MAUDY KEMBO
and
ANNA MAVHANGIRA
and
NYARAI MASHINGAIDZE
and
MUNETSI HENRY TAFIRENYIKA
versus
MS MAZHANDE N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 & 21 March 2018

URGENT CHAMBER APPLICATION

T. K. Hove for the applicants
E. Makoto for the second respondents

ZHOU J: This is an urgent chamber application for an order staying the criminal proceedings which are pending in the Magistrates Court against the applicants. The final order seeks the stay pending determination of an application for review filed by the applicants challenging the dismissal by the Magistrates Court of their application for acquittal at the close of the case for the prosecution. The first respondent is the presiding Magistrate in the trial. The interim relief is in its effect the same as the final relief sought save for the fact that it is sought "pending the return date". The application is opposed by the second respondent.

The brief facts of the matter are as follows. The applicants stand accused of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is being alleged that on 9 June 2016 and at the office of the Master of the High Court at Harare the applicants or one or more of them unlawfully and with intent to deceive the Master of the High Court or realizing that there was a real risk or possibility that the Master may be deceived

misrepresented to the Master by creating and submitting a false affidavit to the effect that George Kembo who was the Executor in the Estate of the Late Dorothy Kembo was no longer interested in the affairs of the estate and that the applicants were the only beneficiaries of the estate. It is further alleged that the applicants, in fact, knew when they made the misrepresentation, that George Kembo was a beneficiary to the estate. Through the misrepresentation, it is alleged, the applicants obtained the Master's consent to sell an immovable property belonging to the deceased estate to one Rockford Nyamakura for a sum of US$21 000, and by their conduct prejudiced George Kembo. The prosecution closed its case after leading evidence from two witnesses. The witnesses were the complainant, George Kembo, and Simon Madi who is the Assistant Master. The applicants through their legal practitioner thereupon made an application in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for discharge at the close of the state's case which was dismissed by the learned Magistrate. On 9 March 2018 the applicants instituted an application seeking review of the decision of the Magistrate. That application was followed a day later by the filing of the instant application.

When the application was placed before me on 12 March 2018 I endorsed on the record that it was not urgent and struck it off the roll of urgent matters. The applicants, as they were entitled to do, addressed a letter to the registrar requesting to be given audience on the question of urgency. I obliged, and invited the parties to make submissions. The second respondent objected to the matter being heard on an urgent basis on the ground that the applicants delayed the filing of the application after the Magistrate had dismissed their application for discharge at the close of the case for the prosecution. There was debate as to the date on which the application for discharge was dismissed. Mr *Makoto* for the second respondent referred to the record of proceedings in which it is indicated that the ruling would be made on 27 February 2018. Mr *Hove* who was involved in the trial submitted that on that date the determination on the application was not made, but the matter was postponed to 6 March on which date the first respondent delivered the judgment in the application for discharge. The trial was due to resume on 13 March 2018, hence the applicant instituted the instant chamber application on 10 March 2018. The resumption of the trial is now set to take place on 23 March 2018. There is nothing on the record that would assist in resolving the issue of the date when the Magistrate dismissed the application for discharge. Be that as it may, it seems to me that my conclusion would still be the same irrespective of whether the application

was dismissed on 27 February or on 6 March 2018. I do not believe that there was such a delay in instituting the application for stay of the proceedings that would deprive the matter of its urgency. My earlier opinion regarding the issue of urgency was based on the issue of the irreparable prejudice to the applicants if the relief being sought in this application was to be refused. That is a matter which the parties addressed in relation to the merits of this application.

Both counsel debated at length the fact that this application constitutes an invitation to the High Court to intervene in interlocutory proceedings in circumstances where the real dispute has not yet been terminated or completed on its merits. Put in other words, both the instant application and the application for review ask this court to intervene in unterminated proceedings before the Magistrates Court. There is a welter of cases in which the court has expressed reluctance to intervene, whether by way of review or by order staying the proceedings, in uncompleted proceedings before a lower court or tribunal, as well as the principles which will guide the court in the exercise of its discretion as to whether or not to intervene. See *Dombodzvuku & Anor* v *Sithole NO & Anor* 2004 (2) ZLR 242(H); *Bvunzawabaya & Ors* v *Commissioner of Prisons & Anor* 2008 (1) ZLR 108(H); *Mashonganyika* v *Lena NO & Anor* 2001 (2) ZLR 103(H). What is clear from the many cases in point is that the intervention by a superior court in uncompleted proceedings of a lower court should only be entertained in exceptional circumstances, see *Attorney-General* v *Makamba* 2005 (2) ZLR 54(S).

In this case despite the reference to the Constitution, it is clear that the applicants are seeking to impeach the factual findings of the Magistrate upon which she refused to discharge the applicants. It has been held that refusal by a magistrate to discharge an accused person at the close of the case for the prosecution which is based on findings of fact is not a gross irregularity entitling the High Court to interfere in the uncompleted proceedings on review, see *Attorney-General* v *Makamba* 2004 (2) ZLR 63(S). Although the merits of the review application is a matter that will be dealt with at the appropriate time, it seems to me that the basic facts which are common cause or are not in dispute would clearly warrant that the applicants be put on their defence. All the applicants represented themselves as the only ones interested in the immovable property which had been part of the deceased estate. The Master's authority to sell was obtained and the property was sold with all the applicants benefitting from the sale. The complainant did not benefit. These basic facts call for some explanation from the applicants and do not amount to placing the onus on

the applicants to prove their innocence. The reasoned conclusion by the Learned Magistrate was that the evidence of Simon Madi actually implicated the applicants insofar as it showed that they misled the Master in order to prejudice the complainant.

Also, there is no irreparable prejudice which would be occasioned to the applicants by the refusal to intervene in the Magistrates Court proceedings at this stage. The applicants still have the remedy of appealing against any judgment of the Magistrates Court which may come out of the proceedings if there are grounds to challenge it. The suggestion that there is a likelihood of inconsistent judgments should the trial proceed while the review application is pending is based on speculation as to the likely outcome of both proceedings. Litigants must realize that the mere filing of an application for the review of a decision of the Magistrate in an application for discharge at the close of the case for the prosecution does not constitute a special circumstance warranting intervention in uncompleted proceedings, especially if the review application seeks to challenge factual conclusions. Only serious matters, such as the apparent lack of jurisdiction of the lower court would justify the intervention otherwise the administration of justice would be jeopardized by unnecessary interference by the superior courts in the unterminated proceedings of lower tribunals.

In the circumstances of this case there are no grounds to justify the relief being sought.

In the result, the application is dismissed.

T. K. Hove & Partners, applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioners