Judgment No. 98/2003
Case No. HC 1755/2003
HC 1756/2003

(1) **NOMSA MAZUNGA**
And
SIBUSISIWE NYATHI
And
PHUMUZILE KHUMALO
Versus
THE MINISTER OF HOME OF AFFAIRS
And
THE COMMISSIONER OF ZIMBABWE REPUBLIC POLICE
And
DETECTIVE INSPECTOR MOYO

(2) **HILDA MUNATSI**
And
ETHEL MOYO
And
TAISEKWA NYABVURE
And
THEMBEKILE MOYO
and
RUZAY SHOKO
And
FRIDA NYOKA
And
BEAUTY MACHISOTO
And
SANDRA TADEYE
And
PHOEBE NKOMAZANA
And
OLIA SIMANGO
Versus
DETECTIVE INSPECTOR MOYO
And
COMMISSIONER OF POLICE
And
MINISTE

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6IBMBIO COMIBMDOS COM66666666666666666666Uªhow why it is necessary to deal with the matters in this fashion. On 20 August 2003, the Bulawayo Central Police under guidance or command of the respondent Detective Inspector Moyo embarked on an operation which resulted in the applicants and others being rounded up and taken to Bulawayo Central Police Station. The applicants were arrested in Fifth Avenue Flea Market and Fort Street vicinity. The area is colloquially referred to as the "World Bank" on account of a perception of the business that is believed to dominate the area. The applicants were conveyed to the police station where they were searched and various amounts of money were recovered. The sums of money were taken by the police. The applicants were not issued with receipts for the amounts. The amounts were however, entered into some form of record and the applicants signed against the amounts taken. After the money was taken the applicants were told that they were free to leave the station. No formal charges were preferred against them. From the amounts taken by the police the applicants were given taxi or bus fares to go home. They were told to report at the police station the following day at 0800 hours. They did so but no one attended to them until 1630 hours when they were told to go home and return the following day at 0800 hours. They complied but the previous day's pattern repeated itself. They decided to seek legal representation. Each applicant gave an explanation for possession of the amount taken by the police.

Nomsa Mazunga had Z$1 900 000,00 in her possession. Gift Ncube had Z$475 000,00 in his possession which he says was going to use to pay school fees.

Sibusisiwe Nyathi had Z$1 850 000,00 which she says she wanted to use to buy tiles and a deep freezer for her business. She was arrested at Station Furnishers. Phumuzile Khumalo had Z$590 000,00 which was for building materials for her house under construction. Hilda Munatsi had Z$714 000,00 which she claims was for her business as she has a stand at the flea market. Ethel Moyo had Z$480 000,00 which she says is her trading capital as she also has a stand at the flea market. Taisekwa Nyabvure had Z$443 100,00 which he says is her trading capital as she has a stand at the flea market. Thembekile Moyo had Z$400 000,00 which she also explained was her trading capital. Ruzay Shoko had Z$399 000,00 also said to be trading capital. Frida Nyoka had Z$330 000,00 also said to be trading capital. Sandra Tadeye had Z$250 000,00 also said to be trading capital. Phoebe Nkomazana had Z$211 500,00 and Botswana P1 000,00. Her explanation for the P1 000 is that her husband works in Botswana and this amount is from him. Olia Simango had Z$50 000,00 also said to be trading capital.

Attempts by applicants' legal practitioners to have the amounts released were in vain resulting in these proceedings being launched. At the time of the commencement of the proceedings the police had not formally charged the applicants for committing any criminal offence. In the opposing papers, however, the police alluded to the charge they intend to prefer against the applicants which reads – (All the four applicants in the first matter being jointly charged)

> "Contravening section 4(1)(a)(i) of the exchange Regulations Statutory Instrument 109/96 as read with section 5(1)(a)(I) of the Exchange Control Act [Chapter 22:05]"

In that between 20 – 22th (sic) day of August 2003 and at Fort Street/5th Avenue Flea market, Bulawayo, the accused Nomsa Mazunga, Gift Ncube, Sibusisiwe Nyathi and Phumuzile Khumalo or one or more of them, unlawfully dealt in foreign currency, that is to say, accused persons gave unknown amounts of cash either in foreign currency or local cash to the accused person unknown to the prosecutor without a permit or licence authorising them to do so". In the second matter a similar charge was also filed with the difference being the names of the accused persons. With such a charge sheet it is clear why the applicants were not brought before a criminal court for the preferment of charges. All that the charge says to the applicants is that the state suspects that they deal in foreign currency illegally with persons and in sums that the state itself does not know. I will return to this issue. The applicants seek an order in the following terms:-

"Terms of Final Order sought

That you show cause to this honourable court why a final order should not be made in the following terms:

1. That the seizure of the monies from the applicant be and is hereby declared unlawful.
2. The respondents pay costs of suit.

Interim Relief Granted

1. That the respondents be and are hereby ordered to release the monies to the applicants respectively immediately upon the service of this provisional order.

Service of the provisional order

This order shall be served upon the respondents at their respective offices by the deputy Sheriff or the applicant's legal practitioner."

It is trite that if:

(a) no criminal proceedings are instituted in connection with an article which has been given a distinctive identification mark and retained in police custody; or

(b) it appears that the article is not required at the trial for the purposes of evidence or for purposes of an order of court; or

(c) criminal proceedings are instituted and the accused admits his guilt and pays a deposit fine; the article must be returned to the person from whom it was seized (if he may lawfully possess it) or, if he may not lawfully possess it, to the person who may – *Commissioner of Police* v *d'Elia* 1992(1) ZLR 367(S) and *Criminal Procedure in Zimbabwe* by John Reid Rowland at 7-17. The respondents seem to be saying that the cash is required for purposes of evidence or for purposes of an order of court as outlined in (b) above. In *South African Criminal Land and Procedure* (Volume V) by A V Lansdown and J Campbell at page 135 the learned authors observed –

'Search and seizure in the hands of the state coperate as a vigorous device in the administration of criminal justice, facilitating the identification of offenders, enabling the police to accomplish their functions of investigating offences and preventing crime and providing the authorities with evidence essential in the prosecution and punishment of wrongdoers. But this device is a double-edged weapon whose effective use in protecting society against law breakers at the same time exposes members of the community to the danger of improper law enforcement.

'Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. Human personality deteriorates and self reliance disappears where homes, persons and possessions are subject at any hour to unherald search and seizure by the police' – per JACKSON J in *Brinegar* v *United States*, 338 US 160 (1949). The exercise of the power of search, coupled as it is with the invasion of the privacy and dignity of the citizen, often in circumstances of shock and resentment, will be closely scrutinised by the courts. In the event of a dispute as to what power is conferred by a warrant, the warrant will be construed with reasonable strictness and, in cases of doubt, all questions pertaining thereto will be interpreted in favour of the person whose privacy has been invaded." *De Wet* v *Willers NO* 1953(4) SA 124 (T); *S* v *Myende* 1962(4) SA 426 (N); *Minister of Justice* v *Desai NO* 1948(3) SA 395 (AD); *Cine Films (Pty) Ltd* v *Commissioners of Police* 1972 (2) SA 754 AD and *Capitol Radio (Pvt) Ltd* v *Minister of Information & Ors* 2000 (2) ZLR 265(H).

I hold the view that the police have no common law right of search and seizure, save when expressly empowered by statutes – *R* v *Howard* 1966(3) SA 423 (RAD). The police officer, in deciding whether he will seize a particular article, must

use his judgment as to whether it may afford evidence of the commission of the particular crime being investigated. It seems to me that general and exploratory searches, not clearly aimed at any specific object, but in the hope of finding evidence in support of a charge being investigated are not covered by statutory provisions. An arrest should not be used as a pretext to search for evidence.

The gravamen of the applicants' case is that because they were not formally charged after their arrest the sums of money must be released to them. In other words because they are not placed on remand the money must be released.

The right of search on arrest, in *casu*, is given by section 49 of the Criminal Procedure and Evidence Act [Chapter 9:07]. In terms of this section the police making the arrest were empowered to seize any article referred to in the section which is in the possession or control of the arrested person. The sums of money outlined were found in possession or control of the respective applicants at the time of their arrest. Section 49 sets out articles which may be seized, whether on arrest or under part V as being –

(a) articles concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence in Zimbabwe or elsewhere,
(b) articles which on reasonable grounds are believed to afford evidence of the commission or suspected commission of an offence in Zimbabwe or elsewhere; and
(c) articles which are intended or on reasonable grounds are believed to be intended to be used in the commission of an offence.

According to Detective Inspector Moyo –

> "The police were carrying out an operation to arrest people dealing with foreign currency without permit or licences. The applicant and her co-applicants were observed by police patrols engaged in unlawful foreign currency dealings. They were then arrested and searched whereupon large sums of cash were discovered in their possession. The cash was seized by the police … This applicant was surely put under arrest and ferried to the police station. On her was $714 000,00 which was seized by the police as an exhibit

> in the coming trial … The applicants were advised that the police were in the process of completing their dockets so that they will be taken to court for remand proceedings … The applicants shall soon appear in court."

What he is saying is that the cash was seized on arrest of the applicants and is intended to be used as evidence (pursuant to the provisions of section 49). The decision by the police not to place the applicants on remand should not be condemned but rather be commended. The use of summons procedure rather than placing applicants on remand should not be viewed as weakness in the state case but rather as the most appropriate way of dealing with offenders of this kind. The cause of justice is not served by placing accused persons in applicants' position on remand: *Criminal Procedure in Zimbabwe supra* at 5-4. If they were observed by policeman "engaging in unlawful foreign currency" dealings their arrest is understandable. In terms of section 25(2)(f) of Criminal Procedure and Evidence Act *supra*, the police have the power to arrest the applicants where a "reasonable suspicion" existed that they were loitering in any such circumstances as to afford reasonable grounds for believing that they have committed or were about to commit an offence. From the charge sheet that I have outlined it seems to me that the quality of the prosecution case is on the weak side. Can I order the release of exhibits on account of perceived weakness in state case? I do not think so because the charge sheet is a mere outline of the state allegation and not evidence. This does not seem to be the appropriate forum to make such a determination. The police arrested the applicants on reasonable suspicion of contravening the Exchange Control legislation. The applicants are not challenging their arrest.

The seized money may, if the trial court so desires be forfeited on conviction. The word "article" in this section is not limited and includes money – see *S* v *Hove*

1979 RLR 374(A). So the money may not only be required at the trial for the purposes of evidence but also for purposes of an order of court - section 59(2) of the code. These factors have to be taken into account when striking a balance between the interests of society in the prosecution and punishment of wrongdoers on the one hand and the danger of exposing members of the community to improper law enforcement. This is a delicate balancing exercise. This is what I will seek to do.

Once there is an allegation that the applicants "where observed illegally dealing in foreign currency" by the police leading to their arrest, whether the police placed them on remand or opted for the summons route is immaterial to the seizure of the cash as exhibit. Looking at the allegations, my *prima facie* view is that the case looks suspiciously weak. I, however, cannot order that the money seized for use as evidence be released on that account alone. In the circumstances, I find that the applicants failed to establish the basis for the relief sought. Relief sought is not merited.

I, accordingly dismiss all the applications with costs.

(1) *Coghlan & Welsh,* applicants' legal practitioners
(2) *James, Moyo-Majwabu & Nyoni*, applicant's legal practitioners
Paradza, Dube & Associates for all respondents instructed by Civil Division of the Office of the Attorney-General