KNOWLEDGE NYAMHOKA and THREE OTHERS
versus
OFFICER COMMANDING ZRP, MANICALAND PROVINCE and TWO OTHERS

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 13 & 14 MARCH 2006

Urgent Chamber Application

Mr *Maanda,* for the 1st, 2nd and 3rd applicants
Mr *Chibwe & Mr Mugabe,* for the 4th applicant
Mr *Chikafu,* for the respondents

HUNGWE J: In this application the applicants seek the following relief:

> "TERMS OF THE FINAL ORDER SOUGHT
>
> That the Respondents show cause, if any, why a final order should not be granted in the following terms:
>
> 1. The arrest and detention of Applicants be and is hereby declared wrongful and unlawful.
> 2. Should the Respondents wish to prosecute the applicants the Respondents shall not arrest and detain the applicants in respect of the allegations raised in this matter and are hereby directed to proceed against the applicants by way of summons.
> 3. The Respondents shall pay the Applicants costs on a legal practitioner and client scale
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> TERMS OF THE INTERIM RELIEF GRANTED
>
> Pending the resolution of this matter it is ordered that:
>
> 1. The arrest and detention of Applicants be and is hereby declared wrongful and unlawful.
> 2. The Respondents and all those acting through them or under their control be and are hereby ordered to immediately release the Applicants from their custody and alternatively forthwith bring them before a Court of law.
> 3. The respondents are hereby ordered to return forthwith to 3rd Applicant possession and control the property listed in listed in Trust Maanda's affidavit.

4. The Respondents are hereby ordered to return forthwith to 4th Applicants possession and control the property listed in annexure "B" to the Supporting Affidavit of Tafadzwa Ralph Mugabe.
5. The Respondents pay the Applicants' costs on a legal practitioner client scale."

This application was filed at 4 o'clock on 10 March 2006 on an urgent basis and placed before me by the Registrar while I was on the Mutare circuit. I directed that the papers be served on the respondents' attorney, who is the Attorney-General, at Harare. Further I also directed that upon service the matter be set down for hearing at 10 o'clock on 13th March 2006 in view of the fact that an infringement of the Bill of Rights was being alleged by the citizen against the State.

On 13 March 2006, Mr *Maanda* indicated that his clients, the 1st, 2nd and 4th applicants had been brought to court on Saturday 11 March 2006. The 3rd applicant had been released without charge. As such no mandamus was being sought in this respect. However as the applicants had been held detained in excess of the statutory forty-eight hours, they still seek a *declaratuur* in respect of the detention. They also sought an order *mandament van spolie* in respect of the property seized from the 3rd and 4th applicants. Mr *Chibwe* indicated that due to the changed circumstances they will now seek a final rather than an interim order. Mr *Chikafu* sought a postponement to accommodate his superiors travelling from Harare for this hearing.

By consent the matter was postponed to the afternoon.

In the resumed hearing, Mr *Chikafu* still appeared alone. He indicated that he did not oppose the order sought in respect of the release of the property confiscated form the 3rd and 4th applicants but that his superiors from Harare were in the process of persuading the police to retrieve the same from the members of the Central

Intelligence Organisation who had the physical possession of the property in question. In respect of the *declaratuur,* Mr *Chikafu* made the submission that as his office had not been made privy to the warrants relied upon by the respondents in detaining the applicants beyond the legal limit of forty-eight hours, the legality or otherwise of the detention complained of can only be confirm once he has had access to the papers relied upon by the police. He needed more time to peruse the further detention warrants the police relied on which they are not keen to release to him. His superiors would hopefully succeed in persuading the police to release the same.

Another application for a postponement was sought by the respondent's counsel to allow further submissions after efforts to establish the true facts have been made. I also directed that senior law officers in the person of Mr Jagada and Mrs Ziyambi, being present in Mutare, to appear in the resumed hearing. Mr *Chikafu* undertook to advise both counsel of the directive. The application was granted.

On the following day, 14 March 2006, serious developments in the matter were brought to the attention of the court by Mr *Chikafu*. According to Mr *Chikafu*, Mr Jagada and Mrs Ziyambi went to Mutare Rural Police station where the applicants were being held in order to assess the evidence against the applicants. He later joined them. The defence team was allowed access to their clients and they proceeded to make interviews. The respondents left the room where the interviews were conducted on their accord. As a result of threats offered to the senior State counsel, the situation got tense. In fear of their liberty, both senior state counsel left for Harare. Present at the Police station were members of the defence team which included Mr *Chibwe*, Mr *Maanda*, Mr *Mugabe*, Mr Makombe, Mr Ndlovu and Mr Mutungura. Mr *Chibwe* took up the sequence of the unfolding

drama. According to him, on being interviewed, 1st applicant made the following revelations.

Soon after his arrest, he was subjected to torture, beatings and other abuse including having a fire-arm pressed against his temple. He was interrogated for long hours without rest. He was enticed by the promise for his release on bail to sign a prepared affidavit in which he implicates 4th applicant and one Roy Bennett in clandestine activities connected with an armed insurrection. He would thereafter be treated as a State witness as has now been the case with one Peter Hitschman. He was released to go and sleep it over in his cell around 03h00 on the morning of Saturday 11 March 2006. Later that morning he had decided to signed it. When they were taken to court, he was remanded in custody. Nothing was said about his release on bail. Senior State counsel asked whether he was prepared to give another statement in view of what he had said. 1st applicant flatly refused the offer, explaining if he did so he would be back in police custody to suffer even worse consequences.

Eventually, Mr *Chibwe* said, they were interviewing 4th applicant. It was then announced that the Attorney-General had telephoned. They should discontinue the interviews, appeared to be the message from the Attorney-General. They were, as counsel, asked to leave. They complied with the request. All this time all the respondents were present at the station as was the ZRP Officer Commanding District, Chief Superintendent Makoni, CIO Officer Commanding District, a Mr Tapfuma, and the CIO Officer Commanding Manicaland Province, Mr *Chibaya*. They all went to ZRP Mutare Central which is the provincial headquarters of the police. The senior state counsel went into conference with the security agencies. Mr *Chibwe* says he later heard 1st respondent shout at counsel accusing them of behaving as if they were defence counsel.

The atmosphere was tense. No-one shouted anything back at first respondent. Later, according to Mr *Chibwe*, state counsel emerged from this office appeared shaken and subdued. He could not say anything further to them except to wish the two travelling to Harare a safe journey. They all dispersed. Mr *Chikafu*, fearful of the threats offered by the enraged state agents did not sleep at his usual place of abode that night.

This update is certainly a shocking development. It however should not detract us from what the real issues in this case are.

After this submission by counsel, who wished this to be on record, I asked Mr *Chikafu* to state the case for the respondents, his clients. He stated that in view of this abjectly unlawful behaviour by his clients, he could hardly make any meaningful submissions. He pointed out however that, as indicated in the previous hearing yesterday, his superiors had eventually, convinced the police to hand back the property belonging to the 3rd and 4th applicants which had been unlawfully seized by them.

As for the other relief, he conceded that the subsequent re-detention of the applicants at the Mutare Rural Police Station was illegal in view of the fact that they were now expected to be in prison custody.

Counsel for the applicants prayed that the court issues an amended order that should reflect the amendments as suggested during the hearing. The order now sought did not seek the release of the applicants as that point had been dealt with in the magistrate's court on 11 March 2006. In that hearing the applicants had sought and had obtained and order of court that required the police to ensure that subsequent interviews of the applicants are conducted in counsel's presence. Police had ignored this order and taken the applicants to Mutare Rural for further interrogation without advising

counsel. They had kept the applicants at a police station instead of the remand prison. This was in a clear breach of the court order and therefore in contempt of that court's order.

He asked that this court declares the subsequent detention of the applicants in police custody unlawful, unconstitutional and therefore illegal. He sought a declaration in that respect.

In this application the respondents, through counsel, conceded the fact that the continued detention of the applicants beyond the statutory forty-eight hours constituted an unlawful detention where it could not be shown that this detention in excess of the period was properly authorized.

Section 13(1) of the Constitution of Zimbabwe provides that no person shall be deprived of his personal liberty save as may be authorized by law in any of the cases specified in subsection (2). Subsection (2) enumerates nine instances where a person's liberty maybe properly curtailed by operation of law. The instances include holding a person following his conviction, under the Mental Health Act; in execution of an order of court punishing him for contempt of that court or other court or of Parliament; in execution of an order for civil imprisonment; for the purpose of bringing him to court or to Parliament for the purpose of executing the order of that court or of Parliament; upon reasonable suspicion that he has committed a criminal offence; for the purpose of complying with an order for committal to an institution of skills training until he attains the age of twenty-one; for the purpose of preventing the spread of infectious or contagious disease; or for the purposes of preventing unlawful entry into Zimbabwe or for the purpose of facilitating his expulsion from Zimbabwe.

Sub-section (3) of Section 13 however sets out the parameters within which any such arrest would remain legal. It states:

> "A*ny person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons of is arrest or detention and shall be permitted, at his expense to obtain and instruct without delay, a legal representative of his own choice and hold communication with him."*

This important provision for the protection of personal liberties has been commented upon by the Supreme Court on several occasions.

In *S v Woods 1993 (2) ZLR 258 (S)* the then CHIEF JUSTICE GUBBAY stated:

> *"The failure to accord to the first and second respondents their constitutional right to proper and meaningful access to a legal practitioner was a serious violation. It was deliberate, and motivated by an apprehension that the consequences of such access might possibly hinder the progress of the investigations, or might even cause these two appellants to become unco-operative. There is no question of the breach being of a technical nature, being committed in good faith, or due to inadvertence. And what makes it all the more reprehensible was the grave nature of the charges for which the two appellants had been arrested and the magnitude of their criminal liability if convicted.*
>
> *The importance attached that attaches to the fundamental right granted by s 13(3) of the Constitution of Zimbabwe,* 'to obtain and instruct without delay a legal representative of his own choice and hold communication with him', *was recognized at an early stage in a number of decisions by the courts of this country. See Minister of Home Affairs & Others v Dabengwa & Another* 1982 (1) ZLR 236 (S) @ 242B; *S v Slatter & Others* 1983 (2) ZLR 144 (H) @ 152H-155D' *S v Sibanda* 1989 (2) ZLR 329n @ 333G – 334F"

I find the above comments by his Lordship quite apposite in this case. The applicants were held, by the State's own admission, beyond the 48 hour period. The weak suggestion that there were Warrants for Further Detention authorizing this was not persisted with as these were not produced in court or shown to the State

Counsel, Mr *Chikafu*. He remained seriously handicapped to persist with this unsubstantiated defence. If the warrants for further detention issued by a Police Superintendent exist it would have been the easiest of tasks for the respondents to furnish these to the court or at least to their counsel. They have neither made Mr *Chikafu* nor his superiors privy to those documents.

The only inference to be drawn is that they do not exist. For, if they exist then the respondents are clearly exhibiting an unacceptably high degree of lack of co-operation with the office of the Attorney-General. If that is the case, it is to be deprecated.

Not only have the respondents unlawfully curtailed the liberty of the applicants, they have also improperly denied them access to counsel of choice. These are such violations of the rights as cannot go uncondemned.

The papers reveal that 1st and 2nd applicants were arrested on 6th March 2006. They were taken to court on 11th March 2006. 3rd applicant was arrested on and detained from 8th March 2006. He was released without charge on 11th March 2006. 4th applicant was arrested on 8th March 2006. He appeared in court on 11th March 2006 facing charges under the Public Order and Security Act [*Chapter 11:17*].

The applicants have demonstrated that by the time they were taken to court, they had been subjected to varying periods of illegal detention.

The point that arises is whether, where an applicant has been held beyond the 48 hour period, it is competent to declare the whole detention period illegal. This point was discussed by GILLESPIE J in *S v Makwakwa 1997 (2) ZLR 298.* Although the court there was dealing with the question whether a person illegally held could be competently charged with escape from lawful custody, in my view

the principle set out therein apply here *mutatis mutandis*. Even assuming in favour of the respondents that somewhere in their high offices the warrants for further detention lie unattended, the facts before me require that I pronounce as illegal that detention. The Court cannot refuse an order when an applicant has made out a clear case on the basis of an unsubstantiated assumption. Mr *Chikafu* did not ask the court to proceed on that basis either. The court has to explore the legal point arising from the facts before it. It must then make its finding.

In the present case, the respondents do not put forward any opposition to the order sought. I assume this is a realization that in acting in the manner they have done so far, they acted unlawfully. This behaviour deserves of the highest possible censure. It cannot be justified in a democratic society. One cannot simply condone such a blatant refusal of access by the police. This is the type of conduct that brings the administration of justice into disrepute.

An applicant for an interdict must establish a clear right, an injury actually committed or reasonably apprehended and that there is no other satisfactory remedy available to the applicant. This is trite. Applicants' rights are clearly established by reference to the Constitution. The infringement of those rights has been conceded by the State.

I do not envisage what other remedy could possibly be available to the applicants. I am therefore satisfied that the applicants meet the requirements for a final interdict. As the real cause for the application had been removed, and only a declaration of rights was now being sought, the applicants are entitled to the *declaratuur.*

In the event the following order is issued:

(1) The detention of 1st, 2nd and 4th applicants in police custody after 11th March 2006 be and is hereby declared unlawful.

(2) The confiscation of property belonging to 3rd and 4th applicant be and is hereby declared unlawful.

(3) The interrogation of the applicants by the police in the absence of counsel of choice and contrary to an order of court be and is hereby declared unlawful.

(4) The respondents pay the applicants' costs on a legal practitioner and client's scale.

Zimbabwe Lawyers for Human Rights, 1st, 2nd & 3rd applicants' legal practitioners
Civil Division of the Attorney –General, respondents' legal practitioners