CHARLES CHITUKU
versus
THE MINISTER OF HOME AFFAIRS
and
THE COMMISSIONER OF POLICE
and
CONSTABLE CHIUTSI

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 2 April 2003 and 14 January 2004

Civil Trial

Mr *M Hogwe* for the plaintiff
Mr *N Mutsonziwa* for the defendants.

Makarau J: The plaintiff's claim against the defendants is for damages arising out of an allegation that the defendants subjected him to inhuman and degrading treatment whilst he was in police custody pending appearance in court to answer to a warrant of arrest.

On 22 February 1999, the plaintiff issued summons out of this court claiming the sum of $100 000-00 as damages for being subjected to inhuman and degrading treatment. The claim was defended. The mainstay of the defence was not to challenge the facts giving rise to the claim but to argue that the plaintiff's claim is unprecedented and unknown under the Zimbabwean law of delict.

At the trial, the plaintiff gave evidence. He did not call any other witness. Evidence on behalf of the defendants came from one Mirirai Madhumira. He is a member of the Zimbabwe Republic Police. At the material time he was stationed at Marlborough Police Station and was on charge-office duty on the night the plaintiff was detained. The evidence from these two witnesses coincided to a large extent. I found both credible although the plaintiff tended to be dramatic and emotional in his presentation.

The evidence from these two witnesses may be summarized as follows:

At the time of the trial, the plaintiff resided in Marlborough, Harare. He was in business. He was engaged in the business of repairing tyres from a premise that is situate at Greencroft Shopping Centre. At times, the police at Marlborough Police Station and from nearby Nyabira Police Station would request him to repair the tyres to their vehicles. At times, he would do this for free as a service to his community.

On 15 October 1998, the third defendant, a policeman stationed at Marlborough Police Station, acting within the scope of his authority and in the course of his employment as a duly attested member of the Zimbabwe Republic Police, arrested the plaintiff. The arrest was lawful. It was made on the strength of a warrant issued by the Harare Magistrate's Court after the plaintiff had failed to appear at court to answer to a traffic ticket issued him on a prior date. The arrest was made around 5.00p.m at the plaintiff's place of business. Thereafter, he was taken to the police station where he was informed that he would be detained overnight and would be taken to court the following morning to answer to the warrant.

Due to the time he arrived at the police station, the plaintiff could not be given supper before he was put into the holding cells.

The cell that the plaintiff was held overnight is 4,3 metres long and 3,68 metres wide. Its normal holding capacity is fifteen persons. On the day in question, it held twenty-four persons. The cell was described by the plaintiff as being so full that the policeman who closed the door after the plaintiff could hardly do so and had to push the door together with the inmates closest to the door.

The defendants explained that the cell was holding way above its normal capacity as a female inmate occupied the other cell. Marlborough Police Station has two holding cells only.

It is necessary for me to be indecorous and refer to issues that one would not ordinarily detail. This relates to the setting of the cell in relation to the toilet facilities offered the inmates and how they were used on the night in question. In one corner of the cell is the toilet for

use by the inmates. The toilet is separated from the rest of the cell by a one and a half metre high wall. There is no door to the toilet. The toilet was used throughout the night. The flushing system of the toilet is operated from outside the cell. On this night, it was only flushed once despite the frequent use the inmates subjected it to throughout the night.

There was no room to sleep. The temperatures were high and no drinking water was provided. No police officer checked upon the inmates the entire night. The police have regulations that inmates are to be periodically checked upon whilst held in the cells at night in case of emergent illness or some other eventuality that may require the opening of the cells.

There was no water to wash one's hands after using the toilet. There was no toilet paper.

The plaintiff and the inmates were released the following morning around 7.00 in preparation for court. A pot of tea (without milk) was given the inmates together with three cups from which all twenty- four inmates were to share the tea.

At court, the plaintiff was asked to pay $100-00 as a fine for the default and another $100-00 being the amount stipulated by the ticket. He was released after making the payments.

On the basis of the above facts, counsel were agreed that the issue arising for my determination is whether the facts of the matter give rise to an action for damages under the law of delict, the defendants having conceded that the conditions under which the plaintiff was held on that night were inhuman and degrading.

In my view, the concession by counsel for the defendants that the conditions under which the plaintiff was held were inhuman and degrading may find support in precedent from this court and from the Supreme Court.

In my review of some of the decisions of the Supreme Court on the subject matter, it appears to me that the term "inhuman and degrading treatment" has been construed only in relation to s 15(1)

of the Constitution of Zimbabwe.

The section provides:

> "No person shall be subjected to torture or to inhuman or degrading punishment or such other treatment."

In *S v Ncube 1987 (2) ZLR 246(SC),* the Supreme Court construed the meaning of the section. It held in that case that the section makes unconstitutional (i) torture, (ii) inhuman punishment, (iii) degrading punishment; (iv) inhuman treatment and (v) degrading treatment. In instructive dicta on the possible differences between treatment and punishment for the purposes of the section, GUBBAY CJ had this to say at 255-6:

> "Treatment has a different connotation from punishment. It seems to me that what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of sentences and conditions of searches of convicts and remand prisoners, the denial of contact with family and friends outside the prison, **crowded and unsanitary cells** and the deliberate refusal of necessary medical care might afford examples. " (The emphasis is mine).

In *Ncube's* case, the Supreme Court was concerned with whether the punishment imposed upon the applicants was inhuman and degrading and was not concerned with either torture or treatment. Be that as it may, the views expressed in that case on the issue of treatment of prisoners serve two purposes in my view. They instruct on what the superior court's thinking is on what would constitute inhuman and degrading treatment accompanying imprisonment and secondly, the views lay a basis upon which inhuman and degrading treatment of persons under lawful custody can be defined further.

On the facts of the matter before it, the Supreme Court dealt with the conditions attaching to a sentence as constituting "treatment" for the purposes of the section. From the discussion in the judgment on how wide the term "inhuman treatment" can be construed for the purposes of the section, it is in my view but a small step to include the conditions attaching to any lawful detention of persons at the instance of the State within the meaning of the term.

Thus, “treatment” for the purposes of the section may, in my view, be held to include the conditions under which the police hold persons under investigation or awaiting appearance in court. I however hold no firm view on this point. Further, it is not necessary that I make a definitive finding on this issue due to the conclusion I reach in this matter.

The *raison d’etre* behind the protection against torture inhuman and degrading punishment and treatment has been articulated in a number of cases in this jurisdiction.

In *Conjwayo v Minister of Justice and Another* 1991 (1) ZLR 105 (SC), the Supreme Court had to determine whether certain conditions under which a prisoner awaiting execution was held were inhuman and degrading. The application was brought before the Supreme Court as a constitutional matter under s 15(1) of the Constitution. In graphic language, the court detailed the conditions under which the prisoners were held. After referring to authorities from India, South Africa, Canada and the United States of America, the court allowed the application. In allowing the application, the court held that to confine a human being in a small cell over weekend for over 47 hours (with two daily half- hour periods out of the cell but within the confined section itself and not in the open air) was plainly offensive to one’s notion of humanity and decency. The court was of the further view that such treatment of the applicants by the prison administration transgressed the boundaries of civilised standards and involved the infliction of unnecessary pain. The court concluded by observing that the emphasis must always be on man’s basis dignity, on civilised precepts and on flexibility and improvement on standards of decency as society progresses and matures. I would add a trite observation at this stage that each case will be determined on its own merits and the standards that may be acceptable today may constitute inhuman and degrading treatment a decade away.

In *Muchenje v Inspector Javangwe* HH 94/95, MUBAKO J as he

then was, dealt with a claim for compensation for wrongful arrest, detention and ill treatment brought by a 50 year old father of six who had been held by the police for investigation purposes. He was held at different police stations from 25 to 26 July 1991. He was made to sit on a bench in his socks without his shoes on. At night, he was made to share a "smelly and cold cell" and a common toilet with two others. He was not allowed anything to eat for 29 hours and was not allowed contact with his lawyer. The court was of the view that the plaintiff suffered unnecessary humiliation, mental anguish and physical discomfort. On the basis of that finding, the court made an award of damages for the physical discomfort and mental anguish.

In my view, the physical discomfort, and mental anguish in this case would closely equate to inhuman and degrading treatment at the hands of the police during investigation although that is not the way the claim was brought. In making the award, the court was showing its abhorrence of any treatment that will cause unnecessary physical discomfort and mental anguish to a suspect while in police custody.

It would appear to me from the authorities that treatment of an arrested, detained or convicted person that affronts the dignity of that person, that exceeds the limits of civilised standards of decency and involve the unnecessary infliction of suffering or pain is inhuman and degrading for the purposes of the supreme law of the land. Measured against that yardstick, I agree with counsel that the treatment of the plaintiff at Marlborough Police Station on 10 and 11 October 1999 was inhuman and degrading in some respects.

It was argued on behalf of the defendants that the plaintiff ought to have approached the Supreme Court under s 24 of the Constitution for damages. The argument proceeded to hold that the plaintiff is improperly before this court and that his claim should be dismissed.

The issue that is presented to me for determination by this argument is whether the plaintiff's remedy for damages is to be

exclusively found in the Supreme Court under s 24, it being so exclusive that he is non-suited before me.

It is my view that if this court is satisfied that the actions complained of violate the rights of the plaintiff as granted under the constitution, it could grant suitable relief to redress the injury. This is part of the inherent jurisdiction that this court enjoys. That this court has such inherent jurisdiction was recognised in *S v Chakwinya* 1997 (1) ZLR 109 (H) and in *S v Kusangaya* 1998 (2) ZLR 10. Both cases, although dealing with the right of an accused to a fair trial, effectively put to rest the notion that the High Court does not have jurisdiction in matters where allegations of constitutional rights infringements are made. GILLESPIE J in *Chakwinya's* case put the point thus at page 115:

> "A similar provision to s24 (4) which pertains to the Supreme Court, is not made in respect of the High Court. That does not mean, however, that the High Court is powerless to give a remedy. Indeed this clause pertaining to the Supreme Court appears *ex abundante cautela* and lest otherwise it be thought that the Supreme Court, a court of appellate jurisdiction, has no original jurisdiction pertaining to the point in issue."

I understand GILLESPIE J to be saying clause 24(4) was put into the Constitution to put it beyond doubt that the Supreme Court has original jurisdiction in these issues. The clause therefore adds original jurisdiction on the part of the Supreme Court without taking away the inherent jurisdiction that this court has always had to redress any actionable wrongs that are brought to its attention.

Section 24(1) of the Constitution provides:

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of person who is detained, if any other alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person, (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme for redress."

Section 24(4) provides:

> "The Supreme Court shall have original jurisdiction
>
> (a) to hear and determine any application made by any person pursuant to subsection
> (1) .....

> and may make such orders, issue such writs and give directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of Declaration of Rights:
>
> Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under the provisions of this Constitution or under may other law."

It appears to me that the above law does not make the jurisdiction of the Supreme Court under s 24 exclusive for the purposes of non-suiting litigants before this court. The position is quite the converse in the sense that where there is another adequate remedy or relief under the Constitution or some other law, the Supreme Court will decline to exercise the original jurisdiction granted to it by the section.

Whether the Supreme Court can grant damages, as a remedy under s 24, is still a moot point. Indications of how the Supreme Court may deal with the issue may be found in the remarks of GUBBAY CJ in *In Re Mlambo* 1991 (2) ZLR 339 (S). In construing s 24 (4) of the Constitution at page 355B he said:

> "Section 24 (4) of the Constitution empowers the Supreme Court to make such orders, issue such writs and give such directions as it may consider appropriate and for the purpose of enforcing or securing the enforcement of the Declaration of Rights. It is difficult to imagine language which should give this Court a wider and less fitted discretion ……."

If these sentiments will guide the future decisions of the Supreme Court, one may venture to suggest that the granting of damages in deserving or appropriate cases will be one of the remedies that the Supreme Court will order under the wide powers granted to it by the section.

In *Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)*, the South African Constitutional Court, in construing the term "appropriate relief" under s 7 of the South African Constitution, held that in principle, there was no reason why such relief could not include an award of damages. This is persuasive authority that in all probability, our own Supreme Court, in an appropriate case, will make

a similar finding.

It is my view that the fact that the Supreme Court may have jurisdiction in this matter under s 24 and that it may be able to grant damages under s 24(4) is not in itself adequate for me to dismiss the plaintiff's claim as I have been urged to do by the defendants. The plaintiff has clearly indicated that his claim was deliberately brought before this court for damages under the *actio injuriarum*. Mr *Hogwe*, for the plaintiff submitted that the claim is unprecedented in this jurisdiction and invited the court to develop the common law of delict to encompass the facts of this matter. The issue to determine is whether he is correct in this regard.

The right to dignity is recognised in the Roman-Dutch law as an independent right that can be protected by the *actio injuriarum*. Inhuman and degrading treatment affronts the dignity or self-respect of an individual. In *Minister of Police v Mbilini* 1983 (3) 705 (AD) at 715G, it was stated that:

> "It is trite law that one of the rights which is protected by the *actio injuriarum* is the right to an unimpaired dignity. Dignity was defined by Melius de Villiers in 1899 in his well-known work *The Roman and Roman-Dutch Law of Injuries* at 24 as-'that valued and serene condition in his social or individual life which is violated when he is either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.'
> .....
>
> These passages have repeatedly been approved by the courts of this country as an accurate statement of the law in regard to the concept of *injuria.* See e.g. *R v Unifaan* 1908 TS 62 at 66 and 67; *Walker v Van Wezel* 1940 WLD 66*; S v A and Another* 1971 (2) SA 293 (T) at 297."

In *Minister of Justice v Hoffmeyer* 1993 (3) SA 131 (A), the court held that the holding of a political detainee in solitary confinement, with certain other deprivations was ground for an action for damages under the *actio injuriarum*. While the court in that case based the infringement to the bodily integrity of the plaintiff, (corpus), the principle to be distilled from the decision is that the *actio injuriarum* is wide enough to encompass any action that violates the *corpus* or *dignitas* of the plaintiff and the law needs no further widening in this regard.

It is therefore my finding that the plaintiff's claim for damages under the *actio injuriarum* is not only good at law but is also properly before this court.

I now turn to assess the quantum of damages due to the plaintiff.

The plaintiff claimed the sum of $100 000-00 in damages. It was submitted on behalf of the defendants in the alternative that should I find for the plaintiff on the issue of liability, the amount of the damages be reduced to $50 000-00.

In assessing damages in this matter, I take into account that not all the complaints by the plaintiff are actionable in my view. While the position has been settled that an arrestee, detainee or prisoner does not shed all his rights as a person upon entering state custody, some rights are lost as being inconsistent with the state of being in custody. (See *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92). Thus I find that the fact that the plaintiff was not given supper before being placed in the holding cell because of his arrest at the time he was arrested. He could not have supper on call as it were whilst under police custody. I further find that the fact that some of the inmates had to use the toilet throughout the night is not actionable. It is a natural consequence of being arrested that one cannot chose who to share the holding cells with nor prescribe the personal\habits of one's cellmates. Apart from that, I find that the other conditions under which the plaintiff was held were an affront to his dignity and self esteem as a person.

Considering all the circumstances of this matter, I believe that an award in the sum of $100 000-00 is appropriate in view of the depreciated value of money.

In the result, I make the following order:

1. The defendants are to pay to the plaintiff the sum of $100 000-00 together with interest thereon at the rate of

25% p.a. from the date of summons to date of payment in full.

2. The defendants are to pay the plaintiffs' costs of suit.

3. The liability of the defendants under this judgment is joint and several, the one paying the others to be absolved.

Mangwana Hogwe & Partners, plaintiff's legal practitioners.

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