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PROSECUTOR GENERAL OF ZIMBABWE
v
(1) INTRATEK ZIMBABWE (PRIVATE) LIMITED (2) WICKNELL MUNODAANI CHIVAYO (3) L NCUBE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKARAU JA & MAVANGIRA JA
HARARE: MARCH 2 & 11 & JUNE 8, 2020

S. Fero with *Z. Macharaga*, for appellant

S. M. Hashiti, for first respondent

L. Uriri with *E. Mubaiwa*, for second respondent

No appearance for third respondent

MAKARAU JA: This is an appeal against the whole judgment of the High Court handed down on 20 March 2019, quashing the charges that the first and second respondents were facing in an ongoing criminal trial before the third respondent and, acquitting them on all the charges.

Background facts

The facts giving rise to this appeal are common cause.

The first and second respondents appeared before the third respondent, a Regional Magistrate, facing four counts as follows:

1. Two counts of contravening s 136 of the Criminal Law (codification and Reform) Act [*Chapter 9.23*], fraud;
2. One count of contravening s 5 (1) (a) (ii) of the Exchange Control Act [*Chapter 22.05*] and
3. One count of contravening s 5 (1) (a) (i) of the Exchange Control Act [*Chapter 22.05*]

They pleaded not guilty and at the same time excepted to the charges as not disclosing the alleged offences or any other offence. Relying on the provisions of s 146 of the Criminal Procedure and Evidence Act [*Chapter 9.07*], the third respondent found that the charges captured the essential averments and allegations required by law. Accordingly, he ruled against the exception which he dismissed.

Unhappy with the ruling, the first and second respondents approached the court *a quo* on review, seeking an order setting aside the decision of the third respondent and substituting it with one upholding the exception, quashing the charges and acquitting them on all the charges. They raised one ground of review. They alleged that the third respondent's decision to dismiss the exception was grossly unreasonable and patently contrary to law such that no reasonable judicial officer who had applied his mind to the facts of the matter would have reached the same decision.

The application for review was opposed.

In opposing the application, the appellant argued in the main that this was not a proper case for the court *a quo* to exercise its discretion to review unterminated proceedings in a lower court.

Pending determination of the review, the first and second respondents applied to the court *a quo* for an order staying the proceedings before the third respondent. By an order issued on 31 December 2018, the application was granted in respect of the fourth count only with trial in respect of the remaining three counts ordered to continue. It was the opinion of the court granting the interdict that the first and second respondents had no prospects of success on review in respect of the remaining counts.

Dismissing the opinion of the court granting the interdict as not binding on it, the court *a quo* granted the application as indicated above.

The decision *a quo*

As a basis for granting the application in the manner that it did, the court *a quo* found as follows:

> "It is therefore clear that the second respondent misdirected himself when he dismissed the exception because he dealt with an issue that was not before him. He decided whether the charges disclosed an offence or not yet what he had been asked to adjudicate upon was whether the facts as stated in the Outline of the State Case disclosed any offence or not. This misdirection in my view goes to the root of the matter.
> Having found that there was a misdirection what is left for the court to decide is whether if the court had decided the correct issue the court would have arrived at the same findings……"

Thus, the *ratio* of the decision *a quo* was the finding that the third respondent misdirected himself when he dismissed the exception because he dealt with an issue that was not

before him. As a result of this alleged misdirection, the court *a quo* felt at large to substitute its own discretion for that of the third respondent, which it proceeded to do.

Dissatisfied with the acquittal of the first and second respondents, the appellant noted this appeal, having obtained leave in terms of s 44(6) of the High Court Act.

Preliminary objections

At the hearing of the appeal, the first and second respondents objected to the notice of appeal as being fatally defective. In addition, they contended that the appellant had abandoned the appeal by failing to file heads of argument within the time set by the registrar.

The court reserved its ruling on the objections before requiring the parties to address it on the merits of the appeal.

I now determine the preliminary objections.

