THE PROSECUTOR GENERAL OF ZIMBABWE
versus
BEATRICE TELE MTETWA
and
RUMBIDZAI MUGWAGWA ESQUIRE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 26, 30 October 2015 and 27 January 2016

Opposed application

E Makoto, for the applicant
1st respondent in person assisted by T Zindi
No appearance for 2nd respondent

MAWADZE J: This is an application for leave to appeal against the first respondent's acquittal by the second respondent at the close of the state case.

The applicant is the Prosecutor General of Zimbabwe.

The first respondent is a well-known legal practitioner.

The second respondent is a magistrate employed by the Judicial Service Commission and is based at Harare Magistrates Court. The second respondent is cited *nominus officiae*.

The first respondent was arraigned before the second respondent facing a charge of contravening s 184 (1) (g) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to defeating or obstructing the course of justice by resisting, hindering or disturbing a police officer in the execution of his or her duties knowing that the police officer is a police officer exercising or executing his or her duties or realising that there is a real risk or possibility that the police officer may be a police officer executing his or her duties. The penalty provision for contravening s 184 (1) (g) of the Criminal Code [*Chapter 9:23*] is a fine not exceeding level seven or imprisonment not exceeding two years or both.

The first respondent was arrested on 17 March 2013 and granted bail pending trial by this court on 25 March 2013. She was then arraigned before the second respondent on 10 June 2013 and acquitted on 26 November 2013.

The charge preferred against the first respondent is that on 17 March 2013 at Number 2023, Area D, Westgate, Harare the first respondent well knowing that Chief Superintendent Luckson Mukazhi, Detective Assistant Inspector Wilfred Chibage and Detective Constable Ngatirwe Mamiza were police officers in the execution of their duties carrying out searches at the said premises as well as Number 14 Bath road Belgravia Harare as per the search warrant unlawfully disturbed, resisted or hindered the said police officers by shouting the following words;

"Stop whatever you are doing, its unconstitutional, illegal, undemocratic. You are confused cockroaches. You are Mugabe's dogs" in order to refrain them from conducting the search and that she proceeded to take photographs and or videos threatening to send such photographs or videos to the international media. It is also alleged that the first respondent closed the gate at Number 2023, Area D, Westgate Harare in order to prevent the said police officers from leaving the premises with some recovered documents and that this delayed the search at Number 14 Bath road Belgravia resulting in the removal of four central processing units and 3 computer monitors from the said premises which the police wanted to recover.

A summary of the allegations against the first respondent are as follows;

On 17 March 2013 police officers were at Number 2023, Area D, Westgate, Harare owned by Tabani Mpofu armed with a search warrant to search the premises. The police officers were investigating a case of possessiong articles for criminal use as defined in s 40 of the Criminal Code [*Chapter 9:23*]. It is alleged that the police officers after searching the house proceeded to search Tabani Mpofu's five motor vehicles in the yard and that the first respondent arrived.

The first respondent is said to have uttered the words referred to earlier on without identifying herself and that a result the police officers stopped the search and proceeded to show the first respondent the search warrant. Instead the first respondent is said to have proceeded to take photographs or videos using her cellphone and thus hindered or disturbed the police officers in carrying out their duties moreso as this caused a number of people to gather at the scene. It is further alleged that the first respondent closed the gate at the premises in order to stop Detective Assistant inspector Chibage from leaving the premises with some recovered documents. At that stage Chief Supritendent Mukazhi proceeded to arrest the first respondent and tried to take her cellphone but the first respondent hid it in her bra, and proceeded to delete the photographs and videos after which she handed over the cellphone. It is also alleged that the police officers were delayed to proceed to Number 14

Bath road Belgravia, Harare where they wanted to conduct another search and that the first respondent who was now under arrest threatened to urinate or defecate in the police motor vehicle. The state alleges that this delay caused the removal of some computers at No 14 bath road Belgravia Harare.

The first respondent pleaded not guilty to the charge.

In her defence outline the first respondent pointed out that both the charge sheet and the state outline disclose no offence. In fact that the first respondent said that she is the wronged party as she was arrested during the course and scope of her duties as a legal practitioner. The first respondent berated the police officers for failing to hand over or show her the search warrant. She further denied uttering the words alleged and pointed out that even if she had uttered such alleged words that would not constitute an offence. In fact the first respondent said the alleged words were never put to her in her warned and cautioned statement and that this is simply an after-thought on the part of the police.

The first respondent's version of events as per her defence outline is that she received a distress text message from Tabani Mpofu and that Tabani Mpofu's relative led her to the said premises in Westgate. Upon her arrival she said the police had completed the search and that no search warrant was shown to Tabani Mpofu hence she asked one of the police officers leaving the premises with a big bag to show her the search warrant but the police officer said he would avail it at the Police Station together with the inventory of items seized. At that stage the first respondent said one of the police officers started to reverse Tabani Mpofu's motor vehicle and the other police officer falsely alleged that she was taking photographs or videos and demanded that she hands over her cellphone but she refused and put her cellphone in her hand bag as the police officer tried to forcefully take it.

The first respondent said it is at that stage that she was told that she under arrest and was lodged at the back of the police truck after which she was driven to Number 14 bath road, Belgravia where she still remained in the police motor vehicle when another group of police officers arrived. The first respondent said it is at that stage that she was hand cuffed and her handbag was forcibly searched. She was later taken to the Police Station and that both the search warrant and the said inventory were not shown to her.

The first respondent pointed out that she is not a Shona speaking person hence the words attributed to her are false and were not even part of the Request For Remand Form 242.

The first respondent stated that her arrest and subsequent prosecution is purely malicious because after her arrest the police decided to interrogate other matters irrelevant to this case by visiting the High Court to check her registration papers and visiting her former husband. The first respondent said her service provider would show that no photographs or video footage was taken using her cellphone. She said she would call Tabani Mpofu, his wife and one Alex Magaisa the relative who took her to Tabani Mpofu's residence. All in all the first respondent denies hindering police in their work. She reiterated that when she got to Tabani Mpofu's residence the police had completed the search. The first respondent is of the view that it is in fact the police who hindered her form carrying out her duties as legal practitioner.

The state led evidence from three witnesses who are Chief Superintendent Mukazhi, Detective Assistant Inspector Chibage and Detective Constable Ngatirwe Mamiza.

At the close of the state case the first respondent successfully applied for her discharge in terms of s 193 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It is this decision by the second respondent which has irked the applicant hence this application for leave to appeal.

In the proposed grounds of appeal the applicant insists that the evidence led by the state shows that the respondent closed the gate of Tabani Mpofu's residence thus hindering and disturbing the police from taking exhibits. The applicant also insists that the evidence led by the state shows that the first respondent uttered the alleged words and that the uttered words indeed hindered and disturbed the police in the execution of their duties.

The first respondent has raised three points in *limine* which I need to deal with before I even address the merits of this application.

The three points in *limine* are as follows;

1) That there is no proper application before this court as the applicant has brought this application for leave to appeal in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*] instead of s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
2) That this application for leave to appeal is invalid as the founding affidavit by one Mr Mapfuwa is irregular and was improperly commissioned by an officer of the Zimbabwe Republic Police (ZRP) an institution that has a substantial interest in this matter.

3) That there has been an inordinate and unexplained delay in mounting this application for leave to appeal thus warranting its dismissal with costs on a higher scale.

I now deal with the three points in *limine seratium*.

1. Citation of s 61 of the Magistrates Court Act [*Chapter 7:10*] instead of s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Mr *Makoto* for the applicant in his submissions conceded that the applicant should have sought leave to appeal in terms of s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] instead of s 61 of the Magistrates Court Act [*Chapter 7:10*]. The provisions of s 198 (3) and s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] are as follows;

> "198 (3) If at the close of the state 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.
>
> (4) If the Attorney General (read Prosecutor General) is dissatisfied with a decision –
>
> (a) ----------
> (b) of a magistrate in terms of subsection (3) he may with the leave of a judge of the High Court, appeal against the decision to the High Court." (Underlining is my own).

The provisions of s 198 (3) and s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] have been interpreted in a number of cases. See *Attorney General* v *Bennet* 2011 (1) ZLR 369 (5); *Attorney General* v *Bvuma & Anor* 1998 (2) ZLR 96 (S); *Attorney General* v *Tarwirei* 1997 (1) ZLR 575 (s); *Attorney General* v *Mzizi* 1991 (2) ZLR 321.

The provisions of s 61 of the Magistrates Court Act [*Chapter 7:10*] are as follows;

> "61 Prosecutor General may appeal to High Court on a point of law or against acquittal.
>
> If the Prosecutor General is dissatisfied with the judgment of a Court in a criminal matter- –
>
> (a) upon a point of law; or
> (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not reasonably be entertained;
>
> he may, with the leave of a judge of the High Court appeal to the High Court against that judgment."

Mr *Makoto* in my view correctly conceded that an application for leave to appeal in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*] relates to a judgment which envisages a situation where all the proceedings are terminated or a full trial has been completed rather than a discharge at the close of the state case. Mr *Makoto* however submitted that this error by the applicant is not fatal to this application for basically two reasons.

The first reason advanced by Mr *Makoto* is that the standard of proof or the applicable principles to be considered in relation to s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] are the same as those applicable in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*]. The second reason in his view is that the citation of the wrong provision of the law is not prejudicial to the first respondent.

I do not share the same views with Mt *Makoto*. There is a clear legal distinction between a 61 of the Magistrates Court Act [*Chapter 7:10*] and s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. This is precisely why the first respondent in her opposing papers raised this objection. The applicant in its wisdom or lack thereof did not seek to amend their papers or at least to make such an application at the commencement of the hearing of the application.

In my view the use or citation of the wrong provision by the Prosecutor General who is expected to be well informed in terms of the law is not an issue which can simply be overlooked by this court or wished away. It is clear that s 61 of the Magistrates Court Act [*Chapter 7:10*] arises at the conclusion of the trial whereas s 198 (4) of Criminal Procedure and Evidence Act [*Chapter 9:07*] applies during the course of the trial at the close of the state case.

I am surprised that despite this concession by the applicant there was no attempt by the applicant to seek condonation. The attitude by the applicant seems to be that I should grant such condonation *mero muto*. However such a glaring failure by the applicant to cite the correct provision of the law cannot be said to inconsequential or condoned *mero muto*. The first respondent is entitled to know in terms of which provision the applicant has applied for leave to appeal as this will inform her response. As already said no application for condonation has been made. I therefore find merit in the first respondent's protestation in this regard and would uphold the point in *limine*.

2. Alleged Impropriety as Regards Mr Mapfuwa's Founding Affidavit

The first respondent has raised two objections in relation to Mr Mapfuwa's founding affidavit which I now proceed to deal with.

(a) The first respondent contends that it was legally improper for Mr Mapfuwa to have his founding affidavit commissioned by an officer of the ZRP as the police institution has a substantial interest in this matter. Reliance was placed on the case of *Chafanza* v *Edgars Stores Ltd & Anor* 2005 (1) ZLR 299 (H) at 300 F in which Cheda J quoted with approval Jennet JP's remarks in *R* v *Rolomane* 1971 (4) SA 100 E at 101-102 to the effect that;

> "No doubt the courts require for the admissibility of affidavits tendered in evidence that they be attested by a commissioner of oaths who is impartial and independent in relation to the subject matter of those affidavits."

The first respondent takes issue that Mr Mapfuwa's founding affidavit was commissioned by police officer who is part of an institution which arrested and interrogated the first respondent.

While I agree in *toto* with the legal principle raised by the first respondent in relation to this issue, I am not persuaded that it is applicable to the facts of this case. I find no impropriety in Mr Mapfuwa's founding affidavit in this case being commissioned by a member of the ZRP. I take judicial notice that there is a clear distinction between the Prosecutor General's office and the ZRP. It would be far-fetched to allege that the Commissioner of Oaths in the circumstances of this case is impartial and biased. I clearly find no merit in this argument.

b) The second print raised by the first respondent relates to the requirements of r 227 (4) (a) of the High Court Rules 1971 which provides that;

> "4 An affidavit filed with a written application ……..
> (a) shall be made by the applicant or respondent, as the case may be or by a person who can swear to the facts or averments set out therein"

While it is correct that Mr Mapfuwa who deposed to the founding affidavit was not the trial prosecutor and that Mr Zvekare and Mr Mugabe were the trial prosecutors, the fact remains that Mr Mapfuwa is a law officer attached to the appeals section of the Prosecutor General's Office. It goes without saying that in order to prepare this application Mr Mapfuwa had to peruse the record of proceedings in order to make an informed decision on whether to seek leave to appeal or not. Mr Mapfuwa to that extent has full knowledge of the facts pertaining to the application and his authority to depose to the founding affidavit cannot be

imputed. The criticism made by the first respondent however is well founded that Mr Mapfuwa improperly commented in his founding affidavit on the demeanour of state witnesses. This is something Mr Mapfuwa could not have possibly gleaned from the transcript of the record of proceedings and to that extent he clearly perjured himself. The demeanour of state witnesses could only have been observed by the trial prosecutors. Mr *Makoto* to his credit made this concession.

My finding is that Mr Mapfuwa can swear positively to the facts of this case as a law officer who perused the record of proceedings and that the failure to have the trial prosecutors swearing to the founding affidavit cannot defeat the application. While the criticism made by the first respondent as regards some of the comments made by Mr Mapfuwa can be deemed to be fair criticism it is not in my view fatal to this application. I am therefore inclined to make the finding that the deposition of the founding affidavit by Mr Mapfuwa does not invalidates this application and therefore dismiss this preliminary issue.

3. Delay in Bringing This Application

The first respondent was acquitted by the trial court on 26 November 2013 and it is common cause that full reasons for the acquittal were availed to all the parties concerned on the same day.

The applicant filed this application for leave to appeal on 29 April 2014 after a period in excess of 5 months. According to Mr *Makoto* the full transcript of record of proceedings became available on 27 February 2014. Thereafter it took the applicant two months to file this application.

The first respondent contends that there has been an in ordinate and unexplained delay in bringing this application and that this is prejudicial to the first respondent. The first respondent submitted that this conduct by the applicant ought to be admonished by an order of dismissal of the application with costs on a higher scale.

It is not in issue that there is no time limit prescribed in s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] within which an application to seek leave to appeal should be made by the Prosecutor General. It is however, trite that such an application should be made within a reasonable time or period. See *Attorney General* v *Lafleur & Anor* 1998 (1) ZLR 520 (H), *Attorney General* v *Bvuma & Anor supra*.

In my view the overriding reason for this principle is the need for finality in litigation and to ensure that the interests of justice are safe guarded.

The right to a fair hearing is enshrined in s 69 of our Constitution and this court has the utter most duty to protect that right. It is couched as follows;

> "69. Right to a fair hearing
> (1) Every person accused of an offence has a right to a fair and public trial within a reasonable time before an independent and impartial court.
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law" (emphasis is my own)

In my view what constitutes reasonable time is a matter of fact and depends on the circumstances of each case.

Mr Mapfuwa in his answering affidavit conceded that there was indeed a delay in bringing this application but attributes this delay to the need to have the record of proceedings transcribed. He said this is not a process directly controlled by the applicant. In his submissions Mr *Makoto* said he had no explanation to make as to why after the transcript of the record was availed on 27 February 2014, it took the applicant two months to file this application on 29 April 2014.

There is no meaningful explanation by the applicant for the delay in making this application other than to try and blame those responsible for the transcription of the record. This is difficult to appreciate in view of the fact that the reasons for the discharge of the first respondent at the close of the state case were availed immediately to the two trial prosecutors.

I have no doubt in my mind that the time taken to approach this court is in ordinate and that there was great need for the applicant to fully explain this delay of 5 months in view of the facts of this case. While I appreciate that there is not time frame in the relevant provision to bring this application it should be noted that this is not a blank cheque availed to the Prosecutor General to bring such an application at any time.

I wish to clearly point out that such a delay should always be juxtaposed with the rights of an accused person who would have been acquitted by a competent court. Such an accused person would have gone home to celebrate with family and friends only to be told and advised some odd 5 months later that the celebration is premature and that the battle has just began. The inference one can therefore draw is that such conduct ceases to be prosecution but persecution as such delay is not only unreasonable and prejudicial to an accused person but flies in the face of the provisions of s 69 of the constitution.

I have no doubt in my mind after considering the facts of this case that it should be made abundantly clear to the Prosecutor General that the Prosecutor General is not at liberty

to come to this court any time the Prosecutor General so wishes and seek leave to appeal. Such conduct should be frowned upon by this court and ought to be admonished without any hesitation by dismissing such an application for leave to appeal.

It is therefore my finding that there has been an inordinate and unexplained delay in bringing this application. I would therefore uphold the point *in limine* taken by the first respondent.

Since I have upheld two of the three points *in limine* raised by the first respondent it is now unnecessary for me to go into the merits of this application.

I am not persuaded that this is a proper case for which I should award costs against the applicant on a higher scale.

Accordingly, it is ordered that;

The application for leave to appeal be and is hereby dismissed with costs.

National Prosecuting Authority, applicant's legal practitioner
Mtetwa & Nyambirai Incorporating Wilmot and Bennet, legal practitioners, 1st respondent's legal practitioners