PRISCA MUPFUMIRA
versus
NGONI NDUNA N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & MANYANGADZE JJ
HARARE, 22 June & 27 July 2023

Application for Leave to Appeal

G R J Sithole with *A Rubaya*, for the applicant
No appearance for the 1st respondent
W Mabhaudhi with *L Masuku*, for the 2nd respondent

CHIKOWERO J:

[1] This is an application for leave to appeal to the Supreme Court in terms of s 94(2) of the High Court Rules, 2021. In particular, the applicant seeks leave to appeal against the decision of the High Court handed down on 11 April 2023 in case number HACC 9/22 (as judgment number HH 232/23). The effect of that judgement was to dismiss an application for review of the interlocutory decision of the magistrates court dismissing an application for discharge at the close of the case for the prosecution and consequently to require that the trial continues in the magistrates court.

THE BACKGROUND

[2] The applicant is the former Minister of Public Service, Labour and Social Welfare. The first respondent is the magistrate presiding at the trial of the applicant. The trial is at the instance of the public, represented by the Prosecutor General, hence the involvement of the second respondent.

[3] The applicant and the former Acting General Manager of the National Social Security Authority ("NSSA") were jointly charged with the crime of criminal abuse of duty as public officers as defined in s 174(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code").

[4] At the close of the case for the prosecution the second respondent conceded that there was no evidence that the former Acting General Manager of NSSA committed the offence charged or any other offence of which he might be convicted thereon. Having found that the concession was properly made, the first respondent returned a verdict of not guilty in respect of the former Acting General Manager.

[5] As regards the applicant, the first respondent dismissed the application for discharge at the close of the case for the prosecution. That decision prompted the application for review, which we dismissed. We found no basis for interfering with the unterminated course of proceedings pending before the first respondent. Put differently, we were satisfied that the applicant had failed to prove that she would suffer actual and permanent prejudice if we did not interfere at that stage. Dissatisfied with our decision, the applicant seeks leave to appeal that judgment to the Supreme Court.

[6] It is settled law in this jurisdiction that an application for leave to appeal falls to be decided on application of the principle of reasonable prospect of success of the intended appeal. In other words, where there is a reasonable prospect of success of the intended appeal leave to appeal must be granted. See *S* v *Mutasa* 1988(2) ZLR 4 (S); *S* v *McGown* 1995 (2) ZLR 81 (S); *Prosecutor-General of Zimbabwe* v *Intratrek Zimbabwe (Private) Limited & Ors* 2019 (3) ZLR 106 (S) and *S* v *Rubaya* 2019 (3) ZLR 834 (S). Conversely, where there is no reasonable prospect of success of the intended appeal, leave to appeal should be refused.

THE PROPOSED GROUNDS OF APPEAL

[7] The applicant's proposed grounds of appeal read as follows:

> "1. The court *a quo* grossly erred at law and grossly misdirected itself by failing to find that the 1st respondent had committed reviewable gross irregularities in that:
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> 1.1 It failed to relate to the valid grounds for review raised by the appellant on which its decision was required and so erred in proceeding to blanket those grounds as one for appeal in the absence of a detailed analysis discounting every ground for review raised by the appellant, a process which is at variance with the provisions of section 56(1) and 69(1) of the Constitution of Zimbabwe.
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> 1.2 It abdicated on its duty in that it failed to deal with the issues argued before it on the validity of the 1st respondent's decision to dismiss the appellant's application for discharge on the basis that the evidence on behalf of the State was "not manifestly unreliable" yet the application had been made primarily on the ground that the State had failed to establish *prima facie* the essential elements of the offence charged as set out in the charge sheet.
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> 1.3 It failed to invalidate 1st respondent's grossly irregular conduct of creating new particulars of the offence charged in circumstances where the original charge and State outline by the State were totally different from what the appellant was asked to explain in her defence case.

1.4 It did not find any gross irregularity in the 1st respondent requiring the appellant to explain how Drawcard Enterprises (Pvt) Ltd was allegedly "handpicked" which effectively relates to the tender process which the appellant was cleared of thereby placing the appellant to explain that which she had been acquitted of by the 1st respondent.

1.5 It failed to relate to the gross irregularity in the 1st respondent's ruling on discharge in that it was self-contradictory as 1st respondent had found glaring deficiencies and material inconsistencies in the prosecution case but still refused to discharge the appellant.

1.6 In circumstances where Barnabas Matongera, who had been jointly charged with the appellant on the basis of acting in common purpose, was acquitted the court *a quo* grossly erred in that it did not find any gross irregularity and/or did not invalidate the strange requirement for the appellant to explain that which Barnabas Matongera was acquitted of.

1.7 It unjustifiably refused to interfere and upheld a process which would, if the trial proceeded, grossly irregularly shift and/or reverse the onus for appellant to prove her innocence particularly after 1st respondent had made the positive findings which warranted appellant's acquittal at that stage thereby causing grave miscarriage of justice."

[8] The intended appeal is hopeless. All the proposed grounds of appeal do not attack this court's finding that the applicant failed to prove that there was a basis for interfering with the course of the unterminated proceedings pending before first respondent. In other words, the applicant does not intend to take issue with this court's conclusion that she failed to prove that actual and permanent prejudice would be occasioned to her if the main matter were to proceed to the defence case. See *Mamombe & Anor* v *Mushure N.O. & Anor* CCZ 4/22 and the cases cited therein.

[9] It was unnecessary to painstakingly go through each and every one of the nine grounds for review relied on in case number HH 232/23. The reason was that all those grounds did not raise the fundamental issue pertaining to an application of that kind, namely, the justification for this court's interference with the course of the unterminated proceedings pending before the first respondent. At the end of the day, what the grounds raised was the correctness of the first respondent's decision refusing to discharge the applicant at the close of the case for the prosecution. It was for this reason that we remarked, at the tail end of the judgment sought to be appealed, that what was before us was in substance an appeal against the first respondent's decision disguised as an application for review of unterminated proceedings pending before the first respondent.

[10] That this was so is demonstrated by the applicant's second proposed ground of appeal. We have already set out that proposed ground. But we emphasise the part which reads as follows:

> "1.2 ……yet the application had been made primarily on the ground that the State had failed to establish *prima facie* the essential elements of the offence charged as set out in the charge sheet."

Assuming that the prosecution indeed failed to establish what is in practice referred to as a *prima facie* case against the applicant, that does not occasion actual and permanent prejudice to the applicant. The applicant may very well be acquitted at the conclusion of the trial. That is a remedy available to her. Assuming she were to be convicted, she would still have the options of bringing the matter to this court on review or appeal. There is the further remedy of appealing to the Supreme Court if her appeal to this court is unsuccessful. Quite clearly, there was no basis for interfering with the unterminated proceedings just as there is no reasonable prospect of the intended appeal succeeding on the second proposed ground of appeal.

[11] Assuming that the first respondent is caught within the four corners of that which is levelled against him in the third proposed ground of appeal, that is something that can be self-corrected in the judgment at the conclusion of the trial, failing which this court, exercising appellate jurisdiction, can properly relate to it. We do not think it necessary to be detained by rehashing the sentiments we expressed in the judgment sought to be appealed against.

[12] We do not think that there is reasonable prospect of success in grounding an appeal on semantics. We say this in relation to the word "handpicked" in the fourth proposed ground of appeal. We explained that, in context, the applicant was put on her defence in light of the evidence of Mukondomi and Chihota. Those two testified that, at Anesu Building, the applicant issued a verbal directive to them to conclude a contract with Drawcard Enterprises (Pvt) Ltd within forty-eight hours of that meeting and, thereafter, to drive her point home, proceeded to exert unrelenting pressure on them to do so. The charge spoke to the unlawfulness of the applicant's conduct, as Minister, to issue the verbal directive in the first place. Whether the first respondent was correct in refusing discharge in these circumstances could not have been the basis for interfering with the course of the unterminated proceedings pending before him.

[13] Glaring deficiencies and material inconsistencies in the case for the prosecution and their effect all fall within the province of the first respondent, as the trial court, in determining whether the second respondent would have proven its case beyond reasonable doubt. This would be in light of the totality of the evidence led at the close of the defence case. Needless to say, in assessing all the evidence, the first respondent may well find the applicant not guilty and acquit her. In the event

that he does not, the doors of this court are wide open. The applicant can appeal. The applicant would be better placed to shelve the fifth proposed ground of appeal and raise it, if the need arises, at the proper time and in the correct proceedings.

[14] The sixth proposed ground of appeal questions the correctness of the decision rendered by the first respondent. It is further evidence of our observation that what was placed before us as an application for review of unterminated proceedings was a disguised appeal.

[15] The final proposed ground of appeal appears not only to be vague but to be argument flowing from the proposed grounds preceding it. It takes the applicant's case for leave no further.

[16] We do not agree with Mr Sithole that we should have asked him to address us before observing that, in substance, the application for review of unterminated proceedings was a disguised appeal. We made that observation when we were considering judgment. Even those sentiments do not change anything. We say so because we aired them after we had found that no case had been made for this court to interfere with the course of the unterminated proceedings pending before the first respondent. In the circumstances, the proper order was a dismissal of the application before us, because the applicant had, on the merits, failed to trigger our interference, and not an order striking the matter off the roll. See *Mwenye & Anor* v *Minister of Justice, Legal and Parliamentary Affairs & Anor* CCZ 05/23.

ORDER

The application be and is dismissed.

CHIKOWERO J:……..……

MANYANGADZE J:…….…….…….

I Agree

Rubaya and Chatambudza, applicant's legal practitioners
The National Prosecuting Authority, second respondents' legal practitioners