SMELLY DUBE
versus
CHIEF SUPERINTENDENT MAJUTA (N.O)
and
OFFICER IN CHARGE ZIMBABWE REPUBLIC
POLICE GWERU CENTRAL (N.O)
and
OFFICER COMMANDING POLICE
MIDLANDS PROVINCE (N.O)
and
COMMISSIONER GENERAL OF POLICE N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 13 MARCH 2018 AND 15 MARCH 2018

Urgent Chamber Application

N Sithole for the applicant
L Musika with *R Taruberekera* for the respondents

MATHONSI J: The applicant, a business woman and director of Mahlaba Housing Programme (Pvt) Ltd t/a River Valley Properties of Gweru, has brought an urgent application seeking to prevent what she regards as her imminent arrest and detention on charges of fraud as defined in section 136 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. The interim relief she seeks is in the following:

> "INTERIM RELIEF GRANTED
> Pending the return date of this application, 1st, 2nd, 3rd and 4th respondents be and (are) hereby interdicted from effecting or purporting to effect an arrest on applicant for offences allegedly committed by Mahlaba Housing Programme (Pvt) Ltd, a body corporate trading as River Valley Properties."

The facts are that the applicant runs a company known as Mahlaba Housing Programme (Private) Limited which trades as River Valley Properties. The company's CR 14 Form containing the list of directors shows that she is one of three directors. The other two are Richard Chiwara and Mncedisi Dube. It is a company involved in acquiring and developing land

in the urban and peri-urban areas for housing purposes. In that regard it has been involved in what is called Hertfordshire Phase 2A, a land development project in Gweru, wherein it has been selling stands to land seekers on certain terms and conditions.

On 6 March 2018 the applicant was invited by the first respondent, a police chief superintendent based at ZRP Gweru District Headquarters, and upon arrival she was informed that inquiries were being made in connection with a crime of fraud as defined in section 136 of the Criminal Law Code. She was informed that the allegations against her are that she had misrepresented to civil servants in Gweru represented by Jeremiah Chapukira that she was the owner of state land in Gweru being Hertfordshire Park Phase 2 and was selling stands therein as a result of which civil servants entered into agreements with her for the purchase of stands which she did not have to their prejudice.

The first respondent recorded a warned and cautioned statement from the applicant in which she denied the charges. After that the applicant was allowed to go and was informed that she would be contacted in the near future on developments in the investigations that are ongoing. The applicant was never detained and is yet to be taken to court for a formal remand. The docket is said to have been taken to the public prosecutor for further advices.

Two days after those developments the applicant filed this application in this court on 8 March 2018 seeking a provisional order, the interim relief of which I have reproduced above. She stated that she has since gotten wind that her arrest and detention were imminent as she was informed by unnamed sources at Gweru Central Police station that there is a directive that she be detained for further investigations in connection with the same issue. She received "several calls from Gweru Police" informing her that they had instructions "from above" to have her locked up. She did not bother to give the names of those who called her. For that reason her liberty is about to be arbitrarily interfered with. The court should therefore grant the order stopping her detention.

The application is opposed by the respondents. The first respondent, who is the investigating officer, stated in his opposing affidavit that indeed he recorded the warned and cautioned statement from the applicant as part of his investigations. Thereafter he referred the docket to the Provincial Public Prosecutor for prosecution directives which are yet to be given. He stated that he harbours no intention whatsoever to detain the applicant as investigations are

ongoing. Had he intended to, he would have done so on 6 March 2018. He denied visiting the applicant's offices on 7 March 2018 for purposes of arresting or threatening the applicant. As far as he is concerned the application has been made on speculative grounds.

It occurs to me that as much as the applicant naturally fears detention, her fear alone cannot ground a basis for the grant of a court order interdicting the police from performing a constitutional mandate to investigate crime and bring culprits to book. In terms of section 219 of the constitution, the Police Service has the responsibility to detect, investigate and prevent crime. There is a well-established procedure generally set out in the Criminal Procedure and Evidence Act [Chapter 9:07] through which the police service discharges its function and brings suspects to book. There is no doubt that where a report of the alleged commission of an offence has been made the police service is required as a matter of constitutional necessity to investigate those allegations and where there is a basis for bringing suspects to court, to secure the attendance of suspects at court.

The procedure for securing the attendance of suspects also recognizes the constitutional rights of the suspects including the right not to be unlawfully detained among a host of other rights enshrined in the constitution. In terms of section 25 of the Act, any peace officer is authorized to arrest without a warrant, any person who commits any offence in his or her presence, any person whom he or she reasonably suspects of having committed any offence mentioned in the First or Ninth Schedule and any person whom he or she finds attempting to commit an offence. So *prima facie* the police service is entitled to arrest a suspect.

Mr *Sithole* for the applicant submitted that the applicant is not challenging the right to arrest her and neither is she challenging the charges for which a statement has been recorded already. She is against the threatened detention from instructions given "from above." There is an element of malice in that intended detention, so the argument goes. For that reason the court should intervene and prevent the deprivation of the applicant's liberty. Mr *Musika* for the respondents submitted that there is no cause of action at all and that the application is premised on speculation and is unfounded.

I think Mr *Sithole* burnt his fingers really by submitting that they are not contesting an arrest but a detention. It is a distinction without a difference it being common cause that one is an element of the other. If you are to arrest a person then surely there shall be a detention no

matter how brief. There is also a glaring contradiction in Mr *Sithole'*s submission that the applicant is not contesting the charges. When the applicant says the charges have been preferred against a wrong person, as she tries desperately to hide behind the veil of incorporation, she is in fact challenging the charges, which she is very much entitled to do. Issues for determination would centre around whether, despite the provisions of section 277 (3) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] which deem the intentional conduct of a director of a company as the intention of every other person who was a director or employee, charges of fraud should have been preferred against Mahlaba Housing Programme (Pvt) Ltd as an incorporation. Another issue to be determined should be whether fraud, as defined in section 136 of the Penal Code, can indeed be committed by a juristic person as the applicant would prefer. I am however not sitting to decide those issues because I am not a remand court. In my view the applicant has come to the wrong court.

There are very impressive rights conferred upon an arrested person by section 41A of the Criminal Procedure and Evidence Act, which were inserted by section 13 of Act 2 of 2016. In terms of section 41A (9):

> "A person who is being detained following his or her arrest, under this Act or any other enactment and whether with or without warrant, shall be entitled to challenge the lawfulness of the detention in person before a court, and the person for the time being in charge of the place where he or she is being detained shall cause him or her to be informed of this right promptly."

That the applicant has a clear right to challenge a detention is apparent from this provision. What I do not agree with is that the applicant is entitled to rush to this court and seek to stop a suspected detention on the basis of speculation. This is more so in a case such as the present where the conduct of the investigating officer is inconsistent with her fear of an arrest and detention. If indeed the investigating officer wanted to detain the applicant he would have done so at the time that a caution was recorded from her. What is more, that officer has vowed that he does not intend to detain her and is patiently waiting for prosecution directives.

Apart from that it occurs to me that this court is not equipped to determine whether to fetter the discretion of the police to arrest, detain and bring a suspect to court merely on the basis of a copy of a warned and cautioned statement in which she denied the charges. This court cannot, on the basis of the papers presented in this application, decide whether there is any merit

in the charges or not. That is the function of the remand court before which the applicant will be taken should the prosecution press on with the charges.

The Constitutional Court was confronted with a similar set of facts in *Moyo* v *Sergeant Chacha and Others* CCZ 19/17 (as yet unreported) where the applicant had challenged the constitutionality of his arrest before it even took place and before he was taken to court. The court ruled that it was incompetent for it to determine the question of the lawfulness of the arrest because the law governing the resolution of the matter required the applicant, like all arrested persons, to appear before a magistrates court to challenge the lawfulness of his arrest. The highest court on the land determined that there is one legal system in Zimbabwe in terms of which disputes are resolved. That system has provided a court— the magistrates court – as the court of first instance bestowed with the jurisdiction to make a determination on the facts on the unlawfulness of an arrest. At page 21 of the cyclostyled judgment MALABA CJ, who wrote the unanimous judgment of the full bench, stated:

> "The applicant was arrested and the intention was to bring him before a magistrate for initial remand. It is at these proceedings that the applicant ought to have challenged the lawfulness of his arrest. The question of the lawfulness of the applicant's arrest would have been within the jurisdiction of that court. The magistrates court would have had the competence to conduct the factual inquiry into whether or not the first respondent formed a reasonable suspicion of the applicant having committed the offences set out in the warned and cautioned statement."

I should add that in my view there are also public policy considerations which militate against the grant of the order sought by the applicant. Over and above the undesirability of unnecessarily fettering the investigative mandate of the police, this court should be slow to entertain a litigant intent on circumventing due process by which arrested persons should access justice. It gives the undesirable impression that there are other persons being given special treatment before the courts. Although this court has inherent jurisdiction to determine any civil or criminal matter, where clearly the applicant would want to be accorded VIP status of having an inquiry into the propriety of charges preferred against him or her determined in advance by the High Court when that should be determined by the magistrates court, this court should purposely refrain from exercising that jurisdiction and defer to the lower court whose function it is to do so. The application must therefore fail.

In the result, the application is hereby dismissed with no order for costs.

Ncube Attorneys' applicant's legal practitioners
Civil Division, Attorney General's Office, respondent's legal practitioners