

REPORTABLE 18)



JONATHAN NATHANIEL MOYO

v

(1) SERGEANT CHACHA (2) THE ZIMBABWE ANTI-CORRUPTION COMMISSION (3) THE COMMISSIONER GENERAL OF POLICE, ZIMBABWE REPUBLIC POLICE (4) THE PROSECUTOR-GENERAL

**CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA JCC, GARWE JCC,
GOWORA JCC, HLATSHWAYO JCC, PATEL JCC,
GUVAVA JCC, UCHENA JCC & ZIYAMBI AJCC
HARARE, JUNE 14 & SEPTEMBER 20, 2017**

L Uriri, for the applicant *V Munyoro*, for the first and second respondents No appearance for the third respondent *T Magwaliba*, for the fourth respondent

MALABA CJ: The applicant approached the Constitutional Court alleging that his right to personal liberty has been infringed by the first respondent, a police officer on secondment to the second respondent (hereinafter referred to as "ZACC"). The applicant asserts that the first

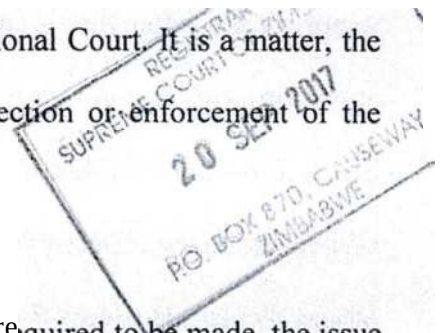
respondent arrested him following a warned and cautioned statement, alleging that he had committed offences of abuse of office, fraud, corrupt concealment from a principal of personal interests in a transaction, and obstruction of the course of justice.

The ground on which the alleged infringement of the applicant's right to personal liberty is based is that the arrest was unlawful for two reasons. The first reason is that the police officer who arrested the applicant had no reasonable suspicion of him having committed any of the offences he was alleged to have committed. The applicant alleges that as a result of the arrest by the first respondent he was deprived of liberty arbitrarily or without just cause. The second reason for the allegation that the arrest was unlawful is that ZACC, under whose authority the first respondent acted, has no powers of arrest. The contention is that the first respondent could not, on behalf of ZACC, lawfully do that which his principal had no power to do.

There is a material dispute of the facts on which the allegation of the unlawfulness of the arrest of the applicant is made. The conflict of facts cannot be resolved without the hearing of oral evidence from the arresting detail and those who were present during the interview of the applicant which preceded his arrest.

The issue for determination is whether the Constitutional Court has jurisdiction to determine the question of the lawfulness of the applicant's arrest and, *ipso facto*, violation of his right to personal liberty. The lawfulness of an arrest is an issue of protection of the right to personal liberty, the determination of which involves the interpretation and application of specific provisions of the Criminal Procedure and Evidence Act [Cap. 9:07] ("the CP&E Act").

The Magistrate's Court, before which the applicant was required under the relevant provisions of the CP&E Act to appear, and had undertaken to appear in terms of the Indemnity of Release into the custody of his legal practitioner entered into with the arresting detail, has jurisdiction to hear and determine the question of the lawfulness of the applicant's arrest. The material dispute of facts generated by the application would be resolved by the Magistrate's Court before which the applicant would plead the alleged unlawfulness of his arrest. The matter for determination does not fall within the jurisdiction of the Constitutional Court. It is a matter, the determination of which does not involve the interpretation, protection or enforcement of the Constitution.



There being no constitutional matter on which a decision is required to be made, the issue of which of the facts in dispute is the truth falls outside the jurisdiction of the Constitutional Court.

The Constitutional Court holds that it would not be within its competence to determine the question of the lawfulness of the applicant's arrest. The law governing the resolution of the matter required the applicant, like all arrested persons, to appear before a Magistrate's Court to challenge the lawfulness of his arrest.

The detailed reasons for the decision are now set out.

The facts on which the decision whether or not the applicant's arrest was lawful are disputed.

They are not fully disclosed in the founding affidavit. In any case, they would relate to

proof of a matter, the determination of which involves the interpretation and application of statutory provisions by a remand court.

The applicant states that on 2 November 2016 he was informed that the Acting Prosecutor-General had written to the third respondent, directing that he be arrested. The fourth respondent denies writing a letter to that effect. He admits that he wrote a letter directing the third respondent to follow due process. There is a letter filed of record, the contents of which are clear. It is the import of the letter that is in dispute as between the applicant and the fourth respondent. The applicant states that not long after he was informed of the existence of the letter, Silas Pondo, a Senior Assistant Commissioner of Police and Acting Secretary of ZACC, visited him. Mr Pondo invited him to the offices of ZACC for an interview. The applicant went to the offices of ZACC at Mount Pleasant Business Park at 1500 hours on 2 November 2016 in the company of his lawyer, Mr Hussein, and his ministerial security aides.

The applicant avers that after a fifteen minute wait he and those who had come with him were led into a boardroom. In the boardroom there were Mrs Farai O. Mashonganyika-Chinyani, a Commissioner of ZACC; Mr Pondo; Mr Lovemore Finde, an investigator; Mr Alex Masiye, the Chief Investigations Officer; Sergeant Chacha; and a legal officer to ZACC.

The applicant alleges that at the commencement of the meeting Mr Finde, supported by Mrs Chinyani, indicated that his security aides had to leave the room. He said he reluctantly acceded to the request. The applicant alleges that Mr Finde requested that his legal practitioner leave the room as what was about to take place was "just an interview". Mr Hussein protested the

request on the ground that it was the applicant's constitutional right to have a legal practitioner present during the interview. Mrs Chinyani then indicated that Mr Hussein could stay on condition he did not ask questions or interfere with the interview.

The interview, which was video recorded, commenced at 3 pm. The applicant says it proceeded with Mr Finde putting questions to him from a written list. The applicant alleges that Mrs Chinyani and the legal officer to ZACC interjected as he responded to the questions. They told him to answer the questions put to him and avoid giving detailed responses. Mr Hussein objected to the interjections, saying the interviewers were coercing him to give answers they wanted to hear. The applicant averred that the first respondent did not ask him any question in the course of the interview. He says he got the impression that the first respondent was present as a recorder. Mr Pondo, who deposed to the opposing affidavit on behalf of ZACC, said the first respondent was part of the investigating team and not a recorder.

The applicant said that after a "lengthy interview", which ended at 7.30 pm, Mr Finde informed him that ZACC had been investigating the case of alleged corruption at the Zimbabwe Manpower Development Fund (hereinafter referred to as "ZIMDEF") for four months. He said they had concluded that the applicant had committed the crime of abuse of office. The applicant's Ministry superintends the operations of ZIMDEF. He said that he was told that the purpose of the interview had been to get his views on the findings of the investigating team. He was then "handed over" to the first respondent. The first respondent read a warned and cautioned statement, charging



The applicant states that his legal practitioner expressed displeasure at the manner in which the “interview” had been conducted. He states that Mr Hussein asked the first respondent whether he was the investigating officer and if he had formed a reasonable suspicion that the offences had been committed. The applicant states that Mrs Chinyani and the legal officer to ZACC told Mr Hussein that the question whether the first respondent had reasonable suspicion of the offences having been committed by the applicant was for a court to decide.

The applicant avers that throughout the interview Mr Hussein had indicated that he had vouchers, written guidelines and other documents which proved the lawfulness of the actions under investigation. He said that ZACC’s officers told him he could supply the documents later. At that stage Mr *Uriri* joined him and Mr Hussein. The three of them prepared the warned and cautioned statement in which he denied the allegations of having committed the five offences. The applicant said that as they were drafting the statement the first respondent told Mr Hussein that he had made a few corrections to the warned and cautioned statement. The offence of obstructing the course of justice was added. It was founded on the allegation that the applicant had frustrated his arrest. The allegation was also based on the statements the applicant had made in the media on the allegations of criminal conduct made against him.

Following the making of the warned and cautioned statement, the first respondent told the applicant that he was under arrest. He said that a discussion ensued between the first respondent and his legal practitioner on the possibility of him being released into the legal practitioner’s custody pending appearance at the Magistrate’s Court. According to the applicant, an agreement

was reached between the first respondent and his legal practitioner that he be released into the latter's custody. The first respondent prepared and read out an "Indemnity of Release". The Indemnity of Release stated that the applicant had been formally arrested on allegations of criminal abuse of office, fraud, money laundering, and obstructing the course of justice.

The applicant undertook to attend at the offices of ZACC on 4 November 2016 at 0800 hours to facilitate his appearance at the Harare Magistrate's Court. The Indemnity of Release warned the applicant of arrest and detention if he failed to comply with the undertaking. Mr Pondo denies the allegation that there was a discussion between the first respondent and the applicant's legal practitioner which led to the production of the Indemnity of Release. He said that the Indemnity of Release was prepared at their own instance without any suggestion from the applicant's legal practitioner. The applicant was then released into the custody of his legal practitioner on the conditions set out in the document.

The applicant filed the application on 3 November 2016, alleging breach of fundamental rights by the respondents. The allegations were to the effect that:

1. ZACC does not in terms of the Constitution or the law have the power to arrest and detain suspects;
2. The fourth respondent does not in terms of the Constitution or the law have the power to order the third respondent to arrest an individual;

3. The first respondent could not at the same time act on behalf of ZACC and the third respondent;
4. The purported arrest, charge and detention of the applicant on 2 November 2016 by ZACC's functionary, namely Sergeant Chacha, was in contravention of the Constitution of Zimbabwe and therefore invalid; and
5. The search warrants of ZACC referenced WSS-ZACC NO. 38/2016 and WSS NO. 45-2016 are invalid.

The applicant filed an urgent chamber application for an order that the main application be heard on an urgent basis. He also sought an interim order staying the criminal proceedings envisaged against him in the Magistrate's Court. The urgent chamber application was heard and granted by CHIDYAUSIKU CJ on 3 November 2016.

The applicant has not stated the interest which he seeks to protect in approaching the Constitutional Court, alleging the infringement of fundamental rights guaranteed under ss 49 and 50 of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution"). The facts suggest that he is purporting to do so in his personal interest under s 85(1)(a) of the Constitution. He does not state specifically which of the many rights protected under ss 49 and 50 of the Constitution have been infringed. The facts suggest that the applicant is attacking his arrest which he alleges was unlawful and therefore an infringement of his right to personal liberty.

It is common cause that the applicant was arrested by the first respondent, who was on secondment to ZACC. The applicant makes the allegation of unlawfulness of his arrest from the following standpoints. He alleges that the warrants of search and seizure, the execution of which produced some of the information relied upon in his arrest, were executed in contravention of s 13(4) of the Anti-Corruption Commission Act [*Cap. 9:22*] (hereinafter referred to as “the Act”).

The relevant subsection of s 13 of the Act provides as follows:

“(4) An officer who intends to make any search, entry or seizure for die purposes of this section shall —

- (a) notify the officer commanding the police district in which the officer intends to make the search, entry or seizure; and
- (b) be accompanied by a police officer assigned to him or her or by the police officer referred to in paragraph (a):

Provided that where an officer has reason for believing that any delay involved in obtaining the accompaniment of a police officer would defeat the object of the search, entry or seizure, he or she may make such search, entry or seizure without such police officer.”

The applicant contends that the subsection makes it a precondition that ZACC’s officers had to notify the officer commanding the police district in which the premises to be searched were located. They had to ask the officer commanding to assign a police officer to them, who had to accompany them in the search, entry or seizure. The applicant contended that, while ZACC could dispense with the accompaniment by a police officer, notification of the officer commanding the police district is a peremptory requirement. He further stated that he was reliably informed that the officer commanding the district in which the ZIMDEF premises are located was not notified. He argues that this rendered the search and seizure unlawful. He went on to argue that on this basis alone his arrest was unlawful. Whether the search, entry and seizure carried out by ZACC’s

officials met the requirements of s 13(4) of the Act is not an issue related to any *decision* on a constitutional matter. It does not call for the Constitutional Court's attention.

The applicant also challenged the lawfulness of his arrest by impugning the actions of the Acting Prosecutor-General. His case is founded on the allegation that the letter the fourth respondent wrote to the Commissioner-General of Police directed the latter to have him arrested. He contends that such power does not repose in the office of the fourth respondent as provided for in the Constitution. Section 259(11) of the Constitution gives the Prosecutor-General the power to direct the Commissioner-General of Police to investigate and report to him or her on anything which, in the Prosecutor-General's opinion, relates to an offence or suspected offence. The contention is that s 259(11) of the Constitution does not authorise the fourth respondent to direct the third respondent to have a suspect arrested.

In addition, the applicant argues that ZACC has no power to arrest any individual. He contends that the arresting officer, being on secondment to ZACC, was subject to the same limitations as his principal. The applicant argues that ZACC can only make a recommendation of an arrest of a person to the Commissioner-General of Police in terms of s 255(3) of the Constitution. He said that no recommendation was made to the Commissioner-General of Police for his arrest. He contended that s 1 of the Schedule to the Act gives effect to the limited powers of ZACC in respect of the arrest of persons suspected of criminal conduct by providing that one of the powers of ZACC is to make recommendations to the police to arrest and detain any persons reasonably suspected of committing any of the offences falling within its jurisdiction.

The applicant said that, in the absence of a recommendation to the Commissioner-General of Police that he be arrested, his arrest was unlawful. It must be stated, however, that no law requires ZACC to recommend to the Commissioner-General of Police the arrest of a person reasonably suspected of having committed or of committing any of the offences falling within its jurisdiction. Section 255(3) of the Constitution only provides that the Government must ensure, through legislative and other means, that ZACC has power to recommend the arrest and secure the prosecution of persons reasonably suspected of corruption, abuse of power and other improper conduct which falls within its jurisdiction.

Giving effect to the peremptory directive contained in s 255(3) of the Constitution, the Government provided in s 1 of the Schedule to the Act that ZACC has power to recommend to the police the arrest of a person reasonably suspected of committing any of the offences falling within its jurisdiction. The words “recommend to the police” cannot be narrowly interpreted to mean “recommend to the Commissioner-General of Police”. Whether what ZACC did was in compliance with the provisions of s 1 of the Schedule to the Act is not an issue connected to any decision on a constitutional matter. It is determinable by interpretation and application of the specific provisions of the statute.

The applicant also attacks the legality of his arrest on the ground that the first respondent did not form a reasonable suspicion that he had committed the offences falling within the jurisdiction of ZACC before arresting him. The applicant argues that the first respondent did not conduct the interview, nor did he prepare the questions put to him. He argues that the first respondent did not examine the documents his lawyer referred to during the interview. The



applicant argues that the first respondent arrested him on instructions from ZACC and not on his own reasonable suspicion. It was further argued that the first respondent had not acted on the instruction of the third respondent. The applicant contended that, in the absence of reasonable suspicion on the part of the first respondent, his arrest was unlawful.

The application is opposed by the second and fourth respondents. It is apparent from the papers that the first respondent would have filed an opposing affidavit had the lawyers representing ZACC not erroneously believed that Mr Pondo could speak for the first respondent. The opposing affidavit deposed to by Mr Pondo on behalf of ZACC shows that even if there would have been a constitutional matter, the Constitutional Court would not have been in a position to determine it because of the existence of a material dispute of facts.

Mr Pondo stated that the first respondent is a duly attested member of the Zimbabwe Republic Police seconded to ZACC in terms of s 3 of the Police (Transfer and Secondment) Regulations, Statutory Instrument 819A/1980 (hereinafter referred to as “the Regulations”). The first respondent was a member of the team that was tasked with the investigation of the applicant for alleged involvement in the commission of offences of fraud, corruption and abuse of office at ZIMDEF. He and the first respondent were present throughout the interview of the applicant which took place in the boardroom at ZACC's premises. The purpose of the interview was to get the applicant's side of the story on the allegations that he was involved in the commission of the offences. The meeting with the applicant was also intended to afford him the opportunity to comment on some of the evidence ZACC had gathered during the investigation of the alleged commission of the offences. Mr Pondo said that the interview was conducted in the presence of

the applicant's legal practitioner. The first respondent and he heard all the questions that were put to the applicant and the answers he gave. He said they were able to form a reasonable suspicion that the applicant had committed the offences set out in the warned and cautioned statement.

The fourth respondent also opposed the application. He said that the functions of ZACC under s 255(1) of the Constitution are not mutually exclusive but complementary. He contended that the arresting of a person reasonably suspected of a crime is not a function. He argued that it is only a power exercised in the process of carrying out a function. The relevant function ZACC would be discharging, as required by s 255(1)(b) of the Constitution, by having a person reasonably suspected of corruption, abuse of power and other improper conduct falling within its jurisdiction arrested, is the combatting of the offences in question. Having a person reasonably suspected of the offences falling within its jurisdiction arrested is a power, the exercise of which depends on the existence of the grounds for a lawful arrest. He went further to state that the function of assistance from members of the Police Service denotes general as well as specific assistance. Such assistance, he argued, would include the arresting of persons reasonably suspected of the offences falling within the jurisdiction of ZACC.

The fourth respondent said that arresting persons reasonably suspected of crimes is any police officer's function. He also argued that s 255(3) of the Constitution enjoins the Government to empower ZACC to recommend the arrest and prosecution of persons reasonably suspected of corruption. This, he contends, does not preclude police officers attached to ZACC from effecting arrests, more so in matters which they would have investigated and formulated a reasonable suspicion upon.

\ "

The fourth respondent views the application as premature and devoid of merit, as the issues raised could have been heard, debated and crystallized in a lower court. He prayed for the dismissal of the application.

For an issue to fall within the jurisdiction of the Constitutional Court, it must be a constitutional matter or connected with a decision on a constitutional matter.

No constitutional matter has arisen in this case. The Constitutional Court is set up in terms of s 166 of the Constitution and its jurisdiction is provided for under s 167 of the Constitution, which provides:

“167 Jurisdiction of Constitutional Court

(1) The Constitutional Court —

- (a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;
- (b) **decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131(8)(A) and paragraph 9(2) of the Fifth Schedule; and**
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter." (The emphasis is mine)

The Constitutional Court has no jurisdiction to determine a matter which is not a constitutional matter. In any case brought before the Constitutional Court, it has to ensure that the issue for determination is a constitutional matter or an issue connected with a decision on a constitutional matter.

The Constitution defines “constitutional matter” in s 332 as follows:

“‘constitutional matter’ means a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution;”.

The import of the definition of “constitutional matter” is that the Constitutional Court would be generally concerned with the determination of matters raising questions of law, the resolution of which require the interpretation, protection or enforcement of the Constitution.

The Constitutional Court has no competence to hear and determine issues that do not involve the interpretation or enforcement of the Constitution or are not connected with a decision on issues involving the interpretation, protection or enforcement of the Constitution.

The critical issue is whether the applicant’s arrest was lawful. To answer this question, it must be established what it is that constitutes a lawful arrest. An arrest is a juristic act exercised by an authorised functionary. The starting point is that in terms of s 49(1)(b) of the Constitution every person has the right to personal liberty, including the right not to be deprived of liberty arbitrarily or without just cause.

Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. An arrest which does not meet the requirement of a lawful arrest is an odious interference with personal liberty. The general position is that every deprivation of liberty is *prima facie* unlawful and must be justified in terms of an objective norm. See *Ingram v Minister of Justice* 1962 (3) SA 225 (W) at 227D; *S v Purcel-Gilpin* 1971 (1) RLR 241 (AD); *Ngcobo v Minister of Police* 1978 (4) SA 930 (D); *Minister of Home Affairs and Anor*

v *Bangajenci* 2000 (1) ZLR 306 (SC). The requirements of a lawful arrest are elements of the protection of the right to personal liberty that have been defined in specific terms by statutory provisions.

Section 49(1)(b) of the Constitution is in broad terms which do not specify the requirements of what constitutes a lawful deprivation of liberty. In the case of arrest, s 49(1)(b) is given effect to by s 25 of the CP&E Act. The section provides:

“25 Arrest without warrant by peace officer or other officer

(1) Any peace officer and any other officer empowered by law to execute criminal warrants is hereby authorised, subject to the general or specific directions of a superior officer or person placed in authority over him, to arrest without warrant —

- (a) any person who commits any offence in his presence:
- (b) any person whom he or she has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule or the Ninth Schedule:

Section 2 of the CP&E Act defines “peace officer” to include “any police officer”. The Ninth Schedule of the CP&E Act contains all the offences listed under the Schedule to the Act relating to s 13 of that Act.

Section 50 of the Constitution, which the applicant alleges was violated by the first and second respondents, also deals with what constitutes a lawful arrest. It also gives an arrested person the right to challenge the lawfulness of the arrest before a court. The best way of reading the section is to start by reading s 50(8), which provides that any arrest that contravenes the requirements of the section is illegal. The relevant subsections of s 50 provide that:

"50 Rights of arrested and detained persons

(1) Any person who is arrested —

(a) must be informed at the time of arrest of the reason for the arrest; ...

(e) must be permitted to challenge the lawfulness of the arrest in person before a court and must be released promptly if the arrest is unlawful.

(8) An arrest or detention which contravenes this section, or in which the conditions set out in this section are not met. is illegal. ...'\

Section 50(1)(a) of the Constitution is given effect to by s 41 A(1) of the CP&E Act, which provides;

“41A Arrested person to be *in* formed of his or her rights

(1) Subject to this section, where a person has been arrested by a peace officer, whether with or without a warrant, the peace officer shall cause the person to be informed promptly, in a language he or she understands, of -

(a) the reason for the arrest; ...”.

Section 50(1)(e) of the Constitution is given effect to by the provisions of s 41 A(6) (b) and

(c) of the CP&E Act, which provide:

"(6) Every person concerned in the arrest of another person under this Act or any other enactment, and whether the arrest is with or without warrant, shall ensure that the arrested person is -

(a) treated humanely and with respect for his or her inherent dignity; and

and (b) permitted to challenge the lawfulness of the arrest in person before a court;

(c) released promptly if the arrest is *unlawful*.”

What is beyond doubt is that what constitutes a lawful arrest is set out in statutory provisions that give effect to the broad terms of the provisions of the Constitution guaranteeing the right to personal liberty. Personal liberty is not interfered with by means of an arrest only. The statutory provisions deal with situations of deprivation of personal liberty by means of arrest for

offences. The Constitution is not directly applicable in the determination of the question of what constitutes a lawful arrest. What are applicable are the statutory provisions. The Constitution is only applicable indirectly through the statutory provisions that give effect to its provisions.

It is apparent from the relevant statutory provisions that a lawful arrest is in large part predicated on the existence of a reasonable suspicion of the commission of an offence. The point is made in *Dumbell v Roberts* [1944] 1 All ER 326, where Scott LJ commented at 329:

“The power possessed by constables to arrest without warrant ... provided always that they have reasonable grounds for their suspicion is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt.”

In *Williams and Another v Msipha NO and Ors* 2010 (2) ZLR 552 (S) at 570D-F it is stated:

“Respect for the fundamental right to the protection of the law is a guarantee for judicial protection of the fundamental right to personal liberty. Section 13(2)(e) of the Constitution authorises deprivation of an accused person of personal liberty where there is reasonable suspicion of him having committed a criminal offence. That is the only ground on which a judicial officer faced with a request by a public prosecutor for the remand of an accused person is authorised by law to deprive the accused person of his or her liberty by an order of remand, in or out of custody, for the purpose of ensuring his or her appearance at the trial on the charge.”

The law is therefore that a person arresting another has to have a reasonable suspicion that an offence has been committed or is being committed by the person he or she arrests. There is no dispute over the standard of a lawful arrest and its location in statutory provisions. The validity of the statutory provisions on what constitutes a lawful arrest is not challenged.

The main challenge to the lawfulness of the arrest of the applicant is based on the contention that the first respondent did not form a reasonable suspicion of him having committed any of the offences set out in the warned and cautioned statement. Mr *Uriri* pressed the contention in the applicant's heads of argument that even if the first respondent had formulated a suspicion,

it was not a reasonable one, as it would have been based on the content of the exchanges between the applicant and Mr Finde during the interview conducted by the latter.

The difficulty is that it is not for the Constitutional Court to decide whether or not the first respondent formed a reasonable suspicion of the applicant having committed the offences set out in the warned and cautioned statement. Before a court with the power to hear and determine the matter the first respondent would have to say in evidence whether or not he formed the suspicion. It is he who could say on what basis he formed the suspicion. He would have been subject to cross-examination. It is *only* after finding that the first respondent formed the suspicion required by the law that the court hearing the evidence could decide whether the suspicion formed was proved to be reasonable.

Whether the person who arrested another had a reasonable suspicion of the arrestee having committed an offence is a question of fact. That question relates to the arresting person's state of mind at the time of arrest. It is about the arresting person's interpretation of facts. The interpretation and conclusion reached subjectively give rise to the question whether there were grounds the knowledge of which would have caused a reasonable person in the position of the arrester to form the suspicion of the arrestee having committed the offence for which he or she was arrested.

In *R v vein Heerden* 1958 (3) SA 150 (T) it was said at 152E:

"The test for determining the existence of a reasonable suspicion is an objective one, that is, the grounds of suspicion must be those which would induce a reasonable person to have the suspicion."

In *Castorina v Chief Constable of Surrey* [1996] LG Rev Rep 241 at p 249. Woolf LJ commented that whether or not an arrest was lawful depended upon the answers to three connected questions. Those questions were:

- “ 1. Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
2. Assuming the officer had the necessary suspicion, was there reasonable cause for suspicion? This is a purely objective requirement to be determined by the Judge if necessary' on the facts found by a jury.
3. If the answer to the two previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion has it been exercised in accordance with the principles laid down by LORD GREENE MR in *Associated provincial picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223”.

In the same judgment, Sir Frederick Lawton at p 460 said:

"Suspicion by itself, however, will not justify an arrest. There must be a factual basis for it of a kind which the court would adjudge to be reasonable. The facts may be within the arresting constable's own knowledge or have been reported to him. When there is an issue in a trial as to whether a constable had a reasonable cause, his claim to have had knowledge or to have received reports on which he relied may be challenged. It is within this context that there may be evidential issue as what he believed to be the facts. But it would be for the court to adjudge what were the facts which made him suspect that the person he arrested was guilty of the offence which he was investigating."

In *Attorney-General v Blumears and Anor* 1991 (1) ZLR 118 (S) at 122A-E, GUBBAY CJ

said:

“The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. This standard represents a necessary accommodation between the individual's fundamental right to the protection of his personal liberty and the State's duty to control crime. It seeks on the one hand, to safeguard the individual from rash and unreasonable interference with liberty and privacy, and from unfounded charges of crime; yet on the other, to give fair leeway for enforcing the law in the community's protection. The criterion of reasonable suspicion is a practical, non-technical concept which affords the best compromise for reconciling these often opposing interests. Requiring more would unduly hamper the legitimate enforcement of the law'. To allow less would be to leave law-abiding persons at the mercy of the whim or caprice of the authorities.”

In the case of Muzonda v Minister of Home Affairs and Another 1993 (1) ZLR 92 (S) at

96E, GUBBAY CJ held thus:

“It is not sufficient for a peace officer to personally believe that he has reasonable grounds on which to base the arrest. These grounds must, in addition, be justifiable from an objective point of view, that is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable grounds.”

The applicant was arrested and the intention was to bring him before a magistrate for initial remand. It is at these proceedings that the applicant ought to have challenged the lawfulness of his arrest. The question of the lawfulness of the applicant's arrest would have been within the jurisdiction of that court. The Magistrate's Court would have had the competence to conduct the factual inquiry into whether or not the first respondent formed a reasonable suspicion of the applicant having committed the offences set out in the warned and cautioned statement.

It is clear that the question the applicant sought to place before the Constitutional Court for determination is whether what the first respondent did under the services of ZACC in arresting him was in compliance with the requirements of a lawful arrest. The issue involves a finding of facts; and the interpretation and application of the statutory provisions on the requirements of a lawful arrest. The determination of the issues does not need proof of violation of the fundamental right to personal liberty. It requires proof of the facts in dispute. It also requires proof of compliance with the statutory requirements of a lawful arrest. The determination of the issues does not involve the interpretation, protection or enforcement of the Constitution. None of the issues is a constitutional matter.

The *Indemnity of Release* bound the applicant in terms of the law to report at the offices of ZACC on 4 November 2016 for the purposes of appearing before a *magistrate* for remand. Had he appeared in accordance with the *Indemnity of Release*, the applicant would have been in a position to challenge the lawfulness of his arrest before the magistrate. That court would have heard evidence and made findings of fact in the adjudication of the challenge to the lawfulness of his arrest. The applicant can still challenge the lawfulness of his arrest in that court.

The question whether ZACC has powers of arrest is closely related to the question whether the first respondent had power to arrest the applicant in the services of ZACC. These are questions which the magistrate can deal with in considering whether the arrest was lawful or not. The determination of the question whether ZACC has powers of arrest involves an answer to the question whether ZACC, in the exercise of its functions, could have the first respondent, a police officer, arrest any person if it reasonably suspects the person of having committed an offence falling within its jurisdiction, provided the police officer also reasonably suspects the person of having committed the offence. This is a matter that the magistrate hearing the question of whether the first respondent reasonably suspected the applicant of having committed the offences falling within ZACC's jurisdiction could competently determine.

The inquiry into the question whether ZACC has arresting powers would be an academic exercise without first determining whether the first respondent, as a police officer on secondment, had arresting powers he could exercise in the services of ZACC. Even before making that finding, the most important inquiry would be whether or not the first respondent had a reasonable suspicion of the applicant having committed the offences set out in the warned and cautioned

The applicant took issue with the statement in the Indemnity of Release that the first respondent is a police officer on secondment to ZACC. He did so on the basis that he understood secondment to mean stripping the first respondent of his powers as a police officer. Mr *Uriri* argued for the applicant that the first respondent was a servant of ZACC. He went further, in the heads of argument, to state that the *onus* was on the first respondent to prove the terms of his secondment. Section 3 of the Regulations provides for the secondment of police officers to employment outside of the Regular Force.

Section 24 of the Police Act [*Cap. 11:10*] provides:

“24 Powers and authority to cease on vacation of office

When any member for any reason ceases to hold or exercise his office, the powers, functions and authority vested in him as a member shall cease immediately.”

The import of s 24 of the Police Act is that the only instance in which a member of the Police Force ceases to have the powers, functions and authority vested in him as a member is vacation of office. The services as a member are terminated upon vacation of office. A police officer does not cease to hold or exercise his office by reason of secondment. From a reading of s 3 of the Regulations, secondment is when a member of the Regular Force is transferred to employment outside the Regular Force in the service of the State upon such terms and conditions as may be fixed by the Commissioner-General. Such an officer continues to have the powers vested in a member of the Police Force, including the power of arrest.

The CP&E Act is a law that has been enacted to give effect to the Constitution. Section 41A of the CP&E Act provides equal protection of the law to all arrested persons who want to challenge the lawfulness of their arrest. Protection of the law is a constitutional principle that is operationalised through the statutory provisions. The principle of equal protection of the law requires that the applicant be subjected to the same treatment to which every similarly situated arrested person desirous of challenging the lawfulness of his or her arrest is treated.

The jurisdiction of the Constitutional Court, as defined in s 167(1) (b) and (c) of the Constitution, includes cases involving allegations of infringement of fundamental human rights and freedoms enshrined in *Chapter IV* of the Constitution. Section 85(1)(a) of the Constitution, which gives a right to a person alleging infringement of a fundamental human right or freedom to approach a court for the vindication of the right or freedom and protection of his or her interest, does not confer jurisdiction.

The making of an application alleging infringement of a fundamental human right or freedom does not necessarily mean that the issue for determination is violation of a fundamental human right or freedom enshrined in the Constitution. The Constitutional Court still has to satisfy itself that the issue for determination is a constitutional matter or an issue connected with a decision on a constitutional matter involving the interpretation, protection or enforcement of the constitutional guarantee of the fundamental human right or freedom.

In this case, notwithstanding the allegation that there was violation of the applicant's right to personal liberty enshrined in s49(1)(b) of the Constitution, the issue for determination is

whether the arrest of the applicant complied with the requirements of a lawful arrest prescribed under s 25 of the CP&E Act. The meaning of lawful arrest is not in issue.

The determination of the question whether the arrest of the applicant fell within the meaning of a lawful arrest would not involve the interpretation or enforcement of the Constitution. It involves the application of the meaning of the statutory provisions to the facts found proved by credible evidence. So a matter does not become a constitutional matter and fall within the jurisdiction of the Constitutional Court just because it is brought in terms of s 85(1) of the Constitution.

The applicant has not explained why he did not utilise the remedies under the CP&E Act. He has not in the same vein alleged that the provisions in the CP&E Act are invalid. One cannot ignore non-constitutional remedies, preferring to directly enforce the right as enshrined in the Constitution. Section 41A of the CP&E Act is a remedy enacted to fulfil the constitutional requirements and, for as long as it complies with the Constitution, it is part of the Constitution. Where the question for determination is whether conduct the legality of which is impugned is consistent with the provisions of a statute, the principle of subsidiarity forbids reliance on the Constitution, the provisions of which would have been given full effect by the statute.

The principle of subsidiarity has been explained in the cases of *Majome v Zimbabwe Broadcasting Corporation and Ors* CCZ 14/2016 and *Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/2016. It states that a litigant who avers that his or her constitutional right has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to

protect the right, unless he or she wants to attack the constitutional validity or efficacy of the legislation itself. Norms of greater specificity should be relied upon before resorting to norms of greater abstraction.

There is a court of first instance which is bestowed with the jurisdiction to make a determination on the facts and the unlawfulness of the arrest. There is one legal system in Zimbabwe in terms of which disputes are resolved.

In Boniface Magurure & 63 Others v Cargo Carriers International Hauliers (Pvt) Ltd

supra it is stated at p 9 of the cyclostyled judgment:

“The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity' underscore the fact that the Constitution sets the standard with which every other law authorised by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible. As was put in *Gcaha v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC):

‘The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes.’”

Under a single legal system, laws are enacted to give effect to the Constitution. A remedy that is consistent with the Constitution serves the purposes of the Constitution when it is used in accordance with the provisions of the law by which it is established. Under our criminal justice system, the Magistrate's Court is an integral part of the mechanism prescribed by the Constitution for the protection and enforcement of fundamental rights of persons arrested on allegations of having committed or committing criminal offences.

In Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd supra

it was said at pp 6-7 of the cyclostyled judgment:

“A constitutional matter arises when there is an alleged infringement of a constitutional provision. It does not arise where the conduct the legality’ of which is challenged is covered by a law of general application the validity of which is not impugned. The question whether an alleged conduct constitutes the conduct proscribed by a statute requires not only proof that the alleged conduct was committed, it also entails that the statutory provision against which the legality of the conduct is tested be interpreted to establish the content and scope of the conduct proscribed before it is applied to the conduct found proved.”

The applicant *has* a remedy under s 41A(6)(b) of the CP&E Act. This is notwithstanding the fact that the same right is provided for under s50(1)(e) of the Constitution. He has not challenged the validity or efficacy of s 41 A(6)(b) of the CP&E Act. He has just chosen to challenge his arrest in terms of the Constitution when he has a remedy under the statute.

Karl Klare in an article titled “Legal Subsidiarity & Constitutional Rights: A Reply to AJ

Van der Walt”, (2008) 1 Constitutional Court Review at p 135 states that:

“The *raison d’etre* of subsidiarity principles is to strike an authoritative balance between the conflicting values of judicial deference and constitutional supremacy, so that courts are not at large weighing the conflict on an *ad hoc*. case-by-case basis.”

In *Mazibuko and Ors v City of Johannesburg and Ors* 2010 (4) SA 1 (CC) the principle is set out as follows:

“Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.”

In *Majome's case supra* it was said at p 12 of the cyclostyled judgment:

“The applicant w'as bound by the principle of subsidiarity in the choice of the law on which to found the cause of action. According to the principle of subsidiarity litigants who aver that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless they want to attack the constitutional validity or efficacy of the legislation

itself. See AJ van der Walt: '*Constitutional property Law*' 3 ed Juta p 66, *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40, *Chirwa v Transet Ltd* 2008 (2) SA 24 (CC) paras 59, 69."

The principle of *subsidiarity* seeks to prevent the Constitutional Court from having to decide on an *ad hoc* basis whether or not to exercise its jurisdiction. That method would make the law uncertain and open the Constitutional Court to the criticism of handpicking certain cases over others, as opposed to applying a general principle to all cases. The purpose of *subsidiarity* was stated in the article by Karl Klare *supra* as being the prevention of a claimant from precipitating a full-dress adjudication of a constitutional issue when the Legislature has given effect to a constitutional right. *Subsidiarity* is therefore seen as performing a "gate-keeping function". It precludes litigants whose rights are protected under a statute enacted to give effect to constitutional rights from relying on such constitutional rights before the Constitutional Court for redress, as opposed to first seeking redress under the statute. The matter may end up at the Constitutional Court. It must do so through the correct process provided for in the wholesome and hierarchical legal system.

In terms of s 13(3) of the Act, ZACC is governed by the CP&E Act. The section provides:

“(3) In exercising its powers, the Commission shall be governed by the relevant provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which govern the police.”

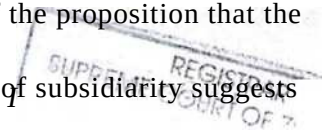
The actions of the first and second respondents are subject to the CP&E Act. This means that ZACC must meet all the requirements of the CP&E Act that bind the police in the execution of their duties, including compliance with the requirement of a lawful arrest. The question whether ZACC complied with the statutory provisions on a lawful arrest is not a constitutional matter. The

applicant was at large to pursue the challenge of the unlawfulness of his arrest in terms of that Act.

This course of action is in line with the principles of subsidiarity.

Mr Uriri correctly conceded the applicability of the principle of subsidiarity. He conceded that the applicant had the right under s 46A(6) of the CP&E Act to challenge the lawfulness of his arrest before the remand court. He sought to urge the Constitutional Court to find that there were exceptional circumstances that justified the decision by the applicant to approach the Constitutional Court directly for a relief that a remand court had power to grant. The argument was that the applicant feared indictment to the High Court once he had appeared before the Magistrate's Court to answer to the charges. Mr Uriri sought to motivate the point in oral argument. It had no basis in the founding affidavit.

An application falls or stands on the founding affidavit. Exceptions must have pride of place in the founding affidavit. They cannot be raised for the first time in oral argument. An exception is and must be based on a rule of law. The fact that the fourth respondent intended to indict the applicant when he appeared before the Magistrate's Court would not be of concern to the Constitutional Court. It had no jurisdiction to deal with the issue in the absence of a constitutional matter. The reason given by Mr Uriri for the justification of the proposition that the application be treated as an exception to the applicability of the principle of subsidiarity suggests that the real purpose of making the application was to avoid appearance before the Magistrate's Court and not vindication of the right to personal liberty.



The challenge to the validity of the warrants for search and seizure in this Court is also misplaced. The law relating to warrants of search and seizure is not contained in its details in the Constitution. The applicant correctly pointed out the sections of the Act which govern the validity of warrants of search and seizure obtained by ZACC. A dispute as regards the lawfulness or otherwise of such warrants does not require the interpretation and application of the Constitution. It requires the interpretation of the Act itself. It does not require the Constitutional Court to determine the issue.

The applicant challenged the lawfulness of the arrest on *the* basis that the fourth respondent directed the third respondent to arrest him. This still goes to the challenge of the lawfulness of his arrest, which can be addressed in the Magistrate's Court. A further difficulty with this point is the way that the applicant has pleaded this issue. He alleged that the fourth respondent directed the third respondent to arrest him. He then avers that he was not arrested by the third respondent or an officer under the third respondent. Instead he takes the view that the first respondent was a member of ZACC and could not have acted under the direction of the third respondent while on *secondment*. According to the applicant, the arrest was effected by the first respondent under the direction of ZACC.

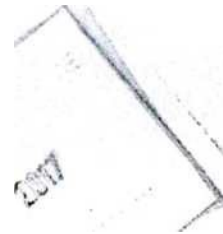
Whatever view the applicant takes of the relationship between ZACC and the first respondent, the question of what s 13 of the Act, as read with s 1 of the Schedule to the Act, means would need to be determined. The Magistrate's Court would have to answer the question whether the statutory provision means that ZACC can have a person arrested whom it reasonably suspects of having committed an offence falling within its jurisdiction by a police officer who

her own reasonable suspicion of the person having committed the offence. Would such action by ZACC and the police officer concerned not produce a lawful arrest? There would be no constitutional matter to attract the exercise of jurisdiction by the Constitutional Court.

There is no proper legal basis on which the applicant approached the Constitutional Court.

In the result, it is ordered that the application be and is hereby dismissed with no order as to costs.

GWAUNZA JCC: I agree



GAR WE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

r>

GUVAVA JCC: I agree

UCHENA JCC: I agree

ZIYAMBI AJCC: I agree



Hussein, Ranchod and Company, applicant's legal practitioners

Civil Division of the Attorney General's Office, for the first and second respondents

National Prosecuting Authority, for the fourth respondent