REPORTABLE ZLR(45)

FREDRICK CHARLES MUTANDA
v
(1) THE STATE (2) KUDAKWASHE JARABINI

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & GOWORA JA
HARARE, FEBRUARY 5 & DECEMBER 5, 2013

T Mpofu, for the appellant
S Fero, for the respondents

MALABA DCJ: This is an appeal against the judgment of the High Court by which an application for review against the decision of the Magistrate's court was dismissed and an order made that the judgment be referred to the Attorney General, Judicial Service Commission (JSC) and the Secretary of the Law Society of Zimbabwe.

At the hearing of the appeal Mr *Mpofu* who appeared for the appellant indicated that the appellant was not challenging the correctness of the decision dismissing the application for review of the Magistrate's Court proceedings. He however, persisted with the grounds of appeal against para 2 of the court *a quo's* order, relating to the referral of the judgement to the bodies stated therein. The facts of the case are as follows.

The appellant and the second respondent were arrested on 26 November 2011 on allegations of fraud and theft relating to CAPS Holdings. The appellant was charged on

his own with 3 counts of fraud as defined in s 136 of the Criminal Law Codification and Reform Act [*Cap 9:23*] (Criminal Law Codification & Reform Act) and two counts of theft as defined in s 113 of (Criminal law Codification and Reform) Act. He was jointly charged with one Justice Mujaka on one count of fraud.

On 29 November the appellant and his co-accused were placed on remand. The Form 242 on the basis of which the Magistrate's Court was satisfied that there was reasonable suspicion of the appellant having committed the offences charged against him contained allegations which were later challenged by the appellant. In respect to the fraud charge he was facing alone it was alleged that the appellant withdrew money from the company's bank accounts at Stanbic Bank and Commercial Bank of Zimbabwe Ltd respectively, upon a misrepresentation that the money was required for the purchase of drugs, when in fact the money was for his own use, to the prejudice of CAPS Holdings. In respect to the charge of theft he was facing it was alleged that the appellant had intentionally withdrawn a total of ZAR169 000-00 from two CAPS Holdings bank accounts held in South Africa knowing that CAPS Holdings was entitled to own, possess or control its funds and he converted the funds to his own use.

The allegation against the appellant and his co-accused was that they misrepresented to the Medicines Control Authority of Zimbabwe (MCAZ) that they had authority to de-register 50 drugs. They did not have such authority. In fact, once the drugs were de-registered they intended to re-register the same drugs in Europe at Liechtenstein.

The appellant and his co-accused were granted bail on condition they did not interfere with witnesses, that they would surrender passports and would not go back to CAPS Holdings. Later the conditions were altered to have the appellant given back his passport. The appellant later went to his place of work. The State considered that as a breach of his bail conditions and that led to an application being made on 13 January 2012 for the reversal of the relaxed bail conditions.

A hearing commenced before the magistrate Jarabini Esquire to determine whether the appellant had breached his bail conditions. The investigating officer was called to testify but proceedings were stopped before he was cross examined. The appellant was at the time represented by Mr *Samkange* of *Venturas and Samkange Legal Practitioners*. At the hearing Mr *Samkange* had also made an application for refusal of further remand. The decision of that application was reserved.

The allegations of the bail breach were to be continued on 25 January 2012. The matter was remanded for continuation on 17 February 2012. Meanwhile the appellant withdrew his instructions from Mr *Samkange* and mandated *Linda Chipato* of *Linda Chipato Legal Practitioners*. On 15 February 2012, Ms *Chipato* wrote a letter to the Attorney General in which she alleged that allegations made against the appellants on Form 242 were contrary to the evidence on hand. She alleged that the appellant was therefore wrongly placed on remand, on what she called, false information.

While aware of the fact that an application had already been made by Mr *Samkange* for refusal of further remand and that a decision was pending on the matter she

suggested to the prosecutor that the appellant be removed from remand. She was also aware of the fact that evidence on the statement of bail had not been completed as the investigating officer was still to be cross examined. In the last paragraph of the letter Ms *Chipato* then wrote:

> "It has also since been brought to our client's attention that a ruling may already have been prepared in anticipation of the next hearing date, wherein the application for refusal of further remand shall be dismissed and our client found guilty of breaching bail conditions with him being sentenced to one year in custody with six months being suspended on the usual conditions. We are not certain whether Esquire Mutevedzi is aware of this. Whilst we find this to be shocking, we would be grateful if you look into it. Should this be the case, we shall not hesitate to immediately make the necessary application to the Supreme Court for violation of our client's rights, miscarriage of justice, abuse of office, coupled with a claim for damages against all parties concerned. Kindly revert to us on the urgent aspect of this case."

At the commencement of the proceedings on 17 February 2011 the prosecutor brought to the attention of the magistrate the allegations made in the letter. It was the prosecutor's opinion that the letter amounted to contempt of court and criminal defamation. He went on to say the letter was abusive, mischievous and malicious. The prosecutor alleged that Ms *Chipato* should have checked the record of proceedings at the clerk of court's office to satisfy herself whether any judgement had been written in advance. On her part Ms *Chipato* indicated to the court that there was no intention to insult the court or to be in contempt of the proceedings.

She indicated it was unfortunate that the prosecutor had brought it to the attention of the court in public proceedings when the intention was to allay her client's fears on the basis of information he had received. She indicated it had not been the intention to bring it to the attention of the courts until the facts had been proven. She further highlighted that her client had met with Mutevedzi who indicated that his ruling had been prepared. In

addition that her client had photographic evidence of the meeting he held with Mr Mutevedzi and another gentleman on the 21 December 2011 at a service station along Chiremba Road in the Chadcombe area in Hatfield.

It was agreed by consent on that day for the matter to be postponed to 20 February 2012 because the investigating officer who was to continue leading evidence on allegations of breach of bail conditions was ill. Ms *Chipato* also indicated that the next remand on 6 March 2011 her client intended to apply for refusal of remand.

When proceedings resumed on 20 February the magistrate delivered a judgement in which he had made a decision to recuse himself from the proceedings. The magistrate indicated that it was in the interests of justice for him to recuse himself because the allegations made in the letter to the Attorney-General by the appellant through his legal practitioners were serious. It was the magistrate's view that in the circumstances, whatever decision he made would not be accepted by either party as being impartial. In his ruling he stated:

> "The general approach to a recusal is also expounded in the case of President of RSA v SA Rugby Union 1999 (4) SA 147 (ii) at page 177 B-E. At the root of this rule (recusal) lies the very concept of judicial independence. In *casu* either way the decision goes, eyebrows will be raised on the ruling by either party or the public given the nature and magnitude of accusations traded between the state and the defence counsel for the 1st accused which has spilled to the bench… Given the circumstances, a decision which represents the true interests of justice can only be achieved by another independent and impartial (so to speak) judicial officer."

On 1 March 2012 the magistrate forwarded record of proceedings to High Court with the request that it be placed before a judge for quashing of proceedings so that fresh proceedings could commence before another magistrate.

When the referral came to the notice of the appellant's legal practitioner, she filed an application in the High Court for review of the same proceedings on the ground that there was no real and substantial justice. In the application she went on to allege that the appellant had been placed on remand on false information contained in Form 242. She placed documents to show that the allegations were not supported by evidence.

She also went further to ask the reviewing judge to determine the legality of the order of remand. She then sent a letter to the Registrar of the High Court for the attention of the reviewing judge in which she alleged that referral by the Magistrate for quashing of proceedings was unlawful. She said the appellant had not been heard before the decision to recuse himself by the magistrate was made. The court *a quo* dismissed the application on 23 May 2012.

As already indicated there was no misdirection on the part of the learned judge on the question of the validity of the grounds on which the application was based. It is clear that the learned judge would not have had the power to consider whether there were grounds for a reasonable suspicion of the accused having committed the offences charged against him. That was a matter which had been decided upon by the magistrate who first remanded the appellant on 29 November 2011. If there were any changed circumstances requiring a review of that decision the Magistrate's court was the correct forum to entertain an application for refusal of remand.

In the course of the judgment the learned judge made reference to issues relating to the letter. He said that the appellant's legal practitioner had adopted a hostile combative mood. He stated:

> "A perusal of the record shows proceedings were conducted in a rather acrimonious, hostile and aggressive atmosphere not conducive to the due administration of justice. Counsel for the accused Ms Chipato did not help matters by resorting to abrasive, coarse, intemperate language unbecoming of a legal practitioner both in her *viva voce* submissions in court and written communications to the Attorney General's office."

He stated further:

> "It thus emerges quite clearly that after succeeding in hounding the presiding magistrate from the proceedings by levelling apparently unsubstantiated, defamatory and contemptuous allegations against the trial magistrate, they now seek to use the High Court to avoid trial and gain immunity from prosecution by devious means. This type of conduct is unethical and an extreme abuse of the review process requiring some sort of censure from the Law Society and the prosecuting authorities should the allegations against the presiding magistrate turn out to be baseless and unfounded. Sight should not be lost that apart from their mere say so wild speculation and conjecture, the applicant and his lawyer have proffered no shred of evidence tending to show that the presiding magistrate is indeed guilty of serious allegations they have levelled against him. They have not bothered to disclose the source of their information or suspicion. They have therefore not laid any basis for the serious allegations they have levelled against the trial magistrate."

The learned judge then went on at p 5 to say:

> "Litigants and legal practitioners must be warned strongly against making idle, unsubstantiated, malicious, slanderous and scurrilous allegations against judicial officers and court officials. That type of conduct can only bring the due administration of justice into disrepute. The need to protect the dignity and integrity of the courts and judicial officials cannot be over emphasised. This is for the simple reason that the courts and judicial officers derive their right to preside over affairs of the subjects of the State from the Constitution and to that extent the people of Zimbabwe."

The judge concluded by saying:

> "I hasten to point out that nothing must be swept under the carpet in this case. There must be a proper investigation of the allegations levelled against the presiding magistrate. If he is guilty as alleged, then the law should take its course and the same should apply to the legal practitioner and her client should allegations be found to be baseless."

It is clear that it was on the basis of the interpretation of the letter that the learned judge made his findings above. In addition, the judge's perception of the conduct of the appellant's legal practitioner, was to him sufficient enough evidence upon which he gave the direction in para 2 of the order that:

> "2. That the Registrar be and is hereby directed to serve a copy of this judgment on the Attorney-General, the Judicial Services Commission and Secretary of the Law Society."

The question is therefore whether or not the interpretation of the letter and the proceedings in the court *a quo* justify the conclusion by the learned judge. There is no doubt that the letter was originally not intended for public consumption, and also that it was not intended, rightly or wrongly, for the magistrate to know. The letter expresses fear by the legal practitioner on behalf of her client, of something he said he had been told by people he met. The letter also showed that investigations of the truthfulness of the allegation made by the appellant had to be made.

Furthermore, a close examination shows it is not as if the legal practitioner has accepted the allegations for truth. Having come across information like that it is difficult to say that the legal practitioner ought not to have brought this information to the attention of the Attorney General. The Attorney General represents public interests and is entrusted with the responsibility of having matters of breach of law investigated. While the learned judge points out that the allegations needed to be investigated in the administration of justice, he also seems to chide the legal practitioner for having done so.

The basis for criticism by the learned judge of the legal practitioner is based on the belief that the letter is contemptuous and defamatory of the magistrate. An

examination of the course of events during proceedings shows clearly that the magistrate appreciated the seriousness of the allegations and did not take them against the legal practitioner. The magistrate gave the legal practitioner the opportunity to put forward her version of what happened to him. Although having been taken by surprise by the revelation of the contents of the letter to the magistrate by the prosecutor and the allegation that she was guilty of contempt of court, Ms *Chipato* remained calm. She appreciated the gravity of the matter and took time to explain how she had come to write the letter.

According to *IBA International Principles on Conduct for the Legal Profession commentary* adopted on 28 May 2011 by the International Bar Association at p 25:

> "Lawyers should represent their clients, competently, diligently, promptly and without any conflict to their duty to court."

There is nothing in the record to support the accusation of Ms *Chipato* being combative and hostile. She had a duty to her client and the only forum to address her client's concerns was to approach the Attorney General's office as she rightfully did.

It is trite that a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures may be required to vindicate a client's cause. In the case of *Pertsilis* v *Calcaterra & Anor* 1999(1) ZLR 70(H) at 74B-D SMITH J stated:

> "Legal practitioners owe their clients a duty of loyalty. They are duty bound to advance and defend their client's interests. A legal practitioner is expected to devote his or her energy, intelligence, skill and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client."

In light of the above statement, the appellant's legal practitioner ought not to be faulted for the course of action she took. If due consideration is given to her conduct before the court when the first respondent's representative drew the court's attention to the letter in question, there is nothing to indicate she compromised her duty to the court as a court official.

The Court is satisfied that the learned judge misdirected himself in the view he took of the effect of the letter and conduct of the legal practitioner during proceedings in the Magistrate's Court. It was for this reason that para 2 of the court *a quo's* order was set aside.

Accordingly it is ordered as follows:

1. The appeal is allowed only to the extend that para 2 of the court *a quo's* order is hereby set aside.

2. There shall be no order as to costs.

GARWE JA: I agree

GOWORA JA: I agree

Messrs Linda Chipato Legal Practitioners, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners