IGNATIUS MORGEN CHIMINYA CHOMBO
v
1. CLERK OF COURT HARARE MAGISTRATES COURT (ROTTEN ROW) 2. BARBRA MATEKO N.O. 3. L. NCUBE N.O. 4. NATIONAL PROSECUTING AUTHORITY 5. JUDICIAL SERVICE COMMISSION.

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & BHUNU JA
HARARE, June 18, 2019

L Madhuku with T Muganhiri, for the Applicant.
ABC Chinake with T R Phiri, for the 1st, 2nd, 3rd and 5th Respondents.
E Makoto, for the 4th Respondent.

CIVIL APPEAL

BHUNU JA: This is an appeal against the judgment of the High Court dismissing the applicant's urgent application for a *mandamus* for the release of the appellant's passport held by the first respondent as security for his attendance at court.

At the close of argument we dismissed the appeal with costs with reasons to follow in due course. I now proffer the reasons for the order.

The facts giving rise to the appeal are by and large common cause. The undisputed narrative of events leading to the appeal is that the applicant is facing criminal charges in the Magistrates Court. He surrendered his passport to the first respondent in terms of his bail conditions.

On 10 May 2019 the second respondent in her capacity as a Magistrate sitting at Harare, issued an order at the applicant's instance and request, temporarily releasing the passport to him. The passport was released to enable the Appellant to access medical treatment in South Africa.

On 21 June, 2019 the Appellant was at Robert Gabriel Mugabe International Airport intending to travel to South Africa for medical treatment. When he was about to board the aeroplane to South Africa his passport was allegedly confiscated by an unknown state agent under the pretext of security checks.

The passport was not returned to the appellant as expected but it somehow found its way to the first respondent who took custody of the passport. As a result, the appellant's trip to South Africa was aborted.

Following unsuccessful requests for the first respondent to release the passport, the appellant applied for a *mandamus* to the third respondent in his capacity as a Magistrate sitting at Harare to compel the first respondent to release the passport. The third respondent declined jurisdiction and consequently dismissed the application. This prompted the Appellant to approach the court *a quo* on an urgent basis seeking an order compelling the first respondent

to obey the Magistrates' Court order issued by the second respondent authorising the release of the Appellant's passport.

In approaching the court *a quo*, the Appellant abandoned the matter determined by the third respondent dismissing his application for a *mandamus* and lodged a fresh application in the court *a quo* for the same relief. He did not see it fit to appeal against the order or have it set aside on review. The net effect is that the order of the third respondent dismissing the appellant's application for a *mandamus* is still extant and binding as it was not appealed against. It was therefore remiss of the appellant to apply for the same relief in the court *a quo* in the face of an extant order dismissing the same relief in the lower court. It is undesirable if not incompetent for litigants to set one court against the other with the prospect of the two courts emerging with two live contradictory judgments on the same matter.

The application for a *mandamus* however, found no favour with the learned judge in the court *a quo*. In consequence whereof, she dismissed the application for the primary reason that the appellant had not exhausted domestic remedies available to him. In dismissing the application she pointed out that it was not the function of Superior Courts to enforce inferior courts' decisions in circumstances where they were capable of enforcing their own judgments. In articulating her point, this is what the learned judge had to say at page 2 of her judgment:

> "The court notes that there are alternative remedies which can still achieve compliance. The Magistrates Court can still stamp its authority by ensuring compliance of its orders. It is not for the High court to enforce the orders granted by the Magistrates Court. Where a clerk of court refuses to obey a court order when called upon to do so amounts to contempt of court, it does not require a superior court to enforce compliance with an extant order. Courts must ensure compliance with their own orders and not expect the High Court to play big brother".

Aggrieved by the dismissal of his application for a *mandamus* by the court *a quo*, the appellant appealed to this Court on four grounds. The four grounds of appeal snowball into one issue, that is whether the High Court erred in declining to enforce the Magistrates Court order in circumstances where the Magistrate's Court was capable of enforcing its own order.

The Appellant's appeal is premised on s 171 (1) read with s 164 (3) of the Constitution. Section 171 (1) (b) confers the High Court with jurisdiction to supervise Magistrates Courts and inferior tribunals, whereas s 164 (3) provides that an order or decision of a court binds the State, all persons, institutions and agencies to whom it applies. The appellant's contention is basically that since the High Court has supervisory jurisdiction over the Magistrates' Courts, it has authority to enforce Magistrates Court orders in the face of resistance.

It was his further argument that the High Court has inherent jurisdiction to ensure that the orders of all courts are obeyed. The crisp question to be answered in this case is however, not whether the High Court has jurisdiction to intervene, but whether the time was ripe for it to intervene. The learned judge answered that question in the negative saying that she could not intervene because the Appellant had not exhausted domestic remedies capable of achieving the relief sought by him. She observed that the Magistrates Court had the jurisdiction and power to enforce its own orders without the intervention of the High court.

Undoubtedly the learned judge was correct in saying that the Magistrates Court has the necessary power and jurisdiction to enforce its own judgments. Section 23 of the Magistrates Court Act [Chapter 7:10] provides the Magistrates Court with the necessary power,

authority, jurisdiction and machinery to enforce its own process. The section provides as follows:

> "23 Force of process
>
> (1) Every process out of any court shall have force throughout Zimbabwe.
>
> (2) Any process issued out of any court may be served or executed through the messenger of the court out of which process is issued or through any other messenger:
>
> Provided that no costs shall be payable in excess of the costs of personal service in the cheapest and most effective manner suited to the circumstances".

A writ of execution issued in the Magistrates' Court amounts to a process of that court. That being the case, it can be issued and enforced by the Messenger of Court against a recalcitrant clerk of court. As correctly pointed out by the learned judge in the court *a quo*, contempt of court proceedings can also provide the necessary remedy.

The case of *In Re Prosecutor General of Zimbabwe on His Constitutional Independence and protection From Direction and Control* CCZ 13/17 relied upon by the Appellant, in fact supports the learned judge's *ratio*, that where a person disobeys a court order, contempt of court proceedings are the preferred mode of enforcing court orders where there is flagrant disobedience of a court order.

In that case the Prosecutor General had deliberately disobeyed orders of both the High Court and the Supreme Court directing him to issue certificates *nolle prosequi.* Without complying with the court orders he approached the Constitutional Court seeking an order relieving him from complying with the court orders. When asked whether he had complied with the court orders his counsel refused to answer. On those facts and at page 10 of the judgment, the highest court of the land said:

> "For the Appellant to refuse to obey court orders, and then to avoid answering the critical question as to why he has not, is tantamount to exhibiting flagrant contempt for this court. This type of contempt ex facie curie cannot be countenanced by the Court. We have a duty to protect our process from abuse and scandalous impunity".

It is now settled law that every court, the Magistrates' Court included, has a duty to protect its process and contempt of court is quite often the preferred remedy. As the Magistrates Court had the jurisdiction and means to resolve the primary dispute without resort to superior courts the learned judge in the court *a quo* cannot be faulted for dismissing the appellant's application for a *mandamus* with costs.

It is for the foregoing reasons that at the close of argument we unanimously found that there was absolutely no merit in this appeal and dismissed it with costs.

GWAUNZA DCJ **I agree**

GUVAVA JA **I agree**

Lovemore Madhuku, Appellant's Legal Practitioners.
Kantor and Immerman, the 1st, 2nd, 3rd and 5th Respondents' Legal Practitioners
National Prosecuting Authority, the 4th Respondent's Legal Practitioners.