ANDREW MAKUNURA
versus
MINISTER OF HOME AFFAIRS N.O.
and
COMMISSIONER GENERAL OF POLICE
and
AGRIPPA CHINYAMA N.O
and
ATTORNEY – GENERAL N.O.

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 14 & 15 November 2016 & 22 February 2017

Civil Trial

T Bhatasara, for the plaintiff
E Mukucha, for the defendants

MUREMBA J: On 12 February 2015 the plaintiff who was driving a private car was stopped at a roadblock along High Glen Road, Harare by the third defendant who is a police officer under the employ of the first and second defendants. The third defendant asked to see the plaintiff's driver's licence which the plaintiff produced. There is a dispute as to whether or not the third defendant then returned the plaintiff's driver's licence and it is this dispute that I am supposed to resolve. However, it is not disputed that the third defendant went on to inspect the plaintiff's motor vehicle and discovered that the plaintiff had no radio listener's licence. The third defendant asked the plaintiff to pay a spot fine of US$10-00, but the plaintiff said that he had no money. What transpired thereafter is disputed between the plaintiff and the third defendant. However, it is common cause that the plaintiff did not pay the spot fine.

It is the plaintiff's averment that when he failed to pay the spot fine the third defendant confiscated his driver's licence and advised him to collect his driver's licence at Southerton Police Station upon payment of the fine on the same day at lunch time. The plaintiff avers that

when he made a follow up on his licence the police denied ever taking his driver's licence. It is on this basis that the plaintiff issued summons making the following claim against the defendants.

> "(1) A Constitutional declaration that 1st – 3rd defendants' demand for a spot fine from the plaintiff abrogates ss 49; 66; 69 (1) and (3); 86 (3) (e) and 71 of the Constitution of Zimbabwe.
>
> (ii) The 1st to 3rd defendants are ordered to forthwith cease the practice of detaining motorists, confiscating their licences, impounding their motor vehicles or any other conduct that would compel a motorist to pay fine on the spot against their will.
>
> (iii) An order for the return by the defendants of plaintiff's metal driver's licence.
>
> (iv) Costs of suit."

In their plea the defendants denied that when the plaintiff failed to pay the spot fine he was detained or compelled to pay it as paying a spot fine is optional to motorists who are willing to do so. The defendants averred that spot fines have already been declared to be unconstitutional in terms of the old constitution and as such they (defendants) have no reason to disrespect the law. The defendants further averred that the plaintiff retained his driver's licence after producing it to the third defendant. The defendants averred that none of the plaintiff's constitutional rights were violated and his licence was not confiscated and as such his claim should be dismissed with costs.

In their joint pre-trial conference minute the parties agreed that the issue for determination is whether or not the third defendant confiscated the plaintiff's driver's licence at the roadblock on 12 February 2015 to force him to pay a spot fine. The defendants made an admission that the confiscation of a driver's licence at roadblocks to compel motorists to pay a spot fine abrogates ss 49, 66, 69 (1) & (3); 86 (3) (e) and 71 of the Constitution of Zimbabwe.

During trial the plaintiff testified to the effect that on 12 February 2015 at around 6am he was driving to work and in the car he was with his wife Tafadzwa Kajasi and their two children who were going to school. He said that when he was stopped at the road block by the third defendant he was asked to produce his driver's licence which he did. The third defendant went round the car holding the licence. He then said that the plaintiff did not have a valid radio listener's licence which the plaintiff did not dispute since it had expired. He was directed to go to a lady police officer to pay a fine of US$10-00 which he said he did not have. The plaintiff said

that the third defendant told him to look for the money. He said that he remained seated in the car asking for his licence back as he did not have the money, but the third defendant insisted that he would not give him his licence back until he paid the fine. He said that the third defendant continued to attend to other motorists as there was a long queue of cars. He said that he got out of the car and tried to speak to the third defendant, but he was adamant that he wanted the fine paid and instructed the plaintiff to go back into his car and wait for him. The plaintiff said that he went and sat in the car. When the third defendant came to his car he asked him if he had found the money. He told him that he had not. The third defendant left his car. The plaintiff said that seeing that he was now running late, he got out of the car and followed the third defendant. He produced his work identification document and told him that he works for the National Blood Transfusion Services as a registered General Nurse. The plaintiff said that is when the third defendant said that if he had no cash he could go but was supposed to make sure that he paid the fine at Southerton Police Station to Assistant Inspector Dube of office 11 before lunch time on that very day. The plaintiff said that the third defendant also gave him his phone number as 0773 286 515 on a piece of paper saying that the plaintiff should phone him when coming to Southerton Police Station to pay the fine. The plaintiff said that the third defendant remained with his driver's licence saying that he would get it upon paying the fine. The plaintiff said that they eventually left the scene at around 7:15am – 7:20am.

The plaintiff said that he, however, did not go to Southerton Police Station on that day to pay the fine because, firstly, he did not have the $10-00 that was required. Secondly, he felt that his rights had been infringed. He said that as a result he consulted his lawyers and told them what had happened. The plaintiff said that he later tried to make a follow up on his driver's licence, but the third defendant denied that he took it. The plaintiff also produced a letter which was written by his lawyers to the third defendant on 26 February 2015 demanding the return of his driver's licence. The plaintiff said that he has since resorted to using the temporary certificate of competence that was issued to him before he was issued with the metal driver's licence. He, however, said that this temporary certificate of competence gives him torrid times at roadblocks as the police ask him why he is still using it. He produced the certificate of competence as an exhibit.

The plaintiff said that on 20 February 2015 in the morning he was stopped by police officers at the same spot as he was driving to work. Again, he was with his family. He said that he was stopped by Constable Rutsinga who asked for his driver's licence. He said that he produced the certificate of competence which Constable Rutsinga queried. The plaintiff said that he explained that his licence was confiscated by his colleague on 12 February 2015, and that it was taken to Southerton Police Station. The plaintiff said that Constable Rutsinga inspected the car and asked him to pay US$10-00 for having no radio listener's licence. The plaintiff said he got $10-00 from his wife and paid the fine.

Under cross examination the plaintiff said that he felt that the confiscation of his driver's licence on 12 February 2015 was a measure to induce him to pay the fine yet he did not have the money on that day even though he was admitting to the offence. He said that on 20 February 2015, he willingly paid the fine because he had the money. The plaintiff said that he did not go to the police station to get his licence back because there is no law which empowers the police to confiscate his licence. He said that he also felt that even if he went to the police station he would not get fair treatment or redress as the police had already judged that he was guilty. He further said that when his lawyers wrote to the police asking for the return of the licence, the police refused to acknowledge that they had the licence.

Tafadzwa Kajasi the plaintiff's wife also testified. Her evidence was basically similar to that of the plaintiff and it is not necessary for me to repeat it *in toto*. Just like the plaintiff said, she also said that when the third defendant took the plaintiff's drivers licence on 12 February 2015, he did not give it back. She said that was the last time she saw the plaintiff's driver's licence. She said that the plaintiff got out of the car and went to talk to the third defendant. He returned without the licence saying that he had been advised to go to room number 11 at Southerton Police Station. He came back holding a piece of paper written the third defendant's name and telephone number.

Tafadzwa Kajasi also said that on 20 February 2015 when the plaintiff was asked for a licence at the same road block he produced a certificate of competence which he now uses. She said that he used it together with his work identification document to pay a fine for not having a radio listener's licence since the certificate of competence does not have a picture.

During the defendants' case the third defendant, Agrippa Chinyama testified. His evidence was as follows. He is a Constable in the Zimbabwe Republic Police attached to Southerton National Traffic. On 12 February 2015 he was manning a road block along High Glen Road in the company of Constables Marako; Bamhare and Dhlomo. He stopped a Toyota Fielder registration number ACT 5173 which was being driven by the plaintiff. He asked for the plaintiff's driver's licence which the plaintiff produced. He saw that it was genuine and handed it back. He went on to inspect the motor vehicle and noticed that the radio listener's licence had expired. He told the plaintiff to pay a deposit fine of US$10-00 but the plaintiff said that spot fines were illegal. He asked him who had said that and the plaintiff said that it was Judge Bere. He told the plaintiff to go and see Assistant Inspector Dube in room 11 at Southerton Police Station to be issued with a form 265 if he disagreed with paying a spot fine. A form 265 is a document which allows a motorist to pay a fine within 7 days if he does not want to pay a spot fine. He said that at the roadblock they (police officers) did not have the form 265 that early morning because they had run out of them the previous day. They were still waiting to receive them from Harare Central District. As a result, they were directing all the motorists who did not have the money for spot fines to go to Southerton Police Station to get the form 265. He said that all they had were tickets for those motorists who were willing to pay spot fines.

During cross examination the third defendant said that when he told the plaintiff to pay US$10-00 as spot fine he said that he did not have it. He said that is when he told the plaintiff to go to station and get a form 265. He said that the plaintiff then drove off at high speed refusing to go to station. The third defendant said that he actually wrote that in his police note book. Asked how the plaintiff refused to go to station, the third defendant said by driving from the roadblock at high speed. He said that when he later went to station, Assistant Inspector Dube said that no one had come to get a form 265 in Room 11. He said that the plaintiff was the only person he had directed to go to station to get a form 265 on that day. The third defendant said that the plaintiff, by refusing or failing to go to station to get a form 265, had committed an offence of failing to comply with police instructions. He said that despite having recorded the plaintiff's motor vehicle registration number he had not yet pursued the plaintiff for the commission of that offence. He said that he had not yet checked with Central Vehicle Registry for the residential address of the motor vehicle. The third defendant admitted that in the opposing affidavit that he

wrote in response to the constitutional court application that was initially lodged by the applicant in respect of this matter he never mentioned that he referred the plaintiff to station to get a form 265 nor did he ever mention anything about the form 265 at all. He admitted that he also did not mention that the plaintiff said that spot fines were illegal and that this was said by BERE J. He also admitted that he gave the plaintiff his name and rank, but he disputed giving the plaintiff his phone number saying that he does not know where the plaintiff got his number from.

As the court I asked the third defendant to clarify some issues. I asked him how the plaintiff was supposed to go to station to get a form 265. He said that if he had not driven away as he did, he was supposed to be escorted by a police officer. He said that the plaintiff drove away at the time he (third defendant) intended to call Constable Bamhare who was at a distance to escort the plaintiff to station.

Constable Mike Rutsinga also testified for the defendants. He said that on 20 February 2015 he stopped the plaintiff at the same roadblock along High Glen Road. He asked for the plaintiff's driver's licence which he produced. He said that he looked at it and saw that it was a genuine metal licence to him. He then went on to inspect the motor vehicle and noticed that the radio listener's licence was expired. He asked the plaintiff to pay a fine of US$10-00 which he paid. He then issued him with a receipt and gave him back his driver's licence. He said that if the plaintiff had no money he would have issued him with a form 265 to enable him to pay the fine within 7 days.

During cross-examination this witness said that when he asked for the plaintiff's driver's licence the plaintiff never said that it was at Southerton Police Station. The plaintiff's counsel referred the witness to the affidavit he had deposed to on 20 February 2015 in response to the Constitutional Court application which was initially made by the plaintiff on 18 February 2015 wherein he stated that when he asked the plaintiff for his driver's licence he said that it was at Southerton Police Station and that he had said that they would go together to the police station to look for it. Despite having made the averment in the affidavit, the witness maintained that the plaintiff had furnished him with a metal driver's licence. He failed to give an explanation for the existence of the averment in the affidavit he had deposed to on 20 February 2015 which is the very day he had dealt with the plaintiff at the roadblock. This witness stated that on the Admission of Guilt form there is no provision for filling in the driver's licence number.

However, during re-examination he said that when he asked the plaintiff for his driver's licence he said that it was at Southerton Police Station. He said that the plaintiff only produced it when he started interrogating him about it.

Analysis of Evidence

Looking at the evidence given by the plaintiff and his wife, I am satisfied that the two of them were credible witnesses. The plaintiff was consistent in his evidence and he remained unshaken during cross-examination. His wife corroborated him on all material issues. Despite their relationship as husband and wife, they did not give me any reason to believe that they connived and fabricated their evidence. From their demeanour, the way they gave their evidence in chief and the way they answered questions during cross-examination, I am satisfied that they were speaking nothing but the truth. I am satisfied that when the third defendant took the plaintiff's driver's licence on 12 February 2015 he did not give it back to the plaintiff because he had failed to pay the spot fine of US$10-00 the third defendant had demanded.

On the other hand, the third defendant and Mike Rutsinga did not impress me as credible witnesses. Their evidence was tainted with glaring inconsistencies which they failed to explain and reconcile. I will start with the evidence of the third defendant. He gave evidence which was inconsistent with the defendants' plea. In the plea it is mentioned that when the third defendant asked for the plaintiff's driver's licence he said that it was at Southerton Police Station and only produced it when he was invited to go to station to look for it. However, the third defendant in his summary of evidence and in his testimony never said that the plaintiff ever said that his driver's licence was at Southerton Police Station. He said that the plaintiff produced it there and then. No attempt was ever made to reconcile or to explain this discrepancy between the plea and the evidence.

In his evidence in chief the third defendant never said that the plaintiff sped off from the scene having not paid the fine and having refused to go to Southerton Police Station. When the plaintiff was cross-examined by the defendants' counsel it was never put to him that he had fled from the scene. The third defendant only said it for the first time when he was being cross-examined by the plaintiff's counsel. This was a crucial issue which ought to have been raised with the plaintiff in cross examination because by fleeing from the police the plaintiff had

actually committed an offence. The failure by the defendants to raise this issue makes me conclude that the plaintiff never ran away as the third defendant wants this court to believe. In any case the third defendant did not take any action against the plaintiff for fleeing. He did not inform any of his colleagues with whom he was working on that day, not even Constable Bamhare whom he wanted to escort the plaintiff to the station and not even Constable Dhlomo who was in charge of the roadblock. Despite having recorded the registration number of the plaintiff's car, the third defendant never made an attempt to have the plaintiff pursued and arrested. He did not even report him to his superiors at station yet the plaintiff was a person who had fled without paying a fine for not having a radio listener's licence. He never notified any other police officer that the plaintiff was a wanted person so that he could be arrested. This conduct by the third defendant tends to confirm the plaintiff's version that he did not flee from the roadblock but that he left after he had been told to go to Southerton Police Station to pay the fine and after having been given the third defendant's details and phone number. The third defendant does not dispute that he gave his name and rank to the plaintiff on a piece of paper after directing him to go to Southerton Police Station. The question now is, after having been told where to go and having been given the third defendant's details, was there any reason for the plaintiff to flee from the roadblock? It does not make any sense. It is not logical. There was no reason for the plaintiff to flee or speed off from the roadblock because there was nothing that he was fleeing from.

In the plea it was never mentioned that the third defendant referred the plaintiff to Station to get the form 265 since he had failed to pay the spot fine. Even in the summary of evidence there is no mention that the third defendant referred the plaintiff to station to get the form 265. In the affidavit he deposed to in response to the Constitutional Court application which was made by the plaintiff the third defendant made no mention of the form 265 at all nor did he say he referred the plaintiff to station to get the form 265. This is an issue that the third defendant only raised for the first time in his evidence in chief. It was never put to the plaintiff during cross-examination. It was also mentioned for the first time during the third defendant's evidence in chief that the plaintiff had refused to pay the spot fine saying that spot fines were illegal.

