

MUNYARADZI CHIKUSVU  
versus  
MAGISTRATE T. MAHWE

HIGH COURT OF ZIMBABWE  
BHUNU & UCHENA JJ  
HARARE 25 January 2015 and 04 February 2015

### **Urgent Chamber Application**

*K Gama*, for the applicant  
No appearance for the respondent

BHUNU J: This is an application for review arising from the applicant's trial in the Magistrates Court before Magistrate Mahwe sitting at Harare. The applicant appeared before the trial Magistrate charged with contravening s 43 (2) of the Shop Licences Act [*Chapter 14:17*]. The section criminalizes the unlawful use of another's shop licence with the intention to deceive.

The applicant is alleged to have unlawfully with the intention to deceive used a licence belonging to Florence Sowah Nana to run a shop through a company called The Grace Corner Trading (Pvt) Ltd. The applicant denied the charge and the matter proceeded to trial. The applicant's complaint is that during the course of the trial the magistrate improperly admitted an uncertified copy of a CR 14 form contrary to the provisions of s 275, 276 and 277 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He now seeks stay of the proceedings pending a review of the magistrates ruling on the grounds of gross irregularity and unlawfulness.

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. In *Masedza & Ors v Magistrate Rusape and Another* 1998 ZLR 36 this court held that:

“The power of the High Court to review the proceedings in the Magistrates Courts 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.” (My underlining)

Although the two respondents were served with notices of this hearing, there was no response or appearance to oppose. My initial gut feeling was that the matter was not urgent because the applicant had a remedy at the end of the day regardless of the outcome of the proceedings. Mr *Gama* for the applicant vociferously argued that the matter was extremely urgent because of the element of illegality in that the applicant was about to be subjected to an illegal trial. I was therefore inclined to bend backwards and granted him the indulgence to be heard on an urgent basis.

During the hearing it dawned on me that if the facts were as articulated by Mr *Gama* the matter could easily be resolved by withdrawing the uncertified document to be produced by a competent officer from the Deeds office. Mr *Gama* agreed to that proposal. I then postponed the matter to enable him to file a substitute draft order in terms of r 240 which provides that:

**“240. Granting of Order**

- (1) At the conclusion of the hearing or thereafter, the court may refuse the application or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for, and may make such order as to costs as it thinks fit.

[Subrule amended by s.i. 25 of 1993 and s.i. 33 of 1996]

- (2) Where the court grants a provisional order under subrule (1), rule 247 shall apply, *mutatis mutandis*, to the provisional order as though it were granted following a chamber application”

Mr *Gama* then filed a draft order in the following terms:

“WHEREUPON after reading documents filed of record and hearing counsel,

**IT IS ORDERED THAT**

- (a) The uncertified copy of a CR 14 Form (Companies record 6664/2006) admitted by Respondent as an exhibit in CRB No. 12070/14 be removed from the magistrates Court record and shall not be admitted as an exhibit.

(b) If the State wishes to produce a CR. Form (Companies Record form 6664/2006 as an exhibit, it shall do so through the Registrar of Companies who shall produce a dully certified or examined copy.”

The net effect of the above draft Order is to substantially alter or reverse the alleged trial magistrate’s order admitting the disputed document. The alteration of the trial magistrate’s order amounts to an effective review of the proceedings before him. The proviso to s 29 (5) of the High Court Act [*Chapter 7:06*] requires the concurrence of another judge before one can alter the magistrate’s decision or ruling.

It is trite and a matter of elementary law that there can be no review of judicial proceedings without the record of the proceedings which are the subject of review. There being no record of proceedings it is virtually impossible to find fault with the trial magistrate’s handling of the matter. In any case the matter is not urgent because the dismissal of this application will not leave the applicant without a remedy. Review and appeal are remedies that are still at the applicant’s disposal when everything is said and done in the Magistrates Court. I can therefore perceive no irretrievable prejudice if the matter is allowed to progress to finality before the first respondent.

In the result it is accordingly ordered that the application be and is hereby dismissed with no order as to costs.

UCHENA J agrees .....

*Gama & Partners*, applicant’s legal practitioners  
*The Prosecutor General’s Office*, respondent’s legal practitioners