

REPORTABLE (65)

KASSAM SHIRAAJ
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
HARARE: 17 JANUARY 2022

E. Mubaiwa with *M. Hungwe*, for the appellant

E. Makoto, for the respondent

CHITAKUNYE JA: This is an appeal against the judgment of the High Court (the court *a quo*) granting the respondent leave to appeal to the High Court against the appellant's discharge at the close of the State case at the Magistrate's Court. At the conclusion of the hearing we dismissed the appeal and indicated that our reasons will follow. These are the reasons.

FACTS

The appellant was arraigned before the Magistrate Court charged with: -

1. Contravening Section 3(1) (a) of the Precious Stones Trade Act [*Chapter 21:06*] and;
2. Contravening Section 3(1) (a) of the Gold Trade Act, [*Chapter 21:03*].

In the first count it was alleged that the appellant was found in possession of 3309, 37 carats of diamonds and 1506, 41 grams of emeralds without being a holder of a permit or licence in respect of the said stones. In the second count it was alleged that the appellant was found in possession of 1345, 99 grams of gold granules, five (5) smelted gold bars weighing

3990, 45 grams, two (2) smelted gold rods weighing 29.78 grams and two (2) smelted gold buttons weighing 10.31 grams all with a combined weight of 5453, 43 grams without being a holder of a permit or licence in respect of the gold.

At his trial in the magistrate's court it was common cause that the pieces of minerals as described above were all recovered from the appellant at Exquisite Jewellers Shop Number P14 Westgate Shopping Complex, Bluff Hill, Harare. The appellant is the Director of Exquisite Jewellers.

The appellant admitted to possession of the aforesaid minerals. His defence was that his possession of the said minerals was lawful by virtue of the fact that he was an employee of a holder of a mining location, Carmel Mining, in Bindura, and those minerals had come from that mine. As regards the gold, he contended that these pieces of gold were handed to him by his employer for him to ascertain what type of minerals they were, after they had been discovered by the employer at the mining location. His defence was thus that his possession was permitted under s 3 (1) (d) of the Precious Stones Trade Act and s 3(1) (d) of the Gold Trade Act.

The respondent called four witnesses and tendered numerous exhibits as evidence after which it closed its case. The appellant applied for discharge at the close of the state's case which application was granted. Dissatisfied by the Magistrate's decision the respondent applied to the High Court for leave to appeal in terms of s 198(3) of the Criminal Procedure and Evidence Act; [*Chapter 9:07*]. The application was opposed.

FINDINGS IN THE COURT A QUO

The court *a quo* after hearing submissions and a consideration of the proceedings from the Magistrate's Court, granted leave to appeal as sought by the respondent. In granting the application the court *a quo* accepted the explanation for the delay in filing the application as reasonable given the circumstances of the case. On the merits of the application the court *a quo* held that the respondent had established an arguable case and the issues to be raised were not frivolous. The judge also found that there were prospects of success on appeal.

The effect of the granting of leave was to pave the way for the appeal to be placed before the High Court for consideration.

BEFORE THIS COURT

The appellant was aggrieved by the decision of the court *a quo* hence this appeal.

The grounds of appeal were couched as follows: -

1. "The honourable court *a quo* grossly misdirected itself in finding that the respondent had proved a *prima facie* case when the evidence on record corroborated the appellant's version that he was duly authorised to possess the minerals in question.
2. The honourable court *a quo* grossly misdirected itself on a point of law in interfering with the discretion of the trial court on its findings on the credibility of the appellant's version in dismissing the circumstantial evidence adduced by the state. Issues of assessment of credibility of evidence are a preserve of the trial court.
3. The honourable court *a quo* further grossly misdirected itself in finding that the explanation given by the respondent for the 9-month long delay prior to seeking leave to appeal was reasonable in the absence of any evidence to that effect having been placed before it."

The application before the court *a quo* was for leave to appeal. It was not the appeal itself. At that stage the judge is required to ascertain whether the applicant deserved to be heard

on appeal or not. He acts as a gate keeper to ensure that only deserving cases are allowed to pass through.

In that regard the court *a quo* condoned the delay in filing the application after considering the circumstances of the case and proceeded to consider whether there were prospects of success on appeal. In as far as the judge was acting as a gate keeper his decision to grant the application simply allowed the appeal to be filed and be placed before an appeal court for determination on the merits. It was not a determination on the merits of the appeal itself. The judge was imbued with judicial discretion to grant or not to grant leave to appeal. In the exercise of such discretion the judge considers, *inter alia*, the prospects of success on appeal. See *Attorney -General v Steyl & Others* 2005 (1) ZLR 269(S). In *casu*, the exercise of the discretion was not challenged as being grossly unreasonable, capricious or *mala fide*.

It is pertinent to note that the matter of the appeal remained pending and unterminated.

APPLICATION OF THE LAW TO THE FACTS

It is trite that superior courts are generally reluctant to interfere with unterminated proceedings in the lower courts or tribunals. In *Chawira & Others v Minister of Justice, Legal and Parliamentary Affairs & Others* 2017 (1) ZLR 117(CC) at p 121B-F the Constitutional Court reiterated this position in these words:-

“Generally speaking higher courts are loathe to intervene in unterminated proceedings within the jurisdiction of the lower courts, tribunals or administrative authorities.

In the recent case of *Munyaradzi Chikusvu v Magistrate Mahwe* HH – 100 – 15, (unreported) the High Court had occasion to observe that:

‘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.’

In *Masedza & Ors v Magistrate Rusape & Anor* 1998 (1) ZLR 36 (H) at 36F it was held that a higher court will intervene in uninterminated proceedings of a lower court:

‘... 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.’

Although the above judicial pronouncements were made by the High Court on review, they are equally relevant to this Court’s criteria for intervention in uninterminated proceedings before lower courts, tribunals and administrative authorities.”

In *Dombodzvuku & Another v Sithole N.O & Anor* 2004(2) ZLR 242(H) at 245C-F MAKARAU J (as she then was) in commenting on the power of the High Court to review criminal proceeding of the Magistrates’ Court at any stage of the proceedings aptly noted that:-

“While the statute granting the review power does not place any limitations on the exercise of that power, this court has in practice rarely exercised the power in relation to proceedings pending before the lower court. In practice, the court will withhold its jurisdiction pending completion of the lower court's proceedings to make for an orderly conduct of court proceedings in the lower court. It would create a chaotic situation if any alleged irregularity or unfavourable ruling on an interlocutory matter were to be brought on review before completion of the proceedings in the lower court. **The court’s aversion to disrupting the general continuity of proceedings in the lower court assumes ascending importance especially in cases where no actual and permanent prejudice will be occasioned the applicants. The power is, however, exercised in all matters where, not to do so, may result in a miscarriage of justice.** See *Ndlovu v Regional Magistrate, Eastern Division & Another* 1989 (1) ZLR 264 (H); *Levy v Benatar* 1987 (1) ZLR 120 (S) and *Makamba v Sithole N.O. & Another* HH 83/04.” (my emphasis)

It is thus apparent that an appellate court will not lightly interfere in uninterminated proceedings before a lower court unless not to do so will result in the applicant suffering

prejudice which cannot be ameliorated in any way or will result in a miscarriage of justice. In *casu*, the judge *a quo* after hearing the parties, held that there were prospects of success and so he accorded the respondent leave to appeal to the High Court. In coming to that decision the judge was exercising judicial discretion premised on what had been presented before him. He was not in any way deciding the appeal.

It was thus incumbent upon the appellant to show that the decision granting leave to appeal would result in such prejudice as to result in a miscarriage justice. It was not enough to merely express dissatisfaction with the decision.

The grounds of appeal as couched do not address the issue of prejudice to be suffered by the appellant if the appeal is allowed to be heard and determined. The aspects raised in the first two grounds are on issues that are to be determined in the envisaged appeal. The third ground relates to an exercise of discretion and nowhere has it been alleged that the discretion was wrongly exercised.

The exercise of judicial discretion can only be overturned on limited grounds such as, *inter alia*, the decision is grossly unreasonable, or the judicial officer acted on wrong principles, allowed irrelevant or extraneous considerations to affect its decision. See *Barros & Anor v Chiphonda* 1999 (1) ZLR 58(S).

In *casu*, there were no such allegations. The points raised in the appellant's grounds of appeal 1 and 2 regarding the Magistrate's findings are issues for the appeal before the High Court in the assessment of the merits and demerits of the appeal before it. In any case no irreparable harm or such prejudice as cannot be corrected in the appeal was alleged. The appeal therefore lacked merit.

It was for the foregoing reasons that we dismissed the appeal.

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Kadzere, Hungwe & Mandevere, appellant's legal practitioners.

National Prosecuting Authority, respondent's legal practitioners.