

BRIGHTON MUTISI

versus

MUGOVA N.O

AND

THE STATE

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI, 22 & 31 May, 2023

Urgent Chamber application for stay of proceedings pending decision on review

R. Mahuni, for the Applicant

No appearance for the 1st Respondent

T. H Maromo, for the 2nd Respondent

MUZOFA J [1] This is an urgent chamber application for stay of proceedings pending the determination of an application for review filed by the applicant under HC 107/23.

[2] The applicant appeared before the 1st respondent a Regional Magistrate sitting at Chinhoyi Court, facing a charge of rape in contravention of s65 of the Criminal Code.

[3] The trial proceeded with the 2nd respondent leading evidence until it closed its case. At the close of the 1st respondent's case, an application was made on behalf of the applicant for discharge at the close of the state case.

[4] After considering both the applicant and the 1st respondent's submissions, the 1st respondent dismissed the application and ordered the trial to continue.

[5] In dismissing the application the 2nd respondent found that there was prima facie evidence before the court to place the applicant on his defence.

[6] Dissatisfied by the decision, the applicant filed an application for review with this court. The application is pending. It is on that basis that the applicant seeks an order to stay the proceedings before the 1st respondent pending the determination of the application for review.

The applicant's case

[7] No issue was raised on urgency and the court believes the matter is urgent. It is urgent in the sense that, the applicant has already filed an application for review impugning the 1st respondent's decision. The court was advised that the defence case has commenced which means the trial is continuing. The 1st respondent insisted that the matter would continue unless there is an order to stay the proceedings. The approach by the 1st respondent cannot be impugned since this is a court that has powers to regulate its processes.

[8] The applicant's case as set out in the founding affidavit and the oral submissions by *Mr Mahuni* is that the court a quo misdirected itself in dismissing the application where there was no prima facie case against the applicant, that the 2nd respondent failed to prove the essential elements of the offence and that the complainant's case was inundated with material inconsistencies that no reasonable court might convict on her evidence.

[9] In his oral submissions, the *Mr Mahuni* elaborated on the inconsistencies by the applicant particularly if considered in light of the applicant's defence that he raised. I must dispose of this improper approach adopted by counsel to refer to the defence case in an application such as this.

[10] In an application made in terms of s198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07) the court is only called upon to confine itself to whether there is prima facie evidence against the accused. Even if the accused's defence outline would be before the court, the court does not consider it. It is all about the evidence as adduced by the State.

[11] The rationale for this approach is obvious. At this stage the accused's evidence would not be before the court. One of the dangers sought to be curtailed or addressed by this procedure is the miscarriage of justice where the defence case may actually fill in the gaps of a porous state case. The state case must be ventilated without regard to the defence case.

[12] It follows then that the submissions on how highly probable the applicant's explanation in his defence will not be considered in coming to a decision in this case. The State was alive to this procedural aspect and properly made submissions on the point.

The 1st Respondent's case

[13] No written submissions were filed in response to the application by the 2nd respondent. Mr *Maromo* indicated that he will make oral submissions in response to the application.

[14] The 2nd respondent opposed the application on the basis that the applicant has already been placed on his defence and if the applicant's fears have been overtaken by events. In my view since the matter has not been finalised, the applicant's apprehension is still valid. In terms of s26 of the High Court Act this court has jurisdiction to review proceedings of any inferior court of justice, tribunal or administrative authority. Since the Act is silent on the timing of a review, this court can review both unterminated and terminated proceedings.

[15] Further to that the point was emphasized that this court must be slow to interfere with unterminated proceedings unless there is a likelihood of a real miscarriage of justice and there is no recourse after termination of the proceedings. The court was referred to the case of *Mamombe v Mushure CCZ 4/22* and the cases cited therein.

[16] On the prospects on success, it was submitted that the application for review has no prospects of success since the alleged inconsistencies in the complainant's evidence can be reconciled. Even if the inconsistencies can lead to a finding that the complainant did not consent credible the applicant would still be liable on a competent verdict.

The law

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[17] The law on interference with unterminated proceedings is now settled. Both counsels properly made submissions on this aspect that superior courts are averse to interfere with unterminated proceedings unless there is a glaring misdirection or irregularity prejudicial to the applicant's rights. The irregularity must be such that it cannot be corrected after the termination of proceedings. See the *Mamombe* case (supra).

[18] In other words a court faced with such an application has to consider two main issues. The first issue is whether there is an irregularity in the proceedings. A mere irregularity will not suffice for no proceedings can be perfect so to speak. There must be a gross irregularity. What constitutes gross irregularity is a factual issue that no one since definition fits all. In the words of the court in *Ismail and Others v Additional Magistrate, Wynberg and Another 1963(1) SA 1(A)*, "It is not every failure of justice which would amount to a gross irregularity justifying intervention before completion --- The irregularity must be gross such that it results in a prejudice on the applicant's rights.'

[19] If there is a gross irregularity, the court must ask itself if the said gross irregularity cannot be corrected by any other means. A review and appeal are remedies that are remedies applicable to every proceeding before a court or tribunal. In view of that it follows that every irregularity or wrong decision has can be corrected after termination of the proceedings. To that extent it is only in very limited or exceptional cases that this court must interfere with unterminated proceedings. Otherwise, a rule of practice has developed in our courts to let the proceedings before the Magistrates court to run its course. The Magistrates should be able to exercise their jurisdiction with limited or no interference from the superior courts.

[20] Infact such applications place the court in a difficult position where it is asked to consider evidentiary aspects of an untermiated trial. There is a high likelihood to pre-empt or influence the decision of the lower court. This is so because a review in such cases is construed widely to include both the procedural and substantive issues of the state case. The court must delve into matters of evidence which are in the domain of an appeal. This precarious position in my view led to the sentiments by the court in *Shava v Magamore N.O & Anor HB 100/17* where the court had this to say about such grounds for review,

‘I have said that the applicant seeks to review the decision of the magistrate on what are clearly appeal grounds. In my view attacking a judgment on the ground that it is not supported by evidence would be a matter of appeal as opposed to review. It has been said in the past that the essential question in review proceedings is not the correctness of the decision under review but its validity. See Herbstein and van Winsen, *Civil Practice of the Supreme Court of South Africa* 4th ed. at p932. An applicant like the present applicant who seeks to have an interlocutory decision set aside in untermiated proceedings on the grounds that the court has made a wrong decision in the proper discharge of its adjudicating function, adopts the wrong procedure. The correct one should be to appeal. Therefore, to the extent that generally an appeal is entertained only after conviction, such a premature approach to a superior court will not succeed.’

Legal and Factual analysis

[21] In order to consider whether there was a gross irregularity for this court to interfere the court must consider the grounds for review.

[22] As already stated the court finds itself in a difficult position as it is not sitting as a review court neither is it sitting as an appeal court since some of the grounds for review are really grounds for appeal. That as it may the court must consider, on a prima facie basis whether there are prospects of success.

[23] I set out the grounds of review I full for completeness.

1. The first respondent’s decision to put the Applicant to her defence is so outrageous in logic that no reasonable Court acting carefully would arrive at it, in that: -
 - 1.1 The First Respondent is procedurally seeking to facilitate the second Respondent (the State) to bolster its otherwise manifestly weak case through the defence evidence. This is procedurally unattainable at law because no onus lies on the Accused person to assist the Court to prove her guilt.
 - 1.2 The First Respondent has irregularly reversed the onus of proof in a criminal trial by seeking the Applicant to prove his innocence, such improper shifting of the onus of proof is blatant violation of the presumption of innocence.

- 1.3 The First Respondent's decision to place the Applicant to his defence on an offence whose essential elements have not been *prima facie* established is contrary to the laws set out in Section 198 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07).
- 1.4 The First Respondent's failure to consider that there was no evidence proffered by the State to prove the essential elements of the offense the Applicant stands charged with, is contrary to law especially in light of the evidence led by the State confirming to law especially in light of the evidence led by the State confirming that there was Rape as defined in **Section 65 of the Criminal Law (Codification and Reform Act) Chapter 9:23.**
- 1.5 The first Respondent's failure to consider that there was no evidence linking the Applicant to the offense is contrary to the law especially in light of the glaring deficiencies in the State evidence as there was no evidence that the evidence by the State witnesses was manifestly insufficient and unreliable to place the Applicant to his defense.

[24] As already stated such an application would invariably stray to grounds for appeal since it's a review in its wide sense. So, the grounds for review must also be concise. They must not be generalised. Similarly, they must not amount to submissions in the heads of argument. In short, they must state the irregularity in precise terms. The court need not surmise or seek further particulars on the ground for review.

[25] The applicant's grounds for review suffer a still birth in that they are too general. For instance, the first ground does not state why the state case is said to be weak. The 2nd ground for review does not state which essential elements of the crime of rape were not proved. The third ground is a contradiction in its terms, the drafting counsel must have mixed up issues. That ground for review confirms that the state led evidence confirming that the offence was committed. The 5th ground is a mouthful raising a number of general issues that there was no evidence linking the accused to the offence, that there were glaring deficiencies in the state case, that the state case was manifestly insufficient and unreliable.

[26] I shall use the 5th ground for review to demonstrate how bad at law that ground for review is. That ground for review would pass for a concluding paragraph in the applicant's heads of argument after a proper analysis of the real issues being impugned.

[27] That there was no evidence is insufficient and falls below the mark for a review court to consider substantively if the 1st respondent fell into error. This is so because before the 1st respondent the complainant gave evidence of how the offence was committed, the person who received the report from the complainant gave evidence and the medical report was produced confirming that penetration was highly probable. The applicant must have pointed out the precise issues placed before the 1st respondent that led to the conclusion or the inference that there was insufficient evidence. An inference by the applicant cannot be a ground for review. It is what transpired or what was not proved that forms an appropriate ground for review. This reasoning applies to the 1st, 3rd, 4th and 5th grounds for review. On that basis they lack merit.

[28] In his oral submissions counsel for the applicant submitted that the state case was weak because the complainant gave three contradictory versions of what the applicant was doing when he called her to his place. This is not referred to in the applicant's founding affidavit neither is it a ground for review. In fact, this supposed to be in the grounds for review. It is trite that oral submissions cannot amend a founding affidavit. I comment in passing that the founding affidavit was also inundated by general statements that there was no evidence and that the applicant would be greatly prejudiced if the trial is allowed to proceed. There was no deliberate effort to address the prospects of success on review. On that basis the application can be dismissed, for an application stands or falls on the affidavits. See *CABS v Finormacg Consultancy (Pvt) Limited & Anor SC 56 /22*.

[29] The 2nd ground for review is clear and to the point. The applicant's point is that the 1st respondent shifted the onus of proof to the applicant which would goes against the principle of law that in criminal proceedings the state bears the onus to prove its case beyond a reasonable doubt. No onus lies on an accused person save in strict liability cases or where by statutory provision the legislature places the onus on the accused person.

[30] The issue on the reversal of the onus was informed by the last paragraph in the 1st respondent ruling where he noted, 'The accused has to explain why the complainant is pointing at him.' It is my considered view that the statement was taken out of context. If taken in context, there can be no doubt that there was no reversal of the onus to the applicant.

[31] The statement did not just appear in the ruling without a background. In the penultimate paragraph the 1st respondent analysed the complainant's evidence and the circumstances surrounding the commission of the offence. The court reasoned that the complainant knew the applicant, she also was very conversant with the room that the alleged rape took place because her friend used to live in that room. The 1st respondent referred to the medical report produced by consent. It showed that sexual intercourse took place and the complainant had indicated that she had not consented. It is only then that the 1st respondent alluded to why the applicant must explain himself. It might be an inelegant way to express the reason to dismiss the application but that statement should be understood to mean that the state had established a case that requires the matter to proceed to the defence case. The ground for review has no prospect of success.

[32] From the forgoing there is no basis placed before the court to interfere with the untermiated proceedings against the applicant. No gross irregularity can be deciphered from the proceeding. In any event even if there is any irregularity, the applicant is still at large to proceed by way of appeal in the event that he is dissatisfied by the 1st respondent's decision.

[33] No issues were raised on costs. The appropriate order in the circumstances is for each party to bear its costs.

Accordingly, the application is dismissed.

Each party to bear its costs.

Mahuni Gidiri Law Chambers, Applicant's Legal Practitioners.

National Prosecuting Authority, 2nd Respondent's Legal Practitioners.