

NKOSILATHI NCUBE

Versus

THE STATE

And

MAGISTRATE D. MALUNGA N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 13 JUNE 2022

Urgent chamber application

T. Tashaya for the applicant
K. M. Guveya for the respondent

DUBE-BANDA J:

1. At the conclusion of the hearing of this matter I handed down an *ex tempore* judgment and dismissed this application. I did so to facilitate the start of applicant's criminal trial before the Regional Court, because I had noted from the submissions of Mr *Tashaya* counsel for the applicant that this application was being used to derail or stall the start of the trial. Notwithstanding that none of the parties had asked for written reasons, I decided to furnish them nonetheless.
2. This is an urgent chamber application in which the applicant seeks a provisional order staying his criminal trial due to start before the 2nd respondent. The order sought is couched in the following terms:

Terms of the order sought:

It is ordered that pending the finalisation of applicant's application for review filed undercover of case number HC 957/22 proceedings undercover of Bulawayo Magistrates' Court BYOR 215/22, be and hereby stayed.

Interim relief granted:

Pending the finalisation of this matter, applicant is hereby granted the following relief:

Pending the finalisation of this matter, proceedings under cover of Bulawayo Regional Magistrates' Court BYOR 215/22 are hereby stayed.

3. The application is opposed by the 1st respondent. The 2nd respondent is cited in her official capacity because of the implementation of the order sought by the applicant, if granted would require her to stop the trial of the applicant.
4. This application will be better understood against the background that follows. Applicant is facing two counts of armed robbery as defined in section 126 of the Criminal law (Codification and Reform) Act [Chapter 9:23]. In count 1 it being alleged that on the 13 November 2020, at approximately 0930 hours at Poly Packaging, Bulawayo applicant used a firearm to rob complainant of the sum of US\$5000-00, a Toyota Corolla, a Samsung S 7 Galaxy and a 38 SPL Rossi Revolver. In count 2 it being alleged that on the 10th March 2021, at 0800 hours at Access Finance Bureau De Change, Bulawayo applicant armed with a pistol robbed complainant of a 38 SPL Revolver with three rounds of ammunition, US\$ 246 682, ZAR 946 169-00, BWP 1000-00, EURO 100-00, ZWL\$ 11404-00.
5. The trial was set to start on the 9th May 2022. On the date the criminal trial was due to start applicant made an application to compel the State to furnish him with the police running diaries dated from 13 to 14 November 2020, and 10 to 14 March 2021; the court to order Access Finance Bureau De Change to provide video footage of 10 March 2021 from 7 am to 9 pm; and the State to furnish him with a statement of the finger print expert it intended to call as a witness. The trial court dismissed the application. Aggrieved by the dismissal of his application, applicant filed an application for review with this court, and such application is pending under cover case No. HC 957/22. It is against this background that applicant has launched this application seeking the relief mentioned above.
6. Applicant seeks that this court interfere with the uninterminated proceedings of the lower court. In *Mamombe and Another v Mushure N.O and Another* ZWCC 4 / 2022 the court said:

In a long line of cases from this jurisdiction and elsewhere, the admonition is repeatedly sounded and explained, that superior courts should be very slow in interfering with the uninterminated 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 Makamba* 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 Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A); *Masedza & Others v Magistrate, Rusape and Others* 1998 (1) ZLR 36 (H); *Mantzaris v University of Durban -Westville & Others* (2000) 10 BLLR 1203 LC; *Rose v S* HH71/2002; *Mutumwa and Anor v S* HH104/2008.; *Chikusvu v Magistrate, Mahwe* HH100/2015; *Chawira and Others v Minister, Justice, Legal and Parliamentary Affairs and Ors* CCZ3/17 and *Shava v Magomere* HB 100/17).

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.

7. An application of this nature can only succeed if the application for review has prospects of success.
8. In the application for review applicant seeks an order that the State furnish him with a video footage. It is contended that such video footage is either in the possession of the State or the police or the complainant. Firstly, the applicant is not certain as to who is in possession of the video footage. At the hearing before the trial court, the State indicated that it was not aware of any video footage taken from the complainant. It did not have such video footage. Secondly, during the hearing of this application, Mr *Guveya* counsel for the State indicated that the State was not aware of such a video footage. In the review application this court cannot order the State to produce a video footage that it does not have in its possession or custody, neither can the police nor the complainant be ordered to produce such a video, assuming it exists, for the simple and elementary reason that they have not been joined in the application. The trial court dismissed the request.

9. Further in the review application applicant seeks an order to compel the State to furnish him with an affidavit or statements of expert witnesses who it intends to call. It is clear that he has been furnished with documents which tell him that the finger prints uplifted from a door handle of a motor vehicle Honda Fit AFG 7940 matched his. The trial court ruled that there would be no need for applicant to be furnished with a written statement from the witness to be called because the documents provided to the applicant have necessary information that he requires at this stage. Again the trial court dismissed this request.
10. Again in the review application applicant seeks to be furnished with the police running diaries for the periods 13-15 November 2022 and 10-13 March 2021 in respect of the investigations of his matter. The trial court relied on the *S v Chibaya* HH 4/2007 which held that the diary logs are not evidence that would be produced at the trial. It constitutes a running commentary on the efforts by the police to investigate the matter. Like in the *Chibaya supra* case applicant did not show what possible assistance he could get from the police diaries in the prosecution of his defence. No sound legal basis was shown why the applicant should see the details of investigations recorded in a police diary.
11. It cannot be said that the interlocutory decision made by the trial court is clearly wrong, to warrant interference by this court in untermiated proceedings.
12. Further even if the video footage was in the possession of the State, and even if the police diary logs constitutes evidential material, these are issues that are in the jurisdiction of the trial court. As a general rule this court cannot interfere and rule on issues of evidence that are playing out before the trial court. It is on this basis again that I am of the view that the review application has no prospects of success.
13. I am aware that I must determine this application without prejudging the applicant's application for review. However, I cannot avoid to comment on it because of its prospects of success or lack thereof that is important in the determination of this application. To me the draft order in the review application is incompetent. Applicant seeks this court to substitute the decision of the trial court and order that he be provided with a video footage, police running diary, and affidavits or statements of expert witnesses. In a review application this court can only set aside or correct the proceedings or decision complained of. In a review application the High Court has no power to make such consequential orders as sought by the applicant. See: *Police Service*

Commission and Another v Manyoni SC 7/22. Again on this point the application for review has no prospects of success.

14. I am of the view that a stay of proceedings sought in this application is not merited. The application for review has been filed with a view to derail and delay the start of applicant's criminal trial. No grave injustice has been shown nor has it been shown that the interlocutory decision made by the trial court is clearly wrong to warrant interference by this court in unterminated proceedings.
15. It is for these reasons that I dismissed the application.

Sengweni Legal Practice applicant's legal practitioners
National Prosecuting Authority 1st respondent's legal practitioners