

PRECIOUS DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 27 JUNE 2022 & 30 JUNE 2022

Application for bail pending trial

P. Butshe for the applicant
Ms. C Mabhena for the respondent

DUBE-BANDA J:

1. This is an application for bail pending trial. Applicant is being charged with the crime of attempted robbery as defined in section 189 as read with section 189 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that applicant in the company of accomplices who are not part of this application were laid and ambushed by the police while on their way to commit an armed robbery at number 20 Gelcon Avenue, Greendale, Harare. The police gave chase and there was an exchange of fire between the applicant's group and the police, resulting in the applicant suffering some injuries. Upon arrest certain firearms and ammunition was recovered from the applicant. Applicant and his accomplices had no firearms certificates for the firearms and ammunition recovered from their possession.
2. Applicant first appeared at Rotten Row Magistrates' Court, Harare on the 1st April 2022, and he was remanded in custody and he continues to appear at the same court for routine remands. His next remand date is 4 July 2022.
3. Respondent took a preliminary objection. I informed the parties that I would only deal with the preliminary point, in the event that it succeeds the matter would end there, and if it fails the Registrar will provide a set down date for the matter to be heard on the merits.
4. First the facts. On the version of events the parties were generally agreeable about what happened at the High Court, Harare and the Magistrates' Court. In summary it is this: the applicant filed a bail application at the High Court, Harare. The application was set-down for

the 31st May 2022, before a judge of this court sitting in Harare. The application was withdrawn at the High Court, Harare on the basis that since applicant was charged with the crime of attempted robbery which is not a Third Schedule offence, the Magistrates' Court had jurisdiction to hear his bail application.

5. On the same date i.e. 31st May 2022, applicant's legal practitioners appeared before the Magistrates' Court ostensible for an application that applicant be released on bail pending trial. The court *mero moto* raised the issue of jurisdiction, whether it had jurisdiction in view of section 116 of the Criminal Procedure and Evidence Act [Chapter 7:09], which takes away the jurisdiction of the Magistrates' Court, subject to the consent of the Prosecutor-General in bail applications where accused are charged with a Third Schedule offence. The parties made their respective submissions and the matter was rolled over to the following day for a ruling. On the following day no ruling was handed down. Thereafter the matter was postponed several times for the court to hand down its ruling on the preliminary issue of jurisdiction. Applicant through his legal practitioners wrote a letter of complaint to the Chief Magistrate, ostensible on the delay in handing down a ruling on the preliminary issue of jurisdiction.
6. Respondent contended that the Magistrates' Court would hand down its ruling on the jurisdiction issue on the 4th July 2022. This was not controverted.
7. On the 17 June 2022, applicant filed this bail application at this court. Respondent has taken a preliminary objection ostensible that applicant cannot approach this court as a court of first instance when his bail application is still pending before the Magistrates' Court, Harare. Cut to the bone the objection is that this court must decline its jurisdiction to deal with this matter on the basis that the Magistrates' Court is seized with applicant's bail application.
8. Mr *Butshe* counsel for the applicant submitted that there was no bail application made at the Magistrates' Court. Counsel contended that when he rose to make a bail application at the instance of the applicant, the court raised the issue of jurisdiction. Counsel submitted further that it could not be argued that a bail application was made at the Magistrates' Court when the court itself denied counsel the opportunity to make such an application. It was argued that the Magistrates' Court still has to make a ruling or decide whether it has jurisdiction to entertain applicant's bail application. Therefore the substance of the bail application is not before the

Magistrates' Court. Hence according to counsel there is no bail application pending before the Magistrates' Court.

9. Counsel submitted that there has been an inordinate delay in handing down a ruling on the jurisdiction issue at the Magistrates' Court. Applicant had to approach this court to deal with the bail application. Counsel contended that this court must make a finding that there is no bail application pending before the Magistrates' Court and proceed to deal with this bail application.
10. Mr *Butshe* argued that this court must make a finding that there is no bail application before the Magistrates Court. I do not agree with this submission. Counsel is merely making a distinction without a difference. My view is that the substance of the application before the Magistrates' Court is a bail application. It is not the preliminary issue on jurisdiction. The jurisdiction issue or the preliminary issue arose in the overall context of a bail application. The Magistrates' Court is seized with a bail application, however it has to first deal and rule on whether it has jurisdiction to entertain the application in view of section 116 of the Criminal Procedure and Evidence Act [Chapter 7:09].
11. The jurisprudence in this jurisdiction is that superior courts should be very slow in interfering with the unterminated proceedings of lower courts. The exception is made for cases where there is a gross irregularity or a wrong decision by the lower court that will seriously prejudice the rights of a litigant or accused person and which irregularity or wrong decision cannot be corrected by any other means. See: *Mamombe and Another v Mushure N.O and Another* CCZ 4 / 2022.
12. Applicant's bail application is before a court established by law. The Magistrates' Court is seized with the application. The relief that applicant seeks in this court is the same relief he seeks at the Magistrates' Court. I do not agree that this court can as a court of first instance, without any sound legal basis entertain a matter that is still pending before the lower court. The Magistrate's Court must be given space to deal with the matter it is seized with without any unnecessary interference by this court. The fact that there has been an allegation of an inordinate delay in handing down a ruling on the jurisdiction issue at the Magistrates' Court is of no moment. The point remains that the Magistrates' Court is seized with his bail application.

13. In the circumstances the preliminary objection has merit and it stands to be upheld. This court declines its jurisdiction to entertain this matter.

In the result I make the following order:

- i. The preliminary objection is upheld.
- ii. This bail application be and is hereby struck off the roll.

Mathonsi Ncube Law Chambers applicant's legal practitioners
National Prosecuting Authority respondent's legal practitioners