CONSTANTINE CHAZA
versus
MUNASHE CHIBANDA N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 18 November 2022 & 26 July 2023

Court Application for Review

T L Mapuranga, for the applicant
No appearance for the 1st respondent
E Makoto, for the 2nd respondent

KATIYO J: The superior courts, generally are not keen on interfering with lower courts unterminated proceedings as a matter of practice. However, certain circumstances as shall be demonstrated in this case, such interventions by this court in pursuit in the interest of justice is acceptable.

The applicant approached this court seeking a review of the first respondent. The applicant is an accused in a criminal trial at Harare Magistrates Courts in which he faces two counts of fraud as defined in s 136 (a) of the Criminal Law (Codification and Reform) act [*Chapter 9:23*] hereinafter referred to as ("The Code"**).** Before the amendment the charges were framed as follows:

Count 1

Fraud as defined in section 136 (a) od the criminal law Codification and Reform Act [*Chapter 9:23*]

In the period between January 2014 to February 2022 and at High Court and Supreme Court of Zimbabwe in Harare, Constantine Chaza misrepresented by tendering and stating that Constantine Chaza was acting on behalf of Elliot Rogers based on a special power of attorney well knowing that the power of attorney was fake intending the court to act the misrepresentation that Constantine Chaza was indeed given a special power of attorney to represent Elliot Rogers in the High Court and Supreme Court in the case numbers HC 3331/14, HC2333/1, HC6665/17,HC649/17, HC2650/18, HC1444/19,HC1016/20,SC15/19 thereby causing actual prejudice to Tendai Mashamanda 41 Ridgeview North Highlands, Harare house.

Count 2

Fraud as defined in Section 136(a) of the criminal law Codification and Reform Act Chapter 9:23.

In that on the 18th of October 2021 and at the High Court in Harare, Constantine Chaza made a misrepresented by tendering and stating that he was representing Elliot Rodgers based on a fake special power of attorney intending the court to act upon the misrepresentation that Elliot Rogers authorized Constantine Chaza to represent him in case number HC5633/2021 resulting in court orders being granted to the actual prejudice of Puwayi Chiutsi. *(sic)*

And charges after the amendment were as follows:

Count 1

Fraud as defines in Section 136(a) of the criminal law Codification and Reform Act [*Chapter 9:23*]

In the period between January 2014 to February 2022 and at High Court and Supreme Court of Zimbabwe in Harare, Constantine Chaza misrepresented by stating and tendering that Constantine Chaza was acting on behalf of Elliot Rogers based on a special power of attorney well knowing that the special power of attorney was fake intending the court to act the misrepresentation that Constantine Chaza was given a special power of attorney to represent Elliot Rogers in the High Court and Supreme Court in the case numbers HC 3331/14, HC2 333/16, HC 6665/17, HC 649/17 HC 2650/18, HC 1444/19, HC 1016/20, SC 15/19 thereby causing actual prejudice to Tendai Mashamanda 41 Ridgeview North Highlands ,Harare house.

Count 2

Fraud as defined in Section 136(a) of the criminal law Codification and Reform Act [*Chapter 9:23*]

In that on the 18th of October 2021 and at the High Court in Harare, Constantine Chaza made a misrepresented by tendering and stating that he was representing Elliot Rodgers based on a fake special power of attorney intending the court to act upon the misrepresentation that Elliot Rogers authorized Constantine Chaza to represent him in case number HC5633/2021 resulting in court orders being granted to the actual prejudice of Puwayi Chiutsi.(*sic*)

The first respondent is the presiding Magistrate and the second respondent is prosecuting on behalf of the State. The charges emanate from various High Court and Supreme Court proceedings in which the applicant represented one Eliot Rodgers. The litigation in the Superior Courts were against one Puwayi Chiutsi initially and then Tendai Mashamanda at a later stage. It follows that these two are the complainants in the matter forming the basis of the present application. The allegations are that the applicant did not have the authority of one Eliot Rodgers to represent him in various litigations as aforementioned. At the initial trial the applicant excepted to the charges which application was granted by the first respondent even though the second

respondent had opposed it. Following the ruling the second respondent attempted to amend the charges. The attempted amendment was only done on the first count with virtually nothing on the second count. The applicant felt the amendment was meaningless and insufficient. He made another application for exception to the charges which application was dismissed without elaborating on the law. The applicant in compliance with the order pleaded to the charges and the matter commenced.

Without much ado he then petitioned this court to review the decision of the first respondent. The applicant as his basis for this review raises the point that there are gross irregularities in the procedure adopted by first respondent. He alleges the gross irregularities are so serious so as to be incapable of ratification after the trial is concluded.

