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EDITORIAL

THE LAWS OF THE CONSTITUTION

Freedom and independence are the perennial pursuits of the human being. Throughout the long history of human society people have ceaselessly struggled to free themselves from the fetters of nature and society. All the struggles that constitute the great epics of the history of mankind have been struggles to defend and to realise freedom. The history of the Zimbabwean people until recently had been one intense struggle to realise independence and freedom from foreign domination and racist subjugation. Our recent struggles have not only increased in real terms our personal freedom and the freedoms available to the masses of the people, but they have also enriched our spiritual and cultural love for the dignity and freedom of men. It is against this, our historical inheritance of love for the dignity and freedom of man, that this issue of the Zimbabwe Law Review and the scientific researches behind it have been put together. In other words, this special issue of the Zimbabwe Law Review yet again evokes and stimulates our desire as a nation to build a truly free and democratic society.

Lawyers are not and should not be mere technicians of the law. The Constitution is the fundamental thesis expressing the principles upon which our nation, or any nation, is built. The Constitution expresses all our values and therefore constitutes a measure of the level of our freedom and humanity. Its criticism is the criticism of the standards of its values. Lawyers play their part in making and advising on legal aspects of both the substance and the technical standards of constitutions. In order to do a better job of this or to express the democratic yearnings of the people, our lawyers must possess a high level of critical values to assist society as a whole to create more and better freedoms for the well-being and property of the people. These freedoms to be enshrined in the Constitution of the land.

We hope that in this issue, as Zimbabwe prepares to make its own new Constitution after 1990, that the researches and critical visions on constitution-alism made here by the various authors from various scientific and ideological vantage points will assist our people and our leaders in charting and further broadening the road of freedom and independence in the drafting of our own, new and sovereign Zimbabwe Constitution as we march forward towards the year 2000.

Issue Editors
REMEDIES FOR UNLAWFUL INTERFERENCE WITH PERSONAL LIBERTY IN ZIMBABWE

G. FELTOE AND P. LEWIN*

INTRODUCTION

In all democratic societies individual people are afforded protection against unlawful interference with their personal liberty and freedom, and in Zimbabwe there are extensive safeguards against unlawful encroachment on personal liberty, as well as various remedies available in the event of unlawful intrusion upon liberty. However, since the attainment of Zimbabwe's hard-won Independence, there have been internal and external elements bent on undermining and subverting the new order. Government has had to take action to try to counteract, for instance, a sustained campaign of sabotage and destabilisation orchestrated from Pretoria. The law enforcement agencies have been called on to take all necessary steps to prevent such activities from occurring and, when they have occurred, to detect and apprehend the culprits as expeditiously as possible. Such a security situation tends, inevitably to create an environment where individual rights are subordinated to the paramount concern for the protection of national security.

Despite the security situation, the judges have treated improper interference with this individual right as a most grave matter. The purpose of this article is thus to explore the practical difficulties faced by those wishing to seek redress of unlawful impingement on their right to liberty1 and to examine the various remedies available.

1. CONSTITUTIONAL SAFEGUARDS

The first and foremost protection of personal liberty is that to be found in section 13 of the Constitution of Zimbabwe. Here this right is guaranteed. It provides that a person's liberty may only be taken away if this has been authorized by law. It further provides for a number of specified situations. For the purposes of this article the important situations where the law can authorize deprivation of liberty are:

(i) upon reasonable suspicion that a person has committed or is about to commit a crime [s. 13(2) (c)];

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1 This article deals only with remedies applicable when the arrest or placement in custody is unlawful. It does not deal with the remedies available to a detainee when the detention itself is lawful, but certain of the post-detention steps mandated by paragraph 2 of the Second Schedule to the Constitution, have not been followed.
(ii) in consequence of a sentence imposed by a court after conviction for a crime or in execution of an order of a court made to secure the fulfillment of an obligation imposed by law [s. 13 (2) (a) and (c)].

During a period of public emergency, a person may also be detained under a law providing for preventive detention without s. 13(1) of the Constitution being breached. This is provided for by ss. 25 and 68 of the Constitution, as read with the Second Schedule.

Section 13 of the Constitution also spells out a number of post-arrest or detention safeguards. Again, the important ones for the purposes of this article are that the person arrested or detained must

(i) be informed as soon as reasonably practicable in a language understandable to him of the reasons for his arrest or detention [s. 13(13)];

(ii) be permitted at his own expense to engage and speak to a lawyer without delay [s. 13(3)].

If a person is arrested or detained on suspicion of criminal activity, he must be brought before a court without undue delay [s. 13 (4)]. If that person is not brought for trial within a reasonable period of time, he must be released from custody either conditionally or unconditionally [s.13(4)].

Under s. 24 (1) of the Constitution, without prejudice to any other remedies which may be available if the provisions contained in s. 13 (or any of the other provisions of the Declaration of Rights) have been contravened, the person affected (or, in the case of a person detained, any other person alleging a contravention in relation to the person detained) may apply to the Supreme Court for redress. Also under s. 24(2), if any proceedings in a court other than the Supreme Court, a question arises as to a possible contravention of s. 13, the person presiding may, and if so requested by a party to the proceedings shall, refer the question to the Supreme Court, unless the question is merely frivolous or vexatious.

Finally, under s. 13(5), it is laid down that a person unlawfully arrested or detained by another is entitled to compensation from "any person or authority on whose behalf or in the course of whose employment that other person is acting". It is further provided, however, that it is permissible for protection to be afforded by law from liability from such compensation in respect of

"(a) any judicial officer acting in his capacity reasonably and in good faith; or

(b) any public officer, or person assisting such public officer, acting reasonably and in good faith and without culpable ignorance or negligence."
2. REMEDIES UNDER THE COMMON LAW

In law it is a very serious crime for any person unlawfully and intentionally to deprive another person of his liberty. Cases of unlawful imprisonment fall within the ambit of this crime. Persons who encroach upon the liberty of others unlawfully can and should be criminally punished. Such punishment will serve as an individual and a general deterrent against unlawful interference with this most important right.

At civil law, there are a number of remedies available to persons threatened with or subjected to unlawful arrest, detention or imprisonment. These are:

(a) an interdict de libero homine exhibendo (habeas corpus) to have the legality of the detention reviewed;

(b) an action for damages for unlawful arrest, detention or imprisonment;

(c) an action for damages for malicious arrest or prosecution;

(d) an interdict to prevent threatened unlawful action.

(a) Interdict de Libero Homine Exhíbendo

This action is the Roman-Dutch equivalent of what is known in English law as the habeas corpus action. As Baxter points out:

"The central purpose of the interdict in modern law is to enable a court to review the legality of an arrest and detention. It consists of a command addressed to the person in whose custody the detained individual is to be found requiring such person to present the detainee in court in order that the legality of his arrest and continued detention may be examined. The remedy is concerned first and foremost with bringing the lawfulness of the detention under review; the release of the detainee is only a consequence."
The action is thus brought when the lawfulness of the detention is under challenge and the whole purpose is to secure the release of a person unlawfully detained. Therefore, although an order for the release of the detainee is only an eventual consequence if the court finds the detention to be illegal, it is a most vital consequence. The first stage is to obtain a mandatory interdict "directing the detainer to produce the detainee in order that the court may examine the circumstances of his detention."\(^5\)

It is clearly established that an applicant can appeal against the refusal by the High Court not to grant this remedy.\(^6\)

Most of the actions for interdicts *de libero homine exhibendo* have been brought in respect of persons detained under the Emergency Powers Regulations (Maintenance of Law and Order) Regulation S.I. 458 of 1983.

Sometimes, however, the action has been brought to secure the release of persons held in custody pending trial for ordinary criminal offences. The leading case in regard to this latter situation is *Bull v Attorney-General & Anor* SC-43-86. In this case two persons had been remanded in custody on a charge of contravening a section of the Official Secrets Act, Chapter 97. An application was brought by a legal practitioner for an order declaring the imprisonment of these persons pending trial to be unlawful and for an order for their immediate release. This action was "in effect" an application for an interdict *de libero homine exhibendo*.

Citing s.13 of the Constitution the court ruled that liberty could be deprived pending trial only if there was a reasonable suspicion that the persons concerned had committed the alleged crime. The onus was on the detaining authority to establish that such a reasonable suspicion existed; they had not discharged this onus in the present case and the liberation of the prisoners was ordered. This order for release, the court said, did not compel the Attorney-General to discontinue the criminal proceedings: he retained the right to prosecute, but the accused had a constitutional right to be left at liberty until such time as a reasonable suspicion was demonstrated that they had committed the alleged crime.

In deciding that the onus of proving a reasonable suspicion had not been discharged, the court found that the bald assertions of a reasonable suspicion by the State were nothing more than speculative conjecture. No evidence was given as to the authoritative character of the source of the allegedly reliable information and proper enquiries had not been made into the content of the information which had allegedly been passed to the South African authorities and the circumstances under which it was passed and to whom. These latter facts were of prime importance because as part of their jobs the accused were empowered to communicate information to authorities in other countries.

\(^5\) Baxter op. cit. at p. 695.

\(^6\) See *Minister of Home Affairs v Dabengwa* 1984 (2) SA 345 (ZS); 1983 (2) ZLR 346.
The effect of this judgment is that the accused can only lawful be remanded in custody pending trial for crimes if a reasonable suspicion exists that they have committed these crimes. If this cannot be established then they have a constitutional right to be free. If the authorities still wish to pursue criminal charges they must be remanded out of custody until such time as the onus of proving reasonable suspicion can be discharged. This has the effect of upholding the fundamental precept of our criminal justice system, namely that everyone is presumed to be innocent of criminal activity until guilt has been proven beyond reasonable doubt.\(^7\)

(b) **Unlawful Arrest, Detention and Imprisonment**

This is a delict for which damages can be claimed. Strictly speaking the actual claim for damages is brought under the *actio injuriarum* or the Aquilian action or under both of these. The plaintiff can seek damages for *injuria* under the *actio injuriarum*. These will be sentimental damages for the invasion of personal liberty and dignity. If the plaintiff has suffered patrimonial loss, such as loss of wages as a result of being kept in unlawful detention, his claim will fall under the Aquilian action.

This delict is, however, normally dealt with as a separate delict. According to one text,\(^8\) the delict is committed "where a person has, intentionally and without lawful justification, totally restrained the personal liberty of another".\(^9\) Another writer says that it "consists in the unjustifiable infliction of a restraint upon the personal liberty of another".\(^10\) The gravemen of this delict is thus simply the unlawful deprivation of liberty. The various elements of this delict will be examined under these headings:

i) the physical element;

ii) the mental aspect;

iii) the defence of justification.

(i) **The Physical Aspect**

There must be total restraint upon personal liberty or freedom of movement. The wrongful confinement can take the form of imprisonment in the normally understood sense, namely locking up a person in a cell. But it can take other forms such as the action by a policeman placing a person under arrest or the prevention of a person from leaving a place at which he is lawfully present or threatening

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8. McKerron, *The Law of Delict* (7th ed.) at p. 159 refers to this delict as false arrest or imprisonment. It is also sometimes called wrongful arrest or imprisonment.


10. McKerron op. cit. p. 159.
force to compel a person to submit to a restraint on his liberty. The wrongful confinement does not have to be preceded by any formal arrest.

The restraint must, however, be a complete restraint. This requirement would not be satisfied where, for instance, a person’s passage is obstructed in one direction only. But if there has been a total restraint upon liberty, then even if the restraint was of short duration, this delict will have been committed. The period of the restraint will, however, affect the level of the damages which will be awarded.

It is not a requirement that the restraint be effected by the use of force or threats of force. But if, as often happens, force is used to achieve the restraint, then damages can also be sought for the use of this force under the separate delict of assault.

(ii) The Mental Requirement

In most cases all or the greater part of the damages claimed will be for sentimental harm. These damages fall under the actio injuriarum. For this action, animus injuriandi or intention to injure is a requirement, but in Zimbabwe law this is little more than a fictional requirement. Thus in defamation cases (which fall under the actio injuriarum), once it has been proven that the defendant published statements of a defamatory character, animus injuriandi is presumed and this presumption can only be rebutted by establishing that one of the recognized defences such as justification or privilege applies.

So too with unlawful arrest, detention and imprisonment. It is quite clear in Zimbabwean law that once it has been proven that the defendant interfered with the liberty of the plaintiff, animus injuriandi will be presumed and the only way in which this presumption can be rebutted is by proving that the action taken was lawfully justified. A bona fide mistake will not be a defence. It will therefore be no defence, for instance, that a policeman mistakenly believed that he was entitled to arrest the plaintiff.

11 McKerron op. cit. at pp. 159–160
12 See Banda v Minister of Home Affairs & Ors (supra), where in addition to damages for unlawful imprisonment, substantial damages were awarded for assault and rape.
13 Zimbabwean law has not followed the South African law in this regard. In South African law animus injuriandi is now treated as being a real requirement and subjective intention to defame must be present. Thus if as a result of a mistake, the defendant lacked subjective intention to defame he would escape liability. The Zimbabwean approach is set out in the leading case of Smith NO & Anor v Wonesayi 1972 (1) RLR 262 (RA).
14 See Lee and Honore op. cit p. 286.
15 In the Wonesayi case supra at p. 286 Beadle CJ stated that “... no matter how bona fide may be a policeman in believing the law entitles him to arrest the defendant, if, in fact, the law does not so entitle him, he is liable in damages for unjuria caused to the defendant.”
Even a bona fide mistake which was reasonable will not excuse from liability at common law.\textsuperscript{16} However, the legislature sometimes exempts from liability persons who have made a bona fide and reasonable mistake.\textsuperscript{17}

Finally it should be noted that proof of malice is not an essential requirement.\textsuperscript{18} If, however, malice was present this will serve to increase the quantum of damages awardable.\textsuperscript{19}

\textit{iii) The Defence of Lawful Justification}

As the police often place people under restraint in the course of carrying out their duties, the police agency is the one which is most frequently sued for alleged unlawful arrest, detention or imprisonment. The police have the responsibility for investigating, detecting and combating criminal activities. In order to carry out this most important work, they are empowered under various legislation to effect arrests and to hold persons in custody. When police action falls within the terms of these provisions, it is lawfully justified and they cannot be successfully sued for damages for unlawful arrest, detention and imprisonment. Persons other than the police are also given by legislation powers to effect arrests. They too are protected against liability if their actions fall within the terms of the empowering legislation.

The police have powers to arrest and hold in custody in terms of the Criminal Procedure and Evidence Act. Chap 59.\textsuperscript{20} They also have powers to arrest and detain persons under the Emergency Powers (Maintenance of Law and Order) Regulations SI 458 of 1983. Under Chapter 59 there are two types of arrest, namely arrest without warrant and arrest with warrant.

Basically, under s.29 the police can arrest without warrant someone who has committed or has attempted to commit crimes in their presence or a person whom the arresting officer reasonably suspects has committed a first Schedule crime.\textsuperscript{21} After arrest without warrant the person arrested must be taken to a police station as soon as possible and he can be detained there, but he must be brought before a court within 48 hours, which period can be extended to a maximum of 96 hours.

