

GEOFFREY ZOMBE SIKAZWE

And

PATRICK CHIBALE NSAKANYA

And

JEFFREY ELISHA PHIRI

Versus

DETECTIVE CHIEF INSEPECTOR MCHADA

And

**THE COMMISSIONER OF POLICE
COMMISSIONER AUGUSTINE CHIHURI**

And

**MINISTER OF HOME AFFAIRS
MINISTER KEMBO MOHADI**

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 15 DECEMBER 2005

S Sibanda for applicants

Judgment

CHEDA J: This is an application for a provisional order in which applicant sought the following relief:

1. The surrender of applicants' passports.
2. The release of applicants' motor vehicles being a Toyota Hiace registration ACG 6198 and documents relating to it.
3. The release of 1st applicant's pair of brown shoes, and

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4. That 1st respondent pays costs of this application at an attorney and client scale.

The historical background of this matter is that applicants are Zambian nationals who entered Zimbabwe on 24 March 2005 through the Plumtree Boarder Post *en route* to Zambia. They were arrested on 5 April 2005 together with one Bobby Tizirai Tapera on allegations of armed robbery. During the investigations of this matter, there was a lot of discussion between the investigating officer and applicants' legal practitioners which led to charges against applicants being withdrawn on 21 July 2005. They asked for the release of their passports, 1st respondent refused on the understanding that the Attorney-General's office was taking the matter to trial on 22 July 2005. This, in fact, turned out that this was a bail application in relation to Bobby Tapera and not a trial.

Wide discussions between the investigating officer, 1st respondent together with officers from the Attorney-General on behalf of respondents and applicants' legal practitioners were held. There seemed to be some disagreements as to the release of applicants' passports.

Applicants' had raised various *alibis*. In addition, applicants had information that certain members of the police force were working in collusion with criminals involved in this matter in an attempt to ensure the escape of a key witness. It is only fair in my

view to say that this matter was fraught with difficulties on the part of investigating officers in particular 1st respondent.

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First respondent in my view was probably one of the few genuine investigators in this matter. Other police officers involved seem to have had other ideas which were frustrating his investigations.

After perusal of this urgent chamber application I ordered that applicants serve this application on respondents which they did and the matter was set down for hearing on 21 November 2005.

On the day of the hearing, the parties to this application had reached an out-of-court settlement in that it had been agreed that the items being held by respondents be released to applicants. The only contentious issue was the question of costs which Mr *Sibanda* insisted they be paid personally by 1st respondent on an attorney and client scale. This was on the basis that despite the fact that charges against applicants had been withdrawn, 1st respondent refused to release the said various items.

An award of costs on the attorney and client scale, though regarded as punitive is intended to indemnify the successful party for the expenses which he has been put in through unnecessarily initiating or defending litigation.

The general rule is that all costs unless expressly otherwise enacted are in the discretion of the Judge, see *Kruger Bros and*

Wasserman v Ruskin 1918 AD 63. Such discretion must however be judiciously exercised see *Levben Product (Pvt) Ltd v Alexander Films (SA) (Pvt) Ltd* 1957(4) SA 225(SR).

In casu, the principle that costs follow the event is no doubt applicable. The only issue which fall for determination by this court

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is whether such costs should be visited upon 1st respondent in his personal capacity. These costs are *de bonis propriis*, which costs are applicable where a person acts or litigates in a representative capacity, see *Byala v Durban City Council and another* 1936 NPD 174 and *Watkins v Kingsburgh Town Council* 1956(2) SA 47(N).

In order for such an order to be made, a good reason should be given, such as improper or unreasonable conduct or lack of *bona fides* on the other party. In other words the successful party must proffer a good reason to convince the court that such costs are justified.

The 1st respondent is a police officer who at all material times was acting in that capacity. As pointed out *supra* this case had sucked in a lot of people both visible and invisible. In my view, 1st respondent stood out as a police officer who was keen to unravel the armed robbery syndicate which had engulfed the country in general and the city of Bulawayo and its environs in particular. His efforts were being frustrated by some of his colleagues and others.

After the charges had been withdrawn, it is clear however, that there was no lawful ground for holding on to the property etc,

but his fervent belief that there was still a need to investigate this matter further can not be said to have been unreasonable in the circumstances. His refusal to release the said items cannot in my view, be said to lack *bona fides*. Lack of *bona fides* is one of the reasons which can result in the court

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awarding costs *de bonis propriis*, see *Grobellar v Grobellar* 1959(4) SA 719(AD).

Police officers work under very difficult circumstances in an attempt to maintain law and order. There is, therefore, a need for the courts to adopt a robust approach when scrutinising their behaviour in the conduct of their duty. In an environment where the police are being accused of corruption, the courts should do everything they can to avoid unnecessary condemnation of their otherwise genuine actions.

Such condemnation can easily dampen the spirit of honest police officers in the execution of their duties. Having, so said, I should not be misunderstood that I support unlawful and wrongful police actions where this has been proved to have taken place. Police officers, are however, enjoined to execute their duties within the confines of our laws. Police officers being human like all of us do make errors in their duties, which errors at times need not to be condemned without just cause. It is, in my opinion, against both

public policy and the interest of justice for the courts to punish police officers who in the execution of their duties make genuine errors in the mistaken belief of the law of by reason of error of judgment. The consequences of such impetuous orders will discourage the police from fighting crimes in society.

In the use of my judicial discretion, respondents are ordered to pay costs on an attorney and client scale jointly and severally each party paying the others to be absolved.

Advocate S K M Sibanda & Partners, applicants' legal practitioners