JOANA MAMOMBE
and
CECELIA CHIMBIRI
and
NETSAI MAROVA
versus
THE STATE
and
BIANCA MAKWENDE, DEPUTY CHIEF MAGISTRATE
& PRESIDING MAGISTRATE N.O
and
MICHAEL REZA N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 26 May 2021 & 10 June 2021

Criminal Review

A Muchadehama, for the applicants
T Mapfuwa with *R Chikosha*, for the respondents

CHITAPI J: In this review application the applicants pray for relief as follows–

"**IT IS ORDERED THAT**:

1. The application for review succeeds.
2. The 2nd respondent's decision to proceed with the trial of the applicants notwithstanding the provisional order in case No. HC 7206/20 be set aside.
3. The proceedings before the 2nd respondent held on 28 April 2021 be quashed.
4. That the decision made on 28 April 2021 in the trial of the applicants in case No. ACC 45-47/20 X Ref CRB HRE P 7566-8/20 be set aside.
5. The criminal matter of the applicants be placed before another magistrate. For the avoidance of doubt, 2nd respondent be and is hereby ordered not to preside over the applicants' matters in case No. ACC 45-47/20 X Ref CRB HRE P 7566-8/20.
6. The 3rd respondent be and is hereby removed from handling the prosecution of the applicants in case No. ACC 45-47/20 X Ref HRE P 7566-8/20.
7. That there be no order as to costs.
8. That in the event of opposition, the party so opposed to bear the costs."

BACKGROUND

The background to this application is that the three applicants are accused persons in a pending case before the Harare Magistrates Court under CRB reference ACC 45-47/20. The applicants appeared for trial before the Deputy Chief Magistrate who is cited as second respondent herein. The applicants were before the court for their prosecution on the main charge of "Publishing or communicating falsehoods prejudice to the State as defined in s 31(a)(ii) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (the Act) and other charges couched in the alternative. The trial was set down on 28 April 2021. The trial did not proceed to the merits. The proceeding became enmeshed in exchanges between the second respondent, the prosecutor, Mr Reza, the third respondent herein and the applicants' counsel on whether the trial should proceed and if so whether the second respondent was not disqualified to preside the trial by reason of a decision of the High Court in case No. HC 7200/20 and HC 7206/20.

There are a number of records of this court which are relevant to and inform the background to this case. In case No HC 7200/20, filed on 3 December 2020, the same applicants herein filed a court application for review. They cited the second respondent herein and the first respondent as first and second respondents. The applicants were seeking a review of the decision of the second respondent herein made on 30 November 2020 in case No CRB ACC 45-47/20 to separate their trials, the decision having been based on the fact that the first applicant herein was not fit to stand trial on account of her medical condition, the details which do not matter for the purposes of the application before me. The first applicant herein challenged the second respondent's decision to separate the trial to enable the trial of the second and third respondents herein, as applicants in case No. HC 7200/20 to be held separately with that of the first applicant. The applicants attacked the order of separation of trials on various grounds of procedural irregularity and on allegations of the arbitrary and caprious conduct of the second respondent in her conduct of the proceedings. Again it is not necessary to go into any detail in relation to the grounds of that application and the opposing papers.

The review application aforesaid was placed before ZHOU J for hearing. The matter was on 21 December 2020 disposed of by a consent agreement between the State (second respondent) in that application represented by Mr *R Chikosha* and Mr *A Muchadehama* for the

applicants. I have guardedly used the words "purportedly disposed of" because issues have arisen on the disposal as I shall address them later. These are the same counsel appearing in the current application. It was therefore easy to interrogate the issue of the disposal of case No. HC 7200/20. On pp 29-30 pf the record HC 7200/20 there is a consent agreement which counsel presented to the learned judge ZHOU J as dispositive of the review. The consent agreement read as follows:

> "IT IS ORDERED BY CONSENT THAT
> 1. The application for review succeeds.
> 2. The 1st respondent's decision dated 23 November 2020 separating the applicants' trials be and is hereby set aside.
> 3. The trials of the applicants shall be concluded jointly before a magistrate other than 1st respondent.
> 4. Since 1st respondent has recovered and is able to understand court proceedings as *per* the doctor's report, applicants to be provided with a trial date on 22 January 2021
> 5. Each party shall bear its costs."

