REPORTABLE (66)

HELEN MATIASHE
v
(1) THE HONOURABLE MAGISTRATE MAHWE N.O (2) THE ATTORNEY GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ,
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, MAY 16 2013, & DECEMBER 4 2014

T. Mpofu, for the applicant
J. Uladi, for the respondents

GARWE JA: In this application, the applicant seeks the following relief:-

1. A declaration that the refusal by the Magistrate to refer the issues raised by the applicant to the Supreme Court is wrong at law and consequently a breach of the applicant's right to the protection of the law enshrined in section 18(1) of the former Constitution of Zimbabwe.
2. A declaration that the decision by the Attorney-General to proceed with the prosecution of the applicant more than five years after the alleged commission of the offence is a violation of the applicant's right to the protection of the law under section 18 of the former Constitution.
3. A declaration that the present application is properly before the Supreme Court.

4. An order that, the prosecution of the applicant being a violation of her right under section 18, such prosecution be and is hereby permanently stayed.
5. An order that the respondents pay the costs of this application.

THE BACKGROUND

The applicant and one Cecil Rhaniel Chengetai Muderede ("Muderede") were engaged in an intimate relationship until about 2005 when the relationship came to an end. At the centre of the dispute giving rise to the present proceedings are two properties. The first is Number 4 Goodall Avenue, Emerald Hill, Harare registered in the name of Helce Enterprises (Pvt) Ltd, a company incorporated according to the laws of Zimbabwe. It is common cause that, from the time of its incorporation, the applicant's name appeared on the official records of the company as one of the two directors of the company. The second property is Number 106 Lomagundi Road, Avondale, registered in the name of another company, Drisdane Investments (Pvt) Limited. It is not in dispute that it was Muderede who purchased this property.

In May 2004 Muderede was specified under the Prevention of Corruption Act [*Cap 9:16*]. Following this development, the applicant proceeded to the offices of the Registrar of Companies where, using the specification of Muderede, she was able to remove the name of Muderede as a director of Helce Enterprises and in his place had the names of her brothers, Kumbirai Matiashe and Kudzai Matiashe, substituted as directors. On the strength of a board resolution passed by the new board, the applicant was able to obtain a duplicate copy of the deed of transfer for number 4, Goodall Avenue, Emerald Hill. The applicant was able, using the same *modus operandi*, to get another duplicate copy of the title deeds for Number 106 Lomagundi Road, Avondale.

On 7 June 2007 Muderede filed a complaint of fraud against the applicant with the police. The allegation on both counts was that the applicant had misrepresented that Muderede had resigned as a director of Helce Enterprises (Private) Limited and Drisdane Investments (Private) Limited and in his place had appointed her two brothers, Kundai Matiashe and Kumbirai Matiashe. It was alleged that on the basis of the misrepresentation, the applicant managed to get duplicate title deeds for both properties.

On 25 June 2007, the applicant made a statement to the police. She was thereafter placed on remand. On 26 February 2008 the charges against the applicant were withdrawn by the State. However on 17 July 2012 the applicant was served with summons to appear in court on 6 August 2012. On 21 August 2012 the applicant then filed an application in the Magistrates Court seeking a declaration that the decision by the Attorney-General to try her after six years violated her right to the protection of the law enshrined in s 18 of the Constitution and that the matter be referred to the Supreme court in terms of s 24(2) of the former Constitution.

In papers filed before the Magistrates Court, the appellant stated that the delay of six years during which no trial had taken place was wholly attributable to the State. She had always been available to attend court to answer any allegations. Further she stated that one of her defence witnesses, Doctor Iris Sarupinda, who was present during the time she had a relationship with Muderede, had relocated to Europe and she was not aware of her present whereabouts. The appellant did not give oral evidence in support of her application.

In the Magistrates Court it was not in dispute that on 24 July 2009 and 2 November 2010 the applicant filed a complaint with the police against Muderede and his

wife Michelle. In the complaint she alleged that the two had fraudulently used the title deeds for the two properties to secure mortgage loans in favour of Shankuru Estates. She also complained that a Mr Magwere, from the office of the Registrar of Deeds, a Mr Shadreck Beni from Metropolitan Bank and one Mujokoro, a legal practitioner, had colluded with Muderede and his wife in the fraudulent registration of the mortgage bonds over the two properties.

The State opposed the application for referral of the matter to this Court and led evidence from the Investigating Officer, Detective Inspector Charles Chirove. The Investigating Officer told the court that a number of factors had contributed to the delay in the prosecution of the matter. In 2008 and 2009 the country experienced a severe economic meltdown which affected the ability of the police to carry out its functions. At one stage the police received reports that Muderede was in South Africa. Because Muderede could not be located the charges against the applicant were withdrawn. Thereafter in 2009 and 2010 the applicant filed reports with the police based on the same facts against Muderede, his wife and other persons resulting in the arrest of Muderede on fraud charges. When both cases were sent to court, Muderede queried why his complaint, which had been filed earlier, was being overtaken by the complaint filed later by the applicant. Muderede even approached the Anti-Corruption Commission alleging that the police were giving the applicant preferential treatment. The applicant also harassed the police and even made complaints to Police General Headquarters against the witness and several of his fellow officers. She was saying she wanted to be consulted before the police made any decision on this matter. He told the court he formed the opinion that the applicant was throwing spanners into the works to ensure that the matter went nowhere. In an effort to make some progress the State then reached an agreement with the applicant and Muderede that the case in which Muderede was an accused

was to be tried first. In the event that Muderede was convicted, then the case in which he was complainant would die a natural death. However in the event that he was acquitted, then the case in which applicant was an accused would then commence. As it so happened, Muderede was acquitted in 2012 as a result of which applicant was then summoned to appear in court. It was his evidence that it was the applicant who was largely to blame for the delay.

The Magistrates court was of the view that since the applicant had participated in the agreement which had contributed to the delay she cannot now be heard to complain. On that basis the court found the application to be frivolous and vexatious. The court further found that the application was an attempt to further delay the proceedings. The court therefore dismissed the application. Following that decision the applicant filed the present application in terms of s 24(1) of the former constitution.

THE ISSUES FOR DETERMINATION

It seems to me that the issues that arise for determination are twofold. These are, firstly, whether the matter has been properly brought before this Court in terms of s 24(1) of the former Constitution. Secondly, if so, whether the applicant is entitled to a permanent stay of proceedings.

WHETHER THE MATTER IS PROPERLY BEFORE THIS COURT

In dismissing the application for the referral of the matter to the Supreme Court, the magistrate commented:

> "Accused now wants to renege from her commitment that she would only be prosecuted if only Cyril Muderede was acquitted because the facts forming the basis of the court charges were similar. Cyril Muderede has now been acquitted so the natural interpretation of their agreement should follow. Accused participated in circumstances which caused the delay so she should not cry foul because if she had no hand in this matter the State could have proceeded to cause the trial of both matters at the same time but in different courts.

> Accordingly, I find that the application is just meant to further delay proceedings and it is frivolous and vexatious. Accordingly the application is dismissed."

It is common cause that, at the time of the making of the application, there had been a delay of over five years in the prosecution of the matter. That this delay was presumptively prejudicial is without doubt. The applicant was entitled to challenge the decision of the State to prosecute her on a charge of fraud in respect of which she had been charged more than five years previously. The delay was such as to trigger an inquiry into the possible violation of the applicant's rights to the protection of the law.

It is clear from his reasons for dismissing the request for referral that the Magistrate did not ask himself whether a constitutional issue did arise from the proceedings. He considered that the applicant had contributed to the delay and that she was trying to further delay the day of reckoning. On that basis alone he found the application to be frivolous and vexatious.

I am satisfied that the Magistrate was wrong in determining the application on the basis of who was to blame for the delay. As Mr *Mpofu* correctly submitted, the Magistrate asked himself the wrong question and inevitably came to the wrong conclusion. Indeed the State conceded that the decision to refuse to refer the application was wrong and that it violated the applicant's right to the protection of the law as provided in s 18(1) of the former Constitution.

In these circumstances the applicant was entitled to approach this Court directly – *Martin v Attorney General & Another* 1993(1) ZLR 153(S) 158H; *Mukoko v Commissioner-General of Police & Ors* 2009 (1) ZLR 21, 24B. This Court must now place

itself in the position it would have been in had the Magistrate, as he ought to have done, referred to it the question raised before him.

WHETHER THE APPLICANT IS ENTITLED TO A PERMANENT STAY OF PROCEEDINGS

The factors that this Court is enjoined to consider in an application of this nature are now settled. These are (a) the length of the delay, (b) the reason given by the prosecution for the delay, (c) whether the accused person asserted his rights and (d) the prejudice occassioned to the accused by the delay – *In re Mlambo* 1991 (2) ZLR 339(S), 350 A-G; *Fikilini v Attorney-General* 1990 (1) ZLR 105, 113 A-H (SC). I proceed to consider each of these factors in turn.

(a) THE LENGTH OF THE DELAY

The delay in bringing the applicant to trial is reckoned from 25 June 2007 when she was charged. See *Shumba v Attorney-General* 1997 (1) ZLR 589, 592 G (S). The fact that charges were withdrawn in 2008 is irrelevant. The clock continued ticking. *In re Mlambo (supra)* at p 346 E-H. The applicant was summoned to appear in court for trial on 6 August 2012. The delay from the time she was cautioned was therefore just over five years. That delay was inordinate and sufficient to trigger an inquiry into the possible breach of the applicant's rights under s 18(2) of the Constitution.

(b) THE REASONS FOR THE DELAY

In her application before the court *a quo*, the applicant attached an affidavit in which she explained the basis of her request for the matter to be referred to the Supreme Court. She did not give oral evidence. In the affidavit she stated that she had not contributed

to the delay in any way and that it was the State that had employed dilatory tactics in the prosecution of the matter.

The State however led evidence from the Investigating Officer. His evidence was that the police force, like most other State entities in the country, was affected by the economic difficulties of 2008 – 2009. The result was that the police had no resources to look for Muderede who was in Banket and at one stage was reportedly in South Africa. Instructions had also been issued for further investigations to be carried out after the withdrawal of the charges in 2008. The main cause of the delay however was the fact that the applicant filed two complaints in 2009 and 2010 based on the same facts. The result was that Muderede, who had been complainant earlier, also became an accused. The witness explained that the applicant brought a lot of pressure to bear on the police. She made reports against several police officers including the investigating officer to Police General Headquarters. She wanted her complaint tried first. Muderede too complained that the police were giving preferential treatment to the applicant. It was because of this situation that an agreement was then reached between the applicant, the State and Muderede that the matter in which the applicant was complainant be tried first. If Muderede was convicted then his complaint would die a natural death. However if he was acquitted then the case in which the applicant was the accused would be resuscitated. On that basis, Muderede was tried and was acquitted. Consequently applicant was then summoned so that she would undergo trial on the allegations levelled by Muderede.

Although the Investigating Officer was cross-examined at length on this evidence, he remained unshaken and was adamant that the applicant played a significant role

in the delay. The applicant did not give evidence and consequently the evidence given by the Investigating Officer remained largely uncontroverted.

The position is now settled that an applicant must adduce evidence and be cross-examined on it - *S v Banga* 1995 (2) ZLR 297. Indeed this Court has emphasized that the absence of *viva voce* evidence can be fatal – *S v Nhando* 2001 (2) ZLR 84; *Matutu v S* SC 34/13. In *State v Banga* (*supra*) GUBBAY CJ stressed the need for an applicant to testify on the extent to which, if at all, the cause of the delay was his responsibility, whether he had asserted his rights and whether any actual prejudice had been suffered as a result. At page 301, D-G, the learned Chief Justice remarked further:

> "Moreover, the absence of *viva voce* evidence completely disables findings to be made that the long delay has been the cause of mental anguish and disruption to the business and social activities of the accused, particularly where, as here, his liberty was not interfered with; and that it has impaired his ability to exonerate himself from the charge due to the death, disappearance or forgetfulness of potential witnesses. See In re *Mlambo supra* at 352G and 354D-E; *S v Demba* S-194-94; *S v Marisa supra* at p 9.
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> 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."

On the basis of the evidence adduced before the court *a quo*, the position may be summarized as follows. The delay between June 2007 when the applicant was charged and the year 2009 is attributable to the State. However that period was explained by the State. When the charge was withdrawn in 2008, it had not been possible for the police to contact Muderede. There also had been instructions for some aspects of the case to be further investigated. Further this was the time of hyperinflation and the police had no resources to look for Muderede. This Court can take judicial notice of the fact that indeed 2008 and 2009

were very difficult years and even the operations of this Court were affected owing to the economic situation then prevailing. It was a situation that affected government and the citizenry at large. In my view that explanation cannot be said to be unreasonable.

The delay after 2009 is explained by the fact that the applicant filed criminal complaints against Muderede, Muderede's wife and other persons involved in the registration of the bond on the two properties. The investigating officer explained the difficult situation he and other officers found themselves. They had two dockets on essentially the same facts. The complainant in the one case was the accused in the other. He explained the pressure that was brought to bear on the Police Officers by the applicant. The applicant made complaints to Police Headquarters and investigations into her complaints were instituted. The dilemma that faced the prosecuting authorities was which case to prosecute first. The applicant wanted the case in which she was complainant to be tried first whilst Muderede was insisting that his complaint be tried first as it was first in time. It was against that background that an agreement was reached between the State, the applicant and Muderede that the applicant's complaint be tried first and in the event Muderede was convicted, then his complaint would die a natural death, and, if not, the applicant would then stand trial. Indeed Muderede was tried and acquitted. It was when the State then sought to proceed with the prosecution of the applicant that she then filed the application for stay of criminal proceedings.

In my view, whilst the State, being *dominus litis*, should have been more assertive, the reality is that the State was faced with a difficult question given the allegations and counter allegations made by both, as to whom to prosecute first between the two. The delay was occasioned by this confusion and the agreement that Muderede be prosecuted first.

The explanation in my opinion is acceptable. It is important that one does not take an armchair view of the situation that arose.

In all the circumstances I am of the view that the State has proferred a reasonable explanation for the delay.

(c) WHETHER APPLICANT ASSERTED HER RIGHTS

It must be accepted that, in March 2008, when a further remand was refused, this was at the instance of the applicant. To that extent therefore she asserted her rights. However in 2009 the applicant also filed a complaint on the same facts. The police investigated both complaints. Two dockets were opened. Both the applicant and Muderede were alleging that the police were not impartial.

Clearly during this time the applicant was aware, or ought to have been, that the State wanted to prosecute her. She is said to have approached Police Headquarters making a number of allegations against certain police officers. She did not, during this period, seek to assert her rights. Instead she went along and only after Muderede's acquittal and the decision by the State to prosecute her did she then file the application to permanently stay the criminal proceedings against her. The totality of the circumstances suggests that whilst in 2008 she asserted her rights, from 2009 she did not and was content to go along in the hope that perhaps the criminal allegations would go away.

(d) THE PREJUDICE OCCASSIONED BY THE DELAY

The issue of prejudice should be assessed in the light of the interest of the accused which the speedy trial right was designed to protect. Three such interests have been

identified. These are (i) to prevent oppressive pre-trial incarceration (ii) to minimize anxiety and concern of the accused and (iii) to limit the possibility that the accused will be impaired in his defence. *Fikilini v Attorney – General (supra)* at 113H – 114A.

In her affidavit both in the court *a quo* and before this Court the applicant says her friend, Dr Iris Sarupinda, who was present at the time the companies were formed, has relocated to Europe and her present whereabouts are unknown. This case is a good example why *viva voce* evidence is essential in an application of this nature. The applicant does not say what evidence exactly Doctor Sarupinda would give in her defence. She does not say whether she suffered any anxiety during this period. Because the applicant did not give evidence, the State was not given the opportunity to cross-examine her on these issues. She does not say when the doctor left the country and what efforts she has made to trace her current whereabouts. In any event the formation of a company is never without formality. Various documents have to be filed showing the shareholding, directorship, registered office, etc, of a company. It is not suggested that this documentation is no longer available. The suggestion that the absence of Doctor Sarupinda will prejudice her is a bald one and in my view would not, in the absence of further substantiation, justify a permanent stay of the proceedings against her.

DISPOSITION

In my view no justification for a permanent stay of the criminal proceedings pending against the applicant has been shown. Put another way, the suggestion that the right to a fair trial within a reasonable time has been contravened is not sustainable on the facts of this case.

In the result therefore the application must fail.

The application is accordingly dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JA: I agree

PATEL JA: I agree

Mtetwa & Nyambirai, applicant's legal practitioners

Prosecutor General, Counsel for the 1st & 2nd respondents