TENDAI BITI LAW
versus
THE COMMISSIONER GENERAL OF PRISONS
& CORRECTIONAL SERVICES
and
THE PRISONS AND CORRECTIONAL SERVICES

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 10 & 23 November 2017

Urgent Chamber application

T Biti, for the applicant

TSANGA J: An urgent chamber application was placed before me on 10 November 2017, following statements by the then President, Robert Mugabe, at a funeral that government would resume executions of death row prisoners since it was concluding the process of appointing a hangman. It was averred that the applicant's law firm, which has been working on important constitutional matters with death row prisoners at Chikurubi Maximum Prison, was being denied access to death row prisoners at Harare Remand Prison. This is where the majority of those on death row are housed. From the correspondence attached, it appeared that the reason for denying the firm access was that it did not have a specific prisoner that it wanted to visit. Also, no request had been received from a prisoner for a visit by any legal practitioner. In the absence of a specific prisoner to be seen, the correspondence also detailed operative regulations and restrictions regarding visits to such prisoners.

What the applicant sought which was virtually in the form of a final order, was to be allowed access to, and the right to interview all death row prisoners at Harare Remand Prison. The application also sought an order that the respondents forthwith produce a full list of all death row prisoners in Zimbabwe, specifying prison number, full names, age, offence, date of arrest and date of sentence, the sentence, the CRB number, the court and place of imprisonment.

The application made it clear that since 1995 there have not been any executions in Zimbabwe. However, what was averred to have changed was that at the beginning of the year an advert was placed for a hangman and 50 persons applied for the job. Three people were averred to have been shortlisted and that what is awaited is the appointment of one of the three.

In the certificate of urgency as well as the founding affidavit, the urgency was said to arise from the fact that following the then President's statements, should executions resume, there would be insufficient time to take instructions and to file necessary applications to protect life. On 10 November 2017, I declined to set the matter down on an urgent basis on the grounds that it was not urgent and ordered that the application be placed on the ordinary roll. My reasons were as follows: It is trite that a judge literally drops everything else to hear a matter on an urgent basis. As such a matter must indeed be one which is so urgent that it cannot be heard through an ordinary court application. Furthermore, the judge must be satisfied that injustice would result to the applicant if it is not heard on an urgent basis. See *Mutarisi* v *United Family Intl Church & Anor* 2012 (2) 434. The urgency *in casu* was clearly said to arise out of statements by the then President as reported in a newspaper article regarding the appointment of the hangman.

In my view there was no compelling argument of urgency. What was immediately apparent was that the applicant's law firm deals with constitutional matters. That is all very well. The mere fact that the matter arises from a constitutional provision does not mean that it is necessarily always urgent and that it cannot be heard on the ordinary roll. It is in itself not a reason for foot-stomping to gain preferential access. Whilst clearly controversial, the death penalty is currently constitutionally provided for in s 48 (2) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 save as in specified circumstances as outlined in s 48 (2) (c) & (d). The exceptions relate to persons less than 21 when the crime was committed; a person who is more than 70 years old; and women. All matters of prisoners who have been sentenced to death by the High Court are heard by the Supreme Court which in turn either confirms or substitutes the death sentence. As to whether or not the sentence is passed is ultimately the prerogative of the President since in terms of s 48 (2) (e) a person sentenced to death has a right to seek pardon or commutation of the sentence from the President.

The utterances did not in any way mean that a hangman would be appointed the very next day or indeed that all persons said to be on death row would be hung within a short space of time. Statements on controversial legal issues are often made by politicians at public

gatherings in order to gain mileage by finger pointing and grand-standing. The fact that the issue is a live and controversial one should not be the predicator of its urgency otherwise the business of the court would simply favour the hearing of such applications as urgent at the expense of those who have been waiting in the queue for a long time.

Furthermore, while there may indeed be cases of death row prisoners that raise specific constitutional concerns as averred in the application, in this instance there was nothing averred that stopped the law firm in question from doing its own research of court records to unearth those cases where the death sentence has been imposed in order to unearth its clients. Additionally, what was in fact placed before me on urgent basis was for all intents and purposes a final order. Seeking a final order surreptitiously through an urgent application whose provisional relief is virtually the same as the final relief is always deemed objectionable for the reason that a final order is then granted without proper ventilation of the issues.

As stated in the much often cited case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR at p 193 A-B:

> "The practice of seeking interim relief, which is exactly the same as substantive relief sued for and which has the same effect , defeats the whole object of interim protection. In effect ta litigant who obtains final relief without proving his case. That is because interim relief is normally granted on the mere showing of a prima facie case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on the on proof merely of prima facie case. This to my mind is undesirable especially where, as here the applicant the applicant will have no interest in the outcome of the case on the return date".

Under the factual circumstances averred in the certificate of urgency and in the founding affidavit, there was no reason in my view why an ordinary application could not be made since the hearing of the matter itself can be expedited where parties ensure that they follow the given time frames that are set under the application procedure. In a court application, the other side has ten days to file their opposing affidavit upon receipt of such application (Rule 233 of the High Court Rules, 1972). The applicant then files their answering affidavit within 10 days (Rule 234). Thereafter the applicant files heads of argument to which a respondent must file theirs within 10 days of receipt. Thereafter the matter is set down for hearing on the opposed roll. There are also consequences where timelines are not adhered to. A respondent for instance is barred where they fail to respond timeously to the court application. In simple terms, an ordinary application can be heard

fairly expeditiously where the applicant, who is the driving force behind their matter, is serious about the matter being heard.

In the circumstances of this case there was absolutely no reason why the matter could not or cannot be heard on the ordinary roll as it was not urgent in the sense that it simply could not wait. As it turned out, the President who made the statement has since resigned. The matter was not urgent then. It is not urgent now. A final order is in fact sought. The application must be heard on the ordinary roll and the requests fully ventilated by hearing arguments on either side.

These were my reasons.

Tendai Biti Law: applicants' legal practitioners