PHEKELEZELA MPHOKO
and
T UTAHWASHE N.O
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 23 January & 20 February 2024

Opposed application

T Magwaliba with *Z C Ncube*, for the applicant
F I Nyahunzvi, for the 2nd respondent
No appearanace for the 1st respondent

CHIKOWERO J:

INTRODUCTION

1. This is an application for review of the second respondent's decision refusing to discharge the applicant at the close of the case for the prosecution. The applicant, a former Vice President of the Republic of Zimbabwe, is appearing before the first respondent (a Regional Magistrate) sitting as a Designated Anti- Corruption Court at Harare on trial on the main charge of criminal abuse of duty as a public officer and the alternative charge of defeating or obstructing the course of justice as defined, respectively, in ss 174(1)(a) and 184(1)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"). There are no exceptional circumstances justifying this court's interference with the unterminated proceedings pending before the second respondent.

THE BACKGROUND

2. As regards the main charge the allegations are that on 13 July 2016 the applicant, who was then the Vice President of Zimbabwe and hence a public officer, intentionally acted contrary to or inconsistently with his duties as a public officer for the purpose of showing

favour to Moses Julius Juma and Davison Norupiri by appearing at Avondale Police Station on 13 July 2016 whereupon he ordered the duo's release from police custody

3. The alternative charge is that, based on the same facts, the applicant defeated or obstructed the course of justice
4. The applicant's defence was that in requesting the police to release Juma and Norupiri, he was executing an order by the late former President of Zimbabwe who, on the basis of top state secrets, believed that harm would befall Juma and Norupiri if they were to spend the night in police cells. The applicant's defence was essentially that he neither criminally abused his duty as a public officer nor did he obstruct or defeat the course of justice because all that he did was to execute the order given to him by the now late former Head of State and Government by merely making a request for the release of the duo from police detention. The police, following their own protocol, freely decided to grant the request, hence the release of Juma and Norupiri before their appearance in court
5. After leading evidence from seven witnesses the prosecution closed its case. This prompted the applicant to apply for his discharge. The application was dismissed

THE REFUSAL TO DISCHARGE

6. In rendering his decision, the second respondent said, among other things:

> "Legally a Vice President cannot interfere with the police in their work. The accused, *prima facie*, engaged in conduct that is inconsistent with his duties as a Vice President. By presenting himself at Avondale Police Station to an Inspector who is in the lowest commissioned rank in the force and requesting for the release of Juma, that constituted engagement in conduct that is inconsistent with the duties of a Vice President. The accused can explain his conduct. It was his own admission that he requested for Juma's release from custody. He was there intentionally and acted intentionally in the act or omission.
> *Prima facie* when a person of his standing and position requests the police to release a suspect in their custody, he is avoiding that suspect from spending time in the cells when the arresting officer wanted the suspect to be in custody. If the accused had not presented himself at the police station with the request for the release of Juma, there would not have been any need for Guvakumwe to consult Chitekwe resulting in the release of Juma and his co-suspect. The issue is not whether the release was on summons or not as is shown in exhibit 7. The question of summons comes subsequent the release. The issue is the release from custody of the suspects itself.
> Was the release done after the accused had intervened with his request for the release of Moses Juma at Avondale Police Station? The answer is in the affirmative. Both ZACC and the ZRP had detained the two suspects to appear in court on the following day.
> It was the accused's request that triggered the release of the two suspects….
> On the alternative charge, the accused when he presented his request at Avondale Police Station knew that the suspects were in custody. That meant police investigations were

> ongoing. His presence at the police station with such a request amounted, on the face of it, to interference with the investigations.
> The evidence led from the first two witnesses addressed the essential elements of the offences the accused faces. For the purposes of this ruling, I found it not necessary to analyze each and every evidence presented thereafter by the other state witnesses. I will do so at the end of the case…"

INTERFERENCE WITH UNTERMINATED PROCEEDINGS

7. The law relating to interference by a superior court with the course of unterminated proceedings pending before an inferior court is settled within this jurisdiction. In Attorney –*General* v *Makamba* 2005 (2) ZLR 54 (S) MALABA JA (as he then was) put it this way at 64C:

> "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."

See also *Ndlovu* v *Regional Magistrate Eastern Division and Another* 1989 (1) ZLR 264 (H); *S* v *Sibanda* 1994 (2) ZLR 19(H); *S* v *Rose* 2012 (1) ZLR 238 (H); *Prosecutor –General of Zimbabwe* v *Intratrek Zimbabwe (Private) Limited and Ors* 2019 (3) ZLR 106 (S) and *Prosecutor General of Zimbabwe* v Intratek Zimbabwe (Private) Limited and Ors SC 67/20.

8. The South African position is similar as exemplified by *Walhaus and Ors* v *Additional Magistrate, Johannesburg and Anor* 1959 (3) SA 113 (AD) and *Ismail and Ors* v *Additional Magistrate, Wynberg and Anor* 1963 SA 1 (AD)
9. In *Lee- Waverly John* v *The State* HH 117/14 this court emphasized that it should only interfere where actual and permanent prejudice will be occasioned to the accused.
10. In short, there ought to exist rare or exceptional circumstances calling for this court's interference which circumstances cannot wait until the trial is completed. See *Prosecutor -General of Zimbabwe* - v *Intratek Zimbabwe & Ors* (supra) at p 9
11. MAKARAU JA (as she then was) had set out the reasons for the general rule at p 8 of the same judgment in these words:

> "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 jeopardized 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 Ishmael *and Ors* v *Additional Magistrate Wynberg and 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."

THE GROUNDS FOR REVIEW

12. In moving us to set aside the lower court's judgment refusing to discharge, substituting same with a decision discharging the applicant at the close of the case for the prosecution and hence finding him not guilty and acquitted in respect of both the main and alternative charges, the applicant listed his grounds for review as follows:

> "**GROUNDS FOR REVIEW**
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> 1. The 1st respondent made a ruling without reference to the law and in particular the Constitution of Zimbabwe, 2013 as read with the Anti-Corruption Commission Act [*Chapter 9:22*]. If he had done so, it would have been apparent to him that the Applicant did not commit any offence at all and therefore there was no reasonable evidence upon which a reasonable court might have convicted him. The two persons, Moses Juma and Davison Norupiri in respect of whom it is alleged that he unlawfully requested their release had been unlawfully arrested.
> 2. The 1st Respondent grossly erred in failing to consider that the evidence of the State had been so grossly unreliable and had been discredited in cross examination that no reasonable court acting carefully might ever have found for the State.
> 3. In addition, the 1st Respondent committed a gross irregularity in assessing the evidence of two witnesses for the State and disregarding the rest of the evidence led. The application for discharge was based on a criticism of all the evidence and it was a gross irregularity to consider only part of that evidence
> 4. Finally, it was a gross failure afflicting the ruling of the 1st Respondent that such ruling despite setting out the essential elements of the offences charged did not deal with how the evidence led established, on a *prima facie* basis, each of those elements. Had the 1st Respondent cared to do so, he would have realized that the essential elements of the offences had not been established and therefore there was no need for the Applicant to be put to his defence."

THE ANALYSIS

13. In his founding papers the applicant jumped the gun, so to speak. Nowhere within the four corners of those papers, as in the heads of argument, did the applicant advert to the existence of actual and permanent prejudice being occasioned to him if the trial continued. Indeed, in oral argument Mr *Magwaliba* submitted that it was not necessary to show that the applicant will suffer actual and permanent prejudice if the trial continued once he has established gross irregularities in the decision refusing to discharge and the irregular

manner that the court had related to the application for discharge. It suffices that we observe that the correct approach in an application of this nature is that it be shown that there will be actual and permanent prejudice occasioned by the refusal to discharge before this court can interfere. This is so because, even if it be assumed that the decision attacked was grossly irregular, it can lose that import in two circumstances. First, if the lower court goes on to acquit the applicant at the end of the trial. Second, the applicant has the right to appeal all the way to the Supreme Court in the event that the lower court convicts him and that decision is upheld on appeal to this court. This is why we say the applicant has put the cart before the horse.

14. It was never the applicant's defence that Juma and Norupiri had been unlawfully arrested, that their detention was thus unlawful and that whatever he did at Avondale Police Station were not crimes by dint of the duo's arrest having been unlawful. In cross-examining the seven State witnesses the lawfulness of the arrest of Juma and Norupiri was never put in issue to lay a foundation for that which now appears as the first ground for review. In his application for discharge the applicant did not premise same on the argument that the arrest of Juma and Norupiri by police officers seconded to the Zimbabwe Anti-Corruption Commission was unlawful since the Zimbabwe Ant-Corruption Commission did not have powers of arrest at that time. He did not, in that application, argue that his request for the release of the two from police custody could not be a crime because the two were not lawfully arrested. The lower court's attention was not drawn to this point of law in determining the application. It is a point that appears to have been discovered on perusing the judgment *a quo*, in particular when that court observed that Juma and Norupiri were arrested by police officers seconded to the Zimbabwe Ant- Corruption Commission and taken to Avondale Police Station for detention in police cells pending their scheduled appearance in court on the following day. Since the decision sought to be reviewed was not predicated on a determination of the lawfulness or otherwise of Juma and Norupiri's arrest and its impact on the lawfulness of the applicant's request for the release of the two from police custody, it cannot be an exceptional circumstance warranting interference by this court with the continuation of proceedings pending before the lower court. The applicant, if he wishes to, can still raise that point in his defence case and rely on it to move

for his acquittal. If the lower court upholds it, what it demonstrates even as we write this judgment is that his remedy still lies with the trial court continuing the trial. Even if the trial court rejects the point, if raised, and proceeds to convict, he can still raise the same point of law as a ground of appeal in attacking the conviction. Incidentally, the first ground for review is not a ground for review at all. Instead, it is a possible ground of appeal against the conviction raised before the applicant has even been convicted.

15. The second is likewise not a ground for review. This is so because it questions the correctness of the decision rendered by the trial court. There can be no appeal against the lower court's judgment refusing to discharge the applicant at the close of the case for the prosecution. We are not exercising appellate jurisdiction at this stage. Accordingly, we are not required to express a view on the credibility of the State witnesses. The lower court, after hearing the defence evidence, will assess the credibility of the witnesses and go on to either convict or acquit the applicant. It suffices that we record that our perusal of the evidence led to date does not appear to suggest the existence of anything incredible in that testimony.
16. We have elsewhere in this judgment reproduced certain portions of the lower court's judgment. We take the view that those portions demonstrate why the lower court was satisfied, on a treatment of the evidence of two out of the seven witnesses, that enough had been said by those two to establish a *prima facie* case. A judgment rendered by a court of law is not an academic paper. We do not think that it was a gross irregularity for the lower court, once it was satisfied on perusal of all the evidence led before it that a prima facie case had been established on evidence of two out of seven witnesses, to refuse discharge on that basis. The need to analyze the evidence of the other five witnesses, for purposes of making its ruling, would have arisen if the testimony of the two, standing alone, was insufficient for purposes of establishing a *prima facie* case. In any event, the lower court was quite alive to the need to assess all the evidence at the end of the defence case. If the applicant is convicted, and if it is his complaint at that stage that the evidence was not treated in its totality, then he can craft an appropriate ground of appeal in seeking to overturn the conviction.

17. As regards the fourth ground for review, there is no one way of writing a judgment. It is true that the written application for discharge adopted the style of dealing with the evidence of the State witnesses, in the order in which they testified, in endeavoring to persuade the lower court that the essential elements of the offences charged in the main and the alternative had not been *prima facie* established. The lower court did not adopt that approach, understandably so. This appeared to be a simple case where a public officer, the then Vice President of Zimbabwe, appeared with his entourage at Avondale Police Station where he put pressure on the Officer in Charge to release two named persons who had been held in police cells pending appearance in court on the following day on certain criminal charges. The Officer in Charge said the applicant pressurized him to effect the release. Two other police officers, who were eye witnesses to the incident, testified to the same effect. The excerpts of the lower court's decision, reproduced elsewhere in this judgment, make reference to this. The lower court engaged with the elements of the offences charged and found, on the face of it, that they had been established. We do not agree with Mr *Magwaliba* that the lower court abdicated its judicial function by refusing to discharge the applicant without determining the application placed before it. We are not surprised that Mr *Magwaliba* did not press for a remittal of the matter to the lower court for the purpose of determining the application for discharge de *novo*. There can be no question of the lower court doing so because it is, as far as that application is concerned, *functus officio*. This matter is distinguishable from *S* v *Makawa and Anor* 1991 (1) ZLR 142 where the Supreme Court held that failure by the trial court to give reasons for judgment was a gross irregularity. That court, sitting as an appellate court, quashed the appeal against conviction on that basis. In the present matter we are not even sitting as an appellate court. The applicant has not been convicted. The lower court gave reasons for its decision. There is no actual and permanent prejudice which will be occasioned to the applicant if the trial continues. He can still be acquitted in which event the impact of the decision now attacked will lose its force. If he is convicted, he still has the remedies of appealing or seeking the review of that judgment.
18. This matter is not one of those rare cases warranting interference with the unterminated trial proceedings pending before the first respondent.

ORDER

1. The application for review of the first respondent's decision rendered on 18 January 2022 refusing to discharge the applicant at the close of the case for the prosecution be and is dismissed

2. The trial of the applicant under case number CRB ACC 53/19 before the 1st respondent shall proceed.

CHIKOWERO J:……

KWENDA J: ……I agree

Ncube and Partners, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners