

JOHANNES TOMANA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 13 February 2018 & 13 June 2018

### **Chamber application**

*T Mpofu*, for the applicant  
*S Fero*, for the State

TSANGA J: Written reasons have been requested for the order I granted on 13 February 2018 in chambers. A chamber application for dismissal of charges in terms of s 160 (2) was placed before me on 7 February 2018 on the grounds that an excess of six months had lapsed from the date of applicant's committal to trial and he had not yet been tried. I directed both parties to appear before me in chambers on 12 February 2018, given the wording of the notice that had been served on the respondent.

The relevant provision in the Criminal Procedure and Evidence Act [*Chapter 9:07*] states as follows:

#### **160 Bringing of accused persons to trial before High Court**

(1).....

(2) If a person referred to in subsection (1) is not brought to trial after the expiry of six months from the date of his committal for trial, his case shall be dismissed:

Provided that any period during which such person is, through circumstances beyond the control of the Prosecutor-General, not available to stand trial shall not be included as part of the period of six months referred to in this subsection.

It was not in dispute that the accused had been indicted to trial in the High Court on 14 November 2016. His trial had been scheduled to take off on 13 February 2017. He had not pleaded at the time because his lawyers wanted to make a constitutional application before

the judge hearing the matter. The commencement of the actual trial was then further stalled by a subsequent application by the Prosecutor General for the judge's recusal for reasons which appear more fully in the judgment case no. CRB 197/16 [HH 531/17].

What was of significance to the chamber application was the impact of the intervening delays on the indictment. The judge had handed down his decision on the matter of his recusal on 18 August 2017. The argument by State Counsel was that the delay in the judgment from February 2017 was beyond its control and that the period could not be included as part of the six month for determining the validity of an indictment. The State's overall position as I therefore understood it, was that there was no lapse in the indictment as the proviso to s 160 (2) was applicable. Applicant disagreed on the basis that it was never an issue of the accused being unavailable to stand trial that had caused the indictment to lapse but the State's own actions in asking for the judge's recusal. I was in agreement that the delay had emanated from this cause as opposed to the accused's unavailability for trial being for reasons that were beyond the State.

Even if one took the State's alternate point of view that the indictment had been suspended whilst awaiting the judge's decision, it was not in dispute that the awaited judgment was passed on 18 August 2017. It was further not in dispute that since 18 August 2017, the State had done nothing to prosecute its case. Since the indictment was already three months old at the time of the trial, even if one added another three months from the date of the judgment, still there was no running away from the fact that the indictment had lapsed by November 2017. No new indictment had been issued since then and there was certainly none when the chamber application for dismissal was filed.

The order that applicant's counsel initially sought, was an outright dismissal of charges in the first paragraph. It had been worded as follows:

- “1. The criminal charges brought against Johannes Tomana in CRB 197/16 being 6 counts of criminal abuse as a public officer as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*], alternatively defeating or obstructing the course of justice as defined in section 184 (1) (b) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] be and are hereby dismissed.”

The second paragraph dealt with the release of his bail recognizance. I ordered that the draft order be amended in the first paragraph to reflect that the dismissal sought in that paragraph was strictly in accordance with s 160 (2) due to lapse of the indictment as opposed to an outright dismissal of the charges as if on the merits as the original wording tended to suggest. I was of the view that it was important for the order to capture this amendment

because there is no suggestion from a reading of s 160 (2) that if a case is dismissed on account of a lapsed indictment, that a new indictment can thereafter not be issued. I explained this reasoning to applicant's counsel who though not necessarily sharing this view had no objections to effecting the amendment as ordered to reflect its context.

In accordance with the directions of the Judge, applicant's counsel duly amended its draft order in the first paragraph to read:

“The criminal charges brought against Johannes Tomana in CRB 197/16 being 6 counts of Criminal abuse as a public officer as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] alternatively defeating or obstructing the course of justice as defined in s 184 (1) (b) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] be and are hereby dismissed in terms of s 160 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].”

Accordingly, I granted the order as amended since the State's counsel failed to put forward any cogent reason why the order as so amended should not be granted since it was a fact that the indictment had lapsed in terms of the relevant provision.

The above are the reasons and circumstances that surrounded the granting of the order on 13 February 2018.

*Mukwewa Law Chambers*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners