SHINEDRIVE AUTO SERVICES (PRIVATE) LIMITED
versus
GRACE SHUMBA (1)
and
CIMAS MEDICAL AID SOCIETY TRADING AS CIMAS RESCUE (2)
and
OLD MUTUAL LIMITED (3)
and
MS N. MARUFU PROVINCIAL MAGISTRATE (4)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 30 August 2024 & 4 September, 2024

Opposed Application for Review

P. Kawonde, for the applicant
S. Alumenda, for the 1st, 2nd and 3rd respondents

DEMBURE J: This is a court application for review of the decision made by the Provincial Magistrate Ms N Marufu, the fourth respondent, sitting at Magistrates Court (Civil) at Harare on 24 October 2023. In terms of that decision the court *a quo* dismissed the applicant, Shinedrive Auto Services (Pvt) Ltd.'s court application for amendment of summons. The other respondents are Grace Shumba (the first respondent), CIMAS Medical Aid Society trading as CIMAS RESCUE (the second respondent) and Old Mutual Ltd (the third respondent). The applicant seeks the following relief:

1. The judgment of the fourth respondent dismissing the application for amendment of summons be and is hereby set aside.
2. The applicant's application be and is hereby granted and the applicant's summons are hereby amended as follows:

By the deletion of paragraph 10 of the particulars of claim and substitution thereof with the following:

10. Plaintiff suffered damages in the sum of US$6 559.15 or the equivalent Zimbabwean Dollars at the ruling interbank rate.

By the deletion of paragraph (a) of the prayer and substitution thereof with the following:

(a) The payment of the sum of US$6 559.15 or the equivalent in Zimbabwe dollars at the ruling interbank rate on the date of payment being the estimated costs of repairing plaintiff's vehicle.

Paragraphs (b) and (c) thereof shall remain unchanged.

3. That there be no order as to costs, however, an order shall be made against such party as may oppose this application if such opposition is unsuccessful, on a legal practitioner and client scale.

FACTUAL BACKGROUND

On 22 May 2022, the applicant's employee, Tichaona Humpres Nyikadzino, who was driving the applicant's motor vehicle, a Mercedes Benz CLK Registration No. AED 4338, was involved in a road traffic accident with the first respondent at the traffic intersection of Simon Muzenda Street and Herbert Chitepo Avenue in Harare. The first respondent was driving an ambulance being a Toyota Quantum Registration No. AEN 0573 while on duty acting within the scope and course of her employment with the second respondent. The third respondent was the insurer of the second respondent's vehicle. The applicant alleged that the accident was caused by the sole negligence of the first respondent who *inter alia*, proceeded against a red traffic light without sounding the siren. As a result of the accident, the applicant's motor vehicle was damaged. In particular, it was alleged that the vehicle's rear bumper was smashed, got detached from the vehicle and fell off to the ground. The rear tail light and shock absorber were also damaged. The rear right fender was deformed. The applicant's assessed damages were ZWL20 000 000.00 (Twenty million Zimbabwean dollars) being the cost of the repairs to its motor vehicle.

The applicant had a summons issued by the Clerk of Court at the Magistrates Court, Harare against the first, second and third respondents for payment of delictual damages in the sum of ZWL20 000 000.00 arising from the road traffic accident on 11 May 2023. After the issue of the summons, the applicant's legal practitioners demanded payment of the said sum of ZWL20 000

000.00 in damages in a letter of demand directed to the third respondent as the insurer dated 24 May 2023. Two quotations for the repairs in local currency dated 22 October 2022 and 23 May 2023 respectively were attached to the said letter. The claim was defended by the first, second and third respondents who denied liability for the damages and the pleadings were closed. After parties had discovered and filed their pre-trial conference documents the matter was set down for a pre-trial conference on 3 July 2023.

Before the date scheduled for the pre-trial conference, in particular, on 29 June 2023, the applicant filed a Notice of Amendment. In the notice, it sought to amend its summons by the deletion of the damages in the sum of ZWL20 000 000.00 and the substitution with US$6 559.15. The first, second and third respondents filed an objection to the proposed amendment. The pre-trial conference could not proceed before the application for amendment of summons was determined. The applicant then proceeded to file a court application for amendment of summons on 16 August 2023. In the application, the applicant averred that the sum of ZWL20 000 000.00 claimed in the summons was no longer adequate to cover the costs of the repairs to its vehicle due to the loss of value of the Zimbabwean dollar on the market. The applicant attached quotations in Zimbabwean dollars which formed the basis of its claim in the summons issued on 11 May 2023. The copies of the exchange rates were also attached to show the loss of value of the local currency on the foreign currency exchange market. It was further averred that the costs of repairs were now at US$6 559. 15. Three copies of quotations in United States dollars all dated 28 June 2023 were filed to justify the said costs of the repairs. It would be unjust to the applicant if the amendment was not granted, the applicant argued.

The first, second and third respondents opposed the application mainly on the grounds that the amendment contravened the principle of currency nominalism, the legal principle that delictual damages must be assessed as at the time of the delict, that the amendment contravened the exchange control policy and law which provided for the use of the local currency in local transactions and that the applicant did not address the requisite issue of prejudice on the other party. They argued that there was no legal basis for the revaluation of the claim. Parties filed their submissions and on 24 October 2023, the fourth respondent handed down the court *a quo*'s decision dismissing the application for amendment. The fourth respondent found that the amendment would be prejudicial to the respondents as it goes to the root of the claim formulated

in Zimbabwean dollars which the applicant now wanted to claim in United States dollars. It was also the court's finding that the respondents had pleaded to the claim in local currency as formulated in the summons and the application was tantamount to bringing a new claim altogether.

Following the decision to dismiss its application, the applicant filed this application for review on 11 December 2023. The first, second and third respondents opposed the court application for review and have raised the following points *in limine*:

1. The application is invalid for the reason that the applicant used the wrong procedure as his grounds of review are incompetent and invalid.
2. The relief sought is legally incompetent due to the principle of currency nominalism rendering the application fatally defective.

POINT *IN LIMINE*

THE VALIDITY OF THE COURT APPLICATION FOR REVIEW

The first issue for determination is whether or not this application is fatally defective and therefore, invalid on account of invalid grounds of review. The question to be answered is whether the purported grounds of review are valid.

FIRST, SECOND & THIRD RESPONDENTS' SUBMISSIONS

Mr *Alumenda*, for the first, second and third respondents, submitted that this application is invalid as the purported grounds of review are invalid. They are grounds for an appeal. All three grounds of review are not valid grounds of review as they do not attack the validity of the decision of the magistrate but its substantive correctness, findings of fact and law and what it perceived to be an error in the exercise of her discretion. Counsel cited the cases of *Khan v Provincial Magistrate & Ors* HH 39/06, *Magodo & Ors v Chief Superintendent Kezias Karuru* HH 276/18 and *S* v *Maphosa HH* 323/13 as authority for that legal position. From these cases, the grounds of review are incompetent and invalid.

Concerning the first ground, Mr *Alumenda* submitted that the applicant attacked the decision on the reason that the magistrate erred in her legal meaning of the word "prejudice". This was about her discretion. The applicant had challenged the legal conclusion, the exercise of discretion and the correctness of the decision in so far as the word "prejudice" is defined. He referred the court to authorities cited in para. 8 of the respondents' heads of argument including *Khan v Provincial Magistrate & Ors supra* where the court held that a review cannot attack the

correctness of a decision. The applicant attacked the legal and factual finding and the discretion exercised by the magistrate which is incompetent in a review application. The applicant ought to have lodged an appeal but unfortunately, the time to appeal has lapsed.

For the second ground, counsel submitted that the whole essence of it is that there was no sufficient evidence for the decision made. He referred to the discovered quotations in Zimbabwean dollars which were attached to the letter dated 24 May 2024 which showed that the claim in the summons was formulated in local currency based on those quotations. These were part of the record. The quotations were also filed with the application for amendment. The respondents filed their plea after they had seen the same quotations which were the backbone of the claim for ZWL20 000 000.00. The magistrate was correct in her findings as the respondents had relied on them to prepare their plea. The challenge here was that there was a lack of evidence and the route to take is to appeal. Mr *Alumenda* referred this court to the decision in *Maphosa supra* and further submitted that the gripe here had to do with the evidence and if the applicant was not happy with that decision the remedy was to appeal. The ground is incompetent.

On the third ground of review, Mr *Alumenda* submitted that the concern raised in that ground is an error in law on the decision made in relation to the "prejudice" to be suffered by the respondents. The applicant is saying that the magistrate should not have exercised her discretion in going outside the record. He referred to the case of *Khan supra* where it was held that one cannot challenge the discretion of the magistrate on review. The proper approach is to appeal. Finally, it was submitted that the stated grounds do not constitute grounds of review in terms of the law. The application is incompetent and invalid. It must be struck off the roll with costs.

APPLICANT'S SUBMISSIONS

Mr *Kawonde*, for the applicant, submitted that the matter arose out of an interlocutory application for an amendment to replace the value in the summons with United States dollars. The record of proceedings for the court *a quo* only included the application up to the heads of argument. I hasten to state that the quotations in both United States dollars and local currency were attached to the application and in the application the applicant had averred that the claim in the summons was formulated based on the same quotations in Zimbabwean dollars. This comes out in paragraphs 7 – 9 of the applicant's founding affidavit before the court *a quo*.

On the first ground of review, counsel submitted that a misdirection is a well-known ground of review. He, however, did not cite any authority for this proposition. He argued that the magistrate looked at the wrong things in her decision and not what is provided for by s 66 of the Magistrates Court Act. Had she looked at the correct things her findings might have been different. The prejudice the lower court found is that the claim was in local currency and is now in United States dollars. The lower court did not define what "prejudice" was. It was argued that the ground goes to the manner in which the court *a quo* looked at the matter and was valid.

As for the second ground, Mr *Kawond*e submitted the lower court indicated that the respondents had pleaded to quotations that had been supplied. He argued that quotations are evidence and are separate from pleadings. One cannot, therefore, plead to evidence. The court *a quo* was saying that because they had pleaded on the matter there would be prejudice but they had not pleaded to evidence. There was a gross misdirection which is a well-known ground for review.

In respect of the third ground, counsel submitted that the court *a quo* found that there was prejudice to the respondents in the event of an amendment. The lower court should have indicated what sort of prejudice. In the judgment, there is no indication of what prejudice was there. He further argued that s 66 of the Magistrates Court Act requires that an application for an amendment be granted unless the other party will be prejudiced in the conduct of his case and that the issue of costs must also be looked at. Where the court fails to state what prejudice it is, it is a gross misdirection or gross irrationality which is a ground of review. The applicant's counsel insisted that the application was valid and that the court should dismiss the point *in limine*.

THE LAW

This court has the jurisdiction to review all proceedings and decisions of all inferior courts, tribunals and administrative authorities in terms of s 26 of the High Court Act [Chapter 7:06]. The grounds of review are as provided in terms of s 27 of the Act or any other law. The said provisions state as follows:

(2) Nothing in subsection (1) shall affect any other law relating to the review of pro"**27 Grounds for review**

(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—

(a) absence of jurisdiction on the part of the court, tribunal or authority concerned;

(b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;

(c) gross irregularity in the proceedings or the decision.

ceedings or decisions of inferior courts, tribunals or authorities."

The law is settled that there is a difference between an appeal and a review. A party cannot seek review where the grounds raised are what the law provides should constitute the grounds of an appeal. Any purported application for review which raises improper grounds of review or gives grounds of an appeal is fatally defective and accordingly a nullity. A review has distinct qualities from an appeal. Thus, Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed p 932 provide the ultimate distinction between the remedy of appeal and that of review as follows:

> "The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity." (My emphasis)

The above legal position was confirmed by this court in *Magodo & Ors v Karuru supra* as representing our law on review and how its unique qualities are different from the remedy of an appeal.

A review must attack the validity of the decision or the proceedings. An attack on the substantive correctness of the decision of the inferior court or an error in law or in fact made by the magistrate including an error in the exercise of the magistrate's discretion is never a ground for a review but for an appeal. See *Khan v Provincial Magistrates & Ors supra*.

THE ANALYSIS

The applicant's grounds of appeal are captured in the notice of application as follows:

1. The 4th respondent misdirected herself by misconstruing what is meant by the word "prejudice" in application for an amendment of a summons.

2. The 4th respondent made misdirection on the facts which was so unreasonable that no sensible person exercising his mind on the matter would have come to a decision by ruling that the respondents had pleaded to the quotations which had been supplied to them in local currency whereas in fact, applicant had never presented any quotations of any kind with his pleadings in the summons, the object of the amendment.
3. The 4th respondent, in error of law, made a finding regarding the nature of the prejudice suffered by the respondents that was outside the parameters of the pleadings placed before her. It is an error of law because she based her decision on an irrelevant consideration.

FIRST GROUND OF REVIEW

On this ground, the gripe of the applicant is that the magistrate made an incorrect decision. It is said she misconstrued the meaning of "prejudice". This ground does not attack the validity of the decision or the proceedings. It attacks the correctness of the decision. The law is settled in this regard. MAKARAU J in *Khan v Provincial Magistrates supra* aptly gave a remarkable difference between an appeal and review, where she held that:

> "An appeal seeks to attack the correctness of the decision of the inferior court or tribunal while a review seeks to attack the manner in which the decision of the inferior court or tribunal has been arrived at. Grounds of appeal are unlimited and cannot be prescribed as they relate to the errors in law or in fact made by the court whose decision is under attack. On the other hand, grounds of review are limited by law and have to be laid out in the application for review. An error in exercising one's discretion can never be the basis for bringing a review. It is a ground of appeal."

The decision handed down by a magistrate may be erroneous because he or she has misconstrued the facts before the court or has misinterpreted the law or applied it incorrectly. That does not give rise to a review. The appropriate procedure to adopt is to appeal. Since I am not determining the merits yet I do not need to consider whether or not the magistrate's decision correctly defined what "prejudice" is. That is an issue for the court to decide on appeal. It can never be a ground of review. Such misdirection, if any, can only be raised by way of an appeal. I, therefore, find the first ground of review legally incompetent and void.

SECOND GROUND OF REVIEW

The applicant's attack on the decision by the magistrate here is again on the correctness of the decision. Properly analysed the applicant's grievance is that the finding of fact amounts to a gross misdirection making it a question of law. That is the formulation of the finding of fact being

said to be one no sensible person can make looking at the evidence on record. This is a ground of appeal based on a gross misdirection or irrationality. It is the basis of an appeal where the appellate court can interfere with the decision of factual findings if there is a clear misdirection or the decision reached is irrational. The attack here is on the substantive correctness of the decision. See *Chenga v Chikadayo & Ors* SC 7/13 at p. 5. In *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01, at pp 5 to 6 of the cyclostyled judgment, the court held that if an appeal is to be related to the facts, "there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented."

It is trite that where a party attacks the lower court's factual findings on the basis of irrationality (which constitutes an error on a question of law) the approach of our courts was stated in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 C-D, where the Court said:

> "The general rule of the law, on regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of 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 such a concussion".

The formulation of the second ground by the applicant clearly reflects that the applicant's gripe is a gross misdirection on facts which amounts to an error in law. The ground is not pleaded as to create the basis of a review. In any event, the ground does not allege any irrationality but that the lower court simply made an error of law when in its decision it stated that the respondents had pleaded to the quotations. Mr *Kawonde* correctly submitted that at law a party does not plead to evidence but to pleadings before the court. Likewise, in summons, a party does not plead evidence. His submissions establish that the applicant takes issue with the error of law made by the magistrate. In other words, the point is that the magistrate made a wrong decision by not applying the law correctly. That does not affect the validity of the decision or the proceedings but it simply made her decision incorrect, the province for an appeal. As already alluded to above and based on the decisions in *Khan* and *Maphosa supra*, an attack on the correctness of the decision or findings of fact and law are never grounds for a review. That misdirection cannot constitute a ground of

review. The appropriate procedure the applicant should have adopted was to appeal. On that basis, the second ground is not a proper ground of review. It is a nullity.

THIRD GROUND OF REVIEW

The third ground again raises that the magistrate made an error of law in that she made the decision on "prejudice" based on an irrelevant consideration. The legal position on this point is settled. See *Khan supra* where the court held that where a party alleges "errors in law or in fact made by the court whose decision is under attack [as well as] [a]n error in exercising one's discretion can never be the basis for bringing a review. It is a ground of appeal." The ground attacks the substantive correctness of the decision. Whether or not it was a correct decision for the magistrate to have looked at prejudice in that manner and exercise its discretion in the manner it did are not issues or questions which can be answered on review. The proper procedure would be to appeal. Mr *Kawonde* in his submissions on this ground stated that the court should have stated what that "prejudice" was given the provisions of s 66 of the Act. He argued she failed to indicate the nature of the prejudice. What these submissions show is that there was a misdirection or errors in law in her findings. That is an area for an appeal. As correctly submitted by Mr *Alumenda*, this misdirection is an issue of an appeal. It is a misdirection warranting an appellate court to interfere with the decision of the lower court. The court must apply the law to the facts placed before it. If it incorrectly applies the law or determines an issue before it incorrectly, as alleged by Mr *Kawonde*, that is a ground of an appeal. I also find the third ground of review improper and fatally defective. It is not a review ground but one for an appeal.

The application for review was ill-conceived. The proper procedure would have been to appeal. Whether or not the appeal would succeed would be another thing. The first point *in limine* must succeed. I noted that the parties, in their submissions on the point *in limine* strayed into the merits of the matter with both counsels making conclusions on the correctness of the decision subject of this application. I did not consider the merits of the matter and cannot make any finding in that regard at this stage. The law exists as it is and legal practitioners must formulate their grounds of review guided by the differences which exist between an appeal and a review. While both can ultimately lead to the decision of the lower court being set aside, they remain fundamentally distinct procedures. Given that I have upheld the first point *in limine*, it became unnecessary for me to consider the second point *in limine*.

DISPOSITION

Having found the grounds of review invalid or legally improper, this application is accordingly fatally defective and therefore, a nullity. The costs must follow the cause.

It is accordingly ordered that:

1. The first point *in limine* be and is hereby upheld.
2. The court application for review be and is hereby struck off the roll with costs.

DEMBURE J: …….

Kawonde Legal Services, applicant's legal practitioners.

Gill, Godlonton & *Gerrans,* first, second and third respondents' legal practitioners.