ANGE MASHAURI
and
JEANETTE NYANGORORE
and
PETRONELLA NYAMAPFENE
versus
CHIEF IMMIGRATION OFFICER
and
THE MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE
and
COMMISSIONER GENERAL PRISONS AND CORRECTIONAL SERVICES
and
MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 16 January & 30 August 2023

Opposed Matter

C Mutsvandiani & O Shava, for the applicant
C Chitekuteku, for the respondents

MAXWELL J:

Applicants approached this court seeking the following order

> "IT IS HEREBY DECLARED THAT;
>
> 1. The detention of 1st Applicant and other minor children namely Christine Mushauri, a female child (born 04/12/12), Amani Mashauri, a male child (born 28/04/18) and David Mashauri, a male child (born 19/08/21) at Chikurubi Maximum Prison was unconstitutional.
> **Alternatively,**
> 2. The Respondents' conduct of detaining 1st Applicant together with three (3) other minor children, namely Christine Mushauri, a female child (born 04/12/12), Amani Mashauri, a male child (born 28/04/18) and David Mashauri, a male child (born 19/08/21) at Chikurubi Maximum Prison in a cell with other detainees of over 18 years of age and above was unconstitutional for abrogating the provisions of **Section 81 of the Constitution.**
> 3. The detention of any child, whether Zimbabwean or Immigrant in a detention center with other detainees of eighteen (18) years of age and above is unconstitutional.

4. Failure to provide educational services and facilities to 1st Applicant and the other minor children namely Christine Mushauri, (Christine), a female child (born 04/12/12), Amani Mashauri, (Amani), a male child (born 28/04/18) and David Mashauri, (David), a male child (born 19/08/21) was unconstitutional.
5. Failure to provide educational services and facilities to any child in prison detention is unconstitutional for violating **section 81 (1) (f) of the Zimbabwean constitution.**
6. Any Respondent who opposes this application is ordered to pay costs on client and Attorney scale."

Background facts

The first applicant deposed to the founding affidavit. She is a Democratic Republic of Congo national who came to Zimbabwe with her parents sometime in 2012 when she was aged 8 years old. They stayed at Tongogara Refugee Camp. On 29 September 2021, first applicant's mother went to the Registrar of Births and Deaths in an effort to register David's birth. She was requested to produce valid documents authorizing her stay in Zimbabwe. When she failed, she was arrested leading to the arrest of the whole family. They were detained at Chipinge Prison before being transferred to Mutare prison. After about two months they were transferred to Chikurubi Maximum Prison on 8 January 2022. The applicant and her siblings were still minors but put in a cell with convicted criminals. Applicant was in Form 3 and the siblings were in grades 5 and 3. There were no educational facilities availed at Chikurubi Maximum Prison. Applicant turned 18 years on or about 8 January 2022. Around the 16th of February 2022 the applicant's three siblings were transferred to SOS Children's homes after the intervention of Justice for Children Trust.

In her founding affidavit applicant avers that respondents are in violation of section 81 of the Constitution as it relates to the rights of children. She states that she takes issue with the violation of the following rights; -

a) The right not to be detained except as a measure of last resort; and in the alternative,
b) The right to be kept separately from detained persons over the age of eighteen years, and,
c) The right to education.

She submitted that the respondents are duty bound by the Constitution and in terms of s 39 of the Children's Act to approach the management of any certified children's institution to seek the admission of any young person from foreign states into such an institution. Further that only

after such institutions have demonstrated lack of capacity to admit the said young persons from foreign countries should prison detention be considered. According to her, respondents never considered any other suitable facilities for her and her siblings before detaining them in prison cells. Applicant further argued that even if no children's institution could accommodate her and her siblings, respondents were still under an obligation constitutionally, to ensure that they were detained separately from other detainees of 18 years and above, which was not done. Applicant pointed out that they were never taken to court for any form of hearing and the period of detention was not defined.

The second applicant deposed to a supporting affidavit. She is the mother of first applicant and her siblings. She confirmed being a national of the Democratic Republic of Congo and an illegal immigrant. She confirmed the averments by the first applicant and indicated that she was advised of her children's rights by third applicant's officials (sic). She prayed for an order in terms of the draft. Third applicant is a child rights activist and legal practitioner. She indicated that she is approaching the court by virtue of s 85(1) (c) of the Constitution. She stated that regarding the detention of children in prison cells, respondents adopt the same approach which they used before the coming into existence of the new constitution. Further that the constitution introduced fundamental children's rights which militate against arbitrary detention by placing an obligation upon respondents, to consider alternative ways of handling child offenders as opposed to sending them to prison. She also stated that where respondents consider prison as the only available option, they are obliged to ensure that children under 18 years are kept separately from adult inmates and that their educational journey is not interrupted. Third applicant stated that on 15 February 2022, she wrote a letter to the first respondent making enquiries about the detention of immigrant minors in prison. Further that the letter was copied to third respondent and no response was received. She averred that further engagements on the subject proved to be an exercise in futility. She prayed for an order in terms of the draft.

The application was opposed. Kambarami Prosper (Kambarami) deposed to the opposing affidavit on behalf of the first respondent. He is an assistant Regional Immigration Officer Head-Compliance at headquarters. He stated that the age and identity of the first applicant was contested and instead of getting feedback from her lawyers, first respondent was surprised to witness the case in the electronic and print media. He pointed out that first and second applicants are

prohibited persons as the asylum application by Madhanga Mashauri, father to first applicant and husband to second applicant, failed before the Zimbabwe Refugee Committee in September 2012. He further pointed out that the appeals to the Commissioner of Refugees and to the responsible Minister of Labour and Social Welfare also failed. He also pointed out that despite being advised to leave Zimbabwe within three months, Madhanga Mushauri and his family did not leave. Kambarami stated that the rights of any child not to be detained with detainees above 18 years is not absolute as to separate a suckling child from their mother seems unreasonable. He pointed out that Applicants' expectations from the Zimbabwe Government relative to their migrant status under the presented circumstances seem disproportionate as the parents have obligations they are negating to the detriment of their children. According to him, the departure from Zimbabwe of the first and second Applicants is an immediate cure to this application. He however noted that Applicants have no intention of complying with the requirement to leave Zimbabwe as they are intent on having the children resume education in Zimbabwe despite their illegality. He submitted that Applicants ought to have engaged international refugee agencies to remedy their plight instead of suing the Government of Zimbabwe. He pointed out that first applicant inherited her illegal migrant status from her parents as a dependent and detention for purposes of exit is the desired action, not release for education or social welfare. Further that the drastic measures taken by Respondents are borne out of Applicants' willful disobedience of the law. Kambarami also pointed out that responsible government institutions were approached but required committal as to duration of care which applicants were unwilling to provide. He further pointed out that Applicants have a duty to respect Zimbabwean laws which they have willfully violated and respondents have an obligation to remove first and second applicants from Zimbabwe.

Submissions by the Parties

It was submitted for the applicants that the arrest and detention of the minor children ought not to have happened and the conduct of the respondents of detaining the minor children in the same prison cell with detainees over eighteen years of age was unconstitutional. Further that in terms of s 81 of the Constitution of Zimbabwe, minors have a right to be kept separately from detained persons over the age of eighteen years, and no discretion is permitted.

Counsel for respondents submitted that first applicant was detained with adult inmates because she could not be detained in solitary confinement and could not be released legally. He

further submitted that the arrest was in terms of s 8(2) of the Immigration Act [*Chapter 4:02*] and cannot be termed unlawful.

Analysis

The circumstances of this case *vis-à-vis* the alleged violation of the rights of the minor children will be considered. The question that exercised my mind was whether or not a litigant in flagrant disregard of a lawful administrative directive can seek recourse against an authority whose directive has been disregarded. Applicants claim violation of three rights, namely, the right not to be detained except as a measure of last resort; and in the alternative, the right to be kept separately from detained persons over the age of eighteen years, and, the right to education. Zimbabwe is a constitutional democracy firmly founded on the rule of law. Applicants seek recourse to the Constitution that does not allow the detention of children under the age of eighteen years except as a measure of last resort. This provision is the reason why the government has put in place the pre-trial diversion programme where an offending juvenile is not incarcerated in prison pending trial. It is also the reason why there are juvenile institutions where convicted juveniles are sent to serve their sentences. In applicants' heads of argument, reference is made to the case of *S* v *FM* HC 112/15 in which TSANGA J pointed out the flaws of incarcerating children under the age of eighteen years. In my view, that case is not applicable as it involved a juvenile who was convicted of a criminal offence. The same is true of the case of *S* v *Banda; S* v *Chikamoga* HC 47/16. In this case, we are not dealing with juveniles who committed criminal offences, but members of a family of prohibited persons.

The Refugee Act [*Chapter 4:03*] allows any person who has applied for recognition of his status as a refugee, and every member of his family to remain within Zimbabwe in the event of the application of such person being unsuccessful, until such person has had an opportunity to exhaust his right of appeal. Such a person is also allowed a reasonable time, not exceeding three months, to seek admission to a country of his choice. First and second applicants are prohibited persons due to the failure of the asylum application of one Madhanga Mashauri, father to first applicant and husband to second applicant. Madhanga Mashauri was notified that he and his family had to leave Zimbabwe within three months of the rejection of the asylum application but he did not. Madhanga Mashauri signed to acknowledge receipt of the appeal decision upholding the rejection of asylum on 24 August 2013. First and second applicants negated their obligation

to comply with a sovereign decision by Zimbabwe to leave Zimbabwe and seek an alternative country of residence.

Section 16 of the Refugees Act allows an authorized officer to arrest and detain any recognized refugee whose expulsion has been ordered pending the completion of arrangements for his expulsion from Zimbabwe. The arrest and detention of the first and second applicants was therefore in terms of the law. Applicants argued that there was an option of letting the children remain at Tongogara Refugee Camp pending deportation. That argument ignores the fact that the authorities had made a decision that this family does not qualify for refugee status. For the Respondents to keep persons at a refugee camp whose request for asylum had been rejected would be contradictory. Applicants also argued that Respondents had an option of engaging child rights organisations who could accommodate the children pending deportation. In my view, the Child Rights organizations have a duty to support compliance with the laws and administrative directives of the sovereign states. In this case they could facilitate the departure of the first and second applicants and the rest of the family from this country. Any challenge to any actions of the Respondents ought to have been launched after compliance with the directives of the respondents. This brings to mind the principle of dirty hands which governs a situation where a party is under a direct obligation imposed by law to act in a specific manner which obligation the party deliberately refuses to perform.

First applicant states that on 8 January 2022, at Chikurubi Maximum Prison, she and her siblings were sharing the same prison cells with other Zimbabwean convicted criminals. As stated above, the government has in place facilities and programmes for offending juveniles. Applicant and her siblings do not fall in that category. Applicant's siblings would have been born elsewhere had her parents respected the sovereignty of Zimbabwe and complied with the directive to leave. They are in flagrant disobedience to a lawful directive yet seek recourse from a government they are disobeying. With regards to the first applicant, respondents stated that there were no other minors for her to share a cell with, and that she could not be put in a solitary cell. First applicant did not dispute that submission. As for her siblings, at the time of suckling and tender age, respondents submitted that they could not be separated from their mother. Applicants have not again refuted this allegation. In any event applicants seem to accept that this issue was overtaken by events as the first applicant states in the answering affidavit that the minors have since been

moved to SOS Children's home. The move to a private institution is telling. It would have been a different issue if applicants could establish that respondents have an institution that caters for children in the circumstances of this case but were negating moving them thereto. In my view the buck stops at third applicant and organisations dealing with children's rights. They are in a position to fill the gap where government falls short. Their timeous intervention could avoid the exposure of minors to circumstances as presented in this case. On p 44 there is an affidavit from an immigration officer stating that on 17 February 2022 an employee of the Justice for Children Trust brought a request for the release of children from Chikurubi and Harare Remand Prisons. He was requested to provide further specified information. At the time of deposing to the affidavit on 20 May 2022 the deponent was still waiting for information. Applicants did not say the requested information was provided. This was three months later! Respondents cannot be faulted for concluding that applicants are grandstanding instead of engaging and cooperating with them in the best interest of the minor children. First applicant also complains that educational facilities were not availed to her and her siblings upon detention. I am not persuaded to condemn the actions of the Respondents in the circumstances of this case.

In *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 the court said at 548 B-C:

> "This court is a court of law, and as such, cannot connive at all or condone the applicant's open defiance of the law. "

In my view to condemn the actions of the respondents in this case would be tantamount to conniving and condoning the first and second applicants' noncompliance with the directive of the Respondents for their family to leave Zimbabwe. Their non-compliance with the request to leave Zimbabwe is a direct challenge to the prerogative of the state to remove prohibited persons for the purpose of safeguarding the public interest. In *CFI Retail (Private) Limited* v *Eric Masese Manyika* SC 8/2016 MALABA DCJ stated:

> "The principle of dirty hands governs a situation where a party is under a direct obligation imposed by law to act in a specific manner which obligation the party deliberately refuses to perform. It is a time honoured principle based on the need for litigants who approach a court of law seeking relief to do so with the required degree of truthfulness, and honesty"

First and second applicants are under a direct obligation to leave Zimbabwe but have deliberately not complied. Although s 69(3) of the Constitution guarantees the applicants' right to

access the courts, it is no licence for them to approach the courts with dirty hands. The applicants must cleanse themselves by obeying the directive given by the respondents before approaching the courts. Applicants are not excused from obeying the law pending determination of their challenge to respondent's actions for to do so would create absolute chaos and confusion rendering the application of the rule of law virtually impossible. This is because anyone could challenge the validity of any law or administrative action just to throw spanners into the works to defeat or evade compliance with the law or administrative decision.

In *Naval Phase Farming (Pvt) Ltd and Ors* v *Min of Lands and Rural Resettlement and Ors* SC 50/18, the dirty hands principle is said to be:

> "a principle that people are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. The kind of conduct which the court penalizes by withholding its protection is conduct involving moral obliquity……" (*my emphasis*)

The applicants have openly and with impunity demonstrated disdain for the administrative decision of the respondents yet have the temerity to turn to this court for relief that would result in the court effectively 'condoning' or turning a blind eye to this open defiance. The following passage in *Bhatti & Anor* v *Chief Immigration Officer & Anor* 2001 (2) ZLR 114(H)) at p 123 F is in my view particularly instructive:

> 'The admission of aliens into a State immediately calls into existence certain correlative rights and duties. The alien has rights to the protection of the local law. He owes a duty to observe that law and assumes a relationship towards the State of his residence sometimes referred to as 'temporary allegiance'.
>
> The State has the right to expect that the alien shall observe its laws and that his conduct shall not be incompatible with the good order of the State and of the community in which he resides or sojourns. It has the obligation to give him that degree of protection for his person and property, which he and his State have the right to expect under local law, under international law, and under treaties and conventions between his State and the State of residence. Failure of the alien or of the State to observe these requirements may give rise to responsibility in varying degrees, the alien being amenable to the local law or subject to expulsion from the State, or both, and the State being responsible to the alien or to the State of which he is a national": *Hackworth, Digest of International Law* (1943), vol 5 pp 471-472 quoted in Dixon & McCorquodale, Cases and Material on International Law, Blackstone Press Ltd, London, 1991 p 428".

See also *Kenderjian* v *Chief Immigration Officer* 2000 (1) ZLR 697 (S).

As indicated above, it is the State's interests in the light of such conduct that must now be balanced against the applicants'rights which are subject to the public interest limitations stipulated in paragraph (a) of s 22(3) of the Constitution, so long as these restrictions are reasonably justifiable in an democratic society. Specifically, the applicants rights must be balanced against the public interest considerations that dictated the directive for them to leave Zimbabwe. The conduct of the third Applicant leaves a lot to be desired. Instead of encouraging Applicants to leave Zimbabwe she actively and knowingly aided and abbetted them in their continued defiance of the law

First and second applicants breached the duty imposed on an alien to observe the laws of the host country and conduct themselves in a manner compatible with the good order of the State. Their conduct constituted a threat to public order. It does not in my opinion, augur well for the maintenance of law and public order that litigants feel they can on one hand exhibit disdain for the law, and, on the other and when it suits them, turn back to the same law to seek protection of their rights. Applicants cannot seek an order that has the effect of social inclusion and integration of migrants who have been ordered to leave Zimbabwe. Resultantly the application fails.

Disposition

The application be and is hereby dismissed with costs.

Shava Law Chambers Rights and Business Centre, Applicants' Legal Practitioners
Civil Division of the Attorney General's Office, Respondents' Legal Practitioners.