

MATCHES CHADENGA  
versus  
MAGISTRATE MANHIBI N.O  
and  
THE PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 17 February 2020

### **Urgent Chamber Application**

Advocate *F Chinwawadzimba*, for the applicant  
*P Garwe*, for the 1<sup>st</sup> respondent  
Mrs *J Matsikidze*, for the 2<sup>nd</sup> respondent

MUZENDA J: This urgent chamber application was brought before me on 19 February 2020 in chambers. I adjudged that the application was not urgent. On 11 February 2020 the applicant's counsel wrote to the Registrar seeking audience with the court and address it on the aspect of urgency. The matter was set down for hearing on 17 February 2020. On the date of hearing the first respondent indicated that it was more concerned about the order of costs being prayed against the cited magistrate. The second respondent opposed the application arguing that the matter was no longer urgent given the background of the application.

The applicant is seeking the following relief.

#### “TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the criminal matter under case number MTC 129/18 be and is hereby stayed pending outcome of the review application under case number HC 30/20.
2. That the respondents shall pay costs of this application jointly and severally the one paying the other to be absolved in the event of anyone of them opposing the application.

#### INTERIM RELIEF GRANTED

Pending finalisation of this matter an interim order is hereby granted on the following terms:

3. Pending the finalisation of the matter the respondents be and are hereby interdicted from continuing with the trial under case number MTC 129/18 scheduled for the 10<sup>th</sup> of March 2020.”

### BACKGROUND OF THE APPLICATION

The background of the matter preceding the commencement of the urgent chamber application is contained in the founding affidavit of the aggrieved applicant from paragraph 5.2 following:

- “5.2 The trial proceedings started on the 15<sup>th</sup> of December 2018 and the state led one witness. Unfortunately the second state witness was not available and the matter was postponed to the 18<sup>th</sup> December to allow the state to bring its witness.
- 5.3 On the 18<sup>th</sup> December 2018 the second witness was in default and the matter was postponed to the 22<sup>nd</sup> of January 2019, nonetheless the second state witness was in default again.
- 5.4 My legal representative made an application for my removal from remand which was declined and the matter was postponed to the 12<sup>th</sup> of February 2019. First respondent ruled that she was affording the state a final opportunity to call its witness. This was the third postponement occasioned by the state. These postponements were made in order to ensure that the state would bring its second witness.
- 5.5 On the 12<sup>th</sup> February 2019, unfortunately my legal representative Mr *Zviuya* was unable to attend court due to a personal emergency which resulted in him travelling to South Africa on that morning. On the day of the hearing Mr *Zviuya* sent a junior lawyer Ms *Crescentia Tatenda Gutuza*, to seek a postponement. Notwithstanding that it was the first time I sought a postponement, it was declined. The matter was stood down to 2:15 for continuation. At 2:15pm, first respondent allowed the second state witness to testify. After the state finished leading evidence, Ms *Gutuza* again applied for a postponement to enable Mr *Zviuya*, my legal practitioner of choice an opportunity to cross-examine the witness. I did not understand why the first request for a postponement was refused given that my legal representative was absent due to reasons beyond my control.
- 5.6 Due to the fact that Ms *Crescentia Tatenda Gutuza* is not a criminal lawyer and does not have experience to cross-examine, she sought a postponement to allow Mr *Zviuya* to attend to the cross-examination. The application was again declined and the 1<sup>st</sup> respondent indicated that the trial was to continue the following day with or without my legal representative notwithstanding that when the matter was postponed on the 18<sup>th</sup> December 2018 it was never agreed that the matter would roll over onto the 13<sup>th</sup> February 2019.
- 5.7 On the 13<sup>th</sup> of February 2019, Ms *Crescentia Tatenda Gutuza* could not attend due to other commitments. I was assisted by Mr *Jakazi* from Maunga Maanda and Associates to seek a postponement. I also furnished the 1<sup>st</sup> respondent with a letter attached herein marked ‘A’. Again the application for a postponement was declined and the matter was stood down to 11:15 am.

5.8 In the meantime Mr *Zviuya* dictated a letter from South Africa to the Provincial Magistrate in a bid to stop the injustice which was taking place in my case. I annexed hereto the letter marked 'B'.

5.9 I returned to court at 11:15 am, however, the court only resumed at 12:45 and the matter surprisingly without any application for a postponement was postponed to the 22nd February 2019."

The applicant instructed his lawyers to refer the matter to the Constitutional Court based on the violation of an impartial court. The applicant indicates in his founding affidavit that he instructed his lawyers to apply for the recusal of the magistrate due to the manner she had conducted applicant's trial. On 12 March 2019 an application for the recusal of the magistrate was dismissed. Applicant also requested for transcription of the record. The first respondent informed the applicant that the matter was going to be proceeded with on 27 March 2019 whether applicant had a lawyer or not. In March 2019 applicant filed an urgent chamber application for stay of proceedings pending an application for review of the proceedings within a period of 30 days. The matter was continuously postponed, the last date of postponement was 5 February 2020. The transcribed record was availed to the applicant on an unspecified date in December 2019 and the applicant filed an application for review. Meanwhile the initial urgent chamber application under HC 77/19 was withdrawn after it had been initially removed from the roll of urgent matters. The reference for the application for review is HC 30/20. The criminal trial has now been set for 10 -11 March 2020. According to the applicant the given dates are still not ideal for him for Mr *Zviuya* will be engaged in the High Court on that date. In his view first respondent is no longer fit to deal with the trial, to him, first respondent has ceased to be neutral and objective in her conduct of the trial proceedings.

On the aspect of urgency the applicant avers that the matter is set to proceed on 10 March 2020 as is ordered by the first respondent. If not postponed it will render the pending application for review purely academic. To him the first respondent will not preside fairly over his case and that is tantamount to a betrayal of his interests and justice. It is his constitutional right to be tried by an independent and impartial court.

The certificate of urgency signed by Mr Peter Makombe on 16 February 2020 contains a repetition of what applicant contends in his founding affidavit word by word and need no repetition.

On the date when the court granted audience to the applicant to address it on the aspect of urgency, Ms *Chimwawadzimba* counsel for the applicant submitted that the matter was

urgent and cited the matter of *Telecel Zimbabwe (Pvt) Limited v Postal and Telecommunications Regulatory Authority of Zimbabwe & Others*<sup>1</sup> where the Learned Judge held that:

“Urgent applications are those where, if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so, to the prejudice of the applicant. Too often, the issue of whether urgency is self-created is blown out of proportion. A delay of 22 days cannot be said to be inordinate as to constitute self-created urgency.” (my emphasis)

The above words were originally echoed by MAKARAU JP<sup>2</sup> (as she then was) dealing with an obiter in the *Kuvarega v Registrar General & Ano*<sup>3</sup>. In that case, the case had been delayed for 25 days. Never the less Justice MAKARAU in the *Document Support Centre (supra)* ruled that the matter was not urgent and dismissed the application.

Applicant’s counsel also referred the court to the matter of *Lee Waverley John v S*<sup>4</sup> an urgent chamber application where the applicant had applied for stay of proceedings pending review where the applicant’s application for a discharge at the end of the state case had been dismissed by the trial court. The facts in the *John*’s case are different from those before me. There was no evidence adduced by the state to implicate *Lee Waverly John* and MAFUSIRE J granted the application.

Applicant’s counsel went on to refer the court to the matter of *Robert Dombodzvuku and Another v Sithole N.O and Another*<sup>5</sup> to advance an argument that a High Court has powers to intervene in incomplete proceedings where injustice and unfairness are apparent. The court is not dealing with a review, it is looking at the aspects of urgency before delving into the merits of the matter. It is important to note that in the *Dombodzvuku* case (*supra*) the learned Judge ruled that the matter was not urgent and dismissed the urgent chamber application.

Mrs *Matsikidze* appearing for the second respondent contended that the cause of action which triggered the application occurred in mid-March 2019 and the applicant has failed to lay good and sufficient grounds for an urgent chamber application she added that the

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<sup>1</sup> 2015 (1) ZLR 651 (H) per MATHONSI J (as he then was)

<sup>2</sup> See also the case of *Document Support Centre (Pvt) Ltd v T.M Mapuvire* HH 117/2006 per MAKARAU J.P (as she then was.)

<sup>3</sup> 1998 (1) ZLR 188 (H) per CHATIKOBO J HH 243/13.

<sup>4</sup> HH 242/13

<sup>5</sup> HH 174/2004 per MAKARAU J (as she then was)

applicant has failed to demonstrate that he will suffer prejudice or irreparable harm if the relief sought is not urgent.

As crisply pointed out by MAKARAU J<sup>6</sup>

“In my view urgent applications are those where if the courts fail to act the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.”<sup>7</sup>

I am satisfied that the applicant can safely have alternative remedy in appealing against any outcome of the matter before the first respondent, his rights cannot be said to be irretrievably lost. Given the history of this application and the date when applicant detected causes that would require an application for an urgent chamber application, the certificate of urgency also failed to meet the expected analysis and judgment reposed on a legal practitioner before such a certificate is prepared.<sup>8</sup> The preferential treatment of allowing a matter to be dealt with urgently is only extended if good cause is shown for treating the litigant in question differently from most litigants.

The applicant seems to rely on the excuse that the record was availed in December 2019 and then corrected in January 2020 but from March 2019 he had been inactive and all the push for acting urgently had completely fizzled out. An application for review in my view is not what triggered the urgent application. It is the alleged manner of the magistrate which unnerved the applicant and the computations of delay in this case should start from March 2019 to date which in my view is inordinate. As per MAKARAU J<sup>9</sup>

“It has been stressed in this court that a matter does not become urgent as the date of reckoning looms. Rather, a matter is urgent when the facts giving rise to the cause of action arise and the matter cannot wait then. Pleas by legal practitioners that if the matter is not treated urgently because the date of reckoning is fast approaching are misplaced and unimpressive.”

In any case Ms *Chinwawadzimba* openly admitted during the submission that the applicant has two available remedies open to him but still contended that this court can still order the stay of proceedings. I see no logic in that argument and I dismiss it.

The matter is not urgent and struck off the roll of urgent matters.

*Bere Brothers*, applicant’s legal practitioners  
*Attorney general’s Office, Civil Division*, 1<sup>st</sup> respondent’s legal practitioners

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<sup>6</sup> Document Support C entre (Pvt) Ltd (*supra*)

<sup>7</sup> See Telecel Zimbabwe case (*supra*)

<sup>8</sup> See General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H) per GILLESPIE

<sup>9</sup> In Robert Dombodzvuku and Another (*supra*)

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