HB 369/17
HCA 68/16

NEWTON NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 27 JANUARY & 23 NOVEMBER 2017

Opposed Application

S. Mlambo, for the applicant
Ms N. Ngwenya, for the respondent

BERE J: This is one of many cases that are frequently being brought to our courts where the applicants seek to have permanent stay of their prosecution due to alleged inordinate delays in bringing their cases to court for prosecution. I must confess, ever since the current constitution came into force, there has been an upsurge in these cases.

The factual background

In September 2005 the community of Macanlays Resettlement Collen Bawn, Gwanda had serious challenges with stock theft. On 7 September 2005 and in an effort to try and curb this criminal enterprise, the locals decided to organise themselves by laying an ambush against some suspects. The deceased and an accomplice walked straight into this pre-laid ambush on the same day. On being summoned to stop the deceased made an attempt to flee from the scene. The flee was an abortive one as the deceased was shot at by the applicant as he tried to escape into some bushy area in order to avoid being arrested.

The deceased was wounded on the right thigh and stomach and he was quickly conveyed to Gwanda Hospital from where he was transferred to United Bulawayo Hospitals. The deceased succumbed from the gunshot wounds and died on 10 September 2005.

The result of all this was the arrest of the applicant on 10 September on allegations of the deceased's murder. On 11 September 2005 the police recorded a warned and cautioned

statement from the accused who stated that he had not intended to kill the deceased but only to frighten him to stop. In his own words the applicant responded to the warning and cautioning as follows:

> "I do admit to the charge, that is what happened. We were patrolling looking for whoever may have killed cattle that had been killed in the farm. We met two men whom we called to come to us; while we were talking to them, one of them ran away. We chased after him and I shot running behind him, I found him sitting saying he had stopped. I had not intended to shoot him but to frighten him, I found that he had blood stains on the hip and the stomach. I am sorry because he is late." (*sic)*

This statement was recorded on 11 September 2005 and confirmed at Gwanda Magistrates' Court on 2 December 2005.

On 12 September 2005 the applicant was placed on initial remand and in custody at Gwanda Magistrates' Court.

On 3 October 2005 the accused who was represented by a legal practitioner, a Mr Siziba of the now defunct Cheda and Partners was granted bail pending trial. The appellant was *inter alia* ordered to report twice a week at Collen Bawn Police Station as part of his bail conditions.

From October 2005 the applicant religiously observed the stringent bail conditions. The applicant's uncontroverted assertion is that each time he went to report to the police station, he made enquiries about his case and in particular as to when his case would be tried and that the police officers constantly told him to "hold on" as he would be summoned at the appropriate time.

The legal practitioner who had assisted the applicant in his application for bail left the country and for quite some time he stayed without a legal practitioner.

On 23rd of December 2009 the applicant approached the High Court for the relaxation of his reporting conditions, that time the applicant was represented by a *Mr M. Dube* of Messrs Cheda and Partners Legal Practitioners and the respondent was represented by a *Mr W. Mabhaudi*. The applicant's bail conditions were altered to require the applicant to report not

twice weekly but once at Collen Bawn Police Station until the trial was finalised. Again, there was no word from the respondent concerning the applicant's trial date.

The applicant stated that he continued to complain to his legal practitioners about the delayed finalisation of his case.

Michael Batanai Chigova, a former legal practitioner with Messrs Cheda and Partners Legal Practitioners confirmed acting for the applicant between January 2010 to April 2015. The legal practitioner confirmed writing to the Area Public Prosecutor for Gwanda a Mr Gundani on 2 April 2014 enquiring into the delay in bringing the applicant's matter to trial. In the meantime the applicant continued to comply with all his bail conditions until his indictment to the High Court for trial on 7 March 2016.

The applicant, not having been tried for the past 11 years has now approached this court seeking the following order:

"It is ordered that:-

1. Applicant's right to trial within a reasonable time in terms of section 69(1) of the Constitution has been violated.
2. Proceedings against the applicant under case number HCA 29/16, ex ref 48/16 be permanently stayed.
3. There shall be no order to costs."

Upon being served with this application the respondent, through one Martha Cheda, a Chief Public Prosecutor (formerly Chief Law Officer) in charge of Bulawayo opposed the application.

In the opposing affidavit, Martha Cheda harped on the numerous institutional challenges that the respondent faced in the handling of murder cases.

The respondent also stated in its opposition that the applicant had never demanded to have a trial date, let alone brought to the respondent's attention that there was a delay in having this matter set down.

During submissions in this case *Mr Mlambo*, for the applicant emphasised the point that the facts as outlined in this case called for the granting of the order sought by the applicant due to the inordinate delay in trying the applicant which according to counsel ran into a serious collision with section 69[1] of our Constitution which requires *inter alia* that an accused person should have a "fair, speedy and public hearing within a reasonable time before an independent and impartial court …" (my emphasis)

Counsel further argued that a delay of 11 years in this case could not be justified by any stretch of imagination. I was referred to among other cases the case of *In re Mlambo*[2] where the court emphasised among other things that in an application of this nature "It is for the person charged to persuade the court that the delay complained of exceeds what is reasonable.[3]"

In her submissions to court *Ms Ndlovu* for the respondent emphasised the point that there was evidence that the applicant had not asserted his right to trial within a reasonable time, either in person or through his counsel. Counsel referred me to the case of *S* v *Bangu* as authority for the proposition that;

> "… the applicant must assert his right to a trial within a reasonable time. A failure to object along the way until the stage is reached when the state is able to commence the trial will lead to the inevitable inference that the accused was quite content to leave the situation in abeyance in the hope that somehow the charge would be forgotten; and that this eleventh hour protest was nothing more than a desperate tactic to avoid the outcome of the trial.[4]"

It is common cause in this case that the applicant was not given an opportunity to give *viva voce* evidence on the application itself. The application consisted of the filed papers followed by the submissions by both counsel.

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[1] Constitution of Zimbabwe, p33

[2] 1991 (2) ZLR 339 (SC)

[3] 1991 (2) ZLR 339 at p353A-B

[4] 1995 (2) ZLR 297(5) p301C-D

It would seem to me that the approach adopted was wholly inadequate as it is against the recently crafted Constitutional Court Rules, 2016 which clearly states as follows:

> "(4) Where there are factual issues involved, the court seized with the matter shall hear evidence from the parties and determine the factual issues:
>
> Provided that where there are no disputes of fact, the parties shall prepare a statement of agreed facts.[5]"

The need to have *viva voce* evidence in an application of this nature was also emphasised 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 being given the opportunity to adduce evidence to rebut that position.[6]"

Commenting on the need to lead viva voce evidence GARWE JA had this to say in the case of *Douglas Togarasei Mwonzoro & 31 Ors* v *The State*:

> "Further it is insufficient to make a statement from the bar, as the applicant's legal practitioners did in this case. The applicants should have been called to testify under oath in order to substantiate their complaints that their rights had been violated. Had that happened, the prosecutor would then have had the opportunity to cross-examine the applicants and, thereafter, to adduce such evidence as he may have considered necessary to contradict the allegations made by the applicants. Only after hearing evidence from both sides would the magistrate have been in a position to make findings of fact …"[7]

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5 Section 24(4) of SI 61 of 2016
6 Judgment No. CC 23-2015 p7
7 Judgment No. CC 29-2015 p5

It is abundantly clear from the above-cited cases as well as the Constitutional Court Rules that it is not sufficient for the applicant to merely state his application on paper but that he/she must give *viva voce* in support of his case.

In the instant case, this was not done and in my considered view this defect in the application is fatal.

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

Messrs Majoko & Majoko, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners