FARAI MAGUWU

versus

THE CO-MINISTERS OF HOME AFFAIRS (N.O)

and

THE CHIEF IMMIGRATION OFFICER (N.O)

and

THE MINISTER OF TRANSPORT, COMMUNICATION

AND INFRASTRUCTURAL DEVELOPMENT (N.O)

and

CIVIL AVIATION AUTHORITY OF ZIMBABWE

and

MINISTER OF STATE FOR NATIONAL SECURITY

IN THE PRESIDENT’S OFFICE (N.O)

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 10 October 2012 and 24 October 2012

*T.S. Manjengwa*, for the applicant

*O. Dodo*, for the 1st, 2nd, 3rd and 5th respondent

4th respondent in default

**Opposed Application**

 MATHONSI J: On 12 September 2011, this court, per KUDYA J, issued a provisional order in favour of the applicant, a human rights activist, who had certain items of his property seized by unnamed officials of Harare International Airport in the early hours of 10 September 2011 as he tried to board a flight enroute to a Human Rights Defenders Conference in Dublin , Republic of Ireland. The provisional order issued by the court is in the following:-

 “Terms of the Final Order

 That the respondents show cause, if any, why a final order should not be made in

 the following terms:-

1. The seizure and deprivation of the applicant’s property by the respondents be and is hereby declared wrongful, unlawful and unjustified.
2. The respondents and all those acting for them be and are hereby ordered to permanently return the items seized from the applicant, namely Hp 625 laptop, power pack, wallet, Olympus Digital camera, US$2000, Business cards and bank cards, notebooks, laptop bag and all its contents to the applicant or his lawful representatives.
3. The respondents be and are hereby ordered to disclose to the applicant and his lawyer, the court, the identities of the state security agents who unlawfully and unjustifiably seized the applicant’s items.
4. The respondents pay the costs of this application on the legal practitioner- client scale, the one paying the others to be absolved.

TERMS OF INTERIM RELIEF SOUGHT

It is hereby ordered that, pending the determination by this Honourable Court of the issues referred herein above, it is ordered that;-

1. The respondents be and are hereby ordered and specially directed to cause the immediate return of the applicant’s Hp laptop, power pack , wallet, Olympus digital camera, US$2000, Business cards, and bank cards, Notebooks Laptop bag and all its contents.
2. The respondents are hereby ordered to desist and stop from interfering with the applicant’s freedom of movement, association, right to property and protection of the law.”

The circumstances leading to the grant of the above provisional order are that the applicant checked in at Kenyan Airways Counter at Harare International Airport intending to board a flight to Nairobi enroute, aforesaid to Dublin, Republic of Ireland. After being issued with his boarding passes he went through all the immigration formalities required by the second respondent’s immigration officials in terms of the law and complied with all Civil Aviation procedures required by the fourth respondent, the Civil Aviation Authority of Zimbabwe.

The applicant states in his founding affidavit that no sooner had he complied with the procedures than he was confronted by 2 persons in civilian attire, a man and a woman, who demanded to conduct a body search on his person and also to search his luggage. Those people did not identify themselves but it is common cause that they are state security agents from the Central Intelligence Organisation falling under the fifth respondent, the Minister of State for National Security in the president’s Office.

The applicant says, he was not informed of the reasons for the search. After the search certain items of his property listed in the provisional order referred to above were seized from him and the security agents disappeared leaving him stranded at the security check point as Kenyan Airways was calling his name to approach and board the flight. He says later he followed the agents to their office where they refused to advise him of any offence that he was suspected of having committed and seized his property without issuing him with any warrant of seizure or even an inventory listing the property they had confiscated from him.

He says the agents were hostile causing him to fear for his safety. He could not proceed with his journey as his property, money and boarding passes were taken and was assisted by Immigration officials to re-enter Zimbabwe but not before he observed that even his bulk luggage which had been loaded on the plane had been tampered with. The handles of his bag had been broken. He reported the matter to the police.

As a result, the applicant approached the Court on an agent basis seeking provisional relief which was granted and is quoted above. He submitted that the seizure of his property was unlawful and unjustified. It is the confirmation of that provisional order which is contested but the first and fourth respondents did not file any opposition. On 14 September 2011, two days after the provisional order was granted, counsel for the respondents addressed a letter to the applicant’s legal practitioners which reads in relevant part as follows;-

“RE: FARAI MAGUWU VS THE CO-MINISTER OF HOME AFFAIRS AND 4

 OTHERS CASE NO: HC 8895/2011

We make reference to the matter cited above and hereby acknowledge receipt of a copy of the provisional order issued by Honourable KUDYA J.

Kindly note that we are instructed by the first, second and third respondents as follows;-

The respondents aforementioned cannot comply with interim relief granted by the learned Judge, and would be unable to do so even if they wanted to, because they simply do not have the items of property referred to in the interim order, and know nothing about them whatsoever……………………………………………...

The fifth respondent is also of the view that the provisional order issued by the learned Judge is incapable of complying with (sic) even if one wanted to comply with it. Whereas the applicant alleges that his items as listed were taken illegally by the fifth respondent’s officers, the fifth respondent for his part denies that all the items mentioned in the Urgent Chamber Application were taken by his officers as alleged or at all. The fifth respondent admits that his officers lawfully took only two reports from, and compiled by the applicant. Clearly such a material dispute of fact will not need to be resolved by adducing *viva voce* evidence.” (The underlining is mine)

The second and third respondents filed opposing affidavits in essence dissociating themselves from the action taken against the applicant.

The second respondent insisted that the “applicant passed through the immigration counter without any problem.” In his view, there is nothing wrong his officers did.

 The essence of the third respondent’s defence is that he has been wrongly cited regard being had to the fact that, as much as the fourth respondent, the Civil Aviation Authority of Zimbabwe, is a parastatal under his ministerial portfolio, it is a legal persona constituted in terms of an Act of Parliament and can sue and be sued in its own right. I agree.

 The fourth respondent is established in terms of the Civil Aviation Act [*Cap 13:16]* and exist independent of the Minister of Transport. Section 4 of the Act provides:-

 “ There is hereby established an authority to be known as the Civil Aviation

 Authority of Zimbabwe, which shall be a body corporate capable of suing and

being sued in its own name and, subject to this Act, of performing all acts that

bodies corporate may by law perform.”

 To the extent that the third respondent has been cited merely “as the Minister responsible for the Civil Aviation Authority of Zimbabwe,” a body corporate, there has been a misjoinder. The applicant had no business citing the third respondent for the acts of commission or omission of the Authority. The application against the third respondent has to be dismissed with costs.

 In his opposing affidavit, deposed to on September 2011, the fifth respondent stated in paragraph 5:-

“I admit the import and purpose of the application. The fifth respondent admits taking some of the items listed which include, 3 x blank Sakunda Cash Sale slips, 1 x Sakunda Cash Sale N0 85980, 1 x Interfin Banky account numbers, 1 x Zimnate Lion Company Travel Insurance Policy , 1 x VISA Application Receipt No. 191, ref 7401062 dated 24 August 2011 attached to the Note Pads, 1 x Standard Chartered Transaction Receipt dated 24 August 2011 and 1 x Quittance De Frais De Dossie E T Receipisse No. HRE 201124900005. These have since been returned to the applicant.

Further the fifth respondent denies ever taking a laptop bag, Hp 625 laptop, power pack, wallet, Olympus digital camera, US$2000, Business cards and bank cards.”

 It is not true that at the time the fifth respondent deposed to the affidavit, which, although undated, was filed on 26 September 2011, the items had been returned to the applicant. In fact it is common cause that by then nothing had been returned to the applicant.

 It is also curious that the fifth respondent was now admitting under oath having more item belonging to the applicant when, in the letter from his legal practitioner dated 14 September 2011, which I have quoted above, he denied having taken any of the applicant’s property except “two reports from, and compiled by the applicant.”

 It is appropriate at this stage to also make reference to the letter from the fifth respondent’s counsel to the applicant’s legal practitioners dated 8 November 2011 which reads in pertinent part as follows:-

 “Kindly find herewith the documents / items listed below, which our client, the

 fifth respondent had confiscated from yours in the discharge of the former’s

 mandate.

1. Short hand notebook
2. Note book
3. Sakunda Energy cash sale receipts
4. Standard Chartered Bank transaction receipt
5. Standard settlement instructions
6. Travel Insurance Policy Certificate (ZIMNAT)
7. ZIMNAT payment receipt
8. Visa application receipt”.

It is significant that the items the fifth respondent was returning to the applicant are dominated by receipts and generally unimportant, if not valueless, papers. Significantly the two reports he admitted earlier as having taken were not included in the list. More importantly, the above list is completely different from what the fifth respondent admitted in the letter of 14 September 2011.

The inescapable conclusion is that the fifth respondent has not been truthful in respect of the items that were taken from the applicant. One cannot help observe as well that all the valuable items which the applicant claims were seized from him have been denied. It is a principle of our law of evidence that where a witness has been shown to be untruthful, as the fifth respondent has been demonstrably shown to be, an adverse interference has to be drawn against such witness. *Leader Tread Zimbabwe (Pvt) Ltd v Smith HH-131-03; Tumahole Bereng* v R [1994] AC 253.

The basis of that legal principle resides in the fact that the witness would be unreliable and the court would not know when the truth is told and when not.

In his opposing affidavit, the fifth respondent explained the role of the department of state for national security as being to detect, assess and neutralise security threats against the country. He stated that owing to the fact that subversive elements operate covertly, the State Security Organisation, has to operate covertly in order to discharge its responsibility. He made reference to the Official Secrets Act [*Cap 11:09]* generally and section 296 of the Criminal Procedure & Evidence Act [*Cap 9:07*] as legal instruments protecting classified information.

The fifth respondent stated that his department had received intelligence information that the applicant was travelling to Dublin “ to attend to (sic) a Human Right Workshop for the purposes of subverting the government of Zimbabwe”. For that reason he was searched and documents seized. That search was therefore not wrongful. He said at paragraph 26:-

 “The applicant was not deprived of all the property he alleges was taken. The

 movable property that was confiscated from him was taken in the interest of

 national security. As aforesaid, the said documents were returned to him after

 verification. There is nothing amiss or illegal in searching a subject of security

 interest.”

 We now know of course that the said documents of “national security” other that 2 reports, were receipts which do not commend themselves favourably as security threats. On the merits of the matter the fifth respondent submitted as follows:-

 “32(i) It is my submission that the application is devoid of merit. The applicant

was searched by security agents as he was suspected of being in possession of information that threatens the bearing of the country.

 (ii) He is a well known Human Rights Activist who is not only a defender of

 the same but also strongly opposed to the selling of the country’s wealth,

 to wit, diamonds.

 (iii) There was reasonable apprehension that the applicant was indeed in

 possession of subversive material which he intended to deliberate on his

 excursion to Dublin, Ireland.

 (iv) The instruction was lawful and not unlawful as the applicant alleges

 (v) The allegations by the applicant are without basis at all and hence should

 not be entertained.”

Mr Dodo for the respondents submitted that there were serious disputes of fact which could not be resolved on the papers and that the applicant should have proceeded by action and not application procedure. The dispute is mainly in the form of the specific items which the state agents seized from the applicant as what he claims was taken is disputed by the fifth respondent. He conceded that when the property was seized the applicant was not issued with a warrant of seizure or any inventory outlining that which had been taken from him.

Asked whether the applicant would be able to call as witnesses at the trial, the state agents who took the property from the applicant for the court to test their credibility, Mr Dodo was adamant that the state agents would not be called as doing so would prejudice their operations. It is therefore not clear what counsel thinks would be achieved by referring the matter to trial.

It is common cause that the applicant was prevented from proceeding with his journey on 10 September 2011 to attend a conference which was commencing on 11 September 2011 and ending on 17 September 2011. To the extent that he was of the firm view that his rights had been interfered with, it was prudent for him to approach the court on an urgent basis seeking relief. There is no way the procedure employed can be faulted.

In addition, the so called dispute of fact is in fact a creation of the fifth respondent’s agents. If they were acting lawfully and were entitled to seize the applicant’s property, it was only natural that they document the process by producing an inventory of the seized property and getting the applicant to sign it. Instead, They proceeded rough shod on the rights of the applicant without consideration whatsoever to the consequences of their actions.

In doing so, they made their bed and must surely lie on it. They cannot be allowed to benefit from their own default as it were. The objection to the procedure used is without merit.

I now turn to consider the lawfulness or otherwise of the seizure of the applicants’ property. Mr Manjengwa for the applicant submitted that subjecting the applicant to a further search and ultimately seizure of his property after he had undergone the normal immigration and civil aviation procedure was unlawful. This was particularly so as that exercise was carried out by people in civilian attire who refused to identify themselves.

Mr Dodo for the respondents countered this by saying that the Department of State Security does not operate under any statute and therefore he could not identify any law under which the exercise was conducted. This argument is unfortunate indeed. Zimbabwe is a democratic country which subscribes to the rule of law.

The applicant is a citizen of Zimbabwe who is entitled to the protection of the law. He enjoys certain rights, including the right to property and free movement as enshrined in the constitution of Zimbabwe. If the property of an individual is to be seized such seizure must be under the authority of the law.

While it is true that the rights of an individual to possession and enjoyment of his property can be derogated from, that can be done in accordance with the law. The fifth respondent has not cited any law under which the state agents acted in this matter. Counsel for the fifth respondent has submitted the state agents do not operate under any law. His submissions are therefore exceedingly unhelpful.

In terms of section 49 of the Criminal Procedure & Evidence Act [*Cap 9:07];*

 “The state may, in accordance (with) this part, seize any article:-

1. which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or
2. which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or
3. which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”

It has not been shown how the state agents were able to reasonably suspect that any of the articles in the possession of the applicant could be the subject of the seizure in terms of section 49 or any other law for that matter. The fifth respondent, who has flatly refused to disclose the identity of the state agents who conducted the seizure, has contented himself with hedging behind vague allegations of subverting the Government of Zimbabwe. How this subversion could be countenanced from the articles the applicant was carrying has not been demonstrated.

In order to assess the reasonableness of the suspicion the court must be taken into confidence as to what exercised the mind of the agents, which, as things stand remain a mystery. What is known however is that the state agents admit taking a number of receipts, insurance policy, bank transaction slips and 2 reports compiled by the applicant. I am not persuaded that these items could be regarded as subversive

In my view, the manner in which the search was conducted by agents who did not identify themselves, was not only arbitrary but also overhanded. If you are to deprive an individual of his property, it is a basic tenet of our law that he must be informed of the reasons for doing so and the law under which such deprivation is being done. Surely state security is undeniably paramount but what is done in pursuit of state security must be justifiable in a democratic society and must conform to the rule of law. After all the applicant had rights whose enjoyment is guaranteed by the law. *Woods and Others v Minister of Justice Legal and* *Parliamentary Affairs & Others* 1994 (2) ZLR 195 (S).

I conclude therefore that the seizure of the applicant’s property was unlawful. In doing so I am fortified by the fact that more than a year after his property was seized on suspicion of subversiveness, no charges have been preferred against him and no other action has been taken against him by the state.

The next issue relates to the identity of the items that were seized from the applicant. I have already stated that the state agents acted in an overhanded manner without regard to any recognised procedure and the interests of the applicant. They did not secure the signature of the applicant on a warrant or inventory confirming what it is that was seized. This has given rise to a dispute as to the identity of what was taken.

The fifth respondent has been shown to be completely unreliable on what was taken. He first admitted taking 2 reports, later he admitted taking more items claiming to had returned them when that was not the case and eventually returned worthless receipts and cash slips with nothing to do with the reason for seizure. I have no reason to doubt the applicant at all when he says his laptop, wallet, money and other property were seized. Those items would ordinarily be in the possession of traveller attending a conference.

I am persuaded that the property the applicant has listed was indeed seized from him unlawfully. It should be returned. The applicant has half-heartedly submitted that the identity of the state agents must be disclosed. Mr Manjengwa argued that this was for purposes of closure. I say half-hearted because, other than reference to it in the draft order, the founding affidavit is silent on the issue. It is trite that an application stands or falls on its founding affidavit. *Mangwisa v Ziumbe N.O & Another 2000 (2) ZLR 489 (S).*

More importantly, the fifth respondent has taken ownership of the activities of the state agents and the relief the applicant seeks can be effectively enforced through the fifth respondent. In taking that route I am mindful of the provisions of section 296 of the Criminal Procedure & Evidence Act [*Cap 9:07],* which, although of no direct application to this matter, recognise the authority of a Minister to depose to an affidavit stating his opinion that disclosure affects the security of the state. This is what the fifth respondent has stated in his opposing affidavit.

There is also the issue of the roles of the other respondents who have dissociated themselves from the actions of the state agents. Thankfully, the fifth respondent has honoured up and accepted responsibility for that misfortunate exercise. It is therefore unnecessary for me to determine the liability of the first, second and fourth respondents.

Accordingly, I make the following order that;-

1. The seizure of the applicant’s property by state agents operating under the fifth respondent be and is hereby declared wrongful, unlawful and unjustified.
2. The fifth respondent and those acting for him be and are hereby directed to return the items seized from the applicant, namely Hp 625 laptop, power pack, wallet, Olympus digital camera, US$2000-00, business cards, bank cards, notebooks, laptop bag and all its contents to the applicant or his lawful representatives.
3. The fifth respondent shall pay the costs of this application.

*Wintertons* Legal Practitioners, the applicant’s legal practitioners

Civil Division of Attorney generals’ office, the respondents’ legal practitioners