

CHIEF INSPECTOR CHUMA 040776 W

versus

THE COMMISSIONER GENERAL OF POLICE

and

THE PRESIDING MAGISTRATE N.O.

and

THE TRIAL PROSECUTOR

HIGH COURT OF ZIMBABWE

WAMAMBO J

MASVINGO, 4 & 10 October 2019 and 29 January, 2021

Opposed Application

M. Vengesai, for the applicant

K. Munatsi, for the 1st respondent

WAMAMBO J. Applicant is applying for a permanent stay of prosecution. He is a police officer who had charges preferred against him in 2015 in terms of the Police Act. A board of inquiry to try applicant was convened for applicant to be tried for contravening paragraph 39 of the Schedule to the Police Act [*Chapter 11:10*] "*improperly using his position as member for his private advantage*".

On 17 June, 2016 applicant exercised his right for his case to be heard before a Magistrate. Thereafter the matter was set down for trial on various dates but trial did not commence. It is against this background that applicant makes the present application.

Mr Vengesai for applicant made firm submissions on behalf of applicant. He delved into the requirements attached to an application for stay of prosecution. He drew my attention to the specific details regarding the said requirements and referred me to the record. He also cited case law to buttress his case. *Miss Munatsi* for the 1st respondent opposed the application arguing that the requirements for a permanent stay of prosecution were not fulfilled.

A permanent stay of prosecution is however founded on Section 167 A of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

It reads as follows:-

“167A *Unreasonable delay in bringing accused to trial*

- (1) *A court before which criminal proceedings are pending shall investigate any delay in the completion of the proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, to the accused or his or her legal representative, to a witness or other person concerned in the proceedings, or to the public interest.*
- (2)
- (3) *If after an investigation in terms of subsection (1) the court finds that—*
 - (a) *the completion of the proceedings is being unduly delayed; or*
 - (b) *there has been an unreasonable delay in bringing the accused to trial or in completing the trial; the court may issue such order as it considers appropriate in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order—*
 - (i) *refusing further postponement of the proceedings;*
 - (ii) *granting a postponement subject to such conditions as the court may determine;*
 - (iii) *that the prosecution of the accused for the offence be permanently stayed;*

- (iv) *that the matter be referred to the appropriate authority for administrative investigation and possible disciplinary action against any person responsible for the delay.*”

Clearly a court that makes the determination whether a matter can be permanently stayed is a court before which criminal proceedings are pending. The charges applicant faces are not pending before this court.

I can only make a determination on whether or not to grant the relief sought if the proceedings are pending before this court.

I find that for the fact that the proceeding are not pending before this court, this application is misplaced and cannot be entertained.

In *Garikayi Mberikwazvo v Resident Magistrate (Kadoma) N.O. and the Prosecutor General N.O.* HH 185-18 at page MUSAKWA J. had this to say in a related application:

“Clearly the criminal proceedings against the applicant are not pending before this court. Mr Mugiya’s submission that this court has jurisdiction can only be valid to the extent that the criminal proceedings are pending before this court.”

Even assuming that the matter can be entertained there is also the insurmountable hurdle that no evidence was led to prove the alleged unreasonable in the delay in the applicant’s prosecution and the prejudice that has been occasioned.

The weight of legal authorities on this aspect is that viva voce evidence must be led”.

Indeed in the instant case *viva voce* evidence was not led.

This was also emphasized by BERE J. (as he then was) in *Newton Ndlovu v The State* HB 369-17 at page 5 wherein he stated as follows:-

“The need to have viva voce evidence in an application of this nature was also emphasized and harped on by PATEL JA in the case of Bernard Manyara v The State where the court remarked as follows:-

There can be no doubt that all of the above assertions and counter assertions should have been ventilated through viva voce evidence in order to determine the reasons and responsibility for the delay in bringing the applicant to trial. Equally necessary was the evidence necessary to demonstrate that the applicant did in fact assert his right to a speedy trial, that he has been prejudiced by the delay and the specific manner in which he has been prejudiced.

Moreover in respect of all these factors the State should have been given the opportunity to test the veracity of the applicant’s position through cross examination in addition to adduce evidence to rebut that position”.

Also see *Douglas Mwonzora & 31 Others v The State* CC 29/2015.

Adhering to the principles as enunciated in the above cited cases I find further that the fact that applicant did not give *viva voce* evidence to support his case is fatal to his application.

In the circumstances I find that the application is unmeritorious.

In the result the application is dismissed with no order as to costs.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners