THABISO NDLOVU

Versus

THE STATE

And

GAMUCHIRAI GORE N.O

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4, 11 JULY 2022 & 14 JULY 2022

Urgent application to stay criminal proceedings

N. Mazibuko for the applicant
Ms. N. Ngwenya for the 1st respondent

DUBE-BANDA J:

1. This is an urgent chamber application in which the applicant seeks a provisional order staying his criminal trial after the dismissal of his application for a discharge at the close of the State case. The interim relief sought is that 2nd respondent herein be barred from insisting that the applicant proceeds to her defence case under Case No. CRB 824/22.

2. The application is not opposed by the 1st respondent. The 2nd respondent is cited in his official capacity because of the implementation of the order sought by the applicant, if granted would require him to stop the trial of the applicant.

3. This application will be better understood against the background that follows. Applicant was arraigned before the Magistrates' Court facing a charge of contravening section 23(1) of the Maintenance Court [Chapter 5:09], it being alleged that applicant has refused to contribute 50% towards the school fees of the children as per the court order. The State adduced evidence from the complainant and thereafter the prosecution closed the State case. Applicant applied for a discharge in terms of section 193(3) of the Criminal Procedure and Evidence Act [Chapter 7:09]. The trial court dismissed the application and put applicant to her defence, and directed that the trial should continue.

4. Applicant was aggrieved by the dismissal of her application for discharge and filed an application for review in this court. The review application is pending under cover of case number HC 1124/22. In the review application applicant seeks an order that the applicant is discharged, found not guilty and acquitted. This application seeks to stay the criminal trial pending the finalisation of the review application. It is against this background that applicant has launched this application seeking the relief mentioned above.

5. The application for a discharge was made in terms of section 198(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], which provides that the court shall return a verdict of not guilty if at the close of the State case the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon.

6. An application of this nature can only succeed if the application for review has prospects of success. 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 it is its prospects of success or lack thereof that is important in the determination of this application.

7. Applicant seeks that this court interfere with the unterminated 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 unterminated 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, Johanesburg & 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.

8. In *Attorney-General v Makamba* 2005 (2) ZLR 54 (S) at 64 C the court said:

> 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.

9. It is on the basis of these legal principles that this urgent application must be viewed and considered.

10. Applicant contends that he should have been discharged at the close of the case for the prosecution. The jurisprudence in this jurisdiction is that the words ‘no evidence’ as used in section 198(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], mean no evidence upon which a reasonable person might convict. The concern of the trial court at the close of the case for the prosecution is whether at that stage of the proceedings there is evidence on record against the accused person which requires a reply from him. If there is such evidence, a discharge must simple be refused and the accused put to his defence.

11. In such an application the *onus* is on the applicant to show that the application for review has prospects of success warranting the staying of criminal proceedings pending the finalisation of the review application. A court cannot merely on the basis of the applicant’s founding affidavit make a finding that indeed the application for review has prospects of success and then order a stay of the criminal trial. Particularly factoring into the equation that the jurisprudence is that the superior courts should be very slow in interfering with the unterminated proceedings of lower courts. In the ordinary course of events a criminal trial must be allowed to run its course, if at the end of the trial the accused is still aggrieved by the outcome, he or she may seek redress from the higher courts.

12. For the applicant to discharge the *onus* to show that the application for review has prospects of success and therefore she is entitled to an order staying criminal proceedings, she must avail the record before this court. Applicant must show that the trial court committed an irregularity or some other established ground of review which vitiates the proceedings by refusing to discharge her at the close of the case for the prosecution. A discharge at the close of the case for the prosecution turns on the issue of evidence. A court can only discharge an accused if it is of the opinion that there is no evidence upon which a court may convict the accused.

13. This application was initially set down for the 4th July 2022, and on that date I engaged Mr *Mazibuko* counsel for the applicant concerning the absence of a complete copy of the record of proceedings from the trial court. Firstly, counsel argued that the court must proceed and hear the application without the record, and then made a turn and asked that the matter be postponed to enable him to secure the record. I acceded to this request and then postponed the matter to 11 July 2022.

14. On the 11th July 2022 there was no record. Counsel explained the difficulties he encountered in trying to secure a copy of the record. Notwithstanding the challenges outlined by counsel my view is that in such an application the *onus* is on the applicant, and therefore it is for the applicant to ensure that a complete copy of the record is provided to this court. I even suggested to counsel that a copy of the record in long hand would suffice in such an application as long as it was legible. This is so because stopping a trial pending before another judicial officer is not the norm, but the exception. Therefore the court must be furnished with a complete copy of the record to ascertain whether indeed there is an irregularity that cannot be corrected by any other means and which vitiated the proceedings. I take the view that without a complete copy of the record it might generally be difficult for an applicant in such an application to discharge the *onus*.

15. On the 11 July 2022, counsel argued the merits of the application. In his argument counsel emphasised the fact that 1st respondent was not opposed to the application. Ms *Ngwenya* counsel for the respondent did not oppose the application, and in fact appeared to support it. In her affidavit counsel averred that there would be no prejudice that would be suffered either by the State or complainant if the proceedings in the court *a quo* are stayed pending finalisation of the review application.

16. In the review application applicant contends that at the end of the state Case, the evidence led showed that the complainant had paid in full the school fees and the parties' legal practitioners had agreed that he should pay and be reimbursed later. It is further argued that the maintenance order obliged applicant to pay school fees into the school's account, not to the complainant. That complainant paid school fees in full, and by doing so he relieved accused from paying her portion of the fees, therefore she could not be accused of failing to pay the fees. Applicant also contends that an arrangement was reached that complainant pays the school fees in full to avoid inconvenience to the children since she did not have means to comply with the court order. On the basis of these contentions it was argued that at the close of the State case there was no evidence establishing an offence.

17. As regards the concession made by the 1st respondent, I take the view that such concession is one of the considerations that this court must factor into the equation in determining where the justice of the matter lies. It is not dispositive of the matter. The court must still consider the evidence, the facts and juxtapose these with the law as expounded in the jurisprudence and then decide whether a case has been made for a stay of criminal proceedings pending the finalisation of the application for review.

18. The averment in Ms. *Ngwenya's* affidavit that there would be no prejudice to either the State or complainant if the proceedings in the court *a quo* are stayed pending finalisation of the review application does not assist in the resolution of this matter. I say so because the test at this stage is not whether there would be prejudice or not, but whether there are 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. My view is that the concession was anchored on a wrong test, and such a concession could not be said to have been properly taken.

19. The allegations against the applicant appears (I say "appears" because the copies of the charge sheet, the State Outline and defence outline have not been attached to this application) to be anchored on the maintenance order date stamped 24 December 2021. In the order applicant was ordered *inter alia* to contribute fifty percent school fees for the children of the marriage

with complainant. The prosecution contended that since the order was granted applicant has refused to abide by such order.

20. In dismissing the application for a discharge the trial court made the following pertinent observations, it said:

> In buttressing the allegations, the State led one witness who is the complainant in this matter. It was his version that accused person was supposed to pay 50% school fees for the minor children at the beginning of each school term. Complainant also stated that he paid his 50% share of the school (*sic*) for all the minor children before the opening of the school term. He ended up paying the other 50% share of the school fees which complainant (*sic*) was supposed to pay because schools were opening and the children would not have been allowed to enter the school premises without full payment of school fees. This was proved through exhibits 2, 3 and 4 which are proofs of payments and clearance certificates meaning the school fees was paid in full without any contribution being made by the complainant (*sic*) as per the court order.
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> During cross examination counsel for the accused person tried to put questions to the effect that complainant had prematurely paid school fees and that there was an agreement which stipulated that complainant will be refunded his contribution. This was denied by the State witness. Also defence counsel insinuated that complainant is being vindictive since he has dragged accused to court six times on various issues. That line of thought does not hold water because court processes are there so that litigants will not take the law into their own hands. The duty of the court is to resolve disputes whenever they arose (*sic*).
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> In addition, even if the court is to assume that there was an out of court arrangement that does not explain away the fact that accused person is still in arrears. This can be noted through exhibit 5 of the maintenance arrears which was tendered in court. If accused has made her contribution through the school account as per the court order she can furnish the court with the receipts.

21. The applicant contends that the decision of the trial court is grossly irregular. I do not agree. The decision speaks to the evidence and related it to the correct legal principles as espoused in the jurisprudence. The law is that all the requirements outlined in the jurisprudence must be present before this court intervenes in uncompleted proceedings. In other words, the accused seeking a stay of a criminal trial pending review must show that the review application has prospects of success in that: that there are exceptional circumstances; arising from a proven irregularity; the irregularity has the effect of vitiating the proceedings; resulting in miscarriage of justice; there is a *nexus* between the miscarriage of justice and the interlocutory order

which is clearly wrong; and that there is proven serious prejudice to the rights of the litigant which prejudice cannot be redressed by any other means.

22. In *Mutasa And Another v Mapfumo N.O And 2 Others 2. Mangoma v Mapfumo N.O And 4 Others* HH 84 / 2021 the court said:

> If an element is missing, then this court must not interfere. It is therefore not enough to show that the decision trial court is wrong or simply that there was an irregularity or that the accused suffered prejudice because all that can be corrected on appeal. By way of example, the interlocutory misdirection may not result in irreparable harm because the accused may be acquitted at the end of the trial a quo. Even if the accused is wrongly convicted or acquitted a quo, the resultant miscarriage of justice can be redressed on appeal. More critically, a wrong decision does not necessarily vitiate proceedings.

23. From the ruling it is clear that in the opinion of the trial court there was evidence at the close of the State case that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon. According to the trial court the evidence on record required an answer from the accused. Whether the decision of the trial court was wrong is not the issue, whether it was irregular is not the issue, and whether applicant will suffer prejudice is not the issue, all that can be corrected on appeal at the end of the trial should she be convicted. There is no allegation that the irregularity complained of vitiated proceedings.

24. Interfering in the unterminated proceedings of lower courts is not the norm but the exception. Is not for the mere asking. I take the view that this case does not fall in the category of the exception. On these facts, the application for review has no prospects of success. Therefore the stay of proceedings sought in this application is not merited. In *casu* there is no basis at law for this court to interfere in unterminated proceedings of the trial court.

In the result, I order as follows:

The application for a stay of criminal proceedings in Case No. CRB 824/22 be and is hereby dismissed.

Calderwood Bryce Hendrie & Partners applicant's legal practitioners
National Prosecuting Authority, 1st respondent's legal practitioners