FELTON KAMAMBO
versus
BIANCA MAKWANDE N.O
and
THE STATE

HIGHCOURT OF ZIMBABWE
CHIKOWERO AND KWENDA JJ
HARARE, 11 November 2022 & 23 March 2023

Court application for review of unterminated proceedings

T Mpofu and A Rubaya, for the applicant
F I Nyahunzvi, for the 2nd respondent
No appearance for the 1st respondent

CHIKOWERO J:

1. This is an application for review of the judgment of the magistrates court dismissing an application for discharge at the close of the case for the prosecution.
2. The applicant is on trial in the magistrates court on thirty-two counts of bribery as defined in s 170(1)(b)(ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations are essentially that he induced Zimbabwe Football Association (ZIFA) congress members to vote for him in the 2018 ZIFA Presidential elections by paying those voters.
3. The prosecution led evidence from numerous witnesses. These included the losing candidate in that election, Phillip Chiyangwa; the applicant's campaign manager, Robert Matoka; the investigating officer and twelve congress members. The latter were counted among the thirty-two who had been paid either by the applicant directly or through his campaign manager.
4. The charge suggested that the principal was the ZIFA Electoral Committee but, in determining the application, the trial court found that the principals were the members of ZIFA. These were the various local football bodies that were eligible to vote in the ZIFA

elections. They included the Premier Soccer League and the four Division One Soccer Leagues.

5. It was not in dispute that the ZIFA Congress members, loosely referred to as councillors, received money either in the form of cash or ecocash, from the applicant and in some instances through Matoka. However, all the councillors who testified, save for one, said that the payments were not bribes. Their evidence was that the payments were reimbursements for the expenses incurred by them in attending the applicant's campaign meetings. Such expenses were for food, accommodation and transport. The lone councillor who testified differently told the trial court that the applicant, uninvited, insisted on availing cash so that the witness would re-fuel his car with the balance going towards purchasing food for the witness' children. Chiyangwa told the court that Matoka approached him after the election and disclosed that the applicant had won the election because he had bribed the councillors to vote favourably. Chiyangwa filed a police report. The police investigations unearthed proof of the payments that the applicant and his campaign manager had effected in favour of the councillors. Matoka testified that all the payments were not bribes but reimbursements of the councillors' food, transport and accommodation costs incurred in attending the applicant's campaign meetings. An affidavit was produced whose contents reflected that he had sworn before a Commissioner of oaths that, indeed, the applicant had bribed the Councillors in cash and at times via ecocash. The applicant had effected direct payments to some of the councillors while on other occasions such bribes were paid through Matoka. Once on the witness stand, however, Matoka testified that he had appended his signature on the affidavit under duress and, in any event, not before a Commissioner of oaths. He said the truth was not in the "affidavit" but in what he was testifying to in Court. He was declared to be a hostile witness, cross-examined by the prosecution and the court relied on those portions of his evidence favourable to the state in finding that a *prima facie* case had been established.
6. We are satisfied that at the heart of this application lies the contention that the trial court was wrong in not discharging the applicant at the close of the case for the prosecution. The applicant urges us to interfere in the uncompleted proceedings of the trial court by

exercising our review powers to set aside the interlocutory decision and to, ourselves, discharge him.

7. The law applicable in an application of this nature is settled. In *Attorney-General* v *Makamba* 2005(2)ZLR 54(S) MALABA JA (as he then was) put it thus at 64C:

> "The general rule is that a superior court should interfere 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" (the underlining is ours).

See also *Prosecutor-General of Zimbabwe* v *Intratrek Zimbabwe (Private) Limited and Ors* SC 59/2019; *Prosecutor-General of Zimbabwe* v *Intratek Zimbabwe (Private) Limited and Ors* SC 67/20; *Ndhlovu* v *Regional Magistrate, Eastern Division and Anor* 1989(1) ZLR 264(HC).

8. We think that the following sentiments of the court in *Prosecutor-General of Zimbabwe* v *Intratek Zimbabwe (Private) Limited and Ors* SC 67/20are pertinent. There, MAKARAU JA (as she then was), with the concurrence of the other members of the Court, said at p 8:

> "Thus, put conversely, the general rule is that a superior court must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with on-going proceedings."(underlining our own).

9. At pp 8-9 HER LADYSHIP continued:

> "Whilst the general rule on when a superior court may interfere in on-going proceedings in a lower court was common cause to the parties, the court *a quo* appeared to have been oblivious of the correct approach to adopt in the matter. Instead of finding a reason for departing from the general rule as settled in the authorities and legal texts, the court a quo was content to find that the third respondent had misdirected himself by dealing with an issue that was not before him as a basis for interfering with the on-going trial of the first and second respondents."

10. Finally, in the same matter the Supreme Court expressed itself thus at p 9:

> "The net result was that the court *a quo* did not find as it ought to have, that this was a rare case in which the irregularity complained of was not only gross but vitiated the proceedings irreparably before it interfered with the on-going trial."

11. We understand the law to be that even if an interlocutory decision is grossly irregular a superior court must still not interfere unless that decision vitiates the proceedings

irreparably. If that decision can lose its impact in the course of those on-going proceedings a superior court will not interfere before the proceedings are finalised. Similarly, if the impact of the grossly irregular decision can be remedied by a Superior Court either on appeal or review after the conclusion of the matter in the court below the superior court will not interfere before then. By the same token we have to be satisfied that the applicant's rights will be seriously prejudiced by what may be a clearly wrong interlocutory decision before we can interfere with the on-going proceedings of the lower court.

12. With these legal principles in mind, the present is not one of the rare cases as to call for our interference at this stage. We see nothing in the interlocutory decision that the judgment of the court below, after a full trial, cannot redress. In the event that the applicant is convicted, he may exercise his right of either appeal or review. Since the onus lies on the prosecution to prove its case beyond reasonable doubt the arguments that he relies on to argue that the interlocutory decision is wrong, on the evidence, may still be relied on by him to challenge the main judgment of the court below, should he be convicted. See *The State* v *Muserere and Ors* SC 147/21. We take this view because the applicant's grounds for review raise the sole contention that the court below grossly misdirected itself, at law and infact, in dismissing his application. He has identified the areas in question, although some of the grounds are in the nature of arguments. At the end of the day, we are satisfied that what the applicant has relied on as grounds for review are in reality grounds of appeal. He cannot appeal the interlocutory decision under cover of what he has chosen to characterise as grounds for review. We have looked at the substance of the grounds, not their form.
13. In the circumstances, it becomes unnecessary to traverse the merits of the application lest we exercise appellate jurisdiction at this stage.

14. In the result, the application be and is dismissed.

CHIKOWERO J:…….

KWENDA J:Agrees……..

Rubaya and Chatambudza, applicant's legal practitioners.
The National Prosecuting Authority, respondent's legal practitioners.