

**ZIBUSISO CHARLES NCUBE**

**Versus**

**TAVENGWA SANGSTER N.O.**

**And**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
KABASA J  
BULAWAYO 27 JULY AND 4 AUGUST 2022

**Urgent Chamber Application**

*T. Dube*, for the applicant  
No appearance for the 1<sup>st</sup> respondent  
*N. Ngwenya*, for the 2<sup>nd</sup> respondent

**KABASA J:** This is an urgent chamber application wherein the applicant seeks the following relief:-

- “1. The criminal trial proceedings against the applicant pending before Bulawayo Magistrates Court under case number CRB BYO 743A-B/22 be and are hereby stayed pending finalisation of the review application filed under case number HC 1194/22.
2. The 2<sup>nd</sup> respondent shall pay costs of suit if the application is opposed.”

The background facts are these: - The applicant appeared before the 1<sup>st</sup> respondent on 26<sup>th</sup> May 2022 and the matter was supposed to be for trial. The defence made an application before commencement of the trial seeking to be served with police diary logs in order to prepare the applicant’s defence outline. The argument was that one Smith Moyo had made a report against the applicant and the applicant gave a warned and cautioned statement in response to that report. The matter was then referred to the National Prosecuting Authority who intimated that the issue appeared to be a civil matter. This was in 2020. In 2021 the

applicant was then informed that the complainant was now one Marata, a change from Smith Moyo. The applicant wanted to know what informed that change in the identity of who the complainant was and the police diary log would assist in that regard.

The application was opposed by the second respondent contending that the applicant had all he needs for purposes of preparing a defence outline. All else regarding the change of the identity of the complainant and how that came about was of no consequence as such would be dealt with at trial. In the event that the evidence showed that the case was a civil matter and not one warranting a criminal charge the matter will be so decided at trial.

The brief facts upon which the criminal charge is premised involve the sale of a plot which belonged to Maxwell Sibanda but had been bought by Smith Moyo. One Progress Dube obtained judgment against Sibanda and the plot was attached to be sold in execution. The applicant represented Progress Dube. Smith Moyo's interpleader application was dismissed whereupon Smith Moyo decided to take over payment of the debt so as to save the plot from being sold. Following that agreement the plot was transferred to Smith Moyo. Despite that agreement and the payment of the debt by Smith Moyo, the plot was subsequently auctioned to Mike Marata with the connivance of the applicant, the Messenger of Court and Michael Nekati, a real estate manager, giving rise to the fraud charge which is the charge the applicant is supposed to be tried for. When the applicant was initially informed of the charges he was jointly charged with the two but this position later changed. When the applicant was then summoned after the NPA had had a look at the docket, the complainant was now Mike Marata and not Smith Moyo and the 3<sup>rd</sup> accused Michael Nekati had now been dropped leaving the applicant and the Messenger of Court, Mgcini Moyo as the 2 co-accused.

The foregoing formed the basis of the applicant's application for the police diary logs so as to see why the complainant had changed and why the 3<sup>rd</sup> accused was dropped, information applicant said he required in order to prepare his defence outline.

The 1<sup>st</sup> respondent handed down his ruling on 24 June 2022 and reasoned that the police diary log is a running commentary on the police efforts to investigate a case and included views and opinions of different people involved in the case. It was therefore not a

document that contains evidence and could therefore not be said was important to assist the applicant in the prosecution of his defence.

The 1<sup>st</sup> respondent concluded as follows:-

“The defence cannot seek to say we must see the reasons according to the police diary why they changed their position or why they made such and such a decision. What they should do is prepare their defence according to the information which is before them because the law does not expect the state to start bringing evidence that they never served the defence with. It is not an ambush. It is the court’s view that the reasons proffered are not enough to sway this court to compel the state to avail the said police diaries, the application is dismissed.”

Aggrieved with this ruling the applicant filed an application for review on 6 July 2022 contending that the 1<sup>st</sup> respondent’s decision is grossly irregular and violates the applicant’s right to a fair trial as enshrined in the Constitution.

The application I am now seized with seeks to stop the pending trial until this review application is determined.

The application is opposed and the 2<sup>nd</sup> respondent took a point *in limine*, arguing that there is no urgency. The applicant holds a different view.

When is a matter urgent? In *Document Support Centre (Private) Ltd v T.F Mapuvire* 2006 (2) ZLR 240 had this to say:-

“... a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then for in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant.”

This is a matter where the applicant argues that his right to a fair trial is under threat. The right to a fair trial is a fundamental right protected by the Supreme law of the land that is the Constitution.

The nature of the right sought to be protected and the fact that the criminal trial at the Magistrates Court has stalled pending the determination of this application persuades me to hold that the matter is urgent.

For this reason therefore the point *in limine* is dismissed. I had asked the parties to address me on both the point *in limine* and the merits so as to obviate the need for a further hearing if, as has happened here, the point *in limine* found no favour with the court.

I turn now to consider the merits. Granted the trial before the 1<sup>st</sup> respondent stalled as the applicant had not prepared a defence outline, I would nonetheless regard this application as one that seeks to interfere in uncompleted proceedings.

Has the applicant made a case for the temporary interdict he seeks? Reference was made to MATHONSI J's (as he then was) decision in the case of *Mukwena v Magistrate Sanyatwe N.O and Anor* HH 765-15 where the learned Judge had this to say:-

“In order to succeed in securing a stay of proceedings pending the review application, the applicant must establish those factors which would entitle him to a temporary interdict, namely, a *prima facie* right, an injury actually committed or reasonably apprehended, the absence of similar protection afforded by any other ordinary remedy and a balance of convenience favouring the grant of the interdict for interdict it is when the respondents are barred from proceeding with the trial.”

I propose to consider each one of these requirements in turn:-

1. *Prima facie* right

The right to a fair trial is enshrined in section 69 (1) of the Constitution. The relevant provision provides that:-

“(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.”

Is this right under threat? I think not. The applicant is aware of the charge he is facing, he is equally aware of the facts upon which such charge is premised and what evidence will be adduced and from whom in order to determine his guilt or innocence. He has been furnished with the state papers, which include the state witness statements. More importantly, he is aware of what his defence is to the allegation of fraud as detailed in the state papers.

If what the applicant has been supplied with does not amount to a process meant to ensure he gets a fair hearing then I do not know what would.

This issue leads on to the aspect of access to information which the applicant argues is his Constitutional right. I have already alluded to that which has been availed to the applicant in order to prepare for trial.

In his ruling the 1<sup>st</sup> respondent relied on the decision in the case of *S v Chibaya and Others* HH 04-07 where the court had this to say:-

“The question of the diary logs made by the police is a different matter. The applicants have not invoked before me any legal premise upon which an accused facing a trial is entitled as of right access to these documents. The diary logs are not evidence that would be produced at the trial. .... Given that this is a running commentary on the efforts by the police to investigate the matter, what possible assistance can it provide to an accused person in the prosecution of his defence.”

Access to information coupled with the right to a fair hearing relates to that which is relevant for the preparation of one’s defence. If, for example, such diary log has an entry querying why Smith Moyo and not Marata or *vice versa* was made the complainant or whether or not the facts disclose a criminal offence, of what benefit is that to the applicant? What is important is whether as a result of the investigations enough evidence was obtained to mount a prosecution and what such evidence is. *In casu* the applicant was provided with the state papers and it is to those state papers that he must look in preparing his defence outline. The applicant therefore has been given the information any accused person should get in order to prepare for trial.

There has been no threat perceived or real to the right to a fair trial.

This leads to the issue of:-

**2. Whether an injury has been committed or reasonably apprehended**

An injury would have been committed had the applicant not been given what he is entitled to and requires in order to know the case he is to meet and to prepare an answer to such a case. The contention that the remarks by GOWORA J (as she then was) in the *S v Chibaya* case (supra) were made before the coming into force of the 2013 Constitution does not hold water. This is so because the remarks by GOWORA J were that:-

“Our courts have now gone further in the duty to disclose. In *S v Sithole* DEVITTIE J held that unless the state was able to justify non-disclosure of witnesses’ statements on grounds of public interest or some other legitimate basis, the accused ought to be provided with copies of the statements he has requested. Thus the accused’s entitlement to information contained in the docket has been expanded subject to certain limitations. The duty to disclose ought not to depend upon a request by the accused but must be premised by considerations of affording an accused person a fair trial unless non-disclosure is justified or can be justified. The entitlement of the accused to witness statements contained in the police docket is thus part of our law. He is entitled to be furnished by the state of all information that would enable him to adequately prepare for the trial and mount a defence to the charges confronting him,” these remarks hold true and are apposite even with the coming into force of the 2013 Constitution. Police diary logs, do not contain information which an accused or applicant in this case requires to adequately mount a defence to the charge. The non-availing of police diary logs cannot be said to amount to a violation of the right to access to information.

Whilst I am aware that this is not the review application the applicant seeks to have determined, I am however not hindered from commenting on the prospects of success of such application as it makes no sense to stop proceedings where the application sought to be prosecuted has no bright prospects of success.

I find the remarks by MAKONESE J in *Sibusisiwe Mhlanga v Magistrate Dzira N.O and Anor* HB 111-22 apposite. The learned judge had this to say:-

“If the review application does not have prospects of success the application for a stay of proceedings must fail. It is trite that this court does not encourage applications for the review of criminal proceedings before a trial is concluded. If, however, there are exceptional circumstances and evidence that the application for review is meritorious such a review can be entertained.”

The injury articulated by the applicant to the effect that he cannot prepare a defence outline without access to a police diary log was adequately addressed by the 1<sup>st</sup> respondent in a well-reasoned ruling, making such injury a red herring not supported by facts.

I turn now to the third factor:-

**3. Absence of similar protection offered by any other ordinary remedy**

The applicant is yet to stand trial. At such trial witnesses are going to testify.

The issues relating to whether whoever is the complainant is indeed one or whether an offence was committed will be ventilated with the adducing of evidence. It is only through

submitting himself to this process that the applicant will be able to challenge the evidence, discredit it and show the civil nature of the matter.

There is therefore adequate protection as whatever evidence the state is to adduce will be tested at trial.

In *Prosecutor General of Zimbabwe v Intratek Zimbabwe (Pvt) Ltd & Ors* SC 67-20 MAKARAU JA (as she then was) cited MALABA JA's (as he then was) decision in *Attorney-General v Makamba* 2003 (2) ZLR 54 (S) on when a superior court should interfere with the untermiated proceedings of a lower court. Stopping a trial which is ready to proceed amounts to such interference and must therefore pass the test as enunciated in the Makamba case (supra).

“The general rule on when a superior court may interfere with the untermiated proceedings of a lower court was settled in *Attorney-General v Makamba* 2003 (2) ZLR 54 (S) where MALABA JA (as he then was) had this to say at 64C

“The general rule is that a superior court should interfere in uncompleted proceedings only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant.”(See also *Robert Gumbura and 6 Ors v Francis Mapfumo N.O and Anor* SC10/21)

This is not the case *in casu* and the assertion by the applicant that the application for review enjoys good prospects of success could not be further from the truth, given the basis of the application and the decision that is sought to be vacated by that application. I have already expressed the view that such decision was well reasoned. I refrain from saying more lest I be seen to be pre-judging the application for review.

The last factor relates to:-

#### 4. **The balance of convenience favouring the grant of the interdict**

Delays in commencement and finalisation of trials result in back-logs which the courts are grappling with, choking the justice delivery system to the prejudice of all players. The sooner a matter is tried the better for all, that is, the accused, prosecution and the courts.

The balance of convenience *in casu* favours the lifting of any impediments to the commencement of the trial.

In conclusion I must just point out that applications that seek to stop proceedings of the lower courts must be made only when they are warranted. Magistrates are qualified judicial officers whose competency requires that superior courts be very slow at interfering with matters they are seized with and are yet to finalise.

With that said, the answer to the question I posed earlier on, i.e. whether the applicant has made a case for the relief he seeks is, no, he has not

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In the result I make the following order:-

The application for stay of trial proceedings be and is hereby dismissed.

*Mathonsi Ncube Law Chambers*, applicant's legal practitioners

*National Prosecuting Authority*, 2<sup>nd</sup> respondent's legal practitioners