GEORGIOS KATSIMBERIS
versus
THE PROSECUTOR GENERAL
and
MINISTER OF JUSTICE LEGAL & PARLIAMENTARY AFFAIRS
and
THE HONOURABLE MRS L RWODZI ESQ. N.O.
and
THE HONOURABLE MRS B MATEKO ESQ. N.O.
and
THE HONOURABLE N MUPEIWA ESQ. N.O.
and
THE HONOURABLE S MAMBANJE ESQ. N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 29 July, 2 August & 12 September 2022

Opposed application – *Declaratur* and Ancillery Relief

Mr *T Chinyoka*, for the applicant
Ms *F Kachidza & Mr M Reza,* for the 1st respondent

MUSITHU J:

BACKGROUND

This application was filed as an urgent court application in terms of the s 85(1)(a) of the Constitution of Zimbabwe (the Constitution). The applicant has since June 2020, been appearing as a State witness before the fourth, fifth and sixth respondents in a matter in which certain persons stand charged with perjury and malicious damage to property. From July 2020, the applicant has been appearing as an accused person before the third respondent in a matter in which he faces a charge of fraud. The persons appearing as accused persons in the perjury and malicious damage to property charges are the witnesses in the fraud charge that he faces.

The applicant contends that the circumstances that gave rise to the charge against him and the said witnesses are the same. The applicant further contends that the first respondent has failed to prosecute his matter fairly in violation of his rights as set out in ss 50(4), 56(1), 69(1), 69(3), 70(1) and 70(3) of the Constitution. It is on that account that the applicant has approached this court seeking the following relief:

"**IT IS DECLARED THAT:**

(1) The State has failed to prosecute the matter against the applicant fairly in violation of his rights as set out in sections 50(4), 56(1), 69(1), 69(3), 70(1) and 70(3) of the Constitution of Zimbabwe.

AND CONSEQUENTLY IT IS ORDERED THAT:

(2) The prosecution of the applicant by the State be stayed permanently.

(3) The……Respondent(s) who opposed the application without just cause be and are hereby ordered to pay the costs of suit on a legal practitioner and client scale, or

(4) There be no order as to costs."

The application was opposed by the first respondent. Any reference to respondent hereafter shall be to the first respondent.

The Applicant's Case

On 12 April 2019, the applicant made a police report of perjury against Michael John van Blerk (van Blerk) of Pokugara properties (Private) Limited (Pokugara Properties), Pokugara Properies, former Harare City Council Town Clerk Hosea Chisango and the City of Harare. He also filed a police report of malicious damage to property against Pokugara Properties, Mandla Ndebele, Hosea Chisango, Kenneth Raydon Sharpe, Isaiah Zvenyika Chawatama, Samuel Nyabezi and Lasten Taonezvi.

These reports were allegedly made following what the applicant considered to have been the unlawful destruction of a property that he constructed through a joint venture arrangement with Pokugara Properties. He claims that the destruction was achieved through a well calculated conspiracy to defraud his company and the joint venture company with the full participation of Kenneth Raydon Sharpe, van Blerk, Mandla Ndebele and Pokugara Properties with the active connivance of several Harare City Council officials. That conspiracy involved what the applicant claimed to be the doctoring of official records, the backdating of official correspondence, corrupt release of documents and information to wrong persons and the signing of affidavits replete with lies and falsehoods which were all meant cover up for the conspiracy.

According to the applicant, the essence of the falsehoods was that the house that he constructed, which they said persons demolished, was built without planning permission and that the applicant had lied that approved plans existed when they did not. He averred that if the plans indeed existed, then those that demolished the property committed malicious damage

to property. Further, if the plans indeed existed, then those that filed court papers alleging that such plans did not exist committed perjury.

The applicant claims that since June 2020, van Blerk, Pokugara Properties and other accused persons have been appearing before the fourth to sixth respondents in connection with the perjury and malicious damage to property charges based on the said facts. In the said cases, the applicant appeared as a State witness.

In an unexpected turn of events, the applicant claims that on 28 July 2020 he was summoned to appear at the Rotten Row Magistrates Court on a charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act[1]. The allegations were that the applicant falsely misrepresented to Pokugara Properties that he had approved plans from the City of Harare for the development at Pokugara Ecofriendly Estate (the name of the development in question), when no such plans existed. As a result of the charge, the applicant has appeared before the third respondent at Rotten Row Magistrates Court as an accused person. Most of the witnesses against him are the same people he reported for malicious damage to property and perjury.

