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IN THE HIGH COURT FOR ZAMBIA **2014/HP/1178**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JOAN ANDRIES **APPLICANT**

AND

THE ATTORNEY GENERAL **RESPONDENT**

BEFORE : **HON. G.C. CHAWATAMA**

For the Plaintiff : *Mr. Sambo – Sambo Kayukwa & Company*
For the Defendant : *Mr. M. Mwaba – Assistant State Advocate (A.G Chamers*

RULING

AUTHORITIES REFERRED TO:

1. ***Order 54 Rule 1, Rule 6, Rule 7 (1) Rule 8 Supreme Court Rules 1999***
2. ***Order 3 Rule 2 of the High Court Rules***
3. ***Section 307, 315 of the Criminal Procedure Code***

The Applicant in this matter on the 30th July, 2014 filed an Ex-parte application for leave to issue a writ of Habeas Corpus AD Sybyiciendim ***(Order 54 Rule 1, Supreme Court Rules 1999)*** and an affidavit in support sworn by one Joan Andries the Applicant in this matter.

The Applicant stated that he was a convicted prisoner who believed that he had already served his sentence. The court was informed that he was arrested on the 25th May, 2008 for the offence of Theft of Motor Vehicle. He was convicted by the Subordinate Court on 11th March, 2009 under cause No. SP/257/2008 and sentenced to five years imprisonment with hard labour with effect from 25th May, 2008. The Applicant appealed to the High Court against the conviction. He was released on bail pending appeal on the 15th April, 2009. Upon being granted bail he left Zambia without authority. A warrant for his apprehension was issued. He was re-arrested by the Botswana authorities on 19th January, 2010 on a warrant issued by the Zambian authorities who applied for his extradition. He remained in custody in Botswana and it was not until November, 2013 when he was handed over to the Zambian authorities. Upon arrival in Zambia he appeared before the High Court whereupon he withdrew his appeal in December, 2013. My Brother Hon. Mr. Justice Evans M Hamaundu in his Ruling stated in part:

> ***"Now therefore the court has ordered that Joan Andries serves his sentence of five (5) years with Hard Labour imposed by the lower court and to be with effect from the 13th December, 2013 less any number of days he was in custody."***

When making this application the Applicant took into consideration the period he spent in custody awaiting trial, the

days he spent in prison following his conviction and sentence and the days he spent in Botswana after his arrest and before he was extradited to Zambia. According to the Applicant the total number of days in five years is 1825 and he has spent more than the number of days in prison in excess by more than 120 days. The Applicant stated that with remission he should have spent 1,217 days in custody.

On the 15th August, 2014, Mr. Sambo Kayukwa, Counsel for the applicant informed the court that they had applied for leave to issue a writ of Habeas Corpus and the return date was the 15th August, 2014. The Respondents were served with documentation to which there was no response. An application was made that the Applicant be granted his application so that the prison Officer-In-Charge at Lusaka Central Prison can present the Applicant before the court so that a decision could be made with regard to his release from prison.

In response Mr. Mwaba for the state informed the court that the documentation was served on them on the 13th August, 2014, thus they were unable to file any documents. The court went ahead and granted the Applicant the leave sought.

On the 18th August, the Respondent filed an affidavit in opposition to the application for writ of Habeas Corpus sworn by one Francis Kasanga the Officer-In-charge at Lusaka Central

Prison. He confirmed that on the 11th March, 2009, the Applicant was sentenced to five (5) years imprisonment by the Subordinate Court which was back dated to the 25th May, 2008 which was the date when the Applicant was arrested. The Respondent stated that the Applicant had spent a total of 324 days in custody before he was granted bail pending appeal. That he jumped bail and was extradited in November, 2013. He withdrew his appeal in December, 2013 and as per order of the High Court was to serve the five year sentence imposed less the number of days he was in custody.

The court was informed that the Applicant's sentence was to be served in Zambia and did not include the number of days that he was in custody in Botswana. On the 21st August, 2014 Counsel for the Applicant drew the court's attention to the fact that no return has been filed. Mr. Mwaba for the Respondent stated that he would rely on the skeleton arguments which are contained their response.

Counsel for the Applicant pointed out that the Officer-In-Charge Lusaka Central Prison had failed to comply with the order of the court that in fact according to the rules this is contempt for which he may be committed to prison. Counsel further stated that the default herein only leaves the situation that the Applicant has a prima facie case and that therefore the court should order that he be discharged forthwith. The court was

asked to consider that the Applicant has stayed in custody for more than the five years that he was sentenced to serve, further that the authorities have refused to credit him with the number of days that he was entitled to in accordance with the High Court ruling of 13th December, 2013. Mr. Mwaba in response informed the court that he was relying on their skeleton arguments.

The court was referred to ***Order 54 Rule 7 (1) Supreme Court Rules 1999 Edition*** which states:

> ***"The return to a writ of Habeas Corpus ad Subjiciendum must be indorsed on or annexed to the writ and must state all the causes of the detainer of the person restrained."***

Mr. Mwaba informed the court that his understanding was that the purpose of the return is to explain why the Applicant is being detained. Mr. Mwaba went on to state that it is allowed where the reasons are many to swear an affidavit where an explanation of why a person is being detained can be given. He further stated that even if there was a default it cannot be the only ground for discharging the Applicant. He relied on the part of Order 54 which states that the return can be amended or replaced.

The court was referred to ***Order 3 Rule 2 of the High Court Rules*** which states:

> ***"Subject to any particular rules the court or a Judge may in all causes and matters, make any interlocutory order which it or he***

considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Counsel relied on this rule should the court find that the Respondent are supposed to file a return, a date should be given for them to file the return.

Mr. Kayukwa in response stated that the affidavit has to be part of the return in the exact wording of ***Order 54 Rule 7 (1).*** According to the rules of court the return on the writ is what must show valid authority of the detention. Counsel stated that without the return there can be no affidavit amendment or substitution. It means there is nothing before the court. Counsel referred the court to ***Order 54 Rule 8 of the Rules of the Supreme Court 1999 Edition*** for the procedure at the hearing of the writ. This provision, stated Counsel, required the court to read the return which return was to show the authority that there is nothing for the court to look at. Counsel went on to say that justice is not for the defaulting party, justice is for the party who has complied with the Rules.

Habeas Corpus remains of highest constitutional importance, for by it the liberty of the subject is vindicated and his release from any manner of unjustifiable detention assured.

The purpose of the writ is that the body may be produced before the court, so that release from restraint may be secured and not

that someone who has unlawfully detained or unlawfully parted with the custody may be punished.

Counsel followed the laid down procedure in that the application was made ex-parte. Upon hearing him the court granted leave and the application was adjourned for notice to be served on the prisons authority as was directed by the court. Upon the application succeeding, the writ was ordered to issue (satisfying ***Order 54 Rule 2 (1))***

Counsel for the Applicant informed the court that ***Order 54 Rule 7 of the Rules of the Supreme Court*** was not complied with by the Respondent. ***Order 54 Rule 7*** states:

> ***"7(1) the return to a writ of habeas Corpus ad subjiciedum must be indorsed on or annexed to the writ and must state all the causes of the detainer of the person restrained.***
> ***The return may be amended or another return substituted therefore, by leave of the court or Judge before whom the writ is returnable."***

What Counsel for the Respondent did was to file an affidavit in opposition to the application for writ of habeas corpus sworn by Francis Kasanga, the Officer-In-Charge at Lusaka Central Prison. Mr. Mwaba also relied on skeleton arguments which were contained in their response. Counsel in pointing out the failure on the part of the Officer-In-Charge informed the court that the default only leaves the situation that the Applicant has a prima

facie case, the court should thus order that the applicant be discharged.

Order 54 Rule 8 of the Rules of the Supreme Court states:

> ***"when a writ of habeas corpus ad subjiciendum is made the return shall first be read, and motion them made for discharging or remanding the person restrained or amending or quashing the return, and where that person is brought up in accordance with the writ, his Counsel shall be heard first, then the Counsel for the crown (state); and then one Counsel for the person restrained in reply."***
>
> ***Where the Respondent does not appear, and the body is not produced, application of order of discharge may be made to the court, supported by affidavit of service and disobedience, for committal for contempt or to a Judge for the issue of a bench warrant."***

In this case the Applicant did appear, however, the Respondent did not comply with ***Order 54 Rule 8 of the Supreme Court 54***. They filed an affidavit setting out facts.

On the two occasions this matter came before me the applicant was present, this defeated the whole purpose of why a writ of habeas corpus is granted and that is to bring up the prisoner to give evidence before a court.

Order 2 Rule 1 Rules of the Supreme Court, 1999 states:

> ***1 (1) "where in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has***

by reason of anything does or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as irregularity and shall not nullify the proceedings, any step taken in the proceedings or any documents, judgment or order therein."

Order 2 Rule 2 states:

> ***"Subject to paragraph (3) the court, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in these proceedings or any document, judgment or order therein or exercise its power under these rules to allow such amendment (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."***

At this stage there has been a failure to comply with the requirement of these rules which failure is irregular however, this irregularity shall not nullify the proceedings nor any order therein. As earlier stated Habeas corpus remains of highest constitutional importance if by it the liberty of a person is vindicated and his release from any manner of unjustifiable detention assure. Thus in exercising my powers under these rules which powers include allowing for amendments to be made and to make such order dealing with proceedings generally as I think fit, allowed for these proceedings to proceed despite the default on the part of the Respondent. Assuming the Respondents had complied with the Rules in accordance with order 54 rule 7 (return of the writ) and I had proceeded as

provided for by ***Order 54 Rule 8*** to the hearing of writ what decision would I have arrived at? would it have been different if the rules had been complied with? The answer lies within the law provided for by ***Section 307 and 315 of the Criminal Procedure Code Cap 88 of the Laws of Zambia.***

I say so because there are certain facts that remain the same. It's a fact that the Applicant appeared before the Subordinate Court in Zambia on a charge of Theft of Motor Vehicle. It is a fact that he was tried convicted and sentenced to serve five years imprisonment. It is a fact that he appealed. It's a fact that he was granted bail pending appeal. The convicted person being a Principal party bound himself to perform certain obligations. It is an undisputed fact that he breached the conditions of bail and left Zambia. It is a fact that he was:

1. *To appear before the High Court when required by the court to answer to the charge (appeal) and be dealt with according to law.*
2. *Together with his sureties severally acknowledge themselves to be bound to forfeit the sums of K15,000,000. Kwacha each in case the said principal party fails to perform the above obligation or any part thereof.*

It is a fact that on the 9th February, 2012 an ex-parte order for an application for Bench Warrant against the Applicant who was on bail was sought. A Bench Warrant to arrest the Applicant had been issued by the Subordinate Court of the 1st class for Lusaka and dully signed by the Magistrate. It is a fact that around the

29th January, 2010 there was a remand warrant issued by the courts in Botswana to the Officer-In-Charge Lobatse to detain the Applicant who was to be extradited to Zambia following his arrest by Interpol in Botswana. It is a fact that the Applicant was extradited.

The issue is whether or not the Applicant has served his term of imprisonment and should be released. In his affidavit he states that he was arrested on the 25th May, 2008 for the offence of Theft of Motor Vehicle. He was convicted by the Subordinate Court on 11th March, 2009 under cause no. SP 257 in 2008 and sentenced to 5 years imprisonment with hard labour with effect from 25th May, 2008.

According to the Applicant, both judgments the Subordinate Court and High Court stated that he should be credited the time he spent in custody. He went on to compute the time as follows:

1. *25-05-2008 he was arrested and remanded in custody in Zambia.*
2. *He was convicted on the 11th March, 2009 and sentenced to 5 years imprisonment with hard labour backdated to 25th May, 2008 by then he had spent 294 days in custody*
3. *On the 15th April, 2009 he had applied for bail pending appeal at this point he had spent 324 days in custody*
4. *19th January, 2010 he was arrested in Botswana on warrant issued by Zambian Authorities and put in custody where he remained until November, 2013 when he was extradited. By this time he had been in custody for more than 1968 days.*

Section 315 of the Criminal Procedure Code provides for who may issue a warrant. The Section states:

> ***"Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence or by his successor in office."***

Section 307 of the Criminal Procedure Code states that:

> ***"A warrant under the hand of the Judge or Magistrate by whom any person shall be sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Zambia, shall be issued by the sentencing Judge or Magistrate; and shall be full authority to the Officer-In-charge of such prison and to all other person for carrying into effect the sentence described in such warrant, not being a sentence to death"***

It is clear from the affidavit of the Applicant that the Applicant wants this court to consider the days that he spent in custody in Botswana as part of the sentence he was to serve in Zambia.

In this case the warrant for the execution of the Applicant's sentence was issued by a Magistrate in Zambia. The sentence imposed of five years was required to be served within Zambia. The warrant gave fully authority to the Officer-In-Charge of the prison where the convicted person or Applicant was sent to serve his sentence. Full authority to the Officer-In-Charge to carry into effect the sentence was described in the warrant.

There is no evidence before me to suggest that the Magistrate intended that the Applicant could serve his sentence in Zambia and in a foreign land. The Applicant was held in Botswana in order to facilitate his return to Zambia after he jumped bail. The day for convicted persons to serve sentences in the countries of their choice has not yet come. The Applicant is therefore lawfully detained.

The Applicant is to be credited with the 324 days he served in the Zambian prison and will complete his five year sentence here in Zambia.

DELIVERED AT THIS 23RD DAY OF OCTOBER 2014.

REPUBLIC OF ZAMBIA HIGH COURT FOR ZAMBIA JUDICIARY 23 OCT 2014 CLERK OF COURT P.O. BOX 50067, LUSAKA

G.C.M CHAWATAMA
JUDGE