The said draft argument was signed by both Mr *Muchadehama* and Mr *R Chikosha*. The parties left a signature portion on the agreement for the learned judge to sign. I shall deal later with the argument raised by Mr *Chikosha* that because the judge's signature was not appended to the order, the consent agreement was not a court order and did not bind the parties.

Related to the review application case No. HC 7200/20 was case No. HC 7206/20 filed on 3 December which was filed on the same date as case No. HC 7200/20, the parties being the same. In case No. HC 7206//20 the applicants applied by urgent chamber application for a provisional order to stay the trial of the applicants pending the determination of the application for review, case No. HC 7200/20. The provisional order was granted by ZHOU J on 16 December 2020. The applicants' trials would therefore only proceed after the determination of case No. HC 7200/20. The provisional order to stay the trial of the applicants was not discharged.

On 28 April 2021, the applicants appeared for their scheduled trial before the second respondent as I have already noted. Arguments which arose and the rulings given by the second respondent are what concerns this review application which was filed on 3 May 2021. Upon filing this review application, the applicants filed on the same date, an urgent chamber application under Case No. HC 1929/21 for a provisional order for stay of the applicants' trial pending the determination of case No. 1918/21 which is this review application before me. I

took the view that the interests of justice would be attained by ensuring that the law took its course by having the trial of the applicants effectively dealt this. This would be achieved by dealing with the review application itself urgently because it was the stumbling block which required to be put out of the way.

The urgent chamber application for stay of trial pending the determination of the review application therefore succeeded in part. The successful part was that I made an interim order to stay the trial. I then gave directions for the management of the review application so that it is heard on an urgent basis by myself, counsel having agreed to such a course. It is important to note that there is an increasing tendency by accused persons to apply for a review of uncompleted criminal proceedings pending in the magistrates' court. The review application is made as an ordinary application. The ordinary application is then filed together with a separate urgent chamber application for stay of the ongoing proceedings pending the determination of the ordinary application for review. Once a stay of proceedings order has been granted, the review application navigates through the winding procedure of ordinary applications and in some instances the application is not prosecuted at all. The State does not apply for a dismissal for want of prosecution. The magistrate's hands are tied by the order of stay of proceedings. A situation arises where the perception is then created that the High Court is the one responsible for stoppages of trials and non-prosecution of criminal offenders. The perception is wrong but reasonable when perceived by the public who may not be knowledgeable on the rules of court and are content to say the matter is still at the High Court which stopped the trial.

The position with applications to stay ongoing proceedings in the subordinate court pending review is that their urgency arises from the fact that the applicants would have considered that reviewable conduct has been committed by the trial magistrate. The conduct complained of is therefore what requires urgent redress so that appropriate directives are given for the proceedings to be continued without undue delay. The urgent application for stay should speak to the urgent need for the determination of the review application. The rules of this court are not wanting in this regard because r 223A provides for the setting down of an urgent matter other than one in which a provisional order is sought which is dealt with in terms of r 244 as read with rule 246. The applicant in an application for review in which the applicant considers

that he or she requires urgent relief for the review of ongoing proceedings may be advised to utilize rule 223A. Rule 223A provides as follows:

> "**Set down of urgent cases**
>
> 223 A. Where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, the court or a judge may direct that the matter should be set down for hearing at any time and additionally, or alternatively, may hear the matter at any time or place; and in such event r 223 shall not apply or shall apply with such modifications as the court or judge may direct."

To the extent that a stay of ongoing proceedings amounts to interference with the discharge of the lawful mandate of the subordinate court, it is an established rule or principle followed by the superior court whose intervention is sought by way of review of unterminated proceedings that to interfere is the exception to the rule and that proceedings must be allowed to run their full course unless and in rare circumstances, the gross irregularity strikes at the root of the proceedings to the extent of vitiating them without prospects of repair or correction at the end of the proceedings. The recent Supreme Court judgment by MAKARAU JA in *Prosecutor General of Zimbabwe* v *Intratek Zimbabwe (Private) Limited & Ano*r SC 67/20 is on the subject of how superior courts should approach review of uncompleted proceedings in the lower court. The learned judge quoted with approval the test laid down by MALABA JA (as he then was) in the case of *Attorney General* v *Makamba* 2005(2) ZLR 54(5) at p 64 C wherein the following appears

> "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."

The learned judge in addition to quoting the above judgment stated as follows on p 7 of the cyclostyled judgment:

> "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 ongoing 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 jeopardized and the efficacy of the entire court system severely compromised.

> Further, it is not every irregularity 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 *Ishmel & Ors* v *Additional Magistrate & Anor (supra)*, it is not every failure of justice which amounts to a gross irregularity of trial. Most can wait to be addressed on appeal or review after judgment."

Therefore, the approach adopted in this judgment will be as directed in the quoted Supreme Court authorities.

What I however wish to add is that, within the context of urgent applications for stay of uncompleted proceedings pending review, what requires review on an urgent basis is the irregular decision made. It would in my view be anomalous to hold that it is the need to stay the continuance of unterminated proceedings pending review and not the review itself that is urgent. Such approach would result in the court or judge contributing to the non-finality of litigation or an accused's prosecution for the offence by urgently stopping the trial to enable the determination of a review whose determination is then not dealt with urgently. The chamber application for stay cannot in logic and common sense be urgent but the review application is deemed not urgent. The two applications relate to and speak to each other. If the applicant considers that the irregularity committed requires urgent redress, then that is the starting point. The applicant should prepare the review application urgently and file it under a certificate of urgency as provided for under rule 223A. If the applicant desires that, pending the application for review the ongoing proceedings should be stopped or stayed, then the applicant may file an urgent chamber application for an order not just of stay of the proceedings but an order that also ensures that the review itself be dealt with urgently. This is the approach which I adopted *in casu* after submissions by counsel on the import of r 223A on the question, whether what required urgent determination was not the wrong or irregularity forming the basis of the relief sought in the review application as opposed to simply asking for a stay of an ongoing trial. An urgent application for stay of proceedings pending review should therefore in my view be considered together with the application for review itself with the latter being managed to ensure its urgent hearing. In this manner, the review court does not then lose control of the management of the review application to the applicant as the *dominis litis* in the review application.

Reverting to the background of this application, the directives which I gave at the hearing on 6 May 2021 were firstly to order that the transcribed record should be urgently

prepared and availed to the parties at the cost of the applicants by 7 May 2021. I stayed the magistrates' court proceedings until 13 May 2021. On 13 May 2021 the transcribed record having been availed, I issued further orders to ensure that the review application itself is dealt with as an urgent mater. I directed the respondents to file their opposing affidavits and documents by 14 May, 2021; the applicants to file their answering affidavits if they desired to do so, together with applicants' heads of argument by 17 May 2021 and the respondents to file their heads of argument by 19 May 2021; the applicants to paginate the record on 20 May 2021 and the hearing to be convened on 26 May 2021. Lastly, having been satisfied that the review application had been managed for urgent determination, I extended the order of stay of proceedings in the lower court to the date of determination of the review application which is by this judgment.

THE REVIEW APPLICATION

The applicants contended that the second respondents' made a ruling that the trial of the applicants should proceed despite the objections of the applicants that there was an extant order of this court which was made in case No HC 7200/20, in terms of which the second respondent was disqualified from presiding the trial of the applicants. The applicants in case No HC 7200/20 as already detailed had filed that review application against the order of the learned Deputy Chief Magistrate ordering a separation of trials of the applicants. In case No HC 7206/20 the trial of the applicants was stayed pending determination of case No HC 7200/20.

I must express surprise that the issues of whether or not the Deputy Chief Magistrate should preside the trial of the applicants proved to be difficult to resolve. I say so because the resolution lay in parties and the court simply establishing the paper trail of High Court proceedings. There were arguments presented before the Deputy Chief Magistrate which should not have been. The starting point was to accept that in case No. HC 7206/20, a provisional order was issued by ZHOU J on 16 December, 2020. In that order, the trial of the second and third respondents herein was stayed pending the determination of case No. HC 7200/20. In the latter case HC 7200/20 all the applicants herein were praying for an order that their trials be joined. Therefore, until case No. HC 7200/20 was determined, the trials of the three applicants could not proceed and had to remain stayed.

The next issue was to establish whether on 28 April, 2021 when the applicants appeared before the Deputy Chief Magistrate, case No. HC 7200/20 had been determined. If the case had not been determined, then, the provisional order granted in case No. HC 7206/20 staying the trial until case No. HC 7200/20 is determined still remained a barrier to the holding of the trial. Trial could only be held upon confirmation of the determination of case No. HC 7200/20. If case No. HC 7200/20 was determined, the next question was "when was case No. HC 7200/20 determined and what order was granted therein". The applicant's counsel contended that the case was determined by the High Court on the basis of a consent agreement whose terms were that there would be held a joint trial of all three applicants. Additionally, the Deputy Chief Magistrate being the magistrate whose determination to separate the trials of the accused was subject of review in Case No. HC 7200/20 was disqualified or barred from presiding the applicants' trial. The applicants relied on the consent agreement as proof that case No. HC 7200/20 was disposed of by consent.

The respondents submitted that the consent agreement was not binding on the Deputy Chief Magistrate because it was not signed by the judge who heard the review case nor was it issued out of the High Court by the Registrar. When the Deputy Chief Magistrate enquired from the Prosecutor Mr Reza whether or not the consent agreement relied upon by the applicants was authentic, the prosecutor responded after an adjournment granted to him to confirm with the signatory, Mr *Chikosha* that Mr *Chikosha* had denied that he consented to the recusal of the Deputy Chief Magistrate from handling the case.

The Deputy Chief Magistrate took the view that even if Mr *Chikosha* had consented to her recusal from presiding the trial, Mr *Chikosha* could not legally consent to the recusal of a magistrate from presiding over a matter but that, however, only a higher court could order such recusal. In relation to the effect of the provisional order on the stay of trial, the Deputy Chief Magistrate quoted the case of *Boka Investments (Pvt) Ltd* v *Thirdluine Trading (Pvt) Ltd* HH 104/13 and stated as follows at p 40 of the record

> "The court had occasion to speak on a provisional order which is not actioned after the 10 days within which an order is either confirmed or discharged.
> The court held that if the provisional order is not confirmed or discharged on the return date this would entail the conclusion that it had lapsed and is no longer extant for the purposes of these proceedings. So it is clear that a provisional order becomes none operative by virtue of failure to set it down on the unopposed roll or for it to be confirmed or discharged. It therefore

> means as enunciated in the judgment which I have cited that the provisional order which was given by the Honourable Court is superannuated is of no force and effect."

In the grounds of review and in particular ground no (j) the applicants contended-

> "Applicants contend (sic) that it was unprocedural for respondents to proceed with a trial that had been stayed by the High Court."

This ground of review has merit. The question to answer is, whether or not the trial proceedings before the Deputy Chief Magistrate were regular in the light of the provisional order staying the trial until case No. HC 7200/20 had been determined. From the ruling of the Deputy Chief Magistrate as quoted above, she accepted the existence of the provisional order. She however erroneously reasoned that the provisional order had superannuated by reason that it was not set down for confirmation or discharge within ten days of its being granted. The *dicta* in the *Boka Investments* case (*supra*) does not support the decision which the Deputy Chief Magistrate reached. The case is clearly distinguishable in that PATEL J (as he then was) was dealing with a provisional liquidation order. Such an order will provide for a specified return date for its confirmation or discharge. Therefore, the provisional liquidation order once issued holds until the specific return date given in the order. If parties do not move for its confirmation or discharge on the specified date, then the provisional order lapses. The provisional order issued in case No. HC 17200/13 was in Form 29C of the High Court Rules. The ten days which are given in the order constitute the period within which a respondent who wishes to opposed the confirmation of the provisional order should file opposing affidavits and other documents in opposition. If the respondents after being served with the provisional order fail to opposed the order within ten days of service upon them of that order, they are barred which means that they cannot file any opposing papers until the bar operating against them has been uplifted. The applicant in such event may set down the provisional order for confirmation on the unopposed roll. The provisional order does not provide for its life span and neither is such life span the ten days which the Deputy Chief Magistrate erroneously interpreted to be the position. The only way that the provisional order would have become stale would have been through the determination of case No. HC 7200/20 to finality or the discharge of the provisional order.

The applicant noted other grounds of review which included an alleged refusal by the Deputy Chief Magistrate to allow the applicants to make applications for the Deputy Chief

Magistrate's recusal amongst other applications. It was argued that the refusal by the Deputy Chief Magistrate to hear the recusal applications amounted to a denial of the applicant's right to be heard which denial according to the applicants constituted a gross irregularity which rendered the trial invalid. I do not find it necessary to delve into the rest of the other grounds of review of other irregularities allegedly committed by the Deputy Chief Magistrate because on the facts before me as disclosed in the papers, it is clear that the trial should not have commenced on 28 April, 2021 because of the existence of the provisional order in case No. HC 7206/21 in regard to which the Deputy Chief Magistrate was misdirected on its import and purport.

The provisional order was very clear. It stayed the trials of the applicants until case No. HC 7200/20 had been disposed of. The applicants averred that a consent agreement had been reached in case No. HC 7200/20 that the trial of the applicants be joined and that the trials be presided by a different magistrate from the Deputy Chief Magistrate. The first respondent denied the existence of the agreement through the prosecutor Mr Reza. The denial was dishonest because the agreement forms part of the pleadings in case No. HC 7200/20. The agreement bears signatures of Mr *Chikosha* for the state and Mr *Muchadehama* for the applicants. The agreement was presented to ZHOU J who noted that the parties had reached a consent which was reduced to writing by the parties. The argument made before me by the first respondent's counsel was that since the judge did not sign the order, the review application had not been disposed of. Again before me, Mr *Chikosha* agreed that he had given the consent and signed the agreement. He argued that his consent did not hold because the judge did not sign the consent to reduce it to a court order. Generally speaking, where parties to civil litigation have agreed on a settlement and its terms, the litigation is considered disposed of on the agreed terms. The parties may request that their agreement of settlement be made an order of court. It is common cause that the consent agreement was not signed by ZHOU J. The parties ought to have ensured that the order is signed by the learned judge if this was their intention.

The argument presented by counsel before the Deputy Chief Magistrate on whether the consent agreement which incorporated a recusal order against the Deputy Chief Magistrate ended or disposed of the litigation was a simple issue for which confirmation could have been sought through the Registrar on whether case No. HC 7200/20 had been disposed of and the

terms thereof. The registrar as keeper of the court records of the High Court would have cleared the matter for the parties including the Deputy Chief Magistrate. The Registrar would if in any doubt have consulted ZHOU J for directions. It appears to me that there was no need for speculation on what order had been issued by the High Court if any, in matters under consideration by the Deputy Chief Magistrate. The resolution of the disputed issues to the extent that they were founded on orders allegedly made by the High Court were very easy to resolve if the paper trail had been used as a guide.

In the hearing, I enquired from Mr *Chikosha* as to why if he had before ZHOU J in case No. HC 7200/20 agreed that the trials of the applicants would be presided by a different magistrate, there was any reason to place the trial before the Deputy Chief Magistrate. I asked Mr *Chikosha* to address the point because, a judicial officer cannot cling to a case and insist on presiding a matter. The Prosecutor General is *dominis litis*. He is the one who institutes a prosecution in a particular court. The trial had not started in the sense that it was partly heard by the Deputy Chief magistrate. Mr *Chikosha* did not advance an intelligible explanation on my enquiry and was content to say that his consent had not been signed into a court order.

Assuming then that the consent agreement in case No. HC 7200/20 did not dispose of the review as argued by the first respondent's counsel, then the matter must be taken to be awaiting determination. For as long as the determination has not been made, then the trials of the applicants remain arrested or stayed by virtue of the provisional order in case No. HC 7206/20. The parties must resolve case No. HC 7200/20 first. It is just unfortunate that the trial of the applicants could not take off on 28 April, 2021 through unnecessary bickering on the part of the state and defence counsels on the status of case No. HC 7200/20. The Deputy Chief Magistrate for her part was misdirected to hold that the provisional order stopping the applicants' trials had a lifeline of ten days. I have noted from the referenced cases related to this application that there have been accusations and counter accusations on who is responsible for the delays and abortive trial on previous dates. It is important in my view that applicants be tried in accordance with the law. It is the interests of justice and the applicants' rights to a trial within a reasonable time that impediments to trial commencement are cleared. In this regard, I would have given directions on how the trial should proceed as I am entitled to in terms of s 29(2)(b)(iii) of the High Court Act, [*Chapter 7:06*] whose provisions empower the judge on

review to set aside proceedings and make such order as the inferior court should have made. However, because of the existence of an extant High Court order staying proceedings pending the determination of case No. HC 7200/20, how the trials of the applicants must proceed is a determined issue by this court. The trials remain stayed pending disposal of
HC 7200/20. In the absence of consensus by the parties whether or not case No. HC 7200/20 was determined and in the absence of a court order produced to that effect, the Deputy Chief Magistrate must be taken to have presided trial proceedings of the applicants in violation of the provisional order in case No. HC 7200/20. The proceedings cannot be allowed to stand as they clearly were in violation of the High Court order.

Under the circumstances my duty becomes uncomplicated. Having found that the Deputy Chief Magistrate presided a trial in violation of an extant provisional order of the High Court, the proceedings are a nullity and the decision of the Deputy Magistrate that the trials proceeds must be set aside. The issue of whether or not the Deputy Chief Magistrate should be recused from presiding the trial is left for finalization in Case No. HC 7200/20 where counsel for the State *Mr Chikosha* and the applicants' counsel *Mr Muchadehama* filed a signed agreement embodying an order that the Deputy Chief Magistrate be recused from presiding the trial of the applicants. The finalization of case No. HC 7200/20 being in dispute must be finalised by the parties to clear the ground for convening the applicant's trial.

Another issue which was raised but then not persisted in was that the third respondent, Mr Reza, the prosecutor be disqualified from being prosecutor of the accused's trials. There was nothing of substance alleged against him as merited his disqualification. He was entitled to strenuously advance the case for the state even though he could have been misdirected or misinformed on the authenticity of the consent agreement by Mr *Chikosha*. A prosecutor is not disqualified from prosecuting a case on the basis that he or she has made a wrong submission of fact or law. It must be shown that the prosecutor has abrogated his duties and responsibilities as set out in the constitution and National Prosecuting Authority Act [*Chapter 7:20*]. There was no misdemeanour committed by Mr Reza to warrant any sanction from this court. Further, an application for the prosecutor's disqualification as was sought cannot be made for the first time on review because a review entails reviewing the record of proceedings of the inferior court or tribunal. The applicants did not apply for disqualification of the prosecutor before the

Deputy Chief Magistrate. There is therefore nothing to review as no application was made in lower court and consequently no decision given either which can be reviewed.

DISPOSAL

All the facts of this application and arguments by counsel having been considered, the review application succeeds. The decision of the Deputy Chief Magistrate that it was competent to convene the trial of the applicants in the face of the extant provisional order granted in case No. 7200/20 arresting the trials of the applicants pending the court decision in case No. HC 7200/20 is set aside. The following further order is made and is the order which the Deputy Chief Magistrate should have made:

1. The trials of the applicants remain stayed as was ordered by this court in case No. HC 7206/20.
2. The trials of the applicants can only be convened upon the final and definitive conclusion of case No. HC 7200/20.
3. The prayer for the disqualification of Mr Reza, the 3rd respondent herein from prosecuting the applicants is dismissed.
4. There is no order of costs.

Mbidzo Muchadehama and Makoni, applicants' legal practitioners
National Prosecuting Authority, 1st & 3rd respondents' legal practitioners