The applicant claims that he appeared in court on 19 August 2020, 14 November 2020, 30 November 2020, 20 April 2021, 7 June 2021, 15 June 2021, and 8 November 2021. At the time that the application was filed, he was scheduled to appear in court again on 30 November 2021 for continuation of trial. In the matters in which he is a State witness, the applicant was due to appear in court on 1 December 2021.

The applicant claimed that the entire process was so warped to the extent of constituting an absurdity in that in view of the many postponements and disruptions of trial dates, there may well be days when he would be appearing as a State witness in one court and submitting evidence demonstrating that the plans existed. Thereafter, he would be expected to dash down the corridors to another court room and appear as an accused person where the State would be seeking to demonstrate that no approved plans existed. The applicant further claimed that at times the cases were listed on the same date and at the same time.

The applicant argued that the conduct of the respondent to have him appear before the same court as an accused person and as a witness at the same time constituted a gross violation of his constitutional rights. For instance, s 50(4) of the constitution guaranteed the right of an accused to remain silent. That right was grounded in the right to be presumed innocent until

[1] [*Chapter 9:23*]

proved guilty.[2] It was consistent with the principle that an accused person had no obligation to assist in their own conviction. It was not a right limited to incriminating evidence only, but also extended to all information of a factual nature. Though that right could be waived by a suspect, such waiver had to be unequivocal. The position was different in the case of a witness who gave a statement concerning what they witnessed. If that witness was subsequently charged with an offence based on the same facts, then they could not assert their right to silence in respect of the witness statement they previously gave. That statement could be used as evidence against them in their prosecution.

The applicant further averred that being a witness did not automatically confer immunity against prosecution, unless there was prior arrangement with the State to that effect. The decision by the State to run the process concurrently took away the applicant's choice to decide whether or not to remain silent. This was because his statement was being used in one court to allege that the Plans existed, and in another court to allege that the Plans did not exist.

The applicant further submitted that s 56(1) of the Constitution guaranteed the right to equal protection and benefit of the law. The fact that he may not have asserted his right to silence in his criminal trial was irrelevant. He was as of right entitled to the benefit of the right to remain silent. The circumstances that he was put in by the conduct of the respondent effectively took away that right and made it illusory.

The applicant also contended that s 70(3) of the Constitution made it clear that evidence obtained in a manner that violated any provision of Chapter 4 of the Constitution must be excluded if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest. The applicant claimed that in the trials in which he was involved as an accused and a witness, what he said as an accused or a witness was being used against him. He gave as an example the fact that the defence in the trial in which he was a witness was able to cross examine him on what had been said about him in the criminal case vice versa. Relying on the case in which he was the accused, they had invited the court not to believe him since the State was charging him on the same facts.

The applicant contended that such an approach was unfair. What was being done to him had a chilling effect to future criminal complainants and witnesses in that it was possible to report a crime and find oneself as an accused person on the same facts. The State could use one's witness statement as a reply to a charge whether or not one chose to assert their right to

[2] Section 70(1)(a) of the Constitution

silence. The defence in the case in which one was a witness would use the words of the prosecutor in the criminal trial in which the witness was an accused to cross examine and challenge their credibility. That chilling effect would discourage people to do legal things in fear of the legal repercussions. That would be detrimental to the administration of justice and the public interest. It was in the public interest that crimes be reported and prosecuted. It was also in the public interest that witnesses must testify freely and voluntarily without fear of having their statements used against them in future.

In respect of the ongoing prosecutions, the applicant averred that the administration of justice was being prejudiced. There was no incentive on his part to be candid and forthright as a witnesses was expected to be. He had to think first about protecting his own interests in relation to his own trial. That also applied to those accused persons who were witnesses against him. They had to think about their own interests as they gave their testimonies against him.

According to the applicant, the trials were also not in the public interest. In order to prove the charge of fraud against him, the State had to prove that the Plans that the applicant produced were fake as they were never approved by the City of Harare, and that he built the structure on the wrong property. Similarly, in order to prove that the other accused persons committed perjury, the State had to prove that the same Plans were valid and lawfully issued. Similarly, in the malicious damage to property charge, if the Plans were lawfully issued, then the demolition of the property was unlawful and the responsible persons were culpable. That approach resulted in the creation of doubt in the prosecutions thus guaranteeing some acquittals. It also exposed the first respondent to ridicule.

