MOHAMED MUAZU v THE ATTORNEY-GENERAL (1988 - 1989) Z.R. 8 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., BWEUPE, AG. J.S.
10TH NOVEMBER, 1987 AND 25TH MARCH , 1988
(S.C.Z. JUDGMENT NO. 1 OF 1988)

Flynote

Constitutional law - Habeas corpus - Application to more than one Judge - Grounds available at first hearing.

Headnote

The appellant was detained under the Preservation of Public Security Regulations and applied to a High Court Judge for a writ of *habeas corpus*. The application was rejected and the appellant appealed. The appellant then filed a second application on the same facts as in the first application for a writ of *habeas corpus* which was heard by another Judge of the High Court.

The respondent objected to the second application and the second Judge dismissed the application. The Judge applied the provisions of the Administration of Justice Act, 1960, of England and held there were no fresh grounds advanced in the second application. The appellant appealed and argued that the provisions of the Habeas Corpus Act, 1816 of England applied in Zambia.

Held:

It is wrong to regard the Habeas Corpus Act, 1816 as part of Zambian written law. All the evidence which would be relied upon in either application was available to the applicant at all times. New grounds can only relate to grounds which could not by the exercise of reasonable diligence be available at the previous time.

Cases referred to:

(1) Re. Kachilika (1979) Z.R. 227
(2) Re. Tarling [1979] 1 All E.R.981
(3) Re. Hastings (No 3) [1959] Ch. 368
(4) Ex parte Chendaeka (1969) Z.R. 69
(5) Re. Sikuka (1978) Z.R. 138
(6) Cox v Hakes [1890] 15 A.C. 506
(7) Eleko v Government of Nigeria [1928] A.C. 459
(8) Re Hastings (No 2) [1959] 1 Q.B. 358
(9) Munjitta v The Attorney-General (1977) Z.R. 346
(10) Musakanya & Another v The Attorney-General (1981) Z.R. 221

Legislation referred to:

1. Preservation of Public Security Regulations, Cap 106
2. High Court Act, Cap 50, s 10
3. Administration of Justice Act, 1960 (UK) s 14 (2)
4. Habeas Corpus Act, 1816 (UK)

5. Interpretation and General Provisions Act, Cap 2 s 3
6. Rules of The Supreme Court of England (White Book) order 54 (1985 Edition)

For the appellant: D.A.. Kafunda, of Msnek and Company.
For the respondent: J. Mwanachongo, Senior State Advocate.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

The brief facts of this case, so far as it is necessary to refer to them, were that the appellant was detained under the Preservation of Public Security

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Regulations. He applied to a High Court Judge (the first Judge) for a writ of *habeas corpus* in which he challenged his detention on a variety of grounds. That application was unsuccessful and he lodged an appeal to this court which appeal is still pending. Meanwhile, the appellant filed a second application for a writ of *habeas corpus* which came up for hearing before another Judge of the High Court (the second Judge). Mr Mwanachongo who appeared for the State in the Court below, raised a preliminary objection arguing that it was not competent for the second Judge to entertain a second application arising out of the same facts and based on grounds similar to those which were considered and dismissed in the first application by the first Judge. The second Judge upheld the objection and dismissed the second application. The learned second Judge determined that, by virtue of s 10 of the High Court Act, Cap 50, he would apply the law and practice for the time being observed in England since our own laws are silent on the procedures governing *habeas corpus* applications. That being the case, he would apply Order 54 RSC (1985 Edition) and the practice provided for under s 14(2) of the Administration of Justice Act, 1960, of England. The sections referred to should perhaps now be quoted. Section 10 of Cap 50 reads:

> " s 10. The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or such rules, orders or directions of the Court as may be made under the Act, or the said Code or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

Omitting the unnecessary, s 14(2) of the Administration of Justice Act, 1960 reads:

> " s 14(2). Notwithstanding anything in any enactment or rule of law, where a criminal or civil application for habeas corpus has been made by or in respect of any person, no such application shall again be made by or in respect 30 on the same grounds, whether to the same court or judge or to any other court or 'judge, unless fresh evidence is adduced in support of the application."

The learned second Judge affirmed his own decision in Re *Kachilika* (1) and also applied the decisions in Re *Tarling* (2), in Re *Hastings* (No 3) (3), *Chendaeka v Municipal Council of Lunshya* (4) and Re *Sikuka* (5). He found that reference to a divisional Court in England is the equivalent of

a single Judge of the High Court in this country and that it was incompetent in this country, as it is now in England, to apply for a writ of *habeas corpus* from Judge to Judge unless the second or subsequent application is based on fresh evidence or fresh grounds. One of the reasons for this was that the High Court Judges enjoy equal powers and each one of them when sitting constitutes the High Court.

This appeal is brought against the ruling of the learned second Judge in upholding the objection raised. Mr *Kafunda's* first ground on behalf of the appellant alleges a misdirection in the finding that our laws are silent and that the English practice and procedure applies. The arguments in support of this ground were basically a repetition of the submissions which were not accepted below. The substance of such submissions was that the law and practice in Zambia should be that obtaining before the passing of the

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Act of 1960 in England so that an applicant should be free to repeat his application, even if based on identical issues, from one Judge to another in accordance with the remarks to that effect in *Cox v Hakes* (6) and in *Eleko v Government of Nigeria* (7) as well as in Re *Hastings* (No 2) (8). It was argued that, since the Habeas Corpus Act of 1816 applies to Zambia, and since that Act was also concerned with procedures, it was a misdirection to say that we did not have a written law on the subject. That being the case, s 10 of Cap 50 had not been correctly applied and all the High Court cases similar to *Kachilika* should be held to have been wrongly decided. Mr *Mwanachongo* argued that the learned second Judge was not wrong in finding that our laws were silent on the matter and in coming to the decision complained of.

We have considered this ground of appeal and must reject immediately the argument that the Habeas Corpus Act of 1816 can be regarded as our own "written law" so as to say that there is no default in our own laws. The fact that Caps 4 and 5 of our laws have made certain English statutes applicable to this country cannot, on any rationale, be construed as implying that those statutes are part of the 'written law' referred to in s 10 of Cap 50. A perusal of the said s 10 shows quite clearly, in our view, that the written law therein referred to is written law made by the competent domestic legislative authorities both past and present and it refers to both principal legislation and, to quote from the section itself, 'such rules, orders or directions of the court as may be made under .... such written law'. The expression 'written law' is in any event defined in s 3 of the Interpretation and General Provisions Act, Cap 2, and it means an Act, an Applied Act, an Ordinance and a Statutory Instrument. The definitions in the same section of all these other words, which we need not here reproduce, make it clear that English statutes, even if applied under Caps 4 or 5, are not included. The learned second Judge, we consider, on firm ground when he rejected the appellant's submissions on this point. It follows also that we affirm the learned second Judge and all those High Court decisions (like *Munjita v The Attorney-General* (9), *Musakanya and Another v The Attorney-General* (10) and those already mentioned hereinbefore) which found that our laws are silent and which applied the current English practice of barring successive applications for the writ of *habeas corpus* unless there are fresh grounds or fresh evidence. The reasoning behind the curtailing of the former practice of allowing applicants to go from Judge to Judge, until they found one perhaps more merciful than his brethren, is explained in the various decisions of the High Court to which we have referred and in the English authorities therein cited. We add only that this appears to us to

be a vastly more sensible position than that the High Court be called upon, through its different Judges, to deal with the same matter over and over again until a crack appears, so to speak, in the judicial fabric.

The second ground of appeal alleged error on the part of the learned second Judge in finding that there was no fresh evidence without considering the fresh grounds. The argument was that fresh grounds were advanced and that, in this connection, a ground must be regarded as fresh although it was available but not advanced at the time of the first application. The further submission in this respect was that since the learned

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second Judge only dealt with the question of fresh evidence but not fresh grounds, we should find there were fresh grounds and that we should, therefore, order that the second application be remitted below for the hearing to continue. We have examined the record of the first application, as we were invited to do, and we have compared that record with the record now before us. We have no doubt that the second ground of appeal should also not be entertained. It seems clear to us, and indeed there was no submission to the contrary, that all the evidence which could be relied upon in either application has been available to the appellant at all times. It is also obvious that the alleged new grounds all stem from facts and materials which were at all times available and could have been raised in the first application. We do not agree that grounds which have always been available could be held back and used later as fresh grounds which could not, by the exercise of reasonable diligence, have been discovered or made available at that previous time. In this connection, we wish to respectfully approve and adopt the following passage which appears in the judgment of the Queens Bench Division in Re *Tarling* (2) at page 987, letters (d) to (f):

> " Firstly, it is clear to the court that an applicant for *habeas corpus* is required to put forward on his initial application the whole of the case which is then fairly available to him. He is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the court."

The true doctrine of estoppel known as *res judicata* does not apply to the decision of this Court on an application for *habeas corpus*: we refer to the words of Lord Parker CJ, delivering the judgment of the Court in the Re *Hastings* (No 2). There is, however, a wider sense in which the doctrine of *res judicata* may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings: see the judgment of the *Privy Council (Lord Morris, Lord Cross and Lord Kilbrandon) in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*. In our judgment, that principle is applicable to proceedings for *habeas corpus*, whether under the 1967 Act or under the general jurisdiction of the Court although, no doubt, the stringency of the application of the principle may be different in cases concerning the liberty of the subject from that in cases concerning such matters as disputes on property.'

The second ground of appeal cannot succeed. There were no other grounds and it follows that this appeal fails. Since the appeal raised two points of general importance which this court was called upon to consider, probably for the first time, we find that this is a proper case in which to make no

order as to costs.

Appeal dismissed.