

REPORTABLE (2)

DOUGLAS MUZANENHAMO

v

- (1) OFFICER IN CHARGE CID LAW AND ORDER**
- (2) OFFICER COMMANDING HARARE CENTRAL DISTRICT**
- (3) COMMISSIONER GENERAL OF POLICE**
- (4) CO-MINISTERS OF HOME AFFAIRS**
- (5) OFFICER IN CHARGE HARARE CENTRAL PRISON**
- (6) COMMISSIONER GENERAL OF PRISONS**
- (7) MINISTER OF JUSTICE AND LEGAL AFFAIRS**
- (8) ATTORNEY - GENERAL**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,
GARWE JA, GOWORA JA, PATEL JA, HLATSHWAYO JA,
CHIWESHE AJA & GUVAVA AJA
HARARE, MAY 24 & NOVEMBER 14, 2013**

Z.T. Chadambuka & D. Chimbwe & M.T. Zhuwarara, for the applicant

T. Dodo & C. Chimombe, for the respondent

PATEL JA: This is an application under s 24(1) of the former Constitution for declaratory and consequential relief pursuant to the Declaration of Rights enshrined in that Constitution. The applicant in this matter is HIV positive. He started his anti-retroviral treatment in 2003. On 19 of February 2011, he was arrested at a meeting held to commemorate an AIDS activist. On the day of his arrest he was detained

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at Harare Central Police Station and then taken to Harare Remand Prison on 23 February 2011.

The applicant avers that he was subjected to various forms of ill-treatment during his detention at both prisons and that his fundamental rights were consequently violated by the respondents. In particular, he complains that at Harare Central Police Station he was not allowed to use his cell-phone and was thereby denied access to his anti-retroviral medication. Furthermore, he was required to remain barefoot and with only one layer of clothing. In addition, the toilet facilities in the holding cells were unhygienic and deplorable. At Harare Remand Prison, he was denied access to his prescribed medication regime. Moreover, together with other inmates, he was stripped and made to jump up and down, and placed in solitary confinement for four days when he complained.

Having regard to this ill-treatment, the applicant seeks a *declaratur* to the effect that the respondents contravened ss 15(1) and 20(1) of the Constitution relative to the protection against inhuman or degrading treatment and his freedom of expression, and that the conditions in the holding cells at Harare Central Police Station and the practice at Harare Remand Prison of requiring inmates to strip naked be declared inhuman and degrading. He also seeks an order requiring the respondents to ensure that inmates be allowed full access to their respective anti-retroviral regimes, that no inmate be required to walk barefoot or be left with inadequate clothing, and that the toilet facilities in the holding cells at Harare Central Police Station be rehabilitated.

The respondents deny most of the applicant's assertions. As regards Harare Central Police Station, they aver that the governing Police Manual prescribes that every inmate be required to surrender all his possessions, other than clothing for personal use, so as to avoid his harming himself. Again, cell-phones and other valuable articles are ordinarily taken for safe custody. The applicant did not request his cell-phone and did not tell the police officers concerned about his HIV status and anti-retroviral regime. All inmates in holding cells are given three blankets each and the toilets are cleaned and inspected every day. However, the toilet flushing mechanisms are placed outside the cells and therefore cannot be used by the inmates themselves. The respondents also concede that the conditions in the holding cells are not entirely acceptable. However, their rehabilitation is not immediately practicable.

With respect to Harare Remand Prison, the respondents aver that they employ qualified doctors to administer appropriate medication and that inmates may only bring their own medication if it is unavailable in the prisons stock. Moreover, the applicant did not lodge any complaint about his medication either upon admission or on discharge. As regards strip searches, these are procedurally done and strict decency is observed. Finally, the respondents aver that the practice of solitary confinement has been abolished and that the applicant was never subjected to this practice.

At the hearing of the matter, Adv. *Chadambuka* submitted that the respondent's assertions and denials are based on what should be in place as a matter of practice. In effect, they have failed to ascertain and rebut what actually happened to the

applicant in relation to his medication and conditions of incarceration. He further submits that these bare denials do not raise any material disputes of fact that are not resolvable on the papers. The court should therefore take a robust view of the facts in order to do justice as between the parties. Mr. *Dodo* concedes that there are certain facts, for instance, the conditions in the cells at Harare Central Police Station, which are common cause. However, apart from this, there are substantial disputes of fact that were foreseeable before this application was instituted. Consequently, he submits that the matter should be dismissed or struck off to be instituted afresh.

MATERIAL DISPUTES OF FACT

As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Masukusa v National Foods Ltd & Another* 1983 (1) ZLR 232 (S) at 235A; *Zimbabwe Bonded Fibreglass v Peech* 1987 (2) ZLR 338 (S) at 339C-D; *Ex-Combatants Security Co. v Midlands State University* 2006 (1) ZLR 531 (H) at 534E-F.

The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by Makarau JP (as she then was) in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F-G:

“A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

In this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence. See *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions ((Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* S-146-86; *Boka Enterprises v Joowalay & Another* 1988 (1) ZLR 107 (S) at 114B-C; *Kingstons Ltd v L.D. Ineson(Pvt) Ltd* 2006 (1) ZLR 451 (S) at 456C-D and 458D-E. The respondent's defence must be set out in clear and cogent detail. A bare denial of the applicant's material averments does not suffice. The opposing papers must show a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard. See the *Room Hire Co.* case, *supra*, at 1165, cited with approval in *Vittareal Flats (Pvt) Ltd v Undenge & Others* 2005 (2) ZLR 176 (H) at 180C-D; *van Niekerk v van Niekerk & Others* 1999 (1) ZLR 421 (S) at 428F-G.

DISPUTES OF FACT IN THE PRESENT MATTER

In their opposing papers, the respondents make certain clear concessions in response to the applicant's averments concerning the conditions at Harare Central Police Station. The second respondent (Officer Commanding Harare Central District) admits that the toilets in the holding cells are not screened and that there is no flushing mechanism for use by inmates within any given cell. He also accepts that, although each inmate should be given three blankets, no mattresses are provided for inmates to sleep on. Apart from this, all the other averments of the applicant are denied, either in their totality or in terms that substantially contradict the applicant's assertions.

In certain respects, the respondents' denials are not sufficiently detailed. For instance, the sixth respondent (Commissioner General of Prisons) admits that strip

searches are conducted in prisons, but avers simply that they are carried out procedurally and that strict decency is observed. He also asserts, rather tersely, that the practice of solitary confinement has been abolished and that the applicant was never subjected to such confinement. Nevertheless, despite the laconic nature of these denials and the failure to elaborate them, they are quite categorical in contradicting the applicant's averments. Taken in the overall context, they cannot be rejected or disregarded as mere fabrication.

In the final analysis, I am of the considered view that the conflicting positions of the parties *in casu* are irreconcilable on the papers in several critical respects. The affidavit evidence does not clearly establish the veracity of all of the applicant's complaints to the extent that it can be said that there is a "ready answer to the dispute between the parties in the absence of further evidence". As was properly conceded by counsel for the applicant, all of the relief sought herein involves having to make findings of fact, and only a few of the relevant facts are resolvable on the papers. I accordingly conclude that there are material and significant disputes of fact that can only be resolved by the calling of oral evidence in trial proceedings.

DISPOSITION

In determining this matter, it is necessary to have regard to the primary purpose of section 24 of the former Constitution. As was succinctly explained by Baron JA in *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (S) at 7:

"The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the

liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division without protracted litigation.”

The facts of the present matter do not evince any need for its speedy resolution. The applicant is no longer in custody and he does not stand in jeopardy of any immediate harm or privation being inflicted upon him. The redress that he seeks arises from events and practices that have already occurred, but relates to the prevention of their recurrence in the future. In either case, I do not perceive any urgency warranting a rough and robust approach to the facts under consideration.

In terms of s 24(4) of the Constitution, the court is endowed with the power to:

“... make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights”.

Given the factual disputes alluded to earlier, it is clearly not possible for this Court to proceed with this application as it stands at this stage. Matters of evidence and credibility are generally beyond the practical remit of this Court and, without firm findings of fact, the court is unable to entertain the substantive relief sought by the applicant. It is of course open to the court to strike off or dismiss the application on the technical ground that the applicant has adopted the wrong procedure and should have instituted this matter by way of action in the High Court. However, in view of the unquestionable public importance of the issues raised, both generally and in the particular

context of persons with HIV or AIDS, I take the view that the discretion of this Court should be exercised in favour of retaining this matter on the roll until the constitutional issues raised are properly resolved. I therefore consider it prudent and necessary to refer this application to the High Court for it to proceed as an action for trial and for that court to determine the matter in its entirety.

It is accordingly ordered that:

1. This application be and is hereby referred for trial to the High Court for determination on the facts and on its merits.
2. For the purposes of trial, the notice of application and notice of opposition filed of record herein shall respectively stand as the summons and notice of appearance to defend.
3. The plaintiff (the applicant herein) shall file his declaration within 10 days from the date of this order.
4. The matter shall thereafter proceed in accordance with the Rules of the High Court.
5. In the event that any party is aggrieved by the decision of the High Court, whether on the facts or on the merits, he is hereby given leave to appeal to this Court within 10 days from the date of that decision.
6. The costs of this application shall be costs in the cause.

CHIDYAUSIKU CJ: I agree.

MALABA DCJ: I agree.

ZIYAMBI JA: I agree.

GARWE JA: I agree.

GOWORA JA: I agree.

HLATSHWAYO JA: I agree.

CHIWESHE AJA: I agree.

GUVAVA AJA: I agree.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners