Judgment No. SC 52/06
Civil Application No. 189/03

(1) GADZANANI NKOMO (2) DINGANI MOYO

v

THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
BULAWAYO, JULY 31 & DECEMBER 5, 2006

K Phulu, for the applicants

T Mkhwananzi, for the respondent

Application in terms of s 24(2) of the Constitution of Zimbabwe.

ZIYAMBI JA: This matter was referred to this Court by the Regional Magistrate in terms of s 24 of the Constitution of Zimbabwe ("the Constitution"). The facts forming the background of the application are as follows -

The applicants were arrested on 31 May 2002 on a charge of armed robbery. It was alleged that they had unlawfully assaulted an employee of Caltex Zimbabwe and, by using force and violence to induce submission, stolen from him the sum of $7000,00. The applicants were remanded in custody.

About three months later, on 11 September 2002, the applicants made an application before the Provincial Magistrate for a stay of proceedings on the basis that they had been remanded on "countless occasions" and the respondent was unable to provide trial dates. No affidavits were filed in support of the application and no prior notice was given to the prosecutor of the applicants' intention to make this application at the remand hearing. In this regard, the Supreme Court has pronounced as follows:

> "It seems to me, also, that before permitting an accused person to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample written notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so." (my emphasis)

See *S v Banga* 1995 (2) ZLR 297 at 302.

It seems the application was not pursued because the trial date was set for 23 October 2002 at the Regional Court in Bulawayo and indeed the trial commenced on that date, less than five months after the arrest of the applicants. At the end of the day's hearing the matter was postponed to 11 November 2002 for continuation. However, prior to that date, the Regional Magistrate who was seized with the matter was transferred to Marondera court and, because of a critical shortage of staff, was not permitted by his superior to return to Bulawayo for the completion of the case.

On 18 June 2003, the applicants' legal practitioners revived the application for stay of prosecution using the same papers. The legal practitioner tendered the following statement from the bar:

> "It is a partly heard matter. The Trial Magistrate has been transferred. In the record is an application for stay of proceedings. I would like the application incorporated to my earlier submission for stay of proceedings which are already filed in the record. Since the time of their arrest the accused persons have been in custody. They have been in custody from 31 May 2002. This is the date which is relevant for they were never free from that date until now.
>
> Gadzanai Nkomo is now very ill. I am applying in terms of s 18 of the Constitution for the accused persons should have a fair trial. Their right to a fair trial has been violated by circumstances. This is not a frivolous and vexatious application. It would amount to negligence on the part of the defence to fail to make this application. I would like the Supreme Court to decide on the issue."

Once again, no affidavits were filed nor was any evidence led in support of the statement which was tendered by the legal practitioner from the bar.

> "Regrettably, the manner in which the legal practitioner requested the referral was totally misconceived. It was wholly insufficient to make a statement from the bar, and then to point solely to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether at any time before 16 August 1994, he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether any **actual** prejudice had been suffered as a result of the delay."

Per GUBBAY CJ in *S v Banga* (*supra*) at p 300.

The application was not opposed by the prosecutor for the stated reason that he did not know when the magistrate would be available to finalize the matter.

The regional magistrate, in granting the application for referral of the matter to this Court, had this to say:

> "The failure of Mr Sengweni to come and finalise his matters from Marondera Court where he is now stationed is mainly an administrative issue. At some stage during early this year Mr Sengweni was barred from returning to this station to finalise these matters by the Provincial Magistrate there Mrs Gwatiringa who said they were short staffed.
>
> Now it is a problem of funds. We were told that money for travel and subsistence allowance was exhausted at this station …. Mr Sengweni has so many partly heard matters at this station. The question to be decided by the Supreme Court is whether these administrative matters which I have highlighted above impinged on the accused persons' right to a fair trial within a reasonable time as stated in s 18 of the Constitution of Zimbabwe. The record is accordingly referred to the Supreme Court at the request of the defence for this issue to be decided. However, the Provincial Magistrate assured me that they have secured money for Mr Sengweni, to come and finalise some of his cases in August this year 2003."

Section 24(2) of the Constitution provides:

> "(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

One of the rights enshrined in the Declaration of Rights is the right to a fair hearing within a reasonable time. Thus s 18(2) of the Constitution provides:

> "**18. Provisions to secure protection of law**
>
> (1) …
>
> (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 issue before us, as stated by the regional magistrate, is whether the applicants' right to a fair hearing within a reasonable time has been violated because of the administrative matters referred to, in short, the fact that the magistrate was for some six months (or eight months at the most) unable to return to the station for the conclusion of the trial.

Generally speaking, in applications of this nature, the length of the delay is the 'triggering mechanism'. If the delay is presumptively prejudicial then the court, going by the evidence on the record before it, will conduct an inquiry into the constitutionality of the delay, taking into account the factors which were set out in *In re Mlambo* 1991 (2) ZLR 339 (SC). They are -

1. The explanation and responsibility for the delay;
2. The assertion of his rights by the accused person;
3. Prejudice arising from the delay; and
4. The conduct of the prosecutor and of the accused person in regard to the delay.

See also *S v Nhando & Ors* 2001(2) ZLR 84.

In the instant case, however, the applicants have placed no evidence before us from which we can conclude that the delay of five months in bringing them to trial or the delay of six months in concluding their trial is presumptively prejudicial.

The absence of *viva voce* evidence can be fatal to an applicant's case because it:

> "… completely disables findings to be made that the long delay has been the cause of mental anguish and disruption to the business and social activities of the accused, … and that it has impaired his ability to exonerate himself from the charge due to death, disappearance or forgetfulness of potential witnesses."

S v Banga supra at p 301 E. See also *S v Matarutse* SC 101 – 94.

Not only is there no written application dealing with the issue referred to us, but no evidence was led on the issue from the applicants. In such a case this Court is handicapped. It cannot allow, and rely upon, statements made by the legal practitioner from the bar. Nor can the written application in the record assist the applicants because it relates only to the period 31 May to 11 September, 2002 which is not relevant to the issue referred to us.

It follows from the above, that the application must be dismissed.

I wish to comment, however, that it appears from the remarks made by the magistrate that the trial would, in all probability, have been concluded in August 2003 had the applicants' legal practitioner not persisted in the request for the referral of this

question to the Supreme Court. The position now is that some three years later, the applicants are still awaiting trial and much of the blame for this state of affairs must be laid at the door of the applicants and their legal practitioner.

Accordingly, the application is dismissed. No order of costs has been prayed for by the respondent and none is made.

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Coghlan & Welsh, applicants' legal practitioners