MUNYARADZI MAWADZE
versus
THE COMMISSIONER GENERAL OF POLICE N.O.
and
ALEXANDER JACHI N.O.
and
THE PROVINCIAL MAGISTRATE, HARARE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 15 September 2021 & 12 September 2022

Opposed application – Review

Mr *T Mpofu and P B Saurombe*, for the applicant
F Gustin, for the 1st and 2nd respondents

MUSITHU J: The applicant and two other co-accused persons stand charged with the murder of one Sipho Million Mncube. The crime was allegedly committed on 12 March 2020. As part of his investigations, the second respondent who happens to be the investigating officer, approached the third respondent for an order to compel the applicant to produce samples of his blood for comparison with samples of blood on some recovered blood stained clothes. The applicant withheld his consent to the extraction of his blood samples for that purpose. It is the warrant of search and seizure that was issued by the third respondent on 24 June 2020 authorising the extraction of the applicant's blood that the applicant wants reviewed. The ultimate relief sought is set out in the draft order as follows:

> "IT IS ORDERED THAT:-
> 1. The warrant compelling the Applicant to have his blood samples taken be and is hereby set aside.
> 2. The 1st and 2nd Respondents be and are hereby ordered not to compel the Applicant to produce any blood sample without the informed and written consent of the Applicant.
> 3. Costs to be in the cause."

The Applicant's Case

The applicant contends that in terms of s 52 of the Constitution, he has a right not to be subjected to the extraction of his bodily tissue without his informed consent. Any limitation to this constitutional right must be justifiable in a democratic society. That limitation must also be founded on principles of human dignity and freedom. The applicant averred that he was not

informed of the legal basis for the limitation of his rights. The applicant further averred that s 50(1) of the Criminal Procedure and Evidence Act[1] (the Act), in terms of which the warrant was issued did not contemplate compulsion of production of bodily tissue without the consent of the owner. Further, that law relates to seizure of articles and items of property as opposed to the extraction or use of bodily tissue.

The applicant further averred that the scenario was akin to the right against self-incrimination and the right to silence in that an accused person had a right not to be compelled to give self-incriminating evidence as well as to remain silent. A statute had to be interpreted in a way that did not infringe the Constitution, that's affirming the presumption of constitutional validity.

The applicant also averred that his blood samples were of little significance to the second respondent's investigation since the police already had samples of the deceased's blood which could be matched against the blood stains found on his clothes or from the car seat.

The Respondents' Case

The main opposing affidavit was deposed to by the second respondent, with the first respondent associating himself with the deposition by the second respondent. The second respondent averred that he approached the third respondent in terms of s 41B of the Act following the applicant's refusal to consent to the extraction of blood samples from his body. He claimed that there was a reasonable suspicion that the applicant committed an offence which justified an approach to the third respondent for the issuing of the warrant sought. That justification was found in s 41B as read with s 50(1) (b) of the Act. The warrant was sought and issued in terms of those provisions.

The intention of the legislature as gleaned from s 41B was to compel a suspect to submit to the extraction of bodily tissue if he did not consent voluntarily. That provision set minimum requirements that had to be satisfied before the court could grant the order sought. Those minimum requirements were indeed satisfied, leading to the issuing of the warrant by the third respondent. The second respondent averred that the applicant ought to have challenged the law, instead of seeking a review of a decision that was made in full compliance with the law. The third respondent's interpretation of the law could not be faulted. The applicant was asking

[1] [*Chapter 9:07*]

the court to interfere with a criminal investigation that was sanctioned by the law. Such behaviour was not only obstructive, but was also calculated to derail ongoing investigations.

It was further averred that the applicant could not pre-empt what investigations by the second respondent sought to achieve. The applicant's samples were required for comparison purposes as set out in the second respondent's deposition accompanying his application to the third respondent. That factual basis was not challenged by the applicant. The second respondent claimed that it was his duty to recover exhibits associated with the case, and bring such before a court of law. It was that information that informed the third respondent's decision to issue the warrant.

The second respondent further argued that the relief sought was tantamount to inviting the court to place itself in the way of a constitutional process thereby acting as a barrier to a lawful investigation. The court could only interfere if the decision to grant the order was so irregular as to defy logic. The court was urged to dismiss the application with costs on the higher scale.

The Submissions

In his oral submissions, Mr *Mpofu* argued that the warrant issued by the third respondent did not tally with s 41B of the Act. It did not relate to a specific provision of s 41B in terms of which it was sought and issued. The exercise of power must be anchored on the law. That was the essence of the principle of legality. There must be a statutory provision that speaks to the exercise of power. The court had to consider whether the requirements of the law were satisfied.

Counsel submitted that s 41B was engaged in two circumstances. It was either there was consent or there was no consent. The jurisdictional basis upon which the respondents could only approach the court was that such consent had been withheld. The second respondent's application to the third respondent was silent on that jurisdictional point. On his part, the third respondent could only issue a warrant if satisfied that the applicant had not consented, as well as the reasons for withholding such consent. The warrant was issued before that demonstration was made.

Mr *Mpofu* further submitted that the third respondent ought to have afforded the applicant an opportunity to explain his reasons for declining to provide his blood samples voluntarily instead of granting the order sought on an *exparte* basis. Such a serious invasion of rights could not be entertained on an *ex parte* basis.

Mr *Mpofu* argued that s 50(1)(b) of the Act dealt with articles that were amenable to seizure. A bodily sample was not an article and therefore not covered by that law. The warrant was therefore issued on the basis of a law that did not apply to it. He further argued that a magistrate could only exercise jurisdiction under s 50 (1)(b) if presiding over criminal proceedings. Criminal proceedings commenced with the preference of criminal charges against an accused. The applicant was not appearing in any criminal proceedings before the third respondent. It was therefore not open for the respondents to proceed in terms of s 50(1)(b).

Counsel further submitted that for a body sample to be extracted against a person's will, that sample must be necessary to prove the guilt of the suspect. The second respondent's affidavit did not even claim that the purpose of the procedure was to prove the commission of an offence. The facts relied on had to be placed before the court. It was not clear from the facts whether the second respondent's contention was that foreign traces of blood found on the applicant's recovered clothes were those of the applicant or the deceased. From a reading of the affidavit, it was not clear what exactly the second respondent sought to achieve.

It was further submitted on behalf of the applicant that s 52(c) of the Constitution entrenched the applicant's right not to be subjected to medical or scientific experiments, or to the extraction or use of his bodily tissue without his informed consent. While it was admitted that the right was subject to limitation, the State had to set out such facts which demonstrated that the case fell within the accepted limitations. The court had to be satisfied that the invasion of rights was one that was reasonably justified in a democratic society. For the foregoing reasons, counsel submitted that the warrant should not be allowed to stand.

In response, Ms *Gustin* for the respondents submitted that the warrant was valid because it was issued in terms of s 41(B)(2)(a) of the Act. Counsel further submitted that paragraph 13 of the applicant's founding affidavit confirmed that the applicant was approached but he declined to give his consent to the extraction of blood samples. She further submitted that the mere fact that reasons were not stated in the warrant did not invalidate it. The validity of the warrant was not an issue for purposes of s 41 (B)(2). Reference was made to the case of *Coltart v Minister of Home Affairs & Others*[2].

Counsel submitted that the law did not require that the police officer gives any reasons when approaching the court. The court only needed to satisfy itself on the following minimum

[2] HB 67/05

requirements set out in the law, which are whether; the applicant withheld his consent; there was a reasonable suspicion that the applicant was involved in the commission of an offence; and whether the bodily tissues were required for investigation purposes. Counsel further submitted that even if it was assumed that the warrant was irregular, the police officer could not be held liable for the irregularity. She submitted that the court should condone the irregularity.

As regards the alleged violations of the applicant's constitutional rights, Ms *Gustin* submitted that the right to personal security was not absolute. It was subject to the limitations set out in s 86 of the Constitution. In any case, the extraction of bodily tissues fell within the limitations provided under s 86 of the Constitution. To support this submission, counsel referred the court to the case of *Fose* v *Minister of Safety & Security*[3]. Declaring the warrant invalid would affect the investigation process and the criminal proceedings at large.

The court was urged to dismiss the application with costs on the higher scale of attorney and client, as it was meritless. It was argued that the second and third respondents had acted within the confines of the law.

In his brief response, Mr *Mpofu* submitted that the concession by the respondents that no facts justifying the issuing of the warrant were placed before the third respondent was quite revealing. The concession was not withdrawn and that dealt a huge blow to the respondents' case. The Magistrates Court was a court of record in terms of the law that established it.[4] It followed that all the proceedings unfolding in that court had to be recorded. There was no record of the proceedings leading to the issuing of the warrant.

Counsel further submitted that it was wrong for the respondents to claim that the warrant was issued in terms of s 41B of the Act, as opposed to s 50 of the same Act. The warrant itself was clear that it was issued in terms of s 50 of the Act, which made it irregular. The second respondent had not even alleged that the reference to s 50 was a typo. In any case, para(s) 4 and 5 of the respondents' heads of argument made it clear that the warrant was issued in terms of s 50.[5] The same warrant in any event recited the provisions of s 50 of the Act.

Counsel argued that from a reading of s 41B(2), a magistrate could only issue a warrant upon being satisfied on one of the conditions set out in paragraph (a) or (b) of s 41B (2). It was

[3] 1997 (3) SA 786
[4] Section 5 (1) of the Magistrates Court Act [*Chapter 7:10*]
[5] Page 36 of the record of proceedings

not clear which condition the third respondent considered in issuing the warrant. Paragraph (b) of s 41B(2) actually made reference to a value judgment implying that the court was required to evaluate the value of the warrant before endorsing it.

Mr *Mpofu* further submitted that the respondent's response raised an important constitutional question, which concerned the existence of a right whose violation was admitted by the respondents. The respondents had to bring themselves within the permissible exceptions if they sought to proceed under s 41B(2). The respondents had to place before the court such material facts as were envisaged under s 41B(2). The third respondent could not just override the withholding of consent without hearing the applicant. That would render nugatory the provision of the law that allowed the applicant to withhold his consent.

The Analysis

The warrant of search and seizure issued by the third respondent at the instance of the second respondent is impugned on the basis that it was not only irregular, but that the third respondent misdirected himself on the law in overlooking several legal aspects that he ought to have considered. On the face of it, the warrant states that it was issued *"in terms of Section 50(1)(b) as read with Section 41B(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]."* I hasten to observe the clumsy manner in which the warrant was prepared. There is no s 41B(b) in the Act.

Section 41B has six subsections, which are accompanied by paragraphs, save for subsection 6. The exact part of s 41B which must be read together with s 50(1)(b) is not stated. The warrant recites the provisions of s 50 (1)(a) of the Act, even though the heading suggests that it was issued in terms of s 50(1)(b). Section 50(1)(b) of the Act states as follows:

> "**50 Article to be seized under warrant**
> (1) Subject to sections *fifty-one*, *fifty-two* and *fifty-three*, an article referred to in section *forty-nine* shall be seized only by virtue of a warrant issued—
> (*a*) by a magistrate or justice (other than a police officer), if it appears to the magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of any person, or upon or in any premises or area, within his area of jurisdiction; or
> (*b*) by a judge or magistrate presiding at criminal proceedings, if it appears to the judge or magistrate that any such article in the possession or under the control of any person or upon or in any premises is required in evidence in the proceedings. (Underlining for emphasis).

Section 49 of the Act allows the State to seize articles on three grounds, which are that: the article is concerned in or is on reasonable grounds believed to be concerned in, the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere;

or it is on reasonable grounds believed that the article may afford evidence of the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or the article is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence. The word article is defined in s 47 to include any document or substance. Sections 51 to 53 are of no relevance to the current proceedings. Section 51 is concerned with the search and seizure without warrant. Section 52 applies to the seizure of an article on arrest or detention of a person carrying same, while s 53 applies to a search by occupier of land.

It was argued on behalf of the applicant that s 50 of the Act only applies in instances where the State wishes to seize an article, and not to cases involving the extraction of blood samples. In order to give context to this submission, it is critical to relate to the provisions of s 41B which apply to bodily samples for investigation purposes. Section 41B(1) applies to the extraction of body samples where the person from whom such sample is to be taken gives their consent. It is common cause that the applicant did not consent to the extraction of blood samples from his body. The appropriate provision to relate to is therefore s 41B(2), which reads as follows:

> **"41B Bodily samples for investigation purposes**
> (1) …….
> (2) If a person does not consent to the taking of a bodily sample, a warrant may be issued by a judge or magistrate upon written request by a police officer who is of or above the rank of inspector, if it appears from written information given by the police officer under oath that there are reasonable grounds—
> (*a*) to suspect that the person named in the information, or any one or more persons in a group of persons so named, has committed an offence; or
> (*b*) for believing that the bodily sample and the resulting forensic DNA analysis thereof will be of value in the investigation of an offence by excluding or including one or more named persons as possible perpetrators of the offence."

It is clear from a reading of s 41 and s 50 that a police officer may approach a judge or magistrate for the issuance of a warrant but for different reasons. A police officer may approach a magistrate under s 41B(2) when the person suspected to have committed an offence chooses to withhold their consent to the extraction of bodily samples. On the other hand, s 50(1)(b) applies to the seizure of articles. Mr *Mpofu* argued that blood samples are not an article. I agree with that submission. Any interpretation that seeks to extend the definition of articles to include blood samples would render s 41B(2) irrelevant. Further, s 50 (2) leaves one in no doubt that the word article cannot be interpreted to include blood samples. The subsection reads as follows:

> "(2) A warrant issued in terms of subsection (1) shall require a police officer to seize the article in question and shall to that end authorize such police officer, where necessary—
> (*a*) to search any person identified in the warrant or any premises within an area identified in the warrant; or
> (*b*) to enter and search any premises identified in the warrant, and to search any person found upon or in those premises."

It is clear that the object of the search and seizure referred to above is an article and not blood samples. It would therefore be preposterous to argue that a police officer can approach the court for the issuance of a warrant to compel the extraction of blood samples on the basis of this provision. Besides, it could not have been the intention of the legislature that a warrant to compel the production of blood samples must be issued in terms of 50(1)(b), when there is a provision in the same law that is dedicated towards achieving the same process.

Ms *Gustin's* submission that the court should turn a blind eye to this kind of irregularity and condone the miscitation of the law in a process that seeks to make inroads into the applicant's constitutional rights is clearly unsound. The court cannot condone that which is patently absurd. The warrant does not relate to the provisions of s 41B. Instead, as already stated, it recites the provisions of s 50(1)(a) of the Act. Counsel did not explain why the second respondent did not proceed in terms of s41B(2), if he really knew what he was doing. It appears as if the second respondent just uplifted a template of a warrant of search and seizure that had been used in respect of a past s 50(1)(b) application. On his part, the third respondent just issued the warrant without paying much attention to the quoted sections of the law to determine if they really applied to the application before him. This kind of inattention to detail is so gross and cannot be countenanced by this court.

In view of the foregoing observations, the only inescapable conclusion this court can reach is that the warrant was not issued in accordance with the law. That makes it irregular and consequently invalid. There is no warrant that the applicant is expected to comply with. In light of these findings, it becomes unnecessary for this court to interrogate the other grounds for review which were premised on the supposition that the warrant of search and seizure was valid.

COSTS

The applicant did not ask for costs of suit in the event that his application was successful. In his submissions, Mr *Mpofu* averred that the very nature of the proceedings did not warrant that this court makes an order of costs. In view of the approach taken by the applicant's counsel, the court will not make an adverse order of costs.

DISPOSITION

Resultantly it is ordered that:

1. The application succeeds.
2. The warrant of search and seizure issued by the third respondent on 24 June 2020 compelling the applicant to have blood samples extracted from him for purposes of a criminal investigation, was not issued in accordance with the law and is consequently a nullity.
3. Each part shall bear its own costs of suit.

Scanlen & Holderness, legal practitioners for the applicant
Civil Division of the Attorney General's Office, legal practitioners for the first & second respondents