\textsuperscript{16} See McKerron op. cit. at p. 160
\textsuperscript{17} An example of such legislative protection against liability is s. 40(1) of Criminal Procedure and Evidence Act, Chap. 59 which provides immunity to a person authorized to execute a warrant of arrest who arrests the wrong person “believing in good faith and on reasonable and probable grounds that he is the person named in the warrant...”
\textsuperscript{18} This delict is entirely distinct from malicious arrest or prosecution which requires proof of malice and with which the agency of the law is used by the defendant in order to cause the plaintiff to be arrested or imprisoned.
\textsuperscript{19} See Lee and Honore op. cit. at p. 286 who state that malice can result in the award of exemplary damages, and McKerron op. cit. p. 160.
\textsuperscript{20} Under the Emergency Powers Regulations members of the Defence Forces and of the Central Intelligence Organization also have the power to detain (s. 2).
\textsuperscript{21} See s. 36 of Chap. 59.
where the person cannot be brought before a court within 48 hours because of a weekend or public holiday or because the distance of the police station to the nearest court is great.

Under s.30 of Chap.59 the police can also detain for up to 12 hours any person whom they are empowered to arrest, or any persons who may be able to give evidence about a crime if such person refuses to give his name and address, or is reasonably suspected of having furnished a false name and address. The purpose of this detention is to give the police time to ascertain or to check the name and address of the person detained.

As regards arrests with warrants, once a warrant for arrest has been issued under s.37 of Chap.59, that warrant will be executed by a policeman acting under s.38.

The policeman arresting the person must produce the warrant if the person being arrested demands this [s. 38(2)]. The person arrested must be brought as soon as possible to a police station [s.38(3)]. A warrant can also be issued under s.37 for the further detention of a person arrested without warrant, but only on application from persons such as a policeman above the rank of inspector or a public prosecutor. This application must detail the alleged crime and must indicate that, from the information available to the person making the application, he has reasonable grounds for suspecting that the detained person has committed the alleged crime.

The Emergency Powers Regulations empower the police to arrest without warrant and detain for up to 30 days on certain grounds. Under s.21 a person can be arrested and detained if

i) the police officer has reason to believe that there are grounds which would justify indefinite detention by the Minister of Home Affairs in terms of s.17; or

ii) the person, on being questioned by the police officer, fails to satisfy him as to his identity.

Under s.53 a police officer can arrest and detain a person whom he reasonably suspects.

"(a) has acted or is about to act in a manner prejudicial to

(i) the public safety or public order; or
(ii) the termination of the state of public emergency; or

(b) has committed or is about to commit any offence under the law relating to

(i) the preservation of public safety or public order; or
(ii) exchange control."
If the arrest and detention has been effected under one of these provisions and complies with the specifications contained therein, then the arrest or detention will be justified and an action for unlawful arrest or detention will not succeed. In some cases it will be beyond dispute that the arrest or detention was justified. The clearest situation will be where a criminal is caught red-handed by a policeman who then proceeds to arrest him without warrant in terms of s.29 of Chap. 59. On the other hand, where the provision requires that before an arrest is effected the arresting officer must have a reasonable suspicion that the person has committed a crime or has done or is about to do something prejudicial to public safety or the like, then disputes can and do arise as to whether from an objective standpoint a reasonable suspicion existed, as shown by the cases dealt with below.

In the case of *Gwenure v Minister of Home Affairs* HH–702–87 the defence to the action for damages for unlawful arrest and detention was that the two policemen effecting the arrest without warrant had acted in accordance with the provisions of s.29 of Chap. 59 insofar as they had *bona fide* and reasonably believed that the plaintiff had committed the crime of fraud. The judge therefore had to consider carefully all the facts in order to decide whether, in addition to a genuine belief that the plaintiff had committed a crime, the information upon which the policemen had acted was such that on its basis a reasonable person would have suspected that the plaintiff had committed that crime. (See p.5 of the judgment.)

After a detailed analysis of the facts, the judge decided that there were reasonable grounds for the suspicion and therefore the plaintiff’s action for damages failed.

In *Minister of Home Affairs v Allan* SC–76–86 the Supreme Court had to decide whether the policeman arresting and detaining the plaintiff had reasonably suspected that he had acted or was about to act in a manner prejudicial to public safety such that the arrest and detention was justified under what is now s.53 of the Emergency Powers Regulations. The arresting officer had mistakenly believed that the plaintiff had taken a photograph of a police station in Bulawayo and that he had done this for a purpose prejudicial to public safety.

The court decided that in all the circumstances it was not reasonable for the policeman to have believed that he was acting in a manner prejudicial to public safety. The policeman had simply jumped to a conclusion and had arrested the plaintiff without first questioning him about the purpose of taking the photograph. The court laid stress upon this lack of enquiries (although it added that it was not laying down that there could never be a reasonable suspicion in the absence of enquiries). It said that without investigation and enquiries in the present case, the suspicion that the plaintiff had acted in a manner prejudicial to public safety was mere conjecture. Without such enquiries there could not have been any reasonable suspicion about his intent. The way in which the matter was dealt with subsequent to the arrest also indicated that the arresting officer did not have a reasonable suspicion at the time he effected the arrest. Because of the
absence of a reasonable suspicion the arrest and detention was not justified under the Emergency Powers provision and thus the plaintiff's claim for damages for unlawful arrest and detention succeeded.

In *Granger v Minister of State* HH-91–85 the plaintiff, an elderly lawyer, had been photographing an accident scene for an insurance company. A vehicle containing five Central Intelligence Organization personnel passed by and one of them, on seeing the plaintiff with a camera, jumped to the conclusion that he was photographing their vehicle and that he was a spy. The CIO vehicle stopped in front of the plaintiff's vehicle and all the CIO personnel except the driver accosted the plaintiff who was now in his vehicle. They were wearing plain clothes and they did not identify themselves as members of the CIO. The plaintiff was grabbed by the shirt and three of the persons shouted "Spy, spy, kill the spy". The plaintiff took fright and drove away.

The driver who had not seen what had transpired saw the plaintiff drive off very fast. One of his colleagues called out to him to catch the person in the car. He set off in hot pursuit and finally caught up with the plaintiff at some traffic lights. He removed the plaintiff’s car keys. The plaintiff's jacket was torn in a scuffle which ensued when the plaintiff tried to regain his keys. The plaintiff was taken to a police station and, after about 40 minutes, he was questioned and the matter was cleared up and he was released.

The four CIO members involved in the first incident were found by the court to have behaved in a completely unreasonable and undisciplined fashion. Their belief that the plaintiff was a spy who had taken a photograph of their vehicle for an enemy power was, in the circumstances, absurd and unfounded and provided no justification for their actions. On the other hand, no damages were awarded in respect of the action of the driver as he had reasonably believed that the plaintiff was attempting to avoid being questioned or to evade arrest and the driver’s “actions were consonant with the rights and duties of a peace officer exercising his powers of arrest”. His actions were therefore held to be justified.

In *Moll v Commissioner of Police and Ors* 1983 (1) ZLR 238 (HB) the court decided that the policeman effecting an arrest and detention in terms of what is now s. 53 of the Emergency Powers Regulations must himself have reasonably suspected that the person he was arresting had done or was about to do any of the things specified in that section. It is thus not lawful for a policeman to arrest and detain a person merely on the instructions of another policeman. As was pointed out in the *Allan* case supra at p.9 it is important that the police take care before they arrest someone. After all, the arrest and detention of a person is a most drastic step which takes away his liberty and this step should therefore not be taken lightly. That is the reason why the Legislature has laid down that reasonable suspicion must exist before a suspect is arrested. On the other hand, the ordinary policeman may have difficulties in judging whether, on the basis of the information to hand, the suspicion he has would pass the test of reasonableness. (See *Allan* p.8). Where there is such doubt, the obvious thing to do is to check with a superior officer.
The distinction is thus made between vague speculation and reasonable suspicion. If, for instance, a report is received from a dubious source that X has committed a crime, arrest would not be justified on the basis of this information alone; further investigation would be required. McNally JA had this to say in the Allan case:

“We are all familiar with two phrases beloved of journalists. One is ‘The police invited him to accompany them to the police station’. The other is ‘A man is assisting the police with their enquiries’. These are not empty phrases. They underline the care which the police must take before they arrest someone. In both cases the implication is that the man concerned is a possible suspect. But in both cases the police accept that further enquiries are necessary before a decision can be taken to arrest him.

Those enquiries may show that an arrest is justified, or that it is not justified. A refusal to assist, or to accompany the police, may in itself create or confirm a reasonable suspicion. Answers may point to innocence or to guilt. But often, until the questions are put, the suspicion is no more than a suspicion. It is not a suspicion based on reason.”

Immunities

Various immunities against liability for unlawful arrest, detention and imprisonment are afforded under statutory provisions. For example, protection against liability is given in certain circumstances to persons empowered to execute warrants of arrest in certain circumstances. This protection is given when

i) the wrong person is arrested, provided that the arrester believed in good faith and on reasonable and probable grounds that the person arrested was the person named in the warrant; (S.40 of Chap. 59)

ii) a person is arrested under an irregular warrant which is bad at law provided that the person effecting the arrest acted in good faith and without culpable ignorance or negligence in believing the warrant to be good in law (s.41 of Chap. 59).
The Levels of Damages Awarded

The amount of damages awarded in cases of unlawful arrest and imprisonment will depend upon factors such as the duration of the incarceration, the conditions under which the person was held, whether the arrest and imprisonment took place in humiliating circumstances, whether the person detaining had any basis at all for detaining or was simply behaving illegally and abusing his position of authority. The facts of a number of cases will be summarised to illustrate how these factors were taken into account in assessing damages.

Granger v Minister of State HH–91–86

In this case the plaintiff was awarded $2000 for the injuria which resulted from the unlawful action on the part of CIO officers who had unreasonably jumped to the wrong conclusion that he had been spying on them. As the action of the driver was held to be lawful, the plaintiff was awarded no damages for his action and he did not claim any damages for the approximately 40 minutes he was kept in custody.

Minister of Home Affairs v Allan SC–76–86

The Supreme Court decided that the trial court's award of $3000 was excessive and reduced it to $2000. The plaintiff had been unlawfully arrested (no force had been used) and after being questioned for some time, he was allowed to spend the night at his friend's house on condition he returned to the police station the next morning. He went to the police station the next morning and remained there until 3 pm., when the matter was cleared up and he was allowed to leave. At no stage was the plaintiff placed in the cells. In all he was under technical arrest for some 20 hours.

Makomberedze v Minister of State (Security) 1986 (4) SA 267 (ZH)

The plaintiff was awarded damages in the sum of $50 000. He had been arrested by the police and detained at two police stations for a period of 10 days. He was refused access to his lawyer and was never told why he was being detained. One of the police did, however, ask him if he was involved in politics in Mozambique. He was never taken before acourt of law. He was then taken to Mutare and handed over without any extradition proceedings to the Mozambiquan authorities who then held him in a detention camp for a protracted period of time. During that time all he was questioned about was his personal details and whether he had ever been to South Africa. He was not taken to court and he never had access to a lawyer. Eventually he was returned to Zimbabwe. He had been in unlawful detention from July 1980 to March 1982.

Prior to his arrest, he had been a district chairman for ZANU(PF). He had owned a house and two businesses and was involved in the administration of some schools for displaced children. He had been married and had six children. On his return he found that he no longer owned his house because installments
I had not been paid on the deed of sale contract. His wife had left him for another man and his children had been placed in schools for displaced children. All but one of the schools he had previously administered had closed down and he had also lost both of his businesses.

In assessing damages the court took into account

i) the fact that he had been a man of good reputation prior to his arrest;

ii) the fact that on his return he had lost all that he had achieved in life;

iii) the fact that he had been in unlawful detention for some 20 months without being given access to his lawyer and without being brought before a court and thus his constitutional and general individual rights to freedom had been encroached upon most grievously.

_Banda v Minister of Home Affairs & Ors HH–243–87_

The plaintiff had been harassed, unlawfully imprisoned for a total of 37 days (she was arrested and detained at various police stations on some four occasions, the longest period being 23 days) and she had been assaulted and raped some ten times by one of the police officers. In awarding $18 500 for unlawful imprisonment jointly and severally against the two policemen involved and against the Minister of Home Affairs, the court decided that “aggravated” damages should be awarded because of the period of unlawful imprisonment and the spiteful and humiliating manner in which it was effected as a result of which she suffered serious humiliation and indignity. She was also awarded $1 500 damages for the assault and $8 500 for the rape.

c) _Malicious Arrest and Detention, and Malicious Prosecution_

These are again delicts falling under the _actio injuriarum_ for which damages can be sought for _injuria_. If patrimonial loss has occurred then this loss should be claimed under the Aquilian action.

The delict of malicious arrest or imprisonment is committed “when the defendant had maliciously and without reasonable and probable cause, procured the arrest or detention of the plaintiff by the proper authorities”.25

Where a person knows or suspects that another person has committed a

24 Strangely, default judgment seems to have been awarded against the Minister although he entered an appearance to defend. The other two defendants did not enter appearances to defend.

25 Lee and Honore op. cit. at p. 378. See also McKerron op. cit pp. 259–260.
crime, he has a lawful right to lay a charge against him with the police. If the result of this report is the arrest and imprisonment of the person against whom the charge is laid, that person has no right of action for damages against the reporter if later the charge is dropped. On the other hand, if there is no reasonable and probable cause for the allegation of criminal conduct and the person making the allegation was acting maliciously in making the report, then this constitutes an abuse of the right to lay genuine complaints and an action for damages will lie after he is released from custody when it is discovered that there is no valid basis for continuing to hold him.

Where there is no reasonable foundation for believing that the plaintiff has committed a crime and the defendant lays a complaint of criminal conduct, knowing or suspecting that this complaint is without foundation and intending simply to cause harm to the plaintiff by having him arrested and held in custody, this delict is committed. In other words, where the motive in laying the complaint is to injure the plaintiff, and there are no reasonable grounds for making the allegation, the defendant can be sued by the plaintiff after the police have released him upon finding the allegation to be baseless. Proof of malice is not an easy matter, but the plaintiff may seek to establish it as a matter of inference from the fact that there was no reasonable ground for suspecting that he had committed a crime, such as to form the basis for the complaint.26

The delict of malicious prosecution27 occurs when the defendant has maliciously and without reasonable and probable cause instituted criminal proceedings against the plaintiff. The action will not lie until the criminal proceedings have terminated in favour of the plaintiff. The plaintiff may of course have suffered loss of personal liberty in this sort of situation in that he may have been held in custody before and during the trial or until the appeal was heard.

With both these actions, it is not the defendant who has actually himself arrested or imprisoned the plaintiff, but instead his action has resulted in the police holding him or the court ordering that he be held in custody.

