TENDAI LAXTON BITI
versus
MAGISTRATE MUCHUCHUTI – GUWURIRO N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 14 & 21 March 2023

Application for Review

Advocate *E Mubaiwa,* for the applicant
Mr *M Reza and Mr T Mapfuwa,* for the second respondent

MANYANGADZE J: This is an application for a review of criminal proceedings which are pending before the first respondent, in the Regional Court, Eastern Division, Harare. What has necessitated the application whilst the criminal proceedings are still pending is an interlocutory application that was made by the applicant for referral of the proceedings to the Constitutional Court.

In the said interlocutory application, the applicant alleged violation of his constitutional rights in various respects. In a ruling handed down on 13 February 2023, the first respondent dismissed the application. Aggrieved by this determination, the applicant filed the instant application, wherein he seeks the setting aside of the determination. He also seeks a stay of the criminal proceedings, pending determination of the intended constitutional application.

Before delving into the substantive issues relating to the review matter, I must deal with a point *in limine* which has been raised by the applicant. The applicant avers that there is no valid notice of opposition to the application. This is so because the deponent to the opposing affidavit, Mr Godswish Dzivakwe, has no authority to depose to such affidavit. Consequently, the notice of opposition must be expunged from the record and the application be treated as unopposed.

In making this averment, the applicant relies mainly on the case of *Cuthbert Dube* v *PSMAS & Anor* SC 73/19. In that case it was held that a person who represents a company in litigation must, if his or her authority is challenged, produce proof, in the form of a resolution of the board of directors, that he/she has the requisite authority.

Further to that, the applicant averred that the deponent to the opposing affidavit was not involved in the trial proceedings and as such had no personal knowledge of the averments he makes in the affidavit.

In countering the averments made by the applicant, the respondent has referred the court to the remarks of MAWADZE J in *Prosecutor General of Zimbabwe* v *Beatrice Mtetwa & Ano*r HH 82/16, where the learned judge stated, at pp 7 -8 of the cyclostyled judgment:

> "While it is correct that Mr M*apfuwa* who deposed to the founding affidavit was not the trial prosecutor and that Mr Zvekare and Mr Mugabe were the trial prosecutors, the fact remains that Mr *Mapfuwa* is a law officer attached to the appeals section of the Prosecutor General's Office. It goes without saying that in order to prepare this application Mr *Mapfuwa* had to peruse the record of proceedings in order to make an informed decision on whether to seek leave to appeal or not. Mr *Mapfuwa* to that extent has full knowledge of the facts pertaining to the application and his authority to depose to the founding affidavit cannot be imputed. The criticism made by the first respondent however is well founded that Mr *Mapfuwa* improperly commented in his founding affidavit on the demeanour of state witnesses. This is something Mr *Mapfuwa* could not have possibly gleaned from the transcript of the record of proceedings and to that extent he clearly perjured himself. The demeanour of state witnesses could only have been observed by the trial prosecutors. Mr *Makoto* to his credit made this concession.
> My finding is that Mr *Mapfuwa* can swear positively to the facts of this case as a law officer who perused the record of proceedings and that the failure to have the trial prosecutors swearing to the founding affidavit cannot defeat the application. While the criticism made by the first respondent as regards some of the comments made by Mr *Mapfuwa* can be deemed to be fair criticism it is not in my view fatal to this application. I am therefore inclined to make the finding that the deposition of the founding affidavit by Mr *Mapfuwa* does not invalidates this application and therefore dismiss this preliminary issue."

The second respondent pointed out that Mr Godswish Dzivakwe is in exactly the same position that the prosecutors in *PG* v *Mtetwa,supra,* were. They were not the trial prosecutors, but had gone through the papers filed in the matter and made the necessary submissions.

I am in full agreement with the remarks of MAWADZE J. Mr Dzivakwe, as a law officer in the Prosecutor General's office, has, by virtue of his office, the authority to represent the Prosecutor General and depose to the affidavit. There is no basis for distinguishing the position Mr *Mapfuwa* was in in the *Mtetwa* case, from the position Mr Dzivakwe is in *in casu.*

In my view, it is significant to note that the *Cuthbert Dube* v *PSMAS* case, which indeed is the *locus classicus* on the requirement for evidence of authority, involved private companies, where it is imperative to produce a board resolution as proof of authority. The rationale underlying such a requirement was pointed out by CHEDA JA in *Madzivire & Ors* v *Zvarivadza & Ors* SC 10/06, which was cited with approval by GARWE JA in the *Cuthbert Dube* case, *supra:*

> "..The general rule is that directors of a company can only act validly when assembled at a board meeting…."

It seems to me such a requirement is not applicable to public officials, who exercise delegated authority in the execution of Government business. Government business would grind to a halt if these officials had to wait for boards to be convened to pass resolutions authorising them to execute their duties. This includes law officers who routinely exercise delegated authority to institute or defend litigation on behalf of Government.

I find no merit in the preliminary point raised by the applicant. It would be a different matter if the applicant was alleging that Mr Dzivakwe is not a duly appointed public prosecutor and is only masquerading as one. I do not understand the applicant to be making such a drastic allegation.

In the circumstances, I am unable to uphold the point *in limine* and it is accordingly dismissed.

I now turn to the merits of the application. A brief factual conspectus should help clarify where the application is emanating from, and thus put it into perspective.

The applicant is a senior legal practitioner practising under Tendai Biti Law firm, where he is a partner. On 30 November 2020, the applicant was at the Harare Magistrates' Court where he was representing his client, Harare businessman Mr George Katsimberis. Mr Katsimberis was facing fraud charges, brought about by his business partner Mr Kenneth Raydon Sharpe. Mr Katsimberis had also raised charges of perjury against Mr Kenneth Sharpe and his managing director, Mr Michael John Van Blerk. The charges arose out of the same subject matter, building plans related to Pokugara Properties (Pvt) Ltd, a company owned by Mr Sharpe. It is in respect of building projects under the aegis of this company that Mr Katsimberis and Mr Sharpe entered into a joint venture agreement, where each had a 50% stake. The joint venture floundered, resulting in accusations and counter accusations of deviant and fraudulent conduct.

It is not necessary to go into the rather convoluted history of the business deals involved. Suffice it to point out that it is against the background of the acrimonious business relationship between Mr Sharpe and Mr Katsimberis, that a confrontation occurred between the applicant and a woman called Tatiana Aleshina.

According to the applicant's papers, Ms Aleshina has shares in Pokugara Properties and other business entities controlled by Mr Sharpe. She is also related to Mr Sharpe. As such, she follows progress in any legal proceedings her principal is involved in. When the applicant

came out of court on 30 November 2020, in the company of his client Mr Katsimberis, he met Ms Aleshina at the court premises. According to the applicant, Ms Aleshina "bombed out of court wagging a finger," telling the applicant not to continue mentioning Mr Sharpe as he was doing in court.

However, according to the State papers, it is the applicant who menacingly approached the applicant, repeatedly calling her "stupid" and "idiot." He allegedly belligerently charged at her as he uttered the insulting remarks, thus instilling fear of an imminent assault. Following this incident, the applicant was arraigned before the first respondent on a charge of assault, as defined in s 89 (1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The charge reads as follows:

> "(1) Any person who–
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> *(a)* commits an assault upon another person intending to cause that other person bodily harm or realising that there is a real risk or possibility that bodily harm may result; or
>
> *(b)* threatens, whether by words or gestures, to assault another person, intending to inspire, or re-alising that there is a real risk or possibility of inspiring, in the mind of the person threatened a reasonable fear or belief that force will immediately be used against him or her;
>
> shall be guilty of assault and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both." (underlining added)

After the applicant's arraignment, a flurry of applications followed.

He made an application excepting to the charge, which was dismissed. He then made an application for the recusal of the first respondent together with the prosecutor handling the case, Mr Michael Reza. This, too was dismissed. He filed an application to the High Court, seeking a review of the dismissal of his application for the recusal of the two court officials. He also filed an application for the stay of the criminal proceedings, pending the application for review. In a case management process, CHITAPI J granted the stay, and urgently dealt with the application for review itself. The judge then dismissed the application for review. This meant that the applicant had to appear before the same magistrate and prosecutor for continuation of trial. The applicant noted an appeal to the Supreme Court against CHITAPI J's dismissal of his application for review. This appeal is pending.

Meanwhile, the applicant made an application for referral of the criminal proceedings to the Constitutional Court. As already indicated, the first respondent dismissed this application on 13 February 2023. This prompted the present application for review. This application (for

review) was again accompanied by an urgent application for stay of the criminal proceedings pending before the first respondent, pending the outcome of the review. During the hearing of the urgent application for stay of the criminal proceedings, it emerged that the applicant's trial had already commenced, and was postponed to 21 March 2023 for continuation. The urgent application for stay of the trial was dismissed, on the basis that the review application itself was going to be heard urgently, and be disposed of before resumption of trial. This rendered the application for stay of the trial superfluous.

In the notice of application for review, the grounds for review are stated as follows:-

1 Gross irregularity in the form of a failure to provide reasons.
2 Illegality in the proceedings and determination.
3 Gross unconstitutionality in the proceedings.
4 Absence of jurisdiction over findings made.
5 Gross irregularity in the form of reliance on issues not raised by or put to the parties.
6 Gross irrationality of determination.

The issues that the applicant raised before the first respondent, for referral to the Constitutional Court, are set out in paragraph 183 of his founding affidavit in the following terms:

> "1. Whether in the circumstances of the matter, pre-trial detention in inhabitable cells and in breach of legislated COVID-19 protocols constitutes a violation of my right to liberty in terms of s 49 (1) and my right as an arrested person to be treated humanely and with respect for my inherent dignity in terms of s 50(1)(c) of the Constitution of Zimbabwe.
>
> 2. Whether my prosecution on the charges as framed constitutes a violation of my right to protection and benefit of the law in terms of s 56(1) of the Constitution of Zimbabwe particularly in that the allegations do not support a charge of assault defined in s 88 and s 89 of the Criminal Law (Codification and Reform) Act."
>
> 3. Whether the extensive negative and biased publication of my case in the public media, particularly The Herald newspaper, is a violation of my rights in terms of s 56(1), 69(1) and 70(1)(e) of the Constitution in that the publicity was calculated to influence the outcome of my trial, ie that I should be convicted.
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> 4. Whether the extensive publication and politicisation of my case by politicians adverse to my own political persuasion, is a violation of my rights in terms of s 56(1), 69(1) and 70(1)(e) of the constitution in that it was calculated to influence the outcome of my trial, ie that I should be convicted.
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> 5. Whether the conduct of the trial by Michael Reza as prosecutor is in violation of my rights in terms of s 56(1), 69(1) and 70(1)(a),(c) and (d) of the Constitution in that Reza is biased and not objective in his approach to the trial.
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> 6. Whether my being tried before first respondent constituted breach of my rights in terms of s 5691), 64, 69(3) , 70(1)(a) and 70(5) of the Constitution in that the court was set up to convict

> me, in that first respondent is biased, descends into the arena, is impatient and raises fears that it has already convicted me.
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> 7. Whether my prosecution is in violation of my rights in terms of s 56(1), 69(1) and 70(1)(a) of the Constitution in that the main witness, Tatiana Aleshina, is manipulative, overbearing and likely to interfere with the trial."

The law that governs applications of this nature is provided for in s 175(4) of the Constitution, which reads as follows:

> "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."(underlining added)