With the above discrepancies, the third defendant did not impress the court as a credible witness. His lack of credibility was further worsened by his co-witness Mike Rutsinga. It appears

that Mike Rutsinga was trying to cover up for the third defendant. In his evidence in chief he said that on 20 February 2015 the plaintiff produced his driver's licence there and then. He failed to reconcile this with what he said in his affidavit in response to the Constitutional Court application which was to the effect that the plaintiff had initially told him that his driver's licence was at Southerton Police Station. He gave no meaningful explanation. This only serves to show that he was not being truthful in his explanation. He tried to lie in order to cover up for the third defendant and ended up being entangled in the web of his own lies. It is also interesting to note that the defendants in their plea averred that the plaintiff had told the third defendant that his licence was at Southerton Police Station yet when the third defendant testified he never said that the plaintiff told him that his licence was at Southerton Police Station. This confusion in the defendants' case shows that the defendants' witnesses were not being truthful with the court. They were trying to build a defence to the plaintiff's claim. If they were being truthful there would not have been any confusion as to whom between the third defendant and Mike Rutsinga was told by the plaintiff that his driver's licence was at Southerton Police Station.

That the plaintiff said that his licence was at Southerton Police Station cannot be doubted. It cannot be doubted because the plaintiff himself said on 20 February 2015 when he was stopped again at the same roadblock he told the police officer who had stopped him that his licence was at Southerton Police station. In their confusion as to which police officer between the third defendant and Mike Rutsinga was told this, these 2 police officers confirm the plaintiff's version. It is my conclusion that the plaintiff said this to Mike Rutsinga on 20 February 2015 because his licence had been taken away from him on 12 February 2015, by the third defendant. I do not believe the evidence of Mike Rutsinga that he was shown the metal driver's licence by the plaintiff as he wants the court to believe. If the plaintiff had his licence on him on that day there was no need for him to lie that it was at Southerton Police Station. I do not see what he would seek to achieve by that. If he did not want to produce it maybe at most he would have said that he had left it at home instead of lying that it was at the police station.

The inconsistencies and lack of credibility by the defendants' witnesses make me conclude that the plaintiff's driver's licence was confiscated by the third defendant on 12 February 2015 in order to force him to pay a spot fine. The plaintiff managed to prove this on a balance of probabilities. I am also convinced that before the plaintiff was made to go by the

third defendant he was detained for quite a while as he and his wife said. This again was meant to coerce him to pay the spot fine.

Reliefs being sought by the plaintiff

1. A Constitutional declaration that 1st – 3rd defendants' demand for a spot fine from the plaintiff abrogates ss 49; 66; 69 (1) and (3); 86 (3) (e) and 71 of the Constitution of Zimbabwe.

Despite the admission made by the defendants that the confiscation of drivers' licences at roadblocks to compel motorists to pay spot fines abrogates ss 49, 66, 69 (1) and (3) 86 (3) (e) and 71 of the Constitution, I will make an analysis of these provisions one by one and see whether they were violated in respect of the plaintiff.

In terms of s 356 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] it is perfectly permissible for the police to accept from accused persons fines not exceeding level three if the accused person is admitting that he is guilty of the offence preferred against him or her and is willing to pay the fine. The provision reads as follows:

> **"356 Payment by accused persons of fines which may be imposed for minor offences in lieu of appearance in court**
> (1) When any person has been summoned or warned to appear in a magistrates court or has been arrested or has been informed by a peace officer, by written notice referred to in subsection (1) of section *one hundred and forty-one* or otherwise, that it is intended to institute criminal proceedings against him for any offence, and a prescribed officer has reasonable grounds for believing that the court which will try the said person for such offence will, on convicting such person of such offence, not impose a sentence of imprisonment or a fine exceeding level three, such person may sign and deliver to such prescribed officer a document admitting that he is guilty of the said offence and-
> (*a*) deposit with such prescribed officer such sum of money as the latter may fix; or
> (*b*) furnish to such prescribed officer such security as the latter thinks sufficient for the payment of any fine which the court trying the case in question may lawfully impose therefor; not exceeding level three or the maximum of the fine with which such offence is punishable, whichever is the lesser, and such person shall thereupon not be required to appear in court to answer a charge of having committed the said offence." (My underlining for emphasis)

The use of the word 'may' means that accused persons are at liberty to admit to the offence and to pay the fine if they so wish. If they admit to the offence and elect to pay the fine, they will not be required to appear in court to answer to a charge of having committed the said offence. If they dispute the offence they will be required to appear in court to answer to the charges. The choice is theirs. This provision relates to all minor offences which do not warrant

the imposition of a sentence of imprisonment or a fine exceeding level three. Minor traffic offences are also covered under this provision. As a result police officers are allowed to accept fines from motorists at roadblocks if motorists are admitting to the offences and are willing to pay the fine to save themselves from the trouble of having to pay the fine later or from having to appear in court on a subsequent date to answer to the charges that they are already admitting to. What is illegal is for police officers at roadblocks to force motorists to pay spot fines against their will. In *Zaine Babbage* v *The State* HB 157/12 CHEDA J held that motorists should be issued with tickets and given reasonable time within which to pay the fine unless the said motorist elects to pay the fine on the spot. This case involved a motorist who had been caught by a police officer using a cellular phone whilst driving. CHEDA J held that a police officer cannot and should not insist on a spot fine on the basis that he is not in possession of a ticket book which ticket book is a necessary administrative tool for executing his duties. He further said that a police officer's failure to carry relevant stationery cannot be used to infringe people's rights. The police are empowered to use their powers as they deem fit if the motorist has no acceptable identification or is a foreigner which will make it difficult for him to be traced in the event of defaulting in paying the fine.

I fully subscribe to what CHEDA J said. Motorists should only pay fines on the spot if they are admitting to the offence and if they elect to make payment on the spot. If they are admitting to the offence, but do not have the money for the fine they should be issued with tickets like the form 265 which give them reasonable time within which to pay the fine. If they are disputing the offence they should be issued with tickets or have dockets opened and taken to court as they have a right to a fair hearing before an independent and impartial court[1]. The court will determine whether they are guilty or not. As was correctly conceded or admitted by the defendants, there is no law which allows the police to confiscate the drivers' licences of motorists in order to compel them to pay spot fines. Compelling motorists who are disputing the offence to pay fines against their will infringes their right to a fair hearing before an independent and impartial court. It means that they are arrested by the police, tried by the police, convicted by the police and sentenced by the police without being given an opportunity to present their case or their side of the story to a person who has no interest in the matter and is therefore not biased.

[1] S 69 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

The police cannot be the judge and the jury in a matter they have an interest in if a motorist is disputing the offence.

In *casu* the plaintiff was admitting to the offence but he had no money for the fine. On the other hand the police had no form 265 to issue to him so that he could pay the fine within 7 days. Instead of detaining him at the roadblock for over an hour, withholding his driver's licence and insisting that he finds the money there and then, they should have seen what they could do in order that they did not infringe on his constitutional rights. For example, they could have taken him to station right away. As it is by detaining him for that long as he attended to other motorists, the third defendant violated the plaintiff's right to personal liberty as enshrined in s 49 (1) (b) of the Constitution.

It reads:

> "Every person has the right to personal liberty which includes the right not to be deprived of their liberty arbitrarily or without just cause".

The plaintiff's deprivation of personal liberty caused him and his wife to be late for work and the children late for school. It was arbitrary and without just cause. That the police did not have the form 265 at the roadblock is not the plaintiff's fault.

I have problems with the way the prayer for the declaratur is worded. The plaintiff wants "a constitutional declaration that the first to third defendants' demand for a spot fine from the plaintiff abrogates s 49 of the Constitution of Zimbabwe". It is not the demand for the spot fine which abrogates the right to personal liberty, but the act of being detained. As I have already said above, the demand for a spot fine abrogates the right to a fair hearing. However, since the plaintiff managed to prove on a balance of probabilities that he was detained by the third defendant, I will grant the declaratur in respect of s 49 of the constitution. I will thus correct the wording thereof as follows, 'the first to third defendants' detention of the plaintiff abrogated s 49 of the Constitution'. I am going to word the declaratur in the past tense seeing that the declaratur which is being sought is not general in nature, but specific to the plaintiff and it is being sought in respect of what happened to him in the past. So instead of saying, 'the detention of the plaintiff abrogates s 49 of the Constitution' I will say 'the detention of the plaintiff abrogated s 49 of the Constitution'.

The plaintiff also wants it declared that his right to freedom of movement as enshrined in s 66 of the Constitution of Zimbabwe was violated. Section 66 (2) (a) of the Constitution reads: "Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to move freely within Zimbabwe."

This right to freedom of movement envisages the right of individuals to travel from place to place within the territory of Zimbabwe. Individuals have the right to travel, reside in and/or work in any part of Zimbabwe where they please within the limits of respect for the liberty and rights of others. I do not see how the detention of the plaintiff or the demand for a spot fine by the third defendant abrogated the plaintiff's right to freedom of movement. The plaintiff was only detained for slightly over an hour at a roadblock, but this did not infringe on his right to freedom of movement. I will thus not grant a declaratur in respect of s 66.

The plaintiff wants a declarator to the effect that his right to a fair hearing as protected in s 69 (1) and (3) of the Constitution was violated. From the evidence led, I do not see in what way this right was violated. S 69 (1) deals with the right of a person accused of an offence to be tried within a reasonable time by an independent and impartial court. In the circumstances of the present case the plaintiff was not disputing the offence. All he wanted was to be given reasonable time to pay the fine as he had no money on the day in question. If he had been issued with the form 265 allowing him to pay the fine within 7 days he would have paid the fine not on that day but on a later date. He is not a person who was disputing the offence and wanted to be taken to court to argue his case. I therefore do not see how his right to a fair hearing before an impartial court was infringed. In the circumstances of his case the issue of the right to a fair hearing does not even arise.

I also do not see how s 69 (3) was infringed. It says;

> "Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute."

Nothing shows that the plaintiff was barred or prevented by the defendants from approaching the courts for the resolution of a dispute. I will therefore not grant a declaratur in respect of s 69.

The plaintiff also wants a declaratur to the effect that the demand for a spot fine violated s 86 (3) (e) of the Constitution. Section 86 (3) (e) states that no law may limit the right to a fair

trial. I cannot grant this declaratur because s 86 deals with limitation of rights and freedoms. It does not deal with rights and freedoms themselves. No right or freedom can be infringed under s 86.

The plaintiff also wants a declaratur to the effect that the defendants' demand for a spot fine violates s 71 of the Constitution which protects the right to property. The word 'property' is defined in s 71(1) as meaning "property of any description and any right or interest in property". The plaintiff led evidence showing that his driver's licence was taken from him by the third defendant and it was not returned to him. Looking at the provisions of s 71 (3) I am not inclined to grant this declaratur because I do not believe that the right to property was meant to cover issues like the present one. Section 71 (3) states that no person may be compulsorily deprived of their property unless certain conditions are satisfied. The conditions are then enumerated from s 71(3) (a) to s 71 (3) (e). Some of them are to the effect that the deprivation should be in terms of general application; should be necessary for reasons like in the interests of defence, public safety, public order, etc.; the acquiring authority should give reasonable notice of the intention to acquire the property and to pay adequate compensation. Clearly from this provision, the issue of confiscation of a motorist's driver's licence by a police officer would not be covered as deprivation of property under s 71. If we say that the right to property covers situations like the present one, we will be stretching the right too far.

In view of the foregoing, I will grant a declaratur in respect of s 49 of the Constitution only.

2. The 1st to 3rd defendants are ordered to forthwith cease the practice of detaining motorists, confiscating their licences, impounding their motor vehicles or any other conduct that would compel a motorist to pay fine on the spot against their will.

The plaintiff wants the first to third defendants ordered to forthwith cease the practice of detaining motorists, confiscating their licences, impounding their vehicles and doing any other conduct that would compel motorists to pay spot fines against their will. The defendants do not dispute that it is illegal to force motorists to pay spot fines against their will. They also do not dispute that there is no law which allows them to confiscate drivers' licences of motorists to compel them to pay spot fines. Motorists who want to pay should do so freely and in admission of their offences. If they are not admitting to the offences, the law gives them rights allowing them to have their day in court. The police should respect those rights and the law bearing in

mind that they (the police) are not a law unto themselves. However, it is my considered view that in the present case I cannot grant an order that the police should cease the practice of detaining motorists, confiscating their licences, impounding their motor vehicles and doing any other conduct that would compel motorists to pay fines on the spot against their will. This is because this relief will not apply to the plaintiff only, but to all motorists at large yet the plaintiff has not instituted these proceedings as a representative of motorists. In other words he has not instituted a class action.

In terms of s 85 (1) (c) of the Constitution, any person acting in the interests of a group or class of persons is entitled to approach the court for enforcement of fundamental human rights and freedoms. A class action is a lawsuit that is filed by an individual or small group acting on behalf of a larger group or "class". It is a procedural lawsuit that allows the courts to manage lawsuits that would otherwise be unmanageable if each individual who has suffered the same wrong at the hands of the defendant was to file their own lawsuit. In our case class actions are governed by the Class Action Act [*Chapter* 8:17]. This is the Act which provides for the institution and prosecution of legal proceedings by or on behalf of classes of persons. It outlines what should be done if a class action is to be brought before the courts. In terms of s 3 of the Act, leave to institute a class action has to be obtained from this court first. There has to be an appointment of a suitable representative of the class in terms of s 5. In terms of s 7, notice of the class action should be given to members of the class of persons concerned. In terms of s 8 the High Court may give directions in the conduct of the class action. In the circumstances of the present case these requirements have not been complied with.

In any case the plaintiff in his pleadings and in his evidence has not shown that motorists at large are affected by this kind of behaviour by the police. He has not shown that other than him being detained at the roadblock, his driver's licence being confiscated by the third defendant at the roadblock on 12 February 2015, other motorists have been affected in that manner too. The pleadings and the evidence before the court show that only one person, the plaintiff himself has been affected by the conduct of the police. When only one person has been affected it is not a ground to seek a relief that affects all motorists at large. It is wrong for the plaintiff to make an assumption that the court knows that what was done to him by the third defendant is the common

practice that is done to motorists by the police. The court deals with evidence that is presented before it.

In the result, I will not grant an order that the police should cease the practice of detaining motorists, confiscating their driver's licences and impounding their motor vehicles.

3. An order for the return of the plaintiff's metal driver's licence by the defendants

The plaintiff wants an order for the return of his driver's licence. The plaintiff led evidence which shows that the third defendant confiscated his driver's licence on 12 February 2015. I am satisfied that that licence was not returned to him. The third defendant had no right to confiscate it. As such the plaintiff has a right to have his licence returned to him. I will grant him this relief.

Conclusion

I do not see why the fourth respondent, the Attorney General was cited in these proceedings. No relief is being sought against him and he has no interest in the matter.

In the result, it be and is hereby declared that:

1. The 1st to 3rd defendants' detention of the plaintiff abrogated s 49 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

It be and is hereby ordered that:

1. The 3rd defendant is to return to the plaintiff his driver's licence within 48 hours of this order.
2. The 1st to 3rd defendants are to pay to the plaintiff costs of suit, jointly and severally, the one paying the others to be absolved.

Mupanga Bhatasara Attorneys, plaintiff's legal practitioners
Civil Division – Attorney General's office, defendants' legal practitioners