**EDWARD JACK SHAMWANA v THE ATTORNEY-GENERAL (1988 - 1989) Z.R. 44 (S.C.)**

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., AND SAKALA, J.S.
28TH AUGUST 1987AND 23TH JULY, 1988
(S.C.Z. JUDGMENT NO. 9 OF 1988)

## Flynote

Constitutional law - Petition to Parliament - When petition is before Parliament.
Constitutional law - Publication - Power of President to proscribe publication - Duty to publish notice of proscription in local newspaper.

## Headnote

The appellant appealed against a judgment of the High Court dismissing his application that the President's order proscribing his petition to the National Assembly was unconstitutional. The President, when he decides to prohibit publication, should publish such order in the Gazette 'and in such local newspaper as he may consider necessary'. The appellant argued that such choice of newspaper was left to the President but that publication was mandatory and not directory. The appellant had presented a petition to his member of Parliament setting out grievances. After the Speaker and all members of Parliament had received copies, the President declared the petition a prohibited publication. The respondent argued that in terms of a petition being before Parliament and therefore being part of the proceedings in Parliament that could not be prescribed, the petition under Standing Orders must be signed by the member of Parliament in charge of the petition and be deposited with the Clerk of the National Assembly for one clear day and thereafter be endorsed by the Speaker. The appellant argued his petition was properly before Parliament.

**Held:**

(i) It is not enough that copies of a petition are sent to the Speaker and to all members of Parliament. It must be established that the member of Parliament in charge of the petition signed it at its commencement, deposited it with the clerk of the National Assembly for at least one clear day, that clerk, after examining the petition, submitted it to the Speaker who duly approved it by endorsing it.

(ii) A banning order is required to be published in a local newspaper of the President's choice. The general object to be secured by the requirement is to communicate the banning order to the general public. Publication to the



general public is mandatory. The general object of the requirement is fulfilled through publication in the Gazette. Omission to publish a banning order in a local newspaper is not fatal to its validity.

**Cases referred to:**

(1) R. v Oakes [1959] 2 Q.B. 350

(2) Vacher v London Society of Compositors [1913] A..C. 107
(3) Grey v Pearson [1853] 6 H.L.C. 61
(4) Direct US Cable Co v Anglo American Telegraph Co [1877] 2 A.C. 394
(5) London and India Docks Co v Thames Steam Tug etc Co [1909] A..C. 15
(6) Burns v Javis [1953] 1 W.L.R. 649
(7) Attorney-General v Chipango (1971) Z.R. 1
(8) Attorney-General v Juma (1984) Z.R. 1
(9) Nkumbula and the Attorney-General (1972) Z.R. 204

**Legislation referred to:**
Penal Code, Cap. 146 s. 53(1), 62
Interpretation and General Provisions Act, Cap.2, s. 4(4)
National Assembly Standing Orders 1980: Orders 152
Constitution of Zambia, Cap. 1: Art 90(1)
Inquiries Act, Cap. 181

**Other Works referred to:**
Erskine May *Parliamentary Practice* (17th ed)
Craies on *Statute Law* (7th ed)

For the appellant: In person.
For the respondent: B. L. Goel, Senior State Advocate.

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**Judgment**
**SILUNGWE, C.J.:** delivered the judgment of the Court.

This is an appeal against a judgment of the High Court dismissing the appellant's application for an order that the President's order proscribing his petition to the National Assembly was wrongful, unlawful and unconstitutional. In his first ground of appeal, the appellant argued that, although the President's order proscribing his petition to the National Assembly was published in the Gazette, the said order was not published in any local newspaper as required by law.

The relevant provisions of the law are to be found in section 53(1) of the Penal Code, Cap. 146, and are in these terms:

> " 53 (1) If the President is of the opinion that there is any publication or series of publications published within or without Zambia by any person or association of persons containing matter which is contrary to the public interest, he may, in his absolute discretion, by order published in the Gazette and in such local newspapers as he may consider necessary, declare that the particular publication or series of publications, or all publications or any class of publications specified in the order, published by that person or association of persons, shall be a prohibited publication or prohibited publications, as the case may be."

There can be no doubt, as the learned trial Judge found, that the 'absolute discretion' of the President referred to in the section relates to the banning of any publication whose contents are, in the President's opinion, contrary to the public interest. The critical issue that arose then, as it does now, concerns the interpretation of the expression:

"… by order published in the Gazette and in such local newspapers as he may consider necessary . . . "

p46

The learned trial Judge came to the conclusion that 'publication of the order in the Gazette is mandatory whereas publication in a local newspaper is left to the President to decide whether it is necessary'. This finding came under attack by the appellant who strongly submitted that the Court below was wrong to interpret the section as conferring upon the President an unfettered discretion whether or not to publish the banning order in a local newspaper as the ordinary meaning of the requirement is that the President must publish the order in the Gazette and in a local newspaper.

Both sides subscribed to the view that publication of a proscription order in the Gazette is mandatory. There was, however, a divergence of opinion between both sides in regard to publication in local newspapers. The appellant contended that such publication was equally mandatory because the two requirements were separated by the word 'and' and not 'or', the former being conjunctive and the latter disjunctive. He made reference to Maxwell on Interpretation of Statutes 12th ed at 232--234 wherein it is stated that:

" In an ordinary usage, 'and' is conjunctive and 'or' disjunctive. But to carry out the intention of the legislature it may be necessary to read 'and' in place of conjunction 'or', and vice versa."

(See also Odgers Construction of Deeds and Statutes 5th ed at 378--379). The appellant went on to say that although Parliament may intend the word "or" to mean "and" as in *R. v Oakes* (1), here the ordinary usage of the word "and" should apply.

On the other hand, Mr Goel submitted that publication in a local newspaper was discretionary because, on the authority of *R. v Oakes* (1), it was necessary in this case to read 'or' in place of 'and'. Mr *Goel's* further reason was that the use in the section of the word 'may' in the expression 'as he may consider necessary' meant that publication in a local newspaper was permissible. A reference to the Interpretation and General Provisions Act, Cap. 2, shows in section 4 that:

" 4(4) Where the words "or", "other" and "otherwise" are used in any written law they shall be construed disjunctively and not as implying similarity, unless the word "similar" or some other word of like meaning is used."

There is, however, no reference in the Act to the word 'and'. In the circumstances, the ordinary sense or usage of the word is to be adhered to unless absurdity or repugnance would result. This means that the word 'and' is to be used conjunctively. In the words of Lord Wensleydale quoted by Lord Macnaghten in *Vaher v London Society of Compositors* (2):

"Now it is 'the universal rule', as Lord Wensleydale observed in *Grey v Pearson* (3) that in construing statutes, as in construing all other written instruments, 'the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or

> some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further '."

In the present case, we are satisfied that the word 'and' has been used in a precise and unambiguous context. The words of Tindal, C.J., as quoted by

p47

*Lord Macnaghten in Vacher* (2), at page 118, are instructive:

> " If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone, do, in such case, best declare the intention of the law giver."

And as Lord Blackburn said in *Direct US Cable Co v Anglo American Telegraph Co* (4) cited by Lord Atkinson in *London and India Docks Co v Thames Steam Tug, etc, Co* (5):

> " The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view."

In any event, as Lord Goddard, C.J. said in *Burns v Javis* (6):

> "A certain amount of c.ommon sense must be applied in construing statutes. The objects of the Act must be considered."

(See also Craies on *Statute Law*, 7th ed at 65.)

Here, the "subject-matter" is the banning order and the "object in view" is communication of the banning order to members of the public by publishing it in the Gazette and such local newspaper as the President may consider necessary. Contrary to Mr *Goel's* submission, the ordinary usage of the word "and" is to be adhered to, that is, the word is used in a conjunctive sense. Further, the expression "as he may consider necessary" does not mean that the President has a discretion to or not to publish a banning order in a local newspaper; all that the expression means, as the appellant submitted, is that the choice of a local newspaper is left to be determined by the President. The application of the section under consideration may, therefore, be stated thus: the President has an absolute discretion to decide whether or not to ban any publication which, in his opinion, is contrary to the public interest. Once the decision is made to ban such a publication, the banning order is required to be published in the Gazette and in a local newspaper of the President's choice. To this extent, the learned trial Judge misdirected herself.

It must now be decided whether the President's failure to publish the banning order in a local newspaper is fatal to the validity of the order. The appellant's viewpoint was that such failure was fatal as the requirement was mandatory. But Mr *Goel* argued in the alternative that the requirement

was directory and that, as such, non compliance was not fatal to the banning order.

The issue of mandatory (or imperative) and directory (or permissive) provisions has previously been discussed and considered by this Court in two fairly recent cases, namely, *Attorney-General v Chipango* (7) and *Attorney-General v Juma* (8), both of which were constitutional cases. However, the distinction between mandatory and directory provisions equally applies to ordinary statutes, as in this case. The distinction is that an absolute requirement (or provision) must be observed or fulfilled exactly; however, it is enough if a directory requirement is observed or fulfilled in substance. In *Chipango* (7), Doyle C.J. had this to say, at page 6 (lines 28--40):

p48

> "It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule', said Lord Campbell, L.C. can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. And Lord Penzance said 'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory '."

In this case, the general object intended to be secured by section 53(1) of the Penal Code is the publication of the banning order to the general public. This is particularly significant in view of the provisions of section 54 of the Penal Code which make, *inter alia,* reproduction or possession of a prohibited publication a criminal offence (misdemeanor).

Unlike *Chipango* (7) and *Juma* (8), the provisions here are virtually for the benefit of the general public.This, however, is not what is crucial; what is crucial is the general object intended to be secured by the requirement and, consequently, whether the particular requirement can be regarded as mandatory or directory.

In *Chipango* (7) it was held, *inter alia*, that publication in the Gazette (within the prescribed period) of Chipango's detention was a mandatory constitutional requirement, designed to guard against the possibility of the detainee being held incommunicado; for a person ought not be whisked away in secret. In any event, relatives or friends of the detainee may wish to visit, or to take some provisions to him or even institute legal proceedings to secure his early release. In that case, failure to comply strictly with the mandatory requirement caused "further imprisonment under the detention order to be invalid."

In *Juma* (8), the detainee was served with grounds for his detention in the English language which he could neither read nor understand. However, as the grounds were translated in writing into the detainee's language which he understood and the grounds were fully explained to him, this Court held that the spirit of the Constitutional requirement had been observed and, as the general object to

be secured by the requirement had been fulfilled, the requirement was, in those circumstances, regarded as directory.

In this case, the general object to be secured by the requirement is to communicate the banning order to the general public. In our opinion, publication of the banning order to the general public is mandatory. As the general object of the requirement was here fulfilled through publication of the banning order in the Gazette, we do not think that the omission to publish it in a local newspaper can be said to be fatal to its validity. In other words, whilst the publication of the banning order to the general public is mandatory, we would regard the requirement to publish in a local newspaper as directory.

The second ground of appeal alleged that the Court below was wrong to hold that the petition was not before Parliament, having held that the

p49

appellant's evidence was uncontroverted. The only evidence before the Court below was contained in the appellant's unchallenged affidavit. It was for the appellant to show on a balance of probabilities that his petition was before Parliament prior to the issuance of the banning order. The only evidence on the matter was contained in paragraphs 4 and 5 of the affidavit and read as follows:

" 4. That under the accepted procedure in a democracy, I together with Musakanya wrote a petition to Parliament through our member of Parliament for constituency expressing our grievances.
5. That before the petition could be heard but after the Speaker and all members of Parliament received copies, the President declared the petition a prohibited publication under s. 53 of the Penal Code."

According to the appellant, 'when the petition was ready to be debated as stated in paragraphs 4 and 5' of his affidavit, it was in order in every way and 'was before parliament'. He went on to say that:

> "In any event common sense and logic must apply. Parliament could not be ready to debate the petition as stated in paragraph 5 unless the Speaker had passed it, for until then, the question of the debate could not arise. The standing order would not have been complied with."

In order to determine whether the appellant's petition was in law before Parliament, that is, that the petition formed part of the "proceedings in Parliament," it is necessary to turn to the National Assembly Standing Orders 1980 which are made under the provisions of article 90(1) of the Constitution. The most relevant Standing Order for our purposes is Order 152 which lays down the procedure to be followed in the submission of a petition prior to its presentation by a member of Parliament in terms of Standing Order 153 and 154. Standing Orders 152 provides that:

> Every petition shall be signed at the beginning thereof by the member in charge of it and deposited for at least one clear day with the Clerk, who after examining it, shall submit it

> for Mr Speaker's approval. No petition shall be presented until such approval has been given by the petition being endorsed as follows: "Passed by Mr Speaker."

Quite clearly, paragraphs 4 and 5 of the appellant's affidavit merely serve to establish that he, together with another person, wrote a petition to Parliament, through their member of Parliament, in which they expressed their grievances and that the Speaker and all members of Parliament received copies of the petition but that before it could be heard it was proscribed by the President under section 53 of the Penal Code. There is thus no evidence on record to show that the procedure as laid down in Standing Order 152 was complied with. It is not enough to prove that copies of the petition were sent to the Speaker and to all members of Parliament. It must be established:

(1) That the member of Parliament in charge of the petition (a) signed it at its commencement; and (b) deposited it with the Clerk of the National Assembly for at least one clear day;
(2) That after examining the petition the Clerk submitted it to the Speaker for approval; and that the Speaker duly approved the petition by endorsing it with the words - 'Passed by Mr Speaker.'

p50

It must be emphasised that, "No petition shall be presented until" the Speaker's approval has been given by the petition being endorsed as follows: 'Passed by Mr Speaker'. There is here no evidence to show that stage was ever reached. It follows that the appellant's petition could not have been, and was indeed not, presented to Parliament; as such, it did not form part of the proceedings in Parliament. (See also Erskine May Parliamentary Practice, 17th ed at 62).

> " Parliament could not be ready to debate the petition as stated in Paragraph 5 unless the Speaker had passed it, for until then, the question of the debate could not arise. The Standing Order would not have been complied with."

This being the situation in which the appellant found himself, his second ground of appeal cannot succeed.

The third ground of appeal was that the findings on whether or not the petition was before Parliament had been based on evidence not before the Court. On the contrary, it is quite clear that the trial Court's findings were based on the evidence before it which was contained in the appellant's own affidavit. This ground is misconduct and cannot conceivably be entertained.

In his fourth ground of appeal, the appellant submitted that the Court below had been wrong to hold that it was *intra vires* the Constitution for the President to ban a petition to Parliament. He urged that no petition to Parliament could ever be against the public interest within the meaning of section 62 of the Penal Code or indeed in any other sense; and that, as such, no debate in Parliament could ever be against the public interest. He went on to say that the President could only exercise the powers under section 53 of the Penal Code if the offending publication is 'contrary to public interest'. He further submitted that paragraph 10 of his affidavit specifically stated that there was nothing subversive in it; and that because 'there is no debate, or matter in Parliament which can be 'contrary to public interest' it follows that the President acted unlawfully and unconstitutionally

when he banned (his) petition'.

The nub of this ground hinges on the appellant's belief that the petition was before Parliament and that, as such, freedom of debate could not be censured by a Presidential opinion no matter how honestly held that opinion might be. As we have already held, the petition was not before Parliament and so the banning order cannot be said to have interfered with the freedom of debate in Parliament. It is Parliament that has conferred (under section 53(1) of the Penal Code) an absolute discretion on the President to ban a publication which, in his opinion, is contrary to public interest. Public interest is defined under section 62 of the Penal Code in these terms:

> "62. For the purposes of sections fifty-three to sixty-one both inclusive . . . 'public interest' means the interest of defence, public safety, public order, public morality or public health."

Unless it is proved that the President acted in bad faith, or contrary to law, or under a view of the facts which could not reasonably be entertained, this action cannot be impugned. There is no such proof in this case. Accordingly, the Court below was not in error to hold that the President's action in the matter was *intra vires*.

p51

The fifth ground of appeal alleged that the Court below was wrong to hold that a detained person cannot petition Parliament for a remedy upon a personal or public interest. This ground was based on the following passage of the trial Court's judgment:

> " I find that the circumstances presented at the material time justified the President's action when the appellant's interests were weighed against those of the public in general. It was important to maintain public order and that is in the public interest is a question of balance between the interests of the individual complaining and those of the public at large. I find that under the circumstances it was proper for the President to prefer the interests of the public to those of the individual. The applicant has not shown that the President's action was in bad faith or for improper motives or was taken under extraneous consideration, or under a view of the facts or the law which could not reasonably be entertained."

We do not read in this passage a finding to the effect that a detained person cannot petition Parliament for a remedy upon a personal or public interest. The thrust of the passage is obviously that, in the circumstances of this case, it was proper for the President to prefer the interest of the public to those of the individual. In our view, the appellant's interpretation of the passage quoted above is erroneous and his ground based on it cannot succeed.

The sixth and final ground of appeal was that the Court below was wrong to equate the powers of the President under section 2(1) of the Inquiries Act, Cap. 181, with section 53 of the Penal Code when those latter powers are *intra vires* the Constitution and both would fall away if they conflict or restrict the enjoyment of rights conferred under the Constitution.
We turn again to the judgment of the trial Court where we find the following passage at page 9:

> " The wording of section 53 of the Penal Code is similar to that of section 2(1) of the

Inquiries Act, Cap.181, discussed in the case of *Nkumbula and the Attorney-General* (9). Section 2(1) of Cap.181 reads:

> The President may issue a commission appointing one or more Commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for "public welfare". Baron J.P. stated that a decision made under a power expressed in such terms cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or on an extraneous consideration or under the view of the facts or another law which could not reasonably be entertained."

It is obvious that the comparison between the provisions of section 53 of the Penal Code and section 2(1) of the Inquiries Act was made in relation to the principle law laid down in *Nkumbula* (9) (where section 2(1) of the Inquiries Act was discussed) and the trial Court came to the conclusion that that principle was equally applicable to the present case. The comparison was not made for any other purpose. There is thus no merit in the appellant's final ground.

The result is that the appeal is dismissed. As the appeal raised new points of law of public interest, there will be no order as to costs.

Appeal dismissed.

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