

MICHAEL MUNDANDISHE

versus

THE COMMISSIONER GENERAL, ZIMBABWE REPUBLIC POLICE N.O

and

THE MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

and

THE OFFICER COMMANDING MANICALAND PROVINCE

(ZIMBABWE REPUBLIC POLICE)

and

THE OFFICER IN CHARGE ZIMBABWE REPUBLIC POLICE MUTARE CENTRAL

and

THE COMMISSIONER GENERAL PRISONS AND CORRECTIONAL SERVICES

(ZIMBABWE PRISON AND CORRECTIONAL SERVICES) N.O

And

THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS N.O

and

THE OFFICER COMMANDING MANICALAND PROVINCE N.O

(ZIMBABWE PRISONS AND CORRECTIONAL SERVICES)

and

THE OFFICER IN CHARGE MUTARE REMAND PRISON N.O

(ZIMBABWE PRISON AND CORRECTIONAL SERVICES)

HIGH COURT OF ZIMBABWE

SIZIBA J

MUTARE, 28 March 2025 and 31 March 2025

OPPOSED APPLICATION

Mr *P. Nyakureba*, for the applicant

Mr *N. Muchinguri*, for the respondents

SIZIBA J:

INTRODUCTION

1. The applicant seeks a declaratory order against the respondents to the effect that the conditions that he was detained under at Mutare Central Police Station on 1 August 2024 were inhuman and degrading in violation of his rights as enshrined under s 50 (1)(c) of the Constitution of Zimbabwe. He further prays for a declaratory order that the conditions under which he was detained at Mutare Remand Prison from 2 August 2024 to 13 September 2024 were also inhuman and degrading in violation of his rights

under s 50(5)(d) of the Constitution of Zimbabwe. Finally, the applicant also craves for consequential relief so that the impugned living conditions at these two institutions could be corrected by the respondents without further ado.

THE APPLICANT'S CASE

2. The applicant is an adult male Zimbabwean citizen aged 51 years. He is ordinarily resident in Mutare in the Manicaland Province of Zimbabwe. He is an artisan who holds a journeymen class four trade test certificate in building construction having acquired it in 1997. The 1st of August 2024 is a day that the applicant will never forget. He was arrested by security agents while in a constituency development meeting at a house belonging to the Councillor for Ward 19 in Aloe Park, Chikanga in Mutare with his eleven other associates of whom nine were males while two were females.
3. The applicant and his associates were briefly detained at Chikanga Police Station up to 2000 hours whereupon they were then moved to Mutare Central Police Station at the Criminal Investigation Department of Law and Order where they were accused of violating law and order maintenance laws in holding a gathering that was not sanctioned by the law. At 0000 hours, they were then detained.
4. The applicant's narration is that they were asked to remove and surrender their shoes, stockings, belts and all their belongings. They were then put in a cell of about twenty-four square metres which did not have lighting and ventilation. It was overcrowded and perfumed with a stinking smell. They did not have enough blankets. They did not have dinner. He alleges that there was in that cell a bucket system toilet pit which could only be flushed by fetching water from outside and it was already full of human excreta and it was open to the view of other inmates whom they found there as well as some of his associates. He went through this embarrassment by the time that he had to answer the inevitable call of nature. There was no water to flush. There was also neither a toilet paper nor any washing basin.

5. At 7:30am the following day, the applicant and his associates were led out to a small fenced apartment for exercise and breakfast. He failed to eat the nice food that his relatives had brought him because of the horrors of the stinking and nauseating smell that he had undergone. A police officer brought some water buckets and gave some inmates who fetched water from a tap to go and flush the toilet in the cell. There were no bathing facilities before they were taken to court. When they got to court, the applicant was denied bail and then taken to Mutare Remand Prison for forty two days until he was granted bail by the High Court on 13 September 2024.

6. At the remand prison, the conditions were no better. There was shortage of food. At times there would spend the night in a standing posture due to overpopulation and crowding. In some instances, they would sleep while tightly packed on the floor. There was no decent clothing and bedding. The sanitary system was bad. The cells measured about one hundred and forty square metres housing hundreds of inmates. There were two bucket toilet systems in a cell of about one hundred and forty to one hundred and fifty inmates which cell under normal circumstances would house seventy inmates. The toilets were in the living room and they would be released to into the open area at about 0700 hours and locked up at 1700hours. It was also an open system where one would relieve himself in full view of other inmates and one would have to ask for urine from the other inmates to flush the excretion and the chamber would always be messed up. The toilets could only be flushed using buckets and water from an outside tap. There was no privacy as well in bathing.

7. The applicant's contention is that the conditions under which he was detained are inhuman and degrading in violation of s 50(1)(c) and s 50 (5)(d) of the Constitution of Zimbabwe as against the first to the fourth respondents and the fifth to the eighth respondents respectively.

THE RESPONDENTS' CASE

8. According to the fifth respondent, Mutare remand prison has recently fitted toilet seats with cubicles to ensure privacy and the standards there meet the requirements of s

50(5)(d) of the Constitution of Zimbabwe. The statistics given by the applicant are denied.

9. The fourth respondent raised a point in *limine* attacking the applicant's founding affidavit on the basis that it appeared to have been signed on 6 December 2024 and yet it was commissioned on 4 December 2024 and hence it was null and void. It was further contended by the fourth respondent that the facilities in the holding cells at Mutare Central Police meet international standards. The conditions are hygienic and the facilities are cleaned and inspected by the Commanders. There is lighting and ventilation. It is false that the cell was stinking and crowded. The toilets have adequate flushing. The applicant was given food and three blankets. The third respondent adopted the fourth respondent's opposing affidavit.

THE APPLICANT'S ANSWERING AFFIDAVIT

10. The applicant maintained his position and indicated that the numbers that he gave were estimates and not actual figures. His contention was that the alleged defect in the founding affidavit is an issue of handwriting by the Commissioner of Oaths as the alleged 4th is a 6th and he maintains that the affidavit was sworn to on 6 December 2024 and that it is valid.

RESOLVING PRELIMINARY ISSUES

11. When the hearing commenced, Mr *Muchinguri* took up the point in *limine* regarding the applicant's founding affidavit. The submission was that the founding affidavit deposed to by the applicant was incompetent or invalid since it showed that the applicant had signed it on 6 December 2024 while it was commissioned on 4 December 2024. These arguments had been taken even in the opposing affidavits and also in the heads of argument by the respondents. The contention was that there was therefore no proper application before the court.
12. On the other hand, Mr *Nyakureba* took the submission that had been advanced by the applicant in his answering affidavit that what appeared as the 4th was actually the 6th.

His further contention was that the court should take the applicant's position as he was the one who knew that he had appeared before the Commissioner of Oaths on 6 December 2024. He had no explanation why the applicant had not obtained a supporting affidavit from the Commissioner of Oaths to clarify the handwriting. He accepted that at law, it was a requirement that the deponent should take oath before a Commissioner of Oaths and that the date of commissioning should attest to such. He submitted that because of the importance of the case, the applicant should be heard on the merits.

13. I also asked both counsel to address me on whether the application was properly before the court in view of non-compliance with the peremptory provisions of r 10 of the High Court Rules, 2021 which require a party raising a constitutional issue to prepare a notice which the Registrar must display for 15 days so as to invite those who wish to join the case as friends of the court to do so. Both counsel were caught unprepared and I adjourned briefly to allow them time to familiarise themselves with the provisions of the relevant rule. When we resumed, Mr *Nyakureba*'s initial submission was that the rule was not clear and later on his submission became a plea for condonation of non compliance with the rule in light of subrule 9 thereof which provides that the court may dispense with any of the provisions of the rule in the interests of justice. Mr *Muchinguri*'s submission was that the application was not properly before the court. He conceded, however, that the court could dispense with any requirement of the rule in terms of subrule 9.

14. I am satisfied that the issue relating to the date of commissioning of the founding affidavit is simply one to do with bad handwriting whereby the digit 4 and 6 tended to look alike. These dates were written by pen and not by typing. Respondent's counsel conceded that the respondents had no other evidence to prove that the applicant did not appear before the Commissioner of Oaths on 6 December 2024. I am also persuaded by Mr *Nyakureba*'s submission that the date of the sixth is the date when the application was prepared as that is the date when they signed the notice of opposition and hence it is impossible that the applicant would have appeared before the Commissioner of Oaths prior to such date. Surely this important case cannot be decided on the basis of

such issues of poor and ineligible handwriting by a Commissioner of Oaths. It should be disposed of on the merits. The respondents' point in *limine* is accordingly dismissed.

15. Rule 10 of the High Court Rules, 2021 is very crucial. It is peremptory and binding to any party who approaches this court raising any constitutional issue. It is very clear and straight forward in its literal sense, contrary to Mr *Nyakureba's* earlier submission. This rule places a duty upon an applicant raising a constitutional issue to prepare a notice which the Registrar should stamp and display in a notice board at the court premises or notice board for fifteen days so as to invite any interested party to apply to join the case as a friend of the court. Such a notice should contain a brief and concise outline of the constitutional issue being raised. This rule is backed up by the provisions of s 171 of the Constitution of Zimbabwe which confers this court with concurrent jurisdiction on constitutional matters. The importance of this rule flows from the fact that applications which raise constitutional issues are of public interest by their very nature. This is also the case with this application where the applicant seeks this court to declare that the conditions in the public institutions where he was incarcerated are inhuman and degrading. He is obviously not the only person who is affected by such conditions in this country and even abroad and hence the failure to comply with r 10 would now deprive other interested individuals and organisations the chance to advance arguments that may be helpful to this court. The court may therefore be justified to strike the matter off the role as not being properly before it by reason of non compliance with this rule. However, the court, in terms of subrule 9, is also at liberty to condone such non compliance and proceed to hear the matter in the interests of justice. Given the important issues raised in this application which have to do with the fundamental rights of detained persons at public institutions, I will condone the applicant and decide the case on the merits. I must also lament that it is important for legal practitioners to always address their minds to all legal issues and requirements of the rules pertaining to the case that is intended to be filed before a court of law so as to be of assistance to the court and also to their clients. The same vigilance should be displayed by counsel in preparing opposing papers. The papers before me only show that all the parties related to the matter as a *declaratur* only rather than a constitutional

application when it was in fact more of a constitutional application seeking declaratory and consequential relief.

THE PROCEEDINGS AND SUBMISSIONS ON THE MERITS

- 16.** By consent of both counsel, an inspection of the cells at the relevant institutions was conducted and the uncontested findings thereof are articulated hereunder.

- 17.** Two cells out of three were inspected at Mutare Central Police Station being cell number 3 and cell number two. Cell number 3 was about 6 x 3 metres in size and there were no inmates in it. It had one globe for lighting. There were two air vents of which the bigger one was about 150cm x 100cm while the smaller one was 120cm x 30cm. There was one chamber which was screened off by a concrete wall of about 70cm height. There was tissue paper. The flashing system was from outside through buckets and there was no washing basin. There was no sitting platform in the living area such that the inmates would sit in the floor. The three cells were catered for by four bathrooms with doors which provided secrecy to the users. The conditions in cell number 2 were the same with those in cell number 3 and even the size was the same save to say that it was occupied by six male inmates. Both cells were clean.

- 18.** At Mutare Remand Prison, two cells were inspected out of a total of 21 cells for the male inmates and these were cells number 8 and cell number 10. Cell number 8 was estimated at forty four square metres and one hundred and five inmates had been locked in it the previous night. It had two toilet chambers which were screened off by a concrete wall of about one metre height and the height was about fifty centimetres above the elevated chambers. There were no tissues. It was said that the tissues are supplied to each prisoner directly or provided by relatives. There was no washing basin. The flashing system was from outside through buckets. There was a globe for lighting and there were windows and air vents. There was no sitting platform. During the day, the prisoners are let out to sit in the open space which is well ventilated. Cell number 10 was smaller in size than cell number 8. It was about twenty five square metres and it had accommodated twenty eight inmates the previous night. It had one globe for lighting. It had one chamber which was screened off. The other observations

were similar to the conditions in cell number 8. The bathing apartment had no door for secrecy but it was not in the living room. Both cells and the bathing areas were clean.

19. Mr *Nyakureba*'s submission was that the conditions at both these institutions did not meet both the national standards required by the Constitution of Zimbabwe as well as the minimum international standards. On the contrary, Mr *Muchinguri* submitted that the fundamental rights provided for in the Constitution of Zimbabwe are limited in terms of s 86(2) of the Constitution of Zimbabwe. His submission was that as long as the detained persons were provided with water and other basic needs, the requirements of the law were met and hence the application had no merit.

THE ISSUES FOR DETERMINATION ON THE MERITS

20. The only issues for determination are whether the conditions in these institutions where the applicant was detained are inhuman and degrading or not and whether if so, whether the consequential relief sought should be granted.

THE LAW AND ITS APPLICATION

21. The law relating to the proper standards and conditions of detention in the police and prison cells in Zimbabwe and abroad is a well beaten path in this jurisdiction. The starting point is to consider the provisions of s 50(1)(c) and s 50(5)(d) of the Constitution of Zimbabwe which are the subject of complaint in this case and they provide thus:

“50 Rights of arrested and detained persons

(1) Any person who is arrested—

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

(5) Any person who is detained, including a sentenced prisoner, has the right—

(d) to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at State expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment;

-----” (Emphasis added)

22. In *Kachingwe and Others v Minister of Home Affairs and Another* SC 145/04 at pp 30 to 31 of the cyclostyled judgment, the court, after examining the relevant Constitutional provisions by then and other International Conventions and also after inspecting the relevant police cells, remarked as follows:

“I have no doubt, in my mind, that the holding cell that the court inspected at Highlands Police Station, the same holding cell in which Kachingwe was detained overnight, does not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards. In particular, the failure:

- (a) to screen the toilet facility from the rest of the cell to enable inmates to relieve themselves in private;*
 - (b) to provide a toilet flushing mechanism from within the cell;*
 - (c) to provide toilet paper;*
 - (d) to provide a wash-basin; and*
 - (e) to provide a sitting platform or bench;*
- constitute inhuman and degrading treatment prohibited in terms of s 15(1) of the Constitution.”* (Emphasis added)

23. In *Makoni v Commissioner of Prisons and Others* CCZ 8/16 the Court highlighted that the protection of the rights of prisoners under s 50(5) of the Constitution of Zimbabwe was in line with the *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* of 1957 which were revised in 2015 as the court at pp 12 to 13 of the cyclostyled judgment held as follows:

“Some of the principles embodied in the 1957 and 2015 Rules are now recognised and replicated in s 50 of the Constitution which elaborates the rights of arrested and detained persons. Thus, in terms of s 50(1)(c), any person who is arrested “must be treated humanely and with respect for their inherent dignity”. More specifically, s 50(5)(d) provides that any person who is detained, including a sentenced prisoner, has the right “to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at State expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment”. Very significantly, s 50(8) stipulates that “an arrest or detention which contravenes this section, or in which the conditions set out in this section are not met, is illegal”.

24. In *Williams and Another v Co- Ministers of Home Affairs and Others* CCZ 4/14 at p 14 of the cyclostyled judgment, the court remarked as follows:

“Detention ought not to reduce the detainee to humiliation and indignity. Every detainee is entitled to be treated with some modicum of decency and respect.”

25. *In casu*, the applicant spent a night as he was detained in a cell at Mutare Central Police Station and thereafter he was kept at Mutare Remand Prison for forty two days. An inspection of the cells in both institutions shows that indeed the lighting and ventilation does meet the minimum standards. The toilets are also screened off from the living area. The bathroom facilities are also not in the living area. The facilities at both institutions were found clean at short notice being the same day when the hearing was held at court. For Mutare Central Police Station, there was further improvement in that the bathing facilities have doors and the cells also had some tissue rolls for inmates. These improvements must be commended, but however, the minimum conditions required by the law have not yet still been met in both these institutions. There is no flushing system from inside the cells, no washing basin for the inmates as well as no sitting platform or bench for the inmates. Mutare Central Police Station is therefore found wanting in respect of these three minimum requirements while Mutare Remand Prison also needs to put up doors at the bathing area for secrecy and also provide readily available tissues for inmates in the cells in addition to these three requirements. The absence of any of these minimum standards or conditions makes the conditions of detention inhuman and degrading in violation of a detainee's fundamental rights.

26. Human dignity is the very essence of life and one's well - being and where this right is violated, a human being is stripped of his higher status of existence and degraded to the level of other animal species which are naturally below the dignity of human beings. Such experience is devastating, revolting and resentful to a human being and it gives the victim a negative impression about the whole criminal justice system. Inhuman and degrading conditions of detention are unfair to those inmates who have not yet been convicted of any offence and who may turn up to be absolved of any criminal conduct by a court of law after undergoing such a harrowing experience. Such persons who are still presumed to be innocent should not be subjected to such unfair treatment. On the other hand, inhuman and degrading conditions of living are neither rehabilitative nor reformatory to the convicted criminal as he or she may only be expected to come out with more devilish behaviour out of such torturous prison cells. The courts of law

should continue to frown upon the inhuman and degrading conditions at our Police Stations and Correctional Centres which are still found wanting until the call is fully heeded so that the conditions of detention at all our public institutions may meet the requirements of our Constitution as well as international standards both of which are now the same.

27. Having made the finding that the conditions under which the applicant was detained were inhuman and degrading, the next question is whether he is entitled to a declaratory order.

28. In *Dongo v Naik & Others SC 52-20* at p 6 of the cyclostyled judgment, the court set out the requirements of a *declaratur*. The court held that for one to be entitled to a *declaratur*, one must have a direct and substantial interest in the subject matter of the suit that could be prejudicially affected. The right must attach to the applicant and no one else. This is a trite position which has been well traversed in this jurisdiction.

1. Furthermore in *Debshan (Pvt) Ltd v The Provincial Mining Director and Others HB 11-17* at p 4 of the cyclostyled judgment, the requirements of a *declaratur* were set out as follows:

“The remedy which the applicant seeks is one provided for in s14 of the High Court Act [Chapter 7:06]. The section provides that this court may, at the instance of any interested party, inquire into and determine any existing, future or contingent right or obligation. It has been stated, in interpreting that provision, that it is a condition precedent to the grant of a declaratory order that the applicant must have a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337 (S) 343G; 344 A –E;

As the court will not decide abstract, academic or hypothetical questions unrelated to such an interest, the interest must relate to an existing, future or contingent right. See Anglo-Transvaal Collieries Ltd v SA Mutual Life Assurance Soc 1977 (3) SA 631 (T) 635 G-H; Munn Publishing (Pvt) Ltd v ZBC, supra. The other requirement for a declaratory order is that the court must decide whether or not the case in question is one in which it should properly exercise its discretion as provided for in s14. The court’s discretion will be exercised where, despite the fact that no consequential relief is sought, justice or convenience demands that a declaration be made as to the existence of or the nature of a legal right claimed by the applicant or the existence of a legal obligation due by the respondent. See Adbro Investment Co Ltd v Minister of the Interior and Others 1961 (3) SA 283 (T) 285 B – C; Johnsen v AFC 1995 (1) ZLR 65 (H)”

29. I am satisfied that the applicant has made up a good case for a declaratory order. He has proven a direct interest in this matter as a resident of Mutare who was detained in both institutions under conditions which violated his constitutional rights. It is his legitimate desire as a resident of Mutare and a citizen of this country that consequential relief be granted to correct these constitutional violations in these two public institutions. The relief sought is neither academic nor moot. I am persuaded that the application therefore has merit and I accordingly grant it in terms of the draft order which was amended by consent:

IT IS HEREBY DECLARED THAT;

- (a) The conditions that the applicant was detained under at Mutare Central Police Station on 1 August 2024 constituted inhuman and degrading treatment in violation of s 50(1)(c) of the Constitution of Zimbabwe.

- (b) The conditions that the applicant was held under at Mutare Remand Prison from 2 August 2024 to 13 September 2024 constituted inhuman and degrading treatment in violation of s 50(5)(d) of the Constitution of Zimbabwe.

- (c) The conditions of detention in police holding cells at Mutare Central Police Station are inhuman and degrading.

- (d) The conditions of detention in Mutare Remand Prison are inhuman and degrading.

Consequently, it is ordered that;

- (a) The first to the fourth respondents are directed to take immediate measures to ensure that the holding cells at Mutare Central Police station have toilets that have a flushing mechanism from within as well as washing basins within the cells.

- (b) The fifth to the eighth respondents are directed to take immediate measures to ensure that the holding cells at Mutare Remand Prison have toilets that have flushing mechanisms from within as well as washing basins and toilet paper.
- (c) The fifth to the eighth respondents are directed to take immediate measures to ensure that the bathing facilities at Mutare Remand Prison are screened off and allow for the dignity of the inmates when bathing.
- (d) Each party shall bear its own costs.

Maunga Maanda and Associates, applicant's legal practitioners
Civil Division of the Attorney General, respondent's legal practitioners