Judgment No. HB-76-2002

Case No. HC 1559/2002
X-Ref Bail 66-67/2002

SAZINI MPOFU **First Applicant**

and

KHETHANI AUGUSTINE SIBANDA **Second Applicant**

and

SUPERINTENDENT MADIDA **First Respondent**

and

CHIEF SUPERINTENDENT NYAMUKONDA **Second Respondent**

and

SUPERINTENDENT J J NDLOVU **Third Respondent**

IN THE HIGH COURT OF ZIMBABWE

CHIWESHE J

BULAWAYO 27 JUNE, 2 & 18 JULY 2002

N Mathonsi for 1st applicant
J Tshuma for 2nd applicant
M Moya-Matshanga for the respondents

Judgment

CHIWESHE J: In this matter the applicants sought and obtained a provisional order calling upon the respondents to show cause why a final order should not be made as follows:

1. That respondents produce the applicants before this court and explain why the said applicants have not been released from detention in terms of the orders of this court and the Supreme Court.

2. That respondents be held in contempt of court and an appropriate sentence be assessed.

3. That the applicants be released forthwith; and

4. That the costs of this application be borne by the respondents *"de bonis propriis"*

Pending determination of the matter the following interim relief was granted:

"That first, second and third respondents are directed to appear before this honourable court at 9.00 a.m on 27 June 2002 and produce applicants before the court and explain why the applicants have not been released in terms of the orders of court."

On 27 June 2002 respondents duly appeared before the court and produced the applicants as directed. The matter was heard then.

The facts of this matter are common cause. The applicants face charges of murder on two counts. They were being held at Khami Prison pending trial. The respondents are prison officers serving at Khami Prison where the second and third respondents are officer in charge and second officer in charge respectively. On 29 May 2002 this court granted an order admitting the applicants to bail. The State indicated then that it intended to appeal against that order. The effect of that indication was to suspend the order admitting applicants to bail. Subsection 3 of section 121 of the Criminal Procedure and Evidence Act [Chapter 9:07] provides:

"(3) A decision by a judge or magistrate to admit a person to bail shall be suspended if, immediately after the decision, the judge or magistrate is notified that the Attorney-General or his representative wishes to appeal against the decision and the decision shall thereupon be suspended and the person shall remain in custody until –

(a) if the Attorney-General or his representative does not appeal in terms of subsection (1) –
  (i) he notifies the judge or magistrate that he has decided not to pursue the appeal; or
  (ii) the expiry of seven days; whichever is the sooner; or
(b) if the Attorney-General or his representative appeals in terms of subsection (1), the appeal is determined."

Consequent upon the failure by the Attorney-General or his representative to appeal within the stipulated seven days, the suspension of the order of this court lapsed by operation of law. Accordingly on 14 June 2002 this court ordered the release of the applicants. The

warrants of liberation were issued and served on the respondents on the same date. Respondents did not release the applicants as ordered. Applicants then filed an urgent application with this court. On 18 June 2002 this court granted a provisional order directing that applicants be released immediately. The second respondent who is the officer in charge at Khami Prison refused to accept service of that provisional order. The order was eventually served on first respondent on 19 June 2002. Again respondents failed to release applicants.

In the meantime the State had appealed against the orders granted by this court on 29 May 2002 and on 14 June 2002. The appeal was dismissed on 20 June 2002 in terms of judgment number SC 50/2002 given under the hand of the Chief Justice. The Chief Justice then signed warrants of liberation directing the release of applicants. These warrants were served at Khami Prison on 24 June 2002 and again respondents failed to comply with that order.

First applicant was eventually released on 25 June 2002. He was immediately after that release arrested by the police. According to respondents second applicant was not similarly released as it was erroneously believed that he should be detained in respect of other charges not connected to this application.

The respondents gave *viva voce* evidence in open court. They admitted having been served with the court orders in question but pleaded the defence of superior orders. They said that according to standing orders given to them by their superiors none of them were allowed to release prisoners classified as "state security prisoners" without clearance from their superiors. According to their evidence applicants fell within that category of prisoners. They said that upon receiving the court orders they sought clearance from their superiors. They were instructed not to comply with the court orders. They argue that in terms of section 26 of the Prisoners Act Chapter 7:11 they were obliged to obey orders from their superiors. Having been ordered not to release the applicants, they had no choice in the matter. They said that with regards common law prisoners no similar standing orders were in force. Any court orders relating to such prisoners would therefore be complied with forthwith.

Subsection (1) of section 26 of the Prisons Act [Chapter 7:11], upon which the respondents' defence is premised provides:

> "(1) Every prison officer shall exercise such powers and perform such duties as may be assigned to him in accordance with this Act and shall obey all lawful directions in respect of the execution of his office which he may receive from any officer senior to him in the service." (my own emphasis)

Clearly the Prisons Act obligates every officer to obey lawful directions. Any instruction to disobey an order of this court or that of the Supreme Court is obviously not a lawful instruction. However the mere fact that an order is illegal does not on its own render the respondents liable for contempt of court. It must be shown that the order was not only illegal but patently so. In the case of *E Muchamba* vs *The State* SC 27-97 it was stated at page 4 of the cyclostyled judgment as follows:

> "It is well settled that a subordinate officer, where the orders of his superior are manifestly illegal, as in this case, is not only justified in questioning them, but even in refusing to execute such commands."

In my view the orders given to the respondents were manifestly and patently illegal. The respondents are senior prison officers of considerable experience in the service. They oversee the day to day administration of the prison population at Khami Prison. They are no strangers to court orders both in terms of their import and in terms of their execution. They must have known that any instructions from any quarters to the contrary were illegal and patently so. Indeed they have not pleaded ignorance in this regard. They knew what the law expected them to do. Having been given instructions to the contrary they did not appraise the court of the difficulties that they were facing. Neither have they been forthcoming in disclosing who in the chain of command had issued the illegal instructions. In the process no less than three court orders including one from the Chief Justice himself were disobeyed. That is unacceptable. I have no hesitation whatsoever in holding them liable for contempt of court.

I accept however that the respondents have since purged their contempt by releasing the first applicant. I will assume in the absence of evidence to the contrary that they did so in order to comply with the orders of this court and the Supreme Court. Their motive in this regard has been questioned by the applicants in two respects – namely that a copy of the relevant warrant of liberation has not been returned to the Assistant Registrar of this court as proof of action taken in pursuance thereof and secondly that the first applicant was released to the police on the authority of persons other than this court. Detective Matira and the respondents explained the circumstances under which the first applicant was arrested upon release. Detective Matira acted in terms of a valid warrant of arrest. Whether the simultaneous release and rearrest of the first applicant was by design or by coincidence is neither here nor there. Applicants are unable in my view to establish any wrong doing on the part of the respondents or the police in that transaction. The question of the return of copy of the warrant of liberation to the Assistant Registrar was canvassed. The respondents gave conflicting statements as to the procedure to be adopted. The correct procedure is that copies of such warrants must be returned to the Assistant Registrar of this court in order that the court be kept informed of the fate of any such orders it may have issued. I am satisfied that other than being an administrative flaw, not much turns on that point. I will accept therefore that as at 25 June 2002 when respondents released first applicant, they had purged their contempt. I will also accept the respondents' explanation as to why they had not released second applicant at the time.

In *Wilson* vs *Minister of Defence* 1999 (1) ZLR 144 it was held that where after civil contempt proceedings have been commenced the contempt has been purged, then it is no longer necessary for the applicant to proceed with the contempt proceedings. He is confined to his remedy for a claim of costs because any possible contempt will have been purged by the release of the applicant. In this case the applicants argue that the present case in that regard is distinguishable from the *Wilson* case and that therefore the same principle should not be made applicable. In my view there is no basis upon which any distinction can be made. The point is that the applicants have since been released and therefore the application has been overtaken by events. I will therefore dismiss the application save for that portion of it relating to applicants' costs.

It appears to me that the respondents were acting in terms of instructions given them by the State. Further their illegal actions were committed within the course and scope of their employ with the state. It appears to me unfair to visit the respondents personally with an order for costs. Instead I would order that the State meets applicants' costs on an attorney and client scale.

In my view applicants should have joined the relevant state authorities in their application. They knew from the outset the nature of respondents' defence to the application. In such instances it is prudent and desirable that the responsible heads of Government departments be cited together with the officers whose conduct forms the subject of the complaint.

Finally what sanctions if any should be imposed upon the respondents? In *Wilson* vs *Minister of Defence supra* GILLESPIE J held that where the contempt has been purged in a civil contempt case the court has a discretion taking into account all relevant factors as to whether or not any sanctions should be imposed on the respondents. I agree with that view. The respondents disobeyed two High Court orders and one Supreme Court order. Their conduct undermines the authority of the courts and impacts negatively on the due administration of justice. It also tarnishes the good image of the prison service. They are all senior officers with a wealth of experience. They hold positions of trust and responsibility. It is through their medium that court orders find effect. The court views their conduct in extremely bad light. Whilst it is accepted that their actions were a result of misdirections from their superiors, their actions cannot be condoned.

In my view the ultimate blame and responsibility rests on the second respondent in his capacity as officer in charge at Khami Prison. Whilst the first and third respondents associated themselves with the contempt in one way or the other, it is the second respondent whose responsibility it was to ensure that the court orders were complied with. I intend to impose appropriate sanctions upon all of them.

It is ordered as follows:

1. That the application be and is hereby dismissed save for costs.
2. That the State be and is hereby ordered to pay applicants' costs on an attorney and client scale.
3. That the second respondent be and is hereby ordered to pay a fine of $10 000.00 or in default of payment to undergo imprisonment for a period of 60 days. This sentence is wholly suspended for a period of 5 years on condition that he is not convicted of any offence committed within that period involving contempt of court and for which he is sentenced to imprisonment without the option of a fine.
4. That the first and third respondents be and are hereby cautioned and discharged.

Webb Low & Barry, applicants' legal practitioners
Criminal Division of the Attorney-General's Office, respondents' legal practitioners