DZINGAI NEVHUNJERE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 1 December 2016 & 15 March 2017

Opposed Application

P. Ngarava, for the applicant
E. Mavuto, for the respondent

HUNGWE J: This application was placed before me through the chamber book seeking a curious order couched in the following terms:

> "It is ordered that:
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> 1. The trial *de novo* ordered by the Honourable Justice ZHOU on 3 October 2012 under case number HC 5594/11, Ref case CA 44-5/10, Ref case no. CRB R479/05 refers to trial *de novo* already commenced and mentioned in para 1 of Justice MTSHIYA's High Court Consent Order granted on 20 January 2010 under case No. HC 265/10 ref case No. CA 44-5/10, ref case No. CRB R 479/05.
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> 2. For the avoidance of doubt and as the State conceded that the applicant (accused person has been tried twice and that it wants to bring the matter for the 3rd time (or 3rd criminal trial) the trial *de novo* alluded to by judge ZHOU is not a third criminal trial or second trial *de novo*.
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> 3. There shall be no order as to costs."

I was unable to understand what the nature of the order the applicant was seeking, or to who was it directed at? Was this intended to be a *declaratuur*? Could it be that the applicant was unclear as to the meaning of certain court orders arising from the fact that they were contradictory? There were no reference files attached, although it was clear that certain court proceedings were subject of the application. The attached affidavits did not make sense in fact they compounded the lack of clarity in the draft order sought. Fortunately the respondent filed an opposing affidavit which cast these papers under a better light regarding the events leading to the present chamber application in which the above draft order was sought.

Upon receipt of the Notice of Opposition the applicant's counsel, Mr *Ngavara* penned a three page letter criticising the respondent's counsel, for filing the Notice of Opposition. Apparently Mr *Ngarava* was irked by Mr *Mavuto*'s attitude. *Mr Mavuto's* attitude was that this application was an abuse of process which needed to be nipped in the bud and therefore urged the registrar to expedite the pleadings and setting down of the matter so as to bring to finality the prosecution of the applicant which was still pending in the magistrate court. Needless to state, Mr *Mavuto* was quite right in his attitude towards the matter because of the events which preceded this application.

Mr *Mavuto*'s letter, dated 26 September 2016, was to this effect:

> "We are kindly requesting you to place the record a Judge in chambers as soon as possible. It is our considered view that the application is frivolous and vexatious only meant to frustrate the due administration of justice. The applicant has since approached the Constitutions Court and his application was dismissed under CCZ 03/15. There is nothing complex about a provisional order and final order which the applicant wants the Honourable court to interpret. We strongly feel that applicant is abusing the court process as the application does not have merit at all. It appears he is in the habit of lodging frivolous applications at this Honourable Court whenever the State wants to commence his trial before the Magistrates' Court."

This letter drew a befuddled response from the applicant's legal practitioners who, on 29 September 2016, wrote thus:

> "The above matter refers. We also refer to a letter dated 26th September, 2016, from The National Prosecuting Authority, filed of record at Your Offices on 27th September, 2016. Be advised that we represent the Applicant DZINGAI NEVHUNJERE (Accused Person) in this Case No. HC 9173/16 in which Mr E. *Mavuto* (from the NPA) is requesting you to place the record before a Judge in Chambers. Be advised that the NPA through the said Mr E. *Mavuto* has filed Opposition Papers and Opposing Affidavit and we are yet to file an Answering Affidavit before we embark on the next procedure namely Preparation and compilation of Heads of Argument because it has become an Opposed Matter. Once we prepare and filed Heads of Argument, the State will also have to file Heads of Argument before we embark on Pagination and setting the matter down for hearing on Opposition Roll after payment of the security costs to the Sheriff to enable you to forward the record to a particular Judge or Judges for consideration or hearing in open-Court.
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> Having outlined the above procedure, we are surprised by Mr E. *Mavuto*'s unsubstantiated averments that the Applicant is abusing Court Process. Whether or not the Application has merit, it is the Court that will decide. Mr E. *Mavuto*, for the reasons best known to himself has become emotional about the whole case which we filed to the High Court after mutual agreement reached between Ms D. Moyo (for the State) and our Mr P. Ngarava (for the accused-Applicant Dzingai Nevhunjere) in the Chambers of her Worship the Trial Magistrate Biance Makwande. So we filed the Application simply because we followed a directive from the Magistrate based on the mutual agreement between the State and the Defence Counsel to map the way forward following a deadlock between the State's interpretation of Judge Zhou's order vis-a-viz Judge *Mtshiya*'s order. We understand that Mr E. *Mavuto* is under pressure (to do what he is doing) from Thomas Bayley, the Cousin of Ian Douglas Smith) for political reasons for we do not have any other reason as to why Mr *Mavuto* would unilaterally request you to treat our Client's Application urgently without following High Court Rules pertaining

to Opposed Applications as can be verified from the Application itself based on our Client's Founding Affidavit and the State's opposing affidavit.

Whether or not it is vexatious and frivolous, only the Court will decide on papers filed of record and upon hearing Counsel in argument.

So please, do not place the record Case No. HC 9173/16 before a Judge in Chambers because all the due processes regarding opposed cases are not completed. Our client believes that Mr E. *Mavuto* has become an interested party and now without any credible and legal justification is personalising the issues relating to our client Dzingai Nevhunjere and Thomas Bayley who has taken his political battles based on land issues and jambanja to the Courts for the past 15 years. (sic)
Now it appears Mr E. *Mavuto*'s comments through his letter of 26th September, 2016, is seeking to unduly influence the Honourable Court or a Judge to simply order the prosecution of our client for the 3rd time despite the State's admission that it had prosecuted him twice and would not want to prosecute him for a third time. Our client believes that it is abuse of the State's *Dominus Litis* status simply to please Thomas Bayley and bolster his struggle to reverse the land Reform Programme in favour of the former white commercial farmer. Our client believes so because of Mr E. *Mavuto*'s comments that:

(i) "The application is frivolous and vexatious only meant to frustrate the due administration of justice;

(ii) There is nothing complex about a provisional order and final order which the Applicant wants the Honourable Court to interpret;

(iii) We strongly feel that Applicant is abusing the Court process as the Application does not have merit at all;

(iv) It appears he is in the habit of lodging frivolous applications at this Honourable Court whenever the State wants to commence his trial before the Magistrate Court."

Our Client believes that Mr E. *Mavuto*'s comments (supra) are in bad taste for the following reasons:

- Firstly the matter is *sub judice*, pending in the Honourable Court and the State has already filed Opposing Papers hence the comments by E. *Mavuto* on issues pending before the Court constitute impropriety on his part as Officer of the Court;

- Secondly, by deciding and ruling that there is nothing complex about a provisional order and final order, he (Mr E. *Mavuto*) is usurping the powers role of the Court or Judge. That is improper conduct.

- Thirdly, our client believes that it is improper for E. *Mavuto* to accuse him (our client) for abusing Court process for the past 15 years, he has been coming to Court without fail and was tried twice and the State completing its case twice.

  So it is unfair to accuse our client of abusing Court process when he requests the Court to give him and guide the Magistrate on a proper interpretation of its orders. The orders we request the High Court to interpret are Court Orders. Our client fails to understand as to

why Mr *Mavuto* or the State becomes agitated for the Applicant's request through the legal court processes.

- Fourthly, whether or not the Applicant's case has no merit at all, it for the Court to decide.(sic)

- Fifthly, the applicant is entitled to object to a Third Criminal Trial for he pleaded twice to the same charge and the State completed its case twice. Therefore he is entitled to challenge a Third Criminal trial." (sic)

I directed that Heads of Argument be filed in order for this court to understand why the applicant believed that his application was not frivolous and vexatious. What followed was much less than a dog's breakfast being passed-off as Heads of Argument by the applicant's legal practitioner. It was an incomprehensible regurgitation of the confusion that afflicted the applicant's founding affidavit, what one may call "the sound of fury signifying nothing."

In an attempt to appreciate what the applicant was about, I set down the matter for oral argument.

The brief facts are that the applicant was charged with stock theft in 2002. His trial duly commenced on 11 February 2005 under CRB 1662/05 before *Chizhande Esquire*. At the close of the case for the State the presiding officer left public service. In 2007 the uncompleted proceedings were quashed, it being ordered that a trial *de novo* before a different magistrate be instituted. That new trial commenced before *Kumbawa Esquire.* At the close of the case for the State, the applicant applied for discharge. The application was dismissed. Dissatisfied, the applicant sought a review of the proceedings before *Kumbawa Esquire* and simultaneously filed for a provisional order seeking a temporary stay of the proceedings before *Kumbawa Esquire* pending the determination of the application for review.

The Provisional Order application in HC 265/10 was placed before MTSHIYA J. The State was not opposed to the grant of the final order sought. Therefore by consent a final order was issued by MTSHIYA J staying the proceedings before *Kumbawa Esquire* pending determination of the application for review of the trial proceedings before *Kumbawa Esquire* in the Magistrate's Court.

The application for review was placed before ZHOU J who determined that the proceedings before *Kumbawa Esquire* be set aside. ZHOU J, in his order, additionally directed that the matter (of stock theft) be remitted to the Magistrates Court for a trial *de novo* before a

different magistrate, should the respondent, wish to proceed against the applicant (HC 5594/11). The State wished to proceed with the new trial as ordered by ZHOU J.

The applicant resists this new trial on the basis that the new trial constitutes an infringement of his constitutional rights as this would be his third trial.

It may very well be his third or fourth trial but it in no way infringes on his constitutional right to a fair and speedy trial. He chose to throw spanning into the works as early as 2007 thereby delaying the final determination of his guilt or otherwise when he could have waited until the trial had run its full circle. He would have had obtained finality in HC 5594/11 had he brought its review application after *Kumbawa Esquire* had pronounced himself on the plea of not guilty that he had tendered.

As matters stand, as far back as 2012 this court had ordered that the new trial be commenced. The applicant chose to take the Constitutional Court route to stymie the new trial. He did not prosecute it.

Presently, I find nothing ambiguous in both my brother judges' orders.

I again for the applicants' benefit adumbrate the effect of this orders.

MTSHIYA J's order was final in nature. By consent it was ordered that the proceedings before Kumbawa Esquire be stayed pending the determination of the application for review. That application for review, before ZHOU J, was successful and found in favour of the applicant in that the Court quashed the proceedings before Kumbawa Esquire. It was a pyrrhic victory because, in the same breath, the Court ordered that the proceedings be commenced afresh before yet another magistrate.

The High Court's statutory powers of review can be exercised at any stage of criminal proceedings before an inferior court. In uncompleted cases however, this power should be sparingly exercised. It would only be appropriate to do so in those rare cases where otherwise grave injustice might result or justice might not be obtained. It is always preferable to allow the proceedings to run to their normal completion and seek redress by means of an appeal or review. **Ndhlovu v Regional Magistrate, Eastern Division & Another** 1989 (1) ZLR 264 (H); see also **Masedza & Others v Magistrate, Rusape & Another** 1998 (1) ZLR 36 (H).

The applicant clearly does not wish to face his judgment day at the Magistrates Court, but face it he must. There is no legal impediment to the fresh trial. The order of this Court in HC 5394/11 was quite clear. The State wishes to conclude that trial. Justice delayed is justice denied. The State in the letter of 26 September 2016 explained that the applicant is delaying justice. Clearly, he is. There is no justification for the present application. It is a matter of

concern to this court that a legal practitioner of Mr *Ngarava*'s standing adopted this attitude. He needs to be reminded again that his duty is to the Court and to the law primarily. He should advice his clients bearing in mind this primary ethical consideration.

Throughout his submissions, I was unable to figure out in terms of which rules of court this application was being made. I am at a loss as to what order to make regarding the Draft Order filed by the applicant as it is nonsensical. Clearly, in my view, it was ill-conceived. There is no reason why the applicant should pay Mr *Ngarava* for such a waste of effort.

The order by ZHOU J is extant and I associate myself with it. I, on that basis, dismiss the application.

Mr *Ngarava* is ordered to pay the respondent's costs *de bonis proprii*.

Ngarava Moyo & Chikono, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners