

SIBUSISIWE MHLANGA

Versus

MAGISTRATE DZIRA N.O

And

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 7 & 14 APRIL 2022

Urgent Chamber Application

Advocate Siziba, for the applicant

T.M Nyathi, for the respondents

MAKONESE J: This is an urgent chamber application for stay of proceedings. The applicant appeared in the Magistrates' Court facing one count of theft as defined in section 113 (2) (d) of the Criminal Law Codification and Reform Act and one count of money laundering in violation of section 8 (1) (a) and (d) of the Money Laundering and Proceeds of Crime Act (Chapter 9:24). The accused pleaded not guilty to both counts. The matter proceeded to trial. The state called four witnesses before closing its case. The defence made an application for discharge at the close of the state case. The application was made in terms of section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07). The 1st

respondent dismissed the application for discharge on the grounds that the state had established a *prima facie* case at the close of the state case.

Applicant filed an application for review against the order of the Magistrate dismissing the application for discharge at the close of the state case. The application for review is pending before this court. The applicant faces the prospect of the trial proceeding to the defence case and to the handing down of final judgment. The applicant has filed this application in a bid to stay the unterminated proceedings in the Magistrates' court.

An application for stay of proceedings pending the review of a Magistrates court's decision made in pursuance of an application in terms of section 198 (3) of the Code depends on the prospects of success. These courts are slow to interfere in criminal proceedings in the lower court and will only do so in exceptional circumstances. Applications for review made against decisions by Magistrates dismissing applications for discharge are flooding this court. All too often these applications are made with the sole intention of delaying or frustrating proceedings in the lower court. If the review application does not have prospects of success the application for a stay of proceedings must fail. It is trite that this court does not encourage applications for the review of criminal proceedings before a trial is concluded. If, however, there are exceptional circumstances and evidence that the application for review is meritorious such a review can be entertained. See: *Nyambo v Magistrate T Mahwe and Anor* HH 291-14; *S v Sibanda* 1994 (2) ZLR 19 (HC); and *S v Masedza & Ors v Magistrate Rusape & Anor* 1998 (1) ZLR 36 (HC).

In the application for discharge at the close of the state case the applicant argued that there was no evidence placed before the court to warrant the applicant being placed on her defence. Defence counsel argued that applicant should be discharged at the close of the state case and acquitted. The defence further argued that in terms of section 120 of the Criminal

Law Codification Reform Act, the state should have produced authority to have the applicant prosecuted as she was married to the applicant. Defence counsel argued that the Prosecutor General did not authorise the applicant's prosecution. It was argued that the applicant's prosecution was therefore a nullity.

The state indicated that the defence should have raised the issue of non-compliance with section 120 of the Criminal Code at the commencement of the trial. The issue cannot be raised at the close of the state case as the court is simply asked to consider whether the state made a *prima facie* case at the close of the state case. The state alleged that the money in question was stolen between 1st June 2018 and 23rd August 2018. The complainant missed the money on the day of divorce. The state argued that the complainant and the applicant ceased to be husband and wife on the 23rd of August 2018. The State argues that the provisions of section 120 of the Criminal Code do not apply.

Section 120 of the Criminal Code provides that:

“It shall not be a defence to a charge of theft, stock theft, or unauthorised borrowing or use of property that the accused was co-owner of the property that forms the subject of the charge whether the co-ownership arises through marriage or a partnership or otherwise....

Provided that no prosecution shall be instituted against a spouse for stealing or unlawfully borrowing or using the property belonging to the other spouse or that forms part of the spouse's joint estate unless the Prosecutor General has authorised such prosecution.”

The learned Magistrate in the court *a quo* came to the decision that the prosecution of the applicant commenced after the marriage of the parties and that therefore there was no

need to have regard to the provisions of section 120 of the Criminal Code. The court reasoned that the application for a discharge at the close of the state case concerns itself with the question of whether or not the state had succeeded in proving a *prima facie* case against the applicant. The court *a quo* stated that:-

“The question that arises is when is it that one can conclude that there was no evidence at the close of the state case.”

The court referred to the following cases:

- (a) *Attorney General v Bvuma & Another* 1987 (2) ZLR 96 (S)
- (b) *Attorney General v Tarwirei* 1991 (2) ZLR 576 (S)
- (c) *Attorney General v Mzizi* 1991 (2) ZLR 321 (S)
- (d) *State v Kachipare* 1998 (2) ZLR 271 (S)

The thread going through these cited cases is that an application for discharge at the close of the state case will succeed where:

- (i) There is no evidence to prove an essential element of the offence charged.
- (ii) Where there is no evidence upon which a reasonable court acting carefully might properly convict and
- (iii) The evidence adduced on behalf of the state is manifestly unreliable and that no reasonable court can safely act on it.

The court *a quo* gave its reasons why the application for discharge at the close of the state case could not succeed. The court held that the state has succeeded in establishing a *prima facie* case.

At the hearing of the application, *Mr T Nyathi*, appearing for the state indicated that the state was now consenting to the application for a stay of the proceedings pending the application for review. I do not believe that the concession by the state was properly made. The state it would seem, did not give much thought to the requirements for a stay of proceedings. The prospects of success as envisaged by the law relates to the merits of the application for review. The only indication by the applicant in this application is that the court *a quo* must have regard to the provisions of section 120 of the Criminal Code and must have come to the conclusion that there was no authority to prosecute and therefore the proceedings are a nullity. In my view that is a wrong approach. The court *a quo* made a finding that there was a *prima facie* case. The learned Magistrate gave detailed reasons why he made that finding. An application for review should only be entertained where the learned Magistrate's decision is irrational or untenable. An application for discharge is not a procedure designed to shield an accused who does not intend to be put on his or her defence.

In Prosecutor General of Zimbabwe v Intratek Zimbabwe (Pvt) Ltd & Ors SC 67-20 MAKARAU JA (as she then was) had this to say about the law regarding interference with unterminated proceedings before a lower court;

“The general rule on when a superior court may interfere with the unterminated proceedings of a lower court was settled in *Attorney General v Makamba* 2003 (2) ZLR 54 (S) where MALABA JA (as he then was) had this to say at 64 C:

“The general rule is that a superior court should interfere in uncompleted proceedings 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.”

In settling this rule thus, the court referred to the South African case of *Ishmael & Ors v Additional Magistrate Wynberg & Anor* 1963 (1) SA 1 (A) where it was similarly observed that a Superior court should be slow to interfere in uninterminated proceedings in a court below and should confine the exercise of its power to those cases where grave injustice might otherwise result or where justice by other means may not be obtained.

I am aware that I must determine this application without prejudging the applicant's application for review. I must merely consider whether it is worth placing before the court for review.

I am of the view that a stay of proceedings is not merited. The application for review has been filed with a view to frustrate and delay proceedings. No grave injustice has been shown to have occurred and this court must not interfere in uninterminated proceedings in the lower court.

In the result, this application is hereby dismissed with costs.

Lazarus and Sarif, applicant's legal practitioners

National Prosecuting Authority, respondents' legal practitioners