ADAM ZVANDASARA
and
GILFERN MOYO
versus
NGONI NDUNA (N.O)
and
PROSECUTOR GENERAL

HIGH COURTOFZIMBABWE
CHIKOWEROAND KWENDA JJ
HARARE, 6 July 2021 & 15 December 2021.

Court application for review of unterminated criminal proceedings

G.Madzoka, for the applicants
No appearance for 1st respondent
T. Mapfuwa, for the 2nd respondent

CHIKOWERO J: Introduction;

This is an application for review of the Magistrates Court's decision to place the applicants on remand.

Factual Background

The applicants are employed by the Zimbabwe National Road Administration (ZINARA) as Finance Director and Human Resources Director respectively. They are stationed at the Head Office in Harare.

In November 2020 they appeared before the first respondent, sitting as the Magistrates Court, Harare facing four counts of Contravening s 14(2) of the Prevention of Corruption Act [*Chapter 9:16*]

The 2nd respondent applied that they be placed on remand relying on the facts set out in the Request for Remand Form as well as what the court below treated as evidence led from the bar by the Public Prosecutor. The Public Prosecutor, who represented the state in the proceedings, not only gave "oral evidence" as aforesaid but produced six documents which he said were

exhibits. The documents are part of the record of the remand proceedings. They were marked as exhibits 1-6. The applicants' defence counsel (not Mr Madzoka) consented to the production of the documents. The Public Prosecutor, not satisfied with relying on the contents of the Request for Remand Form, spoke to the merits of the matter by explaining the contents of the six documents produced by himself. He did this in a bid to prove that the facts set out in the Request for Remand Form disclosed the offences preferred against the applicants and that the applicants were linked to those offences. The Public Prosecutor proceeded in the manner that l have indicated in an endeavour to demonstrate that there was a reasonable suspicion that the applicants committed the offences in question. Thus, based on the combined facts stated on the face of the Request for Remand Form, oral evidence and the documentary 'exhibits', the Public Prosecutor prayed that the applicants be placed on remand.

The application to place the applicants on remand was opposed. In like manner, the legal practitioner representing the applicants also gave "oral evidence" from the bar. He also produced six voluminous documents, whose contents he explained. The production was with the consent of the Public Prosecutor. The documents were marked as exhibits 7-12. Sixteen pages of the record of the remand proceedings are taken up by the 'oral testimony" of the legal practitioner. For his part, the legal practitioner proceeded as he did to persuade the Court below that the applicants conduct was lawful. According to counsel, the applicant's defence was that of justification and defence meant that there was no reasonable suspicion that the applicants committed any offences, and erased whatever offences the applicants were facing.

Section 14(2)(c) of the Prevention of Corruption Act [*Chapter 9:16*] reads as follows:

> " Any person who, without lawful excuse;
>
> (a)…….
>
> (b)…….
>
> (c) does anything calculated or likely to prejudice any other person because that other person has given any information, whether in terms of this Act or otherwise concerning any corrupt practice shall be guilty of any offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

The allegations against the applicants, as outlined in the annexure to the Request for Remand Form, were simple. They were that on 22 October 2020 the applicants, acting in

connivance, transferred the first, second, third and fourth complainants from the ZINARA Head Office Finance Department to Skyline Tollgate, Eskbank Tollgate, Infralink and Management Accounting respectively. The transfers were prejudicial to each of the complainants because they were effectively applicants' way of dealing with the complainants for supplying information to the Zimbabwe Anti-Corruption Commission in an on-going investigation targeting the ZINARA executive among whom the applicants were counted. The facts are graphically set out in paragraphs 4-12 of the Request for Remand Form (in respect of each count) in the following words:

> "4. On 7 October 2020 Zimbabwe Anti-Corruption Commission [ZACC] served ZINARA with a Warrant of Search and Seizure WSS 102/2020 requesting [ZINARA] that certain documents immediately be produced for the purpose of an ongoing investigations (*SIC*] under ZACC Reference HCR 29/10/20 where the investigation was targeting the ZINARA executive in which the two accused persons are part of.
> 5. Accused number [1] ordered the complainants to quickly produce the documents as mentioned in the Warrant of Search and Seizure since the required documents were in his offices.
> 6. The documents were handed to [ZACC] officers through the Company Corporate Secretary View Muzite.
>
> 7. On 14 October 2020 complainant was invited to Zimbabwe Anti-Corruption Commission [ZACC) to clarify on the documents received from [ZACC].
>
> 8. On 22 October 2020, accused [2] wrote a transfer letter which was counter-signed by Nkosinathi Ncube not yet arrested transferring the complainant to Skyline Tollgate as Accounts Clerk Tolling Reconciliations with effect from 26 October 2020.
>
> 9. On 23 October 2020 accused [1] served the complainant with the transfer letter.
>
> 10. On 26 October 2020 Accused [2] issued a verbal instruction to a security guard Tongoreva Musiiwa manning the main entrance at ZINARA head office to barring the complaint [*SIC*] from entering ZINARA head office premises.
>
> 11. When the accused persons transferred the complainant they well knew that Zimbabwe Anti-Corruption Commission was investigating allegations of Criminal Abuse of office as a Public Officer as defined in Section 174(a) of the Criminal Law Codification and Reform Act Chapter 9:23 and that the complainant was assisting the commission in the investigation and was likely to provide more information of other unreported corrupt activities at [ZINARA).
>
> 12. The transfer was likely to prejudice the complainant because the complainant had given information concerning corrupt practices by [ZINARA) executives to [ZACC]

The only differences in the facts, in respect of each of the four counts, is in relation to para 8.

Therein, the specific complainant is named as well as the work station to which the particular complainant was transferred to as well as such complainant's job title.

The evidence section of the Request for Remand Form states the following facts as linking the applicants to the commission of the offences:

- Letters of transfer
- Witness statements
- E-Mail messages sent by the applicants.

These are some of the documents that the Public Prosecutor produced as "exhibits."

For completeness, l record that the applicants' legal practitioner produced, as 'exhibits', the following documents:

- Extract of a Resolution of 1 March 2019 by the ZINARA Board to appoint a Human Resources Consultant (dated 11 November 2020).
- Extract of a Resolution of 17 September 2019 by the ZINARA Board to engage PRAZ and procure the services of the Human Resources Consultant as a matter of urgency (dated 11 November 2020)
- Extract of a Resolution of 24 September 2020 by the ZINARA Board adopting the organizational structure for further action (dated 11 November 2020)
- ZINARA phase one Organizational Restructuring Report dated May 2020 (58 pages)
- Resolution of 24 September 2020 by the ZINARA Executive on New Structure implementation (dated 22 October 2020)
- ZINARA Schedule of Staff Movements

The *viva voce* "evidence" of the legal practitioner, based on these documents, was meant to show the court below that the applicants had a lawful excuse in transferring the complainants. The transfers, so it was said, were lawful. They were effected as part of the ZINARA restructuring exercise and had nothing to do with the investigations by ZACC. The restructuring

exercise was commenced well before the applicants joined ZINARA and, for good measure, well before ZACC commenced investigating allegations of criminal abuse of duty as public officers against the ZINARA executives on 7 October 2020. Therefore, so said the applicants' legal practitioner *a quo,* there was no reasonable suspicion that the applicants committed the offences because the transfers were lawful.

In determining the application the court below referred to pertinent case law. It noted that what was required of the state to succeed in persuading the court to place the applicants on remand

was to allege facts which disclose all the essential elements of the offence and that there must be a nexus between the applicants and the facts so alleged. The court observed that what was required was suspicion and not certainty, but that the former must make sense otherwise it would be frivolous or arbitrary and hence not reasonable. At page 3 of the judgment, the learned magistrate remarked:

> "I have gone to speak about the above principles because the accused persons are not arguing that the allegations do not aver enough to found the essential elements of the offence in section 14(2(9 c) of the Act (*supra*). They are saying there is justification in what it is alleged they did and hence their conduct was lawful. It is for this reason to demonstrate just cause that evidence was placed before the court over the bar ……"

The learned magistrate proceeded to discuss the "evidence" adduced from the bar by the Public Prosecutor and the applicants' legal practitioner. He concluded that the allegations met the

minimum threshold for placement on remand and raised triable issues. Accordingly, he placed the applicants on remand.

The grounds of review

The basic ground upon which the decision a quo is sought to be reviewed is that it is grossly unreasonable. It is useful that l capture the specifics of that ground. They are;

"1. The lower court grossly misdirected itself by making a finding that, there was a reasonable suspicion that the 1st and 2nd applicants committed an offence as alleged, yet the conduct they were accused of having done was lawful.

2. The court *a quo* grossly misdirected himself (*sic*) in finding that the provisions of section 14(2)(c) of the Prevention of Corruption Act [Chapter 9:16] are in conflict with the Labour Act [Chapter 28:01] and the Official Secrets Act [Chapter 11:09] but nonetheless ruled that there was a reasonable suspicion that the applicants had committed the offence. Once, the court a quo found that there was a conflict between the Labour Act and the Prevention of Corruption Act the Labour Act ought to have taken precedence.

3. The Learned Regional Magistrate in the Court a quo, grossly misdirected himself, by making a finding that there was a nexus between the 1st and 2nd applicant and the alleged offence, yet the evidence placed before him indicated the opposite as the acts conducted were lawful and in accordance with the policy of their employer Zimbabwe National Roads Administration.

4. 1st and 2nd Applicants rebutted the allegations made by the 2nd respondent through oral and documentary evidence produced as exhibits, which evidence was not challenged by the 2nd respondent and to the extent that the lower court did not take into account such evidence in making its determination, it grossly misdirected itself.

5. The decision of the 1st respondent is in all respects grossly unreasonable in its defiance of logic and common sense in that it perpetuates the unconstitutional breach of 1st and 2nd Applicants' right to liberty and does clearly show that the 1st respondent's ruling was biased against the 1st and 2nd applicants without any acceptable legal justification."

The applicants prayed for the setting aside of the decision placing them on remand and that the same be substituted with an order removing them from remand.

What is reasonable suspicion and how does a remand court deal with an application to place an accused person on remand?

I will refer to dicta in a number of cases on the subject.

In *Attorney-General* v *Blumears and Another* 1991(1) ZLR 118(SC) GUBBAY CJ said at 122 H -123C:

> "As mentioned en passant, the adversary safeguards customarily employed at a trial such as, the presentation of witnesses, the full exploration of their testimony on cross-examination and the application of the hearsay rule, are not essential for the determination of "reasonable suspicion"…… That issue is capable of being reliably determined without an adversary hearing. The standard is the same as that for arrest without a warrant. It does not require the fine resolution of conflicting evidence that guilty beyond a reasonable doubt demands, or even, a preponderance of probability. Certainty as to the truth is not involved for otherwise it ceases to be suspicion and becomes fact, See S V Ganyu 197792) RLR 97(A)…… Suspicion, after all, is nothing more than a state of conjecture or surmise whereof proof is lacking."

At 125 A, HIS LORDSHIP continued:

> "Of course, if the facts presented do not constitute a criminal offence known to the law , then cadit quaestio – the assumption that the State is able to prove those facts would be of no relevance. And if this requirement is met, then such facts must sufficiently link the accused with the commission of the offence in the sense that they create a reasonable suspicion of his having committed it, or being about to commit it."

Next is *Martin* v *A – G and Another* 1993 (1) ZLR 153 (S) where GUBBAY CJ expressed himself as follows, at 159 B - D:

> "It is the entitlement of every individual to challenge the power and right of the state to place him on remand. This he does upon a submission that insufficient facts have been alleged to enable the court to objectively find the existence of a reasonable suspicion of his having committed, or being about to commit, a criminal offence, thereby justifying the deprivation of his personal liberty under S 13(2)(e) of the Constitution. He may adduce evidence, as the applicant did, designed to demolish, clarify or weaken, the facts alleged by the State. The test to be applied is the same as that for arrest without a warrant. It does not require the firm resolution of conflicting evidence that guilty beyond a reasonable doubt demands,

> nor even a preponderance of probability. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking. See *Attorney General* v *Blumears and Another* 1991(1) ZLR 118 (S) at 122 B-C; *S* v *Ganyu* 1977 (2) RLR 1977 (2) RLR 97(AD) AT 104 F"

Although the court was dealing with an exception to an indictment and an application for further particulars, the sentiments of BHUNU J, as he then was, in *S* v *Kurotwi and Another* 2012(1) ZLR 275(H), at 279E, are instructive. This is what HIS LORDSHIP said:

> "The purpose of an indictment is to inform the accused of the case he is going to meet in court, without necessarily providing the evidence required to prove the allegations. The summary of the state case provides a precis of the evidence upon which the state intends to rely on in proving its case. *Viva voce* evidence, documents, exhibits and any other evidence constitute the actual proof of the allegations against the accused as alleged in the indictment and summarized in the outline of the state case. It is important not to confuse one stage with the other."

What is clear from the cases cited is that evidence is not essential in a determination, by the remand court, of the existence of reasonable suspicion. Facts set out in the form 242 suffice. After all, that document is called a "Request for Remand Form." It means the state can use the facts alleged therein to apply, or request, that the accused be placed on remand.

We note that an accused person may adduce evidence in opposing an application for his placement on remand. It must follow that such evidence would be limited to the challenge to have him placed on remand. The procedure cannot be allowed to mutate to a pseudo-trial with the accused person's legal practitioner (not the accused) giving viva voce evidence and producing exhibits, under the guise of making submissions, in a bid to establish a defence to the offences for which the state applies to have the accused remanded.

The grounds for review 1, 3 and 5 all attack the magistrates court's finding of reasonable suspicion as grossly unreasonable. The basis for the attack is that the applicants' conduct of transferring the complainants was lawful. As correctly observed by the learned magistrate, and urged upon us by Mr *Mapfuwa*, the applicants' contention that their conduct was lawful was irrelevant to the determination of the existence or otherwise of reasonable suspicion. Lawfulness is a defence excusing the applicants from liability. If they are able to establish that defence at the trial they may be acquitted. In our view, the learned magistrate should have determined the application before him without paying any regard to the 'evidence" placed over

the bar by both the public prosecutor and the applicants' legal practitioner. That material was not properly before him. It was wrong for the state to seek to establish the existence of a reasonable suspicion that the applicants committed the offences in question by proving the allegations set out in the annexure to the Request for Remand Form. That can only be done at the trial proper.

Similarly, it was wrong for the applicants' legal practitioner to give evidence from the bar the purpose of which was to endeavour to establish the applicants' defence. What was before the magistrates court was not a trial. Incidentally, this disposes of the fourth ground for review.

The second ground for review was not persisted with.

I see no merit in the argument that the learned magistrate was biased against the applicants. It is true that the court opened its judgment by considering a background to the matter when no evidence of such background was put before it. On its two feet, the Request for Remand Form, plus the annexure thereto, provided a firm basis upon which to place the applicants on remand. The advertence to the "background" becomes, in the circumstances, inconsequential.

Interference in unterminated proceedings

The principles governing interference by a superior court with the unterminated proceedings of a subordinate court are trite. This court can only interfere in exceptional cases of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be addressed by any other means or where the interlocutory decision is clearly wrong, as to seriously prejudice the rights of the litigant. See *Attorney-General* v *Makamba* 2005(2) ZLR 54(S); *Prosecutor-General of Zimbabwe* v *Intratrek Zimbabwe (Private)Limited and others* SC 59/2019; *Dombodzvuku and Another* v *Sithole N.O and Another* 2004(2) ZLR 242 (H).

S v *Rose* 2012 (1) ZLR 238 (H) is explicit on this issue. There, HUNGWE J, as he then was, stated at 243 E:

> "The test as to when a superior court could intervene in unterminated proceedings has already been discussed above. A superior court having jurisdiction on review or appeal will be slow to exercise any such power, whether by mandamus or otherwise, and will only do so in rare cases where grave injustice might otherwise result or where justice might not by

other means be attained."

The applicants were simply placed on remand. The trial has not started. Any of the following things may yet happen:

- The charges against them may be withdrawn before plea.
- The charges may be withdrawn after plea, in which event they would be entitled to an acquittal.
- They may be discharged at the close of the state case.
- They may be acquitted at the end of the trial.
- They have a right to appeal to this court in the event they are convicted, sentenced and are dissatisfied thereby.
- They can bring the verdict and sentence on review.
- They have the right to appeal all the way to the Supreme Court

There is nothing to suggest any permanent prejudice from the continuation of the proceedings in the magistrates' court.

In fact, the applicants had already been released on bail, by the lower court, by the time that they approached this court to seek review of the decision to place them on remand.

The application for review is without merit.

In the result, the application for review be and is dismissed.

Kwenda J agrees ……

Mbano Gasva and Partners, applicants' legal practitioners
The National Prosecuting, Authority, 2nd respondent's legal practitioners