

JOANA MAMOMBE
versus
PROSECUTOR GENERAL N.O
and
BIANCA MAKWANDE N.O
and
COMMISSIONER GENERAL OF PRISONS
and
SUPERINTENDENT HARARE REMAND PRISON
and
OFFICER IN CHARGE CHIKURUBI FEMALE PRISON

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 29 September 2020; 5 and 7 October 2020

Urgent Chamber Application

A. Muchadehama & J Bamu, for the applicant
Miss W Badalane, for the 1st respondent
No appearance for the 2nd, 3rd, 4th, and 5th respondents

MUREMBA J: This urgent chamber application was allocated to me on 29 September 2020. After perusing it I endorsed that the matter was not urgent and removed it from the roll. By letter dated 30 September 2020 the applicant through her legal practitioners approached me and asked for leave to address me on the question of urgency. The issue of the address is dealt with later in the judgment.

The facts of the matter are as follows. On 10 June 2020 the applicant was arrested and charged with publishing or communicating false statements prejudicial to the State as defined in s 31 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] or alternatively defeating or obstructing the course of justice as defined in s 184 of the same Act. Having been denied bail pending trial in the Magistrates Court she approached this court on appeal and was granted bail on 26 June 2020. The trial is still pending. The matter has been set down a couple of times with trial failing to commence.

The applicant is said to be a survivor of an enforced disappearance and is said to have suffered trauma. As a result she started undergoing therapy at some specialist medical facility following an assessment by a medical specialist. The applicant was actually admitted to a

mental institution for treatment on 4 September 2020. Following this admission to hospital, an application for the relaxation of the applicant's bail conditions, particularly the reporting conditions was made on 8 September 2020. Trial had been scheduled for 15 September 2020. The reporting conditions were suspended.

Since the applicant was still hospitalized, on 15 September 2020 she was unable to attend court. This resulted in the Magistrates Court issuing a warrant of arrest for her. The police acting on the warrant of arrest went to the medical facility where the applicant was hospitalized. They arrested her and took her to court where the warrant of arrest was cancelled. The State then went on to make an application to the court to invoke the provisions of s 26 of the Mental health Act [*Chapter 15:12*] and order the applicant to be examined by two medical practitioners and inquire into and report on the applicant's mental state. Despite opposition by the applicant, the second respondent who was the presiding magistrate granted the application on 24 September 2020 and gave the following order

"I therefore order the following:

That the accused person be examined by two medical practitioners who are psychiatric specialists, for the purposes of inquiring into her mental state. The doctors must individually certify on the mental state of the accused and inform this court whether she is able to comprehend these proceedings and to stand trial. For this purpose the accused shall be under the care of the Superintendent of Harare Remand Prison where examination shall be conducted. The examinations must be conducted within a period of two weeks, which period shall run from this day, that is the 24 September 2020. And this court expects a comprehensive report from each of the doctors in the next 2 weeks.

In the meantime the trial which was scheduled for the 29th of September is hereby stayed pending the outcome of the determination"

This order by the Magistrates Court prompted the applicant to file an application for review in this court under case number HC 5435/20 on 25 September 2020. In that application the applicant wants the decision by the Magistrates Court placing her in custody for medical examination by two medical practitioners set aside. She wants the application by the State for her committal for medical examination by two medical practitioners dismissed.

The present urgent chamber application was also filed on the 25th of September 2020 simultaneously with the application for review. In the urgent chamber application the applicant was challenging her detention which she said was unlawful. She averred that having been admitted to bail by the High Court, the detention in custody is an infringement of her right to liberty as provided for in the Constitution of Zimbabwe Amendment (No. 20) Act 2013. She averred that the application was being made in terms of s 50 (5) (e) of the Constitution which

entitles her to challenge the lawfulness of her detention and if proved unlawful she be entitled to her prompt release. She also averred that in terms of s 50 (7) of the Constitution she was seeking an order declaring that her detention was illegal; and an order for her prompt release. She averred that the Magistrates Court's decision amounted to an arbitrary deprivation of her right to liberty because no basis for the deprivation of liberty had been established. She averred that any arbitrary deprivation of a person's liberty is an issue which should be dealt with on an urgent basis because every minute the applicant spends in custody is an infringement of her fundamental right and no amount of monetary compensation will make up for the unlawful detention. She averred that the balance of convenience favours her immediate release. Her draft order was couched as follows:

"FINAL ORDER SOUGHT

That the Respondent show cause if any way a final order should not be granted in the following terms:

1. That Order as may be granted by this Court in Case Number HC 5435/20 is the final disposition of the issues raised in this matter.

INTERIM ORDER GRANTED

Pending determination of the Court Application for review in Case Number HC 5435/20, the following interim relief is granted:

1. Applicant be and is hereby released from the care of 5th Respondent forthwith. Consequently, Applicant must be promptly released from custody and the operation of the Ruling made by Second Respondent on 24 September 2020 be and is hereby stayed.
2. The Court Application for Review in Case HC 5435/20 filed on 25 September 2020 is urgent in nature and should be heard on urgent basis.
3. The respondent shall file any notice of opposition and opposing affidavits to the Court Application for Review if any, within 2 days of the date of this order.
4. The applicant may file an answering affidavit, if any, within 2 days following the receipt of any opposing papers for the respondent.
5. The applicant shall file its heads of argument within 3 days of filing its answering affidavit and respondents shall file their heads of argument within 3 days of service of the applicant's heads of argument.
6. Thereafter the Registrar of the High Court shall cause the application to be set down on the earliest available date.
7. The costs of this application shall be costs in the cause.

SERVICE OF THE PROVISIONAL ORDER

This provisional order shall be served by the Sheriff the High Court of Zimbabwe or the Applicant's Legal Practitioners or their duly authorised agents."

As I have said elsewhere above, after perusing the application I endorsed that the matter was not urgent and removed it from the roll of urgent matters.

It goes without saying that the deprivation of a person's liberty is an issue which deserves to be treated with urgency. It is a right which is protected under s 49 of the Constitution. In terms of s 49(1) (b),

"Every person has the right to personal liberty, which involves the right not to be deprived of their liberty arbitrarily or without a just cause."

In terms of s 50 (s) (e) of the Constitution,

"Any person who is detained, including a sentenced prisoner, has the right to challenge the lawfulness of their detention in person before a court and, if the detention is unlawful, to be released promptly."

In terms of s 50 (7) of the Constitution,

"If there are reasonable grounds to believe that a person is being detained illegally....any person may approach the High Court for an order-

- a) Of habeas corpus, that is to say an order requiring the detained person to be released....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."

The word 'prompt' used in s 50 (5) (e) and s 50 (7) means 'with little or no delay' or 'immediately'. This shows that matters to do with a person's detention should be treated with the utmost urgency because it has a bearing on the person's right to liberty. This means that applications that are brought in terms of these constitutional provisions are urgent by nature. The applicant was thus correct in filing an urgent chamber application. Even the facts of the matter showed that the matter was urgent. However, the error that the applicant made in filing the urgent chamber application was to seek a final order in the interim instead of seeking a provisional order. A provisional order is the one that is granted on an urgent basis. This provisional relief must be confirmed or discharged on the return date. Even the terms on Form 29C of the Rules contemplate that a final order will be made on the return date. If a final order is granted on an urgent basis there will be nothing to confirm or discharge on the return date. In fact, the parties will have no reason to come back on the return date as there will not be anything to confirm or discharge. In other words once an order for interim relief is final, the confirmation or discharge of the provisional order will no longer be possible. Therefore an order for interim relief must be temporary in effect such that a return date becomes a necessity. This means that there has to be a relationship between the provisional order that is granted on

an urgent basis and the final order that will be granted on the return date. For the avoidance of doubt the interim order that the applicant was seeking was couched as follows.

“INTERIM ORDER GRANTED

Pending determination of the Court Application for review in case number HC 5435/20 the following interim relief is granted:

1. Applicant be and is hereby released from the care of 5th respondent forthwith. Consequently, applicant must be promptly released from custody and the operation of the ruling made by second respondent on 24 September 2020 be and is hereby stayed.” (My underlining for emphasis)

Clearly the substance of this relief showed that this was a final order and the granting of a final order in the interim is not competent. This order was not going to be subject to confirmation or discharge on the return date. This buttresses the point that a final order cannot be granted on an urgent basis. Care must be taken in framing the interim reliefs sought because interim reliefs are not for the asking even if the facts of the matter show that the matter is urgent. By filing an urgent chamber application the applicant will be seeking a provisional order to be issued calling upon the respondents to show cause on the return date why a final order should not be granted.

The second defect was in the final order that the applicant was seeking. It read:

“That the respondent show cause, if any why a final order should not be granted in the following terms:

1. That order as may be granted by this court in case Number HC 5435/20 is the final disposition of the issues raised in the matter.”

With all due respect this order did not make any sense. The applicant was seeking that the order that is going to be granted in the application for review under HC 5435/20 be the one to dispose of the issues raised in this matter. The question that comes to mind is what issues are these? In any case how can an order in a different matter dispose of issues in the present matter when these are two different matters with different issues? Is it even competent for the court to grant an order that is couched in this manner on the return date? A court order must easily convey the decision of the court and it must be capable of enforcement¹. The order should also give finality to the dispute between the parties. Clearly the final order in *casu* was not going to give finality to the dispute between the parties as it referred to the order to be made in the application for review as the one that was going to give finality to the matter. The order was not a stand-alone determination which addressed the issues in the present matter. In my view the final relief that the applicant was seeking was also defective.

¹ *Lujabe v Maruatona* (35730/2012) [2013] ZAGPJHC 66 (15 April 2013).

The foregoing shows that both the interim relief and the final relief the applicant was seeking amounted to two final orders being sought in an urgent application. This is improper and incompetent. It is my considered view that if the facts of a matter show that the matter is urgent but the reliefs being sought are thoroughly defective as was the case in this matter a judge is not obliged to set down the matter for hearing. Urgency in a matter is not just created by the facts. It is also created by the reliefs that are sought. The applicant was legally represented. So there was no excuse for the filing of an application with such defective reliefs. A legal practitioner has a duty to ensure that the reliefs being sought are competent. He or she should think things through and see to it that their client's papers are in order before they file urgent chamber applications because they risk jeopardising their clients' matters. The two reliefs the applicant was seeking being defective, I endorsed that the matter was not urgent and removed it from the roll of urgent matters.

As already stated above, Mr *Muchadehama* then wrote to the Registrar seeking audience to address me on the issue of urgency. I granted the request and set down the matter for hearing on 5 October 2020. I directed that the respondents be served for the hearing. However, only the first respondent's counsel attended. The 2nd to the 5th respondent who are Bianca Makwande N.O (the presiding magistrate); the Commissioner General Of Prisons; the Superintendent Harare Remand Prison and the Officer In Charge Chikurubi Female Prison did not attend.

In addressing me Mr *Muchadehama* basically reiterated the facts of the case as I have outlined them above. Mr *Muchadehama* further submitted that the applicant had already been examined by one doctor. He further submitted that the applicant had no problems with being examined by the second doctor as ordered by the second respondent. He submitted that what was of importance was the liberty of the applicant. He submitted that even if the magistrate had decided that the applicant ought to be medically examined, she still could have ordered that she be examined whilst out of custody because the Mental Health Act allows it. I took him to task on the reliefs the applicant was seeking. He conceded that the reliefs were not competent and applied to amend them. He submitted that since the applicant had already been examined by one doctor and was willing to be examined by the second doctor, the applicant was going to abandon the relief seeking stay of the examination pending the determination of the application for review. He further indicated that the applicant was abandoning paras 2 -7 of the interim relief she was seeking. He applied to amend the reliefs to read as follows.

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the decision by the 2nd respondent made on 24 September 2020 remanding applicant in custody for the purposes of being examined by two medical practitioners be and is hereby declared unlawful and is accordingly set aside.
2. There shall be no order as to costs.

Interim Relief Granted

Pending determination of this matter, applicant is granted the following relief:

1. Applicant be and is hereby released from the custody of 3rd, 4th and 5th respondents forthwith.”

With the submissions made by Mr *Muchadehama* and his application to amend the reliefs the applicant was seeking, Miss *Badalane* did not submit much. She was not opposed to the application to amend the reliefs. She however initially submitted that the matter was not urgent but she was unable to advance any reasons why the first respondent was saying that the matter was not urgent especially with the application to amend the reliefs that Mr *Muchadehama* had made. When I put her to task on that aspect, she then conceded that the matter was urgent. She also had no reasons for objecting to the release of the applicant from custody whilst she underwent the medical examination the magistrate ordered. She again conceded that the applicant could be released. It is my considered view that the concessions by Miss *Badalane* were well made. It is not my mandate in the present application to make a determination on whether or not the decision by the magistrate for the applicant to be examined in terms of the Mental Health Act was correct or wrong. It is a matter which will be determined in the application for review in HC 5435/20. However, I am in agreement with Mr *Muchadehama* that it was not necessary for the second respondent to place the applicant in custody for purposes of being medically examined in terms of the Mental Health Act. In terms of s 26 (2) of the said Act, the Magistrate could have ordered the applicant to undergo the examination whilst out of custody. In terms of that provision, it is not a must that an accused who is to be mentally examined be in custody. The provision provides,

“26 Power of magistrate to order examination and treatment of accused persons

(1) In this section—

“magistrate” includes the chief magistrate and any regional magistrate.

(2) Without derogation from section *twenty-seven* or *twenty-eight*, if a person appears before a magistrate for the purpose of—

(a) remand; or

(b) any other purpose prior to arraignment;

on a charge of committing an offence which the magistrate considers will not merit imprisonment without the option of a fine or a fine exceeding level three, and the magistrate has reason to believe that the person is mentally disordered or intellectually handicapped, the magistrate may order that the proceedings against the person be stayed for a definite or an indefinite period, and may—

(i) order the person to submit himself for examination and additionally, or alternatively, treatment in any institution or other place in terms of Part VI; or

(ii) order the person's guardian, spouse or close relative to make an application for the person to be received for examination and additionally, or alternatively, treatment in any institution or place in terms of Part VII or Part VIII; or

(iii) order two medical practitioners to examine the person and inquire into and report on his mental state:

Provided that, if only one medical practitioner is available, the magistrate may order a psychiatric nurse practitioner or a designated psychiatric nurse, social worker or clinical psychologist to examine the person concerned and inquire into and report on his mental state;

and may give such directions for the person's release from custody or continued detention or transfer to an institution or other place as he considers necessary to ensure that the person's mental state is examined and additionally, or alternatively, that he receives appropriate treatment". (my underlining for emphasis)

(3) An order or direction under subsection (2) may be given subject to such conditions as the magistrate think fit.

Depending on the circumstances of the case, the accused can be in or out of custody. Taking into account all the circumstances of the case the court should exercise its discretion judiciously and objectively. In the circumstances of this case, the applicant was already out of custody on bail which she had been granted by this court. Nothing shows that she had breached her bail conditions. It is not disputed that when a warrant of arrest was issued against her for failing to appear in court on 15 September 2020, she was in hospital. The police arrested her from there and took her to court. In the circumstances it cannot be said that she was in wilful default when she did not attend court. Nothing therefore warranted her placement in custody for the purposes of her mental examination. In terms of s 26 (3) the applicant could still have been ordered to undergo the mental examination at a State institution by the State's medical practitioners. The provision empowers the magistrate to give an order which is subject to conditions he or she sees fit. An order that the applicant availed or submitted herself at a particular institution for the examination would have sufficed. There was no evidence that was presented to the court that showed that she would for some reason(s) fail to comply with that order. There was therefore no just cause for placing the applicant in custody thereby depriving her of her right to personal liberty which is jealously guarded by s 49 of the Constitution. A person's liberty is of paramount importance. The interests of justice can still be served even if the accused is ordered to undergo mental examination whilst out of custody. Transparency is not defeated by ordering that the accused presents himself or herself for the examination whilst out of custody. With this, I find the concession made by Miss *Badalane* that the applicant be released from custody well made. I will thus grant the provisional order for the release of the applicant from custody forthwith as prayed for in the amended draft order.

I must however, hasten to add that the applicant should still comply with the magistrate's order that she be examined by 2 doctors at Harare Remand Prison within the timelines given.

In the result, the interim relief the applicant is seeking in the amended draft order is granted.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
National Prosecuting Authority, for the 1st respondent.