TRYMORE MAPUTSA

And

NGONIDZASHE MANZWANGA

Versus

THE COMMISSIONER GENERAL OF POLICE

And

CHIEF SUPERINTEDENT KAPITA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 13 MAY 2022

Urgent chamber application

DUBE-BANDA J

1. This urgent application was placed before me on the 13 May 2022. After considering it, I ruled that the matter was not urgent and I removed it from the roll of urgent matters. On the 19 May 2022, applicants addressed a letter to the Registrar of this court asking to be furnished with reasons for my ruling. Applicants' letter was brought to my attention on the 27 May 2022. These are the reasons.

2. In this application applicants seek an interim relief and final relief couched in the following terms:

   Final relief sought:

   i. That the 2nd respondent serve the applicants with the appeal judgment which was released by the 1st respondent in order to allow the applicants to see the grounds for dismissal of the appeal and prepare their defence for judiciary scrutiny.

ii. That the serving of the sentence at Fairbridge detention barracks be stalled in order to pave way for a hearing of the review application filed on the HC 1035/21.

iii. That there be no order as to costs.

Interim relief granted:

The respondent be and are hereby interdicted from forcing the applicants to serve the sentence pending the finalisation of the review application filed on HC 1035/21.

3. This application will be better understood against the background that follows. Applicants are members of the Zimbabwe Republic Police (ZRP). They appeared before the Magistrates' Court sitting in Bulawayo, charged with the crimes of assault. 2nd applicant appeared on the 14 May 2021, he was found not guilty and was acquitted. 1st applicant appeared on the 17 May 2021, and he was also found not guilty and was acquitted.

4. Following their acquittal by the Magistrates' Court, the two applicants were taken for a disciplinary hearing before 2nd respondent. According to the certificate of urgency the charges before the 2nd respondent emanated from the same set of facts and same complainants as those before the Magistrates' Court. The founding affidavit shows that the 2nd respondent convicted and sentenced the applicants to 14 days detention. Applicants noted an appeal to the 2nd respondent and the appeal was dismissed.

5. On the 16 July 2021, applicants filed an application for review (HC 1035/21) before this court, and such application is still pending. Notwithstanding the pending application for review, applicants were ordered to serve the sentence of 14 days detention. The objective of this application is to interdict the respondents from forcing applicants to serve the sentence pending the finalisation of the review application.

6. It is against this background that applicants have launched this application seeking the relief mentioned above.

7. The application was placed before me, and as enjoined by rule 60(6) of the High Court Rules 2021, which says the registrar shall submit the application to the duty judge, who **shall** consider the matter forthwith, I considered the matter forthwith. After considering the matter, I took note of rule 60(12) which provides that the court or a judge **may** direct that the matter be set down for a hearing, my view is that this rule gives the judge seized with the matter a discretion whether to set-down the matter or dispose of it on the papers. On the facts of this case, I found that it would serve no useful purpose to have the matter set down. I then ruled that it was not urgent and struck it off the roll of urgent matters.

8. In *Documents Support Centre P/L v Mapuvire*, MAKARAU JP, (as she then was) said the following in relation to urgent chamber applications:

> 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 to the prejudice of the applicant.

9. In *Seventh Day Adventist Association of Southern Africa v Tshuma* & Ors HB 213-20, I made the following remarks:

> In the ordinary run of things, court cases must be heard strictly on a first come first served basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. … … An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue, and have its matter given preference over other pending matters. ….. …. …. In assessing whether an application is urgent, this court has in the past considered various factors, including, among other others; … whether the urgency was self-created; the consequence of relief not being granted and whether the relief would become irrelevant if it is not immediately granted.

10. I stand by these remarks.

11. The authorities in this jurisdiction show that urgency is a matter of both time-line and harm.

12. First, I consider the time-line factor. The law on the time-line is settled. It was succinctly laid out in *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 H by CHATIKOBO J at p 193 F –G where he stated that:

> What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.

13. Applicants filed their review application on 16 July 2021. It must have been clear to them at that time that with their appeal to the 2nd respondent having been dismissed, and notwithstanding the review they were bound to be called to serve their sentences, unless a court of competent jurisdiction orders that the serving of the sentences be suspended pending the finalisation of the review application.

14. From their versions, it is clear that they prosecuted the review application, and ignored that there was a sentence that was extant, and waiting to be served. They only jumped into action on 12 May 2022, because they were due to commence serving the sentences on 13 May 2022. This application was in fact placed before me on 13th May 2022, the very day the applicants were to commence serving their sentences. Applicant had all the time as early as July 2021, to jump and seek an order to interdict the serving of the sentences until the finalisation of the review application. This they did not do. They waited until imminent arrival of the day of reckoning. The need to act arose in July 2021. This is a text-book case of the kind of urgency that stems from a deliberate or careless abstention from action until the dead-line draws near. It is not the type of urgency contemplated by the rules of court.

15. In respect of the time-line, this application fails to pass the test.

16. Second, I consider the harm factor. Applicants were found not guilty and acquitted by the Magistrates' Court. Nothing turns on their acquittal at the criminal court. The proceedings before the 1st respondent were not criminal proceedings. They were simple civil matters in which the applicants as members of the Police Service were subjected to Police disciplinary law. See: *Matsika v Commissioner General of Police* HB 67/17.

17. 1st respondent acting in terms of the law, and acting within his jurisdiction convicted the applicants and sentenced each of them to 14 days detention. Applicants appealed to the 2nd respondent and their appeals failed. What has prompted this application is the imminent fear of serving the sentences. Applicants did not file a copy of the record of proceedings from the respondents, and I could not only from their *ipso dicta* stop a lawful process, i.e. the serving of sentences. This court cannot stop that which is lawful. This is a court of law and it cannot itself subvert the law.

18. In respect of the harm factor, again this application fails the test.

19. In conclusion, I make the point that is trite that a decision not to hear a litigant must not be taken likely, because it might have serious implications on the right to a fair trial. However, each case must be considered on its merits. In *casu,* he applicants waited until the last moment to file this application, it was filed on 12 May 2021, at 15:35 hours i.e. just before closure of business for the day and was placed before me in the late afternoon on 13 May 2022, the very day they were due to start serving their sentences. Setting down this matter would have indirectly or through the back-door giving them a reprieve from serving their sentences. All they could have done was to say the High Court has set-down their urgent application, and therefore the serving of the sentences should wait until the matter is finalised. My thinking was it was for this very reason that they filed this application at the eleventh hour. This is a court of law, it cannot aid unlawful conduct.

20. It is for these reasons that after considering this application in terms of rule 60(6), I ruled that it was not urgent and struck it off the roll of urgent matters without setting it down.