

DISTRIBUTABLE: (9)

(1) ROBERT M GUMBURA (2) BLESSING CHIDUKE (3)
LUCKMORE MATAMBANADZO (4) LUCK MHUNGU (5)
TAURAI DODZO (6) THOMAS CHACHA (7) ELIJAH
VHUMBUNU
v
(1) FRANCIS MAPFUMO N.O (2) THE NATIONAL
PROSECUTING AUTHORITY

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKONI JA & BERE JA
HARARE: 11 NOVEMBER, 2019**

L. Madhuku, for the appellants

Ms *L. M. Mabasa*, for the first respondent.

Ms *F. Kachidza*, for the second respondent.

Judgment No. SC 10/22
Civil Appeal No.SC 333/19

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MAKONI JA: After hearing counsel in this matter we dismissed the appeal with no order as to costs and indicated that our reasons would follow in due course. Below are the reasons for judgement.

On 17 May 2019 the appellants approached the court *a quo*, on a certificate of urgency, seeking an order staying the criminal trial in *S vs Robert Gumbura* and eight others, CRB 4105-13/15, pending the determination of a review application filed in HC 4098/19.

The basis for the application was that the appellants had applied for discharge at the close of the state case, before the trial magistrate. The application was dismissed. The

appellants then filed an application for review in the High Court. The respondents intimated that they would proceed with the trial notwithstanding the pendency of the review. The first respondent, who is the trial magistrate, refused to postpone the matter in the absence of an order by the High Court staying the trial.

In their founding affidavits, the applicants averred that they had very reasonable prospects of success in HC 4098/19. They invited the court *a quo* to have regard to the papers in HC 4098/19. They contended that none of the witnesses had connected the appellants to the alleged offences.

On the initial set down date of the application *a quo*, counsel for the second respondent requested for the record of the criminal proceedings as it was not attached to the application. The matter was postponed to 27 May 2019 to enable the appellants to provide the record. On 27 May 2019, the appellants provided the court with the ruling made by the first respondent in dismissing the application for discharge at the close of the state case. The matter was then heard on the basis of the ruling.

The application was dismissed. It was the finding of the court *a quo* that the appellants did not have prospects of success in the application for review. It opined that the first respondent gave a fully reasoned ruling outlining the basis why he believed the state had established a *prima facie* case. The first respondent further pointed out the evidence that linked the appellants to the offence.

The court *a quo* further found that there was no irreparable harm to be suffered by appellants if the trial proceeds. It also found that there were alternative remedies. Additionally it found that the balance of convenience favoured that the trial proceed as it was loath to interfering with uninterminated proceedings of a lower court as this would be unwarranted in the circumstances of this case.

Aggrieved by the decision, the appellants filed the present appeal on the following grounds:-

- “1. The learned judge in the court *a quo* improperly exercised his discretion and erred in law in refusing to stay the appellants’ trial in the magistrates court pending the determination of the appellants’ review application in HC 4098/19 in that the learned judge’s decision is so outrageous in its defiance of logic or common sense that no reasonable judge applying his or her mind to the facts could ever have reached such a decision.
2. Having found that the appellants had established a *prima facie* right, the learned judge in the court *a quo* wrongly applied the Civil Appeal No. SC 333/19 of ‘irreparable harm’, ‘alternative remedy’ and ‘balance of convenience’, thereby reaching an invalid decision.
3. The judgment of the court *a quo* is unconstitutional and null and void in that in refusing to stay the appellants’ trial in the magistrate’s court pending the determination of the appellants’ review application in HC 4098/19, the judgment violates the right to a fair trial protected by s 69 of the Constitution.
4. The judgment of the court *a quo* is unconstitutional and null and void in that in refusing to stay the appellants’ trial in the magistrates court pending the determination of the appellants’ review application in HC 4098/19, the judgment violates the right to have a case reviewed by a higher court protected by s 70, as read with s 69, of the Constitution.”

Mr *Madhuku*’s main arguments for the appellants were based on grounds 1 and 2. Grounds 3 and 4 were alternative arguments. He made the following submissions. It was a misdirection on the part of the court *a quo* to fail to grant the only course available to the

appellants. It would not make sense for the trial to proceed because once it goes ahead there will be no alternative remedy. He relied on the authority of *S v Kachipare* 1998 (2) ZLR 271 (S) for this proposition.

