

JOSIAS MOYO

Versus

MARK DZIRA

And

NATIONAL PROSECUTING AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 15 SEPTEMBER & 30 SEPTEMBER 2020

Urgent Chamber Application

N. Sithole for the applicant
No appearance for 1st respondent
B. Maphosa for the 2nd respondent

KABASA J: This is an urgent chamber application wherein the applicant seeks the following interim relief:-

“Pending the determination of applicant’s applications for review filed under cover of case numbers HCR 1141/20 and HCR 1423/20, proceedings in the case under cover of case number CRB BYO R 83/20 be and are hereby stayed.

In the event that the interim relief is granted, the final order sought is:-

“ Applicant’s case, proceeding under cover of case number CRB BYO R 83/20 having been reviewed and set aside in HC 1423/20, proceedings in CRB BYO R 83/20 be and are hereby permanently stayed.”

I propose to give a background to the matter for purposes of clarity. The background is this. The applicant appeared before the 1st respondent, a Regional Magistrate at Bulawayo Magistrates Court, charged with 12 counts of fraud. The allegations being that he acted as a clearing agent for the complainant, a managing director of a company which sells motor spares and accessories. The company would import goods and the applicant was supposed to pay duty for these goods to the Zimbabwe Revenue Authority (ZIMRA). The complainant would deposit

the money for payment of import duty to the applicant who was to process the relevant clearance papers before the goods found their way to the complainant. This happened over a period of time.

The complainant's consignment of goods was later impounded because it had not been properly cleared. An investigation subsequently unearthed that the bills of entry relating to goods imported on 12 different occasions were not authentic. ZIMRA had not been paid the requisite duty from the deposits the complainant had made into the applicant's bank account.

The applicant was then charged with 12 counts of fraud to which he pleaded not guilty. A total of 9 witnesses were called to testify, among them a bank official who had initially not been on the list of witnesses the State intended to call. The bank official was called in order to produce the bank statements the police had obtained reflecting the deposits the complainant had made into the applicant's bank account. The state had intended to have the bank statements produced through the investigating officer but the defence objected necessitating the calling of an official from the bank.

The bank official was called despite the defence's objections to the calling of this witness, which objection was premised on the fact that such witness had not been lined up as one of the state witnesses and the 1st respondent was essentially allowing the prosecution to "investigate" as the trial progressed.

The defence felt strongly about the "procedural irregularity" and filed a review application to this court under case number HC 1141/20. The trial progressed up to the close of the State's case, whereupon the defence applied for discharge in terms of s198 (3) of the Criminal Procedure and Evidence Act, Chapter 9:07. This provision states that:

"If at the close of the 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."

The applicant's defence counsel had moved for the discharge of the applicant on the basis that the essential elements of the offences had not been proved and the applicant's defence to the charges had not been rebutted. The application did not find favour with the 1st respondent who proceeded to dismiss it and put the applicant to his defence.

Aggrieved, the applicant filed a second review application to this court under case number HC 1423/20. In it the applicant seeks the setting aside of the 1st respondent's decision and an acquittal. The contention being that by putting the applicant on his defence, 1st respondent has placed the onus on the applicant to prove his innocence.

The present application seeks to halt the proceedings before the 1st respondent pending the hearing and determination of these review applications.

Has the applicant made a case for the relief he seeks? In an endeavor to answer this question I will consider the requirements to be met in an application of this nature.

As regards urgency I decided to allow the applicant to jump the queue and hear the matter on an urgent basis. I arrived at this decision based on the argument that the applicant was being subjected to irregularities which threatened his right to a fair trial and stood to be extremely prejudiced thereby warranting a hearing on an urgent basis. He acted without delay when the need to so act arose. (*Kuvarega v Registrar General & Another* 1998 (1) ZLR 188 (HC)).

I therefore was persuaded to grant him the indulgence of hearing the matter on an urgent basis.

I turn now to consider the requirements to be met for the applicant to get the relief he seeks. These requirements have been stated in a plethora of cases, *Setlego v Setlego* 1914 AD 221; *Lilian Ihekwoaba v Chief Immigration Officer & 2 Others* HH-229-11; *Gold Reef Mining (Pvt) Ltd v Mnjiva Consulting Engineers (Pty) Ltd and Another* HH-631-15 and *Magaritha v Munyuki & 2 Others* HH-44-18.

The requirements are:-

1. A *prima facie* right, even if it be open to doubt
2. A well grounded apprehension of irreparable harm if the relief is not granted
3. The balance of convenience favouring the granting of the interdict
4. The absence of any other satisfactory remedy

I asked counsel for the applicant to address me on these requirements notwithstanding the State's attitude to the application. State counsel had initially intimated that the application was opposed and sought a number of postponements in order to read the record of proceedings and file opposing papers but on the date of hearing had a *volte face* and submitted that the application was no longer opposed.

1. A *prima facie* right

Counsel for the applicant submitted that the applicant's trial rights are under siege and there is need to protect his rights to a fair trial.

S69 of the Constitution guarantees the right to a fair trial. To the extent that the applicant expresses the fear that the conduct of the proceedings pose a threat to this right and given that all he has to establish is a *prima facie* right, although open to doubt, I would hold that such *prima facie* right has been established.

I must state that these requirements are not to be considered in isolation but as a whole, in other words conjunctively as opposed to disjunctively (*Magaritha v Munyuki supra*). I move on to the second requirement.

2. A well grounded apprehension of irreparable harm

In *Masedza and Others v Magistrate Rusape and Another* 1998 (1) ZLR 36, the court had this to say:-

“The power of the High Court to review the proceedings in the Magistrates Court is exercisable even where the proceedings in question have not yet terminated. However, it is only in exceptional circumstances that the court will review a decision in an interlocutory decision before the termination of the proceedings. It will do so only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant or the irregularity is such that justice might not by other means be attained.”

