was permissible at law. In the same way ground 5 of the appeal, which contended that the learned trial judge had erred in holding that the action of cancelling the procession and rally and the arresting of the students who had a valid permit had not in any way violated their fundamental rights, depended entirely on whether or not the cancellation of the original permit was permissible.

Finally, Mr. Simeza appealed against the learned trial judge's finding that the appellant on behalf of the students could not recover one hundred and fifty thousand kwacha spent on advertising costs for the unsuccessful meeting. Mr. Simeza was unable to frame a **cause** of action under which the amount was claimed but argued only that the money which had been spent by the students on the advertising was wasted because the police wrongfully preventing the holding of the proposed meeting.

In support of his claim and his arguments Mr. Simeza referred, us to the case of *R. v. Commissioner of Police of the Metropolis (Ex parte Blackburn)* (1968) 2 Q.B. 118 at page 136. This was a case in which a private individual sought an order against the Commissioner of Police in London to make him take action against certain gaming clubs. In the event, by the time the case came before the court the necessary action had already been taken against the clubs so that the court found it unnecessary to make any order. In the course of his judgment Lord Denning M.R. commented that the Commissioner of Police could not be given orders as to how he performed the duties of his office by anyone - not even by the Home Secretary.

It was this portion of the judgment that Mr. Simeza wished to call in aid in support of his argument that Mr. Buchisa's discretion as to the issue of permits was not subject to the order of any other officer in the police force.

We would distinguish that case from the appeal at present before us. The case being considered was whether an order for Judicial Review was available against the Commissioner, which question was answered in the affirmative by the court, but in fact no order was found to be necessary in that case. The ~~obiter~~ comments about the question as to whether or not a Commissioner of Police is subject to the orders of others are not relevant to the question of whether or not a police inspector is so subject. We appreciate that Mr. Simeza argues that a person appointed as a Regulating Officer is given a discretion which cannot be interfered with by any other person, but we can find no authority for such a proposition. There is no statutory authority to support the argument and nothing to suggest that a Regulating Officer is not subject to the ordinary chain of command existing in the Police Force. However, in this case we do not have to consider the general law of the situation. There was specific evidence from Senior Assistant Commissioner of Police Mr. Ndhlovu that he was also a Regulating Officer who was responsible for giving instructions to Mr. Buchisa. In those circumstances, despite Mr. Simeza's forceful argument to the contrary, there can be no doubt that Mr. Ndhlovu was fully entitled to give orders to Mr. Buchisa about the issuing and cancellation or variation of permits and Mr. Buchisa was in duty bound to obey such orders.

The question of whether the original order was cancelled or varied is immaterial. There was no impropriety on the part of the police and the cancellation or variation of the permit in this case was valid at law. The question of compensation for the wasted advertisements does not, therefore, arise.

For the reasons we have given the appeal is dismissed. There will be no order to costs.

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B. T. GARDNER  
SUPREME COURT JUDGE

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M. S. CHAILA  
SUPREME COURT JUDGE

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D. K. CHIRWA  
SUPREME COURT JUDGE