An application for stay of a trial pending review can only be refused on one ground, namely that the pending review would predictably fail. The court *a quo* ought to have delved into the pending review application to determine whether or not it could be said to be frivolous, or an abuse of court. The court *a quo* did not test the learned magistrate's ruling against the evidence led by the state. It merely relied on the reasons given by the magistrate for its ruling. It then simply says "a peep into the review application shows no prospects of success." It did not give any reasons for arriving at that conclusion.

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The court *a quo* further misdirected itself on Civil Appeal No. SC 33/19. The court misapplied the requirements of irreparable harm, alternative remedy and balance of convenience. It wrongly said that the alternative remedy is the same thing as irreparable harm. It failed to appreciate that there will be irreparable harm if a person who ought to have been discharged at the close of the state case is put to his defence. It did not take into account the law in *S v Kachipare (supra)* regarding alternative remedies. It further did not show any prejudice that could have been suffered by the state if a temporary stay of prosecution is granted.

On the alternative arguments, Mr *Madhuku* submitted that the standard he proposes is that a stay of a criminal trial, before the magistrate's court, must be automatic on the mere filing of a review application in the High Court. His basis for the proposition is that on a proper reading of the essential components of the right to a fair trial in terms of s 86(3)

of the Constitution, which right cannot be derogated from, a stay should be granted on the mere filing of such an application.

Ms *Kachidza* for the second respondent made the following submissions. The appellants failed to avail the record of proceedings from the magistrates court, notwithstanding that the second respondent demanded that the record be availed and they were given an opportunity to do so. The court *a quo* proceeded on the basis of the ruling availed to it. It cannot therefore be attacked for not testing the evidence led against the ruling.

The court *a quo* considered the review application and the ruling by the magistrate and found that there were no prospects of success on review. It properly exercised its discretion and gave reasons for its decision.

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The court *a quo* addressed all the elements of an *interim interdict*. It found that there was no irreparable harm if the trial were to proceed as the appellants would have remedies at the end of the trial by way of review or appeal. It addressed the issue of prospects of success and found that none existed. It also addressed the issue of balance of convenience and found that it must be on guard against applications meant to derail proceedings in the lower courts particularly those attacking interlocutory decisions in untermiated proceedings.

Although the appellant raised four grounds of appeal only two issues arise for determination in this matter.

1. **Whether or not the court *a quo* improperly applied its discretion and wrongly applied the law in refusing to grant the interdict sought.**
2. **Whether or not the judgment of the court *a quo* is unconstitutional in that in refusing to grant the interdict it violated the right to a fair trial as protected by s 69 and the right to have a case reviewed by a higher court as protected by s 70 and s 69 of the Constitution.**

THE LAW

The remedy sought by the appellants was a temporary interdict. The prerequisites for such an interdict are trite and are set out in *Setlogelo v Setlogelo* 1914 AD 221. In examining whether the above prerequisites exist, the court exercises its discretion and it must do so judiciously and rationally. The test for irrationality was stated by Lord Diplock in *CCSU v Minister for the Civil Service* (1984) 3 All ER 935 at 951. *Civil Appellate* Judgment No. SC 10/22 *Civil Appellate* No. SC 333/19

“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’... it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.”

See also *Barros and Anor v Chimphonda* 1999 (1) ZLR 6 (S) 58 at 62f-63A and *Charuma Blasting and Earthmoving Services (Pvt) Ltd v Njainjai and Others* 2000 (1) ZLR 85 (S)

Whether or not the court *a quo* improperly exercised its discretion in refusing to stay appellants’ trial pending the determination of the review.

The appellants are challenging the judge *a quo*'s exercise of his or her discretion in refusing to grant the temporary interdict. Their basis for the challenge is that, the court *a quo*'s decision is so outrageous in its defiance of logic or common sense that no reasonable judge applying his or her mind to the facts could ever have reached such a decision. This has been referred to as the 'Wednesbury unreasonableness'. The question to be determined is whether the judgment of the court *a quo* meets the Wednesbury test.

Before addressing the Wednesbury principle, it is trite that an appellate court is slow to interfere with the exercise of discretion by the lower court. This position was well captured in the case of *Charuma Blasting and Earthmoving Service (Pvt) Ltd v Njainjai & Ors* 2000(1)ZLR 85 (S) where the court held that:

“.... An appeal court will generally not interfere with the exercise of a judicial discretion by the lower court. However, the appeal court is entitled to interfere with its discretion for that of the lower court where the lower court's exercise of its discretion was based on an error, such as where it has acted on a wrong principle, or it took into account extraneous or irrelevant matters or did not take into account relevant considerations or it was mistaken about the facts.”

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Further, in *Barros & Anor v Chimphonda* 1999(1) ZLR58 (S) at p62F-63A, it was held that:

“The attack upon the determination of the learned judge that were no special circumstances for preferring the second purchaser above the first one which clearly involved the exercise of judicial discretion, see *Farmers' Co-operative Society (Reg). v Berry* 1912 AD 343 at 350 may only be interfered with on limited grounds. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be renewed and the

appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing.” (My underlining)

The answer should be in the negative. In the exercise of its discretion, the *judge a quo* was alive to the principles applicable in such matters which are that it is undesirable to interfere with untermiated proceedings of a lower court.

It is settled law that a superior court will not readily interfere with untermiated criminal proceedings of a lower court except in exceptional circumstances. These include instances where grave injustice would occur if the superior court does not intervene and where there is gross irregularity resulting in a miscarriage of justice. One such instance is where there is a probability of the proceedings being a nullity. “It would be prejudicial to the accused, and a waste of time and resources, for the trial court to carry on with a trial likely to be declared a nullity.” See *Matapo & Ors v Bhila NO 7 Anor 2019 (1) ZLR 331 (H) at 325 F.* Judgment No. SC 10/22 Civil Appeal No. SC 333/19.

The task of assessing whether or not untermiated criminal proceedings ought to be stayed involves the exercise of discretion. Thus, the decision to stay untermiated proceedings will be interfered with if it has not been exercised judiciously.

In *Achinulo v Moyo N.O & Anor 2016 (2) ZLR 416*, the court granted an order for the stay of untermiated criminal proceedings pending review where the applicant’s application for discharge had been improperly dismissed by the lower court. The court made several pertinent remarks. At 416 C it stated:

“A superior court should always be slow to intervene in untermiated proceedings of an inferior court and will ordinarily not sit in judgment over a matter that is before the court below except in very rare situations where a grave injustice would occur if the superior court does not intervene”.

Further down at 419 C –F it said:

“I have said that this Court will not interfere in uncompleted proceedings except where there is gross irregularity resulting in a miscarriage of justice. That is the point made by MALABA JA (as he then was) in *Attorney General v Makamba* 2005 (2) ZLR 54(S) 64C-E where the learned appeal judge said:

“The general rule is that a superior court should intervene in uncompleted proceedings of the lower court 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.

In *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1(A) STEYN CT at page 4 said:

‘It is not every failure of justice which would amount to a gross irregularity justifying intervention before completion ----. A superior court should be slow to intervene in uncompleted proceedings in a court below and should generally speaking confine the exercise of its powers to ‘rare cases where grave injustice must otherwise result or where justice might not by other means be obtained.’

See also *Ndlovu v Regional Magistrate, Eastern Division and Another* 1989(1) ZLR 264(H) at 269C, 270G; *Masedza and Others v Magistrate, Rusape and Another* 1998 (1) ZLR 36 (H) at 41C.”

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See also *Prosecutor General v Intratreck & Chivago & Ors* SC 59/2019

From the above authorities it can be noted that the remedy to stay uncompleted criminal proceedings is an extra-ordinary remedy and is granted in instances where a grave injustice would occur if the superior court does not intervene. Each case has to be determined on its own facts. The court’s decision in refusing or granting the stay of proceedings can be interfered with where it is found that its discretion was not exercised judiciously and rationally.

The question to ask is whether continuation of the trial in this matter would result in a grave injustice. A close reading of the ruling rendered by the first respondent confirms the finding of the *judge a quo* that there were no prospects of success in the review application. The *judge a quo* went into great detail in assessing the evidence linking the applicants to the offence. The applicants attack the *judge a quo* on the basis that he or she did not test the evidence led against the ruling of the first respondent. Such an attack is unwarranted for the reason that the applicants were quite happy to proceed with the matter despite the absence of a full record which record they were given an opportunity to avail. They failed to do so.

Kachipare's case *supra* does not take the appellant's case further. In considering whether, the defence case having been proceeded with and the charge found proved, the verdict should be set aside on appeal on the ground that the appellant ought to have been discharged at the close of the case for the prosecution and after examining a number of South African authorities Gubbay CJ (as he then was) at p 279 C-D stated;

"It is to be noted that subs (3) of s198 gives the accused person no right of appeal against a refusal to discharge. Only the Attorney- General under subs(4) may, with the leave of a judge of the Supreme Court, exercise the right of appeal, if dissatisfied with a decision given in terms of subs(3). However, the express grant to an accused may have been considered unnecessary by the legislature as s 44(a) of the High Court Act [Chapter 7:06] permits a person convicted in a criminal trial, held by the High Court, to appeal as of right to the Supreme Court against such conviction on any ground of appeal which involves a question of law alone. The refusal of a discharge upon consideration of whether the evidence was such that a reasonable man, acting carefully, might properly convict, involves a question of law. See *Attorney-General v Mzizi supra* at 323B; *du Toit et al, Commentary on the Criminal Procedure Act* sect 178."

Further down at p 280 E-H and p 281A he stated;

"However, it is unnecessary to consider whether to adopt the reasoning of the courts in South Africa, attractive and commendable though it is. For in a situation like the

present, this Court is enjoined to have regard to s 12(2) of the Supreme Court Act [Chapter 7:13].

Proceeding on the premise that the learned judge committed an irregularity in refusing to discharge the appellant at the close of the case for the prosecution, the question is whether it appears, in the words of s 12(2), “that a substantial miscarriage of justice has in fact resulted.” Put simply, whether the court hearing the appeal considers on the evidence (and credibility findings, if any) unaffected by the misdirection or irregularity, that there is proof of guilty beyond a reasonable doubt. If it does so consider, and the onus is on the State to satisfy it, then there is no resultant miscarriage of justice. See *S v Strydom* supra at 367F; *S v Ngara* 1987(1)ZLR 91 (S) at 97B-C.

It follows that if the totality of the evidence allows of no reasonable possibility of the appellant’s innocence in the crime, the irregularity in failing to discharge her at the close of the case for the prosecution will be of no consequence and is to be ignored by this Court.”

As can be noted from the above the door is not shut on an accused person whose application for discharge is refused. He can still appeal in terms s 44 of the High Court Act [Chapter 7: 09] against the entire judgment. Although he or she can no longer sustain the ground in respect of dismissal of his or her application for discharge, this Court is enjoined to have regard to s 12 (2) of the Supreme court Act [Chapter 7;13]. The section provides:

- (2) “Notwithstanding that the Supreme Court is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless it appears to that court that a substantial miscarriage of justice has in fact resulted.”

In terms of the above section this Court can set aside or alter a conviction if it appears to it that a substantial miscarriage of justice has occurred.

From the above analysis it is clear that the applicants had to establish a basis for the court *a quo* to interfere with untermiated proceedings. This they did not do. Having

made that finding it follows that the applicants had no prospects of success in the review. The court *a quo*'s reasoning cannot be faulted. The applicants had alternative remedies.

Turning now to the alternative arguments addressing grounds 3 and 4, the appellants had this to say in para 15 of their heads of argument;

“The two grounds are alternative arguments. It is respectfully submitted that on a proper reading of the essential component of the right to a fair trial, a stay of trial in the magistrates court must be automatic on the mere filing of a review application in the High Court. This is so because in terms of section 86(3) of the Constitution, the right to a fair trial cannot be derogated from”

That is all they said in respect of the alternative argument. Mr *Madhuku*, in his submissions before the court, did not elaborate on the point any further. In my view the alternative arguments were half-heartedly raised with no serious intention of obtaining relief from them. I will not make a determination with regards to the alternative argument as it was not properly ventilated.

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It is for the above reasons that we dismissed the appeal.

GWAUNZA DCJ

I agree

Lovemore Madhuku Lawyers, the applicants' legal practitioners.

Civil Division of the Attorney-General's Office, 1st respondent's legal practitioners.

National Prosecuting Authority, for the 2nd respondent