

GEORGE KATSIMBERIS
versus
THE HON MRS VONGAI MUCHUCHUTI
GUWURIRO ESQ N.O
and
THE STATE
and
THE JUDICIAL SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 13 June 2023, 15 June 2023 & 21 June 2023.

Urgent Chamber Application

T Chinyoka *for the applicant*
F Kachidza & M Reza *for the 2nd respondent*
No Appearance *for 1st and 3rd respondents*

KWENDA J: The applicant has an application for review of unterminated criminal proceedings pending before the first respondent. He has also cited the State as the second respondent and the Judicial Service Commission as the third respondent.

On the 12 June he filed this urgent chamber application for a provisional order. The interim relief which he seeks as part of the provisional order is stay of the proceedings at his criminal trial before the first respondent under CRB R 423/20 pending the return date of this matter on which date he will move this court to confirm the stay of the criminal trial pending the outcome of the criminal review.

After perusing this chamber application, I was persuaded that it was urgent, on the face of it, whereupon I set it down for hearing on the 13th June 2023 on 1430 hrs.

At the hearing, on the 13th June 2023, the State was represented by Ms *Kachidza* asked for time to oppose the application in writing. In making the request she gave notice of the State's intention to object to this application on the basis that the matter was not properly before me because the trial court is seized with the matter and has jurisdiction to grant the relief sought.

I granted the request with the consent of the applicant's counsel and postponed the hearing to the 15th June 2023.

On the 15th June 2023 the parties appeared before me for argument. The 2nd respondent had already filed its notice of opposition in which it raised the preliminary objection as well as opposing the application of the merits. The objection was that the matter was not properly before me in view of the fact it was already the subject of another court with competent jurisdiction and my involvement would interfere with such proceedings. She argued that there were no exceptional reasons justifying such interference because the 1st respondent had the power to postpone the trial in terms of s 165 and 166 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The state also argued that the law requires the applicant to utilise the remedy available to him before the 1st respondent before approaching this court. This court would only be involved in the exercise of its jurisdiction on appeal or review whichever is applicable. Such jurisdiction is normally exercised by a panel of two judges where the outcome is to upset or correct the trial magistrate. The State moved me to strike off the application from the roll.

In response, Mr *Chinyoka* advised the court the applicant had applied for stay of proceedings before the first respondent on the 13th June 2023 who had dismissed it on the same day. He submitted that the underlying reason for seeking review of the proceedings at the applicant's criminal trial was that the 1st respondent had denied the applicant's constitutional right to conduct his defence in the Greek language which he understands. The applicant requires the services of a Greek interpreter who has not been made available by the court. He is, therefore, in the middle of requesting referral of the issue to the constitutional court in terms of s 175(4) of the Constitution of Zimbabwe (Amendment no 20) Act 2013. He is required to give evidence in support of the request for referral and for that purpose he also requires the services of a Greek interpreter. Mr *Chinyoka* also argued that this chamber application is an application for an interdict to prevent an illegality arising out of the 1st respondent's interference with the aforestated applicant's constitutional right.

I have misgivings above the correctness of the citation of the 2nd and 3rd respondents. The applicant cited the State as the 1st respondent. In my view he should have cited the Prosecutor General who prosecutes crime at the public instance. The State does not appear to have the legal personality and capacity to sue and be sued. The second respondent is the employer of the 1st respondent and has only administrative authority over the 1st respondent. In terms of the s165 as read with s190 of the constitution, the 1st respondent must exercise her judicial function without interference. Anyone aggrieved by her judicial decision should utilise

the hierarchy of the courts. It was, therefore, not necessary for the applicant to cite the 3rd respondent. The applicant does not seek any relief against the 3rd respondent. However, the second respondent did not raise these issues.

Having said that, I decided to deal with the merits of the application in view of the fact that the first respondent is properly before me anyway.

I conclude as follows: -

The first respondent's preliminary objection has merit for the following reasons.

- (a) The facts that the applicant made an application before the 1st respondent for postponement of the criminal trial on the 13th June 2023 means that he realised that she had jurisdiction to grant or refuse the relief which has the effect of staying the criminal proceedings.
- (b) When that means is that this application was filed prematurely. In terms of the principle of subsidiarity, the applicant should have exhausted the remedy in the court which is already seized with his trial.
- (c) It is trite that this court does not interfere with proceedings before a competent court, *albeit*, inferior, unless there are exceptional circumstances justifying that interference.

I would have struck off the application for those reasons alone. I however am even fortified by the developments which took place on the 13th June 20123. The dismissal of the application for postponement is an order by a court of competent jurisdiction which is binding. This court can only upset that order in the exercise of appellate or review jurisdiction.

Further, it is not correct that what I have before me is an application for an interdict. The relief sought in the present application is self-explanatory. The applicant did not plead the requirements of an interdict. The applicant's draft order seeks stay of proceedings.

In the result I order as follows: -

The 2nd respondent's preliminary objection is upheld and the application is struck off with no order as to costs.

Mutumbwa, Mugabe and Partners for the applicant's legal practitioner
National Prosecuting Authority for the respondent's legal practitioner