

PAUL THEMBA NYATHI

Versus

DETECTIVE ASSISTANT INSPECTOR REFIAS MASUNA

And

DETECTIVE SUPERITENDENT MARTIN MATIRA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 10 APRIL 2003

N Mathonsi for the applicant
H Ushewokunze III for the respondent

Urgent Chamber Application

CHEDA J: This is an urgent chamber application wherein applicant seeks the following relief:

“Terms of Final Order Sought

First and second respondents show cause why:

1. That applicant should be forthwith freed and released and allowed to go home.
- 1a. That 1st and 2nd respondents should bear the costs.

Interim Relief Granted

2. That first and second respondents should produce the applicant before this honourable court at 11.30hours on 10 April 2003 and explain why he should not forthwith be set free.”

Applicant is Paul Themba Nyathi. On 1 April 2003 applicant attended to a court hearing at the Magistrates’ Court, Bulawayo where one Gibson Sibanda the vice President of the Movement for Democratic Change (MDC) court hearing. He was arrested by 1st and 2nd respondents as he was coming out of the said court hearing. He was taken to Bulawayo Central Police where he was charged with contravening

HB 53/03

certain sections of the Public Order and Security Act Chapter 11:17. Warned and cautioned statements were recorded from him. It is alleged that he had attended and addressed a meeting at the Movement for Democratic Change provincial offices wherein certain action groups were formed to mobilise people to participate in a mass stay away on 18 and 19 March 2003.

On 9 April 2003 *Mr Mathonsi* for the applicant applied to this court for an order that 1st and 2nd respondents should produce the applicant before this court and explain why he should not be set free. That application was granted and it was ordered that applicant be produced before the court at 11.30 hours on 10 April 2003. At the hearing applicant was not produced. *Mr Ushewokunze* for both respondents could not proffer any reasons why respondents failed to do so. The correct legal position is that failure to comply with a provisional order renders a person against whom the said order is made contemptuous and therefore should not be heard and such person remains in contempt until he has purged his contempt. However, in view of the fact that the matter is urgent and involves the liberty of the individual I used my discretion and allowed *Mr Ushewokunze* to make his submissions. *Mr Mathonsi* submitted that respondents have held applicant for more than 48 hours without releasing him or bringing him to court as per the legal requirements. I should state that in order for respondents to continue to hold applicant they should obtain a warrant for further detention.

In my view the issue which calls for determination is whether or not applicant is being legally held. On 10 April 2003 the Deputy Sheriff attempted to serve the urgent chamber application and provisional order but failed to do so. The return of service reads:

“RETURN OF SERVICE

10/04/03

Attempted Service on the 1st respondent Detective Inspector Refias Masuna and 2nd respondent Detective Superintendent Martin Matira at ZRP Bulawayo Central C.I.D. Law and order, First Floor Office No. 15 where I interviewed the said 1st respondent and 2nd respondent.

They refused to accept service and advised that we must serve the process on the Officer Commanding Matabeleland Province. They then locked us in their office and threatened to detain us in their cells.

Process herewith pending your further instructions.

Dated at BULAWAYO this 10th day of April 2003.

(Signed)
Deputy Sheriff Costs

500.00 Abortive Attempt (2)
60,00 Letter to the Registrar

560,00 Messrs Coghlan and Welsh”

As a result of the contents of the return of service *Mr Mathonsi* personally served 1st respondent and filed a certificate of service as per the rules of the High Court which reads –

“Certificate of service

I, NICHOLAS MATHONSI, the legal practitioner of record for the applicant hereby certify that at the offices of CID law and order, Central Police Station, Fife Street, Bulawayo on the 10th day of April 2003 at 10.30am in the forenoon/afternoon, I served the provisional order personally:-

Upon the First Respondent who read it in my presence and at the same time I explained the exigencies thereof.

(Signed)
.....
Nicholas Mathonsi”

HB 53/03

Despite successful service on 1st respondent applicant was still not produced in court. *Mr Ushewokunze* indeed found himself in an extremely difficult position in attempting to justify the apparent disrespectful conduct of the respondents. He argued that his latest instructions from 2nd respondent were that the continuous detention of applicant was lawful as he was in possession of a warrant for further detention issued on 9 April 2003. There are two problems in this assertion by 2nd respondent. Firstly according to *Mr Mathonsi* 2nd respondent did not have the said warrant as at 12.45pm on 9 April and secondly as at 12 noon on 10 April 2003 the said warrant was not only available to the court but to *Mr Ushewokunze* as well. I fail to see why it should not be made available in court bearing in mind that the respondents' case would either stand or fall by the production of the said document. It is my finding that the said warrant is non-existent.

Mr Ushewokunze further argued that it is the intention of respondents to charge applicant jointly with Mr Gibson Sibanda. This, may well be so, but, the fact still remains that as of now he is being held unlawfully. The state is perfectly entitled to take legal action against any individual who is reasonably believed to have committed an offence but that authority is not a blank cheque to do as one pleases but that all such actions should be with utmost respect for an individual's constitutional rights. These rights are not debatable as our constitution is supreme.

It was improper therefore for the respondents to continue to hold applicant without a legal authority to do so. In the event that they wanted to do so in order to continue with their investigations which is legally permissible, they should have obtained a warrant for further detention in terms of the existing laws of the country.

Mr Mathonsi submitted that respondents should bear the costs of this application, which is opposed by respondents. The basis for his submission is that respondents were not co-operative and hence acted both unlawfully and unreasonably. In determining the question of costs it is pertinent to examine the conduct of the respondents. Respondents had been holding applicant in the police cells for over 48 hours despite the fact that they were advised against their illegal actions. They refused to accept service by the Deputy Sheriff who is the officer of this court. It was part of the order that the Deputy Sheriff effect such service and by refusing and threatening to detain the Deputy Sheriff they acted contemptuously *vis-a-vis* this court. In addition to this, they refused to comply with the court provisional order after 1st respondent had been successfully served by *Mr Mathonsi* in that they refused to produce applicant before this court. This type of conduct on the part of the police is unacceptable and in my view the court should show its indignation by ordering the costs as prayed for by applicant.

The following order is made therefore:

1. That the continued detention of the applicant be and is hereby declared unlawful.
2. That the applicant be and is hereby freed and allowed to go home.
3. That if the state still wants to prefer charges against the applicant it shall proceed by way of summons.
4. That the costs of this application shall be borne by first and second respondents jointly and severally the one paying the other to be absolved.

Mr Ushewokunze has appealed against the order of costs against 1st and 2nd respondents I therefore accordingly grant him leave to appeal against costs only. This I do even with full knowledge that respondents are in contempt and should not have

HB 53/03

been heard. The Supreme Court, will therefore deal with the issue of costs and lay it to rest.

Coghlan & Welsh applicant's legal practitioners
Attorney-General respondents' legal practitioners