EAST RIVER INVESTMENTS (Pvt) LTD

and

BISHOP JECHE

versus

HOSEAH MUJAYA N.O

and

THE STATE

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare 13 October, 3, 7, 8 and 16, 17 and 23 November 2022.

T. L Mapuranga with *T. Makamure*, for the Applicants

T. Mapfuwa, for the 2nd Respondent

OPPOSED APPLICATION FOR REVIEW

CHIRAWU-MUGOMBA J: The applicants were jointly charged and appeared at a trial before the 1st respondent. They were jointly charged with: -Perjury as defined in S183(1) of the Criminal Law [*Codification and Reform*] [Act] [*Chapter 9.23*]; Fraud as defined in the same act and additionally with contravening S 63(1)(b) of the Serious Offences (Confiscation of profits) Act (9:17).

The allegations against them read as follows.

Perjury

In that on 6 October and at the Civil Courts in Harare, East River Investments (Pvt) Ltd and Bishop Jeche or one or both of them in the course of or for the purpose of judicial proceedings, made a false statement upon oath, in a written affidavit statement knowing that the statement was false, or realising that there was a real risk or possibility that the statement was false; by the assertion of untrue of untrue or incorrect facts. That is to say, in the court application between East River Investments (Pvt) Ltd as applicant versus Stephen Nyoka as the respondent case number 15187/2010, East River Investments (Pvt) Ltd and Bishop Jeche

asserted under oath that East River Investments (Pvt) Ltd is the lawful owner of Stand number 1018 Mabelreign Township better known as Dansbury Avenue, Mabelreign Harare, transferred to it from deed of transfer 974/2010 in its favour when in fact the purported deed of transfer was rejected at the Registrar of Deeds ‘ Office because of caveat noted on the property.

Money Laundering

In that on the date to the Prosecutor unknown but during the period between March 2010 and 14 February 2011, and in Harare, East River Investments (Pvt) Ltd and Bishop Jeche or one or both of them, received, possessed and concealed, property which is the proceeds of crime, knowing or for which they ought to have reasonably known that the property was derived or realized, directly or indirectly from the commission of an offence. That is to say East River Investments (Pvt) Ltd, Bishop Jeche and Orton Drift Properties received, concealed the unlawful origin of Stand number 1018 Mabelreign Township better known as Dansbury Avenue, Mabelreign Harare, which had unlawfully and fraudulently been transferred from Stephen Leonard Nyoka’s name to Orton Drift properties (Pvt) Ltd using a forged Capital gains tax clearance certificate, fraudulently obtained power of attorney to pass transfer, declaration by seller and agreement of sale.

Fraud

In that on 6 October and at the Civil Courts in Harare, East River Investments (Pvt) Ltd and Bishop Jeche or one or both of them unlawfully and with intend to defraud misrepresented to the Civil Magistrates in the court application between East River Investments (Pvt) Ltd as applicant versus Stephen Nyoka as the respondent case number 15187/2010, East River Investments (Pvt) Ltd and Bishop Jeche asserted under oath that East River Investments (Pvt) Ltd is the lawful owner of Stand number 1018 Mabelreign Township better known as Dansbury Avenue, Mabelreign Harare, transferred to it from deed of transfer 974/2010 in its favour when in fact the purported deed of transfer was rejected at the Registrar of Deeds ‘ Office because of caveat noted on the property thereby causing actual prejudice to Stephen Leonard who eventually was evicted from his house worth US$130 000 by order of the High Court in which East River Investments (Pvt) Ltd did not cite Stephen Nyoka upon realising that Stephen Leonard Nyoka was opposing the matter in the Magistrates Court.

The applicants entered pleas of not guilty. Their defence(s) can be summarised as follows: -

a. They never made a false statement under oath knowing that it might be false.

b. The 2nd applicant was challenging the 2nd respondent to prove that he is the one who actually signed the founding affidavit and would challenge the admissibility of such document.

c. The title deed of the property being deed number 1405/2010 was through the transfer of the property into the 1st applicant's name in April 2010. Such deed is still extant and the complainant ought to follow due process to validate it.

d. The complaint was evicted through the High Court order in HC 8957/10 and not through the Magistrate Court case number 15187/2010. The complainant made several applications before the High Court to stop the eviction but was unsuccessful.

e. The applicants never dealt with the accused person in relation to the loan and sale of the property for US$19000.

f. The 1st applicant is an innocent purchaser.

g. The accused persons were not involved in the transfer of the property from Stephen Leonard Nyoka to Orton Drift Properties (Pvt) Ltd. They innocently purchased the property from Orton Drift based on deed of transfer 974/2010. They were not involved in the generation of the alleged capital gains tax, power of attorney to pass transfer, declaration by seller and declaration by purchaser and agreement of sale.

h. No misrepresentation was made at the Magistrate Court as alleged. The complainant engaged the applicants for a settlement of the matter. When he failed to stick to the terms, he was evicted.

The 2nd respondent led evidence from five witnesses and closed its case. The applicants then made an application for discharge at the close of the state case in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The application made can be summarised as follows. The offence in terms of S89(1)(a) of the Code is not a strict liability one. The absence of the critical allegation that the accused acted unlawfully and intentionally vitiates the charge in its entirety. An accused cannot be placed on his defence to answer a charge that does not disclose an offence. No application

was placed for the amendment of the charge. Section 146(1) of the Criminal Procedure and Evidence Act is couched in peremptory language and a court cannot depart from that. Placing the 2nd applicant to his defence is a violation of his right to equal protection before the law. The 2nd respondent did not lead any evidence to show that the document titled affidavit was signed by the 2nd applicant. One Albert Nyamupfukudza who appeared as a state witness in his evidence-in-chief could not remember if the 2nd accused person had appeared before him a d signed the document. In the absence of such evidence, it cannot be concluded that accused persons are the ones who made the alleged false statement. This therefore means by implication that there is no proof that the 2nd applicant also signed the document on behalf of the 1st applicant. The evidence of the complainant should be disregarded because he is not a handwriting expert or witness. No evidence linked the 2nd applicant to the disputed handwriting.

If the court was not in agreement with the above, then there was no evidence that the document was taken under oath. The Commissioner of Oaths did not confirm that the 2nd applicant appeared before him and signed the affidavit. An accused person can only be asked to relate to the truth or falsehood of a statement where it has been established that he made it under oath.

There is no evidence showing what the complainant did in relation to the alleged misrepresentation in the Harare Magistrates Court Civil in relation to it and there is no evidence of the alleged prejudice. The requirements for fraud have not been met as per section 136 of the Criminal Law (*Codification and Reform*) Act [*Chapter 9:23*]. There is no allegation that the complainant suffered prejudice as a result of misrepresentation in the Magistrate Court civil. Eviction was through a High Court order and not through the founding affidavit.

The Money Laundering offence as defined in s63(1)(b) of the Serious Offences (Confiscation of profits) Act [*Chapter 9:17*] was repealed on the 13th of June 2013 through the insertion of *S104* of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*]. Therefore, the accused persons cannot be placed on their defence to answer a repealed law.

In the second count, no offence is disclosed because the state failed to allege that the accused persons acted unlawfully and intentionally. Therefore, the charge is fatally defective.

The 1st respondent dismissed the application for discharge at the close of the State case. The applicants now seek a review. Their main ground for review which they amplify in seven paragraphs is that the decision to put them to their defence is so grossly outrageous in its defiance of logic that no sensible court having applied its mind the applicable law and facts at hand would arrive at it.

In amplifying the ground of review, the applicants stated as follows. That there was no valid second and third charges that disclose offences, i.e. the crimes of perjury and fraud; that the 1st respondent went on to create new particulars of the offence in seeking that the applicants should explain the source of the document titled affidavit which the 1st respondent found had not been connected to the 2nd applicant through evidence of the Commissioner of oaths, a handwriting expert or any other witness; that the 2nd respondent had not established a *prima facie* case against the 2nd applicant whether he had appeared before a Commissioner of Oath; the 1st respondent had wrongly shifted the onus of proof to applicants to explain the source of the affidavit that formed part of the alleged civil application in circumstances where the 2nd respondent had failed to prove that *prima facie*, the 2nd applicant is the one who had signed the document under the named Commissioner of Oath and that the decision is contrary to the Constitution of Zimbabwe particularly SS 70(1) (a)(56(1) and 69(1) as read with 86(3) (e). And further that it is contrary to S198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The applicants thus seek an order that the decision of the 1st respondent in dismissing the applicant's application for discharge at the close of the state case under case number R640-1/18 be set aside and consequently they be found not guilty and are acquitted under case no. CRB ACC 60/19.

In opposing the application, the 2nd respondent made the following averments. That the reasoning by the 1st respondent that the applicants should explain the source of the affidavit was correct if regard is had to the fact that the appellants had used that document in a civil matter. It was the same document that had been used by the applicants to commit perjury. Although the 1st respondent had observed that there was need to amend the charges, that does not show that the applicants ought to have been discharged. He reasoned that there would not be any prejudice if the charges were amended as the evidence adduced showed a *prima facie* case against the applicants. As long as a finding had been made that all the essential elements of the offences had been established, he was entitled to dismiss the

application. No compelling reasons have been established to warrant interference with unterminated proceedings.

The law on interference in unterminated legal proceedings has been set out in a plethora of cases. I am indebted to CHIKOWERO and KWENDA Js for comprehensively setting out the law in the combined cases of *Mutasa and anor vs the State and anor, Mangoma vs Mapfumo N.O and anor* and *The State vs Chifamba and anor*, HH-84-21. I will cite extensively from that judgment. KWENDA J postulated as follows: -

The law on interference with uncompleted criminal proceedings

The law is set out in the cases of *Dombodzvuku and Another* v *Sithole N.O and Another* 2004 (2) 242 (H) per MAKARAU J (as she then was) and *Attorney-General* v *Makamba* 2005 (2) ZLR 54 (S) at 64 C per MALABA JA (as he then was)

In *Attorney-General* v *Makamba*, supra, MALABA JA as he then was, stated as follows at 64 C

> "*The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross 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.*"

All the ingredients must be present before this court intervenes in uncompleted proceedings. In other words, the accused seeking review must prove that all the following exist: -

i. that there are exceptional circumstances
ii. arising from a proven irregularity
iii. the irregularity has the effect of vitiating the proceedings
iv. resulting in miscarriage of justice
v. there is a nexus between the miscarriage of justice and the interlocutory order which is clearly wrong
vi. and that there is proven serious prejudice to the rights of the litigant
vii. the prejudice cannot be redressed by any other means

If an element is missing, then this court must not interfere. It is therefore not enough to show that the decision *a quo* is wrong or simply that there was an irregularity or that the accused suffered prejudice because all that can be corrected on appeal. By way of example,

the interlocutory misdirection may not result in irreparable harm because the accused may be acquitted at the end of the trial *a quo*. Even if the accused is wrongly convicted or acquitted *a quo*, the resultant miscarriage of justice can be redressed on appeal. More critically, a wrong decision does not necessarily vitiate proceedings. A trial court has the competence to make decisions irrespective of whether or not such decisions are later, on appeal, adjudged to be wrong. A correct interpretation and application of the case law as cited therefore is that circumstances under which this court may be justified to interfere with uncompleted proceedings pending in the lower court should be very rare indeed or put differently such instances should be uncommon and evidently exceptional. In our view that explains why since the decision in *Walhaus &Ors* v *Additional Magistrate, Johannesburg & Anor* 1959(3) SA (AD) applications for review of uncompleted proceedings were hardly heard of. At the risk of repeating myself, the accused seeking review must prove something exceptional justifying a superior court to descend into the arena of proceedings pending before another court of competent jurisdiction because the judiciary is one system. I will restate the decision in *Walhaus &Ors* v *Additional Magistrate, Johannesburg & Anor* supra as quoted and approved by the Supreme Court in the matter of *Prosecutor General of Zimbabwe v Intratrek Zimbabwe (Pvt) Ltd, Wicknell Chivhayo and Anor* SC 59/2019. In that case PATEL JA, as he then was, reproduced the following passage from the case of *Walhaus &Ors* v *Additional Magistrate, Johannesburg & Anor* 1959(3) SA (AD) at page 119D-120E

> "If, as appellants contend, the magistrate erred in dismissing their exception to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is an appeal after conviction. The practical effect of entertaining applicant's position would be to bring the magistrate's decision under appeal at the present, unconcluded, stage of the criminal proceedings against them in the magistrate's court. No statutory provision exists directly sanctioning such a course…. It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme court may, in a proper case, grant relief-by way of review, interdict or mandamus-against a decision of the magistrate's court before conviction…., This, however, is a power which is sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its circumstances. The learned authors of Gardiner and Lansdown (6 ed, vol.1 p.750) state:
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> 'While a superior court on review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and do so in the magistrates' court except in those rare cases where grave injustice might otherwise result or justice might not by other means be attained… In general however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal would ordinarily be available'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's courts… [The] prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental contention raised by the accused, does not *per se* necessarily justify the Supreme court in granting relief before conviction."

Applying the test above and cognisant of the fact that such applications as in *casu,* should be granted in exceptional circumstances, In my view, the trial court was correct in dismissing the application for discharge at the close of the state case. I say so for the following reasons.

Count one on perjury depended on an alleged false statement upon oath. An affidavit by its very nature and operation of the law is taken as evidence. Perjury occurs when someone does not state the truth in the affidavit. See *Mkandla and anor vs. Dube and other's,* HB-41-07 on the requirements of an affidavit. Once the purported deponent disputes that they are the deponent, the evidentiary onus shifts to them to rebut the presumption. That burden can only be discharged under oath. In *casu, Nyamupfukudza* could not remember whether or not the deponent appeared before him. He stated that the period was eleven years.

That is neither here nor there, because it would be impossible to remember those details eleven years after the fact. He also did not deny that it was him who commissioned it. This then shifted the evidentiary burden on the applicants and as observed, this they can only do under oath.

The same observation above applies to the charge of fraud. The misrepresentation is said to have emanated from the affidavit.

The applicants contended that the charge left out the words wrongfully and unlawfully. Section 202 of the Criminal Procedure and Evidence Act reads: -

Certain discrepancies between indictment and evidence may be corrected

(1) When on the trial of any indictment, summons or charge there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the

indictment, summons or charge have been omitted, or that any words or particulars that ought to have been omitted have been inserted, or that there is any other error in the indictment, summons or charge, the court may at any time before judgment, if it considers that the making of the necessary amendment in the indictment, summons or charge will not prejudice the accused in his defence, order that the indictment, summons or charge, whether or not it discloses an offence, be amended, so far as is necessary, **by some officer of the court or other person**, both in that part thereof where the variance, omission, insertion or error occurs and in every other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms, if any, as to postponing the trial as the court thinks reasonable and the indictment, summons or charge shall thereupon be amended in accordance with the order of the court, and after any such amendment the trial shall proceed at the appointed time upon the amended indictment, summons or charge in the same manner and with the same consequences in all respects as if it had been originally in its amended form.

(3) The fact that an indictment, summons or charge has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder.

The record of proceedings shows that the 1st respondent stated in his ruling, that "...however, would not prejudice the accused persons" and in my view, he was right. The applicants have not shown how the omission prejudiced them.

It is noted that the Serious Offences (Confiscation of profits) Act, was indeed repealed by the Money Laundering and Proceeds of Crime Act which came into effect on the 28th of June 2013.

The law relating to repealed enactments is found is section 17 of the Interpretation Act [*Chapter 1:01*] that reads as follows: -

17 Effect of repeal of enactment

(1) Where an enactment repeals another enactment, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or

(*d*) affect any offence committed against the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect thereof; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy shall be exercisable, continued or enforced and any such penalty, forfeiture or punishment may be im-posed as if the enactment had not been so repealed.

My reading of *S17(d)* is that it is in the manner of a savings clause for offences committed before the repeal. In *casu*, it is clear that in relation to the second charge, it is alleged to have been committed between March 2010 and February 2011. This was before the repeal of the relevant act. The contention by the applicants therefore that there was no valid second charge is incorrect.

Using the test enunciated in the *Mutasa* case in relation to the seven grounds for interference, I am unable to agree with the submissions by Mr *Mapuranga*, that this is an exceptional case that warrants interference.

I add my voice to the preponderant view that the circumstances must be very exceptional. Further, that to interfere with unterminated lower court proceedings will paralyze them to such an extent that the High Court will end up acting like an 'appeals' court. Sight must not also be lost on the fact that the standard of *prima facie* case is lower than that of proof beyond a reasonable doubt.

DISPOSITION

IT IS ORDERED AS FOLLOWS: -

1. The application for review be and is hereby dismissed.
2. The decision of the first respondent dismissing the applicants' application for discharge at the close of the state case in terms of section 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] in CRB R640-1/18 is upheld.

Rubaya and Chatambudza, applicants' legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners