DEEN MAHENDRA JIVAN SAVANIA
and
NIGHERT PARWEN SAVANA
versus
THE STATE
and
NOEL MPEIWA N. O.

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 3 August 2015 and 24 August 2016

Opposed

T Mpofu, for the applicants
R Chikosha, for the respondents

BHUNU J: This is an application for review in terms of s 29 (4) of the High Court Act [*Chapter 7:06*] in which the applicants seek reversal of the second respondent's judgment dismissing their application for discharge at the close of the State case.

The brief background to the charge is that both applicants appeared before the second respondent in his capacity as Regional Magistrate for the Eastern Division on 14 August 2014 charged with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They are alleged to have defrauded the complainant of US$140 000.00.

During the course of the trial the applicants applied for discharge at the closure of the State case which application was dismissed by the second respondent on 18 November 2014. Aggrieved by the determination the applicants launched this Court application for review seeking a reversal of the magistrate's determination on the grounds of irrationality and gross unreasonableness.

Generally speaking Superior Courts detest prematurely interfering in proceedings before inferior courts and tribunals before the completion of such proceedings unless it is absolutely necessary to avert a serious miscarriage of justice. The reviewing court would rather wait until the completion of the proceedings before interfering. In *Matapo and Others* v *Bila N.O and Another* 2010 (1) ZLR 321 this court held that generally speaking the High Court does not encourage the bringing of unterminated proceedings for review.

It must be borne in mind that a trial court has a wide discretion whether or not to discharge an accused person at the close of the state case in terms s 198 of the Criminal Procedure And Evidence Act [*Chapter 9: 07*] which reads:

" 3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.

(4) If the Attorney-General is dissatisfied with a decision□

(*a*) of a judge of the High Court in terms of subsection (3), he may with the leave of a judge of the Supreme Court appeal against the decision to the Supreme Court; or

(*b*) of a magistrate in terms of subsection (3), he may with the leave of a judge of the High Court appeal against the decision to the High Court"

It is clear from the wording of the statute that the discretion is conferred on the trial court and no one else. It is an established rule of our law that where the law vests a discretion in a lower court or tribunal it is not for a higher court to substitute its own discretion for that of the lower court or tribunal under the guise of appeal or review, for to do so is to usurp the function of the lower court or tribunal.

It is also noteworthy that the law maker has clothed only the Attorney-General now the Prosecutor-General with the power to appeal against the trial court's decision under subsection 4 to the exclusion of the accused. This is for the simple but good reason that a decision against the State at the close of its case terminates the proceedings whereas a decision in its favour does not terminate the trial. This is because upon the dismissal of his application for discharge at the close of the State case the matter proceeds to the defence case where the accused has a second bite at the cherry to ventilate his defence.

The law maker's intention in denying accused persons the right to appeal at this stage is to prevent unnecessarily meddling in the affairs of unterminated judicial proceedings by the higher courts. The superior courts also loath prematurely interfering with uncompleted judicial proceedings as this means unnecessary work in the event that the accused is acquitted at the end of the trial or double work in the event of either party appealing at the completion of the trial.

The applicants are prematurely seeking acquittal from this court in circumstances where they are unable to furnish the reviewing court with a copy of the impugned ruling or

judgement as will more fully appear in para 8 of the first respondent's founding affidavit where he says:

> "The court dismissed my application. The reason thereof is contained in the ruling. I cannot attach the said ruling but I would like to analyse it with a view to show how the second respondent misdirected himself."

It is trite that review proceedings are based entirely on the record of proceedings. It is therefore untenable and legally incompetent for this court to upset a ruling or judgment that does not form part of the record of proceedings. The reasonableness or otherwise of the impugned ruling cannot be ascertained without it being placed before the court. Whatever ruling the court aquo made is deemed to be reasonable until proven otherwise. The onus was therefore on the applicants to prove on a balance of probabilities that the ruling is grossly unreasonable. It is needless to say that the applicants have dismally failed to discharge that onus.

In light of the foregoing the applicants' application can only fail. It is accordingly ordered that the application be and is hereby dismissed with costs.

Mahuni & Mutatu, the applicant's legal practitioners
The Prosecutor General's Office, the respondent's legal practitioners