

SIMON MANUEL ANDUJAR PORTILLO
versus
CHIEF IMMIGRATION OFFICER (N.O)
and
GODFREY KONDO
and
COMMISSIONER GENERAL ZIMBABWE PRISONS
AND CORRECTIONAL SERVICES (N.O)
and
MINISTER OF HOME AFFAIRS (N.O)
and
COMMISSIONER GENERAL ZIMBABWE REPUBLIC POLICE (N.O)
and
ATTORNEY GENERAL OF ZIMBABWE (N.O.)

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 26 February 2020 & 13 March 2020

Urgent Chamber Application

E T Nhachi, for applicant
C Chitekuteku, for respondent

KWENDA J: This is an urgent chamber application filed on form 29B for what is essentially a *habeus corpus* [see section 50 of the Constitution of Zimbabwe (Amendment No. 20) Act 2013.]¹ The chamber application ought to have been filed on Form 29 with the necessary modifications since it had to be served on interested parties. (see rule 241 (1) of the High Court

¹ (7) If there are reasonable grounds to believe that a person is being detained illegally or if it is not possible to ascertain the whereabouts of a detained person, any person may approach the High Court for an order—
(a) of *habeus corpus*, that is to say an order requiring the detained person to be released, or to be brought before the court for the lawfulness of the detention to be justified, or requiring the whereabouts of the detained person to be disclosed; or
(b) declaring the detention to be illegal and ordering the detained person's prompt release;
and the High Court may make whatever order is appropriate in the circumstances.
(8) An arrest or detention which contravenes this section, or in which the conditions set out in this section are not met, is illegal.

rules 1971.).² The necessary modifications usually involve combining forms 29B by stating the grounds of the chamber application on the face of the application and Form 29, which informs the respondent of his/her procedural rights to defend immediately or any specified period shorter than the minimum of ten days required for ordinary applications. Templates of forms 29B and 29 are in the rules. The application does not, therefore, comply with the rules. The grounds of application are contained in one huge paragraph with 13 lines. Form 29B requires the grounds to be concise and specific. The grounds must also state why the matter cannot wait to be heard on the normal roll.

The legal practitioner who certified the chamber application as urgent submitted as follows, *inter alia*

“applicant is a foreigner and such kind of conduct scares away investors. The matter is tarnishing the image of the country at a time when the country needs foreign investments due to conduct of a few errant officers”

² D. CHAMBER APPLICATIONS

241. Form of chamber applications

(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.

Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications.

[Proviso inserted by s.i. 251 of 1993]

(2) Where a chamber application is for default judgment in terms of rule 57 or for other relief where the facts are evident from the record, it shall not be necessary to annex a supporting affidavit.

242. Service of chamber applications

(1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following—

(a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;

(b) that the order sought is—

(i) a request for directions; or

(ii) to enforce any other provision of these rules

in circumstances where no other person is likely to object; or

[Paragraph substituted by s.i. 25 of 1993]

(c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;

(d) that the matter is so urgent and the risk of irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;

(e) that there is any other reason, acceptable to the judge, why such notice should not be given.

A certificate of urgency should be a value judgment by a practising lawyer based on his/her reading and understanding of the chamber application, founding affidavit and supporting documents submitted to him. A certificate of urgency does not introduce own facts. The submissions quoted above did not originate from either the grounds of application on form 29 B or the founding affidavit. I would have struck the matter of the roll for non-compliance with the rules but I took the view that the allegation of illegal detention made the matter inherently urgent. I therefore condoned the deficiencies.

Merits

The applicant averred that on 22 February 2020 he appeared in the Magistrate's court charged with unlawful prospecting without a licence in contravention of s 368 of the Mines & Minerals Act [*Chapter 21:05*]. He was admitted to bail. On his way to freedom, after paying bail at court, he was advised that an Immigration Officer had left a warrant of his detention for administrative purposes. The warrant had been issued in terms of s 8 (1)³ as read with s 9 (1) and 10 of the Immigration Act [*Chapter 4:02*].

Applicant's counsel submitted that the applicant is a foreigner who has been detained pending deportation. Section 8 (1) speaks of detention for a period not exceeding 14 days. The applicants allege that any detention which exceeds 48 hours without an order of court is in conflict with s 50 (1) of the Constitution and therefore invalid. The Certificate of urgency identified the case of *Muhammed Shabbir and Anor v Commissioner of Prisons N.O & Ors* HH 230/16. I have read the judgment and note the conclusion arrived there in that section 50(1) of the constitution⁴

³ **8 Functions of immigration officers in respect of prohibited persons and others**

(1) 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.

⁴ **50 Rights of arrested and detained persons**

(1) Any person who is arrested—

(a)

(b)

(c) must be treated humanely and with respect for their inherent dignity;

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention; and

(e)

(2) Any person who is arrested or detained—

(a) for the purpose of bringing him or her before a court; or

(b) for an alleged offence;

expressly outlaws detention exceeding 48 hours even for the purposes of deportation without an order of court. It means that the Immigration Act has not been aligned with the Constitution in s 8. Alignment of statutes with the constitution is a legislative process. However, for as long as alignment has not taken place a law can be challenged in terms of the Constitution.

However, in terms of s 175, a *declaratur* that a law is invalid for inconsistency with the constitution only becomes into operation after being confirmed by the Constitutional Court. The applicant was detained on 22 February 2020 and is therefore within the 14 days' period. The applicant's counsel did not take up my suggestion to properly seek a *declaratur* of the unconstitutionality of section 8 of the Immigration Act to the extent that it is inconsistent with the constitution. He knew what is in the best interests of his client. It was not up to me to issue the *declaratur* without the issue and the appropriate order having been properly argued before me. (see *Prisca Mupfumira v The State* SC71/19)

The detention is in terms of a law which remains in our statute books and the presumption of constitutionality means that this court's hands are tied. Assuming the Constitutional court confirms that section 8 of the Immigration Act is invalid, the relief will be up to it. It can postpone the effective date of the declarator to give the Legislature an opportunity to align the statute with the constitution. (See section 175(6) of the Constitution)

In the premises the application is dismissed with no order as to costs.

Mapendere and Partners, applicant's legal practitioners
Attorney General's Office, respondents' legal practitioners.

and who is not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the detention began, as the case may be, whether or not the period ends on a Saturday, Sunday or public holiday.