ALICE MAGODORA
versus
P.M. KAMWANDA, MAGISTRATE N.O
HARARE MAGISTRATE COURT
and
THE STATE

HIGH COURT OF ZIMBABWE
TAGU AND CHINAMHORA JJ
HARARE, 27 October 2022, 27 January & 1 March 2023

Opposed Application

Ms *F J Majome*, for the applicant
Mr *T Mapfuwa*, for 2nd respondent

TAGU J:

INTRODUCTION

This matter was set down for hearing a number of times and the hearing could not proceed as expected. Firstly, when we sat to hear the matter on 27 October 2022, the second respondent's counsel Mr *T Mapfuwa* took issue with the fact that there were two similar applications before the court, that is, HC 2058/22 and HC 5530/22 both involving same parties, same issues and same relief. The two records were indeed before us. The counsel for the applicant Ms *F J Majome* then withdrew case HC 2058/22. Still HC 5530/22 could not proceed because that record was incomplete because r 62 (5) of the High Court Rules, 2021 had not been complied with in that some documents were missing, especially the record of proceedings. The second respondent was then hamstrung to file its Notice of Opposition and heads of argument. Resultantly, the matter was removed from the roll to enable applicant to file and serve a copy of the record of proceedings.

The matter was re-set for 27 January 2023. Again on that date the applicant had not served the second respondent with relevant papers. Second respondent was served with the applicant's heads of argument at 0900hrs on the day of hearing. Applicant was seeking to have the matter heard as an unopposed application on account of the second respondent not having filed its Notice

of opposition and heads of argument. Matter was again postponed to 3 February 2023 to enable the second respondent to file its papers. On 8 February 2023 the matter finally took off.

BACKGROUND FACTS

The present application was brought in respect of the dismissal by the first respondent of the Applicant's application for discharge at the end of the State's case. The applicant is charged with contempt of court under s 182(1) of the Criminal Law (Codification and Reform Act) [*Chapter 9.23*]. She pleaded not guilty to the charge. The second respondent closed its case. Believing that a *prima facie* case had not been established the applicant applied for discharge at the close of the State Case. The application was dismissed and applicant was put on her defence. The applicant proceeded to file the present application for review as she felt that the first Respondent proceeded irregularly by dismissing the application for discharge. Further, the applicant also seeks to have s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] declared invalid to the extent of its inconsistence with ss 56 and 69 of the Constitution. That is failure to equally accord the accused person the same rights to appeal against an unsatisfactory decision on discharge of accused persons as the State enjoys.

ISSUES TO BE DETERMINED

I perceive the two as the main issues for determination.

1. Whether or not the first Respondent misdirected herself by dismissing an application for discharge at the close of the State Case warranting this court to interfere with unterminated proceedings at this stage.
2. Whether or not s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] should be declared unconstitutional?

WHETHER OR NOT FIRST RESPONDENT MISDIRECTED HERSELF?

This is an application for review of unterminated criminal proceedings in terms of s 26 and 27 of the High Court Act [*Chapter 7.06*]. Section 29 provides powers of review of criminal proceedings. The law is very clear on this matter. BHUNU J (as he then was) in the case of *Munyaradzi Chikusvu* v *Magistrate T. Mahwe* HH 100/15 had this to say:

> *"*It is trite that judges are always hesitant and unwilling to interfere prematurely with proceedings in the inferior courts and tribunals. In the ordinary run of things inferior courts and tribunals should be left to complete their proceedings with the superior courts only coming in when everything is said and done at that level. In *Masedza* & Ors v *Magistrate Rusape* and Anor 1998 91) ZLR 36 this court held that:

> "The power of the High Court to review the proceedings in the Magistrate Court is exercisable even where the proceedings in question have not yet terminated. However, it is only in exceptional circumstances that the Court will review a decision in an interlocutory decision before the termination of the proceedings, it will do so only if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant, or the irregularity is such that justice might not by other means be attained." (My emphasis)

The same sentiments were earlier expressed by BERE J in the case of *Tafadzwa Mutumwa and Molly Maka* v *The State* HH 104/08 when he said:

> "Whilst the review jurisdiction of the High Court in un-terminated criminal proceedings from the Magistrate Court is unquestionable, it should be borne in mind that, that avenue must only be pursued in extremely rare situations. The preferred or ideal situation seems to be that superior courts should only intervene at the conclusion of the criminal proceedings in the lower court. One finds instructive guidance from STEYN CJ in the case of *Ismail and Others* v *Additional Magistrate, WYN BERG and Another* 1963 (1) SA 5-6 where the learned judge stated:
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> > "I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others* v *Additional Magistrate, Johannesburg* and Anor 1959 (3) SA 113 (AD) at p. 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the Magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or error which are to be dealt on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. 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 case where grave injustice might otherwise result or where justice might not by other means be attained." (My emphasis)

In the case *of Attorney–General* v *Makamba* 2005 (2) ZLR 54 (S) MALABA (JA) (as he then was) held at p 64C that:

> "The general rule is that a superior court should intervene 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."

What emerged from the authorities is that all the following ingredients must be present before Court intervenes in uncompleted proceedings:

i) that there are exceptional circumstance,

ii) arising from a proven irregularity,

iii) the irregularity has the effect of vitiating the ;proceedings,

iv) resulting in miscarriage of justice,

v) there is a nexus between the miscarriage of justice and the interlocutory order which is clearly wrong and

vi) that there is proven prejudice to the rights of the litigant and that the prejudice cannot be addressed by any other means.

In proving the existence of the above ingredients the applicant submitted that the first Respondent was grossly unreasonable when she dismissed the application for discharge and held that the State had made a *prima facie* case. That the first respondent was clearly biased towards the applicant by holding that the State had made a prima facie case. She said s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] does not give the judicial officer the discretion to discharge or not to discharge an applicant, contrary to the first respondent's reasoning for dismissal of the application for discharge. This demonstrates gross irregularity as the provision of the Act are clear in this regard. The first respondent therefore proceeded by her own law and no reasonable judicial officer would have arrived at such a decision.

Asked by the court to explain the exceptional circumstances that warrants this court to interfere with an unterminated proceedings at this stage, counsel for the applicant submitted that prejudice to the Applicant lies in the continuation of trial. She maintained that in this case she was not personally served with the Court Order upon which the charges she is currently facing are based. She referred the court to Order 7 (3) (1) of the Magistrates Court (Civil Rules 2019) which reads as follows:

"Service of a summons, warrant or order of court shall be effected by the messenger."

She therefore argued that none of the witnesses who testified served the order on the applicant and the applicant ought to have been acquitted at the close of the State case.

The second respondent on the other hand maintained that a *prima facie* case was established. It said *in casu*, it is clear the proceedings in the court *a quo* do not meet the threshold for the decision of the court *a quo* to be set aside. That the applicant was well aware of the order of the court that she was to allow the complainant access to the minor child in question, but went on to willfully deny the said access and violated an extant order of the court, simply because she had, "planned her holiday" together with the said minor child. A *prima facie* case did indeed exist.

The allegations being faced by the Applicant are that on 26 December 2021 at 1-78th Avenue, Sunridge Harare, the applicant unlawfully failed to comply with a court order CCA 327/21 which had been issued on 17 December 2021 at Harare Children's Court which required that applicant gives access of a minor child TINASHE VERRA MAGODORA to BLESSING MOSES NDUNA for the first two weeks of each school holiday and denied the latter access to the former. The applicant is said to have contravened s 182 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] (Contempt of court) in a case before the first respondent CRB 556/22. The applicant's main defence as reflected in para 2 of her defence outline tendered as an annexure is that:

> "In particular, she was not in willful and mala fide refusal to comply with a court order as she did not have the requisite knowledge of its existence, having not been served by the Messenger of Court."

The questions for the court to consider are whether or not the learned Magistrate in the court *a quo* erred at law by making a finding that the State had indeed managed to prove a *prima facie* case at the close of its case, and whether or not there are exceptional circumstances warranting the intervention by this court on unterminated proceedings.

The discharge of an accused is dealt with under the Criminal Procedure and Evidence Act [*Chapter 9.07*]. Section 198 (3) of the said Act allows the court, at the end of the State case, if it considers that there is no evidence that the accused committed the crime charged or any other crime of which he might be convicted on that charge, the court must return a verdict of not guilty. In the case of *S* v *Kachipare* 1998 (2) ZLR 271 (S) at 276 established three grounds where the accused can be discharged. This is where there is no evidence:

(i) to prove an essential element of the offence,

(ii) on which a reasonable court, acting carefully, might convict,

(iii) a reasonable court could safely act on it.

The applicant submits that there was no requisite evidence because there was no service of the order. Meaning one of the essential elements of the offence was not proved. The court found that the applicant had been served because when the judgment and order were delivered the applicant's legal practitioner was present. The second respondent also submitted that the applicant was served because the applicant's legal representative was present when the order was given.

Indeed the sole State witness said he did not serve the order on the applicant but also maintained that when the order was given, the applicant's counsel was present. The court asked the applicant's legal practitioner *F J Majome* to comment on the suggestion that when the order was delivered, the applicant's legal practitioner was present. Madam *F J Majome* confirmed that indeed when the order was granted she was present in court on behalf of the applicant as her legal practitioner, but insisted that the order should have been later served on the applicant personally. I found this explanation devoid of any merit. If the applicant and or her legal practitioner where not present in court when the order was delivered, then the need to serve the applicant would have arisen. I say the explanation proffered has no merit because the State presented a valid order of the court, delivered by a competent court in the presence of the applicant's legal practitioner, which order was not complied with even when the complainant phoned the applicant to surrender the child to him in terms of the court order. The court therefore did not err by finding that a *prima facie* case had been established and that the Applicant be placed on her defence.

WHETHER OR NOT THERE ARE EXCEPTIONAL CIRCUMSTANCES?

The general rule is that a superior court should only 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. As I have already found, the decision of the court a quo cannot be said is clearly wrong as to seriously prejudice the rights of the applicant. If the decision is wrong, which I doubt, the applicant still stands not to suffer because there is a chance that applicant may be acquitted at the close of the defence case when the court compares the State Case and Defence case. In the event of a conviction, the applicant has two choices, either to have the proceedings reviewed or she can appeal against the court *a quo's* decision. Therefore, any misdirection by the court *a quo* can be redressed by other means. Clearly, there are no exceptional circumstances warranting the superior court to intervene in the uncompleted proceedings.

WHETHER SECTION 198 (4) (b) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT IS DISCRIMINATORY AND UNCONSTITUTIONAL?

The contention by the applicant is that she is not permitted by the Criminal Procedure and Evidence Act [*Chapter 9.07*] to file an appeal, upon leave of the High Court judge, against an

unsatisfactory ruling regarding an application for discharge at the close of the State case whereas the State enjoys such an advantage in terms of s 198 (4) (b) of the Act. She is of the view that if she was equally allowed such an advantageous facility she could have utilized it, which would have automatically stayed proceedings pending the resolution of the appeal, thereby according her a right to a fair trial. She would not have been disadvantaged. She was therefore, advised that such preferential treatment of the State by the Legislature is unfair, discriminatory and undermines her constitutional rights to a fair trial and fair hearing. By failing to equally provide for an accused person such as herself s 198 (4) (b) of the Act is discriminatory and therefore unconstitutional and should be declared void for that failure.

THE LAW

Section 175 of the Constitution of Zimbabwe provides for powers of courts in constitutional matters. It provides in subsection (4) that;

> "If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious."

In the case of *Martin* v *AG and Another* 1993 (1) ZLR 153 it was held that "frivolous" connotes in its ordinary and natural meaning, the raising of a question marked by lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed, it is not raised *bona fide*, and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless.

In the present case when the provisions of s 175 (4) where brought to applicant's counsel, and when asked as to which section the application was or is being made, Ms *F J Majome* said the court is being asked to use its discretion and refer the matter to the Constitutional Court. The position of the State is that s 198 (4) of the Criminal Procedure and Evidence Act is not *ultra vires* the Constitution. The State Counsel submitted that s 198 (4) of the Criminal Procedure and Evidence Act provides that if the Attorney-General is not satisfied with the decision of a magistrate, he may, with the leave of a judge of the High Court, appeal against the decision to the High Court. The logic of the provision is clearly grounded in the fact that one should bear in mind

that in considering the provisions of s 198 (3) of the Criminal Procedure and Evidence Act, [*Chapter 9.07*] the court is not dealing with the accused person's defence as at this stage no such evidence would have been placed before the trial court by the accused. All what is subjected to scrutiny at this stage is the prosecution case. The proffered defence outline by an accused person whilst it may be on record is not subject to consideration at this stage. It is on this basis that at the close of the State case only the State is given the opportunity to appeal with the leave of the High Court to the High Court. Hence the provision is grounded in the principles of natural justice and the order being sought lacks merit under the circumstances.

Failure by the applicant to clearly outline the basis of the application, and failure to have made that application before the trial court, or at least approach the Constitutional Court directly leaves me with no other impression other than that the application to refer to the Constitutional Court the invalidity of s 198(4) of the Criminal Procedure and Evidence Act is frivolous and vexatious. The application is therefore dismissed.

CHINAMHORA J, agrees……

Jessie Majome & Co., applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioners.