DAVIS DUMEZWENI LUTHE

Versus

NATIONAL PROSECUTING AUTHORITY

And

REGIONAL MAGISTRATE MRS S NDEBELE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 14 AND 21 SEPTEMBER 2023.

Urgent Chamber Application

S. Mguni, for the applicant
T. M. Nyathi, for the 1st respondent
No appearance for the 2nd respondent

KABASA J: This application was first placed before me on 17 July 2023. There was no indication that it had been served on the respondents. I then sought clarification as regards this issue. The response came when the court had electoral matters to dispose of and priority was given to those matters. As this was a few weeks before end of the term this matter could not be set down due to time constraints. The judge who assumed duty in the first week of vacation undertook to handle the matter and that was the last I heard of it until the first day of the third term, 11 September 2023 when the file was placed before me with an explanation that it had been mixed up with other files and was therefore not set down. I then set it down for 14 September 2023, almost two months later.

This explanation was important in order to put the issue of urgency into its proper perspective.

This Urgent Chamber Application seeks to stop the continuation of trial before the second respondent. The applicant was charged with three counts of criminal abuse of duty as a public officer as defined in section 174 (1) (a) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded not guilty and the trial commenced with the leading of evidence from eight state witnesses. At the close of the state case the applicant applied for a discharge in terms of section 198 (3) of the Criminal Procedure and Evidence Act, Chapter 9:07, which application was dismissed by the second respondent.

Aggrieved by the dismissal, the applicant filed an application for review which seeks to vacate the second respondent's decision. This application was then lodged to stop the continuation of the trial until the review application is heard and determined.

Mr. Mguni, counsel for the applicant contended that the application is urgent as applicant's right to a fair trial is at stake. The second respondent's dismissal of the application for discharge at the close of the state case was irregular and should applicant be put on his defence he would be prejudiced. Such prejudice arising from the fact that he may be forced to self-incriminate.

As regards the merits it was counsel's contention that the law is clear that once there is no evidence led against the accused at the time the state closes its case, such accused shall be discharged. There was no evidence to sustain a conviction as all the witnesses exonerated the applicant. The court therefore acted contrary to the law by dismissing the application for a discharge at the close of the state case.

Whilst this court is slow to interfere with unterminated proceedings the irregularity of the second respondent's decision calls for such interference, so counsel argued.

The application was opposed. *Mr. Nyathi*, for the first respondent argued that the matter is not urgent. Counsel's argument was premised on the fact that the criminal trial was postponed to 30 November 2023 for continuation and chances are the review application would have been disposed of by then. The postponement of the matter to November therefore takes away the urgency of this application.

On the merits, counsel's argument was that evidence led showed that the applicant was the Accounting Officer of the local authority in question. He was therefore a public officer and he failed to account for the property in issue. It is now for him to show that by failing to so account he did not favour anyone. The review application has no prospects of success and so the application to stop the trial pending the hearing of the review application must fail.

The brief background of the matter which led to the charges the applicant is facing is this:-

The applicant was the Town Secretary for Plumtree Town Council from 2003. During the period spanning from April 2007 to October 2009 he, acting in his capacity as the Town Secretary allegedly undervalued council stands which were sold to one Charles Moyo, these were stand number 650 and stand number 273. He therefore showed favour to Charles Moyo. He also sold sixty-one low density stands which stands were yet to be pegged and were therefore non-existent. This was done to show favour to Charles Moyo. He also sold eight residential stands but council received no payment and there was no council resolution authorising such sale. The applicant conducted himself in a manner inconsistent with his duties in order to show favour to Charles Moyo.

Evidence was led from eight witnesses, one of whom was the Chairperson of the Plumtree Town Council. His evidence was largely that an internal audit discovered that the stands sold to Charles Moyo had no determined value and no proper description. Payment for 2 of the stands was through "barter trade" but the equipment given to Council in exchange for the stands had no ascertained value to determine whether such equipment was commensurate with the value of the allocated stands. The 61 stands were not pegged and so determining their value was difficult as they were allocated on a bulk layout plan. Due process was therefore not followed.

The rest of the witnesses confirmed the fact that the applicant was the one responsible for implementing council resolutions and advised the council on these transactions as the Accounting Officer.

In dismissing the application for discharge the second respondent had this to say:-

> "From the evidence of most state witnesses above, it appears the accused in his capacity as Town Secretary and Chief Adviser to the council he was the one responsible for the full implementation of council resolution. Evidence has shown that the sale of 61 stands was not fully implement (sic) as no Agreement of Sale was done between council and client. No source documents were found pertaining to the values of stand 650 and 273 *vis-à-vis* the equipment that the client brought in exchange of the said stands for it to be ascertained if the value of the equipment brought in matched the value of the sold land since it was a barter trade. The accused as the Accounting Officer then had to maintain an asset register that had such source documents. Accused in his defence has mentioned some values of the stands 650 and 273 as the values that they were sold for. As the Accounting Officer then, he is the one better placed to shed light on the source document. *Prima facie*, all the transactions pertaining to the sale of council land to the investor Charles Moyo sailed through with his involvement as the Town Secretary, Chief Adviser to the council and Accounting Officer and it is only prudent that he explains his role in all of it."

Whilst I am cognizant of the fact that this is not the review application, in looking at the application I am seized with, the chances of success of the review application is critical as no purpose would be served in stopping the trial when the review application is unlikely to succeed.

The stoppage of a criminal trial interferes with unterminated proceedings. *In casu* the matter has stalled due to the pendency of this application.

In considering the issue of urgency I am therefore alive to the need to allow judicial processes to proceed with minimal hindrance. The issue of urgency has been articulated in a plethora of cases (*Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188, *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240, *Triple C Pigs & Anor* v *Commissioner – General*, ZRA 2007 (1) ZLR 27).

The need to ensure delivery of justice makes it imperative to resolve applications of this nature with minimal delay. It is for this reason that I hold that the matter is urgent, notwithstanding the delay caused by reasons already stated at the beginning of this judgment.

Turning to the merits the applicant seeks an interdict. In *Mukwena* v *Magistrate Sanyatwe NO & Anor* HH 765-15 MATHONSI J (as he then was) had this to say:-

> "In order to succeed in securing a stay of proceedings pending the review application, the applicant must establish those factors which would entitle him to a temporary interdict, namely, a *prima facie* right, an injury actually committed or reasonably apprehended, the absence of similar protection afforded by any other ordinary remedy and a balance of convenience favouring the grant of the interdict for interdict it is when the respondents are barred from proceeding with the trial."

Is the applicant's right to a fair trial under threat? I think not. The second respondent considered the evidence led up to the close of the state case and held that a *prima facie* case had been made. Section 174 (1) of the Criminal Law Code casts the burden on the state to prove the *actus reus*, that is

a) the accused is a public officer

b) who in the course of his/her duties or functions

c) by commission or omission, breached his or her duties or functions.

Once the state leads evidence which *prima facie* sets out these requirements, the burden to disprove intention on a balance of probabilities is cast on the accused person (*S* v *Chogugudza* 1996 (2) ZLR 28 (S) , Sv Masimike S-57-20).

The internal audit report referred to by the first witness is what led the second respondent to hold that it is now over to the accused to show that there was absence of intention to perform the functions of public office in a manner that was aimed at showing favour to someone.

The applicant has a right, constitutionally guaranteed to keep his silence and so should there be no evidence at all against him, as contended, no issue of self-incrimination arises as argued by *Mr. Mguni*.

The applicant's right to a fair trial is therefore not in jeopardy.

No injury has been committed or is reasonably apprehended in the circumstances.

In the event of a conviction the applicant has a right of appeal which is guaranteed. It can therefore not be said there is absence of any other ordinary remedy.

In *Prosecutor-General of Zimbabwe* v *Intrateck Zimbabwe (Pvt) Ltd & Ors* S-67-20, MAKARAU JA (as she then was) cited with approval the remarks by MALABA JA (as he then was) in *Attorney-General* v *Makamba* 2003 (2) ZLR 54 (S) where the learned JA said:-

> "The general rule is that a superior court should interfere in uncompleted proceedings only in exceptional circumstances of proven 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."

Has a case been made for interference *in casu*? Should this court stop the trial pending the hearing of an application for review?

In *Mhlanga* v *Magistrate Dzira & Anor* HB 111-22, MAKONESE J had this to say:-

> "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 ……"

I have already intimated that this is not the review application. I therefore shy away from making definitive pronouncements about the merits or demerits of that application. I however will say this much, the prospects of success of that application are not such as to persuade me to stop the trial pending the hearing of that review application.

The applicant must submit himself to the trial process, choose not to speak should he be so inclined and allow the trial to be concluded. Whether the review application would have been heard by 30 November 2023 is not a factor that persuades me to hold otherwise.

I posed the question earlier on as to whether a case had been made for the relief the applicant seeks. The answer is NO.

In the result I make the following order:-

The Urgent Chamber Application to stop the criminal trial proceedings be and is hereby dismissed.

S. Mguni and Associates, applicant's legal practitioners
National Prosecuting Authority, 1st respondent's legal practitioners