

REPORTABLE (3)

JOEL NORMAN SENGEREDO v THE STATE

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA,
GOWORA JA, PATEL JA, HLATSHWAYO JA & GUVAVA JA
HARARE, FEBRUARY 26 & NOVEMBER 10, 2014**

T Mugabe, for the applicant

I Muchini, for the respondent

CHIDYAUSIKU CJ: This application was referred to this Court by the court *a quo* in terms of s 24(2) of the old Constitution of Zimbabwe (hereinafter referred to as “the Constitution”). The facts forming the background to this application are the following –

The applicant was charged in the magistrate’s court with two counts of fraud as defined in s 136(B) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In Count One it is alleged that on 19 February 2008 and at no. 30 East Road, Avondale, Harare, the applicant unlawfully, and with intent to defraud, misrepresented to the complainant in Count One that he was selling a property, stand number 521 St Patrick’s Close, Helensvale Township, Harare (“the stand”), when he well knew that he was not selling the said property but only intended to induce the complainant in Count One to act upon the misrepresentation and pay him some money. As a result of this misrepresentation the complainant in Count One paid the applicant the sum of US\$62,000 (Sixty-two thousand United States dollars), thereby causing the complainant in Count One to suffer prejudice in the amount of US\$62,000 (Sixty-two thousand United States dollars).

In Count Two it is alleged that on 11 October 2008 and at no. 30 East Road, Avondale, Harare, the applicant unlawfully, and with intent to defraud, misrepresented to the complainant in Count Two that he was selling a property, stand number 521 St Patrick's Close, Helensvale Township, Harare, yet in truth and in fact he was not selling the said property. The applicant made the misrepresentation when he well knew that he was not selling the said property but only intended to induce the complainant in Count Two to act upon the misrepresentation. The complainant in Count Two paid the applicant the sum of US\$48,500 (Forty-eight thousand five hundred United States dollars), thereby causing the complainant in Count Two to suffer prejudice in the amount of US\$48,500 (Forty-eight thousand five hundred United States dollars). In short, the applicant sold the same stand to two different people from whom he received the above amounts.

The applicant was arrested by the police in connection with the above allegations. He was made to sign a warned and cautioned statement on 15 February 2009 after being formally advised that criminal proceedings were being preferred against him. On 17 February 2009 he was placed on remand on these allegations. On 05 November 2009, after attending court on no less than ten occasions, further remand was refused.

It would appear from the record that some time in November 2010 a decision was arrived at by a law officer in the then Attorney-General's Office to decline prosecution, on the ground that the allegations against the applicant do not constitute a criminal offence. He opined that the allegations against the applicant constituted a civil wrong, for which the complainant could sue the applicant. Quite clearly, this conclusion by the law officer is

erroneous. The alleged conduct of the applicant, if proved, constitutes both a criminal offence and a civil wrong.

In May 2011 the Attorney-General rescinded his earlier decision to decline prosecution and directed that the applicant be re-summoned to attend court. It would appear that the Attorney-General rescinded the earlier erroneous decision after representations from the complainant in Count One.

On 10 August 2011 the applicant was placed on remand and thereafter remanded on a number of occasions.

On 20 February 2012 the applicant made an application for referral of this matter to this Court for determination in terms of s 24(2) of the Constitution. The trial magistrate granted the application and the matter was referred to this Court.

Two issues fall for determination in this application –

1. Whether the applicant's right to a fair hearing within a reasonable time, as enshrined in s 18 of the Constitution, was violated; and
2. Whether the applicant's right to protection of the law, as enshrined in s 18 of the Constitution was violated by the State, in that the Attorney-General rescinded his decision not to prosecute the applicant after receiving representations from the complainant in Count One.

Counsel for the applicant made detailed submissions in support of these two grounds.

I will deal with the second ground first. The submission that a complainant's representation to the Attorney-General to reconsider his decision in a criminal matter is unconstitutional and violates the accused's right to protection of the law as it undermines the independence of the Attorney-General is misconceived. A complainant in a criminal matter has a substantial interest in the prosecution of an accused. In my view, a complainant is perfectly entitled to make representations to the Attorney-General regarding such prosecution. The Attorney-General is not bound to accept such representations. He can either accept or reject such representations depending on whether or not he finds merit in the representations. In terms of the law, where the Attorney-General does not accept the representations the complainant is entitled to a certificate of *nolle prosequi* – see s 13, as read with s 16, of the Criminal Procedure and Evidence Act [Chapter 9:02]. The mere fact that representations have been made does not in any way interfere with the independence of the Attorney-General, who is free to accept or dismiss such representations. In fact this submission is as absurd as submitting that the Court's independence is compromised by submissions by counsel.

This ground of challenge therefore fails.

I now turn to the first ground of challenge, namely the alleged inordinate delay in bringing this matter to trial. This Court has dealt with applications for stay of prosecution on the grounds of inordinate delay in trying the accused on numerous occasions and the law is now well settled. In the leading case of *In Re Mlambo* 1991 (2) ZLR 339 (SC), this Court set out the procedure to be followed and the factors that a court takes into account in deciding whether the applicant's right to a fair trial within a reasonable time has

been violated or not. The following are the factors to be taken into account in making a determination –

1. the explanation and responsibility for the delay;
2. the assertion of his right by the accused person;
3. the prejudice arising from the delay; and
4. the conduct of the prosecution and of the accused person in regard to the trial.

The case of *In Re Mlambo supra* has been followed in numerous cases. In the case of *S v Banga* 1995 (2) ZLR 297 (S) at pp 300 F-G the Court had this to say:

“The principles which govern applications of this nature are now well settled. They were set out in *In re Mlambo (supra)* and have since been applied on many occasions; more recently in *Hungwe & Ors v A-G* S-50-94; *S v Matarutse* S-101-94 and *S v Marisa* S-126-95.

In this application, the period of slightly over four years was presumptively long enough to trigger an enquiry into the factors that go into the balance in the determination of whether the delay in bringing the applicant to trial was reasonable in the pertaining circumstances. These factors are –

- (i) the explanation and responsibility for the delay;
- (ii) the assertion by the applicant of his fundamental right to a hearing of the case within a reasonable time;
- (iii) the existence of any prejudice suffered by the applicant resulting from the delay.”

To enable this Court to properly determine the factors set out in *In re Mlambo supra*, certain peremptory requirements have to be met by the applicant making such an application. In *Banga’s* case *supra* at pp 300G-301B the Court pronounced itself as follows:

“Regrettably, the manner in which the legal practitioner requested the referral was totally misconceived. It was wholly insufficient to make a statement from the bar, and then to point solely to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his

responsibility; to whether at any time before 16 August 1994, he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether any actual prejudice had been suffered as a result of the delay.

Such a fundamental omission on the part of the defence is fatal to the success of the application.

This Court has stressed frequently that if an accused is of the view that the State is dragging its feet in bringing him to trial, he must assert his constitutional right to be tried within a reasonable time and in default of compliance with such protest seek a stay of proceedings. See *S v Ruzario* 1990 (1) ZLR 359 at 367F-G; *In re Mlambo supra* at 354B-C; *S v Musivitsi & Anor* S-229-93 at p 6; *S v Matarutse supra* at p 3.”

The Court went further to state the following at pp 301F-302A:

“I trust that I have made it clear that it is essential for an accused, who requests a referral to this Court of an alleged contravention of the Declaration of Rights, to ensure that evidence is placed before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the Supreme Court hears argument and then decides if a fundamental right had been infringed. Only in exceptional circumstances will an applicant be permitted to supplement the record of the proceedings before the lower court by the production of affidavits. Cogent reasons will have to be provided as to why the further evidence was not presented to the lower court. The well known requirements laid down in *Farmers' Co-op Ltd v Borden Synd (Pvt) Ltd* 1961 R & N 28 (FS), 1961 (1) SA 441 (FS) and as discussed latterly in *Leopard Rock Hotel Co (Pvt) Ltd v Walenn Const (Pvt) Ltd* 1994 (1) ZLR 255 (S) and *Bevan Trading (Pvt) Ltd v Voest-Alpine Intertrading GbmH* S-149-94, will have to be met.”

In casu, the legal practitioner for the applicant did not fully appreciate what was required of him. He only made submissions from the Bar and simply pointed to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility or that of the prosecutor. He was required to place before the magistrate's court evidence as to whether at any time before 28 February 2012 the applicant had asserted his right to a fair trial within a reasonable time and, even more importantly, whether or not actual prejudice had been suffered as a result of the delay. See *S v Nkomo and Anor* SC 89/03.

The failure by the applicant's legal practitioner to place evidence before the magistrate's court, which evidence would have assisted this Court in assessing the relevant facts in this case, was fatal.

Accordingly, the application is dismissed. There will be no order as to costs.

MALABA DCJ: I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

PATEL JA: I agree

HLATSHWAYO JA: I agree

GUVAVA JA: I agree

Nyakutombwa|Mugabe Legal Counsel, applicant's legal practitioners