

NATASHA NYAMATSANGA
and
LOREEN MUCHAIWA
and
NATASHA MATAIRE
and
BENJAMIN NKUNGA
and
KIMBERLY NHIDZA
and
TADIWANASHE CHISEKO
and
KUDAKWASHE MUSONZA
and
SANDRA JAMBAWO
and
MUKUDZEI MUSINDO
and
TAPIWA KAPFUNDE
and
SEAN SAVIERI
and
BRIGHTON TARUBEREKERA
and
MANDLENKOSI MASHINGAIDZE
and
ASHLEY TAFADZWA MAPFUMO
and
CHRISTIAN NYANZURE
and
THELMA MATANGANYIDZE
and
SINIKIWE KANDORORO
and
WINNIE MUHONDE
versus
THE COMMISSIONER GENERAL OF POLICE
THE MINISTER OF HOME AFFAIRS & CULTURAL HERITAGE
THE PROSECUTOR GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 25 October 2024

Urgent Chamber Application

K Ncube with P Uriri & T Mugaviri for the applicants
F Chimunhoke & E K Nyamufukudza for the 1st and 2nd respondent
T Kangai for the third respondent

WAMAMBO J:

This matter came as an urgent chamber application. On 23 August 2023 the applicants were arrested for violating section 66 (A) (1) (a) of the Electoral Act [Chapter 2:13] as read with section 189 of the Criminal Law Codification and Reform Act [Chapter 9:23]. The allegations were that the applicants were gathering election results intent on announcing same as the official results. At the time of arrest the police confiscated items enumerated on Annexure “A”

The applicants appeared at Court for their initial remand on 25 October 2023 under CRB HRE 1367- 1402 /23 as per Request for Remand form Annexure “B”

On 30 May 2024 third respondent withdrew charges citing lack of evidence. On June 7 2024 through counsel an approach was made to the officer in charge CID Law and Order Harare Central Police Station with the request for the release of all gadgets seized from and upon the arrest of the applicants.

According to the applicants their request hit a brick wall and they were advised that the gadgets would not be released as investigations were still on going. A follow up letter was written by applicants Counsel Annexure “D” but same was not responded to.

The applicants’ contend that following the withdrawal of charges before plea the police were obliged to release the seized gadgets (comprising of cell phones) in terms of section 58 (1) (d) of the Criminal Procedure and Evidence Act [*Chapter 9: 07*].

The applicant seek an order in the following terms

“IT IS ORDERED THAT

1. The first and the second respondent be and are hereby ordered to forthwith facilitate the release to the applicants of all their electronic gadgets seized by the police on the 23rd of August 2023 pursuant to the respective Exhibits. Seizure Confirmation Receipts
2. The first and the second respondent to pay the cost of this suit on the legal practitioner and client scale, only if they oppose this application.”

The first and the second respondents oppose the application and raise preliminary points. They aver that the matter is not urgent. Further that the applicant ought to have filed an application for the disposal of the exhibits which was seized with the matter.

The police are still conducting investigations and will proceed by way of summons upon conclusion of investigations. It was also averred that the certificate of urgency does not bring to light the urgency in the matter.

The third respondent also raises the issue of lack of urgency. I will presently deal with the preliminary issues. I will commence with the issue of urgency.

Mr Chimunhoko for the first and second respondents contended as follows:

When the gadgets were seized from the applicants on 23 August 2023 applicants did not take any action until the withdrawal of the matter. At the withdrawal stage applicants were informed that the matter would proceed by way of summons. The State is pursuing investigations by seeking the assistance of experts to extract information from applicants' gadgets.

The urgency is self-created and the application is meant to scuttle investigations which are underway. Applicants should have sought a disposal order from the Criminal Court which dealt with the matter.

Mr Ncube made the following submissions on the preliminary points. Applicants have been appearing on routine remand since 23 August 2023 awaiting a trial date. On 30 May 2024 third respondent withdrew charge before plea for lack of evidence. The applicants could not act before the withdrawal of charges as they were awaiting trial. The exhibits would have been required for trial.

The need to act arose on 30 May 2024 when the charges withdrawn. *Mr Ncube* narrated the events leading to the filing of this application including efforts made to obtain Court extracts reflecting the withdrawal of the charges and communication to the police via Exhibit "D".