In his prayer he asks for the following:

"1. The decision of the first respondent made on the 23rd of June 2023 in case number CRB 1925/22 dismissing the applicant's exception be and is hereby reviewed and set aside.
2. The charges of two counts of fraud against the applicant in case number CRB 1925/22 be and hereby quashed.

In the alternative:

1. The matter is remitted back to the Magistrate Court at Harare for a determination on whether the amendments effected by the state bring clarity to the charge, and if not the appropriate relief to be granted."

In the interim the applicant and the respondents' legal practitioners agreed that the proceedings in the Magistrates Courts should be stayed pending the outcome of this review application. The interim order forms part of this file.

According to the applicant founding affidavit when he initially excepted to the charges on both counts the second respondent was ordered to amend his charges. It is not in dispute that the 2nd Respondent made the following changes only on count one: The second respondent interchanged the words tendering and stating:

- Introduced the word **special between well knowing that, the and power of attorney, it removed the word indeed.** There were no changes effected on count two. With this the applicant formulated an opinion that no changes had been effected by the purported amendment. The applicant made another exception to the

charge. The second respondent opposed the application. Nevertheless, the first respondent ruled against the application and ordered that the applicant pleads to the charges which he did only for the purposes of complying with the court order. He submits that he had difficulties in understanding as to how the alleged misrepresentation was done. Was it through tendering a fake power of attorney or stating a fake power of attorney or tendering and faking power of attorney or stating by words only that he was acting for Eliot Rodgers or stating that he was given a power of attorney by Eliot Rodgers. This, he submitted, that was left in an embarrassing position as to what is that he was supposed to plead to. They further argued that by being ordered to plead to such defective and embarrassing charges it amounted to gross irregularity which vitiates the proceedings and completely stands in the way of a fair trial. Argued that the ruling by the second respondent does not recognise that it is opening the door to the second respondent for having an invalid charge placed before the court which will sufficiently broad to expand or contract the case as it sees fit. Further that it does not in any way address how the second respondent complied with the duty to bring clarity to the charge. Contented that the second respondent is in effect washing off hands demanding a trial whatever the consequence. The applicant whilst cognisant of the fact that the decision by the first respondent is interlocutory it is pertinently wrong and causes great prejudice. It is grossly irregular and irrational that the trial which proceeds in this manner will be so farcical and incapable of remedies at any other stage. The applicant had also applied for further particulars wherein requested the following particulars

- Count 1

In what way was the prejudice caused to Tendai Mashamanda?

- Count 2

In what way was prejudice caused to Puwayi Chiutsi?

In both counts if it is alleged that the applicant presented a special power of attorney which was purporting to be signed by Eliot Rodgers, is it not Eliot Rodgers the complainant?

What are the cases numbers of the matters in which the accused was alleged to have misrepresented in the High Court of Zimbabwe? What was the matter involving Mashamanda and what was the matter involving Puwayi Chiutsi? What was the nature of these cases? Is the fraud alleged to be in the act of forging the powers of attorney or is it alleged to be in the misrepresentation that Mr Rodgers did not participate in the litigation? Is it accepted that all civil disputes between the aforesaid Eliot Rodgers and the two complainants were resolved by Supreme Court in case numbers SC 24 /22 and SC 24/22?

The second respondent responded by stating that the request for further particulars were triable issues which he briefly outlined. Will come back to comment on these issues. The second respondent in opposing the application for review deposed to an affidavit wherein he stated that a matter is reviewable at law where there has been gross irregularity in the proceedings or decision-making process, or where there has been irrationality in the decision-making process that it defies logic and, or where there has been an illegality and the authority is guilty of an error in law. Argued further in cases of review of pending proceedings, case law has set an additional requirement. That one looks at whether the proceedings or decision rendered below even if it was beset with misdirection resulted in a miscarriage of justice which is not curable by way of appeal or review at the end of trial. Review is not just an activity. Argued that our courts even if a magistrate has erred in dismissing an exception to the charge, his error would be in the performance of his statutory functions, giving rise to a wrong decision and the normal remedy is an appeal after conviction. That, it is not desirable to bring the magistrate's decision under appeal in unterminated criminal proceedings especially where redress by means of review or appeal would ordinarily

be available upon completion of the proceedings. The second respondent further argues that the mere mention by the applicant that he has a good defence to the charges in question is an indication that the charges are comprehensive. It goes on to aver that the court *a quo* cannot be faltered in its failure to uphold the exception as there are available remedies to the applicant.

