CONSTANCE MUJEYI
and
WATSONLAITON
and
MATTHEW LAITON
versus
THE OFFICER IN CHARGE HARARE
CENTRAL POLICE STATION(INVESTIGATIONS)
and
THE INVESTIGATION OFFICER
(ASSISTANT INSPECTOR NGWARATI)
and
THE COMMISSIONER GENERAL OF POLICE
and
THE COMMISSIONER GENERAL
ZIMBABWE PRISON SERVICES

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 9 July 2015

Urgent Chamber Application

A. Mugiya, for the applicants
T Tabana, for the respondents

MATHONSI J: The State, every person and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms enshrined in the bill of rights of the constitution of this country. That is what s 44 of the constitution commands of the state and every government institution or official. The fundamental human rights and freedoms contained in chapter 4 of the constitution are crucial and cannot be derogated from. It is the duty of all concerned to uphold those rights and freedoms in order to strengthen our constitutional democracy and where a complaint of an infringement of those rights is made the courts must take such complaint seriously and promptly investigate it with a view to

arrest such infringement without delay.

The three applicants are detained at Harare Remand Prison pending trial on a charge of theft of large sums of money allegedly stolen in South Africa from a complainant who employed the first applicant as a maid. They were denied bail by this court following an appeal by the state prosecutor against an initial bail order granted by the remand court.

Estery Zimunya, their mother has deposed to an affidavit in support of the present application alleging that whilst in remand prison, the first respondent, who is the officer in charge of investigations at Harare Central Police Station and the second respondent who is the investigating officer in the matter, have been "terrorising" the applicants. They routinely requisition the applicants from prison to parade them in Chitungwiza as thieves who are dangerous. They sadistically beat them up in her presence and in the presence of members of the public.

While purporting to be conducting investigations in the absence of their legal practitioner, the first and the second respondents will be in the company of the complainant, a South African national, who is also allowed to systematically beat up the suspects. The complainant is also accorded the right to enter their holding cells willy nilly to brutalise the suspects. Each time Zimunya visits her children at remand prison they always complain of torture.

More importantly, the first and the second respondents are said to have drafted affidavits for the applicants to sign admitting the allegations levelled against them. They are forcing the applicants make confessions on the promise of a withdrawal of charges. In addition, they took from the applicants a sum of R60 000-00, declared R50 000-00 which has not been surrendered to the court as an exhibit but is kept by the first and the second respondents who intend to release it to the complainant upon the signing of confessions. With the applicants stone walling they have resorted to contacting their mother to persuade them to oblige.

In light of the alleged serious violations of their constitutional rights, the applicants seek the following relief:

> "A. TERMS OF THE ORDER SOUGHT:
> IT IS ORDERED THAT:
> 1. The respondents be and are hereby interdicted from torturing the applicants.
> 2. The fourth respondent is ordered to deny the 1st – the 3rd respondents the opportunity to take the applicants out of the remand prison at any time whatsoever.

3. The respondents' conduct of exposing the applicants to the members of the public, the complainant's wrath or interrogations be held to be unlawful and wrongful.
4. The respondents to pay costs of suit.

B. PROVISIONAL ORDER GRANTED
Pending the confirmation of the provisional order;
1. The respondents are ordered to stop torturing the applicants forthwith.
2. The 1st – 3rd respondents be and are hereby interdicted from allowing the complainant to harass, interrogate and compel the applicants to admit to the allegations and the release of the monetary exhibits.
3. The 4th respondent is ordered to bar the 1st – 3rd respondents from taking the applicants out of the remand prison except with the knowledge of their lawyer and where the law permits.
4. The 4th respondent is ordered not to allow the complainant access to the applicants at the remand prison.
5. The 1st – 3rd respondents are ordered to hand over all the exhibits concerning this matter to the clerk of court Harare Magistrates Court."

For a start, the draft order could have been drafted in a better and mere elegant manner. It is also not produced in Form 29C has provided for in the rules. This court has repeatedly stated, like a broken record, that legal practitioners drafting a draft provisional order for the consideration of the court must ensure that the draft complies with the rules. It is not open to them to invent their own alien drafts when the rules provide the form which should only be reproduced for purposes of being granted as an order of the court. If the relief sought by the applicants were to be granted, the order that they seek would have to undergo substantial overhaul for it to make sense.

Back to the merits of the matter, care must be taken not to usurp the constitutional power of the police to conduct criminal investigations and bring offenders to book, for it is the responsibility of the Police Service to detect, investigate and prevent crime. It would be absurd if courts of law were to interfere with the lawful discharge of that function and order the police not to interrogate suspects and not to take them from remand prison for purposes of investigating crimes. Remand prisoners are awaiting trial either because their turn has not came in the busy schedules of criminal courts or investigations are yet to be completed.

This is because there are times when suspects are taken for initial remand in order to comply with statutory limits of detention or to secure further remand while investigations are still on-going. In that regard, the investigating officer is required to continue with the investigations, a

process which may require the presence of the accused person to answer questions or to make indications. There can be no lawful basis for interdicting the investigating officer from doing what is in essence his core-business. Neither is it possible for prison authorities to prevent that lawful activity. Doing otherwise would unduly fetter the police in the discharge of their constitutional mandate.

I have said that it is the responsibility of all government officials to respect, protect, promote and fulfil the rights and freedoms of individuals which are set out in chapter 4 of the constitution. Section 50 of the Constitution provides that any arrested person must be permitted, without delay, and at their own expense to consult in private with a legal practitioner of their choice. At the state's expense they should be allowed to contact their legal practitioner for that purpose. Section 50 (4) (c) makes it clear that:

> "Any person who is arrested or detained for an alleged offence has a right not to be compelled to make a confession or admission."

Even more important it is the right of persons from torture or cruel, inhuman or degrading treatment or punishment contained in s 53 which provides:

> "No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."

Zimbabwe is a constitutional democracy with a proud history of its adherence to the rule of law. It is therefore amazing that several years into independence and democracy one still receives complaints of torture of criminal suspects and the assault or intimidation of suspects in order to force a confession out of them. Just how this happens is very difficult to understand. Quite often police officers do not have the patience to lawfully investigate crimes using their intellect and smartness. A criminal investigation must be conducted by force and power and a confession must be extracted out of a suspect by all means possible. It is unacceptable and must come to an end without further delay. Courts of law must condemn such conduct in the strongest of words and must never reward such behaviour at the trial.

The respondents have strongly opposed the application with Mr *Tabana* who appeared with Mr *Mbara* of Police General Headquarters objecting first to the capacity of the deponent to depose to the affidavit supporting the application on the basis that she was not privy to the facts. When his attention was drawn to the provisions of r 227 (4) that an affidavit in support of an

application shall be made by the applicant "or by a person who can swear to the facts or averments set out therein," and that the deponent has stated in para(s) 6.2 and 6.6 that the pertinent events occurred in her presence, Mr *Tabana* abandoned that objection. He also abandoned his objection to the draft order on the basis that the interim relief sought was final in nature. Preventing torture can only be final and not interim.

While denying that the suspects were subjected to torture or that the complainant was allowed access to them in remand prison, Mr *Tabana* sought to rely on handwritten statements solicited by prison officials from the suspects themselves in which they stated that they were treated well in prison and sought to discredit their own application. Just how low are we prepared to sink in order to win a case? What it means is that the respondents approached the suspects after receipt of this application and solicited evidence against their own application. This was done in the absence of their legal practitioner who filed the application on their behalf.

I find it strange that the respondents did not see anything wrong with such blatantly unprofessional conduct and were even prepared to harvest something out of such interference, a harvest of thorns indeed. It has also not escaped the gaze that the respondents are defending even that part of the claim which merely calls upon them to act lawfully and uphold the Constitution. Torture is not only unlawful, it is also evil and despicable.

I must say though that I am not persuaded that the applicants were denied legal representation, in fact Mr *Mugiya*, unwittingly gave weight to that when he submitted that he was called to the police station on 29 June 2015 to confer with the applicants when they were about to be taken for indications. I am also not convinced that the complainant has been allowed access to the suspects for purposes of brutalising them. Such sensational and overdrawn averments do not attract sympathy with the court, they infact amount to unnecessary exaggeration and overkill, which many discredit an otherwise well intended application.

Accordingly, I grant the provisional order as amended, the interim relief of which is in the following:

"**INTERIM RELIEF GRANTED**

Pending determination of this matter, the applicants are granted the following relief:

1. The respondents are hereby directed to stop any torture that is or may be perpetrated against the applicants or treating the applicants in any unlawful manner.

2. The 4th respondent is directed not to allow the complainant access to the applicants at remand prison."

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Prosecutor General's Office, respondents' legal practitioners