In these actions the onus is on the plaintiff to prove on a balance of probabilities that the defendant caused him to be arrested, detained or prosecuted and that he acted without reasonable and probable cause and was actuated by malice.28

26 However, speaking about English law, Bonner in his book Emergency Powers in Peacetime at p. 133 says: "The Plaintiff must prove two elements: malice, and the absence of reasonable and probable cause. These elements must be kept quite distinct; the second is not to be inferred from the existence of the first."
27 See Lee and Honore op. cit. at p. 378 and McKerron op. cit. at p. 259.
28 For the difficulties faced by plaintiffs in English law, see the case of Glinkski v McIver [1962] AC 726.
d) Interdict

An interdict can be obtained to prevent the threatened commission or continued commission of an unlawful act such as unlawful arrest, detention or imprisonment. Thus in the South African case of *Wood v Ondanga Tribal Authority* 1975 (2) SA 294 (A) an interdict was granted to prevent the authorities from unlawfully arresting, detaining or inflicting physical punishment upon persons on the ground that they were suspected of being SWAPO members. The “authority” in question, which was a puppet of the South African regime, had been unlawfully arresting, then subjecting to savage floggings, suspected SWAPO members.

In the Zimbabwean case of *Bull v Minister of State (Security) & Ors* 1987 (1) SA 422 (ZH) at 426-427 the court reiterated the requirements for a final interdict, namely

i) a clear right;

ii) an infringement of that right (actual or apprehended); and

iii) the absence of any alternative remedy.

Sometimes the authorities can be ordered to take action to prevent unlawful action which it is suspected is being perpetrated by subordinates within their organization. Thus in *Banda v Minister of Defence* NO SC–188–86 there was a temporary order that

"the respondent and the Commander of the Air Force are directed to prevent any member of the air Force of Zimbabwe from unlawfully detaining, arresting or assaulting the appellant."

**ENFORCEMENT OF REMEDIES**

Anyone whose right to personal liberty has been infringed has recourse to one or more of the legal remedies enumerated above. But the fact that a particular remedy or remedies exist does not, of course, in itself provide the relief to which a person is entitled. To obtain this relief, a person must enforce the remedies by recourse to the Courts, where, to obtain a judgment or order of Court, the right and its infringement and, in actions for damages, the quantum of the damages must be established. It is only once this has been achieved that a person can obtain the remedy by enforcing the Court’s judgment or order.

In general, with the exception of s.24 of the Constitution, there are no special

29 See Baxter op. cit. p. 685.
30 See also *Minister of Law & Order & Ors v Nordien & Anor* 1987 (2) SA 894.
31 In the Bull case an interdict was sought to restrain the respondents from detaining the detainees at a place outside a certain distance from Harare and at any place where the prison conditions did not conform to those pertaining in ordinary prisons.
laws or rules which apply particularly to the enforcement of remedies relating to personal liberty. The procedures used to enforce them are those employed to enforce any civil remedy in our Courts.

How then does an individual go about enforcing a remedy and are there any practical difficulties which will be encountered in doing so?

It is convenient to deal with these questions under the following headings:

1. In which Court should the aggrieved party seek relief?
2. Who should approach the Court and against whom should the remedy be enforced?
3. When should the litigation commence?
4. What form of procedure should be used?
5. How can the judgment or order obtained be enforced?

1. In Which Court Should the Aggrieved Party Seek Relief?

The jurisdictional grounds which apply to all civil litigation apply equally to litigation for the enforcement of the remedies for unlawful interference in personal liberty. In addition, s.24 of the Constitution gives the Supreme Court original jurisdiction to hear and determine constitutional points of law where it is alleged that any of the provisions of the Declaration of Rights have been contravened.

Section 24 of the Constitution, so far as it is relevant, reads as follows:

"24 (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person or that other person may, subject to the provisions of ss(3), apply to the Supreme Court for redress.

(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party in the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(3) Where in any proceedings such as are mentioned in ss(2) any such question as is therein mentioned is not referred to the Supreme Court,
then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of the question shall lie to the Supreme Court under ss(1).

(4) The Supreme Court shall have original jurisdiction to

(a) hear and determine any application made by any person pursuant to ss(1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and

(b) to determine any question arising in the case of any person which is referred to it pursuant to ss(2); and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights; Provided that the Supreme Court may decline to exercise its powers under this sub-section if it is satisfied that adequate means of redress for the contravention allowed are or have been available to the person concerned under other provisions of this Constitution or under any other law.”

The purpose of this section, and its procedure, is clearly explained in the decision of Mandirwhe v Minister of State 1981 SA (1) 759 (Z.A.D) at 764 as follows:

“The purpose of S24 is to provide, in a proper case, speedy access to the final Court in the land. The issue will always be whether there has been an infringement of an individual’s fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this Court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division [now Supreme Court] without protracted litigation.”

“Sub-section (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division. Sub-section (2) deals with a different situation: it contemplates that proceedings have been commenced in the General Division [now High Court] or in a subordinate Court in circumstances in which it was not anticipated that the question of a contravention of the Declaration of Rights would necessarily arise, since otherwise one expects ss(10) to be invoked. The question having arisen, the sub-section provides a speedy procedure for the determina-
tion by the Appellate Division of, in effect, a constitutional point of law without the necessity first to conclude the trial in the court of the first instance and to come to this Court by way of appeal. When the question is referred to this Court, the proceedings are merely interrupted. This Court answers the question but the matter must be concluded in the Court a quo. The sub-section does not authorize the proceedings to be transferred to this Court; it does not say, as the learned Judge’s order incorrectly said, that the matter may be referred — only the constitutional question may be referred for determination. Since therefore the proceedings must finally be concluded in the Court in which they were commenced it follows that a reference under ss (2) may be made mero motu by the person presiding only if the determination of the question is in his opinion necessary to enable him to reach a decision on redress sought; unless the answer to the question is sought for this purpose the Court a quo is simply seeking an academic opinion; which is not a proper exercise of the discretion given by the sub-section."

The facts in the Mandirwhe case were that, at the request of the Mozambique Government, the respondent had the applicant’s brother arrested and surrendered to the Mozambique Government. The applicant applied to the High Court for his release and was granted a rule nisi. On the return day of the rule nisi the respondent admitted the unlawfulness of the arrest but stated that his efforts to obtain the return of the applicant’s brother from Mozambique had not been successful. The Court discharged the rule nisi and referred the matter to the Appellate Division in terms of s.24(2) of the Constitution. The Appellate Division held that the referral was incompetent since there was no question arising which required determination to enable the Court a quo to reach a decision on the relief sought as the application had already been decided upon.

In the case of Bickle & Ors v Minister of Home Affairs HB–116–83 the applicants were seeking an order that a forfeiture order made pursuant to the Emergency Powers (Forfeiture of Enemy Property) Regulations 1981, as amended, was invalid and of no force and effect on the ground that the Regulations were not authorised by s. 16(b) of the Constitution. They also raised other issues upon which they might equally have succeeded in obtaining the relief they were seeking.

The court a quo ruled specifically on the constitutionality of the Regulations and having found in favour of the applicants on this issue did not consider the other issues.

The matter went on appeal to the Supreme Court (SC–151–83) and the Supreme Court commented that the Court a quo should have proceeded to consider whether the other issues raised afforded the applicants the relief they were seeking and, if they did, it should have left unanswered the constitutional issue.
In the case of Granger v The Minister of State SC—23–84 and SC—83–84 the plaintiff alleged that he was subjected to unlawful and injurious conduct by members of the Central Intelligence Organisation and sought to recover damages suffered. The defendant pleaded a number of defences, among others he pleaded that no liability for damages arose because of Regulations which granted immunity in certain circumstances to any member of the Security forces.32

The plaintiff replicated and raised the issue as to whether the Emergency Powers (Security Forces Indemnity) Regulations were *ultra vires* the Constitution. The defendant applied for the constitutional issue to be referred to the Supreme Court. The High Court agreed to this request and referred the issue to the Supreme Court in terms of s.24(2) of the Constitution.

The Supreme Court was doubtful whether the referral was proper and expressed the initial view that it was premature and that the Court *a quo* should first have continued the trial and dealt with the other defences raised by the defendant which might have been conclusive, in which case there would have been no need for the constitutional issue to be referred at all. However, after hearing argument to the effect that the reference was properly and timeously made the Supreme Court agreed that it must determine the constitutional issue raised.

The referral in this case was distinguished from that in the Mandirwhe case (supra) in which case, by the time the referral was made, the Court *a quo* had already decided and disposed of the application and the constitutional issue was therefore only of academic interest. In the Granger case, the issue referred had not been rendered academic by the matter having been disposed of by the Court *a quo*, even though it might have been possible for the Court *a quo* to dispose of the case on other grounds.

*Bickle's* case was also distinguished in *Granger's* case on the basis that it came before the Court by way of appeal and not by referral under s.24(2) of the Constitution. In addition, the learned Judge’s remarks were confined to the desirability of a court *a quo* avoiding a decision on issues that could be decisive in order to decide possibly unnecessarily, on a constitutional issue.

None of the three cases mentioned above relate to an issue brought directly to the Supreme Court in terms of s.24(1). It is, however, clear from the dictum quoted above from the Mandirwhe case that where it is clear from the outset that the existence of a prospective litigant’s remedy is dependent on whether there has been or is likely to be a contravention of the Declaration of Rights that litigant may apply directly to the Supreme Court for a decision as to whether there has been such a contravention of the Declaration of Rights.33

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32 See s. 4(1) and (2) of the Emergency Powers (Security Forces Indemnity) Amendment Regulations 1983 (No2).

33 See also Hewlett *v* Minister of Finance & Anor 1981 ZLR 57 where this procedure was used and Poli *v* Minister of Finance & Economic Development & Anor SC 167–87.
In practice, therefore, in so far as this aspect of enforcement is concerned, an aggrieved party should not have any difficulties in obtaining access to a court and where appropriate speedy access to the final court. Practitioners report, however, that individual judges of the Supreme Court have indicated extra-curially a preference to deal with constitutional issues on appeal rather than to have them brought under s.24.

2. Who Should Approach the Court and Against Whom Should the Remedy be Enforced

a) Who Should Approach the Court?

As regards locus standi, our courts have adopted a very liberal approach. This approach takes account of the fact that frequently it will not be possible for the person unlawfully detained himself or herself to bring an action. It is premised upon the idea that where personal liberty is at stake, a narrow, technical approach to locus standi is inappropriate. Thus where it is clear that there are good reasons for someone other than the detained person bringing the action and that the detainee would have brought the action had it been in his power to do so, the courts will allow another person such as a relative (or in the absence of a relative, someone who is not related to the detainee) to bring the action.\(^3\)\(^4\) The bringing of the action by someone other than the detainee would be particularly necessary when access has been denied to the person unjustifiably detained, so that no instructions have been able to be taken from him.

It should be noted that s.24(4) of the Constitution allows "any other person" to apply to the Supreme Court on behalf of a detained person to redress a contravention of s.13 in relation to the detained person.

b) Against Whom Should the Remedy be Enforced?

Most cases where damages are claimed for unlawful arrest, detention or imprisonment arise out of actions taken by policemen or members of the Central Intelligence Organization. In such cases the actions will usually be brought not only against the persons who themselves took the action, but additionally against the State on the basis of vicarious liability. Under the State Liabilities Act, Chap. 54 the State can be sued for any delict committed by a State employee "acting in his capacity and within the scope of his authority" (s.2). It is provided that the relevant Minister may be cited as the nominal defendant. He must be cited by his official title and not by name.

For a time it was thought that the State could not be vicariously liable if the arresting officer acted on his own initiative and used his own discretion in making the arrest rather than on the basis of instructions. It is now quite clear that the State

\(^3\)\(^4\) See *Wood & Ors v Ondangwa Tribal Authority & Anor* 1975 (2) SA 294 (A) cited with approval in *Deary NO v Acting President & Ors* 1979 (4) SA 39 (ZA) and *Haamei v Commander, Combined Operations* HH–65–80.
is vicariously liable irrespective of whether or not the policeman who effected the arrest was acting on the instructions of a superior officer. In exercising his discretion to arrest he is not acting as an independent contractor. He "acquires this discretion by virtue of his office and statutory authorisation and in the exercise of this discretion he stands under the comprehensive supervision of his superiors, via regulations and instructions. Moreover, the superior officers have full disciplinary powers over the policeman who exercises his powers of arrest and detention in a wrongful manner."\textsuperscript{35}

Indeed, in Zimbabwe, as opposed to South African law, it has never been doubted that there could be vicarious liability in these circumstances. For example, in the case of \textit{Banda v Minister of Home Affairs \\& Ors HH--243--87} at p.11, the two policemen were held to be acting "in the ordinary course of their employment and within the scope of their authority as servants of the State and whilst under the control of [the Minister of Home Affairs]."

In cases where an interdict is being sought, care should be taken to bring the application against the party in whose power it is to comply with the relief requested and not against the party who carried out the initial arrest or detention, even though the latter may be the party who acted unlawfully. A separate action can then be brought against that party for damages arising from the unlawful act.

Of particular interest is the position of the Attorney-General in cases where an accused person who is being held in custody in terms of the Criminal Procedure and Evidence Act, Chap.59 is forbidden bail by the production of a Ministerial certificate in terms of s.106(2)(a) of that Act. If the State is not able to establish that there was a reasonable suspicion that the accused had committed or was about to commit the offence with which he is charged, then the imprisonment is unlawful, there is no valid custody to which the Ministerial certificate can relate and the accused is entitled to his release.\textsuperscript{36} In such cases, since the Attorney-General is the authority who has the sole responsibility as to whether to prosecute and whether to keep a person on remand, he is the person who can establish that there is a reasonable suspicion that the offence has been or is about to be committed.

In such cases he is thus the authority who should be called to account in any proceedings in which the Court is being asked to review the lawfulness of the imprisonment.

In the case of \textit{Ndhlovu v the Attorney-General of Zimbabwe HB--1--87}, in which the applicant was at the time of the application being held on remand on allegations of contravening certain sections of the Law and Order (Maintenance) Act in terms of a Ministerial certificate forbidding bail, it was argued that the Attorney-General should not be answerable for the delicts committed either by

\textsuperscript{35} See \textit{Mhlongo v Minister of Police} 1978 (2) SA 551 (A) and \textit{Minister of Police v Gamble} 1979 (4) SA 759 (A) See also Wiechers Administrative Law at pp. 334--336 and Baxter Administrative Law pp. 627--629

\textsuperscript{36} See \textit{Bull v The Attorney-General \\& Anor} S--43--86 (supra)
the Zimbabwe Republic Police or the Central Intelligence Organization and was therefore not the proper juristic person against whom the application for an interdict *de homine libero exhibendo* should have been instituted. This argument was rejected on the grounds that the Attorney-General was the correct respondent since he had the sole discretion to prosecute and to keep the applicant on remand.

Although it may be clear in law against whom the remedy should be enforced, in practice it may be more difficult to find out who at the time of the institution of proceedings is the authority in control. This may sound surprising but a review of the cases shows that persons held in custody are frequently passed from one authority to another, and back again, as the alleged reasons for their detention change. In addition, it is sometimes not clear whether the arresting authorities are members of the Zimbabwe Republic Police or the Central Intelligence Organization. The distinction is, of course, important since the Police are the responsibility of the Minister of Home Affairs while the CIO falls under the umbrella of the Minister of State (Security).

3. *When should Litigation Commence?*

There are no special provisions dealing with the time within which litigation enforcing these remedies must be commenced and the ordinary rules of prescription apply. However, it should be noted that there are special provisions in the Police Act, Chap. 98 dealing with the bringing of claims arising out of delicts committed by policemen. The relevant section reads:

\[S76\] Any civil action instituted against the State or a member in respect of anything done or omitted to be done under this Act shall be commenced within six months after the cause of action has arisen and notice in writing of any civil action and the cause thereof shall be given to the defendant at least one month before the commencement of such action.\[60 days\]

For this reason, it is of great practical importance to establish as early as possible who the party or parties are from whom the relief is to be sought, so that the claim does not prescribe. In this respect it is worth noting that if there is any possibility of confusion as to whether the arresting authority is the Police or the Central Intelligence Organization, steps should be taken to clarify the position immediately.

4. *What Form of Procedure Should be Used?*

Once again, there are no special forms of procedure for the enforcement of these remedies: the general rules of our law providing for the enforcement of all civil remedies apply. The claims for damages for unlawful arrest, detention or

37 See *Minister of Home Affairs v Badenhorst* 1983 (2) ZLR 248 (S) and *Stambolie v Kabasha & Commissioner of Police* HH–676–87
imprisonment, and for malicious arrest or prosecution which must, in accordance with the ordinary rules of procedure, be enforced by way of action commenced by summons. This is because they are illiquid claims.

The Claims for interdicts, writs de libero homine exhibendo or to prevent threatened unlawful action will be enforced by way of application. In accordance with Rule 252 of the High Court Rules, 1971, this procedure may be commenced either by notice of motion or ex parte by way of petition. It will, however, generally be made by way of notice of motion unless there are special circumstances which dictate an ex parte application.

These special circumstances can be placed in two categories. Firstly, where immediate relief is essential because of the danger of delay. Secondly, where relief without notice is essential because notice might precipitate the very harm that the applicant is trying to prevent. Since the ex parte procedure offends the basic audi alteram partem rule, the Court is reluctant to grant an order, even in the form of a rule nisi unless the petitioner is able to establish one or other of the special circumstances mentioned above.

The High Court set out its views on this choice of procedure in Practice Note No 1 of 1983 in which it stated that where the rights of other persons were involved notice should wherever possible be given to all persons who might be affected. It went on to say that although Rule 252 of the High Court Rules 1971 allows applications for an interdict to be made either ex parte or by way of notice of motion, the Court will insist that the correct procedure be followed even though urgency may be alleged. It is therefore important for the applicant to consider carefully whether the special reasons are adequate to permit the use of ex parte procedure. In doing so, the applicant must always bear in mind that the Rules of Court do make provision for urgent notices of motion by allowing the normal time limits to be shortened. An application on notice can thus come before the Court with very little delay if a Certificate of Urgency is filed.

In the case of Van Wyk v the Chief Intelligence Officer, Maiabeleland North & Ors SC-101-86 the applicant had petitioned the High Court as a matter of urgency and in Chambers, without notice to the respondents, for a rule nisi that the applicant should be produced in Court and that the Respondents should show cause why his arrest and detention should not be declared unlawful. The High Court had dismissed the petition, ruling that it should have been brought on Notice of Motion so that the Respondent's affidavits could have been presented before the Court, and the Respondent's legal representatives could have been present to argue the case. An appeal against the ruling to the Supreme Court was dismissed. The reasons for this dismissal of the appeal were as follows:

"It is essentially a matter of practice as to whether matters should be dealt with by way of petition (with or without notice to the other side)

38 See Republic Motors v Lyton Road Service Station 1971 (1) RLR 129.
39 Proviso to Rule 229(1) of High Court Rules 1971.
or by way of Notice of Motion. The High Court has set out its views, in Practice Note No 1 of 1983.

In the present case the appellant's whereabouts are known, his lawyers have access to him and no concern is expressed about his state of health and well-being. In these circumstances the fundamental protection of life and bodily security, which the writ de libero homine exhibendo is designed to secure, has already been achieved.

In such a case it seemed to us entirely proper that the High Court should require the appellant to proceed by way of Notice of Motion. It is a matter for the discretion of the court and we could see no basis for holding that that discretion had not been exercised judicially."

The Supreme Court thus construed the writ de libero homine exhibendo as having the fundamental purpose of protection of life and bodily security. This differs from the conventional view that the writ is for the purpose of "enabling the court to review the legality" of the detention. Clearly, however, where it is feared that the life or health of the detainee is in serious danger, this certainly increases the urgency of the matter and the case should be dealt with as swiftly as possible. In such a case, as well as granting a rule nisi, the court should, if necessary, grant an order directing the persons holding the person to safeguard his life and health until he is brought to court.

If the incorrect procedure is used the Court has a discretion as to whether it will dismiss the application, as was done in the Van Wyk case (supra) or to allow the petition to stand as a notice of motion as has been done in other cases. In the latter instance service of the petition must be made on the respondent.

The Rules of Court are silent on the precise procedure to be followed when constitutional issues are brought or referred to the Supreme Court under s.24. For this reason not all of the procedure is clearly defined and part of it has evolved through practice. If the Supreme Court is asked to decide a constitutional issue by referral under s.21(2), the general application procedure is followed. How-

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40 As Baxter points out (op.cit p.695) "these applications are usually dealt with as matters of urgency and are given priority on the court role" and "the return date on the rule nisi is made as short as possible." He also observes that the rule nisi "may be issued ex parte if justice so requires" and "the application might even be heard on the basis of oral evidence."

41 In the South African case of Nordien & Anor v Minister of Law and Order & Ors 1986 (2) SA 511 (C) the relevant Minister, the Commissioner of Police and certain other senior Police officers were directed to take all necessary steps within their powers to prevent any member of the Police from assaulting, threatening, harassing or intimidating the applicants who had allegedly suffered at the hands of some ill-disciplined policeman. See also Bull v Minister of State (Security) & Ors 1987 (1) SA 422 (ZH).

42 Ex parte Weir 1956 R&N 350 and York Brothers v Minister of Home Affairs & Anor HH–264–82.
ever, no formal written application need be made. The parties must attend on the Registrar with the judgment of the Court *a quo* and request a date of hearing. No written application for set down need be made. The application then proceeds in the usual way.

If the issue comes directly to the Supreme Court under s.24(1), the practice is to use the usual application procedure. A written application by way of notice of motion supported by affidavit will be required. But where the issue comes under s.24(1) or (2), and if it is urgent it can be brought on a Certificate of Urgency in which case a short return date can be set and an early set down fixed.

In regard to this aspect of the enforcement procedure too there are therefore no special practical difficulties which might hinder the enforcement of these types of remedies.

5. *How can the Judgment or Order Obtained be Enforced?*

The last step in enforcing a remedy ordered by the Court is the actual execution of the judgment or order. It is with this final step that a successful party might have difficulties and, if so, the judgment or order obtained may be worthless.

If a judgment is one which sounds in money, that is a judgment for a specified amount of money, for example, for damages or costs it would normally be enforced by way of warrant of execution against the unsuccessful party's property or by way of a garnish order for the attachment of debts due or to become due to him or as a last resort, by way of civil imprisonment proceedings. However, s.41(1) of the State Liabilities Act, Chap. 54 provides that there can be no execution or attachment or process in the nature thereof against State property, but that the State may cause money to be paid out of the Consolidated Revenue Fund to satisfy the judgment. Since it is settled law that a judgment sounding in money cannot be enforced in any other way43, if the State refuses to satisfy the judgment or order, the remedy cannot be enforced against the State.

Since the repeal of the Emergency Powers (Security Forces Indemnity) Regulations following the ruling of the Supreme Court in the Granger cases, that portions of these regulations were *ultra vires* the Constitution, the State official who himself infringed the plaintiff's constitutional rights can be sued. He would usually be joined as a defendant with the State in any action for damages for unlawful interference with the personal liberty of the plaintiff with the object of obtaining a judgment against the defendants jointly and severally. If the State refuses to pay,44, there is nothing to stop the judgment being enforced against the State official. However, it is probable that such a person may well not have sufficient financial resources to make execution of the judgment against him feasible.

44 There are no official reports of such refusals, but practitioners admit that there have, in fact, been such refusals.
If the judgment or order obtained is an order *ad factum praestandum*, that is an order to do or refrain from doing something which would be the case where the relief obtained was an interdict, then the order can only be enforced by way of contempt of court proceedings. However, the State has in a number of cases where this type of order has been obtained, been successful in circumventing the order by technically complying with it so as to avoid its enforcement by contempt proceedings, but immediately finding some other basis on which to re-arrest, re-imprison or re-detain the applicant, thus rendering the order ineffective.\(^4\)\(^5\)\(^6\)

It is perhaps worth noting that most Supreme Court civil judgments or orders are given on appeal and are recorded in the Court *a quo* and enforced in all respects as if they had been given by that Court.\(^6\) Other judgments not given on appeal may be executed and enforced by the High Court as if they were original judgments of that Court.\(^7\)

**Government Policy Relating to Unlawful Arrest and Imprisonment**

On 16 July 1986 the then Prime Minister, speaking in Parliament in reply to a question as to why the Government had not paid out damages awarded by the courts against if for unlawful arrest and detention, said:

“If Government — and I want to say this as a matter of principle — were to be awarding damages and paying huge sums of money that are involved in these cases, some of which are of petty nature, Government would in my view be using the tax-payers’ money wrongfully. It is true that Government has paid damages where, for example, a person suffers injury as a result of an accident involving on the one side, a vehicle driven by a Government employee, we have paid — we have not refused. However, where people take advantage of our liberal situation to go to court and win on technicalities, they should not expect that Government is going to use the people’s resources to enrich them when we believe in some cases that they are wrong-doers. I do not think, that in that case, we would be doing justice to the nation and so we would have to look at these cases ourselves and say in fact that this person who says he was wrongfully arrested, when in fact, to our knowledge, he was consorting with dissidents, we cannot grant damages at all. We never do that. However, if an ordinary citizen is arrested and he appeals and there is a case and we feel it is a genuine case, we will pay damages and we will not refuse to do so. So there it is. We will discriminate security cases and other cases that we feel merit our compliance but there are certain others where I think we will introduce a law to this Parliament to nullify those damages.”\(^4\)\(^8\)

\(^4\) For example, *Minister of Home Affairs & Anor v Austin & Anor* 1986 (4) SA 281 (ZSC); and *York Bros v Minister of Home Affairs & Ors* HH–264–82.

\(^5\) S. 22, Supreme Court of Zimbabwe Act, 1981.

\(^6\) S. 7, Supreme Court of Zimbabwe Act, (supra)

\(^7\) *Hansard* vol. 13 No. 11 cols 389–390.
The attitude of Government is thus that they will not pay out of sparse public funds substantial sums to persons who have been awarded damages by the courts if it is felt on the basis of information available to Government that these persons do not deserve to receive this compensation because the police did indeed have grounds for arresting and holding them. Although this attitude may be somewhat understandable, not only does it place Government in conflict with the courts insofar as they are refusing to pay out the damages which the courts have ruled the State is obliged to pay, but it is problematical on other grounds. If the authorities had reasonable grounds for arresting and holding, then surely this evidence should be produced at the time the action for damages is being brought. The action should be vigorously defended on the basis that the arrest and detention was lawfully justified. All relevant evidence pointing to, say, a reasonable suspicion of criminal or anti-State activity should be elicited.

If, however, this is done and the court finds that the arrest or detention was not lawfully justified and thus the plaintiff’s rights were unlawfully interfered with, surely the State should accept this ruling and pay out the damages. This would apply perhaps to an even greater extent if the police were not able to produce any evidence at all to justify their arrest and detention of the plaintiff. The State may retort that in some of these cases there is information which leads it to believe that the police action was justified, but that either it was not sufficient to satisfy the judge who has to apply the stringent standard of reasonableness or that it was information of a highly sensitive or confidential nature which it could not produce in court.

To the first of these arguments it might be said that where the constitutionally mandated standard cannot be satisfied, infringement upon personal liberty is not justified and the person concerned is entitled to his damages. To the second, if the information is of a sensitive nature the case can be held in camera so that the information can be protected. Additionally, revelation of information such as the names of informers is not required in order to prove reasonableness of the action in arresting and detaining.

What therefore is being argued is that it is unseemly for the State to wait until a judgment has been handed down against it and then to turn around and maintain that the police action was justified. If the police action was justified, then at the time the State is being sued on the basis of vicarious responsibility it should ensure that all possible evidence which goes toward establishing that the action was indeed justified should be produced and, if necessary, the evidence should be heard by the court in camera.49

If the Government, without giving any reasons, simply declines to pay the

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49 In the case of Banda v Minister of Home Affairs & Ors HH-243-87 neither of the two policemen entered an appearance to defend. This was not surprising as the evidence against them seemed to be overwhelming. In Makomberedze v Minister of State (Security) 1986 (4) SA 267 (HH) no evidence whatsoever was led for the defendant and the facts were not in dispute.
damages awarded at the end of a court case, the claimant will have wasted time and money bringing a claim which turns out to be nugatory. As Government will presumably not disclose to him its reasons for refusing to pay him the damages, he is not in a position to make submissions seeking to persuade Government that these reasons are wrongly based. They are thus condemned as it were without being able to defend themselves. This Government attitude may well create an atmosphere where even genuine claimants are reticent about bringing actions because they will be uncertain whether after going through the expensive process of suing the Government, the Government might not simply refuse to pay the damages awarded. It is not known in which cases the State has declined to pay out damages awarded by the court, but in cases such as Banda, Makomberedze and Granger would there have been any justification for refusing to pay?

The Government attitude towards the payment of damages in these sorts of cases may also be dangerous in its possible effects on the behaviour of law enforcement officers. It is possible that these officers could adopt the approach that even if they have acted without reasonable cause, they need not be concerned about the consequences; in the event of an action for damages succeeding, Government will simply adopt the expedient device of refusing to pay the damages and therefore no harm will be done. Of course, in actuality the law enforcement officers themselves could be personally sued.

Moreover, in adopting this sort of approach, Government could risk action against it in the Supreme Court by the person who has not been paid alleging a breach of his right provided for in s.13(5) of the Constitution, namely his right to compensation for unlawful arrest or detention.

Finally, the basic principle must apply namely: that where a legal action is brought, the court and not the Executive must decide whether the steps taken by the law enforcement agencies are warranted and justified.

The Executive should not continue to adopt a stance that, no matter what the courts decide, it will be the final arbiter in the matter and will reserve to itself the discretion to decide whether it will give effect to the remedy which has been granted by the court. The principle that these issues be decided by an independent arbiter, namely a judge or magistrate must remain and be respected.

CONCLUSION

The state of unrest within Zimbabwe since Independence has placed a great strain on the efforts of law enforcement agencies to secure and maintain the new order. Nothing said or suggested in this article is intended to curb the right of the State of Zimbabwe to take whatever measures are required to counteract subversive activities, wherever they emerge. What has been argued rather is that where innocent persons are adversely affected during such operations — such as when the law enforcement agencies abuse their powers or act outside the scope of their powers — the aggrieved persons should be entitled to the forms of redress embodied in the law of Zimbabwe.