EWORHO v. THE ATTORNEY-GENERAL 1986 BLR 359 (HC)

Citation: 1986 BLR 359 (HC)

Court: High Court, Francistown

Case No:

Judge: Murray J

Judgement Date: September 5, 1986

Counsel: The Applicant in person. N. Chadwick, Principal State Councel, for the State

Flynote

Practice and procedure - Writ de homine libero exhibendo - Detention of applicant in prison as unlawful entrant to Botswana - Detention continuing indefinitely until applicant's removal from Botswana - Application to court for a rule nisi for G applicant's release - Whether applicant may lawfully be detained indefinitely pending arrangements for his removal - Immigration Act (Cap. 25:04) (1973 Rev.), s. 14(1).

Headnote

It is provided by the Immigration Act (Cap. 25:04) (1973 Rev.), s. 14(1) as follows:

> "14(1) Any person who is liable to be removed from Botswana under this Act may be detained by an immigration officer for H such period as may be necessary for the completion of arrangements therefor."

The applicant entered Botswana lawfully as a visitor on 28 April 1986. His stay was extended by the immigration officers to 7 May 1986. About that day the applicant tried to leave Botswana by rail to Zimbabwe but the immigration officers of that country refused his entry and he was returned to Botswana.

He was then taken before the Regional Immigration Officer for Francistown who determined that he was an A unlawful entrant to Botswana and that he should be detained for such period as would be necessary for the completion of arrangments for his removal from Botswana in terms of section 14(1) of the Immigration Act. He was accordingly detained. On 15 August 1986, counsel for the applicant applied for a writ de homine libero exhibendo for the release of the applicant from detention on the ground that the applicant's continued detention after such protracted period was unlawful. B

Held, granting the application: the power of detention under section 14(1) of the Immigration Act (Cap. 25:04) (1973 Rev.) is limited to such period as may be necessary for the completion of arrangements to remove a person detained from Botswana. In the circumstances of the instant case the court could not hold that detention from the first half of May 1986 to 15 August 1986 was reasonably necessary to make arrangments to effect the C removal of the applicant from Botswana. The *writ de homine libero exhibendo* would therefore issue. Dictum of Rooney Ag. C.J. in *Mtetwa v. Officer Commanding State Prison, Lobatse and Others* 1976 B.L.R. 1 at p. 5 applied.

Case referred to:

Mtetwa v. Officer Commanding, State Prison, Lobatse and Others 1976 B. L. R. 1.

Case Information

APPLICATION for leave to issue a writ de homine libero exhibendo by an applicant detained under the provisions of the Immigration Act (Cap. 25:04) (1973 Rev.), s. 14(1). The facts are fully stated in the ruling. E

The Applicant in person.

N. Chadwick, Principal State Counsel, for the State.

Judgement

Murray J. The applicant, Christopher Eworho, whose name, somewhat confusingly, is spelt differently as Christopher Oworho in various of the papers before me, is a citizen of Ghana. The brief facts that give rise to this application are that he entered Botswana on 28 April 1986 lawfully and subsequently had his stay extended to 7 F May by immigration officers in Gaborone. About that day the applicant tried to leave Botswana by rail to Zimbabwe but immigration officers of that country refused him entry and he was returned to Botswana. I understand this was on the footing that he lacked adequate means to repatriate himself to Ghana. As appears hereinafter I requested that a social welfare officer should interview the applicant. This has been duty filed and G the court expresses its gratitude for the report that was in fact filed by the Prison Service. It appears from that report, and this does not seem to be in contention, that:

(a) the applicant's only air ticket back to Ghana was left by him in Harare and the validity of that ticket has expired long ago; and

(b) the applicant lacks sufficient funds to purchase another air ticket. H

After he had been refused entry to Zimbabwe the applicant was brought by immigration officers, into whose custody the Zimbabwe authorities delivered him,

before Mr. Moreetsi, the Regional Immigration Officer for Francistown. Mr. Moreetsi determined that the applicant was an unlawful entrant to Botswana. In exercise of certain statutory powers I shall shortly be looking at in this judgment Mr. Moreetsi caused him to be detained. The validity of the initial detention does not seem to be

MURRAY J

in issue but the prolonged period for which the applicant has since been detained at the continued instance of Mr. A Moreetsi is at the heart of this application.

