

KENNEDY NYABINDE  
and  
MR VUDZIJENA N.O.  
(In his capacity as the Presiding Magistrate)  
and  
ATTORNEY GENERAL N.O.

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 16 August 2006

### **Application for Review**

CHITAKUNYE J: The applicant was charged with the crime of theft to which he pleaded not guilty. He was nevertheless convicted after a trial.

Dissatisfied with the conviction he applied for review of the criminal proceedings in terms of sections 26 and 27 of the High Court Act [*Chapter 7:06*].

Section 27 of the said Act sets out the basic grounds upon which criminal proceedings maybe placed before this court for review. These comprise

- (1) the absence of jurisdiction on the part of the court, tribunal or authority concerned;
- (2) interest in the case, bias, malice or corruption on the part of the persons presiding over the court or tribunal concerned, or on the part of the authority concerned as the case may be,
- (3) gross irregularity in the proceedings or the decision.

Any applicant who wishes to bring criminal proceedings for review must bear in mind the above grounds.

In *casu*, the manner in which the grounds for review were couched left a lot be desired. The applicant did not state clearly which of the grounds he was relying on. It is only as one reads through that one realises that the first ground of lack of jurisdiction is not one such ground. What emerges is that applicant sought to base his case on the remaining two grounds.

Even then such reliance was not aptly put forward. For instance the third ground of gross irregularity was merely a bold statement without any substance. It reads

**“Gross irregularity in the proceedings.”**

The applicant believes the proceedings in the court *a quo* were fraught with gross irregularity and were not free and fair or were not done in a just manner and prays for an order in terms of the draft.”

This is clearly inadequate as it is shorn of the conduct that is said to be grossly irregular. No particulars of such gross irregularities were pointed out under the ground. On the second ground applicant seemed intent on providing details of bias or interest by the trial magistrate but again could not do so articulately.

For instance under “on conviction” the applicant alluded to his dissatisfaction with the proceedings and his belief that the trial magistrate believed the State’s evidence as against his evidence. Arguments raised hereunder pertain to the trial magistrate’s assessment and findings on credibility of the witnesses. In challenging such findings applicant sought to say that the trial magistrate totally disregarded his defence and accepted the State’s case unreasonably. This was not the case. A perusal of the reasons for judgment shows that the trial magistrate carefully considered all that was said and produced before him as evidence before deciding to believe the State’s version. He explained why he believed a particular witness’s evidence. The applicant’s contention was therefore misconceived. For instance, the applicant submitted that the trial magistrate should not have accepted into evidence deposit and withdrawal slips that were used to transfer the money in question without a handwriting expert’s evidence. But surely there was no dispute that the complainant signed those slips. The issue was on the circumstances under which he signed the slips and not whether he signed them or not. So handwriting evidence was not necessary. It was also not disputed that applicant did books of accounts for complainant

including attending to complainant's applications for bank loans. He would in the process bring documents for complainant to sign.

It was further not disputed that a sum of \$6 million was transferred from complainant's bank account into applicant's bank account as a result of the withdrawal and deposit slips complainant had signed.

The issues, as already alluded to pertained to the circumstances under which complainant signed those slips and whether he actually authorised the transfer of the money. The complainant's stance was basically that he did not authorise the transfer of the money. He signed the slips in question when he was signing loan application forms applicant had brought to him. At the time he signed the papers he believed they were all in respect of the loan application he was making.

On the other hand the applicant contended that the complainant authorised the transfer. To confirm this he said at first complainant wrote a letter to Agribank branch manager directing the transfer of \$6 million into applicant's account. When the letter was unsuccessful the complainant then signed a withdrawal and a deposit slip to effect the transfer of the \$6 million. This time the bank effected the transfer. He said the \$6 million was a gift from complainant to assist him attend to his sick mother-in-law and mother and to also retain his services.

As already noted above complainant denied ever writing the letter authorising the transfer nor knowingly signing the slips to effect the transfer. He was alerted of the transaction by his bank officials after which he advised them he had not authorised such a transaction. This led to applicant's arrest.

The bank officials who testified denied ever seeing a letter written by the complainant asking for the transfer of the money. The applicant could not produce that letter in court, though from his testimony he retained the letter after the bank had rejected it.

A careful analysis of the evidence adduced in court shows that there was no bias in the assessment of evidence such as to warrant this court's interference in the proceedings.

Equally no case of gross irregularities has been made out. This is a case where applicant is simply trying his luck at getting the conviction revisited without going through the process of an appeal. It is my view that applicant should have appealed against the conviction if he strongly felt he had a case.

The proceedings are confirmed as being in accordance with real and substantial justice. The application to have the proceedings set aside is therefore dismissed.

*Chirambasukwa & Associates, the applicant's legal practitioners*  
*The Attorney-General's Office, for the respondent*