Judgment No. HB 97/2003
Case No. HC 1309/2003

JOHN RAPHAEL MASUKU

Versus

THE ATTORNEY-GENERAL, ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 26 AUGUST AND 18 SEPTEMBER 2003

J James for applicant
S Musonha for respondent

Urgent Chamber Application

NDOU J: The applicant is facing 19 counts of theft of automobiles and a count of robbery of a motor vehicle. The trial is before us having commenced in October 2002. The applicant has previously applied for bail as evidenced in HB-32-01; HH-79-02; SC-59-02 and HB-57-03. We have heard a number of witnesses. The state still wishes to call a number of witnesses, it seems over fifty (50) more witnesses according to submissions made by its representative. I previously agreed to hear the matter during vacation. Around three weeks of my previous vacations were used to hear the matter. This time around I decline a request by the prosecution to hear the matter over the vacation period and insisted that the matter be properly set down during term. The matter was not set down during the second term of 2003. The applicant protested by way of this application. After the launch of these proceedings, the state without consultation with myself, the Assistant Registrar of this court and applicant's legal practitioner decided to set the matter down during the third term. Some of the dates were not convenient to myself and applicant's legal practitioner. But in the end it is possible that an agreement will be reached on appropriate dates in the third term of 2003.

In this application the order sought is in the following terms –

"It is ordered:

1. That the applicant be and hereby is entitled to his immediate release from custody, and the Registrar of the High Court be and hereby is directed to issue a warrant of liberation for the applicant.
2. That the respondent provide adequate trial dates in respect of the criminal trial which the applicant is presently undergoing which dates are suitable to Mr Justice Ndou and the applicant's legal practitioners within two days of the date of this order, and in the event that the respondent fails to comply with this order, then the applicant may apply for the permanent stay of criminal proceedings which the applicant is presently undergoing before Mr Justice Ndou.
3. That the respondent pays the costs of this application."

The respondent opposed the application. Opposing papers were filed and heads of argument were also filed and the matter was set down for hearing on 26 August 2003. There was no representative of the respondent. I directed that the respondent's representative be given time as he was said to be travelling from Harare. After 25 minutes there was still no appearance and I directed that the hearing be proceeded with. The respondent's legal practitioners in the Bulawayo office were reluctant to come and make appearance. The hearing ended after 45 minutes and still there was no word from the respondent's side. This is, to say the least, a very unsatisfactory state of affairs. Representatives of the state in court proceedings should lead by example.

The main thrust of this application, as I understand it, is that there has been an unreasonable delay in setting down the partly heard matter for continuation resulting in an unfair trial of the applicant. A person charged with a criminal offence has a right to a fair hearing within a reasonable time. This is a fundamental right enshrined in section 18(2) of the Constitution of Zimbabwe. In re-*Mlambo* 1991(3) ZLR 339(S)

and *S* v *Taenda* 2000(2) ZLR 394(H) at 396-7. According to CHINHENGO J in the latter case at 397A-B –

> "In general, an unreasonable delay to the finalisation of criminal proceedings causes prejudice to the accused. He suffers social prejudice arising from doubt as to his integrity or conduct. The presumption of innocence does not, in the eyes of the public, family and friends, continue to operate as long he is on remand or his case remains uncompleted."

We are dealing here with pre-conviction delay. Is the delay in *casu*, unreasonable? The answer to this question will inevitably determine the outcome of this application. The principles to be applied in determining whether the delay was unreasonable and the interests to be considered in such a determination were aptly set out by CHINHENGO J in the *S* v *Taenda supra* at 397D-E as follows-

> "To arrive at a determination whether there has been an unreasonable delay one has to balance several interests – the conduct of the prosecution, the conduct of the accused, the length of the delay, any reasons given to justify the delay and prejudice to the accused. Regard, it has been said, must also be had to the accused's assertion, or failure to assert, his right to a speedy trial. But it must be borne in mind always that accused persons who are not legally represented should not be penalised for lack of knowledge as to their rights in this regard. The accused's failure to assert his right to a speedy trial should not generally be regarded as an important factor, especially where it is not established that the accused has in his own way contributed to the delay. To over emphasise that as a factor may result in failure to afford the accused the protection to which he is entitled once it is established that the delay was unreasonable. In this regard I agree entirely with the sentiments expressed by GILLESPIE J in *S* v *Mavharamy* 1998(2) ZLR 341(H) …"

At page 398D to 399A and C the learned judge further observed-

> "The determination as to whether there has been an unreasonable delay therefore calls for a rational and objective assessment of all relevant factors. Included among the factors are systemic conditions arising from the practical situation appertaining in this country – resource limitations and congestion in the courts and, perhaps administrative incompetence, all of which, though taken into account, must not be accepted as excuses so as to diminish the state's responsibility in regard to them or to detract from their prejudicial effect on the accused – *Mlambo*'s case *supra* at 346A-B. The words of ICRIEGLER J in *Sanderson* v *Attorney General, Eastern Cape* 1998(1) SACR 227(CC) are opposite. At 242a-c he said-

"The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or pre-ordained. In some jurisdictions, prejudice is presumed – sometimes irrefutably – after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to impose semi-formal time constraints on the prosecuting authority. That would be a law making function which it would be inappropriate for the court to exercise. The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial related interests that concern us. Of the three forms of prejudice, the trial related variety is possibly hardest to establish and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice that section 25(3)(a) [equivalent to our section 18(2)] seeks to diminish."

And at 244c-f:

"Having isolated some of the relevant considerations, how are they assimilated in determining whether or not a lapse of time is reasonable? The qualifier 'reasonableness' requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial and resolving the liability of the accused. Particularly, when the applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit from belonging to a society which requires the prosecution to prove its case in a public forum. We have also to be prepared to pay a price for our membership of such a society, and accept that the criminal justice system such as ours invariably imposes burdens on the accused. But we have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are reasonable. Delay cannot be allowed to debase the presumption of innocence and become itself a form of extra-curial punishment. A person's time has a profound value, and it should not become a play-thing of the state or society.
This case on which I have relied for my determination of the question before me was not concerned with a person who had been tried and convicted as in the present case, but with one who had not been tried but had been on remand for a long time from the time that he was charged with the offence to the time that he applied for a permanent stay of prosecution. But the principles to bear applied in determining whether the delay was unreasonable and the interests to be considered in such a determination are similar."

In this case the applicant must have perceived that there would be a delay in the completion as shown by the number of bail applications which I alluded to above.

He applied for bail pending trial on more than one instance. He took his quest for liberty up to the Supreme Court. This conduct, in my view, was a form of asserting his rights. I will therefore, not hold against him the failure to assert his right during the period he was in custody.

In this matter it is not disputed that there has been a delay in finalisation. The only issue is whether such delay is unreasonable. This is a complex matter involving several witnesses, hundreds according to the respondent. Over thirty of those have already testified. The stolen vehicles have been, in most instances, interfered with as far as engine or chassis numbers. Forensic evidence will be led on such issues. The number of witnesses makes the logistics of setting the matter difficult in light of the congestion in this court. With such a long and complex case the burden on the applicant is inevitable. Such a burden is profoundly troubling and incidental but I have to ensure that such a burden is not unreasonable. I have to strike a balance between the social interest and the applicant's rights. The state has taken belated steps to set the matter down for hearing during the third term of 2003. A number of cases have been removed from the roll to accommodate this matter. There is a cognisable indication that the state has given this matter the priority that it deserves. Looking at all these factors rationally and objectively I hold the view that the delay is not unreasonable. I appreciate that the delay is a burden of the applicant but looking at the circumstances holistically, the delay is in the main, understandable. At least for now that is the situation but this finding should not be seen as a green-light to the respondent to drag its feet. In light of this finding the first relief sought in (1) *supra* must fail. As far as the second relief in (2) is concerned I am satisfied that it should succeed.

On the question of costs, it is trite that this is within my discretion. In exercising this discretion I have to take into consideration the circumstances of the case, carefully weigh the various issues in the case, the conduct of the parties and any other circumstances having a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties – *Fripp* v *Gibbon & Co* 1913 AD 354; *Davidson* v *Standard Finance Ltd* 1985 (1) ZLR 173 (HC); *Kerwin* v *Jones* 1958(1) SA 400 (SR); *Gwinyayi* v *Nyaguwa* 1982(1) ZLR 136 (SC) and *Waste Products Utilisation (Pty) Ltd* v *Wilke's & Anor* 2003 (2) SA 590(W).

The applicant is partially successful. He is not responsible for objectionable conduct in causing the delay. The respondent did not set down the matter for continuation until these proceedings were launched. I see no reason why the applicant should not be indemnified for the expense to which he has been put through having to launch this application to have a trial date provided by the respondent.

In the circumstances I make the following order –

It is ordered-

1. That the respondent be and is hereby directed to provide adequate trial dates for the continuation of the criminal matter which the applicant is currently undergoing, which dates are suitable to the trial court and the applicant's legal practitioners, within two days of the date of this order and such trial dates shall be within the third term of this court, 2003.
2. That the respondent shall pay the costs of this application.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners
Criminal Division of the Attorney-General's Office respondent's legal practitioners