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Judgment No. SC 44/07
Const. Application No. 253/06

JOSEPHINE SIBANDA v

(1) ATTORNEY-GENERAL OF ZIMBABWE (2) COMMISSIONER OF POLICE

SUPREME COURT OF ZIMBABWE
CHEDA JA, GWAUNZA JA & GARWE JA
HARARE, JULY 16, 2007 & JANUARY 28, 2008

B Mtetwa, for the applicant

R Chikosha, for the first respondent

No appearance for the second respondent

GWAUNZA JA: The main application in this matter is made in terms of s 24 of the Constitution of Zimbabwe ("the Constitution") for the enforcement of the applicant's right to a fair hearing within a reasonable period of time as provided for in s 18(2) of the Constitution. The application came on referral from the magistrates' court, in terms of s 24(2) of the Constitution.

Before this Court, the first respondent ("the respondent") filed an application ("the second application") in which he sought leave to adduce and tender evidence not placed before the court *a quo*. After hearing argument on this matter, we

found no merit in the application and dismissed it. We indicated that the reasons for such dismissal would be included in this judgment and proceeded to hear the main application.

I will first give the reasons for our dismissal of the second application and then consider the main application. To avoid confusion, I shall continue to refer to the applicant in the second application as "the respondent" and the respondent therein as "the applicant".

The deponent to the respondent's founding affidavit, Joseph Tarusarira Mabeza, of the Attorney-General's Office, submits that the application in question is for leave to produce "affidavits, letters and the police running diaries". He further submits that the documents in question, numbering twenty-five, were important insofar as they went to show *"*why the delay was occasioned in the matter in which the respondent *(*now the applicant*)* is an accused". It is also the respondent's contention, in support of this application, that a record of the proceedings in the magistrate's court showed that "no proper argument" was made on the issue of the delay in prosecuting the case against the applicant. The respondent concludes by stating that it was in the interest of justice that the documents be produced, so that "this Honourable Court can make a proper and just response to the application filed by the respondent".

A number of issues arise from the respondent's submissions.

The first is that, by the respondent's own admission and, indeed, as is evident from the record of proceedings *a quo*, the application for the referral of this matter to this Court was heard fully by the court *a quo*. Argument was entertained from both sides, and the court, after duly considering those arguments, granted the applicant leave to take the matter to this Court. By complaining that "no proper argument was made" on the issue of the delay, the respondent is in fact admitting that, while it had the opportunity to argue against the application for referral, it had failed to do so "properly". It therefore wishes to do so now, with the aid of the documents it now seeks to produce. There can, in my view, be no doubt as to the impropriety of such a course of action.

The respondent has given no good explanation as to why the documents in question were not properly produced in the court *a quo*. There is no suggestion that such documents were not available at the time the matter was heard. Indeed, if the respondent felt it needed more time to assemble the documents in question, or prepare better than it did, for the hearing of the application for a referral, all it needed to do was apply to the court *a quo* for postponement of the hearing. That no such application was made suggests the respondent was ready and prepared to argue the matter. The court *a quo* heard argument and determined the matter on the basis of the evidence placed before it. No indication was made to it that there was in existence other evidence that it had to take into account before reaching its determination. The decision of the court *a quo* should have, properly, been influenced by all the evidence that the parties considered necessary to address their respective arguments.

Having failed to place such evidence before the court, the respondent, therefore, lost the opportunity it had to press for the adduction of the relevant further evidence in the court *a quo*.

The second issue that arises is that the additional evidence sought to be adduced had relevance to the application for referral in the court *a quo*. The application before this Court is for a decree of perpetual silence in terms of s 18 of the Constitution. To the extent that this is a different matter from the application for referral that the lower court entertained and determined upon, it is not relevant to the application *in casu*. Even if it had such relevance, the respondent has followed the wrong procedure in seeking to adduce it.

This brings me to the third issue arising from the respondent's papers. The respondent has titled the application, "COURT APPLICATION TO PRODUCE AFFIDAVITS AND DOCUMENTS IN TERMS OF SECTION 22(1)(B) OF THE SUPREME COURT ACT (*CHAPTER 7:3*)". Reference to the application being made in terms of s 22(1)B of the Supreme Court Act is clearly misplaced. As the title to s 22(1)(B) indicates, that section is concerned with the powers of the Supreme Court in appeals in civil matters. The main application *in casu* is not an appeal. The respondent has thus not pointed to any provision that gives it a legal basis for making the application in question.

In its opposing affidavit the applicant argues, among other averments, that at the hearing of the application for referral the respondent had given no indication that it needed to call any witnesses. The applicant also makes reference to the respondent's failure to cross-examine her, and submits this was to her a clear indication that the State could not challenge her version of events. The applicant also contends that allowing the application would be prejudicial to her, as delays in the matter would continue. Also that, as a result, she would be denied the right to cross-examine the deponents to the affidavits sought to be produced, when such right would have been automatic had the witnesses testified before the magistrate.

These contentions, I find, are well founded and serve to emphasise the lack of merit in the respondent's application.

The second application could, therefore, in view of the foregoing, not succeed; hence our dismissal of it.

I will now turn to the main application in which the applicant seeks the following relief, that:

"1. The proceedings in the magistrates' court, Harare, in the case of The State v Josephine Sibanda, case No. R452/06, be and are hereby permanently stayed.

2. The Attorney-General is to pay the costs of this application."

Section 18(2) of the Constitution, on which the applicant relies for the order sought, reads as follows:

> "(2) If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The case at the centre of this dispute is one in which the applicant was accused of fraudulently causing the transfer of the property known as stand No. 14052 Chatsworth Road, Vainona, Harare, from the name of one Robert Mugaba, into her name. It is the applicant's case that the report was first made to the CID Fraud Section in 1993 by Joseph Sibanda, then her husband, although the two were having matrimonial problems. The applicant avers she was first informed of the investigations into the case in early 1994 when she was officially warned and cautioned by officers from the CID Fraud Section in Harare. At some point in 1994 the applicant and Joseph Sibanda reconciled, with the latter even using the title feed in question as security as part of his bail conditions when he was arrested on charges of theft.

Nothing further was done in relation to the charges of fraud until 1999, when the marriage relationship between Joseph Sibanda and the applicant deteriorated to a point where the latter issued divorce summons. When Joseph Sibanda thereafter sought to revive the fraud charges against the applicant, the applicant made a follow up with the police and was informed that the case had been closed for want of sufficient evidence. Nothing further seemed to have happened until 5 September 2002, when the applicant was again called to the police station over the same matter. She wrote a letter of protest the following day, i.e. 6 September 2002, to the Police Commissioner. Pressure continued to be applied on the police by Joseph Sibanda and Robert Mugaba,

who had sold the property to the applicant's husband. More correspondence was exchanged between the police and Joseph Sibanda. One letter addressed to Joseph Sibanda, dated 18 June 2003 and written by J Nyakotyo, whose designation was Assistant Commissioner - Officer Commanding (Serious Fraud Squad) – Criminal Investigation Department, read in part as follows:

> "Reference is being made to the above matter which you reported on 31 July 2002.
>
> Please be advised that we are putting the matter to rest because the matter has been overtaken by events. The judgment that was given by the High Court Judge took into account the allegations you are making to your former wife and went on to award the property to the now deceased (*sic*).
>
> We wish to advise you that you should wait for the outcome of your pending case in the Supreme Court."

Reference to the High Court and Supreme Court is in relation to the divorce matter. The writer of the letter clearly meant to say the disputed property had been awarded to the applicant as part of her divorce settlement. In the event, the Supreme Court, on 31 January 2005, upheld the High Court's decision. This, however, did not deter Joseph Sibanda from insisting that the police arrest the applicant. The police response took the form of Detective Assistant Inspector Rwafa ("Rwafa") on 7 February 2005 paying a visit on the applicant at home and demanding that she either attend court or face arrest and detention. No summons had been issued and it was not clear on what authority Rwafa acted.

The applicant in her founding affidavit and other documents sets out the events that then followed -

1. **15 MAY 2006**

(a) She attended court in the company of her legal practitioner in order to avoid arbitrary arrest at the instigation of Rwafa. After initial confusion, since the prosecutor in the relevant court, court 13, knew nothing about the case, she was advised by the senior prosecutor that she would be given a trial date in court 13.

(b) Since none of the regional magistrates or prosecutors were prepared to entertain the matter without a summons and, again to avoid arrest by Rwafa, she successfully requested from a provincial magistrate a remand to trial date, which was set for 27 June 2006.

2. A few days later Rwafa again appeared at the applicant's premises without summons with the intention of taking her back to court. Enquiries established that the prosecutor who was seized with the matter knew nothing about Rwafa's visit, nor did the Attorney-General's representative at the Head Office. The latter advised her not to attend court as it was irregular for the police to require her to go to court when she had already been remanded to a trial date. Rwafa had to be ordered off the applicant's premises by his superiors.

3. **27 JUNE 2006**

The applicant attended court on 27 June 2006 and her legal practitioner gave notice to the prosecutor of the intention to apply for a referral of the matter to this Court on the basis that she had been denied a trial within a reasonable period of time. The matter was postponed at the instance of the State to 12 July 2006 while instructions were awaited from the Attorney-General's Office, to which the docket had been referred.

4. **12 JULY 2006**

The applicant attended court and once again no magistrate was prepared to entertain the matter, and the prosecutor dealing with the case was not available. The docket was then given to another prosecutor, who requested time to peruse it. She was then remanded to the following day.

5. **13 JULY 2007**

Again, no magistrate was available to deal with the matter. The matter was referred to a lower court by the prosecutor but, when consulted, the regional magistrate in charge directed that the matter be referred back to court 13 for a hearing by the magistrate there. That magistrate again being unavailable, the applicant was remanded back to the provincial magistrate for trial on 18 September 2006. The applicant therefore did not have a chance to make an oral application for referral of the case to this Court.

6. **18 JULY 2006**

A letter written by O Mabahwana, the public prosecutor of court 13, to the applicant's legal practitioner, read in part as follows:

> "I understand (the) case was remanded to 18 September 2006. Taking into account the very age of the case and your intention to apply for a referral of the case to the Supreme Court on a Constitutional issue would (*sic*) necessitate the case being heard timeously. If you are agreeable the date (can?) be brought forward for the purpose of your application (*sic*). Please communicate your position to this office before 20 July 2006."

7. **24 JULY 2006**

The applicant's legal practitioner responded to the public prosecutor's letter, indicating there was no objection to the matter being heard before 18 September 2006.

8. At the State's instance, the matter was moved forward and finally heard on 25 July 2006, specifically for the purpose of the referral in question. After the hearing, the magistrate was satisfied that the application was neither frivolous nor vexatious and referred it to this Court.

Against this background, the applicant lists the following reasons as the basis of her argument that her right to a fair hearing within a reasonable time has been infringed –

1. That the matter arose in 1994 and, after investigations by the police, it was determined that there was no case, to an extent that she was not even placed on remand;

2. After her various enquiries with the police elicited the repeated response that the matter had been closed and the docket filed away, she had no reason to suspect that the matter would later be resuscitated. She had also reconciled with her husband, who had initially reported the matter to the police;

3. When her former husband again sought to resuscitate the matter in 1994, the police remained adamant that the matter was closed and that he should pursue the claim in the civil courts.

4. The High Court in the divorce matter dismissed her former husband's accusation of fraud against her, and this decision was upheld by this Court.

5. Many of the players in the matter at the relevant time were no longer readily available, and she could not fully recall the person she dealt with at the office of the City of Harare. Also the original police investigators were no longer within the Police Force.

6. The "start-stop" manner in which the matter was handled had been extremely traumatic to her, her children and her family. In particular, the fact that Rwafa, the investigating officer, would pitch up at her home without warning in order to harass her over the case, had been particularly unsettling and embarrassing. The police harassment extended to "carting" her to court without a summons or formal notice, when the court had already postponed the matter to a trial date without conditions. In her

view, this demonstrated the arbitrary manner in which the case was handled, as well as an element of malice and bad faith; and

7. No reasonable or acceptable explanation had been given for wishing to resuscitate the matter more than twelve years after it was reported and she was first warned and cautioned.

The applicant also disputes that there is any new evidence that has come to light, since the allegations in the State outline remain exactly the same as those made in 1994.

The respondent opposes the application for a permanent stay of prosecution in the matter brought against the applicant in the magistrate's court.

The first part of the Heads of Argument filed on behalf of the respondent addresses issues to do with the application made in the court *a quo* for referral of the matter to this Court. The respondent seeks to argue, on a number of grounds, that the application was not properly filed and determined. The point is made that the prosecutor concerned did not "properly handle" the issue and should have asked for a postponement. Further, that, therefore, the magistrate determined the matter based on incomplete evidence having been presented before him.

I have already commented on these contentions and have no hesitation in dismissing them. In any case, what is before this Court is not an appeal against the magistrate's decision to refer the case to it. The arguments now sought to be advanced

by the respondent should properly have been made in the context of an appeal against the magistrate's decision, not within the context, as *in casu*, of a different application before a different court. Having failed to appeal against the decision to refer the matter to this Court, the respondent has irrevocably lost the opportunity to impugn the same decision. Since the decision to refer the matter to this Court has not been challenged through an appeal, it therefore stands.

This Court is accordingly seized only with the matter concerning the applicant's quest for a permanent stay of prosecution in the matter between the State and herself, i.e. CRB R452/06. This is the matter that the respondent correctly addresses in the second part of his heads of argument. It is argued for the respondent that the application has been filed, to all intents and purposes, in order to frustrate the "ends of justice". Citing as authority the case of *Sivako v Attorney-General* 1999 (2) ZLR (S) at p 279, the respondent contends that what is demanded by s 18(2) of the Constitution is that an accused person is given a fair hearing. Further, that the question of fairness is ultimately decided objectively on the facts of each given case on a value judgment.

While conceding that the matter had been properly reported to the police in 1994, the respondent alleges, without indicating who did it, or how, that the case was being interfered with to such an extent that the Office of the Attorney-General only got to know of its existence in July 2003. This was after the applicant's husband, Joseph Sibanda, had lodged a complaint with the police. The respondent makes the further point that it was the reconstructed docket that had led to the matter being attended

to at the magistrate's court. It is observed that the applicant "only appeared" before a court in 2006.

The respondent does not challenge the applicant's averments concerning the events that resulted in the matter dragging on for so long. It seeks, however, to obliquely put the blame for interference in the matter on the applicant. While conceding that the police are an arm of the State, the respondent nevertheless seeks to distance the Attorney-General's Office from actions or conduct that might have contributed to the delays complained of. It is submitted in para 7 of the respondent's Heads of Argument that the matter took longer than it ought to have done "as proper channels were not followed" for the prosecution of the matter.

Although not developing the argument further, the respondent also poses the question of when exactly it can be said that the applicant was properly charged. Citing *In re Mlambo* 1991 (2) ZLR 339 at pp 350-351, the respondent correctly submits that the factors to be considered in applications of this nature were –

(i) the length of the delay;

(ii) the reason for the delay;

(iii) the assertion of his/her rights by the accused person; and

(iv) the prejudice occasioned as a result of that delay.

Even though the respondent concedes, as the applicant alleges, that the delay in processing the matter was quite considerable and can trigger an inquiry into the constitutionality of the delay, it is nevertheless pertinent, before considering these factors, to settle the issue of exactly from when the period of the delay should be reckoned.

The respondent, as indicated, mentioned that the issue was "of great importance", but did not expand on the argument or cite any authorities that might have been useful in this determination. The applicant argues, however, on the basis of *In re Mlambo supra* at 346 that the time frame to be considered starts to run from the day the person is charged. In that case, the learned Judge observed that the key word in s 18(2) was "charged". He rejected the argument that the provision envisaged only the situation where the accused is called upon to plead to a formal charge. The learned Judge referred to this interpretation as a restrictive construction which had the effect of rendering the protection almost nugatory. He continued as follows at p 346:

> "I have no hesitation in holding that the time frame is designed to relate far more to the period prior to the commencement of the hearing or trial than to whatever period may elapse after the accused has tendered a plea. This meaning is wholly consistent with the rationale of s 18(2) – that the charge from which the reasonable time enquiry begins, must correspond with the start of the impairment of the individual's interests in the liberty and security of his person. The concept of 'security' is not restricted to physical integrity, but includes stigmatization, loss of privacy, anxiety, disruption of family, social life and work."

The applicant argues on the basis of this authority that the time frame *in casu* started to run from the moment the applicant was arrested and notified of the offence through the recording of the warned and cautioned statement in 1994.

I am persuaded by these contentions. The *dictum* cited above, I find, can be applied fully to the circumstances of this case. The entire period of the delay complained of *in casu* relates to the time before the applicant was ever called upon to tender a plea. Events never, in fact, got to that stage.

The impairment of the applicant's interest in the liberty and security of her person must have started with the demand for her to record a warned and cautioned statement. Matters affecting her "security", as defined in *Mlambo's* case *supra*, arose from events following the recording of the statement. The respondent has not challenged the applicant's averments that she experienced anxiety and fear of arrest, occasioned by constant telephone calls and visits to her home by the police over the matter. Loss of privacy, disruption of family and social life are also alleged and not seriously challenged. This could only have been exacerbated by repeated visits to the court and frustration over the failure of the trial to take off, as well as by what the applicant referred to as the arbitrary manner in which the matter was handled by the police and the embarrassment of being "carted" to court without a summons or other formal notice.

I am satisfied that, in the matter at hand, and on the authority of *Mlambo's* case *supra* as cited, the time frame for the delay complained of must be reckoned from the time the applicant recorded the warned and cautioned statement.

Having so determined, I will now turn to consider the factors outlined in *Mlambo's* case *supra* that must be considered in an application of this nature.

(1) THE LENGTH OF THE DELAY

There is no disagreement between the parties that the delay complained of, stretching over some twelve years at the time the application for referral was made, was considerable. The respondent, having conceded this point, proceeds to advance a somewhat contradictory argument, that "the only difficulty that arises is on when the period can be said to have started". A half-hearted reference is then made to the fact that the police had closed the docket on more than one occasion. These averments lack merit in the face of the respondent's concession that a delay in excess of ten years was considerable.

The applicant has succeeded in establishing that the length of the delay *in casu* more than justifies the constitutional challenge in question.

(2) THE REASONS FOR THE DELAY

The parties blame each other for the delay in the prosecution of the case. They do, however, agree that one of the factors was the closure of the docket by the police several times over a number of years. While the applicant submits the police did this after finding there was insufficient evidence to support the charge, the respondent charges, vaguely and without substantiation, that the applicant had somehow used her influence and prevailed on the police to drag their feet in processing the case.

The respondent charges as follows in para 11 of his Heads of Argument:

> "If anything and if one was to agree with the applicant she was more inclined to have the matter stayed rather than for it to go on trial. This is evidenced from the fact that Legal Services Directorate for the Zimbabwe Republic Police also got involved in the matter when by right this matter should have been sent to the Attorney-General's Office for a final determination to be made.
>
> It is also apparent that she could have been involved in not having the docket finalised and sent to court for final determination of the issue."

The respondent, as already indicated, has not tendered any evidence to prove the allegations he makes against the applicant. It has, for instance, not been explained exactly what it was about the applicant that could have given her so much influence over the police, or how she could have managed to exert such influence over them.

It appears to me that if anyone had the power to influence the police to press the charges in question, it was Joseph Sibanda. He seems to have persistently succeeded in getting the police to resuscitate the charges despite written notification from the same police officers that the docket had been closed.

The respondent has not challenged the applicant's submission that a significant period of the delay in question related to the time between 1994 and 1999 when the applicant and her former husband, Joseph Sibanda, reconciled and resumed married life together. Nor has the respondent disputed the applicant's assertion that, after the matter finally was referred to his Office, it then took another four or so years (2002-2006) for the matter to be set down for hearing. The respondent, however, accuses the police of not carrying out instructions received from the Attorney-General's

Office during that period. No elucidation is given as to what those instructions were, why the police did not carry them out, or what, if anything, the Attorney-General's Office had done to get the required response from the police. What is clear, however, is that nothing has been placed before the Court to suggest the applicant was in any way responsible.

Taken together, these two periods take up some nine years of the delay. In the face of this reality, the respondent's allegation that the delay in the processing of the case was largely attributable to the applicant is clearly not supported on the facts of the matter. The evidence before the Court suggests, in fact, that much of the delay was occasioned by Joseph Sibanda, who, apparently, put on hold his demands to the police to have the matter prosecuted during the period of the parties' reconciliation. That he could not have pressed for the processing of the matter during this period is confirmed by the applicant's assertion (not challenged by the respondent) that during their period of reconciliation, Joseph Sibanda had used the title deed to the property in question as security in his dealing with the bank, as well as for bail purposes in respect of some criminal charges that he was facing.

Thus, when looked at as a whole, in regard to the reasons for the delay in question, the evidence before the Court shows that a major part, if not all, of such delay must be placed at the door of Joseph Sibanda, the police and the respondent. There is no evidence suggesting, as the respondent charges, that the applicant, in interacting with the police over this matter, was motivated by a desire to block rather than expedite progress

in the prosecution of the case against her. While Joseph Sibanda's part can be attributed to the acrimony between him and the applicant over their divorce, the motive of the police and the respondent in not speedily processing the matter is clearly open to speculation.

(3) THE ASSERTION OF HIS/HER RIGHTS BY THE ACCUSED PERSON

The facts of this matter show that the criminal charges in question arose in 1993, with the applicant recording a warned and cautioned statement in 1994. Thereafter she and Joseph Sibanda reconciled their matrimonial differences and, it appears, both of them were during that period content to let the matter rest. After the two broke up again, Joseph Sibanda sought to resuscitate the charges. The applicant made enquiries with the police and was informed that the docket had been closed for want of sufficient evidence. According to her evidence, there was no necessity, after this, to continue making enquires. While failure to assert one's right to a speedy trial might make it difficult for an applicant to prove that she was denied a speedy trial, *in casu* the applicant could not have been expected to seek to assert a right that she had been made to believe had ceased to exist by virtue of the closure of the relevant docket. This was until she was visited by Rwafa, demanding that she present herself to the magistrate's court. She obliged and had to endure the various postponements of the case, as already outlined. The respondent, while charging that she has not been diligent in attempting to assert her rights to a speedy trial, does not say what else, besides what is outlined above, the applicant could have done in the circumstances to assert her rights.

There is on record evidence to show that both the applicant and Joseph Sibanda were in contact with the police over the matter. While the latter clearly was putting pressure on the police to prosecute the applicant, the respondent has tendered no evidence to substantiate its allegations that the applicant's efforts were directed towards putting pressure on the police to delay or block progress on the case.

The probabilities, in my view, favour a finding in support of the applicant's assertion that she was trying to get the police to act on and expedite finalisation of the matter.

I am satisfied, therefore, that the applicant did all that could have been done to assert her rights to a trial within a reasonable period of time.

(4) PREJUDICE OCCASIONED AS A RESULT OF THE DELAY

The applicant submits that she has suffered real prejudice as a result of the State's inordinate and unexplained delay to afford her a fair trial. She states she has suffered serous inconveniences, social stigma and pressures detrimental to her mental and physical health. Further, that she was literally "unlawfully terrorised" by police, who would pitch up outside her gate without notice and demand that she present herself at court or at the C.I.D. Fraud Section. The applicant cites the following passage in *In re Mlambo supra* at 344 B-D which she contends, correctly in my view, is apposite:

> "The right (in section 18(2) of the Constitution of Zimbabwe), therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures

> detrimental to mental and physical health of the individual. … I believe that there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial."

It is also submitted for the applicant that the long delay in bringing the matter to trial was likely to impair her capacity to mount a full and fair defence. This was particularly so, given the fact that she has lost some of the details and memories of sequence of events in the matter. She believed the matter was at a close and had therefore no reason to seek to consciously preserve all the evidence that was available in 1994. In addition to this, it is submitted, many of the players in the matter were no longer available, including the original investigating officers. Finally, it is submitted on behalf of the applicant that prejudice that impairs the ability to mount a full and fair defence "runs roughshod" over the fairness of the trial and is one of the most important factors that should be considered by the Court.

I find on the evidence before the Court that these contentions by the applicant have substance. In *Barker v Wingo* (1972) 407 US 514 (US SCt) (quoted by DUMBUTSHENA CJ in *Fikilini v Attorney-General* 1990 (1) ZLR 105 at 113 G-H -114 A, a case that the respondent cites but which, in my view, does not support its case (rather the opposite)), the learned Judge said:

> "Prejudice of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the

> entire system. If witnesses die or disappear during a delay, the prejudice is obvious. …"

Despite citing this passage in his heads of argument the respondent, I find, has not tendered any evidence, or advanced any argument, to disprove the applicant's assertion that her interests as outlined herein had been prejudiced. All that the respondent does, after conceding that while a long delay may, in the absence of acquiescence, express or implied, give rise to a strong presumption of prejudice to the applicant, is to state that "in the present matter this ought not to be the case". The respondent does not then proceed to show why this should be so.

One further matter calls for comment. The applicant makes mention of the fact that in the divorce proceedings between her and Joseph Sibanda, the High Court dismissed the latter's allegations against the former of fraud with regard to the house at the centre of this dispute. The court proceeded to award the house to the applicant as part of her divorce settlement, a decision that the Supreme Court upheld on appeal. It is pertinent to note that the High Court awarded the Vainona property (among other property) to the applicant *in casu*, not because it had dismissed the fraud allegations made against her, nor because the property was already registered in her name. Rather, the award was made because the court considered it to be a fair share to which the applicant was entitled by virtue of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*]. The implication is that the court would have awarded the property to the applicant even had she been prosecuted and convicted of fraud. Thus, Joseph Sibanda would in the end still

have been unable to have the applicant's title to the property rescinded in his favour, if indeed such was the motive behind his quest to have the applicant prosecuted.

The applicant seeks an order of costs against the respondent. The respondent, however, has not addressed this part of the applicant's prayer. In *In re Mlambo supra*, where a permanent stay of criminal proceedings was ordered by this Court, the learned Judge granted costs against the Attorney-General after observing as follows:

> "It is permissible in an application of this nature to order that the costs incurred should follow the event. See *Bull v Attorney General of Zimbabwe* 1987 (1) ZLR 36 (SC); [1988] LRC (Const) 324. I see no reason to deprive the applicant of his costs."

In casu, I likewise see no reason not to award the applicant her costs.

Having found, when all is considered, that the applicant has proved a case for the relief sought, I make the following order -

1. The proceedings in the Magistrate's Court, Harare, in the case of *The State v Josephine Sibanda* – case no. R452/06 – be and are hereby permanently stayed.

2. The first respondent is to pay the costs of this application.

CHEDA JA: I agree

GARWE JA: I agree

Mtetwa & Nyabirai, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first respondent's legal practitioners