NATIONAL PROSECUTING AUTHORITY
versus
NOEL MUPEYIWA
(Cited in his official capacity as a Regional Magistrate –
Eastern Region)
and
NAVISTER INSURANCE BROKERS (Pvt) Ltd.
(Represented by Wesley Simba Sibanda. In his capacity
As Judicial Manager.)
and
GIVEMORE NDERERE
and
VHUKILE HLUPO
and
OTTEN CHAKAWA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 12 January and11 February 2015

Urgent Chamber Application

C. Mutangadura, for the applicant
C. Kwirira, for the 2nd to 5th respondents

BHUNU J: The applicant is the National Prosecuting Authority duly established as such in terms of s 258 of the Constitution**.** It is responsible for instituting and undertaking criminal prosecutions on behalf of the State.

The third to fifth respondents are directors in 2nd Respondent Navister Insurance Brokers (Pvt) Ltd with whom they were jointly charged of fraud as defined in s 136 of the Criminal Law (Codification and Reform Act) [*Chapter. 9:23*] before the first respondent, the Regional Magistrate for the Eastern Region.

In the alternative they were charged with theft as defined in s 133 of the Act. They are alleged to have prejudiced the complainant Air Zimbabwe of substantial amounts of money acting in consort and common purpose in the course of duty as Navister directors.

The four respondents applied for discharge at the close of the state case in terms of s 198 (3) of the Criminal procedure and Evidence Act [*Chapter. 9:07*] which provides that:

> "(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

Before the trial magistrate had delivered judgment it was drawn to his attention that a provisional and final orders had been issued by the High Court under case number HC 5607/14 placing the second respondent under judicial management. The relevant para I (e) of Mtshiya J's order dated 10 September 2014 reads:

> "All actions, and applications and executions of all writs, summons and other process against the Applicant shall be stayed and not proceed without leave of this Honourable Court."

The first respondent interpreted the above order to mean that the second respondent could not be legally prosecuted in any court without the leave of the High court. In his ruling this is what he had to say:

> "The settled position is that once a corporate entity is placed under Judicial Management or under liquidation no legal proceedings should commence or proceed without leave of the High Court. This then means this trial against accused one cannot proceed without leave of the High Court. The State is not prepared to separate accused one from accused 1, 2, 3 and 4 and what this means is that the trial cannot proceed till the State (has) obtained leave from the High Court"

At that juncture the State applied for a longer postponement to enable it to apply in the interim for leave to prosecute the second respondent. The State then decided to stall the entire proceedings indefinitely by refusing to separate trials so as to proceed against the third to fifth respondents to whom Mtshiya J's order did not apply. The application was opposed. The Defence countered that an indefinite postponement would prejudice the accused. They then moved for removal from remand arguing that when the state is ready they can always be summoned to court for continuation of trial.

The first respondent ruled in favour of the defence saying:

> "All four accused persons are hereby removed from remand. The State will proceed by way of summons. And the application by the State for a longer remand is hereby dismissed"

Aggrieved by the above rulings the State launched this urgent chamber application challenging the correctness of the rulings made by the first respondent. In that application it sought a provisional order couched in the same terms as the final order sought. It is needless to say that this is undesirable but I shall not dwell on that as the application does not fall to be

determined on that aspect at this stage. The provisional order sought is couched in the following terms:

"IT IS HEREBY ORDERED THAT:

1. The Order granted on 10 September 2014 in case number HC 5607/14 does not have the effect of terminating criminal prosecution of the 2nd Respondent.

2. The 2nd, 3rd, 4th and 5th Respondents be and are hereby ordered upon service of this order to appear before the 1st Respondent for continuation of trial there pending on the same bail conditions that existed before their removal from remand."

Urgency was premised on the argument that the removal of the accused persons from remand would compromise the ends of justice. With due respect this is clearly self-created urgency which the courts have said time without number does not qualify to have a matter treated as urgent.

It is trite that a matter is not urgent where the applicant has an alternative remedy to avert the envisaged harm, damage or prejudice. In this case it is abundantly clear that the applicant has an option to separate trials and continue with the trial of the natural persons whom it fears might flee from justice. Surely the applicant cannot plead urgency in circumstances where it is prepared to wait indefinitely until it has sorted out its legal problems with one accused person when in the interim it can proceed with the other accused persons.

The trial magistrate's ruling releasing the accused from remand while the applicant is putting its house in order is salutary as the determination promotes the right to personal liberty enshrined in s 49 of the Constitution without compromising the ends of justice because the respondents can always be summoned to Court when the State is ready to continue with the trial.

That being the case I come to the conclusion that the matter is not urgent. At this stage I do not wish to embroil myself in the legal controversy concerning the validity or otherwise of a certificate of urgency signed by a litigant's legal practitioner or one from the same firm. The bottom line is that this matter is not urgent.

The National Prosecuting Authority, applicant's legal practitioners
Magwaliba Kwirira, 2nd to 5th respondent's legal practitioners