The first and second respondents objected to the form and content of the notice of appeal. It was spiritedly argued on their behalf that the notice of appeal was fatally defective as it did not comply with any of the appeal rules of this Court. Central to this argument was the question whether the appeal was a criminal or civil appeal in which event it had to conform to either the Supreme Court Rules 1979 on criminal appeals or the Supreme Court Rules 2018 on civil appeals.

It is not necessary for the purposes of ruling on the preliminary objections that I resolve the question whether appeals such as the one in *casu* are criminal in nature, deriving their colour from the subject matter, or are civil, following, the nature of the proceedings *a quo*. This is so because appeals by the Prosecutor-General are specifically provided for and solely governed by s 44 of the High Court Act with s 45 providing that the time limits for the filing of such appeals are to be provided for in terms of rules of court enacted for the purpose. The point to make and note is that such appeals are not conjoined to or made part of or subject to either civil or criminal appeal rules. Section 44 of the High Court Act as read with s 45 makes separate provisions for these appeals. I regard them as appeals *sui generis*.

Notwithstanding that we have had the procedure for years, no rules providing for such appeals have been made. I suggest in passing and respectfully so, that it is highly desirable that such rules be enacted without any further delay.

It being common cause that there are no rules governing appeals by the Prosecutor - General in terms of s 44 of the High Court Act, it is idle to suggest that the appellant's appeal was fatally defective for want of complying with the rules.

I am satisfied that the appellant complied with the specific provision of the law enjoining him to note the appeal after obtaining leave from a judge of this Court. The draft notice of appeal was attached to and formed an integral part of the application for leave to appeal that was granted by this court. It was on the basis of this notice of appeal that the judge in chambers was able to form the opinion that the intended appeal had merit and prospects of success.

For the avoidance of doubt, it is my finding that the notice of appeal in this matter cannot be and is therefore not deficient or defective as alleged. This is so because there is no yardstick to measure it by in that there are no rules that specify what form it should have taken and what content it should have. It was considered as part of the application for leave to appeal that was duly granted. I further draw comfort from the admitted fact that the respondents did not suffer any prejudice as a result of the notice of appeal having been filed in the form that it was.

Regarding the objection that the appellant' heads were not filed within the timeframe set by the Registrar, it is common cause that the appellant did file some heads within the stipulated time frame, which heads have since been supplemented to a large extent as they did not address the appeal suitably and adequately. To hold that no heads were filed in the circumstances would be to substantially raise the bar on the quality of heads to be filed before this Court, a requirement that may be ahead of its times and may deny the majority of litigants access to justice.

I rule against the preliminary objections which I dismiss.

I now turn to the merits of the appeal.

The appeal

In the main, the appellant argued that the court *a quo* erred in interfering with unterminated criminal proceedings in a case where there were no exceptional circumstances warranting such interference and particularly where the trial had commenced and evidence was being led before the subordinate court.

In addition, the appellant raised three other grounds attacking the court *a quo*'s finding to the effect that the facts alleged in the outline of the state case did not disclose an offence, that the facts of the matter gave rise to a civil matter only to the exclusion of criminal proceedings and that the second respondent ought not to have been charged in his personal capacity.

The Issue

The sole issue that arises in this appeal is whether the court *a quo* erred by interfering with the unterminated proceedings before the third respondent.

The Law

The general rule on when a superior court may interfere with the unterminated proceedings of a lower court was settled in *Attorney-General v Makamba* 2005 (2) ZLR 54 (S) where MALABA JA (as he then was) had this to say at 64 C:

> "The general rule is that a superior court should interfere in uncompleted proceedings of the lower courts 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."

In settling the rule thus, the court referred to the South African case of *Ishmael & Ors v Additional Magistrate Wynberg & Anor* 1963 (1) SA 1 (A) where it was similarly observed that a superior court should be slow to intervene in unterminated proceedings in a court below and should confine the exercise of its power to those cases where grave injustice might otherwise result or where justice by other means may not be obtained.

Thus, put conversely, the general rule is that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with on-going proceedings.

The rationale for the general rule may not be hard to find. If superior courts were to review and interfere with each and every interlocutory ruling made during proceedings in lower courts, finality in litigation will be severely jeopardised and the efficacy of the entire court system seriously compromised.

Further, it is not every irregular and adverse interlocutory ruling or decision that amounts to an irreparable miscarriage of justice. Some such lapses get corrected or lose import during the course of the proceedings. And in any event, as observed by STEYN CJ in *Ishamel & Ors v Additional Magistrate Wynberg & Anor* (*supra),* it is not every failure of justice which amounts to a gross irregularity justifying intervention before completion of trial. Most can wait to be addressed on appeal or review after final judgment.

Analysis

Whilst the general rule on when a superior court may interfere in on-going proceedings in a lower court was common cause to the parties, the court *a quo* appeared to have been oblivious of the correct approach to adopt in the matter. Instead of finding a reason for departing from the general rule as settled in the authorities and legal texts, the court *a quo* was content to find that the

third respondent had misdirected himself by dealing with an issue that was not before him as a basis for interfering with the on-going trial of the first and second respondents.

The decision of the court *a quo* cannot be saved. The court *a quo* fell into grave error in one or two respects.

Firstly, the court *a quo* did not adopt the correct approach of when to exercise its review powers in on-going proceedings, which approach has been discussed above. It did not establish those rare or exceptional circumstances in the matter that called for its intervention and which circumstances could not wait until the trial was completed.

The first and second respondents had in fact indicated in their founding affidavit that such circumstances would be advanced at the hearing of the matter. If these circumstances were indeed revealed to the court *a quo*, they did not form part of its reasoning and more importantly, the basis of its decision to grant the application. The net result was that the court *a quo* did not find as it ought to have, that this was a rare case in which the irregularity complained of was not only gross but vitiated the proceedings irreparably before it interfered with the on- going trial.

Instead, the court *a quo* proceeded on the wrong footing. It found a misdirection on the part of the third respondent, a finding that was neither material nor adequate to justify its interference. This is so even if the alleged misdirection was conceded to by the appellant. The power of the court *a quo* to interfere with on-going proceedings is not conferred upon the court by the consent of the parties. Even where the parties agree as in *casu* that there had been a

misdirection by the lower court, this did not absolve the court *a quo* from judiciously assessing whether this was a proper case for it to interfere and not to allow the proceedings in the lower case to run their full course. Had the court *a quo* done this it would have found that this was clearly not a proper case for interfering with the unterminated proceedings before the third respondent.

Secondly and in any event, the first and second respondents having raised a specific ground of review, the court *a quo* was duty bound to make a finding on the alleged gross irregularity. There was thus a wide and patent disconnect between the ground alleged in the application for review and the *ratio* of the decision *a quo*. The first and second respondents had alleged irrationality in the interlocutory decision, which allegation the court *a quo* did not determine, let alone advert to in its judgment.

It is therefore my finding that the court *a quo* erred in interfering with the unterminated criminal proceedings before the third respondent. It erred by failing to make a finding that the ground of review raised by the first and second respondents had been proved and that having been so proved, it brought out a miscarriage of justice that not only went to the root of the matter and vitiated the entire proceedings but could not wait to be redressed after the completion of the trial. More particularly, the court *a quo* erred in taking the wrong approach in the matter.

Disposition

The appeal must be allowed and the judgment of the court *a quo* set aside. The trial of the first and second respondent before the third respondent must proceed.

This being an appeal by the Prosecutor -General in terms of s 46 of the High Court Act, it is just and equitable that each party be made to bear its own costs of this appeal.

In the result, I make the following order:

1. The appeal is allowed with each party bearing its own costs.
2. The judgment of the court *a quo* is set aside and is substituted with the following:
    1. The application for review is dismissed with each party bearing its own costs.
    2. The trial of the second and third respondents under case number CRB114-5/18 before the third respondent is ordered to procced."

GWAUNZA, DCJ **:** I agree

MAVANGIRA, JA **:** I agree

National Prosecution Authority, appellant's legal practitioners.

Manase and Manase, 1st and 2nd respondent's legal practitioners.