GILBERTO ELIAS FUMO ZUCULA
versus
THE OFFICER IN CHARGE – HARARE REMAND PRISON
and
THE DIRECTOR – DEPARTMENT OF IMMIGRATION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 March 2015 and 16 March 2015

Urgent chamber application

N Mugiya, for the applicant
T Tabana, for the respondents

MUREMBA J: The applicant who claims to be a Mozambican national was arrested on 28 February 2015 in Harare on allegations that he was in this country illegally.

He was arrested by the second and third respondents and placed in the custody of the first respondent at Harare Remand Prison.

From 28 February 2015 to 13 March 2015 when this application was heard the applicant was still in detention. He had not been charged with any offence. For the two weeks that he had been at Harare Remand Prison he had not appeared in a court of law. This history of the matter is what prompted the making of the present application. The following is the prayer that is being sought.

"A. TERMS OF THE FINAL ORDER SOUGHT

IT IS ORDERED THAT:

1. The respondents are interdicted from interfering with the applicant's right to liberty unless in terms of the law.

2. The respondents are ordered to pay costs of suit on a client – attorney scale.

B. PROVISIONAL ORDER GRANTED

Pending the confirmation of the provisional order;

IT IS ORDERED THAT:

1. The respondents are ordered to release the applicant from their detention forthwith or at least not later than 24 hours from the date of this order."

The deponent to the applicant's founding affidavit is the wife of the applicant, one Cynthia Ndlovu a Zimbabwean citizen. Attached to the application is the marriage certificate which shows that the applicant and Cynthia Ndlovu contracted the marriage on 29 May 2009. They got married in terms of the Marriage Act [*Chapter 5:11*].

In the affidavit Cynthia Ndlovu made averments that on the day the applicant was arrested she was present. He was severely assaulted and he sustained injuries. He was taken to Harare Remand Prison. Since then she has been denied access to see him.

Cynthia Ndlovu stated that from the time they got married the applicant has been staying in this country on the basis of permit renewal while he is applying for citizenship.

In opposing the application the second and third respondents argued that the applicant has no permit to justify his presence in Zimbabwe. He holds no permit to renew nor is he seeking any permit renewal. It was stated that upon being arrested the applicant was asked to produce his passport and permit which authorised his stay but he had none of the two documents. It was only after a few days that the wife brought the applicant's Mozambican birth certificate and driver's licence to the second respondent's offices.

The second respondent stated that its offices sent the two documents to the Mozambican embassy for verification through the Ministry of Foreign Affairs. They got a response that although the documents are true and original documents of the Republic of Mozambique the interview that had been carried out with the applicant had established that the applicant is not a citizen of Mozambique.

With Mozambique having disowned the applicant, the applicant's claim that he is a Mozambican national was put in serious doubt. The second and third respondents argued that once a country disowns a person who claims to be its national, they cannot enjoin or force that country to receive such a person lest it risks sparking a diplomatic row.

The second and third respondents stated that they had exercised their discretion in choosing not to charge the applicant with a criminal offence for staying in Zimbabwe illegally. It was submitted that they had had the applicant arrested and detained only for the purpose of having him deported to his country.

THE LAW AND ITS APPLICATION

What grants a foreigner the right to stay or remain in Zimbabwe is either a visitor's entry certificate or a permit. The visitor's entry certificate is granted at the port of entry when a foreigner enters Zimbabwe. This certificate is granted in terms s 31 of the Immigration Act [*Chapter* 4:02]. This certificate is valid for the period stated on it which according to section 31 shall not exceed 6 months in the first instance. Upon its expiration it can be extended.

A permit can be a residence permit, an employment permit, a student permit, a scholar's permit or an alien's permit. These permits are issued in terms of sections 16, 22, 31, 34 and 37 of the Immigration Regulations, 1998 SI 195/98 respectively. With a residence permit it can be a permanent residence permit or a permit which is issued to a foreigner who is married to a Zimbabwean citizen or to a foreigner who is a dependant to a Zimbabwean citizen.

In terms of s 32 of the Immigration Act [*Chapter 4:02*] police officers and immigration officers are empowered to demand from any person whom they suspect to be a foreigner the production of either a visitor's entry certificate or a permit which authorises their stay in Zimbabwe. If the person fails to show that he is not a foreigner and also fails to produce any of the two documents he or she may be arrested and be charged for being here illegally. The section reads as follows.

> **"32 Production of documents**
> (1) A police officer or immigration officer may demand from any person whom he suspects on reasonable grounds of being an alien the production of his visitors entry certificate or any permit, as the case may be.
> (2) If a person referred to in subsection (1) fails—
> (*a*) to produce any certificate or permit referred to in that subsection; or
> (*b*) to satisfy the police officer or immigration officer that he is not an alien or that he is not required in terms of this Part to be in possession of any certificate or permit referred to in that subsection;
> the police officer or immigration officer may arrest such person.
> (3) Sections *eight*, *nine* and *ten* shall apply, *mutatis mutandis*, in respect of a person arrested in terms of subsection (2).
> (4) If an alien to whom a visitors entry certificate or permit has been issued fails or neglects to produce it within seventy-two hours of any officer or immigration officer demanding its production, he shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

In the present case the second and third respondents were well within their rights when they arrested the applicant on 28 February 2015 and asked him to produce documents which authorised his stay in Zimbabwe.

As it is the applicant is in Zimbabwe illegally for he has no document whatsoever to justify his stay in Zimbabwe. He failed to produce a permit even though averments were made in Cynthia Ndlovu's founding affidavit that the applicant had a permit which entitled his stay. The second and third respondents made it clear that for the applicant to remain in Zimbabwe he needed to produce his passport which shows that he was granted a visitor's entry certificate at the port of entry when he entered Zimbabwe. It was also submitted by the second and third respondents that instead of producing the visitor's entry certificate, the applicant being married to a Zimbabwean citizen could produce a residence permit which is issued to a foreigner who is married to a Zimbabwean.

I asked Mr *Mugiya* for the permit which entitles the applicant to stay in Zimbabwe, but he availed no such documents. Instead he made submissions that the applicant had never been issued with a permit of any sort to stay in Zimbabwe for the almost six years that he has been married to Cynthia Ndlovu. It was submitted that the applicant had always used his passport and the visitor's entry certificate which he would have extended when it expired whenever he intended to extend his stay otherwise he would return to Mozambique upon its expiration. So the averments that were made by Cynthia Ndlovu in her affidavit that the applicant was staying in this country on the basis of permit renewal were incorrect.

When I asked for the applicant's passport Mr *Mugiya* produced a ZRP form 162 which is a stolen property list form. Submissions were made to the effect that the applicant had lost his passport before his arrest and had made a police report to that effect. The form 162 looks authentic on the face of it, but the only problem that I have is that this document was shown for the first time to the second and third respondents on 12 March 2015, after this application had been filed on 10 March 2015. It was submitted by these two respondents that at the time of his arrest the applicant not only failed to produce his passport, but he also never said that his passport was lost. He did not even produce the ZRP form 162 and neither did he allude to its existence. If the applicant had indeed lost his passport he surely would have told the police officers who arrested him and the immigration officers who interviewed him after his arrest that he had lost his passport and that he had made a police report.

However, an analysis of the ZRP Form 162 shows that the police report was only made on 3 March 2015, well after the applicant's arrest on 28 February 2015. So although it is claimed that the applicant had lost his passport before his arrest, the fact is that he did not

make a police report to that effect. A police report was only made after he had been arrested and was already in detention at Harare Remand Prison. It cannot therefore be true that it is the applicant himself who made the police report. It can reasonably be inferred under the circumstances that it is Cynthia Ndlovu who made that report, but she did not want to be truthful about it. This explains why the form 162 was not signed despite it having space for the signature of the owner or the custodian of the stolen or missing property. The omission of the signature was deliberate. It was meant to mislead people into believing that it was the applicant himself who had made that report if they did not notice the anomaly on the date of the applicant's arrest and the date the police report was made.

It is obvious that what prompted Cythia Ndlovu to make the police report was the arrest of the applicant. Had it not been for that, this report would not have been made. Most probably the applicant never lost his passport. The natural thing to do for a person who has lost his or her travel documents is to report the loss to the local police, the department of Immigration and to one's embassy in order to get a replacement travel document, for instance, an Emergency Travel Document. Surprisingly the applicant did not make a report to any of these.

Be that as it may, it was submitted that upon being interviewed after his arrest the applicant indicted that he came to Zimbabwe via Forbes Border Post. It was submitted on behalf of the second respondent that ports of entry keep all records of visitors or foreigners who enter Zimbabwe on what is called an Immigration Form 1. Verifications were made with Forbes Border Post but the border post did not have any record about the applicant's entry into Zimbabwe in January 2015 as he had averred. Further verifications were also made with Nyamapanda and Machipanda Border Posts, but they also did not have any records of entry pertaining to the applicant.

