KUDAKWASHE GAMBANGA
versus
FERESY CHAKANYUKA N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE 6 March 2023 and 24 July 2024

Opposed Application

T L Mapuranga for the applicant
No appearance for the 1st respondent
F I Nyahunzvi for the 2nd respondent

WAMAMBO J This matter is an application for review.

The applicant appeared before a Magistrate sitting at Mbare Magistrates Court facing a charge of fraud as defined in section 136 (a) (b) of the Criminal Law (Codification and Reform) Act [*Chapter* 9:23].

He was charged with Wayne Victor Moss who was the first accused while the applicant was the second accused. The charge as framed reads as follows-:

> "In that on 23rd day of January 2020 Wayne Victor Moss and Kudakwashe Gambanga one or both of them with the intention to defraud Liju Varghese made a representation to him that Kudakwashe Gambanga had free funds in the United Kingdom and he urgently required cash US $25 000 for payment of lobola and was offering to meet any foreign obligations for anyone who would give him the US$ 25 000 thereby causing Liju Varghese to act upon the misrepresentation and gave US$ 25 000 to Wayne Victor Moss after presentation of a fake Metro Bank Account telegraphic transfer of the money into his United Arab Emirates Habib Bank account number 020109020610330200031 thereby causing actual prejudice to Liju Varghese to the tune of US$25 000."

A trial ensued and the State called one witness, the complainant to support their case. At the close of the State case the defence applied for discharge which application was dismissed by the first respondent. The applicant raises a number of grounds as the basis for the application for review. Applicant seeks the following relief.

> "1. An order setting aside the decision of the first respondent dismissing the second accused's application for discharge at the close State case under Case Number CRB Mbare 2317/19.
> 2. A verdict of not guilty to be returned in respect of second accused person and that he be acquitted under Case Number CRB Mbare 2317/19."

In the court application for review the applicant raised four major grounds for review. The said grounds are more fully reflected in applicant's founding affidavit in paragraphs 10 to 13. Applicant's heads of argument deals with this aspect at paragraphs 7 to 40. Mr *Nyahunzvi* for the second respondent opposed the application.

The only state witness is Liju Varghese the complainant. A summary of his evidence is to the following effect-:

He supplies package material to accused one's company and he used to visit accused one's offices on a regular basis. On 23 January 2020 during one of his visits to accused one's offices accused one requested for US$ 25 000 to give to one of his friends who was about to get married and urgently needed to pay lobola. Accused one said accused two (the applicant herein) used to work in the UK and had properties there, in South Africa and in Zimbabwe. He was informed by accused one that accused two had friends in the UK who could settle the amount and had free funds in the UK. The witness agreed to the proposal. On the same day the witness gave first accused US$ 4 000 after accused one sent him proof of payment to the witness account for US$25 000 via e-mail.

A copy of the e-mail was tendered as an exhibit with no objection from the defence. An amount of US$ 21 000 was given to accused one by the witness. However when the witness checked his account he discovered that no money had been deposited into his account as promised. A follow up was made with accused two who came to the witness's office promising to rectify the situation with the bank. Accused two's explanation was that his money was in pounds while the witness account was in US dollars. The Metro bank where the US$ 25 000 was purportedly deposited informed the witness that the document reflecting the deposit on his email was not genuine. The second accused became uncontactable. The witness however managed to contact him later and second accused informed him he was in South Africa arranging for payment and that the money was ready and could be paid in rands. The witness at the end of the day did not recover his US$ 25 000.

The witness rejected the suggestion that there was a commercial transaction between him and second accused for the supply of 83 metra tons of maize and affirmed that he has nothing to do with maize. He also refuted the suggestion that he was involved in an illegal deal. The State sought to produce warned and cautioned statements made by the accused persons and also sought to proceed with a trial within a trial but abandoned the process and then closed their case.

At the hearing before me counsel for the applicant attacked the Magistrate's ruling, which appears at pages 115 to 123 of the record. The Magistrates decision is described as being grossly irregular and is "not only outrageous in its defiance of logic but it is a grave infraction of the first principle and constitutional command."

I have already referred to the applicant's stance and his justification that this matter calls for an order as per the draft order referred to earlier. The justification is presented in such a broad manner that the attack is *inter alia* an infraction of the Constitution, that essential elements were not proven, that the witness departed from his statement and that the Magistrate shifted the onus of proof to the accused. However the heads of argument do recognize that the discretion of a Superior Court to interfere with unterminated proceedings from a lower Court is very narrow.

The applicant in paragraph 38 of the heads of argument refers to a decided case by MATHONSI J (as he then was as follows- :

> "38 In *Isaura Masinga* v *Sande No* & *anor* HH 372-19 MATHONSI J as he was then, had this to say at p6 of the cyclostyled judgment-:
> The principle that a superior Court will only interfere in unterminated proceeds of an inferior court in exceptional circumstances of gross irregularity vitiating the proceedings or in rare case of grave injustice has been hallowed by repetition over a number of years in judicial pronouncements See *Ndlovhu* v *Regional Magistrate, Eastern Division* & *Anor* 1989 (1) *ZLR* 264 (H) at 269C – 270 G *Masedza* & Ors v *Additional Magistrate Rusape* & *Anor* 1998 (1) *ZLR* (1) 36 (H) at 41 C, *Ismael* v *Additional Magistrate Winberg* & *Anor* 1963 (1) SA 1 (A) at p. 4 *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) at 64 C-E where MALABA JA (as he then was) said
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> > "The general rule is that a Superior Court should intervene in uncompleted proceedings of 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."

I have duly considered the principles as reflected above and also considered the attack on the Magistrates decision from many fronts. I am also mindful that at this stage the accused persons have not been found guilty.

I am also mindful that the learned Magistrate was aware of the relevant law applicable at this stage. The Magistrate referred to section 198(3) of the Criminal Procedure and Evidence Act (Chapter 9:07) and applied same to the circumstances of this case.

I have read the Magistrate's ruling and reflected upon it against the backdrop of the evidence led and the submissions relating to this case. Among other suggestions is that there was a reverse onus. I found no evidence of such on record.

The evidence accepted on a *prima facie* basis by the Magistrate was that US$ 25 000 was given to accused one for onwards transmission to accused two.

The complainant's testimony reveals that accused two (the applicant) knew of the transaction. When he was contacted by the complainant he went to the complainant's office and proferred an explanation. The explanation was on why the money had delayed being reflected in complainant's account. When the heat was turned on applicant became scarce only to surface in South Africa proposing to make a payment in rands. Why would applicant be so concerned as to approach complainant's office to explain about repayment of US$ 25 000? Why would he offer a repayment of the money in rands? The answer in all probability is that he was acting in carhoots with accused one. The probability is high in the circumstances that accused one and applicant acted together to defraud complainant. The presentation of a fake deposit slip which applicant sought to explain away leads to the conclusion that his involvement was from the start of the fraud. His latter involvement in seeking to explain the transaction, the physical visit to complainant's office and his disappearance and offer to pay in rands is *prima facie* proof that he along with accused one were intent on committing fraud from the outset.

The applicant clearly associated himself with the email reflecting a deposit into complainant's account by his actions as pointed out earlier. It was averred that the charge left out that the alleged misrepresentation was unlawfully made.

I don't agree that was fatal. Much as it would be clearer if the charge alleged unlawfulness that is not the end of the matter. Firstly by making a misrepresentation to another's actual prejudice clearly implies unlawfulness. The summary jurisdiction form refers to the applicant and Wayne Victor Moss as the accused persons.

The charge preferred against them is clearly reflected as Fraud as defined in section 136(a) (b) of the Criminal Law (Codification and Reform) Act [*Chapte*r 9:23].

The evidence led on how the US$25 000 was given to accused one, the efforts made to recover it and the fake deposit slip and various contradictory and untruthful proposals by the applicant clearly establish unlawfulness on the face of it. I find that the charge is not prejudicial to the applicant in its current form and in any case and can also be amended.

The essential elements of fraud were established on a prima facie basis. The underlying intention of the applicant and his co accused were to misrepresent to the complainant to his prejudice in the totality of the circumstances. That complainant is a suspect witness was not established through his testimony and there is no reason the tag of a suspect witness should be placed on the complainant or his evidence. His evidence was tested in cross examination mindful that issues of credibility do not enter at this stage of proceedings.

I am satisfied that the essential elements of fraud were established on a prima facie basis and evidence implicating the applicant was established.

I find the Magistrate's ruling fair and in accordance with the law as espoused in *Isaura Masinga* v *Sande N.o* & *Anor* (*supra*) and the cases therein referred to. I find that contrary to applicant assertions this is one case that should proceed to the defence case.

To that end, I find that the application has no merit and should be dismissed.

I therefore order as follows-:

The application be and is hereby dismissed.

Rubaya & *Chatambudza* applicanzts legal practitioners
The National Prosecuting Authority second respondent legal practitioners