It is at this stage convenient to notice the statutory provisions in this regard. The Immigration Act (Cap. 25:04) (1973 Rev.) defines a "visitor" as "any person in Botswana other than a person referred to in section 17." This definition fits uneasily into the Act but as it was never contended that the applicant was not a visitor within the B meaning of the Act I do not propose to examine this question any further. I turn now to section 17 of the Act. Subsection (1) of that section permits visitors to remain in Botswana for such period as may be specified in a visitor's permit for up to 90 days. It is provided by section 17(5) thereof:

> "Any visitor who remains in Botswana in contravention of subsection (1) without reasonable cause shall be guilty of an C offence and liable to a fine of P10 for every day during which the offence continues. Whether or not he is prosecuted or liable to be prosecuted for an offence under this subsection, any visitor who remains in Botswana in contravention of subsection (1) may be removed therefrom by an immigration officer or by a police officer acting under the authority of an immigration officer, and section 13(2) and 14 shall have effect in relation to such visitor as they have in relation to a D prohibited immigrant."

It is also appropriate to refer to the provisions of the Act relating to prohibited immigrants. The grounds upon which persons can be declared to be such are set out in section 7 of the Act. Provision is made for an E immigration officer to determine if a person is a prohibited immigrant in section 11(1). Subsection (2) of that section provides that a person so declared may appeal to the nearest magistrate's court from such declaration within three days. This is of peripheral interest in this case as no such determination has been made in relation to the applicant. As however under the provisions of section 17(5) quoted above the provisions for removal of a prohibited immigrant are made to apply to the applicant as a visitor unlawfully in Botswana I must now turn to F those provisions. Before doing so I note that the provisions for removal of a prohibited immigrant are akin to those applicable to a visitor unlawfully in Botswana under section 17(5). The material part of section 13(1) reads:

> "a prohibited immigrant...shall be removed from Botswana by an immigration officer or by a police officer acting under the G authority of an immigration officer."

The question of detention pending removal under both section 17(5) and under section 13(1) is governed by section 14 of the Act and, as this is of the utmost importance to the matter before me, I quote it in full: H

> "(1) Any person who is liable to be removed from Botswana under this Act may be detained by an immigration officer for such period as may be necessary for the completion of arrangements therefor.
>
> (2) Such person may during such period be detained in the nearest convenient prison.
>
> (3) Any person so detained and not serving a sentence of imprisonment shall be treated as a person awaiting trial."

MURRAY J

The ability of the legislature to make such statutory provision is governed by section 5 of our Constitution. The A material part reads as follows:

> "(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say...
>
> *(i)* for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the B expulsion, extradition or other lawful removal of that person from Botswana or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another;..."

Mr. Moreetsi in his evidence before me explained to the court that since his initial meeting with the applicant he C had caused him to be detained in Francistown Prison acting pursuant to his statutory powers under sections 17(5) and 14.

Before dealing further with the merits of the application before me I shall explain how this application came to be made. On Wednesday 15 August 1986 Mr. Attorney Pilane and Mr. Advocate Chadwick appeared before me in chambers. There were at that stage no papers filed in this matter. Mr. Pilane briefly outlined the facts of D Christopher Eworho's detention as they were known to him. He expressed the view that his client's continued detention after such a protracted period was unlawful. In these circumstances he asked me to grant his client bail. He told me that his client was possessed of a small amount of Pula, I am unable to recollect the exact amount and I have no note of it, but so far as I remember less than P100. Mr. Pilane explained that this was all E that could be offered by way of surety. I expressed the view that I doubted if I had jurisdiction to grant bail in view of the fact that the applicant was detained under the provisions of the Immigration Act (Cap. 25:04) (1973 Rev.). This was a view with which Mr. Chadwick concurred. I suggested to Mr. Pilane that the correct remedy might be to make an application for a writ de homine libero exhibendo and/or review of the decision of Mr. Moreetsi. This F was accepted by Mr. Pilane and I accordingly made the following order:

> "(1) That a rule nisi do issue returnable on Wednesday 20th August at 2 p.m. calling on the respondent to show cause why a writ de homine libero exhibendo should not issue for the applicant's release from the custody of the Officer Commanding Francistown Prison. G
>
> (2) That a Social Welfare Officer be requested to interview the applicant in prison as to how an air ticket stated by Mr. Pilane to belong to his client and to have been left in Harare might be returned to enable the applicant to return to Ghana of which country he is a citizen.
>
> (3) Officer Commanding Francistown Prison to produce the applicant on the return day at 2 p.m." H

For the sake of completeness I mention that no application for review of any order by Mr. Moreetsi or any other immigration officer has been pursued. No further consideration of this aspect of the case is therefore necessary. Although it is normal, in applications for leave to issue a writ de homine libero exhibendo, to make the person who is alleged to have the custody of the detainee a respondent to the

MURRAY J
application, Mr. Chadwick has, quite properly, not taken any point in this regard. I accordingly dispense with the A officer-in-charge of Francistown Prison being made a party. Likewise no affidavit has been sworn by the applicant to verify the facts upon which this application is made. As all the relevant facts were deposed to in the unchallenged parts of the oral testimony of Mr. Moreetsi I further dispense with such an affidavit.
On 20 August the time of the hearing was fixed for 2 p.m. to suit the convenience of Mr. Pilane. This was to B enable him to travel from Gaborone during the course of the morning. However during the course of that morning the court staff relayed to me at somewhat garbled message to the effect that Mr. Pilane would be unable to attend the hearing that day and was requesting a postponement. As the matter involved the personal liberty of the applicant I was not disposed to postpone the substantive hearing, even though, when this message was C explained in open court to the applicant, he himself requested a postponement. I felt, in view of the applicant's more than arguable entitlement to relief, that he would be more prejudicied by granting a postponement than refusing it. Mr. Chadwick told me that he knew Mr. Pilane had made all possible endeavours to have a Francistown attorney act as his agent so it seems that Mr. Pilane's conduct is not as discourteous to the court D as it first appeared to me. I appreciate that Mr. Pilane may well have been acting, in view of the impecuniosity of his client, for very little, if any, reward. Nonetheless I feel that some explanation is owed to the court of Mr. Pilane's failure to appear for no reason has been vouchsafed to me. In view of the geographical distance involved I do not propose to order Mr. Pilane to appear before me to explain why he failed to attend court on this day in the E first instance. I do however direct that a copy of this judgment be sent by the clerk of this court to Mr. Pilane forthwith and that Mr. Pilane do write to the clerk within 10 court days to explain his failure to appear. If such explanation is satisfactory I shall take no further steps, but in the absence of any satisfactory explanation I shall order Mr. Pilane to appear before me. F
I return to the hearing of 20 August. Mr. Moreetsi was called as a witness by Mr. Chadwick by my leave as it had not been possible to have an affidavit sworn by that time. I find it unnecessary to summarise his evidence any further than I have already save to mention that he explained to me that attempts had been made to get the nearest High Commission of Ghana, which is physically situated in Harare, to arrange for the applicant's G repatriation. It was argued by Mr. Chadwick that there was no financial provision for the repatriation of illegal entrants in the budget of the appropriate department. If I were to make an order which would otherwise result in the freeing of the applicant from his detention in Francistown Prison the only source for expenditure of public money to repatriate the applicant to Ghana would be the contingencies fund authorised under section 121 of the Constitution. This, he pointed out, could only be invoked if His Excellency The President was satisfied that there H was an urgent and unforeseen need for such expenditure. I expressed the view in argument that this provision is irrelevant to the jurisdiction of this court. Whenever damages, be it for a delict or a breach of contract, fall to be paid by the State under a court order it is the duty of the State to make appropriate provision for such payment. I can see no different consideration arising where

MURRAY J

expenditure is forced upon the State as an indirect, rather than a direct, consequence of a court order. It is A inconceivable that the entrenched provisions of the Constitution could be derogated from by financial provisions therein. I therefore reject this argument of Mr. Chadwick without more ado.

Having heard Mr. Moreetsi give evidence I am in no doubt that he genuinely believed that it was the responsibility of the Government of Ghana to organise the repatriation of the applicant and that he was authorised to continue B to detain the applicant indefinitely until the authorities of Ghana made appropriate arrangements. I add that such argument was even advanced, albeit faintly, by Mr. Chadwick to this effect. I mention this to show that I do not think that there is any evidence of mala fides by servants of the Government of Botswana in relation to the applicant's continued detention. I must point out however that the assumption upon which Mr. Moreetsi worked C appears naive. If a wait of three months in custody is lawful why not three, or for that matter 30 years? The proposition has only to be stated for a degree of absurdity to be manifest.

At the conclusion of the hearing of 20 August I drew the attention of Mr. Chadwick to a judgment of Rooney Ag.C.J. in *Mtetwa v. Officer Commanding State Prison Lobatse and Others* 1976 B.L.R. 1 This I have found a D most helpful and useful decision. I am prepared, as will appear later in this judgment, to follow it unhesitatingly for it seems to me to contain a correct statement of the applicable law. The law relating to the issue of writs of de homine libero exhibendo is, as he points out, entirely part of our received law.

This judgment of Rooney Ag.C.J. contains a most useful comparison of the writs of de homine libero exhibendo E and habeas corpus as well as an examination of the grounds for the grant of such relief.

When I drew this authority to the attention of Mr. Chadwick I thought it was right that he should have an opportunity of considering it and I offered him an adjournment for this purpose. This offer was accepted and the hearing was then adjourned to 22 August. Mr. Chadwick also undertook to see what steps could be taken to F resolve the apparently unsatisfactory situation in relation to the applicant's continued detention.

On 22 August the application was restored the rule nisi having been extended in the meantime to the conclusion of the hearing. Mr. Chadwick informed the court that consultations had taken place and that it was now proposed that, with the co-operation of the immigration authorities of Zimbabwe, the applicant should be taken by G immigration officers to the premises of the High Commission of Ghana in Harare. It was proposed that he should then be left there for Ghana to make such arrangements for his repatriation as that country deemed fit. This seemed to me to be an ingenious idea for resolving the impasse and I agreed to further adjourn the hearing to see if this could be done. It appeared to me that this course might be the speediest way of causing the relief that H the applicant was apparently entitled to being granted. I fixed 28 August as the next hearing date should the applicant still be in Botswana.

It was therefore a disappointment that on 28 August Mr. Chadwick and the applicant again appeared before the court. I was told that the proposed solution had not proved viable. A recent telex from the

MURRAY J

Botswana High Commission in Harare to Mr. Moreetsi was put before me. Part of it reads: A

> "The Office of Ghana High Commission in Harare [is] still [in] process of arranging [the Applicant's] repatriation...
>
> Your office will be informed as soon as the arrangement [is] ready (repatriation)."

I told Mr. Chadwick that I was no longer prepared to defer a decision in this matter and called upon him to B complete his submissions to me. Mr. Chadwick pointed out to me that if I did grant a writ de homine libero exhibendo it would be open to the immigration authorities to use the prohibited procedure and further detain the applicant. I do not find it necessary to comment on this beyond saying that if this is done the applicant will be at liberty to make another application for a further writ de homine libero exhibendo. It may well be that a court C subsequently seised of the matter would consider the time the applicant has already spent in custody to be relevant.

I invited Mr. Chadwick to further address me on *Mtetwa's* case and, as already mentioned, he endeavoured to persuade me that I ought not to follow it, but as I shall explain, I fear that he failed to do so. Mr. Chadwick also answered a query that I had previously put to him. I had asked him if I was empowered, if I concluded that the writ D de homine libero exhibendo should issue, to order that the writ should not issue forthwith but lie in the office of the court registry for a given period of time to enable the State, if it desired, to make arrangements for the applicant's removal from Botswana prior to the issuance of the writ. I asked this question so that, if it should be answered in the affirmative, the consequences of discharging an unauthorised entrant to Botswana could be E avoided. Mr. Chadwick told me that the result of his researches revealed that in relation to both the writs of de homine libero exhibendo and habeas corpus the grant of relief was mandatory once a court concluded that detention was unlawful. I accept what Mr. Chadwick told me in this regard.

The applicant sought to address me on matters that were not material to the hearing of this application. Sadly I F must record that he adopted a truculent and unpleasant attitude. Nothing that the applicant said was relevant.

At the conclusion of the last hearing I found it necessary to reserve this judgment as the matters involved appeared too complicated to be conveniently resolved in an extempore judgement. I did however tell the applicant that unless any reservations appeared to me in the course of preparing this judgment I proposed to order that a G writ de homine libero exhibendo should issue when I deliver judgment.

No such reservations have appeared to me. I shall now explain my reasoning as to why I must grant this relief.

Section 15 of the Immigration (Consolidation) Law 1966 fell for consideration by Rooney Ag.C.J. in *Mtetwa's* case. This section is in identical terms to section 14 of the current Act, save that the word "Act" appears in place H of the word "Law". I have already set section 14 out. To enable the comment I am about to quote of Rooney Ag.C.J. to be more readily understood I shall restate the section he was considering. It reads:

> "(1) Any person who is liable to be removed from Botswana under this Law may be detained by an immigration officer for such period as may be necessary for the completion of arrangements therefor.

(2) Such person may during such period be detained in the nearest convenient prison. A

(3) Any person so detained and not serving a sentence of imprisonment shall be treated as a person awaiting trial."

Rooney Ag.C.J., after setting out the above quoted section, said this in *Mtetwa's* case at p. 5: B

"I may remark here that the power of detention under the above quoted section is limited to such period *as may be necessary* for the completion of arrangements to remove the person detained from Botswana."

The emphasis is that of Rooney Ag.C.J. I would hold that the construction of Rooney Ag.C.J., who had already referred to the Constitutional provision I have quoted and relevant case law, is entirely correct. C

Having reached this decision on the law I must now apply it to the facts. I take judicial notice of the availability of modern air travel; for reasons already given the question of cost is irrelevant. In these circumstances I do not find it possible to hold that detention from the first half of May this year to 15 August last begins to be reasonably D necessary to make arrangements to effect the removal of the applicant to Ghana. Thus the writ de homine libero exhibendo must issue. I shall now hear submissions as to the appropriate wording of such writ and as to costs.

Application granted. E

P. M. A.