IGNATIUS MORGEN CHIMINYA CHOMBO
versus
NATIONAL PROSECUTING AUTHORITY
and
PROSECUTOR GENERAL
and
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 30 January 2019 & 20 February 2019

Opposed Application

L. A Madhuku, for the applicant
E Nyazamba, for the 1st respondent
Ms *V Munyoro*, for the 3rd respondent

MATHONSI J: This case calls upon this court to examine the underlying principles relating to our criminal justice system, the interest of the community and society at large as well as the interests of the specific victims of criminal conduct in ensuring that criminal prosecutions take place and do so within a reasonable time in light of the devastation endued by victims of acts of criminality. More importantly the case requires the court to interrogate what has been regarded as the dual dimension of the community interest namely the collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law on the one hand and that those who transgress the law and are put on trial are fairly and justly treated. See the remarks of CORY J in the Canadian case of *R* v *Askov* [1990] 2 SCR1199, 1233 which is quoted with approval in *In re Mlambo 1991* (2) ZLR 339 (S) and *Mutsinze* v *The Attorney General Zimbabwe* CCZ 13/15 (unreported). The court is also required to determine whether this is an appropriate case for an approach to be made by an accused person facing a criminal prosecution in terms of s 85 of the Constitution of Zimbabwe for it to grant the relief of a permanent stay of criminal prosecution on allegations of violations of an accused person's constitutional rights enshrined in the bill of rights.

The applicant is a former cabinet Minister who has served the government of Zimbabwe in various portfolios over the years including the portfolio of Minister of Local Government, Public Works and National Housing, Home Affairs as well as Finance and Economic Development. He was the Minister of Finance when the events that form the basis of this application occurred. He has brought this application in terms of s 85 of the Constitution seeking a declaration that his following rights were violated by the State:

1. His right to personal liberty protected by s 49 of the constitution.
2. His right to be informed at the time of arrest of the reasons for the arrest as protected by s 50 (1) (a) of the Constitution.
3. His right to be treated humanely and with respect for his inherent dignity while under arrest as protected by s 50 (1) (c) of the Constitution.
4. His right to human dignity protected by s 51 of the Constitution.
5. His right to personal security protected by s 52 (a) of the Constitution.
6. His right not to be subjected to physical or psychological torture, cruel, inhuman or degrading treatment or punishment protected by s 53 of the Constitution.
7. His right to the equal protection and benefit of the law protected by s 56 (1) of the Constitution.

The applicant's case is that prior to his official arrest by the police on 23 November 2017 on 3 counts, namely, contravening s 4 of the Prevention of Corruption Act [Chapter *9:16*]; Criminal Abuse of Office as public Officer in contravention of s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and fraud in contravention of s 126 of the latter Act, he had in fact been arrested by the military in dramatic fashion in the early hours of 15 November 2017. The applicant complains of having been awakened at around 01:00 hours by an explosion. There was a second explosion followed by crackling sounds at the kitchen door area before footsteps were heard on the roof.

Immediately thereafter his bedroom door, where himself , his wife and maid were sheltering following the commencement of the attack, was knocked down before seven men in military uniform and armed with AK 47 assault rifles, rushed in. The 3 of them were ordered to lie down and a gun was pointed to his head. He was handcuffed and roughed up before being blind folded using his own T –shirt he had been putting on. He was rushed out bare footed across the

yard through the metal gate which had been knocked down and dragged into a lorry where he was made to lie on the floor between the seats. Three men secured him by stepping on his legs while others stepped on the midriff area and yet another on his head.

The applicant says he was driven blind folded to an unknown place and detained in a room still blind folded and under guard. He remained in that state for the next 9 days and became disoriented because of the blind fold. The blind fold would only be removed for him to bath but he would eat while blind-folded. During that period he was interrogated by different people who desired to know how he ran the Ministry of Finance and accused him of abusing his power and not giving money to the army. He was also questioned about how he ran his party, as the secretary for administration, among other things.

After 9 days he was advised that he was being taken away from that place of detention and instructed to pack his things. Still blindfolded he was driven to his residence and the blindfold was only removed upon arrival there at about 20:00 hours where he then beheld a vehicle parked by his gate. It was removed to enable the vehicle he was in to drive to the gate for him to disembark. As he did so, and still by the gate, he was arrested by police officers. He was taken to the police station where charges were preferred against him aforesaid.

It is against that background that the applicant has made the application for a declaration of infringement of his constitutional rights and for an order of a permanent stay of prosecution. According to the applicant his violent arrest by soldiers on the morning of 15 November 2015, his detention at an unknown place for 9 days while under torture and his subsequent handing over to the police outside his residence on the night of 23 November 2017 constituted one transaction by state agents and was a violation of his constitutional rights enunciated above. He asserted that this court, per MUSHORE J, has already made a finding in *Chombo* v *The State* HH 196-18 that those actions were perpetrated by state agents which finding is binding.

He pressed the point that those actions were unconstitutional in that he was detained for 9 days without trial contrary to s 49 (a) of the constitution; he was arbitrarily deprived of his liberty without just cause contrary to s 49 (b); he was arrested without being informed of the reasons for arrest contrary to s 50 (1) (a); he was treated inhumanely without regard to his inherent dignity contrary to s 50 (1) (c) and s 51; he was subjected to both physical and psychological torture, cruel, inhuman and degrading treatment contrary to s 52 and s 53 in the form of being handcuffed,

blindfolded and being chained while being forced to run to the lorry; and his right to equal protection of the law under s 56 was violated given that other criminal suspects are not treated the same. For all these violations the applicant prays for a permanent stay of prosecution as contemplated by s 85 of the Constitution as the only appropriate remedy.

The application is opposed by all the respondents and the first and second respondents' opposing affidavit deposed to by Justin Uladi, a Chief Public Prosecutor at the National Prosecuting Authority, is disarming by its brevity given the detailed allegations made against the state by the applicant in the founding affidavit, which affidavit also annexes the *viva voce* evidence given by the applicant before the remand court on 25 November 2017. The state, or is it state agents, have been accused of acting unlawfully and infringing on the fundamental rights of the applicant and one expects the state to respond fully to those accusations. Where the allegations are denied, having been made at the initial remand hearing, one expects that the state would have investigated them and responded in greater detail as to why the allegations are without foundation.

Alas, Chief Law Officer Uladi could only say about the allegations contained in paras 12 to 31 of the applicant's founding affidavit, which I have summarised above, that they are "a recital of the spurious allegations against the respondents", which is not helpful at all. If that statement was meant as a denial of the pointed accusations made, it certainly does not do a good job of such a denial. Apart from that, Uladi stated that the applicant has adopted the wrong procedure because the constitutional infringements complained of arose at the magistrates court and should have been dealt with in terms of s 175 (4) of the Constitution by the applicant requesting the magistrates court to refer the matter to the Constitutional Court for a determination of the constitutional issues. He insisted that this court does not have jurisdiction to determine the application.

The third respondent took issue with his joinder as a party to the application because the current Constitution does not require the Attorney General to be cited in proceedings against the Government. The Attorney General is constitutionally required to act as counsel for the government and for that reason he has been wrongly cited. Even while protesting what he regarded as a misjoinder, the third respondent also proceeded to make the point that this court should refrain from exercising jurisdiction over the matter on the basis of the same grounds relied upon by the first and second respondents. He added that this court can only exercise jurisdiction upon an appeal

being made against a decision of the magistrates court. Given that the constitutional issue was not adjudicated upon by the magistrates court, the applicant is non-suited.

Before examining the legal issues which arise I should complete the factual background by adding that when the applicant was brought before a magistrate for initial remand on 25 November 2017 he opposed his placement on remand by reason that he had been detained beyond the lawful period of 48 hours as provided for in s 50 (2) of the Constitution. He outlined, through oral evidence on oath given before the remand court, the ordeal he had gone through from the time he was raided by military personnel on 15 November 2017 to the time he was handed over to the police. Part of his evidence was corroborated by his maid, one Jane Bobo, who confirmed that those who captured the applicant were soldiers because they were in military fatigue, were carrying AK 47 rifles and had their faces covered.

Counsel for the applicant submitted that remand should be refused because s 50 (2) and (3) of the Constitution had been violated: *S* v *Madondo & Anor* 2015 (1) ZLR 807 (H) 810 B-C where MAWADZE J made the remarks:

> "It is common cause that the appellants were not brought before the magistrates court within the stipulated hours as provided for in s 50 (2) of the Constitution, and that their continued detention was not extended by a competent court in terms of s 50 (3) of the Constitution. Further, the appellants were not released immediately after the expiry of the 48 hours. In terms of s 50 (8) the continued detention of the appellants contravenes the provisions of both s 50 (2) and s 50 (3) of the Constitution and is without doubt illegal."