I do not agree with counsel for first and second respondents that the need to act arose upon the arrest of the applicants. Clearly the need to act arose upon the withdrawal of charges on 30 May 2024. The applicants have chronicled the efforts exerted to gather relevant documents for this application and efforts made for the gadgets to be released to them after the withdrawal of the charges. There was no counter argument on the version of the applicants as far as they allege they wrote to the police and approached the Clerk of Court. I find in the circumstances that applicants

acted when the need to act arose and thus dismiss the preliminary point of lack of urgency as raised.

The issue of the Certificate of urgency was not pursued in oral argument. I take it was not worth pursuing. I have however considered the certificate of urgency which appears to accord with the requirements as set out in the Rules of this Court. This point *in limine* is also dismissed.

I move to consider the merits. The matter rested upon the interpretation and application of sections 58 and 59 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Mr Ncube for the applicants relied in particular on s 58 (1) (d) (i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

He also referred to the case of *Piteous Gwara v Officer In Charge (Zimbabwe Republic Police Anti-Corruption Unit Bulawayo) v D S Ngwenya* HB 254/21.

Mr Chimunhoko submitted that s 58 (1) (d) (i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] makes reference to s 59 of the same Act, which section is not applicable here as it relevant to disposal of exhibits where there are no criminal proceedings instituted. It was his submission that in this case the exhibits are still required.

Mr Kangai agreed with submission by second and third respondent. He further submitted that applicant has other remedies at her disposal in terms of s 58 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

A reading of the *Piteous Gwara* case (*supra*) does not directly assist in the resolution of this matter. It is decided on totally different facts to this matter.

Section 58 (1) (d) (i) of the Criminal Procedure Act [*Chapter 9:07*] reads as follows

“58 Custody and disposal of seized articles.

(1) Subject to subsection (2) a police officer who seizes any article referred to in section 49 or to whom any such article is delivered in terms of this part or to whom an article seized in terms of any other enactment is delivered to be dealt with in terms of this Part shall

(a).....

(b).....

(c).....

(d) be held subject to section 59 until criminal proceedings which are instituted in relation to that article:-

(i) have been abandoned or discontinued or are concluded otherwise than with the conviction of the accused in which event the custodian police officer shall forthwith restore any such article. The accused or the owner thereof as may be appropriate unless the article is one whose possession is intrinsically unlawful or

(ii).....”

The applicant has made reference to the above section in support of its application. The respondents contend that s 59 and 58 A apply. The reference to section 59 is clearly misplaced in this case, as it applies to ‘disposal’ of article where no criminal proceedings are instituted, where it is not required for criminal proceeding or where accused admits his guilt.

The issue referred to in section 58 (1) (d) (1) of the abandonment or discontinuation of proceedings would appear to suit the circumstances of this case. It therefore follows that the seized article should be restored to the accused or the owner thereof.”

I have not been referred to authority neither did I find any to the effect that an article can be kept for further investigating after the withdrawal of charges before plea.

I have also considered the period the seized gadgets have been under the possession of the respondents which is from 23 August 2023 to the date of withdrawal on 30 May 2024. This long period allowed for further if any investigations and the fact that charges have been withdrawn calls for the gadgets to be restored with their owners

The design to withdraw charges before plea must have been made upon proper reflection. To allow otherwise would mean charges can be withdrawn and an exhibit or exhibits kept by the respondents indefinitely.

I find in the circumstances that the application has merit. I find no reason to depart from the practice that the costs follow the result. I however have not found any mala fides or other reason justifying costs on a higher scale. To that end costs shall be on the ordinary scale.

I order as follows:

1. The first and second respondents be and are hereby ordered to forthwith facilitate the release to all the applicants of all their electric gadgets seized by the police on the 23rd of August 2023 pursuant to the respective Exhibits Seizure and Confirmation receipts.
2. Respondent shall pay costs of suit.

Kossam Ncube & Partners, applicant’s legal practitioners
Civil Division of the Attorney General Office first and second respondent legal practitioners
National Prosecuting Authority third respondent’s legal practitioners

