PATRICK DUBE

Versus

THE STATE

And

MR S NDLOVU (N.O)

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 22 AUGUST 2019 AND 21 MAY 2020

Unopposed Application

T Tavengwa, for the applicant
B Maphosa, for the 1st respondent

MABHIKWA J: I must say from the onset that I hold the view that applications for the review of uncompleted proceedings of a lower court, particularly criminal proceedings, being brought before a single Judge in Motion Court should be greatly discouraged. They are, in my view, generally undesirable.

It has often been argued that a Review Application of this nature is so made in terms of the Common Law. It has also been argued, as appears to be the case *in casu* that such reviews may also be brought in terms of the High Court Rules, 1971 as there is nothing in the said rules or any other law that prohibits a litigant from bringing such an application.

The court application page for the review application in question clearly is in Form 29. It gives notice to the two (2) respondents, the State and trial Magistrate that an application will be made to the High Court and that an accompanying affidavit will be used in support of the application. Thereafter, it sets out the obligations of the respondents should they intend to oppose the application. They should file notices of opposition in Form No. 29A together with one or more opposing affidavits with the Registrar of the High Court Bulawayo within ten (10) days after the date of service of the application on them. They are notified of the applicant's address and also of the need to file any additional documents

verifying the facts set out in their affidavit(s). Finally they are notified of the consequences of their failure to oppose the application within the above specified period of 10 days, that the matter will be set down for hearing and dealt with unopposed.

This clearly is an application in terms of Order 32 Rule 230 of the High Court Rules which provides that;

> "A court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies. Provided that, where a court application is not to be served on any person, it shall be in Form 29B with appropriate modifications."

The relief that the applicant seeks is set out in the Draft Order as, and that;

"1. The decision of the 2nd respondent dismissing the applicant's application for discharge at the close of the State be and is hereby set aside.

2. Applicant be discharged and acquitted at the close of the State case. (underlining is mine)

3. There be no order as to costs."

Admittedly, there is nothing shown in Order 32 Rule 230 that would prohibit bringing such an application. In my view however, it is a rule meant for litigants in civil matters both being directly interested parties prosecuting and or defending their matters personally or through their chosen legal practitioners. In such cases of review however, the 2 respondents are both court officials with loads of other cases to attend to. One of them, the Magistrate is in any event generally not expected to file opposing papers. He should and is by nature of his duties be impartial in a trial. To that extent, Magistrates often do not file any papers, and rightly so in my view, otherwise they would run the high risk of being accused of partiality or bias should they file papers whether opposing or supporting the application. Moreover if they oppose, they may, in addition to bias, be accused of simply defending their position at all costs. As a result, a trial Magistrate would very rarely file papers, save for instances where the application gravely attacks him in his person. The 1st respondent is the State and *dominis litis* at trial. He is legally an interested party but practically speaking, he is not in the same position in terms of direct interest as that of the complainant or a respondent in a civil matter.

To make an application for review and place the prosecutor and where need be, the trial Magistrate in a position of strict time lines of civil rules so to speak, with the high

possibility of getting an easy order in Motion Court for the discharge and acquittal of an accused person in serious criminal proceedings, needs great care to be taken. How proper and feasible is it to deal with such review applications in Motion Court considering also the provisions of section 29 (3) of the High Court Act (Chapter 7:06)?

This brings me to the fact that such applications may and should be taken on review in terms of Part IV of the High Court Act which deals with the High Court's powers of Review in Criminal matters. Section 26 provides as follows.

> "Powers to Review Proceedings and Decisions:
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> Subject to this act and any other law, the High Court shall have power, jurisdiction and authority to Review all proceedings and decisions of all inferior courts of justice, tribunal and administrative authorities in Zimbabwe."

Order 27 then sets out the grounds upon such review proceedings may be brought. It provides that;

> "27(1) Subject to this act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be:-"

It may be noted that section 27(2) has the effect of allowing the legal force of any law relating to the review of proceedings or decisions of lower courts such as an application in terms of Order 32 Rule 260. However what clearly runs throughout Part IV of the High Court Act is the fact that one gets the impression that inspite of section 26 and 27, the legislature did not envisage that such applications for review at the close of the State case would likely be made as a daily tradition, hence the restrictions in those sections concerning the circumstances under which such review proceedings may be brought. Secondly, the said Part IV refers mostly to convicted persons and or sentenced persons as regarding the review proceedings.

These are review proceedings, not an appeal against the interlocutory decision of a lower court. That means that whilst appreciating the difference, the drafters were nonetheless cognissant of the provisions of section 198(4) of the Criminal Procedure and Evidence Act (Chapter 907). They were also cognissant of the Superior Courts' pleathora of decided cases dealing with and discouraging interference with interlocutory decisions in uncompleted proceedings of a lower court.

In my view, the pointed and rigid nature of the High Court Act, is the very reason why legal practitioners avoid it. It also does not provide the strict time limits to the respondents as the Order 32 Rule 260 of the High Court rules, 1971 which they crave for. However, I am of the view that it appears wrong and undesirable that in the midst of a trial and after the complainant and other witnesses have had their fair share of intense testimony and cross examination, they get to court on the next appearance date for continuation of trial, hoping to hear the accused testify in his defence after the trial Magistrate's decision that he should do so, only to learn that the accused is not even in attendance, having been acquitted in Motion Court proceedings of the High Court simply because of the failure by the State to file opposing papers timeously.

As stated above, the Superior Courts have always discouraged interference with the proceedings and decisions of the lower courts except in very rare and exceptional cases where grave injustice and irreparable harm to the interests of the applicant will occur as a result of proven gross irregularity complained of if the court does not intervene.

I have not been persuaded to consider that the court's sentiments in *Guwa and Another v Willonbiby Investments (Pvt) Ltd* 2009 (1) ZLR 380 together with section 44 (5) of the High Court Act as read with sections 176 and 56 (1) of the Constitution of Zimbabwe have changed the superior courts' position on the undesirability of intervening in a lower court's uncompleted proceedings to the extent argued by the applicants *in casu*.

Surely, it has always been in exceptional eases such as *Isaura Masinga v Ms Sande (NO) and Prosecutor General* –HH 372/19, that the court will interfere.

In Isaura Masinga's case, the court showed extreme outrage at the grave injustice that had resulted from the failure to discharge the accused at the closure of the state case, given the somewhat "ubsurd" circumstances of that case. It was held to be a "typical example of exceptional circumstances or compelling reasons for a superior court to intervene or stop a harmful trial."

Even in those circumstances, the court still had the mind to caution as follows:

> "This court will ordinarily not sit in judgment over a matter before an inferior court except in very rare circumstances where a grave injustice would occur if it does not intervene. While it is correct that this court has review jurisdiction over unterminated proceedings it is always slow to intervene in unterminated proceedings of an inferior

> court except in cases of gross irregularities in the proceedings or where it is apparent that justice may not be attained by any other means.

The principle that a superior court will only interfere in unterminated proceedings of an inferior court in exceptional circumstances of gross irregularity vitiating the proceedings or in rare cases of grave injustice has been hallowed by repetition over a number of years in judicial pronouncements. See *Ndlovu v Regional Magistrate, Eastern Division and Another* 1989 (1) ZLR 264 (H) at 269 C-270g; *Masedza and Others v Additional Magistrate Rusape and Another* 1998 (1) ZLR 36 (H) at 41C, *Ismael v Additional Magistrate Winberg and Another* 1963 (1) SA 1 (A) at p 4;

> See also *Attorney General v Makamba* 2005 (2) ZLR 54 (S) at 64.

> "The general rule is that a superior court should intervene in uncompleted proceedings in a lower court 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 a litigant."

> The applicant in this case laid one ground for review as follows.

> "1. The irrationality or outrageousness of the 2nd respondent's decision of dismissing applicant's application for discharge at the close of the State case when the evidence led in court clearly shows that the State failed to prove a *prima facie* case against the applicant. Put differently, 2nd respondent dismally failed to objectively consider the evidence which clearly exonerated applicant from any wrong doing."

That ground clearly attacks the Magistrate's 6 paged ruling on the application for discharge as being irrational, outrageous and lacking objectivity in its analysis of the evidence. It is clearly a ground for appeal. There is no allegation of lack of jurisdiction, bias, personal interest in the case, malice or corruption, and, or gross irregularity in the proceedings as envisaged in common law review proceedings as well as reviews under sections 26 and 27 of the High Court Act.

The state called five (5) witnesses to testify. Two (2) of them gave very short formal evidence of a few sentences to the extent that they were not cross-examined. I would agree that minus the issue of the cumulative number of the cattle personally owned and sold by the applicant and that they bought three (3) cattle from him,, their evidence has very little probative value. However, the same cannot be said of the other 3 witnesses. The 1st is the executrix and widow of the late Ezekiel Dube whose cattle, together with those of the

executrix, recorded in one stock card in the name of the deceased husband, were allegedly stolen. Although she was riddled in cross-examination, it cannot be said that her evidence remained so wortheless and devoid of any probative value that it would not require any answers from the accused. Secondly, and most importantly, the same cannot be said of the two (2) police officers and (1) purchaser of (12) cattle from the accused.

The Investigating Officer and the other police officer testified that they established that the accused personally owned four (4) cattle although he was generally not forthcoming with the correct information. When they asked him, he denied selling any cattle after the death of his brother the late Ezekiel Dube. However, they went on to recover twelve (12) beasts that accused had sold to the 5th witness Innocent Chibakidi who also testified to that effect. According to the police witnesses and as partly admitted by Chibakidi, only seven of the 12 cattle were cleared by the police. The other five (5) were not cleared. Applicant also allegedly hid what officers referred to as the Form 397 of the 7 cleared beasts. Four (4) of the 7 said beasts had tags. It was the widow's testimony that 48 out of the 64 of the cattle in issue had tags, presumably ear-tags. The officers testified that the whole sale transaction of the cattle sold to Chibakidi was questionable. Ten (10) cattle were recovered from him. There were the 3 other steers mentioned above recovered from Howard Mbizi and Fanuel Makumbe. All these had been allegedly sold after his brother's death.

From the foregoing, I am not persuaded that the application before me meets the criteria expected if I were to use my discretion judiciously to grant the relief sought.

Accordingly, the application is dismissed.

Mutuso, Taruvinga and Mhiribidi, applicant's legal practitioners
National Prosecuting Authority, respondents' legal practitioners