LOOKING BACK TO LOOK FORWARD
Case note on *S v Madondo & Anor* 2015 (1) ZLR 807 (H)

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Introduction

The advent of the new Constitution[1] in 2013 ushered in a new constitutional paradigm anchored on the sacrosanct principle of supremacy of the constitution. It envisages an open and democratic society where the enjoyment of human rights by citizens is paramount and takes precedence over all else. To give meaning to this aspiration, courts have a positive duty to ensure that citizens' rights are not lightly curtailed through the conduct of state machinery or laws passed by the state. The courts are therefore called upon to view the constitution as an organic or living document whose continued growth depends on their judicial decisions.[2] In that regard, when interpreting constitutional provisions especially the bill of rights, a court is obliged to give a generous and wide interpretation in favour of enjoyment of rights as against their restriction.[3] This recently came to the fore in the High Court case of *S v Madondo & Another* 2015 (1) ZLR 807 (H).[4] This

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1 The Constitution of Zimbabwe, 2013 ("the Constitution").

2 *S v Mhlungu* 1995 (3) SA 391 (CC) at [8].

3 Currie & De Waal *The Bill of Rights Handbook* 138; *S v Zuma* 1995 (2) SA 642 (CC) at [14]; See also *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57 F-H where the court instructively stated:

"This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed."

4 At 807 where the learned Judge stated that "Judicial Officers, like the magistrates should familiarise themselves with the provisions of

case was decided in the context of the accused's right to liberty.[5] It has had far reaching consequences on how magistrates' courts now approach the question of remand where an accused person has been over-detained by the police. In other words, it has now assumed the status of a *locus classicus* on the point. Acting on the basis of this case, it is now settled practice in the magistrates' courts that any accused person brought before a remand court having been over-detained must be released without the court even considering the facts whether there is reasonable suspicion of commission of an offence or not. High profile cases such as that of cleric Evan Mawarire immediately come to mind.

It is in that context and background that the case is critically analysed in this article with a view to see if the Constitution altered the law on that point rendering previous cases no longer applicable on the question.

Brief Facts of the Case

The two accused persons were arrested on 1 May 2015. They were only arraigned before a magistrate for initial remand on 4 May 2015. The Police had tried and failed to obtain the accused's warrants for further detention before the expiry of the 48 hours. When the accused were arraigned before the Magistrates Court on 4 May 2015, an application for their immediate release was made on the basis that they had been detained in excess of 48 hours in violation of their constitutional right to liberty. The Magistrate accepted as common cause that the accused had indeed been detained in excess of 48 hours. She, however, declined to release the appellants and placed them on remand. She then proceeded to deal with the application for bail by the accused and declined to admit both accused to bail on the basis that they had the propensity to commit similar offences as they had been arrested after placing further advertisements in the newspaper to dupe other people. They appealed to the High Court against the refusal to grant bail.

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the Constitution in order to protect the rights of arrested and detained persons who in most cases are first brought before them. The Constitution is the supreme law and should be complied with."

[5] Which is guaranteed by section 49(1) of the Constitution.

The Decision

Without hearing the appeal on the question of bail, the High Court *mero motu* released the appellants on the basis that the over-detention of the appellants was an illegality which the court *a quo* ought not to have condoned. The court of appeal could therefore not countenance such illegality too by entertaining the appeal and ordered their release in terms of Section 50(3) of the Constitution. The section reads:

> Any person who is not brought to court within the forty-eight hour period referred to in subsection (2) must be released immediately unless their detention has earlier been extended by a competent court.

Critique of the Judgment

With the greatest respect, the judgment may be critiqued on three grounds. First, the construction placed on section 50(3) of the Constitution is debatable. Secondly, it is doubtful if the procedure adopted by the court justified its conclusion. Thirdly, the decision may have been made *per incuriam*[6] against an existing and binding case authority. These bases will now be discussed *in seriatim*.

Interpretation of Section 50(3)

Section 50(2) is a right of any person arrested for an alleged offence to be brought to court within the specified period of 48hours following the arrest. While the section assists in the enjoyment of the right to liberty, it is a right on its own, distinct from the right to liberty. The section provides a right to be brought before a court or to be placed under judicial authority.[7] Section 50(3) which must obviously be read together with section 50(2) is its enforcement provision which

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[6] A judgment made *per incuriam* is one which ignores a contradictory statute or binding authority, and it is therefore wrongly decided and of no force or effect. A judgment that is found to have been decided *per incuriam* does not then have to be followed as precedent by a lower court. (Law and Legal Definition https://definitions.uslegal.com/p/per-incuriam/ date of use 19/02/18).

[7] Woolman and Bishop *Constitutional Law of South Africa* 2nd ed Vol 3 (Juta 2014) p51-85; Currie I & De Waal J *The Bill of Rights Handbook* 6th ed (Juta 2013) p776.

seeks to ensure that the arrested person is not detained beyond the permissible 48 hours.

The question that then arises is whether section 50(3) is directed to the remand court before which the accused has now been brought after 48hrs of detention or it is to the police officer who still has the accused in his custody at the expiration of 48hrs? It is respectfully submitted that Section 50(3) is a constitutional demand directed to the police officer or authority under whose detention the accused is in to release that accused as soon as the 48 hour period lapses either without charge, on police bail, summons or warning to appear in court. This interpretation must be correct if regard is had to the purpose of the right to be brought before judicial authority which is "to force the state to declare its hand when it is purporting to detain a person for allegedly committing an offence"[8] by bringing that person before a court as soon as possible. It is aimed at limiting the opportunity for cruel, inhuman or degrading treatment.[9] It achieves this by enjoining the police officer to immediately release on the expiration of 48 hours thus depriving the state further opportunity to subject the accused to illegal treatment. If the police officer fails to present an arrested person before a court within 48 hours or to release him, by the time he takes that accused to court he has already not only breached section 50(2) but also 50(3). When this happens, what does the remand court do? Should it still invoke that same section 50(3) and release the accused? It is argued that the subsection is not directed to the remand court for the reason that when a person who has been detained beyond the 48 hour period is eventually brought before a court for remand, the situation mutates into what I will call "the *Mukoko scenario*".[10] The remand court cannot release him on the pretext of section 50(3) if reasonable suspicion has been established that he has committed an offence.

In *Madondo's* case, the court justified the release of the accused on the basis that it could not condone an illegality. It reasoned thus:

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8 Woolman & Bishop *op cit* 51-88.

9 Currie and De Waal *op cit* 776.

10 As derived from the facts of *Mukoko v Attorney-General* 2012 (1) ZLR 321 (S).

> I am not inclined in this case to deal with the appeal of the appellants in relation to bail application as to do so would amount to condoning a clear illegality. The consequences of unlawful detention are clear. See *S v Makwakwa* 1997 (2) ZLR 298. I am therefore obliged to act in terms of s 50 (3) of the Constitution and order the immediate release of the appellants as their continued detention is illegal.

It is submitted with respect, that the same argument was before the Supreme Court in *Mukoko v Attorney-General* 2012 (1) ZLR 321 (S). The question whether the accused must be placed on remand in those circumstances is laid down in that case and represents the law on that point. It is possible that argument may arise that the *Mukoko* case was decided before the "new" Constitution and should no longer continue to hold. I would respectfully disagree. The same position has been confirmed in the recent Constitutional Court case of *Petros Makaza and Others v The State* CCZ 16/17 where it is stated:

> *In Mukoko's case, this court had this to say at 339A-B on the effect of evidence extracted through torture on a prosecution:*
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> "The decision of the Court on this point is that **ill-treatment per se has no effect on the validity of the decisions (decision) to charge the victim with a criminal offence and institute prosecution proceedings against him or her.** It is the use of the fruits of ill-treatment which may affect the validity of the decisions (decision) depending on compliance or non-compliance by the public prosecutor with the requirements of permissible deprivation of personal liberty under s 13(2)(e) of the Constitution." (bold for emphasis)

It is critical to note that from the context of the *Mukoko* case that the ill-treatment which was being referred to by the Supreme Court included her over-detention where she had been held incommunicado for 19 days. In fact, one of the grounds raised by the defence was that the uncontested behaviour by State security agents in kidnapping the applicant from her residence and subjecting her to torture, inhuman and degrading treatment whilst she was in their custody rendered the institution of the criminal prosecution an abuse

of legal process. It was also argued that the conduct of the State security agents offended the sense of what the judiciary expects as decent behaviour from law enforcement agents in the treatment of persons in their custody. The contention was that the Court was obliged to refuse to countenance the bringing of the criminal prosecution in the circumstances.[11]

As long as there is no correlation between the pre-charge ill-treatment (including over-detention) and the evidence that the prosecution seeks to rely on for its decision to institute criminal proceedings, the state does not lose its right to prosecute, including placement on remand.[12] It would be absurd, therefore, that the prosecution would still be allowed to prosecute the accused notwithstanding that he has been over-detained or subjected to torture, inhuman or degrading treatment yet it is not allowed to merely place the same accused on remand. The crucial consideration is whether or not reasonable suspicion has been established that the accused committed the offence charged.[13] It would appear from the above that the facts or evidence being relied on by the state to establish such suspicion should not itself be a product of the ill-treatment.[14] Considered from this viewpoint, it may also be argued that an accused may now challenge placement on remand if the only evidence available to the state is tainted by torture, inhuman or degrading treatment.[15]

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11 *Mukoko v A-G* 2012 (2) ZLR 321 (S) at 329B-D.

12 *Petros Makaza & Others v The State* CCZ 16/17 at p6 of the cyclostyled judgment.

13 *Mukoko's* case at 342C-D.

14 This is so if regard is had to what the court stated @ 342D that "An illegal arrest or detention, without more, has never been viewed as a bar to subsequent prosecution for an offence the accused person is reasonably suspected on untainted evidence of having committed."

15 The writer is aware of a different view to the effect that the constitution has provided a mechanism to deal with evidence allegedly obtained in violation of an accused person's constitutional rights. In this regard s 70(3) is relevant. It is argued that s 70(3) is concerned with admissibility of unconstitutionally obtained evidence, which is a question for the trial court and not a remand court. This position is fortified when one considers the scope of a remand application – it is not designed to determine the admissibility or otherwise of evidence – this falls within the realm of a trial court, which determines the

The fact that the court in *Madondo's* case did not stipulate what would become of the state's case against the accused after releasing them suggests that it was of the view that the state does not lose the right to prosecute. In fact, in practice we have had instances where after the accused is released on the strength of the *Madondo* case, no later than he leaves the courtroom with his pyrrhic victory does he meet the police officer at the court entrance with a summon calling him back to court on the same facts and charge.

It is desirable that the issue of over-detention be best addressed by awards for damages and not to adopt an all-or-nothing approach of ordering immediate release of the accused the earliest moment that the court is appraised of even the slightest over-detention. The *Madondo* case does not leave room for the remand court to take into account such important considerations whether there is reasonable suspicion of commission of an offence by the accused; the seriousness of the offence; how strong the evidence against the accused is; and the principle of proportionality.[16] Strict application of this case would certainly work out an injustice to the state in some instances, for example, where the offence is serious and evidence overwhelming but the accused arrives at court only some minutes after the 48 hours. That approach has been disapproved by Woolman & Bishop who posit that:

> The advantage of damages as a remedy is that it avoids the objection of remedying one evil by creating another, and it possesses the flexibility so problematically lacking in all-or-nothing rulings relating to release, or to the

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question through a trial-within-a-trial procedure. The courts in South Africa have generally rejected pre-trial motions of challenging admissibility of alleged unconstitutionally obtained evidence.

[16] The principle of proportionality was explained by the learned DCJ (as he then was) in Mukoko's case @ 343D that "the principle requires that a fair balance be struck between the interests of the individual in the protection of his or her fundamental rights and freedoms and the interests of the public in having those reasonably suspected of having committed criminal offences tried, and if convicted, punished according to law." It follows therefore that if the principle is applied to the case of over-detention, the court must be allowed discretion to weigh the competing interests and arrive at a decision regard being had to what is just in the circumstances.

> admissibility of evidence, **or to a stay of proceedings**…It should also be awarded sparingly in situations where an interdict to stop violating, or a mandamus to start fully respecting the right in question, makes more sense."[17] (bold for emphasis)

Section 50 (7), (8) and (9) of the Constitution provide adequate remedies such as *habeas corpus*, release and personal liability for compensation by the person who is responsible for the illegal detention.

Finally, the interpretation placed by the court on section 50(3) creates a conflict between that section and section 49 (1) (b) of the Constitution which authorises taking away of the right to liberty where there is a just cause. One such just cause is reasonable suspicion that an offence was committed.

Issues of Procedure

First, the matter that was before the High Court was an appeal against refusal of bail. The issue of placement on remand had already been decided upon by the court *a quo* before it went on to decide on the question of bail. The ship had already sailed, so to speak. Thus, by ordering release of the accused, not on bail but to simply go without a further remand date, the High Court effectively set aside the magistrate's decision to place the accused on remand. With the greatest respect, despite that the decision to place the accused on remand was not the issue being taken on appeal, the court effectively reversed that decision and released the accused. A decision to place an accused on remand is an interlocutory decision that is not appealable and can only be taken on review.[18]

Secondly, an appeal against refusal of bail is an appeal in the narrow sense.[19] The court of appeal must therefore only interfere with the decision of the inferior court if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably as to vitiate its decision.[20] It is

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[17] Woolman & Bishop *Constitutional Law of South Africa* 2nd ed (Juta 2014) p51-69.

[18] *A-G v Muchero & Anor* 2000 (2) ZLR 286 (S)

[19] *v Ruturi* (2) 2003 (1) ZLR 537 (H); HH-26-03. See also *S v Chikumbirike* 1986 (2) ZLR 145 (S)

[20] *S v Chikumbirike* 1986 (2) ZLR 145 (S) @ 146E-F.

submitted that the decision to place the accused on remand could not have been an irregularity or a misdirection in an appeal against refusal of bail. If the accused were disgruntled with the magistrate's decision to place them on remand, they should have sought review of the court's decision. They did not. They appealed against refusal of bail, thus the issue of their placement on remand was not before the appeal court.

The Need to Look Back in Order to Look Forward: A decision made per incuriam

The *Madondo* case totally failed to advert to the points laid down in the *Mukoko* case yet the legal question it was dealing with was the same. The absence of any demonstration that the two were distinguishable meant that the judge was bound by the decision of the Supreme Court.[21] The judgment was therefore made *per incarium* and it may be argued that it cannot be precedent for inferior courts.

Conclusion

The judgment of the High Court failed to apply the existing binding precedent. As a result, its decision stands to be of no force to the extent that inferior courts may not be bound by it.

Once the 48 hour detention period lapses, the continued detention becomes unconstitutional.[22] It is for the accused or any person acting on his behalf to now challenge his continued detention in terms of section 50 (7). This is achieved by means of a *habeas corpus*. If such person is finally brought to court, the court cannot refuse to place him on remand on the mere basis of over-detention if reasonable suspicion has been proved by the state that he committed an offence. This follows the principle that the state does not lose its prosecutorial powers against the accused because of pre-trial ill-treatment by the authorities as long as the evidence relied upon for the decision to prosecute is based on untainted evidence.

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[21] Which was actually sitting as a constitutional court in this instance.

[22] Currie & De Waal The Bill of Rights Handbook 777.