In the absence of a passport and a record from the port of entry, there is no visitor's entry certificate that the applicant can talk about. In any case even if the visitor's entry certificate was there by now it would have expired because it was submitted that the applicant was given between 15 and 30 days when he entered Zimbabwe in January 2015. It was said that when he was arrested he had not yet extended his visitor's entry certificate. By now the 30 days have long expired. In fact, by 10 March 2015 when this application was made 30 days had already lapsed. When this application was filed the applicant was already in contravention of s 29 (1) (a) of the Immigration Act which states that an alien shall not remain

in Zimbabwe unless he is in possession of a permit to remain in Zimbabwe. It is without question that at the time of his arrest the applicant was a prohibited person. In terms of s 17 (1) (a) of the same Act he is not entitled to remain in Zimbabwe because he is a prohibited person.

By virtue of being a prohibited person the applicant has no right to ask to be released from detention and be allowed to remain on Zimbabwean soil. As correctly argued for the respondents the applicant should be held in detention pending deportation to his home country. His detention is not in contravention of s 49 of the Constitution of Zimbabwe Amendment (No 20) Act 2013 which protects the right to liberty. Mr *Mugiya* argued that the applicant's continued incarceration without being taken to court infringed this right. Section 49 (1) reads:

> "Every person has the right to personal liberty, which includes the right -
>
> (a) not to be detained without trial; and
> (b) not to be deprived of their liberty arbitrarily or without just cause."

What section 49 (1) (a) simply means is that if a person is charged with an offence he should not be detained without trial. In other words he or she should be taken to a court of law for trial. The provisions of s 50 of the Constitution which relate to the rights of persons who are arrested and detained for the purposes of being brought before a court of law or for an alleged offence become applicable. As correctly put by Mr *Mugiya* a person who has been charged with an offence should be made to appear in a court of law within 48 hours of his arrest or detention. See s 50 (2) of the Constitution.

Mr *Mugiya* argued that since the applicant's detention had far exceeded the 48 hour period he must be entitled to his immediate release in terms of s 50 (3) which states that,

> "Any person who is not brought to court within the forty-eight hour period referred to in subsection (2) must be released immediately unless their detention has earlier been extended by a competent court."

While I agree with Mr *Mugiya's* submissions with regards to the law I find his submissions on the reasons why the applicant should be released wrong. They are wrong for the reason that upon his arrest the applicant was not charged with an offence, not even for contravening the Immigration Act. As earlier on stated, the second respondent chose not to charge the applicant. So the applicant's detention is in terms of s 49 (1) (b) of the

Constitution and not in terms of s 49 (1) (a). In terms of s 49 (1) (b) which should be read disjunctively from s 49 (1) (a), a person can be deprived of his personal liberty without having been charged with an offence. However, under such circumstances the deprivation of liberty should not be done arbitrarily or it should be done for a just cause. In other words the deprivation of liberty should be authorised by the law or be in compliance with the law or it should be for reasons that are just in their substance. See *Ukor Martin Okey* v *Chief Immigration Officer & 2 Ors* HH 400-14.

I hold the view that when a person is detained in terms of s 49 (1) (b) it is not a requirement that they be taken to court because they would not have been detained for the purpose of being taken to court. So s 50 (2) of the Constitution which requires that a person who has been arrested and detained for the purpose of being brought to court or for an alleged offence should be taken to court within 48 hours would not be applicable.

In *casu*, what is apparent is that the applicant was detained for two reasons. Firstly, for the production and verification of the documents which authorised him to remain in Zimbabwe and for the verification of his identity and nationality. Secondly, it was for his deportation to his home country.

In terms of s 8 (1) of the Immigration Act,

"Subject to section *nine,* an immigration officer may arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of this Act and may detain such person for such **reasonable period, not exceeding fourteen days**, as may be required for the purpose of making inquiries as to such person's identity, antecedents and national status and any other fact relevant to the question of whether such person is a prohibited person."

So this provision of the Immigration Act allows that a person be detained for a period of up to 14 days pending inquiries about his or her identity, background and nationality. In *casu* at the time this application for the applicant's release was made he had not exceeded 14 days in detention. So his detention was still lawful.

In terms of s 8 (2) (a) and (b) of the Immigration Act [*Chapter 4:02*) immigration officers are empowered to remove or cause to be removed from Zimbabwe any prohibited person. The section reads,

"(2) Subject to subsections (5) and (6), an immigration officer may—
(*a*) subject to subsection (3), remove or cause to be removed from Zimbabwe any prohibited person; and
(*b*) pending the completion of arrangements for the removal of a person in terms of paragraph (*a*) and such

removal, subject to section *nine*, detain that person."

S 8 (2) (b) makes it clear that pending the completion of deportation arrangements the prohibited person may be detained. In terms of s 9 (1) the prohibited person may be detained in a prison, police cell or some other convenient place. For the prohibited person to be detained it is not a must that he or she should have been charged with an offence for remaining in Zimbabwe illegally. The decision to charge or not to charge lies with the second respondent. I say this because in terms of s 14 (1) (i) of the Immigration Act any person who has entered or remained in Zimbabwe illegally, whether or not he has been prosecuted for being in Zimbabwe illegally is a prohibited person. He or she is a prohibited person by operation of the law. Such a person has no right to remain in Zimbabwe but to be deported. Besides qualifying for deportation, the prohibited person may also be prosecuted. So in some instances a prohibited person may be prosecuted and then deported while in other instances the prohibited person may be deported only without having been prosecuted.

It is therefore clear that in terms of s 8 (1) and 8 (2) of the Immigration Act a foreign national can be arrested and detained without being charged with any offence. In view of s 49 (1) (b) of the Constitution I would not say that this infringes the right to personal liberty. As already stated above, all that needs to be shown under s 49 (1) (b) of the Constitution is that the detention or deprivation of liberty was not done arbitrarily or it was done for a just cause. In *casu,* it has been demonstrated that the arrest and detention were done in compliance with the law, that is, s 8 (1) and (2) of the Immigration Act. Besides complying with the law the detention is also for a just cause and the just cause is the deportation arrangements that are being made.

Even s 48 of the Immigration Regulations, 1998 states that in a case where a prohibited person is arrested on a criminal charge and the criminal proceedings are concluded or he finishes serving the sentence imposed upon him, he shall be handed over to an Immigration Officer for detention. So even after criminal proceedings have been concluded, the prohibited person should remain in detention pending deportation. It is permissible and it is the most appropriate thing to do. For a person who is in this country illegally that cannot be said to be an infringement of the right to personal liberty. They have no right to be in this country in the first place. Therefore there is no way they can be released from detention. To release such a person would not only be unreasonable and inappropriate, but also illogical. It is illogical because it is tantamount to authorising the prohibited person to remain in

Zimbabwe in the absence of valid documents authorising their stay. The point that I am simply illustrating is that not every detained person should appear in a court of law. Of course if they are challenging the lawfulness of their detention they have the right to appear before a court of law. See s 50 (5) (e) of the Constitution. However, in instances where a prohibited person is being detained for the sole purpose of being deported to their country I do not see the need for them to be taken to court, let alone insisting that they should be taken there within 48 hours. As long as that person has not been charged with an offence taking him to court serves no purpose at all.

S 48 of the Immigration Regulations reads as follows.

> **"**If a prohibited person who has arrived in Zimbabwe or a person who is being detained in terms of subsection (1) of section 8 of the Act is arrested upon a criminal charge, he shall be handed over to the custody of an Immigration Officer at the conclusion of the criminal proceedings or at the expiration of any sentence of imprisonment imposed upon him, as the case may be, and shall thereafter be detained under and subject in all respects to this Act and these regulations."

Submissions were made at the hearing by the second and third respondents that at the time the applicant was arrested he was arrested together with six other foreign nationals who did not have documents which authorised their stay in Zimbabwe. By the time this application was made, out of the seven, four had already been deported to their home countries because they had the necessary travel documents. The second and third respondents submitted that in the applicant's case what is delaying his deportation is his lack of travel documents such as a passport or an Emergency Travel Document. It was submitted that a person cannot be deported on the strength of a birth certificate or a driver's licence. The second and third respondents submitted that when they forwarded the applicant's birth certificate and driver's licence to the Mozambican embassy they expected to get confirmation that the applicant was a Mozambican national and the Mozambican embassy to furnish them with an emergency travel document to enable his deportation. They were surprised when on 11 March 2015 they received a letter from the Mozambican embassy to the effect that the interview that was carried out with the applicant had revealed that he was not a Mozambican national. It was argued for the respondents that in the premises the applicant has no country to be deported to. Mozambique cannot be forced to accept a person whom it has said is not its national. The second and third respondents argued that once the applicant brings valid information about his

nationality he will be deported to his country.

It is my finding therefore that the applicant's detention is not illegal as it is sanctioned by s 8 (2) (a) and (b) of the Immigration Act and s 49 (1) (b) of the Constitution of Zimbabwe. Accordingly, the application for the applicant's release is dismissed with costs.

Mugiya & Macharaga, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners