PETER KAWONDE
versus
MS KUFA
PROVINCIAL MAGISTRATE
and
THE PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 19 July 2017

Urgent chamber application

MUREMBA J: This urgent chamber application was allocated to me through the Chamber book on 19 July 2017 and upon perusing it, I endorsed that the matter was not urgent. I have now been requested to furnish the reasons thereof by the applicant, I hereby furnish them.

The applicant who is a legal practitioner is an accused person in an uncompleted criminal trial being held at Harare Magistrates Court before the first respondent in CRB 1782/16. The matter is being prosecuted by the second respondent. Trial has since commenced.

At the close of the State case the applicant made an application for discharge which the first respondent dismissed and ordered that the matter proceeds to the defence case. Dissatisfied with the ruling, the applicant approached this court and filed an application for review of the first respondent's decision under case number HC 6049/27 which application is yet to be heard by this court. Meanwhile the trial in the Magistrates' Court was supposed to continue on 24 July 2017. The applicant being of the view that his application for review should be determined first before the trial can continue in the Magistrates' Court filed the present application on 17 July 2017 seeking an order for stay of proceedings pending determination of the review application.

In his application the applicant averred the following. He averred that his rights to a fair trial have been infringed and this calls for the unusual intervention by this court in the unterminated proceedings in the Magistrates Court. He said that he was charged with 3 counts of fraud as defined in s 136 of the Criminal Law (Codification Reform) Act [*Chapter*

9:23] and in the alternative he was charged with one count of theft of trust property as defined in s 113 (2) of the same Act, but the State failed to establish a *prima facie* case in both the main charges and the alternative charge to warrant his placement on his defence. The applicant averred that however, the first respondent in dismissing his application for discharge failed to interrogate and make findings on the contentions he made regarding the State's failure to establish a *prima facie* case against him. He averred that the first respondent made no finding at all on whether or not the State had managed to establish a *prima facie* case against him. The applicant further averred that the first respondent failed to supply reasons why the applicant was being put on his defence which means that she disregarded the lengthy submissions he made in his application. He averred that this shows that the first respondent was partial towards the State and was predisposed towards a particular result which is to have him convicted.

The applicant averred that the second infringement of his rights was that during trial the Prosecutor applied to amend the charges which application he did not oppose, but the first respondent failed to make the necessary amendments and this is apparent from the record of proceedings. The applicant said that as a result, although he has been put on his defence, it is not clear to him which charges he is facing between the initial charges and the amended ones. He said that it is his right to know in sufficient detail what criminal charges he is facing so that he may answer to them. He said that this failure by the first respondent goes to the root of the trial and vitiates the proceedings warranting them to be stopped until the application for review is determined.

The applicant also made reference to the 15 grounds for review that he outlined in his application for review in HC 6049/17 some of which were as follows. Despite the application for discharge being 71 paragraphs long, the first respondent did not deal with any of the points raised by the applicant as to why he should be discharged. The first respondent failed to express herself with that degree of exactitude expected of a judicial officer and she created evidence on behalf of the State. The first respondent declared that issues which had been put in issue by applicant were not in dispute. The first respondent shifted the burden of proof from the State to the applicant to prove his innocence. The first respondent failed to apply the law regarding acquisition of movable property, namely money and made wrong conclusions. The first respondent made wrong findings of facts, which were baseless. In short the applicant was simply criticizing the ruling by the first respondent. He was attacking the factual and legal findings and the conclusions she made. I must mention that these 15 grounds

for review are just an expansion of the two grounds which form the basis of his present application.

The applicant averred that after his application for discharge had been dismissed on 28 May 2017, he applied that the trial be stayed to enable him to approach this court and file an application for review, but that application was refused on the grounds that there was nothing from this court stopping the continuation of trial. The trial proceeded to the defence case and the applicant started giving his evidence in chief. Time ran out and the matter was postponed to 7 July 2017 for continuation. The applicant decided to file his application for review and he requested for a transcription of the record which he only got on 4 July 2017. On that same date he filed the application for review with this court. On 7 July 2017 the trial did not continue because the first respondent was not at work. The matter was postponed to 24 July 2017 for continuation. Realising the first respondent's determination to continue with the trial, the applicant filed the present application for stay of the trial proceedings on 17 July 2017. The applicant averred that the first respondent is not an impartial adjudicator and will not easily make a finding favourable to him even where facts demand so. The applicant averred that the first respondent went to the extent of interpreting to herself the meaning of the ambiguous charge of theft of trust property the State has preferred against him and has shifted the burden of proof from the State to him to prove that he is not guilty of that charge. The applicant averred that the first respondent has even gone on to distort his (applicant's) defence which makes it easier for the State to prove its case against him. He stated that the trial has become a sham as the first respondent has only one goal, which is to convict him.

The applicant went on to detail the defence which he gave in the trial court which he said the first respondent did not even consider and did not give reasons why she says it's false. He stated that the first respondent has already pronounced on his guilt even before he has given his defence. The applicant went on to state that he is likely to be convicted and upon conviction the first respondent is not likely to grant him bail pending appeal. The applicant averred that meanwhile incarceration will have severe consequences on him since he runs a legal practice. He averred that should he be imprisoned his legal practice will collapse as he is the sole partner thereof. He stated that even if he is later acquitted of the charges it will be difficult to resuscitate his legal practice. He said that for these reasons the review proceedings should be determined first before the trial can continue.

The applicant averred that there is no alternative remedy available to him. He said he has good prospects of success in the application for review. He said that the balance of

convenience favours that trial proceedings be stayed for now as no harm will be occasioned by the State. If the application for review fails the trial will continue. He said that if the proceedings are quashed and a trial *de novo* is ordered or if he is acquitted there will be no prejudice to the State as the administration of justice would have been enhanced.

My reason for refusing to hear the matter was that despite citing a number of gross irregularities which he said the trial magistrate made, the applicant did not attach the record of proceedings in issue. Attached to the application was the application for review, the application for discharge, the State's response thereto, the court's ruling and some correspondences to do with the applicant's request for a transcribed record from the magistrate's court. In the absence of the record of proceedings I had no way of verifying or ascertaining the averments the applicant made in his founding affidavit. The truthfulness of these averments can only be ascertained from the record of proceedings.

Whilst this court has powers to review uncompleted criminal proceedings of inferior courts at any stage, this is a power it exercises sparingly. See John Reid Rowland *Criminal Procedure in Zimbabwe* p 26-12; *Attorney-General* v *Makamba* 2005 (2) ZLR 54 (S) and *Dombodzvuku & Anor* v *Sithole N O & Anor* 2004 (2) ZLR 242 (H) at 245 D-F. It only does so in rare cases where grave injustice might occur, otherwise it is preferable to allow the proceedings to be completed and for the aggrieved party to subsequently seek redress by means of an appeal or a review. See *Ndhlovu* v *Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H). *In casu* in the absence of the record of proceedings I had no way of ascertaining whether this case is one of those exceptional or rare cases where there is need for intervention before proceedings of the lower court are completed. Averments were made about 2 separate sets of charge sheets being in the record and the applicant being unclear about which one he is answering to because when the State applied to amend the charges the first respondent did not make the necessary amendments. The record would speak for itself on whether or not the necessary amendments were not effected by the first respondent. Without the record this remained an unsubstantiated claim. The applicant's averments that the first respondent in her ruling manufactured evidence for the State and distorted his defence can only be ascertained from the record of proceedings. Without it, these remained bald averments.

I could not glean the gross irregularities and the bias that the applicant highlighted or enumerated from the application for discharge he made, the State's response thereto and from the ruling of the trial court. There was need to attach the record of proceedings to the

application. I could only ascertain whether or not the trial court misdirected itself in its ruling by perusing the record of proceedings since it is the one which contains everything that transpired in court including the evidence that was led by the State. It also shows which charges the applicant was made to plead to. The absence of the record of proceedings in an application of this nature makes it impossible for a judge to properly assess the correctness or validity of the averments of gross irregularities and bias that are made by the applicant in his application.

In view of the foregoing, I could not ascertain whether or not the applicant's case is one of those rare cases where grave injustice might be occasioned if the proceedings were allowed to run to their normal completion. It is for this reason that I endorsed that the matter was not urgent.

Kawonde Legal Services, applicant's legal practitioners