

THE STATE  
versus  
MUNYARADZI MAWADZE

HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
HARARE, 6 & 8 February 2023

ASSESSORS: 1. Mr Mhandu  
2. Mr Shenje

### **Application for a postponement**

*T Mukuze*, with *Ms C Mutimusakwa*, for the State  
*S Hwacha*, for the accused

#### **DUBE-BANDA J:**

1. This is an application for a postponement. The accused was initially jointly charged with two other persons. The matter was first set down for trial for the week starting 26 September 2022. On the 26 September 2022 the accused made an application for a separation of trials, and on the 27 September 2022 the application was dismissed. See: *The State v Mawadze* HH 676/22. Subsequent to the dismissal of the first application for separation of trials, all the three accused made an application for disclosure of witness statements and other evidential material. On the 29 September 2022 the application for disclosure was granted. See: *The State v Mawadze* HH 675/22. On 30 September 2023 the accused made another application for separation of trials. On 5 October 2022 the second application for separation of trials succeeded. See: *The State v Mawadze* HH 688/22.
2. Adv. *Mpofu* is representing the accused, on a brief from Mr *Hwacha* of Messrs Dube, Manikai & Hwacha Law Firm. On 5 October 2022 Adv. *Mpofu* was not in attendance and this court was informed that he was attending to other prior diarized commitments. The instructing attorney Mr *Hwacha* appeared for the accused, and informed the court that he was standing in for Adv. *Mpofu* and only for the purposes of noting the ruling in the second separation of trials application.

3. On 6 October 2022 and at the instance of the State the matter was postponed *sine die*. The trial was then set down for the week starting 6 February 2023. On the 6 February 2023 Adv. *Mpofu* was again not in attendance. The court was informed that he was engaged with prior diarized commitments. Mr *Mukuze* counsel for the State although making the point that the prosecution was ready for trial, asked that the matter be postponed to 8 February 2023 for the purpose of furnishing the accused with certain documents and to enable the accused to prepare for trial. This postponement was not opposed, although Mr *Hwacha* insisted that the accused's counsel of choice Adv. *Mpofu* would not be available on the appointed date, and will only be available during the week starting 20 February 2023 or the week starting 27 February 2023. The court did not make a ruling regarding the accused's counter application for a postponement. The matter was then postponed to 8 February 2023.
4. On 8 February 2023 Mr *Hwacha* made further submissions in support of the application for a postponement. Cut to the bone the application is anchored on these facts; that the accused's counsel of choice Adv. *Mpofu* is engaged with prior diarized commitments. Two copies of notices of set down were tendered, both indicating that Adv. *Mpofu* will be engaged with other matters the week starting on 6 February 2023. Again it was argued that no notice of set down was served on the defence, and that on the 6 February 2022 the defence was handed an amendment to the indictment papers. Mr *Hwacha* argued that neither he nor Adv. *Mpofu* has had an opportunity to consult with the accused regarding the proposed amendments.
5. *Per contra* Mr *Mukuze* submitted that the State has a prerogative to set down criminal matters for trial. That a notice of set down for 6 February 2023 was served on one Mr *Saurombe* a legal practitioner. It was served on 1 February 2023. He signed a copy of the notice confirming receipt thereof. A copy of the notice of set down was tendered and is before court. It turned out that when these submissions were made Mr *Saurombe* was in attendance in court. Mr *Hwacha* in not so many words confirmed that indeed the notice of set down was served on Mr *Saurombe*. It is Mr *Saurombe* who immediately informed Mr *Hwacha* of the date of set down.
6. Again Mr *Mukuze* argued that the amendment spoken about merely answers to the order of separation, i.e. indicating that the accused is no longer charged with the two person he was initially charged with. The charge has not changed and the evidence has not changed. Counsel submitted further that the dates suggested by Adv. *Mpofu*

are not available to the State. In terms of the Cause List there are other matters set down for those dates. Mr *Mukuze* asked that the application be dismissed and the matter proceeds to trial.

7. The law is that if necessary a court may adjourn or postpone a case to a later date. This is sanctioned by s 166 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which says “a trial may, if it is necessary or expedient, be adjourned at any period of the trial, whether evidence has or has not been given.” When a court considers an application for postponement, whether it is by the State or the defence, the following two basic principles have to be considered: that it is in the interests of society that guilty persons should not evade conviction by reason of an oversight or because of a mistake that can be rectified; and that an accused is deemed to be innocent and therefore has a right to a speedy hearing. See: *S v Geritis* 1966 (1) SA 753 (W).
8. The decision whether to adjourn the proceedings is in the discretion of the court. In *Maburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) it was said the discretion as to whether to grant a postponement should be exercised judiciously and not capriciously. It was held that a trial court should be slow to refuse a postponement where the reason why a party is not prepared have been fully explained and is not due to delaying tactics. A postponement will normally be allowed to enable an accused to obtain legal representation. But there are exceptions. See: *R v Zackey* 1945 AD 505; *R v Joannou* 1957 (4) SA 385 (FC). In *casu* the accused has legal representation. It is the continuous unavailability of briefed counsel of choice that is in issue.
9. The question to be answered is whether this court can postpone a matter to accommodate accused’s counsel of choice. Put differently, whether the criminal trial of the accused must depend on the diary of his counsel of choice. In *Stonewell Searches (Private) Limited v Stone Holdings (Private) Limited and 2 Others* SC 22/21 the court said: Over and above that, the mere fact that a party’s counsel of choice is unavailable is not a good ground upon which to grant a postponement. This position was laid out in *D’ Anos v Heylon Court (Pty) Ltd* 1950 (1) SA 324 C at 335-336, where the court held that:

“...the non-availability of counsel cannot be allowed to thwart the bringing before the court of the matter in issue. In all but the rarest of cases suitable counsel will be

is available. This is not the convenience of counsel; it is the reasonable convenience of the parties- and by that I mean both parties- and the requirement of getting through the court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom if indeed ever be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties."

10. In *casu* the instructing attorney Mr *Hwacha* submitted that the counsel of choice Advocate *Mpofu* will only be available on the week starting 20 February 2023 and again on the week starting 27 February 2023. The dates suggested by counsel are not available to the State and the court. I take the view that the request for a postponement to set down the case only on the dates suitable to counsel is beyond the limits of acceptability. This is a criminal matter. If this court were to accede to the postponement sought by the accused, the net effect of it will be that this matter will stall for a very long time. Such cannot be in the interests of the administration of justice. This will cause the public to lose confidence in the administration of justice. A set down of a criminal trial cannot be dependent solely on the availability of counsel of choice. It is in such cases that an accused may have to seek the services of another suitable counsel who will be available and ready for trial.
11. Indeed the accused is entitled to a fair trial, and at the center of a fair trial is the right to legal representation, and by extension he is entitled to be represented by his counsel of choice. However there are exceptions to this general principle. There is a limit in which this court may postpone a matter to accommodate accused's counsel of choice. In this case counsel suggests his own dates, which dates are not convenient to the prosecution and the court. I take the view that the line has been crossed in this matter.
12. It must be noted that trial fairness is not only confined to the position of the accused, but extends to society as a whole, precisely because society has a real interests in the outcome of a case. Trial fairness is also about the State and the witnesses. Particularly taking into account that the deceased was allegedly murdered on the 12 March 2020. It is now going to three years since this crime was allegedly committed. A criminal trial is not a game, it is a serious matter. Fair trial is not a prerogative of the accused alone. On the facts of this case the accused's preference for a particular counsel to take his case cannot be permitted to stall this matter any further.

13. Again it is clear that the accused's legal practitioners had notice of the trial date on 1 February 2023. Today is 8 February 2023. The accused had adequate notice to prepare for this trial. Again the amendments spoken about are merely formal to answer to the order of separation. This cannot be cause for a postponement to consult further with the accused. These reasons given for seeking a postponement are clearly not satisfactory. Again it is in the interest of the accused that this matter be finalised without unreasonable delay. It is what the right to a fair trial speaks to and demands. Further, I repeat the accused may have to reconsider the issue of counsel. Otherwise this court in the interests of justice will not allow this matter to stall further.
14. A refusal to grant a postponement in a criminal trial is indeed a serious matter. However, on the facts of this case I take the view that it is justified. I repeat that the request for a postponement to have this matter set down only on the dates suitable to *Adv. Mpofu* is beyond the limits of acceptability. This is a criminal trial and its processes cannot solely depend on the diary of counsel. If it were so this trial will remain in *limbo* for a very long time to come. It is for the above reasons that the application for a postponement must fail.

In the result, I order as follows:

- i. The application for a postponement be and is hereby refused.
- ii. The trial of the accused shall commence tomorrow the 9<sup>th</sup> February 2023 at 10 O'clock.

*National Prosecuting Authority, State's legal practitioners  
Dube, Manikai & Hwacha, accused's legal practitioners*