ARCHFORD MUSEKIWA

Versus

NDUMO MASUKU

And

NATIONAL PROSECUTING AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 NOVEMBER 2022 & 16 FEBRUARY 2023

Urgent Chamber Application

Ms F. Nyathi for applicant
Ms P. Kanengoni for respondent

MAKONESE J: This is an urgent application whose relief is couched in the following terms:

"Interim relief sought

Pending the finalization of this application applicant is granted the following relief:

1. That the respondents be and are hereby ordered to suspend further prosecution/trial of the applicant under case number CRB LPN 86/22 until the finalization of this application.

Terms of final order sought

2. That the respondents be and are hereby interdicted from prosecuting the applicant under cover of case number CRB LPN 86/22 until the finalization of the application for review pending before this honourable court under case number HC 1849/22.
3. The respondents pay the costs of suit on a higher scale only if they oppose the application."

This application is opposed by the respondents.

Factual background

On the 11th of May 2022 and at Lupane Magistrates' Court applicant appeared on a charge of criminal abuse of office in contravention of section 174 (1) (a) of the Criminal Law Codification and Reform Act (Chapter 9:23). Applicant pleaded not guilty. The allegations as outlined in the charge sheet are that during the period 23rd September 2021 to 25th September 2021 and at St Lukes Police base, Lupane, applicant a police officer employed by the Zimbabwe Republic Police, and in the exercise of his duty as such, unlawfully and intentionally acted inconsistently, by issuing a Livestock Clearance Certificate Form 392 in favour of Baron Siaka Masuku. It is further alleged that applicant arrested Baron Siaka Masuku without conducting investigations nor bringing the suspect to court within the stipulated 48 hours. The state alleges that applicant proceeded to improperly clear cattle that had been paid as compensation *in lieu* of a criminal prosecution.

The trial commenced on the 11th of May 2022. The state led evidence from Mandla Ncube, Clement Mhlanga, Boniface Musekiwa, Darlington Hochi and Robert Ndlovu. At the close of the state case the applicant launched an application for discharge at the close of the state case in terms of section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07). This application was dismissed by the court *a quo*. This application for review seeks to motivate this court to order the stay of proceedings in the court *a quo* pending the finalization of the application for review.

Submissions by the applicant

Applicant submits that this court must order a stay of proceedings in case number CRB LPN 86/22 pending review of the dismissal of his application for discharge at the close of the state case. Applicant contends that the trial court grossly misdirected itself when it refused to grant the applicant his application for a longer remand when the matter had originally been brought by way of summons. Applicant submits that no prejudice would be occasioned to the respondents allowing the High Court to consider the referral for review before the trial resumes.

Applicant argues that whilst it is in the interests of justice that criminal trial be disposed of expeditiously, all accused persons are guaranteed the right to a fair trial within a reasonable

time in accordance with the provisions of section 69 (1) of the Constitution of Zimbabwe (Amend) 20, 2013.

Applicant submits that the trial in the court *a quo* commenced at Lupane Magistrates Court on the 11th of May 2022. The state led *viva voce* evidence from 5 state witnesses. Applicant contends that in his view the evidence of the first and second witnesses exonerates him from any wrongdoing with regards to the conduct of his duties. Further, applicant contends that the evidence of the 3rd and 4th witnesses, members of the police service suggest that the matter ought to have been dealt with as an administrative matter, and not as a criminal matter.

Applicant argues that the state did not establish a *prima facie* case, and that he ought not to have been placed on his defence.

Applicant argues that, if the trial is allowed to proceed, pending the review of the proceedings in the court *a quo*, the review proceedings will be rendered academic. Applicant contends he will suffer irreparable harm and prejudice and would have no other remedy.

Submissions by the respondent

Respondent contends that this matter should never have been brought to this court under a certificate of urgency. The apprehension of any harm by the applicant was reasonably expected the moment the application for discharge at the close of the state case was dismissed. The application for discharge at the close of the state case was dismissed on or about the 12th of September 2022. This application was only filed on the 1st October 2022.

Respondent submits that the applicant did not treat this matter with the urgency it deserved. No explanation was advanced as to why the matter suddenly became urgent over a month and half after the dismissal of the application for dismissal at the close of the state case.

Respondent submits that this application does not deserve to be treated as urgent and should be dismissed on that basis alone. I am alive to the fact that this matter was argued on the 8th of November 2022. The delay in the handing down of that judgment has not been entirely the fault of the litigants. For this reason, it is only proper for this court to make a determination on the merits.

Application of the law

In *Sibusisiwe Mhlanga* v *Magistrate Dzira N.O. & Anor* HB-111-22, this court remarked that applications for review made against magistrates dismissing applications for discharge at the close of the state case were flooding the High Court for the sole purpose of delaying and frustrating proceedings in the lower courts. Where the review application does not have reasonable prospects of success, an application for stay of proceedings must fail. These courts do not encourage applications for the review of unterminated proceedings.

Where a magistrate dismisses an application for discharge at the close of the state case, a decision to review the matter, and set aside the proceedings, should occur only in exceptional circumstances. This is because the accused still has a remedy in appealing the decision to the High Court at the end of the trial. In the majority of cases, frivolous and vexatious applications for review are filed in the High Court to frustrate the finalization of the matter.

The law on discharge at close of state case

In a long line of cases it is now settled that an application for discharge at the close of the state case should succeed where:

(a) there is no evidence to prove the essential elements of the offence. See *Attorney General* v *Bunt & Anor* 1987 (2) ZLR 96 (S)
(b) the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it. See *Attorney General* v *Tarwirei* 1997 (1) ZLR 575 (S)
(c) where a reasonable court acting carefully might properly convict based on the evidence. See *AG* v *Mzizi* 1991 (2) ZLR 321

The applicant could not rely on any other grounds other than the ones espoused above and must prove that the state failed to discharge its onus based on these grounds. The duty of the state is to establish a *prima facie* case at the close of the state case.

Application of the law

On the facts of this matter, the respondent contends that the first two witnesses clearly implicated the applicant. The respondent submits that the evidence led established a *prima facie* case that the applicant committed the offence of criminal abuse of duty as a public officer as provided under section 174 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). In arriving at the decision to dismiss the application for discharge at the close of the state case, the court *a quo* exercised its discretion and carefully analysed the evidence before it. The fact that internal disciplinary action could have been taken is not a bar to criminal proceedings. The applicant has not shown that the decision of the court *a quo* is vitiated by any irregularity that would warrant the urgent intervention of this court.

This court must only interfere in unterminated proceedings in the lower court where it is clearly shown that the court *a quo* improperly exercised its discretion or that the decision is vitiated with some irregularity. I must point out that the court should not interfere with proceedings in the lower court to enable litigants to frustrate the finalization of cases. At the end of a criminal trial a litigant still has the remedy of an appeal or review.

Disposition

In my view the applicant's prospects of success on review are close to none and therefore there would be no prejudice suffered if the case proceeds to the defence case.

In the circumstances, and accordingly, the application be and is hereby dismissed.

Makaya & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners