

NEVER MUNHUMAYENGWA  
versus  
DETECTIVE CONSTABLE NYONI  
and  
DETECTIVE INSPECTOR GAWAZA  
and  
THE COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE  
MAKARAU J  
HARARE, 13, and 14 February and 8 March 2006

**Urgent Chamber Application**

Mr *Nkomo*, for applicant  
Mrs *Sweto*, for respondents

MAKARAU J: The applicant was picked up by the police on Sunday 5 February 2006. He was taken to Matapi Police Station where he was detained without charge. On 6 February 2006, the investigation of the matter was turned over to the 1<sup>st</sup> respondent. On the same day around 4.30 p.m. the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondents proceeded to applicant's workplace, Dockson Investments (Private) Limited, in Shamva. In Shamva, they received information that the applicant had committed fraud or theft against his employer. The two respondents then investigated the matter and on Wednesday 8 February, took the applicant to court for his initial appearance before court. The prosecutor instructed the investigators to carry out further investigations before the applicant could be placed on remand.

Instead of having the applicant released, the police issued a warrant for the applicant's further detention. On the strength of this warrant, the applicant was detained again in police custody, allegedly pending further investigations. On 9 February 2006, the applicant's legal practitioners made inquiries with the 1<sup>st</sup> and 2<sup>nd</sup> respondent as to why the applicant was still in police custody way past the 48 hours provided for in the law. Notwithstanding this inquiry, the respondent kept the applicant in detention.

On 10 February, 2006, the applicant filed this urgent application for an order compelling the police to bring him before the court. Sometime during the day of 10 February 2006, the applicant was released. For the purpose of this judgment, it is

unnecessary that I determine the exact time of day when the applicant was released by the police.

When the matter was called up before me the question that remained for determination was whether the applicant is entitled to his costs for bringing the application and if so, whether he is entitled to such costs on the scale pertaining to legal practitioner and client. The respondents argued that they are not liable for costs at all in this matter as the detention and subsequent release of the applicant were all lawfully done.

With respect, the detention of the applicant was fraught with violation of his rights as a suspect. At the time of his arrest, no charge had been framed against him. It appears that he was arrested before any investigations had been carried out.

There is no dispute that in terms of the law, the police are mandated to bring an accused person before the court within 48 hours of his or her arrest. To exceed this period is to violate the rights of the accused person. Having arrested the applicant on Sunday, the respondents were at law mandated to bring him before the court on Tuesday 7 February 2006. To detain him beyond close of business on that date became unlawful.

It is common cause that the applicant was taken to Mrewa Magistrates Court on 8 February, a day after his detention had become illegal. The prosecutor declined to have the applicant placed on remand and the proper manner of proceeding for the police would have been to release the accused. Instead, a warrant for further detention was issued. It is arguable whether this warrant had any legal validity as it sought to extend what was now illegal detention. Whatever the merits of the argument, it is clear that notwithstanding the absence of evidence to sustain a *prima facie* case of fraud against the applicant, the police were determined to hold him in custody. In my view, the police, being the highly trained force that they are, were aware of the illegality of their actions and sought to justify their illegal detention of the applicant by making him pay an admission of guilt fine for driving without a valid licence when at the time of his arrest he was not driving and the charge upon which he had been detained was fraud or theft from employer.

I have no doubt in my mind that the police acted knowingly in detaining the applicant well beyond the mandatory period. I reject the suggestion by the applicant that

they did this at the instance of any one. I accept the position as put by the 1<sup>st</sup> respondent in his affidavit that detentions are done by the police in their discretion and subject to validation by the courts.

That the respondents are liable to meet the costs of the applicant in this matter presents itself to me clearly. Due to their unlawful conduct, the applicant had to approach the court for relief.

Normally, a court will not order a litigant who complies with the law before an order is made against them to meet the costs of the other litigant on the higher scale unless some special grounds are present and the court wishes to express its disapproval of the conduct of the party or wishes to place the successful litigant in the position he would have been in relation to costs had he not be compelled to litigate. Such special grounds include instances where the party has been dishonest or fraudulent or was actuated by malice or has been guilty of grave misconduct. (See *Sentrachem Ltd v Prinsloo* 1997 (2) SA1; *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 and *Hamza v Bailen* 1949 (1) SA 993 (C).

In my view, the conduct of the respondents in this manner merits criticism as it amounted to a contemptuous disregard of the applicant's rights for no apparent reason. The courts cannot stop the respondents from violating the rights of suspects they are dealing with but the court can express its disapproval of such conduct by imposing an appropriate order of costs.

On the basis of the foregoing, it is my view that the respondents cannot escape an award of costs of the higher scale.

In the result, I make the following order:

1. The respondents, jointly and severally, the one paying the others to be absolved, are to pay the applicants cost on the legal practitioner and client scale.

*Legal Resources Foundation*, applicant's legal practitioners.

*Civil Division of the Attorney-General's Office*, respondents' legal practitioners.