Indeed, that is the basis on which the applicant made his request for referral of the issues cited above. The constitutional provision is clear and unambiguous. Once the court is requested by a party to refer constitutional issues that have arisen in a matter before the court, it is obliged to refer the issue to the constitutional court. The legislature however, in its wisdom, saw it fit to put a rider to this provision. The court must refer, unless the issue raised is "*merely frivolous and vexatious"*. That is an important proviso. Its object is to prevent the apex court from being inundated or clattered with all manner of requests for referral. What this means is that the court in which such issues are raised exercises a discretion to determine whether or not a request made is *frivolous or vexatious*. Such a discretion must of course, like all cases in which the court is imbued with discretion, be exercised judiciously. It is a limited power, confined only to the question of whether or not the request for referral is frivolous or vexatious. The court must therefore deal with the question conscientiously, lest it denies a deserving litigant access to the Constitutional Court. This point was highlighted in *Martin* v *Attorney General & Anor* 1991(1) ZLR 153 (SC), where the court stated:

> "The test is whether the referral would constitute an abuse of the Supreme Court which is now the constitutional court and has to be determined applying a conscientious and objective thought to the question."

It is significant to note that what is before this court is not an application for referral to the constitutional court. What is before this court is an application for review of the application for referral that was placed before the court *a quo.* It is essentially a review of the *decision* that the court *a quo* made in respect of the application that was before it. This court must therefore be wary of falling into the trap of simply substituting the decision of that court with its own

decision. Put differently, the exercise of a discretion by a lower court is one not to be lightly tampered with. There must be serious and gross misdirection in the exercise of that discretion to warrant interference. This is especially so when the court is dealing with unterminated proceedings of a lower court.

It is not a normal application for review that comes to this court in the course of ongoing proceedings in the lower court.

The court must therefore be guided by the applicable statutes and case law. The applicant is basically asking this court to exercise its review powers, as provided for in s 27 of the High Court Act [*Chapter 7:06*]. Section 27 reads as follows:

> "(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
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> *(a)* absence of jurisdiction on the part of the court, tribunal or authority concerned;
>
> *(b)* interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
>
> *(c)* gross irregularity in the proceedings or the decision.
>
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

An examination of this provision shows that it has two fundamental aspects. One aspect relates to irregularities of a purely procedural nature. These relate to *the manner* in which the proceedings are conducted. The other aspect relates to *the decision* itself. This is where a review may easily be confused with an appeal. It is found in paragraph (c), which refers to gross irregularity in the *proceedings or decision.*

Thus, the court is called upon to consider whether they are irregularities in the manner in which the proceedings were conducted. This aspect is not so problematic. The court considers whether basic tenets of natural justice were observed. These are trite, and include such principles as *audi alteram partem*, absence of interest or bias on the part of the judicial officer, or absence of jurisdiction on the part of the court. The other dimension, in which the decision is impugned on review, is not that simple and straightforward. A decision is normally impugned on appeal, not review.

It will be seen that *in casu*, submissions by the applicant have traversed both aspects i.e. irregularities relating to procedure and the decision.

Starting with the submissions that seek to impugn the procedure used, I find little if anything of substance in this regard. It appears the applicant fully ventilated his case, and was allowed to place whatever material he needed to substantiate his allegations. Indeed, he himself states, in para(s) 184 to 185 of his founding affidavit:

> "In keeping with the strict requirements of subrule (4) of r 24 of the Constitutional Court Rules, 2016, I led very extensive evidence before first respondent in support of my request for the referral of the constitutional issues to the Constitutional Court of Zimbabwe. The period covered some 13 months of me on the stand.
>
> I produced several large volumes of documentary evidence, all speaking to the constitutional issues that I sought to have referred. The documents ranged from newspaper articles, records from public offices such as City of Harare and the Deeds Registry, court records arising in certain judicial proceedings, extracts of several posts made on electronic media and an audio recording, amongst others."

What the applicant however does, is to bring in the aspect of bias on the part of the court. He basically avers lack of impartiality on the part of both the judicial officer and the prosecutor. He alleges breach of the fundamental principle of *nemo judex in rem suam causa.* In this regard, he refers to the cases of *R* v *Gubudela* 1959 (4) SA 93, *TM Supermarkets (Pvt) Ltd* v *Chimhini* SC 49/18.

It appears the applicant was particularly concerned with the effect of the negative media publicity on his case. He avers that that publicity would have a significant impact on his right to a fair trial.

Still on procedural aspects, the applicant avers that the first respondent gave no reasons for her decision, such failure being a gross irregularity that vitiates the proceedings. Reference was made to *Gwaradzimba* v *CJ Petron and Company (Pvt) Ltd* SC 12/16, among other cases.

Further to that, the applicant argues that the first respondent had no jurisdiction to delve into the constitutional issues raised. It is the preserve of the Constitutional Court to determine such issues, once they are raised. Reliance was placed on the cases of *Chinanzvavana and Others* v *Attorney General of Zimbabwe* HH 73/09, *Mukoko* v *Attorney General* 201, *Nyagura* v *Ncube NO & Ors, Dhlamini & Ors* v *The Stat*e 2014 (1) ZLR 296 (SC).

The other pillar on which the application rests is that the first respondent's decision was grossly irrational. It is contended that her reference to the existence of other remedies was irrelevant to a resolution of the matter placed before her, and constituted gross irrationality. Consequently, her decision must be vacated. If a decision is outrageous and irrational, it

amounts to a gross irregularity that vitiates such decision and the proceedings involved – *Affretair (Pvt) Ltd & Anor* v *MK Airline (Pvt) Ltd* 1996 (2) ZLR 15 (S).

In its response to the averments made by the applicant, the second respondent mainly emphasizes the point that what the first respondent had to consider was whether the request for referral was frivolous and vexatious. This is precisely what she did, after considering the issues raised by the applicant. The second respondent avers that most of the issues raised by the applicant, which included some voluminous documents, were irrelevant, hence the first respondent's decision that what was before her was a frivolous and vexatious application.
The respondent stresses, in paragraph 22 of its opposing affidavit;

> "Section 175 (4) allows 1st Respondent to decline to refer to the Constitutional Court a matter where she considered it to be merely frivolous and vexatious."

Indeed, a look at the 20 page ruling by the first respondent shows that she was alive to the issues raised by the applicant, and dealt with them reasonably comprehensively.

To begin with, she set out the law governing the application she was dealing with. In my view, she demonstrated an understanding of the nature of the application she was seized with, and the applicable law. She made reference to s 175(4) of the constitution, and some cases where it was interpreted. These include *Martin v Attorney General & Anor* 1999 (1) ZLR 153 (SC), *Levi Nyagura* v *Lazini Ncube NO & Ors* CCZ 7/19, *Magurure and Others* v *Cargo Carriers International Hauliers (Private) Limited* CCZ 15/16. She was thus guided by the relevant statutes and case law.

The first respondent then crystallised the issues set out by the applicant into five categories, which she proceeded to deal with in the rest of her ruling. There is nothing irregular for a judicial officer, before whom numerous issues have been referred for determination, to crystallise them into fewer issues, instead of dealing with them item by item. He or she places the items into categories in which they can be easier analysed. The judicial officer however, must be careful that such categorisation or crystallisation of issues does not leave out material issues for consideration. This approach is normally done where the issues listed are too long and repetitive. If the list is short and concisely set out, it is best to deal with each of the issues *seriatim.* In the instant case, I find no fault with the approach adopted by the judicial officer.

To show that she was very much alive to the issues raised by the applicant, the first respondent noted, on the question regarding the charge, whether it disclosed an offence, that it was open to the applicant to make an application for refusal of further remand. On the question

of complaints against the police, she noted that this is dealt with on initial remand. It is therefore not correct, as averred by the applicant, that reference to a refusal of further remand was tied to the issue of complaints against the police. It was mentioned in the context of the propriety or otherwise of the charge. There was therefore nothing irrational about the context in which the issue was dealt with. It is the applicant who appears to have mixed up the issues, and in the process endeavoured to portray the applicant's reasoning as grossly unreasonable and/or irrational.

On alleged malicious adverse publicity, especially by the State media, the first respondent stated that its verdict was not going to be based on public opinion. It seems the applicant downplayed this reasoning, and chose to focus more on the reference to the remedy of defamation damages. The essence of the complaint was the right to a fair trial. The first respondent adverted to that aspect, by pointing out that public opinion is not a factor that was going to influence her decision.

On impartiality on her part and that of the public prosecutor involved, the first respondent noted that this issue was dealt with by the High Court, which ordered that the trial continues without the recusal of the prosecutor. The High Court decision has been appealed to the Supreme Court and the appeal is pending. The first respondent wondered why the applicant is bringing up the same issues again. There is nothing anomalous in such reasoning.

As I indicated earlier on, this is a peculiar application, in that it seeks the review of unterminated criminal proceedings pending in a lower court. The threshold for interfering in such proceedings is very high. In fact, it is exceptionally high. The court is compelled to interfere only where it considers that there will be a grave miscarriage of justice which is likely to be unrectifiable. It is not simply a question of disagreeing with the decision of the court *a quo*. The facts and circumstances must be such that justice will turn on its head if the proceedings in question are allowed to run to conclusion. See *Prosecutor General of Zimbabwe* v *Intratek Zimbabwe (Private) Limited* SC 57/20, *East River Investments (Pvt) Ltd & Anor* v *Mujaya NO & Anor* HH 847/22.

Even the Constitutional Court itself, when faced with an urgent application for stay of criminal proceedings which were underway before a regional magistrate, made a strong pronouncement on the law applicable. In the case of J*oana Mamombe and Anor* v *Faith Mushure NO and Anor* CCZ 4/22, MAKARAU JCC stated, at pp 4 – 5 of the cyclostyled judgment:

> "In a long line of cases from this jurisdiction and elsewhere, the admonition repeatedly sounded and explained, that superior courts should be very slow in interfering with the unterminated proceedings of lower courts. The exception is made for cases where there is a gross irregularity or a wrong decision by the lower court that will seriously prejudice the rights of a litigant or accused person and which irregularity or wrong decision cannot be corrected by any other means. (see Attorney *General* v *Makamb*a 2005 (2) ZLR 54 (S); *Rasher* v *Minister of Justice* 1930 TPD 810; *Ginsberg* v *Additional Magistrate of Cape Town* 1933 CPD 357; *Walhaus* v *Additaional Magistrate, Johannesburg* & *Anor* 1959 (3) SA 113 (A); *Masedza 7 Others* v *Magistrate, Rusape and Others* 1998 (1) ZLR 36 (H); *Mantzaris* v *University of Durban – Westville & Others* (200) BLLR 1203 LC; Rose v S HH 71/2002;
> *Mutumwa and Anor* v *S* HH 104/2008, *Chikusvu* v *Magistrate, Mahwe* HH 100/2015; *Chawira and Others* v *Minister of Justice Legal and Parliamentary Affairs and Ors* CCZ 3/17 *Shava* v *Magomere* HB 100/17.
>
> The above admonition is sounded to a superior court that has inherent or legislatively-conferred review powers over the proceedings or decisions of the lower court. It is meant to guide the approach to be taken by such a court. This is so because the power to interfere with the unterminated proceedings of a lower court either permanently or as affording interlocutory relief, is nothing but an exercise of review jurisdiction by the superior court over the proceedings or decisions of the lower court. The authorities clearly establish the position at law that proceedings in a lower court or its decision are only interfered with if there is a gross irregularity in the proceedings or the interlocutory decision is clearly wrong. Both instances respectively encompass the common law review grounds of gross irregularity in the proceedings and/or gross unreasonableness in the decision. By established practice of the courts, it is thus accepted that the existence of these two grounds of review may, in appropriate circumstances, justify a superior court of competent jurisdiction interfering with the ongoing proceedings of a lower court."

Overally, the analysis done by the first respondent cannot be said to be grossly unreasonable or irrational. I find no basis for upsetting the first respondent's ruling, which in turn would lead me to interfering with the proceedings underway before her. The ongoing trial must be brought to finality in that court.

I note that neither party has asked for costs against the other. It seems this is in keeping with the general practice not to award adverse costs in applications of this nature. Accordingly there will be no order as to costs in this matter.

In the result, it is ordered that:

1. The application be and is hereby dismissed.
2. There is no order as to costs.

Mbidzo, Muchadehama and Makoni, applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioners.