PRICCILAR VENGESAI
versus
HOSEA MUJAYA N.O
and
NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 15 December 2020, 30 March 2021 and 17 March 2022

Application for Criminal Review

T Musarurwa, for the applicant
T Mapfuwa, for the respondents

KWENDA J: The applicant is on trial before the Regional Court for the Eastern Division sitting at Harare on two counts of bribery as defined in s 170 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*].

In the first count it is alleged that on or around 26 June 2014 the applicant corruptly offered unsolicited money to a High Court Judge as a reward to the judge for rendering a judgment in case No. HC 4018/14 which happened to be in favour of a certain company known as Avondale Holdings (Pvt) Ltd. She sent text messages to the judge on two occasions seeking an appointment to meet the judge. Permission was granted on the 26th of June 2014. Upon entering the judge's chambers and being offered a place to sit, the applicant pulled out an envelope from her hand bag from which she took out a bundle of United States Dollar bills which she offered to the judge while explaining that it was from Avondale Holdings who had succeeded in a matter decided by the judge. The judge recorded the conversation before declining the offer and reporting the matter to the Police. The applicant was arrested and charged with bribery.

Subsequent to that, the applicant became aware of the name of the State counsel seized with prosecuting the bribery case. She telephoned him on the 24th and 27th April, 2018 and corruptly offered him a sum of USD$500 as an inducement or reward for him to decline prosecution. The State counsel pretended to go along with the script but set a trap leading to the arrest of the applicant as she was handing over USD$500 to the prosecutor while,

unbeknown to her, detectives where watching. The applicant was then charged with bribing the State counsel, hence the second count.

The applicant's trial on the two counts has commenced before the first respondent. The second respondent is the Prosecutor General who prosecutes criminal cases on behalf of the State. He is represented by *Tinashe Kanyemba* who is prosecuting.

The applicant has denied both charges. She was initially legally represented by *Admire Rubaya*, a legal practitioner who renounced agency on the 9th August 2018. Another legal practitioner, *Rumbidzayi Venge* took over representation of the applicant on the 14th August 2018. On the 15th August 2018 *Venge* applied for postponement of the trial in order to engage a more experienced counsel. The first respondent granted the application grudgingly giving the applicant only one day to do so. The applicant was able to secure the services of *Tazorora Musarurwa* who upon perusing the papers became of the view that applicant was unlikely to receive a fair trial due to what he believed is a personal relationship existing between the informant in the second count and the first respondent (the trial magistrate).

When the matter came up for continuation on the 16th August 2018 the applicant's defence team led by Mr *Musarurwa* requested audience in chambers. The first respondent granted the request whereupon the defence team and the prosecutor went to the first respondent's office where efforts to convince the first respondent to step down as the Presiding Officer were unsuccessful.

The parties went back to court where the applicant made an application for the first respondent's recusal in an open court. The first respondent dismissed the application. The applicant then applied for more time to prepare for the continuation of the trial and that, too, was dismissed. Advocate *Musarurwa* and Ms *Venge* then decided to discontinue their representation of the applicant. They both asked to be excused and the trial progressed with the applicant unrepresented by counsel.

The applicant was aggrieved by the various decisions made by the first respondent. She therefore filed this application for review on the 20th of August 2018 and a separate application for stay of the criminal trial proceedings pending the review. The order for stay of proceedings was granted by this court on the 5th September 2018 and the trial has not progressed since then.

The applicant is of the opinion that the first applicant is biased against her. She has invited this court to descend in the trial arena and grant the reliefs paraphrased below:

(1) that the first respondent's refusal to recuse himself be set aside.

(2) that the first respondent's refusal to postpone the trial to enable her counsel to take further instructions from her be set aside.

(3) that the proceeding be quashed and recommenced before a different Magistrate.

(4) that the second respondent (Prosecutor General) should be ordered to remove Tinashe Kanyemba as the prosecutor and replace her with another.

(5) Costs of suit

The applicant neglected the application for review resulting in the second respondent filing an application, almost a year later on the (7th of May 2019) for the dismissal of the former for want of prosecution. The application was made in terms of r 236 (4) of the High Court Rules, 1971. The rule provided [the rules have been repealed] as follows: -

> ***"236. Set down of applications***
> (1) ……...
> (2) Where the respondent has filed a notice of opposition and an opposing affidavit and the applicant has filed any answering affidavit he may wish to file; the applicant may set the matter down for hearing in terms of rule 223.
> (3) ……..
> (4) Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, set the matter down for hearing, the respondent, on notice to the applicant, may either—
> (*a*) set the matter down for hearing in terms of rule 223; or
> (*b*) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."

The second respondent's application for dismissal was premised on the grounds that he had opposed the application for review on the 12th September 2018 and thereafter, after filing an answering affidavit on the 5th October 2018, the applicant had not set down her application for review. The Registrar declined to set the second respondent's application despite several requests because, as the Registrar correctly pointed out, the second respondent was required to file heads of argument before the matter could be set down. See r 238 of the High Court rules, 1971 worded as follows:

> ***"238. Heads of Argument***
> (1) If, at the hearing of an application, exception or application to strike out, the applicant or excipient, as the case may be, is to be represented by a legal practitioner—
> (*a*) before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument clearly outlining the submissions he intends to rely on and setting out the authorities, if any, which he intends to cite; and
> (*b*) ……..
> (1a) An application, exception or application to strike out to which sub rule (1) applies shall not be set down for hearing at the instance of the applicant or excipients, as the case may be, unless—

(*a*) his legal practitioner has filed with the registrar in accordance with sub rule (1)—
(i) heads of argument; and
(ii) proof that a copy of the heads of argument has been delivered to every other party; and
(*b*) in the case of an application, the pages have been numbered in accordance with paragraph (*c*) of sub rule (1) of rule 227.
(2) ……"

Meanwhile the applicant had set this matter down for hearing as unopposed on the 13th of June 2019. Fortuitously, the judge presiding on the unopposed roll, JUSTICE CHAREWA, discovered that there was another matter, Case No. HC 3758/19, being the application for dismissal, which remained pending and in any event this application had been opposed. She therefore did not entertain this matter and proceeded to remove it from the roll.

The applicant once again was happy to let sleeping dogs lie and she did not do much to progress her application for review except to file a blank notice of set down from November 2020 until a routine systems audit picked that there were two matters which appeared abandoned namely; the applicant's review application for review and the second respondent's application for dismissal. The applicant was probably content that the trial before the second respondent had been stayed indefinitely from September 2018. The audit led to a set down of this matter before us.

The applicant has through this application identified certain interlocutory decisions/rulings so far allegedly made by the first respondent which she wants set aside and in addition to that she has moved this court to direct the second respondent (the Prosecutor General) to remove and replace the prosecutor handling the applicant's trial.

The applicant has not advanced any grounds for the removal of the prosecutor. She has not approached the Prosecutor General. There is therefore no decision by the second respondent which can be subject of review. The applicant has no cause of action against the second respondent and the matter ends there.

With regards to the first respondent we do not find anything unprocedural in how he handled the matter leading to the decisions to dismiss the applications for recusal and postponement of the trial. He gave the parties ample opportunity to present their respective arguments before ruling on the matter. He had the legal competence to rule in the matter at his discretion. If his ruling turns out to be wrong that can only be subject of an appeal at the conclusion of the trial.

The distinction between a review and an appeal has been stated in case law. In many instances some litigants have used and insisted on the review procedure to challenge

interlocutory decisions in circumstances where they should be appealing taking advantage of the thin line between the definition or the phrases 'a wrong decision', 'a misdirection' and 'a decision so wrong and irrational that no reasonable court acting reasonably could arrive at the decision.' The obvious motivation would be avoid seeking leave, since leave is required to appeal against interlocutory decisions with a few exceptions. In my view that debate around the distinction among the terms 'wrong decision', 'a misdirection' and 'a decision so wrong and irrational that no reasonable court acting reasonably could arrive at the decision' would not detain this court if the timing of either the review or appeal is correct, that is, at the end of the trial. The primary function of the appeal and review procedures is to afford protection against miscarriage of justice. Herbstein & Van Winsen *Civil Practice of the High Courts and Supreme Courts of South Africa* 5th Ed p 1271 states as one of the distinguishing feature between a review and an appeal the following:

> "The reason for bringing proceedings under review or an appeal is usually the same, viz to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not of review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."

Review and appeal should normally take place after a matter has been determined with finality. A court may make a decision which maybe contestable but the contestation must await the outcome of the trial because for all we know the decision to take up the allegedly wrong decision on appeal or review will be largely influenced by the outcome of the process. Therefore, the power of this court to descend into the arena of a criminal trial in progress before another judicial officer is not *carte blanche.* In other words, this court does not have the unrestricted power to side track a criminal trial in progress before another court, albeit of inferior jurisdiction, ticking boxes as the trial progresses and ruling on every queried decision; for to do so is to interfere with a judicial function. It does not matter that such side tracking is emanating from the top, it remains interference.

In *Prosecutor General of Zimbabwe* v *Intratrek Zimbabwe (Pvt) Ltd, Wicknell Chivhayo and Anor* SC 59/2019 the Supreme Court quoted with approval the following excerpt

from *Walhaus &Ors* v *Additional Magistrate, Johannesburg & Anor* 1959(3) SA (AD) 119D-120E

> "If, as appellants contend, the magistrate erred in dismissing their exception to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is an appeal after conviction. The practical effect of entertaining applicant's position would be to bring the magistrate's decision under appeal at the present, unconcluded, stage of the criminal proceedings against them in the magistrate's court. No statutory provision exists directly sanctioning such a course…. It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme court may, in a proper case, grant relief-by way of review, interdict or *mandamus*-against a decision of the magistrate's court before conviction…., This, however, is a power which is sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its circumstances. The learned authors of *Gardiner and Lansdown* (6 ed, vol.1 p.750) state:
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> > 'While a superior court on review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and do so in the magistrates' court except in those rare cases where grave injustice might otherwise result or justice might not by other means be attained…In general however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal would ordinarily be available'
>
> In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's courts… [The] prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental contention raised by the accused, does not *per se* necessarily justify the Supreme court in granting relief before conviction."

In *Attorney-General* v *Makamba* , supra, MALABA JA as he then was, stated as follows at 64 C:

> "The general rule is that a superior court should intervene in uncompleted proceedings of the 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."

All the ingredients must be present before this court intervenes in uncompleted proceedings. In other words, the accused seeking review must prove that all the following exist:

i. that there are exceptional circumstances
ii. arising from a proven irregularity
iii. the irregularity has the effect of vitiating the proceedings
iv. resulting in miscarriage of justice
v. there is a nexus between the miscarriage of justice and the interlocutory order which is clearly wrong

vi. and that there is proven serious prejudice to the rights of the litigant

vii. the prejudice cannot be redressed by any other means

It is therefore clear that the commission of an irregularity by a judicial officer presiding at a trial is not *per se* justification to interfere. This court only interferes where the irregularity committed is such that the proceedings have lost legal validity.

The first respondent adopted the correct procedure before arriving at the decisions that are now impugned. All the parties were given ample opportunity to make submissions.

At this stage we do not have to agree with the rulings. If the rulings were competently made after following the correct procedure, we may not interfere now even if had the same argument been presented before us we would have ruled differently. The time will come in the hierarchy of the courts when the court will be able to pronounce itself on the matter after the trial has concluded.

In the result we order as follows:

The application is dismissed.

Chikowero J, agrees: ……. …….

E Gijima Attorneys, applicant's legal practitioners
National Prosecuting Authority., respondent's legal practitioners