ROY LESLIE BENNET
versus
THE PARLIAMENT OF ZIMBABWE
and
THE COMMISSIONER OF PRISONS
and
THE MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 28 February and 10 March 2005

Adv. *Matinenga*, for the applicant
Mr. *Chihambakwe,* for the 1st respondent
Mr. *Ruzive*, for the 2nd and 3rd respondents

URGENT APPLICATION

PATEL J: The Applicant is Roy Leslie Bennett, a Member of Parliament, who is presently incarcerated at Mutoko Prison, pursuant to his committal to imprisonment by Parliament, for an effective term of 12 months beginning on the 28th of October 2004.

The First Respondent is the Parliament of Zimbabwe. The Second and Third Respondents are the Commissioner of Prisons and the Minister of Justice, respectively, who are cited in this matter in their official capacities.

Relief Sought

The Applicant contends that the 12 month term of imprisonment imposed upon him will expire simultaneously with the dissolution of Parliament at the end of March 2005. If this is correct, it means that the validity of his prison term is truncated to a total period of 153 days. Accordingly, with due remission of his sentence by one-third, he ought to have been released from prison on the 7th of February 2005.

The Applicant therefore seeks an urgent order directing his release from prison forthwith and, in any event, within 12 hours of the granting of the order.

In the alternative, the Applicant seeks an order for his release on the 30th of March 2005, being the date when the present Parliament will be dissolved – by virtue of Proclamation 2 of 2005 (S.I. 15 of 2005).

The Issues

The issues for determination by the Court are as follows:-

1. Whether or not the application satisfies the requirement of urgency.
2. Whether the Applicant is precluded from bringing this application on the grounds of *lis pendens* and/or *res judicata*.
3. Whether or not the Applicant is entitled to one-third remission of his sentence in terms of section 109 of the Prisons Act [*Chapter 7:11*].
4. The effect of section 63(8) of the Constitution of Zimbabwe on the Applicant's prison term.
5. Whether section 32(2) of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] operates to expunge the Applicant's prison term upon the dissolution of Parliament.

Urgency

The Applicant contends that his right to liberty is at stake and that this factor in itself warrants the determination of his application as a matter of urgency. Moreover, if his averments are correct and his claim that he ought to have been released on the 7th of February is upheld, he will suffer irreparable harm if his incarceration is allowed to continue.

As against this, it is contended on behalf of the Respondents that the Applicant's imprisonment, *per se*, does not necessarily give rise to any urgency. Moreover, the Applicant has not satisfactorily explained why he waited for over two weeks before initiating this application. The failure to explain this delay in the founding papers, so the Respondents contend, effectively vitiates the Applicant's claim of urgency. (*Kuvarega v Registrar-General & Another* 1998 (1) ZLR 188, at 193).

I accept the Respondents' argument that the Applicant could have lodged this application soon after the critical date of the 7th of February, despite the distance between Harare and Mutoko Prison and the need to consult with his legal practitioners. The fact that he was able to file his detailed answering affidavit within 24 hours clearly belies any contention to the contrary.

Nevertheless, I am of the view that the facts of this case are distinguishable from those in *Kuvarega's* case, *supra*. The latter case involved an applicant who waited for a given deadline to materialise before taking the requisite action. In the present matter, we are not concerned with any deadline that the Applicant ought to have met. He is in the position of being continuously incarcerated as opposed to being at liberty on the legal grounds that he avers.

I am also satisfied that the delay in bringing this application to the Court is not inordinate in the circumstances of this case. If there has been some delay, it is such as to warrant condonation by this Court in the interests of justice, in terms of Rule 4C of the High Court Rules, 1971.

Lis Pendens* and/or *Res Judicata

Mr Chihambakwe, on behalf of the First Respondent, submits that the parties and the issues *in casu* are identical to the parties involved and the issues that were determined by this Court in Case Nos. HC 11689/04 and HC 11808/04. Again, it is averred that the

same issues are the subject-matter of an appeal pending before the Supreme Court. On this basis, it is contended that the application should be dismissed on the grounds of *res judicata* and *lis pendens*.

While I accept that the parties in the three cases cited may be similar to those involved in this matter, I am of the view that the issues canvassed in those cases are very different from those before this Court. In the present matter, the Applicant is not seeking a stay of current proceedings in Parliament nor is he challenging the validity of the sentence imposed upon him by Parliament. Instead, what he claims is that the term of imprisonment that he is currently serving has or will come to an earlier end by operation of law. His cause of action *in casu* is patently new and untested. Accordingly, I hold that the defences of *lis pendens* and *res judicata* do not inure to the benefit of the Respondents in this matter.

The Prisons Act [*Chapter 7:11*]

Section 109(1) of the Prisons Act, in its relevant portions, provides as follows –

> " A convicted prisoner under sentence of imprisonment for a period of more than one month ... may, subject to such conditions as may be prescribed, earn by satisfactory industry and good conduct remission of one-third of his sentence ... ".

In the present case, three distinct questions arise for consideration. Firstly, does section 109 apply to the Applicant? Secondly, what are the conditions prescribed for remission in terms of this section? And thirdly, is a prisoner entitled to remission for good conduct?

Application of section 109

Section 2 of the Act defines a "convicted prisoner" as "any prisoner under sentence of a court or court martial". The word "court"

is defined in section 3(3) of the Interpretation Act [*Chapter 1:01*] as being "any court in Zimbabwe of competent jurisdiction".

The Respondents contend that the Applicant is not a "convicted prisoner" as defined and that, therefore, the benefit of remission in terms of section 109 of the Act cannot be extended to him. On behalf of the Applicant, *Adv. Matinenga* concedes that he is not a convicted prisoner and that the Act contains a glaring *lacuna* in that regard. Notwithstanding this, he submits that the Applicant, whilst in prison, is subject to the same disabilities that apply to a convicted prisoner and should, therefore, enjoy the same benefits as apply to the latter. On that basis, he urges the Court to adopt a teleological approach in interpreting the Act (*per* Devenish – *Interpretation of Statutes*, 1992, at 39-48) and to fill an inequitable gap in the law in order to serve the ends of justice.

Whatever the merits of the teleological or purposive approach to statutory interpretation, I do not think it necessary to legislate for Parliament in the instant case. Section 16 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] spells out the jurisdiction of Parliament in the exercise of its powers to deal with contempts and other offences. Section 16(4) is of specific relevance to the matter at hand. It provides that –

> "Parliament sitting as a court shall have all such rights and privileges of a court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act, matter or thing which in this Part is declared to be an offence."

As I read it, this provision makes it abundantly clear that, in the exercise of its penal powers, Parliament sits as a court with full jurisdictional competence to inquire into and punish the commission of offences pertaining to Parliamentary affairs. For that purpose, at any rate, it is "a court of competent jurisdiction" as envisaged in the Interpretation Act. Although Parliament is not a court of law endowed with criminal or civil jurisdiction in the conventional sense (*per*

Gubbay CJ in *Mutasa v Makombe NO* 1997 (1) ZLR 330 (S), at337), it is nevertheless a court of competent jurisdiction when exercising its penal powers under Part V of Chapter 2:08. Accordingly, I am of the view that the Applicant is a "convicted prisoner" within the meaning of the Prisons Act and is, therefore, properly covered by the provisions of section 109 of that Act.

Conditions for remission

In answer to the question as to what conditions have been prescribed for remission under section 109, counsel for the Respondents were unable to enlighten the Court in that regard. Their difficulty is quite comprehensible in view of the rather sparse treatment of this subject in the Prisons (General) Regulations, 1996 (S.I. 1/1996). Section 113 of the Regulations curtly provides that –

> "Remission of sentence in accordance with Part XVIII [now Part XIX] of the Act shall be calculated by means of a Remission Table drawn up and issued by the Commissioner."

The contents of the Remission Table referred to were not divulged to the Court. In any event, the table is presumably no more than a mathematical index computing the period of remission applicable to specified prison terms.

The real difficulty, it seems to me, is that no conditions appear to have been prescribed pertaining to, *inter alia*, the procedure to be followed and the criteria to be applied in granting remission under section 109 of the Act. This, as I see it, is a real *lacuna* in the law which the Second and Third Respondents may well wish to rectify at the earliest opportunity.

Entitlement to Remission

It was submitted on behalf of the Applicant that he has behaved in an exemplary fashion during the course of his incarceration and that he is, therefore, entitled to one-third remission of his sentence in

accordance with the practice hitherto followed by the Prisons authorities. As against this, the Respondents emphasise the wording employed in section 109(1), viz. a convicted prisoner may earn remission of his sentence.

It seems to me that the Respondents' submission in this regard is unassailable. There is nothing in the terminology or context of section 109 to suggest that its resort to the word "may" is intended to mean "shall" or to bear any similar peremptory connotation.

Consequently, I hold that the grant of remission to a convicted prisoner, in terms of section 109(1) of the Act, involves the exercise of a discretionary power – subject to the usual fetters governing the use of administrative discretion.

It follows that the Applicant is not entitled, as a matter of legal right, to one-third remission of his sentence. This does not mean that he is without remedy in the event that, when the time for remission is due, he is denied the benefit of remission on purely arbitrary or discriminatory grounds. It is trite that administrative discretion must be exercised fairly and reasonably and that any irregular exercise of an administrative power is subject to review by the courts on the well-established grounds of illegality, impropriety or gross irrationality. (See section 3 of the Administrative Justice Act [*Chapter 10:28*] which now encapsulates the common law position in this respect).

Section 63(8) of the Constitution of Zimbabwe

Section 63(8) of the Constitution provides as follows –

> "On the dissolution of Parliament all proceedings pending at the time shall be terminated and accordingly every Bill, motion, petition or other business shall lapse."

It is contended for the Applicant that his committal to prison by Parliament is a matter that falls within the ambit of this provision and

that his term of imprisonment will immediately lapse as at the date of the dissolution of Parliament on the 30th of March 2005.

As I read it, 63(8) simply declares that all parliamentary business pending in Parliament at the time of its dissolution must lapse at that time. Any such inchoate business is terminated and cannot be automatically revived in the new Parliament at its inception.

In the present case, the Applicant's conduct and subsequent committal to prison were inquired into and duly concluded by Parliament in October 2004. It is a completed matter requiring no further inquiry or determination by Parliament. Nor does it leave any room for the Applicant to approach Parliament with a view to seeking the review or reconsideration of his case. In a sense, Parliament is effectively *functus officio* in the matter and is under no duty or obligation to revisit it.

In this respect, I find no merit whatsoever in the Applicant's contention and entertain no difficulty at all in dismissing it.

Privileges, Immunities & Powers of Parliament Act [*Chapter 2:08*]

For present purposes, the relevant provisions of Chapter 2:08 are sections 3, 16, 21 and 32. These provisions are as follows.

> "3. Parliament and members and officers of Parliament shall hold, exercise and enjoy—
> (a) the privileges, immunities and powers conferred upon Parliament, respectively, by this Act or any other law; and
> (b) all such other privileges, immunities and powers, not inconsistent with the privileges, immunities and powers referred to in paragraph (a), as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on the 18th April 1980."

> "16. (1) It is declared for the avoidance of doubt that Parliament has all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission of any act, matter or thing in this Part declared to

be an offence without derogation from the powers and jurisdiction exercisable by Parliament by virtue of paragraph (b) of section *three* with respect to the commission of any act, matter or thing, whether or not in this Part declared to be an offence, which is or may be adjudged by Parliament to be a contempt.

(2) Parliament shall have power to award and execute the punishments provided by this Part for the commission of any act, matter or thing which in this Part is declared to be an offence.

(3) Subsection (2) shall not be construed as precluding Parliament from awarding and executing any punishment for the commission of any act, matter or thing referred to in that subsection which Parliament has power and jurisdiction to award and execute by virtue of paragraph (b) of section *three* in addition to or instead of any punishment provided by this Part for the commission of that act, matter or thing.

(4) Parliament sitting as a court shall have all such rights and privileges of a court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act, matter or thing which in this Part is declared to be an offence."

"21. Any person who commits any act, matter or thing specified in the Schedule shall be guilty of an offence and liable to a fine not exceeding four thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

"32. (1) It is declared for the avoidance of doubt that any person adjudged by Parliament to be guilty of a contempt which is not an act, matter or thing declared in Part V to be an offence may, in addition to any other penalty to which he is liable by virtue of this Act or any other law, be committed to prison for such period during the current session of Parliament as Parliament may determine.

(2) Any person referred to in subsection (1) who, because of a prorogation or dissolution of Parliament, has not served a period of imprisonment deemed sufficient by Parliament may be committed to prison in the next session until Parliament is satisfied.

(3) Parliament shall not have power to impose—

(a) any fee for any contempt; or

(b) any fine for any contempt which is not an act, matter or thing

declared in Part V to be an offence.

> (4) The provisions of sections *twenty-three* and *twenty-four* shall, apply *mutatis mutandis*, to a warrant of committal to prison issued in pursuance of subsection (1) or (2)."

Also pertinent is paragraph 16 of the Schedule which penalises "Assaulting, insulting, interfering with or wilfully obstructing a member coming to or going from Parliament or whilst within the precincts of Parliament …….. ."

The Applicant's argument for early release is predicated on section 32 of the Act. It is that section 32(1) permits Parliament to commit any person to prison only during the current session of Parliament. Where any such person is to be committed to prison for a further period, section 32(2) allows such re-committal in the next session of Parliament. The combined effect of these provisions, so it is argued, is that every person committed to prison by Parliament must be released from prison when Parliament is prorogued or dissolved.

The obvious flaw in this argument is the clear confinement of section 32(1) to "a contempt which is not an act, matter or thing declared in Part V to be an offence". For present purposes, the salient provisions of Part V are contained in sections 16(2) and 21 as read with paragraph 16 of the Schedule. The overall effect of these provisions is that any person who assaults a member within the precincts of Parliament is guilty of an offence and may be committed to imprisonment for a period not exceeding two years. The period of imprisonment so fixed constitutes a definite term that is not subject to restriction or truncation by dint of section 32.

It seems apposite at this juncture to explore the reasons for this divide between the provisions of Part V and section 32. As is evident from section 3(b) of the Act, Parliament is vested with all the privileges, immunities and powers as were held by the House of Commons in the United Kingdom as at the 18th of April 1980. For the avoidance of doubt, section 16(1) declares that the additional penal powers and jurisdiction conferred by Part V of the Act are without

derogation from the inherent penal powers and jurisdiction exercisable by virtue of section 3(b). Again for the avoidance of doubt, section 32(1) declares that a person adjudged by Parliament to be guilty of a contempt falling outside the purview of Part V may be committed to prison – but only for a period during the current session of Parliament.

The reason for confining imprisonment under section 32 to the current session of Parliament is not immediately discernible from the Act itself. In order to understand the peculiarity of this provision, it is necessary to examine the corresponding position in England as at April 1980.

In *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21st edn. 1989, pp. 103-114, the learned authors expound the penal jurisdiction of both Houses of Parliament. At pp. 103-104, they observe –

> "The Lords are a court of record, and as such have power not only to imprison but to impose fines. They also imprison for a fixed time …….. . The Commons' claim to be a court of record has been virtually abandoned though the consequences have not included surrender of all the concomitant powers. …….. On the other hand, though the Commons formerly imprisoned offenders for a time certain, it has subsequently been considered as wanting the power to commit for a period beyond the end of the session; and unlike the Lords, which enjoys an undisputed status as a court of record, the Commons has not levied fines in the modern period."

As regards the period of committal and discharge, they state further, at pp. 108-109 –

> "The Lords has power to commit offenders to prison for a specified term, even beyond the duration of the session. ……..
> The Commons abandoned its former practice of imprisoning for a time certain, and is now considered as without power to imprison beyond the session. The more recent practice of the Commons has been not to commit offenders for any specified time, but generally or during pleasure …….. .

> Persons committed by the Commons, if not sooner discharged by the House, are immediately released from their confinement on a prorogation. If they were held longer in custody, they would be discharged by the courts upon a writ of *habeas corpus*.
>
> Where, however, the House considers that an offender who has thus regained his liberty has not been sufficiently punished, he may be again committed in the next session and detained until the House is satisfied."

What is evident from the passages quoted is that the House of Lords is a court of record and has the power not only to imprison for a fixed duration but also to impose fines. In contrast, the House of Commons is no longer a court of record. More significantly, it cannot impose fines nor can it imprison beyond the current session.

Reverting to our own situation, the above distinctions and variations are clearly recognised and specifically addressed in our Act. As already indicated, Parliament is inherently endowed with the penal powers and jurisdiction vested in the House of Commons (sections 3(b) and 16(1)). As such, it may commit any offender to prison during the current session (section 32(1)) and may re-commit that offender in the next session (section 32(2)). However, it may not impose any fine for any contempt which is not declared to be an offence under Part V of the Act (section 32(3)).

In my view, Part V of the Act is deliberately designed to override these limitations on the powers of the House of Commons and to invest our Parliament with the plenary penal powers enjoyed by the House of Lords. Thus, in relation to those acts and contempts which are declared to be offences under Part V, Parliament sits as a court of record and is empowered not only to impose fines but also to commit offenders to imprisonment for a fixed term, even beyond the duration of the current session.

To conclude this aspect of this case, it is clear that the special provisions of Part V of the Act stand apart from the general provisions of Part VII and section 32 of the Act. The Applicant *in casu* was found

guilty of contempt in the form of offences specified in the Schedule and covered by Part V of the Act. He was then committed to a fixed term of imprisonment in accordance with sections 16(2) and 21 of the Act. The offences encompassed by these provisions and the consequences thereof fall outside the remit of section 32. It follows that the Applicant cannot invoke that section in order to claim his early release from prison upon the dissolution of Parliament.

Summation

To sum up, the application fails on all of the three grounds proffered by the Applicant as warranting his early release from imprisonment.

Firstly, he may be granted but is not entitled as of right to one-third remission of his sentence under section 109 of the Prisons Act. Secondly, his term of imprisonment is not curtailed or in any other way affected by section 63(8) of the Constitution. And thirdly, his term of imprisonment is not governed by the provisions of section 32 of the Privileges, Immunities and Powers of Parliament Act and, as such, it will not automatically terminate upon the dissolution of Parliament on the 30th of March 2005.

In the result, the application is dismissed with costs.

Kantor & Immerman, legal practitioners for the applicant

Chihambakwe, Mutizwa & Partners, legal practitioners for the 1st respondent

Civil Division of the Attorney-General's Office, legal practitioners for the 2nd and 3rd respondents.