To confirm that the proceedings were indeed a farce, the applicant averred that on 15 June 2021, the third respondent dismissed his application for the reference of his matter to the Constitutional Court on the basis that the charge of fraud was materially different from the perjury charge. The applicant however argued that though the charges were not the same, the facts were clearly the same.

For that reason, if the trials were allowed to continue, there was a real likelihood that one court would arrive at a decision different from the other(s), thus bringing the administration of justice into disrepute. The applicant insisted that his trial was unfair in violation of s 70 of the Constitution. His rights under ss 50(4), 56(1), 69(1), 69(3), 70(1) and 70(3) of the Constitution were being violated by the State. The prejudice that he continued to suffer was irredeemable. It could only be cured by a permanent stay of the ongoing prosecution.

The Respondent's Case

The opposing affidavit was deposed to by Richard Chikosha, a Principal Public Prosecutor in the office of the respondent. He denied that the charge of fraud was similar to the charge of perjury faced by van Blerk and Pokugara. He averred that Pokugara Properties was the first to make a police report against the applicant. The applicant made his own report some two months later. He claimed that for unknown reasons, the police processed the applicant's docket first as opposed to that of Pokugara.

The fraud charge emanated from the misrepresentation made by the applicant to Pokugara Properties that he had the requisite building plans when he did not have them. Senior City of Harare officials submitted statements which confirmed that the Plans used by the applicant were never approved by Council. The applicant therefore had a case to answer.

The respondent further averred that where after making a statement, a witness is charged with an offence based on the same facts that witness can still assert their right to silence. Further, as rightly noted by the applicant, every person was entitled to equal protection of the law. The applicant had not been denied any of his Constitutional rights.

The respondent further contended that the witnesses in the fraud case should be the ones complaining since they reported their case first. In any event, the mere presence of a different charge of perjury was not a basis for concluding that the respondent would adduce evidence obtained in a manner that infringed Part 4 of the Constitution.

In conclusion the respondent urged the court not to interfere with the unterminated proceedings of the lower court as the issues raised were devoid of merit. The case did not fall within the realm of exceptional circumstances that would justify the intervention of this court.

The Submissions

In their submissions, counsel by and large abided by the papers. Mr *Chinyoka* for the applicant dismissed the respondent's averment that it was Pokugara Properties that made a police report first. He made reference to a letter from the Special Anti-Corruption Unit (SACU), in which the unit was complaining about the manner in which the cases were being prosecuted. Part of the letter reads as follows:

> "It should be clear that these two cases relates to the same approved plan for the same stand. It should be made clear as well that George Katsimberis was the first to report and Pokugara Properties and Michael John Van Blerk were the first to be charged and after that a witness and complainant George Katsimberis was charged for the same facts before he took his stand on the witness stand."[3]

[3] p 124 of the record

The letter goes on to express concern on the prosecution of the applicant on the same facts as the persons against whom the applicant lodged a criminal complaint. Counsel submitted that the apparent clash between the two prosecuting entities clearly showed that even SACU appreciated that the manner in which the prosecution was being conducted was unsatisfactory.

Mr *Chinyoka* further submitted that the *Mukoko* v *Attorney General*[4] judgment did not limit the application of s 70(3) of the Constitution to the prevention of the use of evidence obtained from an accused through torture, inhuman or degrading treatment. It was much wider in scope and extended to evidence that was submitted when a person gave information in the course of making a criminal complaint and which information the State sought to use against him. The applicant's rights to a fair trial were clearly violated. The applicant was entitled to the protection of the criminal justice system, yet he was being asked to forego the protection of the law in violation of s 56 of the Constitution. It was within the powers of this court to stay proceedings if their continuation would achieve a purpose other than what the law desired. The applicant had been placed in an invidious position where he had to make a choice between foregoing his protection of the law as a witness or his right to silence as an accused person.

In his reply, Mr *Reza* explained that the malicious damage to property and the perjury charges were being prosecuted by SACU. The prosecution of the applicant for fraud was ongoing on the basis of evidence submitted by the investigating officer involved in the investigation of that offence. According to Mr *Reza*, there was nothing wrong in having the two matters prosecuted at the same time. The applicant could still assert his rights as a witness.

In her submissions, Ms *Kachidza* denied the alleged infringement of the applicant's constitutional rights. She argued that the applicant could still exercise his right to remain silent, although that right was not absolute. She submitted that even if the court were to find that there was indeed a violation of the applicant's rights, the court could not be invited to grant the relief sought by the applicant. She further submitted that this court had already declined to stay proceedings in separate matters involving the same parties that were heard by TAGU J, MHURI J and CHIRAWU-MUGOMBA J. The Magistrates Court also dismissed his application for referral of the matter to the Constitutional Court in terms of s 175(4) of the Constitution.

Ms *Kachidza* further submitted that the applicant ought to have approached the Constitutional Court directly. He could also have appealed against the decision of the

[4] 2012 (1) ZLR 321 (S)

Magistrates Court which dismissed his application for a referral of the matter to the Constitutional Court.

The Analysis

Superior courts are generally slow to interfere with unterminated proceedings of lower courts except in very exceptional circumstances. MALABA JA (as he was then) set out the position of the law in *Attorney General* v *Makamba*[5] where he said:

> "The general rule is that a superior court should intervene in uncompleted proceedings of the 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 the litigant. In *Ismail and Others* v *Additional Magistrate, Wynberg and Another* 1963 (1) SA 1(A) STEYN CT at page 4 said:
>
> > 'It is not every failure of justice which would amount to a gross irregularity justifying intervention before completion ----. A superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its powers to 'rare cases where grave injustice must otherwise result or where justice might not by other means be obtained.'
>
> See also *Ndlovu* v *Regional Magistrate, Eastern Division and Another* 1989(1) ZLR 264(H) at 269C, 270G; *Masedza and others* v *Magistrate, Rusape and Another* 1998 (1) ZLR 36 (H) at 41C."

Similar sentiments were also expressed in a recent judgment of the same court in *Gumbura & 6 Ors* v *Mapfumo N.O.*[6], where MAKONI JA said:

> "It is settled law that a superior court will not readily interfere with unterminated criminal proceedings of a lower court except in exceptional circumstances. These include instances where grave injustice would occur if the superior court does not intervene and where there is gross irregularity resulting in a miscarriage of justice. One such instance is where there is a probability of the proceedings being a nullity. "It would be prejudicial to the accused, and a waste of time and resources, for the trial court to carry on with a trial likely to be declared a nullity." See *Matapo & Ors v Bhila NO 7* Anor 2010 (1) ZLR 321 (H) at 325 F. The task of assessing whether or not unterminated criminal proceedings ought to be stayed involves the exercise of discretion….."

From the foregoing authorities, it is clear that a superior court will only interfere with unterminated proceedings of a lower court where grave injustice would materialise if there was no immediate intervention. It must also be demonstrated that the professed infractions necessitating an approach to the superior court are completely irredeemable as to necessitate the court's intervention by granting the relief sought. In other words, this court is being urged not to wait for the completion of the unterminated proceedings as doing so will be tantamount to a miscarriage of justice.

---

[5] 2005 (2) ZLR 54(S) 64C-E
[6] SC 10/22 at p 8 of the judgment

The applicant contends that his right to remain silent as enshrined in s 50(4)(a) as read with s 70(1)(a) of the Constitution was completely abrogated. Section 70 (1)(a) provides that a person accused of an offence is presumed innocent until proved guilty. The applicant argues that the fact that the respondent decided to run the prosecution concurrently, wherein they are using applicant's statement in one court to allege that the building plans existed, and prosecuting him in another court alleging that the said plans did not exist, took away any choices he had of deciding whether or not to remain silent during his trial.

It is indeed axiomatic that the right against self-incrimination is one of the fundamental pillars of a fair trial. In the context of the present matter, it has not been demonstrated that the applicant was impeded in the exercise of his right to remain silent. The trial has already commenced and underway. The applicant does not aver that in the conduct of his defence he indeed attempted to assert his right to remain silent but was impeded by the fact that he had made a separate statement as a witness.

While the court agrees with the applicant that the manner in which the respondent has set about prosecuting the two cases is indeed messy, that alone cannot be a basis for granting a permanent stay of prosecution. The letter from SACU speaks to a complete discordance between the two prosecuting entities. It is not the business of this court to interfere with the prosecutorial powers of the respondent or enlighten the two entities on how they should complement each other in the discharge of their respective mandates. This court will only interfere where there is a clear demonstration of grave injustice having been occasioned as a result of the parallel prosecution of the two matters. That has not been done and for that reason, the court does not accept the submission that the right to remain silent, which is intertwined with the right against self-incrimination has become illusory.

The same can be said of the submission that the manner in which the respondent has conducted the prosecutions sends a chilling effect to criminal complainants and witnesses. The Magistrates Court is a court of law which is guided by rules of evidence and procedure in the conduct of its business. It is a court of record. It is not a kangaroo court or mock court in which the principles of law and justice are completely perverted. The rights of accused persons are explained to them at the outset. The criminal justice system also has its own inbuilt mechanisms of correcting any wrongs that may have manifested themselves in the conduct of a criminal prosecution.

The applicant also avers that his right to equal protection before the law in terms of s 56 (1) was also eroded. In his heads of argument, the applicant submits that the essence of that

right is that every person is entitled to the protection of their rights, to legal certainty, to the knowledge that laws will be applied uniformly and fairly, to the rule of law and to procedural and substantive uniformity and fairness. The applicant does not go further to explain in what respect this right to equal treatment of the law was breached. In the oral submissions, applicant's counsel only highlighted that the applicant was being asked to forego his right to protection of the law in violation of s 56. The point was not motivated further. In the absence of a clear demonstration of how that right was violated, then this court is at a loss as to appreciate the essence of this submission. The applicant has not shown how his right to protection of the law as a witness was violated. He has also not demonstrated how his right to equal protection of the law as an accused person was violated.

The right to a fair trial is the hallmark of the criminal justice delivery system. It is entrenched by s 69 (1) of the Constitution which guarantees a person accused of an offence a fair and public trial within a reasonable time before an independent and impartial court. That section must also be read and understood in the context of s 70(1)(a), which entrenches the presumption of innocence until one is proved guilty. According to the applicant, while s 70(1)(d) of the Constitution permits him to be represented by a legal practitioner of choice, the same does not apply to him when testifying on the same facts as a witness. A witness has no such rights.

Further according to the applicant there is a danger that the information that he gave to the State, without the supervision of a legal practitioner can then be used against him in the case in which he appears as an accused person. In running a concurrent process where the applicant is a witness in one breath and an accused person in another, the State conveniently removed the applicant's right to silence, the right to legal representation and the right against self-incrimination.

The court had in difficulties in comprehending how the running of parallel criminal prosecutions had the effect alluded to by the applicant. The court can only conclude that the applicant's fears are at most illusory than real. The trial process is replete with rules of procedure that regulate the adducing of evidence by the parties. The law has inbuilt safeguards that are intended to preserve the rights of accused persons and witnesses alike. I find no merit in this submission.

The applicant also pointed to the infringement of his rights under ss 70(1) and 70(3) of the Constitution. Section 70 (1) is made up of paragraphs (a) to (n). They all relate to several rights of an accused person. It is not clear from the applicant's submission which of those

rights were infringed. That leaves the court hamstrung in determining whether there was a violation of any right under that section.

Section 70(3) of the Constitution provides that in any criminal trial, evidence that was obtained in a manner that violates any Chapter 4 provision must be excluded if its admission would render the trial unfair or would be detrimental to the administration of justice or the public interest. While I agree with Mr *Chinyoka's* submission that the nature of the evidence referred to in s 70(3) is not just limited to evidence obtained through the use of torture, inhuman or degrading treatment, as submitted by Ms *Kachidza* still the applicant did not go so far as to point out to the evidence that was obtained in a manner that infringes s 70(3). The point was not argued further in the heads of argument and oral submissions. For that reason, the court cannot make a determination on whether there was indeed any breach of the law in that regard.

It is the conclusion of this court that the applicant has failed to discharge the minimum threshold set out in the aforementioned authorities to justify the court's interference with the unterminated proceedings of the lower court. Applicant's counsel advised that an application for referral of the matter to the Constitutional Court was dismissed by the lower court. One wonders why that decision was not appealed against at that earlier stage of the proceedings if the applicant was indeed serious about having the alleged constitutional infractions scrutinised by the apex court.

The relief sought by the applicant also warrants some comment. If the applicant's complaint is so much about the perceived prejudices emanating from a parallel prosecution, then it was not advisable to seek a wholesale permanent stay of his prosecution. For in doing so, this court would have effectively determined that the charges against him were probably contrived. The court ultimately determines that no firm foundation has been laid for interfering with the unterminated proceedings of the lower court and granting the relief sought.

COSTS

Neither party addressed the court on the issue of costs. I consider the matter to be within the realm of public interest litigation thus not warranting an adverse order of costs. It is befitting that each part bears its own costs.

DISPOSITION

Resultantly it is ordered that:

1. The application be and is hereby dismissed.
2. Each party shall bear its own costs.

Mutumbwa Mugabe and Partners, legal practitioners for the applicant
National Prosecuting Authority, legal practitioners for the respondent