The applicant filed heads of arguments in support of his case and I have not had benefit of the respondents' heads of arguments. From the certificates of service filed of record indicate the respondents were duly served with the applicant's heads of arguments. Because of the nature of the proceedings, I will proceed to determine the case on merit despite the respondents having failed to do so as required by the rules of this Court. I am indeed impressed by the authorities cited by the applicant in his heads of argument. In the celebrated case of *Attorney General* v *Makamba* 2005 (2) ZLR 54 (SC) held that:

> "The general rule is that a superior court should interfere in uncompleted proceedings of the lower courts only in exceptional circumstances of the 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 *Chin'ono* v *Regional Magistrate & Anor VP Guwuriro N.O & Anor* HH690/21 MUSITHU J stated as follows:

> "It is trite that a charge must be framed in such a way that does not leave the accused person guessing as to what offence he alleged to have committed."

In *Kasukuwere* v *Mujaya N.O & 3 Ors* CHITAPI J had this to say:

> "The framing of a charge is not a walk in the park. One should start by the general jurisprudential principle that good laws must be clear and unambiguous. By equal measure, a charge must be clear and unambiguous.in other words accused must not be left unsure or unclear as to the case that he or she must answer to……."

Also cited is the case of *R* v *Koda Alias Fire* 1919 SR 10 it was held that:

> "In the first place the charge and indictment are themselves extremely defective. The

> accused is charged with altering particulars…there are over a dozen particulars on a certificate and the accused should have been fully informed what actual particular it was alleged he had altered. Every accused person is entitled to know clearly the detailed nature of the charge brought against him….."

The case of *Weber & Anor* v *Regional Magistrate, Windhoek & Anor* 1969 (4) SA 394 SWA @397 it was held:

> "Among the rare case in which the SC has an occasion thought fit to intervene in unconcluded proceedings in the magistrates courts are cases where the accused complained that the charge against him lacked sufficient particularity. He is entitled to such particulars of the offense with which he is being charged as will sufficiently inform him of the case he has to meet and enable him to prepare and present his defence……"

Also argued that the failure by the court to determine an issue placed before it is an irregularity which permits a higher court to intervene. In *Gwaradzimba N.O* v *CJ Petron (Pty) Ltd* 2016 *(1) ZLR (SC)* the Supreme Court held as follows:

> **"**The position is well settled that a court must not make determination on only one of the issues raised by the parties and say nothing about other equally important issues raised," unless the issue so determined can put the whole matter to rest."

In *Longman Zimbabwe (Pvt) Ltd* v *Midzi & Ors* 2008 (1) ZLR 198**:**

> "The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial determination on the issue in dispute. Indeed, the failure to resolve the dispute is a misdirection, that vitiates the order given at the end of trial."

In *S* v *Nathaniel* 1987(2) SA225(SWA)@228-229 and 237 It was held as follows:

> "Accordingly, where a court sustains an objection to the charge sheet the state must be given an opportunity of remedying such a charge sheet. If for some reason the charge sheet is not capable of amendment or if particulars will not remedy the defect the charge is quashed forthwith. Our courts act to set aside defective charges even though no objection to charge is taken by the accused and even after there has been a plea, evidence and a conviction."

In this case it is not in dispute that upon application on the exception to the

charges the first respondent ruled in favour of the applicant and ordered the second respondent to amend the charges. Without any meaningful amendment to the first count not withstanding that no attempt was made on the second count the first respondent went on to accept the charges in that format. The applicant raised objection to this approach but was not heard leading to him pleading to the charges for fear of defying the court order. Let me hasten to say this action by the applicant was correct as the court had ruled against him. It should be noted that his plea was just to comply with the court order even though he disagreed with the court position precisely the reason he approached this court on review. He argues that the first respondent contradicted her own ruling when she allowed second respondent to have the applicant plead to unamended charges as per her ruling. This created an apprehension of unknown consequences on the part of the applicant raising fears of gross injustice could result. The second respondent's argument is not placed on any footing as all they seem to do is just to oppose for the sake of opposing. All they rely on is just that the applicant has other remedies available to him at the end of the proceedings by way of appeal or review. The second respondent should be aware of the consequences of any criminal implication on any individual as they go through the process. The anxiety and the trauma associated with it tells it all. The general approach on the issues of undetermined proceedings interference by the superior courts is not cast in stone for what is important at the end of the day is justice. To leave this process to the end of the proceedings sometimes it will be open to abuse. Individuals should be prosecuted when charges are clear and unambiguous and is the duty of the courts to ensure that no one manipulates the process at the detriment of the others. In this particular case there has been no reason advanced by the second respondent as to why they failed to carry out a simple task of amending the charges. Also a reason why the first respondent allowed the charges to be put in that format contrary to her ruling. Assuming that they wanted the defects to be cured by evidence. It has been argued that Eliot Rodgers whose power of attorney and signature are the subject matter of the charges did not

complain against the applicant nor is going to be witness in the matter. If at all, it was submitted that he is insisting that he authorized the Applicant to represent him. If this position is true and that the respondents have not refuted it so who is the complainant. Who is the right person to stand as the complainant even assuming the signature is forged? However, the real issue is whether the charges disclose an offence and if not, was any amendment done as was ordered by the first respondent. All the second respondent did was to interchange words on the first count and left the second count totally unattended to. So, in these circumstances can the superior courts leave such proceedings to go on in that format?

According to s 27(1) (c) the High Court Act [*Chapter 7:06*], the High Court may review lower court proceedings on the grounds that there has been ….*gross irregularity in the proceedings or the decision*….

Section 28 of the same act gives High Court the power subject to any other law, the power to set aside or correct the proceedings or decision on review of any proceedings or decision other than criminal proceedings.

In this particular case alluded to above the state has not given any authority in opposing this review application other than general sentiments passed in the opposing affidavit. The court reckons that on the day of the application a Mr *Makoto* from National Prosecuting Authority is the one who stumbled upon this case and made submissions on behalf of the respondents. He correctly conceded on the interim order of having the proceedings stayed pending the outcome of this review application. In analyzing the submissions above I have no doubt this is a typical case where any person in this situation would fear for the eventualities given the persistence at which the Respondents handled this case. Judicial officers have a duty to uphold the tenets of justice and safeguard it jealously. The test of irrationality was stated by LORD DIPLOCK in *CCSU* v *Minister for the Civil Civil Service* (1984) 3 All ER 935 at 951 as follows:

"By irrationality, l mean what can by now be succinctly referred to as 'Wednesbury

> unreasonableness'……it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should well equipped to answer, or else there would be something badly wrong with our judicial system."

The failure by the court *a quo* to uphold its earlier ruling on the need to have the state amend its charges was irrational and defies logic in the application of justice delivery. There is no dispute that the first count was brought back as demonstrated below with minor attempt to amend which was never an amendment. The second count remained as it was. This is either or that the second respondent did not have anything to change or encountered difficulties to do so. It cannot be emphasized that failure to uphold the basic principle of justice may result in miscarriage of justice. Section 70(1) of the new constitution of Zimbabwe states as follows:

> **"**Any person person accused of an offense has the following rights…..
> ……
> (b) to be informed promptly of the charge, in sufficient detail to enable them to answer it……."

Section 68 of the same Constitution goes further and gives the following:

> "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedural fair……."

Of more relevant is s 146(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which states as follows:

> "Subject to this Act and except otherwise provided in any other enactment, each count of indictment, summons or charge shall set forth the offence which the accused is charged in such a manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property if any, in respect of which the offence is alleged to have been committed, and may be reasonably sufficient to inform the accused of the nature of the charge."

A mere comparison of the original charge sheet as above and the purportedly amended charge sheet brings to bear that no amendment was done other than

interchanging words. This flies against the provision of the s 171 of The Criminal Procedure and Evidence Act [*Chapter 9:07*] ("The Code") states that:

> "When the accused excepts only and does not plead, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment, summons or charge …."

Section 177 of the Code mandates the state to give particulars to the accused in appropriate circumstances. Section 178 of The Code talks of quashing the indictment in appropriate circumstances. All what the law is trying to point is that for the fair hearing the accused should be sufficiently be informed of the nature of the charges he stands accused of, for him or her to be able to adequately prepare his defense in the absence of which a likely miscarriage of justice will occur. I have no doubt in this case that the basic rules of justice were not followed. Even the mere listing of the witnesses to the exclusion of one Eliot Rodgers tells it all. Whilst it is the discretion of the second respondent as to who should be the complainant, I do not think in this case got it right. Having taken all the circumstance surrounding this case I am not impressed by the second respondent's stance who did not even bother to file heads of arguments. That aside, there is nothing in this case to persuade this court that the second respondent's argument stands on something. It has no foot and all they do is a bare opposition with no merit. The first respondent grossly erred when she allowed the applicant to plead to the unamended charges despite objections from the applicant's counsel. I am persuaded by the applicant's argument. If the second respondent intends to proceed then he has to do what is required of them, that is to comprehensively amend charges as was ordered. Having stated as above, I will rule in favour of the applicant with an amendment to the draft order as follows:

1. The decision of the first respondent made on the 23rd of June 2022 in case number CRB 1925/22 dismissing the applicant's exception be and is hereby reviewed and set aside.
2. The plea which had been entered by the applicant be and is hereby set aside.

3. The matter is remitted back to the magistrate court and be placed before a different magistrate should the second respondent decide to proceed with the matter.
4. No order as to costs.

Nyamundanda and Mutimudye Attorneys, applicant's legal practitioners
National Prosecuting Authority, second respondents' legal practitioners