JOB SIKHALA
versus
MAREHWANAZVO GOFA N.O.
and
THE NATIONAL PROSECUTING AUTHORITY
and
THE PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 27 February & 9 March 2023

Urgent Chamber Application for Stay of Criminal Trial Proceedings Pending Determination of Court Applications for Review

A Muchadehama with J Bamu, for the appellant
No appearance for the 1st respondent
T Kangai, for the 2nd and 3rd respondents

CHIKOWERO J:

[1] This is an urgent chamber application for stay of a criminal trial being presided over by the first respondent sitting as the magistrate court at Harare pending determination of two court applications for review pending before this court against two interlocutory decisions made at that trial.

[2] Having read the application and the reference files in chambers I formed the *prima facie* view that the matter was not urgent. I made written comments to that effect and removed the matter from the roll of urgent matters.

[3] Having become aware of this, the applicant, through his legal practitioners of record, wrote to the Registrar requesting audience with the judge to make submissions on the issue of urgency. This the applicant was perfectly entitled to do because the view that I held on perusing the application, without having heard oral submissions from the applicant, was a *prima facie* one.

[4] I acceded to the request and caused the matter to be set down.

[5] In preparing for the hearing on urgency, I became concerned with whether the application itself was properly before me. Hence, on the date of the hearing, I directed counsel to address me on that issue. They did so whereupon I reserved judgement.

[6] Despite Messrs *Muchadehama* and *Bamu's* valiant efforts, I agree with Mr *Kangai*, for the second and third respondents, that this application is not properly before me. It is my view that it is the wrong proceeding in the circumstances. The procedure adopted is incorrect. This is why.

[7] In early December 2022 the applicant appeared before the magistrates court at Harare sitting as a designated Anti-Corruption Court facing a charge of defeating or obstructing the course of justice as defined in s 184(1)(e) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. Having pleaded not guilty to the charge, the applicant then filed a composite exception to the charge and defence outline. The exception was premised on the contention, among other things, that the charge did not disclose an offence.

[8] The exception was opposed, and dismissed. Reasons were tendered for that decision.

[9] Aggrieved, the applicant filed a court application for review of that interlocutory decision. This was on 20 December 2022 under case number HC 8597/22. Without having filed opposing papers, Mr *Kangai*, who also represents the second and third respondents in that matter, addressed a letter to the Registrar querying why the applicant had caused the matter to be set down on the unopposed roll in light of the decision in *Munobvanei & Anor* v *The Presiding Magistrate N.O. & Ors* HH 280/19. The second and third respondents have not filed opposing papers. On 1 February 2023 the applicant, through his legal practitioners of record, applied for that matter to be set down on the opposed roll. The matter is yet to be set down for hearing.

[10] I note in passing that the relief sought by the applicant in that matter is this. That the applicant for review should be granted and that the decision dismissing the exception be set aside and be substituted with one upholding the exception and finding the applicant not guilty and acquitting him. Also sought therein is an order quashing and setting aside the criminal proceedings and that each party bears its own costs.

[11] The applicant, before the magistrates court, was of the view that service of the court application for review triggered the second respondent to apply for a postponement of the criminal proceedings to enable the latter to go back to the drawing board. The application for postponement of the trial was granted.

[12] The second respondent then served the applicant with what the latter called:

> "a re-crafted witness statement in respect of one Kudakwashe Mandiranga, an additional video clip and a transcript."

[13] This prompted the applicant to file a written application, citing s 70 of the Constitution as read with s 382 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP and E Act). Therein the applicant sought an order interdicting the second respondent from adducing further evidence in violation of the law that I have mentioned. The witness statement, additional video clip and transcript formed the basis of the application. The applicant's contention was that the second respondent had sourced this material in order to use it in the trial to plug the loopholes that the applicant had adverted to in the exception, defence outline and the court application for review.

[14] Satisfied that no prejudice would be suffered by the applicant since he could amend his defence outline if so advised, that the tool of cross-examination was available to the applicant and that the applicant could not be seeking an order to stop the prosecution from adducing further evidence when it was yet to adduce any evidence in the first place, the trial court dismissed the application. Again aggrieved, the applicant took the proceedings relating to that decision and the interlocutory decision itself on review on 9 February 2023. This was under case number HC 912/23. He will in that application seek an order dismissing the second respondent's "application to amend the material facts relied upon to establish the State's case against the accused." He will also pray for an order remitting the matter to the magistrates court for trial before a different magistrate and that all prior proceedings before the magistrates court in this matter pre 9 February 2023 be expunged from the record. The applicant will pray that each party bears its own costs. That application is pending before this court.

[15] The applicant applied for postponement of the criminal trial pending determination of the two court applications for review. The application was made before the second respondent. In terms of s 165 of the Criminal Procedure and Evidence Act the second respondent has the power, where necessary or expedient, to postpone a pending trial. She also has the power, at any period of the trial, to adjourn such trial if it is necessary or expedient to do so. This is in terms of s 166 of the Criminal Procedure and Evidence Act. In either case, the power is discretionary. Having exercised the discretion vested in her by the legislature in terms of s 165 of the Criminal Procedure and Evidence Act, the second respondent dismissed the application for postponement. Although

copy of that decision was not placed before me Mr *Muchadehama* confirmed that the second respondent gave reasons for that decision. The interlocutory decision is extant. It has not been taken on review. It is an interlocutory decision made during the course of unterminated criminal proceedings pending before the first respondent.

[16] Mr *Muchadehama* argued that the present application is properly before me because a practice has developed where applicants proceed in the manner that the applicant has done. He referred me to *Gumbura & Ors* v *Mapfumo N.O. & Anor* SC 10/21; *Mbatha & Anor* v *Ncube N.O. & Anor* SC 19/18; *Machaya & Ors* v *The State & Anor* HH 442/19; *Mamombe & Ors* v *The State & Ors* HC 1929/21 and *Biti* v *Regional Magistrate Guwuriro N.O. & Ors* HC 5605/21.

[17] *Biti* was an urgent chamber application for stay of criminal proceedings (a trial) filed in terms of r 60(6) of the High Court Rules, 2021 pending determination of a court application for review of the magistrates court's decision refusing an application for postponement of the trial and requiring the trial to proceed in the absence of the applicant's legal practitioner of choice. As interim relief, the applicant in that matter sought a stay of the trial proceedings pending confirmation or discharge of the provisional order. As final relief, the applicant would have prayed for an order calling upon the respondents, who were the presiding magistrate, the State and the trial prosecutor to show cause why pending the finalization of the application for review the trial proceedings should not be stayed. No opposing papers were filed. The record reflects that Messrs *Hashiti* and *Muchadehama* appeared for the applicant while Mr *Mapfuwa* appeared for the State and the trial prosecutor. The court granted a final order staying the trial proceedings pending determination of the application for review as well as setting time lines for the filing of papers in respect of the application for review itself as well as setting down 11 November 2021 as the date for hearing of the application for review. I do not see anything in *Biti* indicating that the court's attention was drawn to the issue which I raised in the present proceedings. The court did not render a written judgement in *Biti*. That matter is distinguishable.

[18] *Mamombe & Ors* v *Makwande N.O. & Anor* HC 7206/20 was an urgent chamber application for stay of criminal trial proceedings pending determination of an application for review of the magistrates court's decision ordering a separation of the trials. Convinced that an application for postponement of the trial, if such were made before the trial magistrate, would not succeed, the applicants opted to approach the High Court for an order of stay of the criminal

proceedings pending before the magistrates court. No opposing papers were filed. The court granted interim relief ordering a stay of the separate trials of the second and third applicants pending confirmation or discharge of the provisional order. On the return date, the applicants were to call upon the respondents to show cause why the separate trials were not to be stayed pending determination of the application for review. In granting the provisional order, the court did not render a written judgement. On the facts, *Mamombe* is distinguishable on the basis that the trial court had not been asked to postpone the trial before the applicants sought and obtained a stay of the criminal proceedings pending before that court. In other words, there was no extant decision of the magistrates court speaking to postponement of the trial at the time that the applicants in that matter approached the High Court on an urgent basis. More fundamentally, there is no indication that the court was required in *Mamombe* to determine whether the application was properly before the High Court.

[19] In *Mamombe & Ors* v *The State & Ors* HC 1929/21 the applicants filed an urgent chamber application for stay of criminal proceedings presided over by the second respondent (the trial magistrate) pending determination of a court application for review. Among other things, the trial magistrate had proceeded with the trial and postponed the matter to a future date for resumption of the trial despite the fact that there was an extant High Court order staying that trial. On 6 May 2021 this court granted an order temporarily staying the trial pending the determination of the urgent chamber application. The hearing of the application was postponed to 13 May 2021. On 13 May 2021 the life of the earlier order was extended to the determination of the application for review. In addition, time frames were set for the filing and service of papers and a date was set for hearing of the application for review. Mindful of the fact that each matter is in a sense peculiar and falls to be determined on its own circumstances, my view is that HC 1929/21 is again distinguishable. Further, I discern nothing from that record suggesting that this court was called upon to decide whether the application itself was properly before the High Court. The court granted a provisional order. It did not render a written judgement.

[20] *Machaya & Ors* v *The State & Anor* HH 442/19 was an urgent chamber application for stay of criminal proceedings before the magistrates court pending determination of a court application for review of the magistrates court's interlocutory decision. The High Court struck the application off the roll on the basis that by postponing the matter the magistrates court had in

substance already afforded the relief sought through the Urgent Chamber Book. The application was superfluous. The court was not called upon to decide whether that which was superfluous was, but for that fact, properly before it.

[21] Finally, I do not read *Gumbura & Mbatha* (*supra*) to be authority for the proposition that the applicant is properly before me. I do not agree with Mr *Muchadehama* that the applicant was simply being courteous to the magistrates court in seeking a postponement of the matter. The novel submission was that had he chosen to, the applicant could simply have ignored that court, not made any application for postponement of the trial and straightaway launched the application which is the subject of this judgement. That he chose to be courteous by seeking a postponement (which was refused) before effectively seeking the same relief before this court, which is not seized with the trial, does not mean that he is not properly before the High Court in the urgent chamber application. That cannot be correct. This urgent chamber application for stay of criminal proceedings cannot ignore the existence of a valid interlocutory decision by the magistrates court refusing the very same relief that the applicant is seeking before me. The magistrates court is a court of law. So is the High Court. The former's interlocutory decisions cannot be brushed aside, as if they do not exist, simply because the magistrates court does not have inherent jurisdiction. To hold otherwise would be to encourage litigants to embark on forum shopping. The applicant did not challenge the decision of the magistrates court refusing to postpone the trial pending determination of the court applications for review. I need not express a firm view on the forum that such challenge needed to take. What I find, however, is that this urgent chamber application for stay of criminal proceedings is not the correct procedure to express dissatisfaction with the magistrates court's interlocutory decision to dismiss the application for postponement. This finding is in line with the views of the two-judge bench in *Mupfumira & Anor* v *Mutevedzi N.O. & Anor* HH 200/20. I am not aware of any decision of the Supreme Court faulting the sentiments expressed in *Mupfumira* (*supra*).

[22] I am fortified in the finding that the applicant is improperly before me by Mr *Bamu's* submissions that the applicant is entitled to "a second bite of the cherry." If the applicant was simply being courteous to the magistrates court by seeking a postponement, there can be no scope for a submission that he is entitled to another bite of the cherry. In my judgement, litigants must properly access the courts. This the applicant did not do. This court would not be regulating its

own process by effectively conducting a parallel hearing of the application for postponement of the criminal trial. There is an extant court decision on the issue of postponement.

[23] The application is improperly before me.

[24] In the result, the application be and is struck off the roll.

CHIKOWERO J:…….

Mbidzo Muchadehama and Makoni, applicant's legal practitioners
The National Prosecuting Authority, second and third respondent's legal practitioners