TATENDA CHAKABVA
versus
THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
CHIEF IMMIGRATION OFFICER
and
MINISTER OF HOME AFFAIRS
and
ATTORNEY GENERAL

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 8 October 2024 & 11 November 2024

Constitutional Application

T S Chinopfukutwa for the applicant
Ms V Munyoro for the 2nd respondent

DUBE-BANDA J:

INTRODUCTION

[1] This is an application for an order to declare s 8(1) of the Immigration Act [*Chapter* 4:02] ("the Act") inconsistent with s 50 (2) Constitution of Zimbabwe (Amendment No. 20) Act 2013 ("Constitution") and invalid. It is contended that s 8(1) of the Act is inconsistent with the Constitution in that it authorises an immigration officer to detain a suspect for a period not exceeding fourteen days without judicial oversight thus offending s 50(2) of the Constitution. The applicant anchors his standing on s 85(1)(d) of the Constitution, which allows any person acting in the public interest to approach a court alleging that a fundamental right or freedom enshrined in the Bill of Rights has been, is being or likely to be infringed.

[2] The application is opposed by the Chief Immigration Officer ("the second respondent"), and I take it that the other respondents have taken a decision to abide the decision of the court.

STANDING

[3] In this case the first issue for determination is whether the applicant has standing in this matter. In the opposing affidavit the second respondent took issue with applicant's standing. However, in oral submissions Ms. *Munyoro* counsel for the second respondent conceded the standing of the applicant. Notwithstanding this concession, in a case where a litigant is approaching the court in terms of s 85 (1) (d) of the Constitution, the court must be satisfied that indeed the applicant has standing. As was stated in *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5 para 13 that abstract challenges ask courts to peer into the future, and in doing so they stretch the limits of judicial competence. For that reason, the applicants bear a heavy burden – that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face. This principle also resonates with what was said in *Mudzuru &Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/15 that the court must be careful not to risk the credibility of its process by unwittingly associating its jurisdiction with proceedings that have nothing to do with the objectives of public interest litigation. This therefore requires the court to carefully scrutinise whether the applicant has standing in the matter.

[4] As stated above, the applicant alleges that the fundamental rights of persons detained in terms of s 8(1) of the Immigration Act are infringed in that the provision authorises a detention of up to fourteen days without judicial oversight. He asserts that such detention is in violation of s 50(2) of the Constitution. The applicant anchors his standing on s 85(1)(d) of the Constitution, which provides as follows:

> Enforcement of fundamental human rights and freedoms
> (1) Any of the following persons, namely—
> (*a*) any person acting in their own interests;
> (*b*) any person acting on behalf of another person who cannot act for themselves;
> (*c*) any person acting as a member, or in the interests, of a group or class of persons;
> (*d*) any person acting in the public interest;
> (*e*) any association acting in the interests of its members;
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

[5] In general, s 85(1) of the Constitution has substantively expanded the scope and ambit of the protection of human rights. In its entirety s 85(1) has radically altered the rules of standing in constitutional litigation from what they were under the Lancaster House

Constitution. In answering s 85(1) the courts adopt a broad rather than a narrow approach to standing to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. In addition, s 85(1) when substantively interpreted, gives anyone with a sufficient direct and indirect interest in a matter, the right to be heard before a court of law. In particular s 85(1)(d) takes the issue of standing to a higher level. In *Mudzuru &Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/15 the court said:

> "Section 85(1)(d) of the Constitution is founded on the broadest conception of standing. Its primary purpose is to ensure effective protection to any public interest shown to have been or to be adversely affected by an infringement of a fundamental right or freedom. Whilst its purpose is to ensure that a person who approaches a court in terms of the procedure prescribed under the rule, has the protection of public interest as the objective to be accomplished by the litigation, s 85(1)(d) directs against the use of the procedure to protect private, personal or parochial interests."

[6] In a similar tone, in *Lawyers for Human Rights and Other v Minister of Home Affairs and other* 2004 (4) SA 125 (CC) at para 15 the Constitutional Court of South Africa dealing with s 38(d) of that country's Constitution, which is identical to s 85(1)(d) had this say about public interest standing:

> "Subsection (d) expressly allows court proceedings by individuals or organisations acting in the public interest. Public interest standing is given in addition to those provisions that allow for actions to be instituted on behalf of other persons and on behalf of a class. Subsection (d) therefore connotes an action on behalf of people on a basis wider than the class actions contemplated in the section. The meaning and reach of the standing conferred by this paragraph must be determined against this background."

[7] The above cases show the scope and ambit of public interest standing sanctioned by s 85(1)(d) of the Constitution. The inquiry must now cascade to whether the applicant is genuinely acting in the public interest, or he is just a busy body for no good measure. As was stated in *Lawyers for Human Rights and Other v Minister of Home Affairs and other* (*supra*) para 18 that it is ordinarily not in the public interest for proceedings to be brought in the abstract. However, it was stated further that this is not an invariable principle, in that they may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. See *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5 at para 10.

[8] The courts had developed a criterion to determine whether a litigant is genuinely acting in the public interest or not. In *Lawyers for Human Rights and Other v Minister of Home Affairs and other (supra)* para 18 the court said the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the

right are important considerations in the analysis to determine whether the applicant has public interest standing. At home, in *Mudzuri* the court speaking to the criteria to determine whether a litigant is acting in the public interest, had this to say:

> "The applicants had no personal or financial gain to derive from the proceedings. They were not acting *mala fide* or out of extraneous motives as would have been the case if they were mere meddlesome busybodies seeking a day in court and cheap personal publicity. The applicants were driven by the laudable motive of seeking to vindicate the rule of law and supremacy of the Constitution. It is a high principle of constitutional law that people should be in a position to obey laws which are consistent with constitutional provisions enshrining fundamental human rights and freedoms. They acted altruistically to protect public interest in the enforcement of the constitutional obligation on the State to protect the fundamental rights of girl children enshrined in s 81(1) as read with s 78(1) of the Constitution.
> Children fall into the category of weak and vulnerable persons in society. They are persons who have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty, and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest."

[9] The criterion provides a safety net to ensure the genuineness of the litigant's motives by identifying and stifling cases brought for personal glory or to gain mileage in publicity or some other extraneous reasons under the guise of public interest litigation.

[10] In summary, the applicant asserts that s 8(1) of the Act deals with a unique and delicate issue of suspected illegal foreigners and the manner they are denied their right to liberty. In addition, he asserts that the issues in this application not only affects the enjoyment of liberty by persons suspected to be illegal foreigners, but also affect their dignity. It is further contended that the constitutional values embedded in the Constitution are undermined if the rights, freedom and dignity of foreign nationals are violated under the guise of immigration control. Further, in motivating his standing, the applicant avers that invariable and more often, persons who are detained in terms of s 8(1) of the Act are vulnerable people who suffer from language barriers, have no access to family, friends or any other support system. The vast majority of them do not understand legal system in this country, and lack financial resources to retain the services of legal practitioners. In addition, the applicant states that under such limiting circumstances, it is difficult for the affected foreign nationals to mount a constitutional challenge of s 8(1) of the Act.

[11] The apex court in this jurisdiction said in *Mudzuru &Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/15 that:

> "It is not necessary for a person challenging the constitutional validity of legislation to vindicate public interest on the ground that the legislation has infringed or infringes a fundamental human right, to give particulars of a person or persons who suffered legal injury as a result of the alleged unconstitutionality of the legislation. Section 85(1)(d) of the Constitution requires the person to allege that a fundamental human right enshrined in Chapter 4 has been, is being or is likely to be infringed. He or she is not required to give particulars of a right holder. The reason is that constitutional invalidity of existing legislation takes place immediately the constitutional provision with which it is inconsistent comes into force."

[12] In *casu* the applicant has alleged that fundamental human rights of foreign immigrants arrested and detained in terms of s 8(1) of the Immigration Act has been, is being or is likely to be infringed. I accept that the persons affected by s 8(1) of the Act represent a vulnerable and underprivileged group. In the circumstances, the issue of vulnerability tips the scales in favour of applicant's standing. As was said *Mudzuru &Another v the Minister of Justice, Legal and Parliamentary Affairs & 2 Others* CCZ 12/15 that the law recognises the interests of vulnerable persons in society as constituting public interest. See *Lawyers for Human Rights and Other v Minister of Home Affairs and other* 2004 (4) SA 125 (CC)*;*

[13] In addition, this matter concerns a challenge to the constitutionality of a statutory provision, which provision is critical in immigration control and therefore there is need for certainty in this regard. The applicant contends that the impugned provision is constitutionally invalid, and if it is indeed so, it would mean there exist in our statue books an invalid provision causing prejudice to persons suspected to be prohibited immigrants, in particular those detained under its authority. This qualifies this challenge as a public interest litigation and accords the applicant standing. Moreso, in the context of the need for certainty, I also factor into the equation that there are two seemingly conflicting judgments of this court on the issue of s 8(1) of the Act. See *Shabbir & Anor v Commissioner of Prisons N.O. & Ors* (HC 3043 of 2016; HH 230 of 2016) [2016] ZWHHC 230 (31 March 2016) and *Zucula v Officer in Charge (Harare Remand Prison) & Ors* (HC 2153 of 2015) [2015] ZWHHC 266 (15 March 2015). This conflict is not good for our jurisprudence. It is therefore, in the public interest that the Constitutional Court, if possible be heard on this issue. I also factor into the equation that the applicant a citizen, who is bringing a matter of public importance and is motivated by a desire to protect the Constitution. There has been no evidence or allegation that he is just a busy body seeking cheap publicity or motivated by some extraneous considerations. The facts show that this is a public interest matter.

[14] I take the view that the detention of persons for up to two weeks without judicial oversight provided in s 50(2) of the Constitution is a matter of public interest. I am not inclined to shut the door on the applicant. In my view, the present matter deserves to be entertained on the basis of public interest standing. In the circumstances, I find that the applicant is genuinely acting in the public interest and has standing in this matter.

MERITS

SUBMISSIONS BY THE PARTIES

[15] In summary, the applicant submitted that the protection offered by s 50(2) of the Constitution is triggered where a) a person has been arrested or detained; b) for an alleged offence or for the purposes of being taken to court. It was further argued that once a person is detained on suspicion of contravening the Immigration Act, she or he would have effectively have been detailed for an alleged offence and hence s 50(2) protection is triggered. Mr *Chinopfukutwa* counsel for the applicant emphasised that s 50(2) does not exclude foreign nationals, and it protects every person in Zimbabwe.

[16] Counsel submitted further that s 8(1) of the Act erodes the right of persons arrested and detained in terms of s 8(1) to appear before a court of law within forty-eight hours of arrest or detention in terms of s 50(2) of the Constitution. It was asserted that to the extent that the impugned provision authorises detention of up to fourteen days without judicial oversight, it is unconstitutional and invalid. For his submissions counsel relied on the case of *Shabbir & Anor v Commissioner of Prisons N.O. & Ors* (HC 3043 of 2016; HH 230 of 2016) [2016] ZWHHC 230 (31 March 2016).

[17] In addition, counsel submitted that the infringement imposed by s 8(1) of the Act is not reasonably justifiable in an open society based on the rule of law, democracy, openness, justice and human dignity, and for that reason the provision cannot be served by s 86 of the Constitution. Further in support of the argument that s 8(1) is unconstitutional, counsel submitted that Zimbabwe ratified international and regional conventions that outlaw arbitrary detention, and cannot authorise such detentions. Counsel submitted that the application must succeed.

[18] In his opposing papers the second respondent opposed the application on a number of grounds. It was contended that s 8(1) only applies to persons who not only entered Zimbabwe illegally, but whose identity, nationality, antecedents are unknown and also reasonably

suspected to be prohibited persons. It was averred that foreigners lawfully in Zimbabwe, those who have overstayed, those who have committed administrative violations of the Immigration Act, and refuges are expressly excluded from this category. It was argued that s 8(1) seeks to protect Zimbabwean citizens from harm emanating from foreigners entering the country illegally and without identity, nationality and known antecedents. Such persons are said to be a threat to the security of the State. It was averred further that persons of known and verified identities and antecedents, suspected to be in country illegally are arrested, detained and brought before a court as soon possible and not later than forty-eight hours. This was said to be the practice.

[19] The second respondent asserted that s 8(1) of the Act is a necessary tool to counter transnational organised crime like terrorism, human trafficking, espionage committed by persons of concealed and / or falsified identities and antecedents. Which in essence justifies the limitation of the right to be brought to court within forty-eight hours. The second respondent argued that the arrest regulated by s 50(2) of the Constitution is an arrest for the "purposes of bringing an accused person to court for trial or for an alleged offence." While an arrest provided for in s 8(1) of the Act is "for the purpose of making inquiries as to such person's identity, antecedent and national status and any other fact relevant to the question of whether such a person is prohibited". It was further argued that s 8(1) authorises administrative detention. It does not apply to confirmed and known prohibited immigrants, who cannot be detained pending a s 8(1) investigation. It was submitted that known prohibited immigrant cannot be arrested in terms of s 8(2) of the Act and thus s 50 (2) of the Constitution would apply to such a person. Respondent emphasised the distinction between a confirmed prohibited immigrant and a suspected one. Counsel relied on the case of *Zucula v Officer in Charge (Harare Remand Prison) & Ors* (HC 2153 of 2015) [2015] ZWHHC 266 (15 March 2015). Ms *Munyoro* emphasised in argument that a s 8(1) detention cannot be declared illegal for want of compliance with s 50(2) of the Constitution. Counsel submitted that this application has no merit and must be dismissed with the costs of suit.

THE APPLICATION OF THE LAW TO THE FACTS

[20] This matter turns on a narrow ambit that is whether s 8(1) of the Immigration Act is inconsistent with s 50(2) of the Constitution and invalid. Before turning to the relevant statutory provisions and their interpretation, it is apposite to refer to the relevant principles. The

Constitution makes the notion of the 'supremacy of the Constitution' a founding value. This is underscored in s 2 which declares that it is "the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency." In *Combined Harare Residents' Association and 4 Others v The Minister of Local Government, Public Works and National Housing* (3 of 2024) [2024] ZWCC 3 (6 February 2024) para 37 the Constitutional Court stated thus:

> "In my view, the clear import of this section is to deny any legitimacy to, and thereby make void and of no force, any law, practice custom or conduct that is inconsistent with the Constitution to the extent of the inconsistency. This denial of legitimacy and force and effect is by operation of law. Put differently, by virtue of this section, all laws, practices, customs or conduct that are not consistent with the Constitution are invalid *ipso facto*. Such cannot lay any claim to legality and cannot therefore have the force and effect of regulating the conduct of the citizenry."

[21] In addition, s 46 of the Constitution provides the following with regard to interpretation of the Bill of Rights: it says when interpreting the Bill of Rights, a court must give full effect to the rights and freedoms enshrined in Bill of Rights; must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom; must take into account international law and all treaties and conventions to which Zimbabwe is a party; and may consider relevant foreign law. The interpretation clause must be read within the context of the supremacy clause. For completeness, I make the point that purposive interpretation is aimed at teasing out these core values stated in s 46, and a court faced with an interpretation of a provision in the Bill of Rights must prefer an interpretation of a provision that best supports and protects these values. See Currie I and De Wall J *The Bill of Rights Handbook* (6th ed. Juta) 136.

[22] According to the learned authors Currie I and De Wall J *The Bill of Rights Handbook* (6th ed. Juta) 133;

> "Constitutional interpretation is the process of determining the meaning of a constitutional provision. More narrowly, for purposes of Bill of Rights cases, the aim of interpretation is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision. Interpretation therefore involves two inquiries: first the meaning or scope of a right must be determined, then it must be determined whether the challenged law or conduct conflicts with the right."

[23] Still in the same context, in *Combined Harare Residents' Association and 4 Others v The Minister of Local Government, Public Works and National Housing* (3 of 2024) [2024] ZWCC 3 (6 February 2024) para 50 and 51 the court stated thus:

> "In its judgment, the court *a quo* correctly set out the approach that a court determining the constitutionality of any law custom or practice must take. This entails interpreting the Constitution first and then determining whether the impugned law, practice or custom is consonant with the Constitution.(*Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes(Pvt)Ltd* 1983 (2) ZLR 376 (S)).
> The accepted approach referred to above calls upon the Court to interpret the relevant provisions of the Constitution in full as the first step. Having thus established the meaning of the Constitution, the court must then proceed to interpret the full content of the impugned law as the second step. The final step entails comparing the meaning ascribed to the impugned law with the provisions of the Constitution. If the impugned law is capable of two meanings, one contrary to the Constitution and the other in keeping therewith, the court must adopt the meaning that will give effect to the Constitution. *(Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (supra))."*

[24] At the centre of this case is whether s 8(1) of the Act is inconsistent with s 50(2)(b) of the Constitution, which provides as follows:

> (2) Any person who is arrested or detained—
> (*a*) for the purpose of bringing him or her before a court; or
> (*b*) <u>for an alleged offence;</u>
> and who is not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the detention began, as the case may be, whether or not the period ends on a Saturday, Sunday or public holiday.

[25] It is clear that sections 50(2)(a) and (b) address two different scenarios, and they say so upfront. In that s 50 (2)(a) addresses the case of those persons arrested or detained for the purpose of being brought before a court; while s 50 (2)(b) address the case of those arrested or detained for an alleged offence. Section 50(2)(b) is immediately activated once a person has been arrested or detained for an alleged offence. The Oxford internet dictionary defines the word 'alleged' to mean 'without proof'. Therefore, s 50(2)(b) protects those persons who are arrested or detained on the basis of a suspicion of having committed an offence. Put differently, all that is required for s 50(2)(b) to be engaged is that a person has been arrested or detained for an alleged offence. The provision is clear that such a person, if not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the detention began.

[26] For completeness, it is important to highlight the significance of s 50(2) of the Constitution in the whole constitutional matrix. The purpose of the accused's rights to be placed promptly under judicial authority is to protect the right to freedom, liberty and security of the person by ensuring that an independent and impartial body determines whether, in the interest

of justice, there is any justification for continued detention. This resonates with the right to freedom and dignity espoused in s 46 of the Constitution, and the values that underline our constitution order. See *Prokureur-General, Vrystaal v Ramakhosi* 1996 11 BCLR 1514 (O) 152F. In *S v Mloyi* 2020 (1) ZLR 1239 (H) the court said:

> "The right of an arrested person to be placed promptly under the judicial authority of a court, with 48 hours being the outer limit, determines the lawful duration of detention in the hands of the police. This period is calculated from the moment of arrest. After the expiry of this period the detention becomes unconstitutional."

[27] A detention beyond the forty-eight-hour limit without judicial oversight is unlawful, and infringes the detainee's rights to dignity, and freedom and security of the person. It is an affront to the rule of law. It undermines the values and principles that are enshrined in s 46 of the Constitution.

[28] Having ascertained the scope of the constitutional provision in issue, the next issue for determination becomes whether s 8(1) of the Act deals with persons sought to be protected by s 50(2)(b) of the Constitution. Put differently, whether s 8(1) deals with persons arrested or detained for an alleged offence. Section 8(1) of the Act says:

> "Subject to section *nine,* an immigration officer may arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of this Act and may detain such person for such reasonable period, not exceeding fourteen days, as may be required for the purpose of making inquiries as to such person's identity, antecedents and national status and any other fact relevant to the question of whether such person is a prohibited person."

[29] The rules of statutory interpretation dictate that the words of a statute must be given their ordinary grammatical meaning unless this would lead to an absurdity. See *Endevour Foundation & Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356 F-G to 357 A; *Mavedzenge v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ 05/18; *Chihava and Others v Provincial Magistrate and Another* 2015 (2) ZLR 31 (CC). The court in *Cool Ideas 1186CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para [28], pp 484-485 expressed the fundamental test of statutory interpretation in these terms:

> " ... the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
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> (b) the relevant statutory provision must be properly contextualized; and (c)
>
> all statutes must be construed consistently with the Constitution, that is, were reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

[30] Section 8(1) shows that it is concerned with suspected illegal foreigners and their arrest and detention. This section is activated where (a) an immigration officer suspects on reasonable grounds that a person has entered or is in Zimbabwe in contravention of the Immigration Act; (b) and there is need to inquire or investigate the person's identity, antecedents and national status and any other fact relevant to the question of whether such person is a prohibited person. Once these two jurisdictional requirements are met, the officer may arrest and detain such person for a period not exceeding fourteen days. In the context of this case, the question that arises is whether the person detained in terms of s 8(1) of the Act has been arrested or detained for an alleged offence. I say so because if such a person has been arrested or detained for an alleged offence, then s 50(2)(b) of the Constitution is immediately activated. I take the view that such a person is indeed arrested or detained for an alleged offence, which is that he or she has entered or is in Zimbabwe contravention of the Immigration Act. In terms of s 36 of the Act it is an offence to enter or to be in Zimbabwe in contravention of the Immigration Act. Herein lies the offence.

[31] The respondent makes a distinction between persons contemplated in s 36 and those referred to in s 8(1). It is contended that those in s 36 are detained for the purposes of bringing them to court or for alleged offence, while those in s 8(1) are detained for the purposes of making inquiries about their identities, antecedents and nationality. To me this is superficial and a distinction without a difference. I say so because those caught up in terms of s 8(1) would have been suspected to have entered or to be in Zimbabwe in contravention of the Act. This is an offence in terms of s 36 of the Act. From whatever perspective one looks at this issue, the conclusion is one: that persons arrested or detained in terms of s 8(1) have been so arrested or detained for an alleged offence. Unlike s 50(2)(a) which turns on the purpose of the arrest or detention, s 50(2)(b) is activated by the reason or basis of the arrest or detention i.e., whether the arrest or detention is for an alleged offence or not. The gist of the matter is that persons detained in terms of s 8(1) of the Act have been arrested and detained for an alleged offence. It matters not that the arrest and detention is for the purposes of making inquiries. It is inconsequential. The point is s 50(2)(b) would have already been triggered by the reason of the arrest, i.e., for an alleged offence.

[32] I find comfort in the reading of *Shabbir & Anor v Commissioner of Prisons N.O. & Ors* (HC 3043 of 2016; HH 230 of 2016) [2016] ZWHHC 230 (31 March 2016) because it is in sync with my thinking. The court said:

> "It is clear from the submissions by Mr *Mukucha* that the purpose of arresting the applicants was not to bring them before a court. Section 8 of the Immigration Act relates to functions of immigration officers in relation to prohibited immigrants. A person cannot be a prohibited immigrant unless he or she has contravened a provision of the Act. A person who has entered or remained in Zimbabwe in contravention of the Immigration Act is considered a prohibited person in terms of s 14 (1) (i). Therefore, the applicants were arrested for an alleged offence which brings them within the ambit of s 50 (2) (b)……
>
> Therefore, it is my view that the applicants cannot be detained beyond forty-eight hours without an order of a competent court. If the second respondent persists in seeking the deportation of the applicants whilst they are in detention, he has to take into account s 50 (3) of the Constitution."

[33] I therefore have sufficient agreements with the reasoning and conclusions reached in *Shabbir & Anor v Commissioner of Prisons N.O. & Ors (supra).* In my view the judgment is in sync with the whole constitutional matrix ushered in by the new constitutional order and the values imbedded therein.

[34] The respondent contends that s 8(1) of the Act constitutes administrative detention. The judgment in *Shabbir & Anor* v *Commissioner of Prisons N.O. & Ors (supra)* is criticised for what is called the failure to recognise the distinction between a confirmed prohibited immigrant and a suspected one. It seems to me that the criticism has absolutely no substance. At arrest every person is deemed, by operation of the law to be innocent until proven guilty. In the eyes of the law, there is no confirmed prohibited immigrant at arrest, whether is a s 36 or s 8(1) arrest, all are arrested on the strength of a reasonable suspicion that they have entered or are in Zimbabwe in contravention of the Immigration Act. A confirmed prohibited immigrant only exists after due process and conviction. Therefore, in the reading of s 50(2)(b) all are arrested for an alleged offence. In the circumstances, whether it is a s 8(1) or s 36 arrest, the protection provided by s 50(2)(b) is immediately activated.

[35] In addition, the contention that s 8(1) constitutes administrative detention, cannot withstand closer scrutiny. I say so because administrative detention for the purpose of making inquiries or investigation may not be accepted in an open and democratic society anchored on freedom, dignity and the rule of law. To detain a human being, no matter his or her nationality for fourteen days without judicial oversight cannot be lawful in a country where the

Constitution is supreme and the rule of law is a founding value. I take the view that no system of justice that can countenance such a patent injustice. In fact, my view is that administrative detention is a simple euphemism for arbitrary detention, and such is an anathema to the constitutional principles of freedom, liberty, human dignity and the rule of law that this country stands on.

[36] I agree with Mr *Chinopfukutwa* that the Constitution does not distinguish whether one is a Zimbabwean or a foreign immigrant, all are persons and entitled to the s 50(2) protection. Further, the respondent seems to make an elementary mistake, and it is this: that if a suspected prohibited immigrant is produced before court within forty-eight hours of arrest, such a person would be immediately released. Our system of justice does not operate that way, the person may still, depending on the facts of the case remain in lawful custody. What is important, and accords with our sense of justice is judicial oversight, which s 8(1) clearly denies persons suspected to have entered or to be in Zimbabwe in contravention of the Immigration Act whose identity, antecedents and national status are unknown.

[37] In addition, I factor into the equation that s 46 of the Constitution provides an interpretation model in the interpretation of the Bill of Rights. It enjoins a court to take into account international law and all treaties and conventions to which Zimbabwe is a party. In this regard the applicant contends that Zimbabwe is a party to and has ratified the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights. Indeed, Zimbabwe is a party to these conventions and has ratified them. Article 9 of the ICCPR states that:

> "Article 9
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

[38] Article 6 of the African Charter on Human and People's Rights states that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

[39] It is clear that both under international and regional conventions, ratified by Zimbabwe, arbitrary detentions are impermissible. The conventions underscore that a detained person must promptly be brought before a court, this is important for the determination of the legality of the arrest and the detention. In this country promptly means within forty-eight hours. I agree with Mr *Chinopfukutwa* that to the extent that s 8(1) permits a fourteen days detention without judicial oversight, it actually authorises arbitrary detention. Whether is called administrative detention or arbitrary detention it is prohibited under international and regional conventions. In the circumstances, it is clear that s 8(1) is in violation of both international and regional conventions.

[40] The second respondent submitted that s 8(1) of the Act is protected by the limitation clause in s 86 of the Constitution. In that the limitation sanctioned in s 8(1) is reasonable and necessary for the purposes of combating international terrorism and other international crimes. In a limitation inquiry, the first stage is to ascertain whether the right has been infringed by law or conduct of the respondent. In this instance, s 8(1) to the extent that it authorises a detention of up to fourteen days without judicial oversight, infringes s 50(2) of the Constitution. The inquiry then cascades to whether the infringement can be justified as a permissible limitation of the right enshrined in s 50(2). I take the view that while the arrest and detention of illegal immigrants targeted by s 8(1) might be inspired by security concerns of protecting the community, it cannot pass constitutional muster. In other words, it cannot be accepted as a justification for infringing this right in an open and democratic society based on human dignity, equality and freedom. In addition, less restrictive means could have been used to achieve the stated purpose. Section 8(1) falls foul of the limitation clause because it has not been demonstrated that other less damaging means, such as shifting the *onus* to the detainee who seeks to be released, to show good cause. In my view s 86 of the Constitution limitation clause cannot serve s 8(1) of the Act.

[41] In any event, s 69(1) of the Constitution guarantees every accused person the right to a fair trial. The right to a fair trial lies at the heart of our criminal justice system. It seeks to provide procedural fairness before the State intrudes upon fundamental rights and freedoms of an arrested or detained person. The right to brought to court within forty-eight hours of arrest

or detention is a right to a fair trial. It protects the rights to dignity, liberty and freedom. The right to a fair trial allows for the pre-trial processes to be brought into the open and rights to be vindicated. No wonder that the limitation clause - s 86(3) of the Constitution provides that the right to a fair trial cannot be limited. The right to appear in court within forty-eight hours being a right to a fair trial and cannot be limited.

[42] It does not appear to me that there is any possible interpretation that can preserve the constitutional validity of s 8(1) of the Immigration Act. Neither is there principle of law that can serve this provision against being found to be inconsistent with the Constitution and invalid. It intrudes and infringes the sacred rights to human dignity, liberty and freedom. These rights are sacrosanct. In *Shabbir & Anor* v *Commissioner of Prisons N.O. & Ors (supra)* the court held that the impugned provision is in conflict with s 50 of the Constitution. I agree. In the circumstances, s 8(1) of the Immigration Act is found to be inconsistent with s 50(2)(b) of the Constitution and invalid. It is for these reasons that this application must succeed.

[43] The general position is that no costs are awarded in a constitutional matter. There are no reasons in these proceedings that justify a departure from this position. No costs shall be awarded against the second respondent.

In the circumstances, I make the following order:

i. The application succeeds.
ii. It is declared that s 8(1) of the Immigration Act [Chapter 4:02] to the extent that it permits an immigration officer to detain a person for fourteen days without a court appearance is inconsistent with s 50(2)(b) of the Constitution of Zimbabwe (Amendment No. 20) Act 2013 and is invalid.
iii. This order, in terms of s 175(1) of the Constitution of Zimbabwe (Amendment No. 20) Act 2013 has no force or effect unless is confirmed by the Constitutional Court.
iv. There shall be no order as to costs.

DUBE BANDA J:……..

Sadowera Kuwana applicant's legal practitioners
Civil Division of the A-G's Office second respondent's legal practitioners