LEVI NYAGURA
versus
TILDAH MAZHANJE N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4, 10 & 25 April, 2018

Urgent Chamber Application

T. L Mapuranga with T.G Chigudugudze & J P Mutizwa, for the applicant
T. Mapfuwa, for the respondents

CHITAPI J: The applicant brings this urgent chamber application seeking an order in terms of his proposed provisional order which reads as follows:

Terms of final order sought

That you show cause to this Honourable Court why a final order should not be made in the following terms that:-

1. That the interim relief granted by this court in this matter be and is hereby confirmed.
2. That pending the finalization of the review application instituted by the applicant in this Honourable Court under case on. HC 2653/18, the applicant be and is hereby granted stay of criminal proceedings under case no. CRB 2287/18.
3. That the parties abide by the court's decision in the application for review instituted by applicant on 21 March 2018 under case no. HC 2653/18.
4. That each party bears its own costs.

Terms of the interim order sought

Pending determination of this matter, the applicant is granted the following relief:-

1. That the criminal proceedings before the magistrate's court at Harare, Rotten Row Courts under case no. CRB 2287/18 be and are hereby stayed.

Service of provisional order

The applicant or his legal practitioners be and are hereby authorised to serve this provisional order upon the respondents.

The application is opposed by the second respondent. The first respondent is the presiding magistrate whose decision is the subject matter of the review application pending before this court under case no. HC 2653/18. The first respondent is not really a player in this application because she made her decision, the subject of review and became *functus officio.* To put the matter beyond doubt, the applicant appeared before the first applicant at Harare Magistrates court on 17 February, 2018 charged with the offence of Criminal Abuse of Duty as a Public Officer as defined in section 174 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*]. The applicant was placed on remand and admitted to bail. On 8 March, 2018, the applicant applied before the first respondent to challenge the legality of his placement on remand. On 14 or 15 March, 2018 following a consideration of written submissions, the first respondent dismissed the applicant's challenge to his remand. I have recorded the dates 14 or 15 March, 2018 because of confusion arising from the applicants' papers in case no. HC 2683/18 wherein in his founding affidavit he states that the ruling dismissing his challenge to remand was made on 14 March, 2018 yet the draft order refers to a ruling made on 15 March, 2018. The applicant thus remains on remand and the confusion on dates do not bear on the substance of the application.

The applicant then filed the review application in case no. HC 2653/18 on 21 March, 2018. Having made her ruling, the first respondent became *functus* on the point although the applicant as with any accused person appearing before the court on remand is at large to mount another challenge to his remand if new circumstances have arisen to warrant a review of the first or previous order. Any other magistrate including the first respondent can consider any new challenge which the applicant may bring against his continued remand.

The above background is necessary in order to fully appreciate the purport and import of the urgent application before me. It is also necessary to set out the content of the draft order in the review application in case no. HC 2653/18. It reads as follows:-

" Whereupon after reading documents filed of record and hearing counsel:

IT IS ORDERED THAT:

1. The ruling by the first respondent handed down on 15 March, 2018 under case no. CRB 2287/18 be and is hereby reviewed and set aside.

2. The matter is hereby remitted to the Magistrate Court and the First Respondent be and is hereby ordered to commence an enquiry on the existence of the reasonable the reasonable suspicion and in doing so must:

"(i) Require the Second Respondent to objectively demonstrate its lawful right to exercise its power to place applicant on remand and in that regard the court should hear evidence from the investigating officer on whether or not he formed the suspicion and if so, on what basis.

(ii) Afford Applicant an opportunity to challenge the existence of a reasonable suspicion through cross examining investigating officer and adducing whatever and whether is in his possession which he believes would demolish the suspicion.

(iii) Thereafter determine whether the suspicion formed was proved to be reasonable and place applicant on remand or remove him from remand in accordance with the finding made."

To place the application before me in perspective therefore, the applicant seeks an order that the magistrates court proceedings in CRB 2287/18 should be stayed. This is the interim relief which the applicant prays for. The final order which the applicant will pray for on the return date is essentially the same as the interim relief sought. During argument, I asked the applicant's counsel whether or not he essentially was not asking for an order arresting or staying the magistrate court proceedings pending review. The applicant's counsel confirmed that what I asked him to confirm was in fact the order he intended to ask for.

The second respondent took a point *in limine* that the application was not urgent, a contention that the applicant disagreed with. In respect of how the hearing was to proceed, the parties agreed that they argue the points *in limine* first. They argued them and I reserved judgment thereon.

The first respondent's counsel submitted that the applicant had been on remand since

17 February 2018 and had not demonstrated what irreparable harm he would suffer by his continued remand. He contended that irreparable harm could only come about if the applicant had been given a trial date. Counsel further submitted that there was no impending peril to the applicants rights resulting from the applicant's remand status and that there was no good reason for the application to be accorded preferential treatment.

The applicant's counsel strenuously argued that the application was urgent because it concerns the interference with applicant's right to liberty as guaranteed by s 49 (b) of the Constitution (2013). In my observation, s 49 (b) should not be read in isolation but together with s 49 (1) (a) because the two are co-joined. Section 49 (1) of the Constitution provides as follows:

> "49. Right to personal liberty
>
> (1) Every person has the right to personal liberty which includes the right-
> (2) Not to be detained without trial, and (own underlining)
> (3) Not to be deprived of their liberty arbitrarily without just cause."

The applicant has not been detained without trial and has not contended so. He has not been arbitrarily deprived of his liberty because upon his arrest, due process was followed and he was taken before a court and subjected to court proceedings. The Constitution in s 50 (2) provides that an arrested or detained person accused of committing an offence be brought to court within 48 hours of the arrest or be released. The applicant has not contended that his rights were infringed in this regard. What he contends is that the court before whom he appeared acted irregularly by not acceding to his request that the investigating officer should testify during the subsequent remand proceedings wherein he sought to challenge his remand.

Without determining the review application, I am unable to appreciate the applicant's complaint. It is the applicant who sought to challenge the decision to have him continue being on remand. When he initially appeared before the court following arrest, the court complied with s 50 (4) of the Constitution which reads as follows:

> "50 (4) Any person who is arrested or detained for an alleged offence has the right-
>
> (a) ……
> (b) ……
> (c) ……
> (d) At the first court appearance after being arrested to be charged or to be informed of the reason why their detention should continue, or to be released."

The applicant was released thereafter on bail. The applicant on his next appearance, not having done so by choice on his initial appearance, mounted a challenge to the grounds of his remand. He wanted the investigating to testify. The question is, "as whose witness?" If the investigating officer was supposed to support the applicant's case, the applicant could have subpoenaed him or her. The applicant did not allege that he encountered problems to subpoena the investigating officer

From the applicant's affidavit, he states that he appeared before the court on Saturday 17 February, 2018. He deposed that the second respondent applied for his placement on remand on the basis of facts alleged by the investigating officer. He states that he reserved his right to challenge the "second respondent's power" to place him on remand as well as the lawfulness of his arrest. Firstly, the second respondent applies for the placement of an arrested person on remand and does so by alleging facts against the arrested person from which a court determines that there is a reasonable suspicion that the person whose remand is sought committed the offence. By stating that he reserved his rights to challenge the remand later, the applicant must be taken to have accepted on the facts alleged, against him, that a reasonable suspicion that he committed the offence charged had been established. If not, he should not have consented to the remand but challenged it at that stage and a ruling made. A subsequent or reserved challenge meant that the applicant would now bear the onus to disprove the facts on which he was remanded on a balance of probabilities. The applicant made the application in written form but wanted the court to order the attendance of the investigating officer. The request was not granted and the applicant mounted a review application for this court to set aside the order of the first respondent and direct her to rehear the challenge. I will not prejudge what the judge who will deal with the review application will conclude.

The applicant upon filing the review application considered that it was necessary for this court to stop further proceedings before the magistrate. He filed this application. In my judgment, there is no urgency at all in this application. The application is without doubt an abuse of the court process. The applicant was placed on remand by the first respondent. He subsequently challenged his continued status as a remand suspect. The application was dismissed by the first respondent in

the ordinary course of court proceedings. The applicant has not alleged that any of his rights as set out in s 70 of the constitution have been violated.

There can be no urgency arising in situations such as *in casu*. This court cannot allow a situation where every accused person who has appeared before a competent court and has had his application for refusal of remand refused and files an application for review of such refusal to found urgency from the mere fact that such accused has challenged the lower court's decision and seeks to stay remand proceedings. The procedure for the remand of a suspect by the court pending trial is provided for by law with sufficient safeguards that the remands take account of the constitutional rights of an accused person to a fair trial within a reasonable period.

Had the decision brought on review been one made in the course of a trial with the likely consequence that an alleged irregularity may be prejudicial to an accused's rights to a fair trial, this court depending on the circumstances of each case may exercise its discretion to interfere with the ongoing trial although the general rule is that a superior court should loathe and be slow to interfere with uncompleted proceedings of an inferior judicial body unless exceptional circumstances justify such interference. There are no special or exceptional circumstances which arise in this application to justify the urgent hearing sought by the applicant.

In the circumstances, the application is adjudged as not urgent. It is accordingly struck off the roll of urgent applications with no order as to costs.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioner
National Prosecuting Authority, 1st respondent's legal practitioners