In pressing for remand, Mr *Nyazamba* who still represented the State at that early stage, led evidence from Benias Murira, a detective who, along with a full contingent of 8 detectives from the Criminal Investigations Department and 2 uniformed police officers, had arrested the applicant at his gate as he was being dropped off by his captors on the night of 23 November 2017. The officer denied knowledge of the applicant's earlier arrest by members of the army or that the police had acted as a tag team with the army to receive him after the army ordeal on that date. According to him they acted independently and had conducted surveillance a distance from his house after being informed by the applicant's wife that he was not at home. It was fortuitous that they happened to be parked at his gate when the military officers dropped him.

In a judgment placing the applicant on remand, the magistrate ruled that the applicant had not proved that he had been arrested by "state agents" even though his narration of events from 15 November 2017 had gone unchallenged by the State which had chosen to confine itself only to the

involvement of the police on 23 November 2017. The remand court then found that the applicant had not been over-detained because he had only been arrested on the night of 23 November 2017 and not 15 November 2017.

It is that decision which was strongly criticized by MUSHORE J when she presided over the applicant's bail appeal, the magistrates court having also refused the applicant's application for bail. At pp 6-7 of the cyclostyled judgment the learned judge said:

> "The bail court did not apply its mind to the Constitutional infringements which the appellant complained of, neither did it interrogate the appellant's complaints. It ignored submissions that appellant's fundamental constitutional rights as a detainee had been infringed. The decision made *a quo* was unconstitutional to the extent that the court did not observe, as it was obliged to, the provisions of s 50 of the Constitution. The State did not challenge appellant's submissions that he was subjected to inhuman and undignified treatment at the hands of his captors, and that he was not informed of the reason for his abduction, at the time that he was arrested in the dead of night at his home, or at any time prior to being brought to court on 23 November 2017. Contrary to the peremptory provisions of s 50 (2) (b) appellant was held for far beyond 48 hours in an undisclosed location. I am troubled by the comments made by the court *a quo* in remaining complicit with the State's misleading statement that the date of arrest was when the police arrested appellant, in circumstances where the appellant had been abducted and kept incommunicado by State agents several days, before the Police 'arrested' the appellant. It is obvious from the evidence which was presented by the appellant that the Police were in cahoots with the mysterious state agents given that they took over where the state agents had left off. The appellant was detained by State agents on 15 November 2017 and only brought before a court of law a whole week later. By its failure to investigate the complaints made by the appellant, the court ultimately ended up ignoring the fact that s 50 (5) of the Constitution had been breached in several ways. Appellant was denied his right to remain in communication with family or to consult in private with his lawyer or doctor during the period of his detention."

Mr *Madhuku*, who appeared for the applicant, submitted that the above findings by the court are no longer contestable given that the respondents did not challenge that judgment and that this court is now bound by that judgment. Mr *Nyazamba* refuted that pointing out that the decision is not binding on me and that at no point did MUSHORE J make a finding that the applicant's rights were infringed by State agents. I am not sure where Mr *Nyazamba* derives the assertion that the court did not make a finding that State agents infringed the appellant's rights, when the passage I have recited above says so.

I prefer to look at the pronouncement by the learned judge from the premise that it was made *obiter dictum* because the issue of constitutional infringements was not before the court. What was before the court was a bail appeal wherein the magistrate had gone on to deny the applicant bail after placing him on remand. Apart from that, I have already said that the narration

of events by the applicant from the time he was raided, commando style, by soldiers on 15 November 2017 and taken into custody has not been disputed in any meaningful way. At the remand hearing the State preferred to lead evidence from an arresting detail which was extraneous by reason that it related to events which occurred from 23 November 2017. It just ignored the events from 15 November 2017 as an inconvenience in typical ostrich style of burying the head in the sand in the hope that the problem, once out of sight, would go away on its own.

As I have said, it is not enough for the respondents to simply dismiss the allegations out of hand as Mr Uladi sought to do, by saying they are "spurious allegations". I agree with Mr *Madhuku* that doing so does not qualify for a denial of allegations *stricto sensu*. In our civil practice and procedure, that which is not denied in affidavits is taken as admitted. That is the view expressed by MCNALLY JA in *Fawcett Security OPS (Pvt) Ltd* v *Director of Customs and Excise & Ors* 1993 (2) ZLR 121 (S) at 127 F:

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted. Therefore Customs have in effect conceded that they were asked by Fawcett whether all was well, and they advised that it was."

See also *Minister of Lands and Agriculture* v *Commercial Farmers Union* S-111-01.

Even were the first and second respondents to be taken as having denied the statement of the applicant regarding the circumstances of this arrest and detention from 15 November 2017 to 23 November 2017, that would not mean that the applicant's statement should be disbelieved. All that they have done is to submit a bare denial and nothing more. As representatives of the state against whom such serious allegations are made, they should have commissioned an investigation into those allegations right from the time the applicant lodged a complaint with the remand court. They did not and cannot now say that the story is false without more. In any event I do not think that a self-respecting court of law applying its mind reasonably and fairly to the facts would come to the conclusion that it did not happen that the applicant was captured by the army and detained as alleged. This is because his story is credible and has not been rebutted. I conclude therefore that indeed the applicant was arrested by state agents in the manner that he has alleged.

When going forward to consider the application I note that the aspect of the applicant's complaint about over detention which he had relied upon in an attempt to stave off the state's request for remand is not before this court at the moment. As already stated, the applicant had sought his release on the strength of s 50 (2) and (3) that his detention beyond the mandatory 48

hours entitled him to his immediate release. That was rejected by the magistrate, a decision criticised by MUSHORE J in *S* v *Chombo supra*. The applicant however did not appeal that decision of the magistrates court as correctly observed by both Mr *Nyazamba* and Ms *Munyoro* for the respondents. Nothing more needs to be said about that issue.

Mr *Nyazamba* for the first and second respondents took a couple of points *in limine*. The first one is the non-joinder of the State agents or the Zimbabwe Defence Forces whose members are alleged to have kidnapped and tortured the applicant. He submitted that r 22 (2) of the Constitutional Court Rules requires that every application made under Chapter 4 of the Constitution should be served on the Attorney General and all interested parties. For that reason the applicant should have cited and served the application on those that kidnapped and detained him from 15 November 2017.

That point *in limine* does not appear to have been well thought out as counsel could not rely on the provisions of the rules of another court in this court. The rules of the Constitutional Court have no bearing on the procedure followed in this court whose procedure is governed by its own rules. In any event in terms of r 87 (1) of the High Court of Zimbabwe Rules, 1971:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The rule is worded to have such wide application as to include applications. Mr *Nyazamba*'s first point *in limine* was of no moment.

The second point *in limine* was also taken by Ms *Munyoro* for the third respondent who, I must say, abandoned her initial challenge to the joinder of the third respondent electing instead to participate fully in the proceedings. It is that the wrong procedure was followed. In the respondents' view the applicant is improperly before this court because s 85 (1) of the Constitution allows a person to approach a court, not necessarily the High Court, alleging an infringement of a fundamental right. As the criminal prosecution of the applicant is already pending in the magistrates court, the applicant is confined to approaching that court for relief. Both Mr *Nyazamba* and Ms *Munyoro* submitted that the applicant should have invoked s 175 (4) of the Constitution upon the commencement of his trial to request a referral of the Constitutional matter to the Constitutional Court for determination.

Mr *Madhuku* for the applicant submitted that s 175 (4) is available to a person who desires to go to the constitutional Court for vindication of his or her constitutional right. He pressed the point that s 85 (1) allows a person seeking vindication to approach any court, including this court. In the applicant's discretion he came to this court as he could not be expected to await the commencement of the criminal trial in order to request a referral of the matter to the Constitutional Court. On the other hand, for him to make a direct approach to that court, the applicant would have to seek and obtain leave. He submitted further that a litigant is not compelled to approach the Constitutional Court unless the matter falls only within the jurisdiction of the Constitutional Court. I agree.

Section 85 of the Constitution provides:

> "(1) any of the following persons, namely-
> (a) any person acting in their own interests;
> (b) any person acting on behalf of another person who cannot act for themselves;
> (c) any person acting as a member, or on the interests, of a group or class of persons;
> (d) any person acting in the public interest;
> (e) any association acting in the interests of its members;
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.
> (2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1)."

In terms of s 171 (1) of the Constitution the High Court may decide constitutional matters except those that only the Constitutional Court may decide. Those matters that only the latter court can decide are set out in s 167 (2) namely, to advise on the constitutionality of any proposed legislation if the legislation is referred to it in terms of the Constitution, to hear and determine disputes relating to the election to the office of President, disputes relating to whether or not a person is qualified to hold the office of Vice President or to determine whether parliament or the President has failed to fulfill a constitutional obligation. Therefore the High Court is at liberty to determine other constitutional matters not specifically reserved for the Constitutional Court.

In advancing the argument that this application should have been placed before the magistrates court, counsel for the respondents relied on s 175 (4) of the Constitution which provides:

> "If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request merely frivolous or vexatious."

Reliance was also placed on the judgment of the Constitutional Court in *Moyo* v *Chacha & Ors* CCZ19-17 (as yet unreported), a case in which the applicant who had not yet appeared for initial remand but had been informed of the intention to take him to the magistrates court for that purpose, had sought to pre-empt that by approaching the Constitutional Court alleging that his right to personal liberty had been infringed by the arresting detail who had no reasonable suspicion of him having committed an offence and that his arrest was unlawful by reason that the Zimbabwe Anti-Corruption Commission which had instigated the arrest had no arresting powers. The Court ruled that the matter involved a determination of a lawful arrest, an exercise which involved the interpretation and application of s 41A of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It concluded that the Constitution was not directly applicable in the determination of the question of what constitutes a lawful arrest.

Leaning heavily on the principle of subsidiarity, that a litigant who alleges that his or her constitutional right has been infringed must rely on legislation enacted to protect that right and not the underlying constitutional provisions, MALABA CJ, concluded that the applicant should have challenged the lawfulness of his arrest at the remand court. He stated at p 25 of the cyclostyled judgment:

> "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 Criminal Procedure & Evidence Act. He has not in the same vein alleged that the provisions in the Criminal Procedure & Evidence Act are invalid. One cannot ignore non-constitutional remedies, preferring to directly enforce the right as enshrined in the Constitution. Section 41A of the Criminal Procedure & Evidence Act is a remedy enacted to fulfill 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."

In my view, the authority of *Moyo* v *Cheche & Ors*, *supra*, cannot be used to contest the jurisdiction of this court to determine this application and the principle of subsidiarity does not seem applicable at all. In respect of the latter there does not appear to be any corresponding remedy regarding the complaints of infringement made, as could be enforced via legislation other than the

Constitution. The applicant contested his remand on the basis of over-detention and lost. He was placed on remand. He now seeks a permanent stay of prosecution on the basis of a variety of constitutional infringements, a discretionary remedy available to him by virtue of s 85 (1) of the Constitution.

Apart from that, unlike the case of *Moyo* v *Cheche & Ors*, *supra*, where the applicant made a direct approach to the Constitutional Court, the present applicant has come to the High Court which by its very nature, is not only a court of inherent jurisdiction, it is also a court of first instance. It cannot side-foot its adjudicating responsibility by deferring to the magistrates court. I am fortified in that view by the fact that this court has concurrent jurisdiction even in respect of those cases where lower courts also have jurisdiction. So even where the magistrates court would have jurisdiction this court still retains jurisdiction by virtue of its concurrent jurisdiction which cannot be ousted merely because an inferior tribunal would exercise jurisdiction.

Talking of inherent jurisdiction, it has been said that it is a virile and viable doctrine defining the reserve or fund of powers, a residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so in order to do justice between the parties. See *Halsbury's Laws of England* 4 ed (Butterworth's London). A more fitting description of inherent jurisdiction is one given by MAKARAU J (as she then was) in *Sibanda & Anor* v *Chinemhute N.O & Anor* HH-131-04:

> "I have always visualized the difference between a court of inherent jurisdiction and one without as two buildings open to the citizenry. One has all its doors and windows open to all and for all reasons (and in all seasons), apart from those expressly and clearly forbidden entry by statute. Where a point of entry is hitherto non-existent for a member of the public in the form of procedure, one is inherently created in the interests of justice. This is the court of inherent jurisdiction. The sentry manning the building is less stern and less demanding than his counterpart at the gates of the other building. This other building representing the court without inherent powers is generally closed up apart from a few windows to allow access to those expressly defined in the statute creating the court, on certain terms and for certain specified purposes. Where the statute does not create a point of entry, the court cannot open one for anyone. In this country that distinction boils down to classification of courts on the basis of superior courts and inferior courts."

See also Derdale Investments (Pvt) Ltd v *Econet Wireless (Pvt) Ltd & Ors 2014 (2) ZLR 662 (H).*

As a court of inherent jurisdiction enjoying concurrent jurisdiction with the magistrates court this court cannot close its doors to the applicant simply because he could have made a similar application in that court. I therefore reject the point *in limine* taken on behalf of the respondent.

That conclusion accords with the public policy consideration underscored by s 69 (3) of the Constitution which gives every person the right of access to the courts. This court cannot be seen to be closing its doors to those seeking redress.

That then brings me to the merits of the matter in which I am called upon to determine whether there were infringements of the applicant's constitutional rights. If such infringements occurred whether the applicant is entitled to the remedy of a permanent stay of prosecution on the charges which have been preferred against him. I have already found that the circumstances under which the applicant was raided, handcuffed, blindfolded and frog marched to a vehicle which took him to an unknown place where he was held captive for almost 9 days, have not been refuted in a meaningful way. I find that indeed that mistreatment occurred as a result of which there were infringements of the applicant's constitutional rights as alleged. The question which arises therefore is whether the appropriate remedy should be an order of a permanent stay of prosecution.

In determining that, the starting point is to note that the violations of the applicant's rights as narrated by the applicant appear to have been undertaken for no discernible reason at all. I say so because quite excessive force and violence were used to capture the applicant leaving a trail of destruction. He was then held for some time in movie-style while nothing meaningful was happening except to keep him in isolation for a lengthy period while extraneous questions were routinely put to him if for nothing but the amusement of his interrogators. He was not subjected to physical assault and neither was there any attempt to extract evidence or a confession from him in respect of the offences he is now facing. It is quite strange indeed.

The Supreme Court and indeed the Constitutional Court have both expressed themselves extensively on the subject of ill-treatment of accused persons prior to trial and its effect on an application for a permanent stay of prosecution. The Supreme Court granted a permanent stay of prosecution in the case of *Mukoko* v *Attorney G*eneral 2012 (1) ZLR 321 (S), a case decided under the old constitution. In that case the applicant had sought a permanent stay of a criminal prosecution owing to torture and inhuman and degrading treatment she had been subjected to at the hands of State Security agents before being brought to court on allegations of recruiting a person to undergo military training. She had been subjected to repeated beatings on the soles of her feet, forced to kneel on gravel for a lengthy period whilst being interrogated, kept in solitary confinement for a long period while being held incommunicado, kept blind folded while she was

not in solitary confinement and driven while blindfolded to undisclosed destination among other abuses.

The prosecution had then sought to rely on evidence extracted from the applicant through the violation of her rights enshrined in the then Constitution of this country. The court had to resolve *inter alia* whether ill-treatment in breach of s 15 (1) of the old constitution prior to the charge being brought against the victim taints the subsequent decision to lay the charge and institute criminal prosecution against the applicant. MALABA DCJ (as he then was) who delivered the unanimous decision of the court stated at 339A:

> "The decision of this court on this point is that ill-treatment *per se* has no effect on the validity of the decisions to charge the victim with a criminal offence and institute prosecution proceedings against him or her. It is the use of the fruits of ill-treatment which may affect the validity of the decisions depending on compliance or non-compliance by the public prosecutor with the requirements of permanent deprivation of personal liberty under s13 (2) (e) of the Constitution." [Emphasis added].

The court went on at 342H – 343D;

> "As a matter of law and fact it is clear that where reasonable suspicion of the accused person having committed a criminal offence existed at the time the public prosecutor charged him or her with the offence in question and commenced criminal prosecution proceedings, the prosecution must be taken to have been properly instituted, regardless of the fact that the accused person was subjected to torture or inhuman or degrading treatment prior to the charge being brought against him or her. The charge and prosecution would be a product of the consideration by the public prosecutor of evidence on the conduct of alleged wrong doing by the accused person."

The above pronouncement by the Supreme Court were adopted and followed by the Constitutional Court in *Makaza & Ors* v *The State* CCZ 16-17 (as yet unreported), a case decided under the new constitution which came into effect in 2013. It is a case which l shall relate to shortly. It appears trite that each case relating to an application of this nature must be decided on its merits. However, the general principle that has evolved over the years is that the grant of a permanent stay of prosecution is an exceptional remedy. See *Clipsal Australia (Pty) Ltd* v *Gap Distributors (Pty) Ltd* 2009 (3) ALL SA 491 (SCA).

In *Mutsinze* v *The Attorney General Zimbabwe* CCZ 56-13 (unreported) in explaining what may be regarded as exceptional circumstances motivating the grant of a permanent stay GARWE JCC remarked at paras 41 and 42:

> "In *Wells* v *Queen* [2010] VSCA 100, the Supreme Court of Victoria (Australia) accepted that it is only in an exceptional or extreme case that a court would grant a permanent stay on the basis that such proceedings constituted an abuse of process and that the test to be applied is;

> 'whether, in all the circumstances the continuation of the proceedings would involve unacceptable injustice or unfairness, or whether the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to constitute an abuse of process.'

The power to stay proceedings permanently may be exercised:

> 'where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course.'
> ICC 01/04-01/06-772, (Appeals Decision) paras 30-31, *The Prosecutor* v *Thomas Kubanga Syilo (International Criminal Court)* 14 December 2006."

Mr *Madhuku* submitted that the case of *Mukoko* v *The Attorney General, supra*, no longer represents the law of this country because it was decided under the old Constitution and cannot be reconciled with the spirit of the current constitution. I do not agree. The thrust of the *Mukoko* judgment was followed, as I have said, by the Constitutional Court in *Makaza & Ors* v *The State*, *supra,* a case decided by the highest court under the current constitution. Both cases are binding on this court by virtue of the principle of *stare decisis*. Where the higher courts have pronounced themselves clearly on a principle, this court, as a lower court, has its hands tied and must of necessity apply the principle as pronounced by the superior court. It is as simple as that. That is the law and as Aristocle put it:

> "The umpire has regard to equity and the judge the law."

In fact Mr *Madhuku's* view point is that this court should follow the judgment of *Makaza & Ors* v *The State* but not the majority judgment delivered by CHIDYAUSIKU CJ with the concurrence of 7 other Justices which judgment adopted and followed as l have said, the *Mukoko* v *AG* judgment. He submitted that what represents the current or modern thinking is the judgment delivered by GARWE JCC in that matter in which the learned judge sought to "qualify the main judgment by adding the rider." I must say that l have serious difficulties with that approach mainly because the 2 judgments in question appear to me to be at variance and may not necessarily be complimentary. Even if l were wrong in saying so what cannot be disputed though is that the Apex Court has created a contradiction which only itself, and certainly not this court, can resolve.

In that case CHIDYAUSIKU CJ was very clear that *Mukoko* v *The Attorney General, supra,* represented the law of this country. Although distinguishing that case, on the basis that in *Makaza's* case the prosecutors were not relying on confessions obtained as a result of torture to sustain the

charges as had happened in *Mukoko's* case (the applicants had not confessed despite the torture), the learned Chief Justice's pronouncement admits of no ambiguity.

> "A prosecution predicated on a confession extracted through torture is unlawful and unconstitutional. In the *Makaza* case, the applicants did not confess despite the torture. On their own evidence they, as it were, resisted the torture. The prosecution is based on the evidence of the complainant and other witnesses. Similarly, in the Gumbo's case no evidence was obtained from the alleged assault or ill-treatment. In both matters, there is no direct connection or nexus between the fruits of the alleged torture or inhuman or degrading treatment to which they were subjected and the institution of the criminal proceedings. In the circumstances, an order of the permanent stay of the criminal proceedings is not the appropriate remedy. This conclusion is regrettable in the extreme. It is, however, an inevitable consequence of the proper interpretation of the law. This court abhors the torture of an accused person. Torture is wholly unacceptable to this court but it cannot be a bar to prosecution where the prosecution is based on evidence not extracted by such torture. The appropriate remedy for the applicants lies in a claim for damages and not a stay of prosecution." [emphasis added]

As l have said, that was the majority decision although the learned Chief Justice concluded by stating after quoting a passage in *Mukoko's* case that the Constitution did not permit an accused person to escape prosecution due to torture, that in an appropriate case the court may feel constrained to order a permanent stay in extremely rare circumstances. GARWE JCC took off from that rider. He stated that the remarks in the main judgment were too wide, they do not correctly reflect the law in terms of the current constitutional dispensation. The learned judge remarked:

> "In my view therefore this court can, in an appropriate case, order a permanent stay of prosecution even where there is enough evidence on which a prosecution can be sustained. What constitutes an appropriate case is an issue I prefer to leave for another day."

If this was not a dissenting judgment nothing is. I was therefore taken aback when both Mr *Madhuku* and Mr *Nyazamba* took the view that it was not a dissenting judgment even though GARWE JCC went on to arrive at a different conclusion from that of the majority. In respect of part of the application (that is, by Gumbo and Machengedza) he did not dismiss the application but struck it off the roll because he was of the view that it had not been properly referred to the Constitutional Court.

In our jurisdiction, it is the opinion of the majority of the court which is the court's judgment and becomes binding on the court and inferior courts as it forms the law on the subject. It is necessary to decide where GARWE JCC's opinion belongs, that is, whether it should be taken as a dissenting or concurring opinion. According to Julia Laffranque, in an article under the title: "Dissenting Opinion and Judicial Independence," *Juridica International VIII/2003* at p 163:

> "The opinion of the majority of the court is drawn up as the court judgment. The minority opinion, or dissenting opinion or dissenting vote ….. is the opinion expressed by one judge or jointly by several judges who disagree with the decision reached by the majority in the case. Such a separately expressed opinion can differ from the majority opinion for its reasoning, or reasoning and the conclusion. Anglo-American legal literature distinguishes between the dissent and the dissenting opinion. Dissent in the administration of justice can mark the direct disagreement of one or several members of the bench with the majority opinion. …….. The concurring opinion ……is an opinion where the judge agrees with the result of the judgment but not with the reasoning."

John Black, in *Jewitt's Dictionary of English Law*, 2nd Ed, Sweet & Maxwell, 1977 defines dissenting opinion as:

> "The individual opinion of a member of a court who disagrees with the judgment of the court."

International best practices including in the International Court of Justice in The Hague and in most national judicial systems judges who agree with the court decision as to its final conclusions but who come to that conclusion by way of different reasoning usually publish their concurring opinions. Dissenting opinions may assist the future development of the law in those fields where the law is still developing, a prior dissenting opinion may act as a stimulus to bring a new case before the court but, as I have said, the opinion reached by the majority of the judges determines the decision of the court. See Henry G Schermers & Denis F Waelbroeck, *Judicial Protection in The European Union 736*, 6 ed 2001. There is a sharp distinction between dissenting and concurring opinions. What the two have in common is that they both do not become binding precedent, the controlling opinion of the majority of the bench does.

The separate judgment of GARWE JCC has all the hallmarks of a dissenting judgment. He specifically stated that the majority judgment written by the late Chief Justice does not "correctly reflect the law." Where the majority ruled that a permanent stay of prosecution will not be ordered unless if the prosecution relies on the fruits of the infringements to anchor its case against the accused, the learned judge insisted that such a stay may be ordered even where the prosecution is relying on other evidence. Given that the majority of the court did not share that view, it follows that GARWE JCC's opinion identified and dealt with what he regarded as the flaws or deficiencies in the main judgment. See *Sebola and Anor* v *Standard Bank of South Africa* (CCT 98/11) 2012 ZACC 11. That part of the Constitutional Court judgment can therefore be safely regarded as one for the future. Collegiality, consistency and clarity of the law require that the court speaks with one voice, where possible. For this court, as an inferior court, the duty is to apply the judgment of the court.

I have painstakingly dealt with the *Makaza* judgment because it is important to decide which part of it binds this court. In my view it is the main judgment which should be applied by this court as an inferior court. I have no choice in the matter but to apply the principle that where the torture or ill-treatment of an accused person prior to charges being preferred against him or her has not resulted in a confession or the extraction of evidence sought to be used by the prosecution at the criminal trial, but the prosecution is relying on other evidence not obtained illegally, the accused person is not entitled to an order of a permanent stay of prosecution even though he or she was ill-treated or tortured.

I am aware that CHIDYAUSIKU CJ painfully arrived at that conclusion in *Makaza* because torture must always be condemned by all courts of law in the strongest of terms. It is however for the Constitutional Court to depart from that position and not for this court which possesses no jurisdiction to overturn decisions of that court as Mr *Madhuku* should be taken to have suggested. In the present case, the ill-treatment or torture of the applicant was for no apparent reason. No evidence or confession was sought or obtained from him. He cannot obtain the relief that he seeks. Having come to that conclusion l find it unnecessary and indeed superfluous to issue the declarations sought in the draft order.

It is ordered that:

1. The application is hereby dismissed.
2. Each party shall bear its own costs.

Lovemore Madhuku Lawyers, applicant's legal practitioners
National Prosecuting Authority, 1st & 2nd respondents' legal practitioners
Civil Division of the Attorney General's Office, 3rd respondent's legal practitioners