There must be very good cause shown before this court steps in to interfere with proceedings before the Magistrates’ Courts. As MATHONSI J (as he then was) eloquently put it in *Elizabeth Shava v Primrose Magomore N.O. and Another* HB-100-17.

“The net effect of such an approach is really to render in-effectual the jurisdiction of the Magistrates’ Court to try offenders and to sit in judgment over such matters.”

The applicant *in casu* argues that to allow the trial to continue will be tantamount to sanctioning illegalities. The applicant could appeal but such would not provide a complete cure of the harm as he would have sacrificed resources with his liberty continuing to hang in the balance when such a burden should be terminated. Does this make for exceptional circumstances warranting a departure from the general rule that the superior courts should be very slow in interfering with unterminated proceedings?

The most that will happen *in casu* is that the applicant may be convicted. His fate does not however end with the decision of the 1st respondent as the applicant has a right to seek either a review or note an appeal.

The decision to allow the calling of the bank official was made after the 1st respondent reasoned that:

“The defence was served with the bank statement. They already know its contents. The state argued that they want to call a bank official at ZB Bank solely for the purposes of tendering the bank statement. In the court’s view the accused will not be prejudiced if the witness is called. Whether the state decide (*sic*) to call the bank manager or his/her deputy or a bank teller, in the court’s opinion the deference (*sic*) is the same there is no need for a statement from the witness as in the court’s view this witness is specifically to talk about the document only.”

Such reasoning can hardly be construed to reflect bias on the part of the 1st respondent. The argument that the 1st respondent was bent on aiding the state against the accused/applicant in order to convict the applicant is not borne out by this reasoning.

Equally, it can therefore not be said the applicant has a well grounded apprehension of irreparable harm if an interdict is not granted to halt the proceedings before the 1st respondent. As regards the refusal to discharge the applicant at the close of the state case, the 1st respondent had this to say.

“The accused’s version is that after receiving the money from the complainant he would hand it over to Alpha Mashingaidze for the purposes of declaring the goods. He would then receive bills of entries from Alpha Mashingaidze and transfer them to the accused person (complainant?). He argued that he never did anything wrong with the papers he received.

In the court’s view the accused has a case to answer. He should be placed to his defence to explain in full how the money received from the complainant was used. While he handed over the money to Alpha Mashingaidze he still remained accountable for the use of that money. He was supposed to ensure that duty is paid after due process was done.”

Can it be said this reasoning amounts to a gross irregularity that vitiates the proceedings and therefore lead to a miscarriage of justice that cannot be redressed by any other means? I think not.

That said, it cannot be said the review applications will undoubtedly succeed thereby making it imperative to halt the trial before its conclusion.

The “irreparable harm” of possible loss of liberty should a conviction ensue and the sacrificing of resources in paying for the services of a legal practitioner does not, in my view, meet the mark of exceptional circumstances justifying the halting of the trial pending the hearing of the review applications.

“The general rule is that a superior court should intervene in uncompleted proceedings of the lower court only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant” (per MALABA JA in *Attorney-General v Makamba* 2005 (2) ZLR 54 at 64C-E).

With this general rule in mind I hold the view that there is no well grounded apprehension of irreparable harm if the relief is not granted.

3. The balance of convenience favouring the granting of the interdict

The State case has closed and the defence case is set to open at the resumption of the trial set for 1st October 2020. This is a trial that is almost complete and the judicial officer should be allowed to see the trial to its logical end.

“It is trite that judges are always hesitant and unwilling to interfere prematurely with proceedings in the inferior courts and tribunals. In the ordinary run of things inferior courts and tribunals should be left to complete their proceedings with the superior courts only coming in when everything is said and done at that level. (per BHUNU J (as he then was) in *Munyaradzi Chikusvu v Magistrate T. Mahwe* HH-100-15)

The balance of convenience favours allowing the 1st respondent to proceed with the trial to its logical conclusion. Care must be taken not to unnecessarily shackle magistrates by interfering with the exercise of their judicial powers in a manner that may result in an unfortunate erosion of their confidence to the detriment of the justice delivery system. They should be allowed to render judgments rightly or wrongly and the hierarchical corrective system provided by the court structure should be trusted to come in and effect whatever correction that is required.

I therefore hold that the balance of convenience does not favour the granting of the interdict sought by the applicant.

4. The absence of any other satisfactory remedy

I have already alluded to the fact that at the conclusion of the trial the applicant is not rendered remedy-less. Whatever irregularities that are found to have afflicted the proceedings, such can be addressed by way of appeal or review.

If the 1st respondent is shown to have been wrong in allowing the calling of the bank official for purposes of producing the bank statements and also wrong in coming to the decision not to discharge the applicant at the close of the state case, the superior courts will correct that.

It cannot be said whatever irregularities that occurred, if any, are such that they cannot be addressed on appeal or review at the conclusion of the trial. Consequently it cannot be said there is no other satisfactory remedy except the granting of the interdict.

I am equally not persuaded to grant the interdict on the basis that if I do not, the pending review applications will be rendered nugatory. Given the general rule as regards interference with untermiated proceedings by superior courts, it cannot be said the review applications are guaranteed to succeed.

With that said, the answer to the question I earlier on posed as to whether the applicant has made a case for the relief sought is NO.

I do not intend to make an order for costs. I do not think this is a case that warrants such an order and the 2nd respondent did not ask for costs either.

In the result, the application is accordingly dismissed.

Ncube Attorneys, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners