LIBERTY MAGODO
and
TINEVIMBO MUZEZEWA
and
RICHARD BUZUZI
versus
CHIEF SUPERINTENDENT KEZIAS KARURU

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 16 May 2018

Opposed Application for review

Ms K. Hutchings, for the applicants
Ms. N.L Mabasa, for the respondent

MUZENDA J: The three applicants are police details who were charged in terms of paragraph 35 of the Schedule to the Police Act [*Chapter 11:10*] as read with paragraph 29 (A) (iii) of the same Act which reads:

> "Acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force."

The three appeared for hearing on the 21st November 2014 before a single officer, the respondent, Chief Superintendent Kezias Karuru. The State led evidence from four witnesses and closed its case. On the 20th March 2017 the applicants jointly moved the trial officer through an application for a discharge at the close of the prosecution case in terms of section 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The trial officer dismissed the application and ordered that the three be placed on their defence since the state had managed to prove a *prima facie* case against them. The trial officer in his ruling gave the applicants brief reasons for the dismissal of the application for discharge and indicated that he would provide detailed reasons after hearing the defence case in his final judgment. The applicants, then filed an urgent chamber application under case number HC 3198/17 for review on the same grounds outlined in

this current application. MUSAKWA J ruled that the urgent chamber application brought by the three applicants was not urgent and he struck it off the roll of urgent chamber applications.

On the 19th October 2017 the three applicants filed this application seeking the following relief in the terms of the draft order attached to the application:

> "1. The order of the court *a quo* is set aside and substituted with the following:
> (a) the application for discharge at the close of the state case, be and is hereby granted, 1st, 2nd ` and 3rd accused be and are hereby acquitted.
>
> Alternatively
>
> 2. First respondent be and is hereby directed to give reasons, for the ruling made on 7th April 2017 dismissing the application for discharge at the close of the state's case within 10 days of this order.
> The application is opposed.
> The following appears on the grounds for review
> "(a) the decision of the respondent refusing to give reasons for dismissing applicants' application for discharge at the close of the state's case is grossly irregular.
> (b) the respondent's decision to refuse applicant's access to the record of proceedings for purposes of seeking a review of the proceedings is grossly irregular.
> (c) the respondent's decision to dismiss the applicants' application for discharge at the close of the state's case where there are inconsistencies in the state's evidence is grossly irregular."

These three grounds for review prominently appear in the applicant's affidavits and paragraph 7 of first applicant's founding affidavit contains the following extract.

> "I refer this Honourable Court to page 53 of the record of proceedings where the following transpired. Ruling application per discharge at close of state case……..
>
> Having gone through the submissions by both defence and state counsel, as well as the record of proceedings, it is adjudged that the state has a *prima facie* case and the accused to be put to their defence. A comprehensive reasoning for the ruling to be given in the judgment.
> Court: While the state seems to concur that the reasons for the ruling be availed before we proceed to the next stage of the trial. May parties be guided that the court has the right to hold reasons for the main judgment as it has done where it may seem giving reasons at the moment is not desirable. It suffices to say the state has a *prima facie* case and the accused have to respond to the allegations. The requirement is that the court should provide reasons in the main judgment as it has alluded to." [my emphasis].

The applicants' further content that the trial's action was grossly irregular for withholding his reasons for dismissing the application for discharge and cited section 68 (2) of the Constitution which provides thus:

> "Section 62: any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct was the right to be given promptly and in writing the reasons for the conduct."

According to the applicants the duty by the trial officer to give reasons for this ruling is a Constitutional requirement and would also create an impression of fairness and improves the quality of decision making; unreasoned decisions are arbitrary and unfair, they alleged.

Section 27 of the High Court Act [*Chapter 7:06*] provides the grounds for review as follows:

> "(1) Subject to this Act and any other law, the grounds on which any proceedings on decision may be brought on review before the High Court shall be
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c)gross irregularity in the proceedings or the decision"

From the reading of the applicants' papers it is clear and conspicuous that the applicants have brought this application under section 27 (c) that is on grounds of gross irregularity on the part of the trial officer.

Section 35 (1) of the Police Act provide as follows:

> "the proceedings before or at any trial by board of officers or an officer in terms of this Act, shall be as near as may be, be the same as those prescribed for criminal cases in the courts of Zimbabwe."

In other words this is why the applicants utilized provisions of section 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] in applying for a discharge of the applicants at the close of the state case.

Having outlined the law, it is now incumbent to analyse the grounds of review raised by the applicants. I will start with the second ground of review outlined by the applicants in their application.

(a) WHETHER RESPONDENTS DECISION TO REFUSE APPLICANT'S ACCESS TO THE RECORD OF PROCEEDINGS FOR PURPOSES OF SEEKING A REVIEW OF THE PORCEEDINGS IS GROSSLY IRREGULAR:

Paragraph 7 of the first applicant's founding affidavit refers this court to page 53 of the record of proceedings. Pages 13 to 85 of the applicants' application contain the entire record of proceedings which clearly shows that this ground of review is baseless and is accordingly disregarded by this court. The averment by the applicants are either misplaced or purely mischievous to allege that the respondent did not avail the record of proceedings yet they allude to it and went on to annex it to the application.

WHETHER RESPONDENT'S REFUSAL TO GIVE REASONS FOR DISMISSING THE APPLICANTS' APPLICATION FOR DISCHARGE AT THE CLOSE OF THE STATE CASE IS GROSSLY IRREGULAR

The reading of the record of proceedings shows that the respondent, did not refuse to give reasons for the dismissal of the application for discharge of the applicants at the close of the state case. Ms *K Hutchings* who appeared for the applicants on this application submitted that the respondent should have granted the application for discharge and the failure to do so by the respondent, the trial officer, were in contravention of real and substantial justice. She went on to attack the evidence adduced by the state and cited a number of case law authorities to support her submission. She reiterated the provisions of section 68 (2) of the Constitution and submitted that the failure by the trial officer was a fundamental breach of the applicants' constitutional rights and went on to cite a host of South African case law authorities to support her submissions. She cited the matter of *Makawa and another* 1991 (1) ZLR 142 (5). *S* v *Kachipare* 1998 (2) ZLR 271 (5), *A.G.V Mzizi* 1991 (2) 321, *S* v *Tsvangirai* 2001 (2) ZLR 426 among others.

Ms *Mabasa* for the respondent argued that the proceedings brought by the applicant for this review were interlocutory in nature. There was no finality to them and the applicants had a lot of options open to them after the trial. She submitted that the respondent made a correct ruling and ordered the applicants to be put on their defence. She cited cases to the effect that failure to give reasons for a decision made does not violate the applicant's right to a fair trial. I agree with Ms *Mabasa*'s submission. The respondent did not refuse, to give reasons, he did, but indicated that detailed reasons would be furnished at the time of judgment. The question is did this amount to a procedural impropriety which would move this court to review the proceedings below? The procedural impropriety is a ground which covers not only failure to observe the rules

of natural justice, but also failures to observe the procedural rules expressly laid down in the particular legislative instrument which confers the power in question.

This is one of the notorious cases where applicants hurriedly move disciplinary proceedings to be abandoned on grounds of rushing to the High Court for 'review'. The applicants should have proceeded with the hearing and only after a ruling or judgment would they have brought the matter to this court using section 31 of the Police Act for review or appeal against the judgment of the trial officer.

In the matter of *Jani* v *Officer in Charge Mamina and others* HH 4289/15 the court held that:

> "The High Court will only exercise its renew powers of unterminated proceedings in exceptional cases where grave injustice might otherwise result or where justice might not by any means be attained."

See also *Albert Matapo and others* v *Magistrate Bhilla and the Attorney General* HH 84/2010 by UCHENA J (as he then was). In *Haiti* v *Katiyo (N.O) and National Prosecuting Authority* HHC 6307/15 the court held that:

> "The cardinal principle to observe is that the courts are reluctant to issue orders that in effect stall trial proceedings, unless the circumstances clearly require it."

In *State* v *Rose* HH 71/12 the court held that the test when a superior court could intervene in unterminated proceedings is whether a grave injustice can be done to a litigant. A superior court however is usually slow to exercise its powers of review in such a matter whether by mandarmus or otherwise and will only do so in rare cases where justice might not by other means be obtained. The intervention can be done if the justice is so gross that it is incapable of correction by way of ordinary review or appeal or where it is unconscionable to wait for the conclusion of the proceedings before seeking review in the normal way.

If section 31 of the Police Act is properly utilized by police details who are subject of disciplinary proceedings. The High Court will not be inundated by review applications of incomplete trial proceedings. These applications of incomplete trial proceedings, interlocutory nature stretch the fiscus and inconvenience the litigants themselves. The applicants in this matter ought to have gone through the proceedings and thereafter utilized section 31 of the Police Act. I am not convinced by the applicants that this is one of the rare applications that the court can exercise its review powers on unterminated proceedings. Had the trial officer failed to provide

the reasons for judgment at the end of trial, surely the applicants would have had excellent grounds for review.

WHETHER THE DECISION TO DISMISS AN APPLCATION FOR DISCHARGE IS GROSSLY UNREASONABLE AND THAT IT BE SET ASIDE AND SUBSTITUTED WITH AN ORDER UPHOLDING THE APPLICATION FOR DISCHARGE.

This aspect/ground for determination is related to the relief being sought by the three applicants, where they pray that they be all acquitted at the close of the state case. Section 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides as follows:

> "198 (3) if at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons, charge, or any other offence of which he be convicted thereon, it shall return a verdict of not guilty."

At the close of the prosecution case the state had led evidence from Charity Manyate, Dennis Manonge, the brother of the deceased and Nyaradzo Magodo, a passenger in deceased's motor vehicle. All the three witnesses were eye witnesses and all three pointed to the applicants as responsible for the death of the deceased combi driver. It is not in dispute that deceased died from the injuries sustained in the melee between the applicants and the deceased. Witnesses saw the deceased being manhandled by the three applicants, falling and writhing in pain and asking for help from the three applicants who refused to assist him.

It is upon this background that the three applicants applied for their discharge at the close of the state case. The law on the application of section 198 (3) is settled but for purposes of this application it needs reiteration. In the matter of *State* v *Morgan Richard Tovangirai and others* HH 119 -2003 GARWE J (as he then was) summarised the oft stated principle as follows:-

> "In terms of section 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] where at the end of the state case the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit him."

In particular the court must discharge the accused at the close of the case for the prosecution where:

a) There is no evidence to prove an essential element of the offence.
b) There is no evidence on which a reasonable court acting carefully, might properly convict.
c) The evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it.

Whilst it is settled that a court must acquit at the end of the state case, where evidence of the prosecution witness has been to manifestly unreliable that no reasonable tribunal could safely convict on it, such cases will be rare and would occur only in most *exceptional* cases where the witness' credibility is so utterly destroyed that no part of his material evidence can possibly be believable.

See also *S* v *Kachipare* 1998 (2) ZLR 271 (s) at page 276 B – F.

The trial officer ruled that there was a *prima facie* case for the applicants to put them to their defence having looked at the evidence of the prosecution witnesses, there is no procedural irregularity on his part. The decision he made is above reproach, the discretion he used was proper in this court's view. The applicants ought to have testified and trial officer would have made a value judgment, in the whole matter. We are dealing with a procedure rather than substantive law and the answer to the question posed by the applicants is whether the trial officers decision to dismiss the applicants' application for discharge at the close of the state's case where there are inconsistencies in the state's evidence is grossly irregular, is obviously in the negative. There is nothing grossly irregular about the procedure allowed by the respondent which would warrant this court to intervene by way of review.

Herbstein and Van Winsen: *Civil Practice of the Superior Court of South Africa, 4th Edition* at p 93 wrote:-

> "The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason of wanting that is that the court came to a wrong conclusion on the facts of the law. The appropriate procedure is by way of appeal where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends therefore on whether it is the result only or rather the method of trial, which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. <u>The giving of a judgment not justified by the evidence would be a matter of appeal and not review upon</u> this test. The essential question in review proceedings is not the correctness of the decision under review but its validity" (my emphasis).

The applicants were legally represented and the record of proceedings is tainted with applications, interjections pulling of the state's representative etc. this is purely uncalled for. It is trite that the Police Act equates proceedings before a disciplinary authority in the police to that of conventional courts but legal practitioners should not take advantage of police prosecutors by forcing them to make concessions which are not necessary not to toe the line of thinking of the

legal practitioner. In this matter the decision by the legal practitioner to bring an application for review before the testimony of the applicants was hurriedly made. What was ideal in the circumstances was to lead the applicants into their defence whereafter if convicted the applicants would have resorted to section 34 of the Police Act which provides for options open to convicted officers of the police. Provisions of sections 31 – 34 of the Police Act, must be utilized more often than resorting to unnecessary applications for review for incomplete proceedings.

In this application, the applicants wants this court to order the acquittal of the three applicants at the close of the state case, in other words applicants apply that this court assume the role of trial officer, analyse the evidence of the state and announce a verdict without having the version of the applicants. As stated earlier in this judgment, such a course of action could be taken if the court finds fault on the side of the trial officer. This court did not find any, nor can it be said that the applicants managed to prove any ground to review such an action by a review court.

The trial court should be allowed to proceed with the trial and such completion of trial should be expedited.

Disposition

The application is dismissed with costs.

Coghlan Welsh & Guest, applicants' legal practitioners
The Civil Division of the Attorney General's office, respondent's legal practitioners