BRENT JOHAN LUNT
versus
BARBARA MATEKO N.O.
and
THE STATE
and
NYASHA MATENDAWAFA

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 21 July & 2 November 2022

Court Application for Review

Mr *T K Hove*, for the applicant
No appearance, for the 1st, 2nd and 3rd respondents

DEME J: This court is generally reluctant to interfere with unterminated proceedings in the inferior courts. However, as shall be demonstrated in this case, certain exceptions warrant the intervention of this court guided by the interests of justice principle.

The applicant approached this court seeking the review of the decision of the first respondent. The first respondent dismissed the application for discharge at the close of the State case which was lodged by the applicant. More precisely, the applicant prays for the following relief:

> "1. The decision of the first respondent dismissing the applicant's Application for Discharge at the Close of The State Case under Case Number HRE P9372/19 be and hereby set aside.
>
> 2. Applicant be and hereby discharged and acquitted at the close of the State Case Number CRB HRE P 9372/19.
>
> 3. Each party to bear its own costs."

The following were the applicant's grounds for review:

> "1. The first respondent's decision to put the applicant to his defence is outrageous in its defiance of logic that no sensible court having applied its mind reasonably and judiciously would arrive at it in that:-
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> 1.1 Having properly found that the State had failed to establish the essential elements of the offence in that, there was no evidence to prove that the trophies were from the Black or Square Lipped Rhinoceros which are the specially protected species of rhinoceros in terms of the Parks and Wildlife Act [*Chapter 20:14*], first respondent wrongfully exercised a discretion which does not exist by putting applicant to his defence.

1.2 The first respondent erred in dismissing the applicant's application to be discharged at the close of the prosecution case having found that the State's evidence on the aspect of possession and in particular physical control had inconsistencies and disparities which go to the root of the charges.

1.3 The first respondent completely erred by failing to appreciate that the presumptions provided in section 97(1) and 97(8) of Parks and Wildlife Act [*Chapter 20:14*], (the Act) only applies if the State manages to prove that the subject is an item which is specially protected in terms of the Act and that the State has managed to place the applicant within the ambit of the offence for purposes of an applicable "reverse onus" to kick in on other question of physical possession. At any rate, first respondent's decision to invoke reverse onus in terms of section 97(7) and 97(8) of the Act is contrary to law and it constitutes a gross irregularity which leads to miscarriage of justice.

1.4 First Respondent's decision to put Applicant on his defence is contrary to section 70(1) (a) and 69(i) as read with section 86)3) (2) of the Constitution of Zimbabwe and generally contrary to criminal law and procedure."

The applicant and the third respondent appeared before the court *a quo* jointly charged with unlawful possession of a trophy of a specially protected animal established in terms of s 45(1)(b) as read with s 128(1)(b) of the Parks and Wildlife Act [*Chapter 20:*14] (hereinafter called "the Act"). State allegations are that on 2 July 2019, detectives from Criminal Investigation Department Minerals, Flora and Fauna Unit, Harare, received information to the effect that the applicant and the third respondent were in possession of Rhinoceros horns which they intended to sell in Masasa area, Harare. The applicant and the third respondents were driving Toyota Mark X white in colour Registration number AEP 9848. Detectives proceeded to Masasa and spotted the matching vehicle driven by the third respondent while the applicant was a passenger in the vehicle. After identifying themselves, the detectives requested to search the applicant and the third respondent and found four rhinoceros horns from the blue bag which was held by the applicant. Upon being asked to produce relevant documents authorising them to be in possession of rhinoceros horns, the applicant and the third respondent failed to produce such documents. The weight and value of the rhinoceros horns are 5,993 kilograms or US$ 240 000 respectively.

The application was not opposed by the second respondent which submitted that the merits of the application and substantive aspects of the law for the matter had already been determined by this court in the case of applicant's co-accused, who is the third respondent in the present application. The second respondent referred the court to the case of *Nyasha Mutendawafa* v *Barbara Mateko N.O. & Ors*[1] where the third respondent's application for

[1] HH50/22.

review against the decision of the first respondent was granted by this court. The second respondent went on to submit that the judgment is still extant and no appeal had been noted against such judgment.

At this moment, it is critical to have reference to the appropriate law governing the offence in question. Section 45(1)(b) of the Act establishes, among other offences, an offence of being in possession of any part of the specially protected animal without a permit In particular, s 45(1) (b) of the Act provides as follows:

> "(1) No person shall—
> (a) …; or
> (b) keep, have in his possession or sell or otherwise dispose of any live specially protected animal or the meat or trophy of any such animal;
> except in terms of a permit issued in terms of section forty-six."

Section 128(1) (b) of the Act provides for the penalty of the offence for possession of a part of a specially protected animal. More precisely, s 128(1)(b) of the Act provides as follows:

> "(1) Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving—
> (a) …; or
> (b) The unlawful possession of, or trading in, ivory or any trophy of rhinoceros or of any other specially protected animal that may be specified by the Minister by statutory instrument; shall be liable—
> (i) on a first conviction, to imprisonment for a period of not less than nine years;
> (ii) on a second or subsequent conviction, to imprisonment for a period of not less than eleven years:
> Provided that where on conviction the convicted person satisfies the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty, the facts of which shall be recorded by the court, the convicted person shall be liable to a fine four times the value of the ivory or any trophy or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

The horn of the Rhinoceros qualifies to be a trophy contemplated in s 45(1)(b) and s 28(1)(b) of the Act. Trophy is defined in terms of Section 2 of the Act in the following way:

> "trophy" means—
> (a) Any horn, ivory, tooth, tusk, bone, claw, hoof, hide, skin, hair or other durable portion whatsoever of any animal whether processed or not, which is recognisable as the durable portion of any animal; and
> (b) The egg of any animal; and
> (c) Anything of which the durable portion of any animal forms a part, which is declared to be a trophy in terms of section seventy-six;"

A specially protected animal is defined in Section 2 of the Act. More specifically, the definition of a specially protected animal in the Act is as follows:

> "specially protected animal" means any animal declared in terms of Part IX to be a specially protected animal."

Section 43 of the Act which falls under Part IX of the Act defines the specially protected animal in the following manner:

> "The animals specified in the Sixth Schedule are hereby declared to be specially protected animals."

Rhinoceros is an animal which falls under mammals in terms of Sixth Schedule to the Act. In terms of the Sixth Schedule, the rhinoceroses are categorised into the two following divisions:

> "(a) Black-Diceros bicornis
> (b) Square-lipped-Ceratotherium simum".

Having laid the foundation of the essential and relevant legal provisions, it is crucial to turn to the proceedings and examine whether the essential elements of the offence in question were unearthed through the evidence of the second respondent. For this offence, it is apparent that intentional and physical possession of a part of a specially protected animal is an essential element for the offence facing the applicant. The State called, among others, Doctor Tapiwa Hanyire, a veterinary doctor to give expert evidence in order to assist the court. However, it is clear from the ruling of the first respondent that she considered that the State, through the doctor's evidence, failed to prove possession of a trophy of rhinoceros which are specially protected animals. In her ruling, the first respondent made the following remarks:

> "His evidence was more of a layman … His assessment could not tell the species of the horns … Considering what was to be established as per the Act, this witness failed dismally……. to discharge his duties as an expert. The technical aspects in relation to the origin of the horns and the type of species should have been clarified by this particular witness. However the evidence of this witness was not scientific at all.
> The State ought to have called an expert in the field to assist the court if the horns were from the specially protected species rhinoceros. Therefore there was no evidence that the horns were from black or square lipped rhinoceros"

It is obvious from the first respondent's remarks that the State witness who was considered to be an expert could not adduce expert evidence which could help the court. The first respondent categorised the evidence of this witness as that of a layman. The first respondent also made an important observation that the State was supposed to have called for

an expert to testify before the court. Her remarks signifies that the State case is manifestly unreliable. If the State failed to prove that the horns were that of the rhinoceros, one wonders what could be the first respondent's basis for believing that the second respondent had established a *prima facie* case warranting to put the applicant to his defence. Once satisfied that the State has failed to prove essential elements for the offence, the first respondent ought to have proceeded to discharge the applicant at the close of the State case. The application for the discharge of the accused at the close of the State case is provided for by s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides as follows:

> "(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

The requirements of the application for discharge of the accused at the close of the State case now resemble a well beaten path in our jurisdiction. The court will examine whether or not the following issues have been satisfied:

(a) Whether there is evidence to prove an essential element of the offence;

(b) Whether there is evidence on which a reasonable court, acting carefully, might properly convict;

(c) Whether the evidence adduced on behalf of the State is so manifestly unreliable to the extent that no reasonable court could safely act on it.

The application for the discharge at the close of the State case has been settled by a plethora of cases including *S* v *Bvuma*[2], *S* v *Muzizi*[3], *S* v *Tarwirei*,[4] *S* v *Kachipare*,[5] *S* v *Tsvangirai*[6], *AG* v *Makamba*[7], *S* v *Benjamin Paradza*[8], *S* v *Christopher Tichaona Kuruneri*[9], , *S* v *Bennet*[10] *and S* v *John Arnold Bredenkamp*[11].

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[2] 1987 (2) ZLR 1996.

[3] 1991 (2) ZLR 321.

[4] 1997 (1) ZLR 575.

[5] 1998 (2) ZLR 271 at 276C-277A.

[6] 2003 (2) ZLR 88 at 89H-91A.

[7] 2005(2) ZLR 54 at 64 G-65 B.

[8] 2006 (1) ZLR 20 at 24G-25F.

[9] HH 59-2007.

[10] 2011 (1) ZLR 396 at 400D-401B.

In the case of *The Prosecutor-General of Zimbabwe* v *Richard Masvaire and Ors*[12], the court propounded the essential requirements of the application for discharge of the accused at the close of the State case in the following remarks:

> "The legal position therefore, in an application brought in terms of s 198 (3), may be summarised as follows:
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> (a) an accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;
> (b) in deciding whether the accused is entitled to be discharged at the close of the State case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;
> (c) where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.
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> See also *State* v *Shrien Prakash Dewani* CC 15/2014 (Constitutional Court of South Africa).
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> At that stage of a trial, the evaluation of the evidence is different from that involved at the end of the trial. It is a *sui generis* interlocutory application, which typically raises a question of law and not fact. A court seized with such an application must bear this in mind when adjudicating an application in terms of s 198 (3) of the Criminal Procedure and Evidence Act.
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> The words "no evidence" have been interpreted to mean no evidence upon which a reasonable court acting carefully may convict. Again the "no evidence" test is *sui generis*.
>
> See *S* v *Shuping.*[13] It will be seen that at this stage there is not an onus in the usual sense of the law, and specifically not an onus on a *prima facie* basis to be met by the State. "*Prima facie"* is defined as that: if a party on who lies the burden of proof goes as far as he reasonably can in producing the evidence and that evidence calls for an answer, it is *prima facie* evidence. In the absence of an answer from the other side, it becomes conclusive. Therefore, once a prima facie case has been established the evidential burden will shift to the accused to adduce evidence in order to escape conviction. However the burden of proof will remain with the prosecution."

Having been satisfied that there is no evidence incriminating the applicant it is appropriate that an order for the discharge of the applicant be made as this is in the interests of justice. An order for the discharge can be contrasted with the order of acquittal of the applicant. Discharge of the accused has the effect of retaining the verdict of not guilty which is consistent with the provisions of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07]*. Retaining the verdict of not guilty is in harmony with s 70(1)(a) of the

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[11] HH305/13.

[12] HH5/19.

[13] 1983 (2) SA 119 (B).

Constitution of Zimbabwe which upholds the doctrine for the presumption of innocence. Unlike discharge, acquittal can only be a result of a full trial where all parties to the criminal proceedings lead their evidence. The effect of the grant of the application for discharge of the accused at the close of the State case has been extensively discussed in the case of *Prosecutor General* v *Richard Masvaire* (*supra*) where the court made the following observations:

> "In my view, there is a clear difference between an acquittal and a discharge. Although the words "not guilty and acquitted" and "not guilty and discharged" may be used interchangeably when an applicant in terms of this section in successful, the correct position at law is that because the ruling is only interlocutory at that stage, the court cannot return a final verdict. Therefore, even where a court is satisfied that there is no evidence, at that stage, upon which a reasonable court might convict, the true position is that the accused is only discharged and not acquitted. Section 198 (3) permits the court to discharge an accused before the end of a full trial. A full criminal trial, encompasses the evidence led on behalf of the State and that led on behalf of the accused. A finding of not guilty after a full trial results in an acquittal in the legal sense of the word. The consequence of an acquittal is that the accused cannot be tried again on the same facts and the same charge. In that sense an acquittal bars a second trial on the same facts and for the same offence, or on the same facts for any other offence for which different charges from the one made against the accused might have been made.
>
> On the other hand our law provides that where a person has been discharged he can still be rearrested and committed for a further inquiry. An order for discharge simply implies that there is no *prima facie* evidence against the accused to justify further inquiry in relation to the charge. Such an order does not establish anything regarding the guilt of the accused. In such cases a discharge does not bar the institution of fresh proceedings when new or better evidence becomes available against the accused. An instance of this is when the State procedurally withdraws charges against an accused person before he has pleaded to a charge. Whilst the accused person is literally free and is released from court, such a discharge may or may not mean that his innocence has been established. It only means that at that stage there is insufficient evidence to proceed with a trial or to keep him on remand. A refusal of remand also has the same effect. The court, in essence, is putting State on terms, either prosecute the accused or release him. If the charges are not withdrawn, the court invariably refuses to keep an accused on remand. This does not mean that the accused's innocence has been established.
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> In my view, when a court discharges an accused in terms of s 198 (3) of the Criminal Procedure and Evidence Act, it is merely stating the fact that no *prima facie* evidence has been established to warrant a full trial. It is upholding the accused's right to a fair trial. This is, in my view, the more reason why a careful exercise of judicial discretion is required. There is need to balance the interests of the accused as well as those of the due administration of justice. Only after full trial can the innocence of an accused person be pronounced finally."

Upon reaching a conclusion that the State's evidence was so manifestly unreliable, the first respondent went on, on her own initiative, to invoke the provisions of s 97(1) and (8) of the Act despite the fact that the defence counsel and the State had not made submissions on this aspect. More specifically, s 97(1) and (8) of the Act provides as follows:

> "(1) The possession of any animal or fish or the meat or trophy of a freshly killed animal shall be *prima facie* evidence against a person accused of contravening any provision of this Act that he has hunted such animal or caught such fish.
>
> (8) The burden of proving any fact which would be a defence to a charge of committing any offence in terms of this Act shall lie upon the person charged."

If the defence counsel and the second respondent had made their submissions, it would have been clear whether or not the horns were from the freshly killed Rhinoceroses as contemplated in s 97(1) of the Act. In the absence of such submissions, the first respondent's findings would be prejudicial to the applicant. In the case of Nyasha Mutendawafa (*supra*), MANZUNZU J, commenting on the approach of the first respondent by invoking s 97(1) and (8) of the Act made the following remarks:

> "In respect to the element of possession, the first respondent said the State's evidence was marred with inconsistencies. Despite that, it was noted that the State was at this stage required to establish a *prima facie* case. Section 97 (1) and 97 (8) of the Act was invoked on "reverse *onus*." Application of s 97 by first respondent did not find support from both the applicant and second respondent simply because the parties were not heard on the point which was raised *mero motu* by the court in its ruling.
> Despite a clear indication of the State's failure to prove the elements of the offence, the first respondent abruptly without any justifiable cause concluded that a *prima facie* case was established. The conclusion is contrary to the requirements as laid down in the Bvuma case (*supra*). This is one of those rare cases, in my view, where the application must succeed and rightly so."

I fully associate myself with the court's findings in the case of Nyasha Mutendawafa (*supra).* In light of *stare decisis* principle, my hands are tied. The facts in the present application cannot be distinguished from the case of Nyasha Mutendawafa (*supra).* Reference is made to the case of *Denhere* v *Denhere & Anor*[14], where, in relation to the principle of *stare decisis*, the Constitutional Court made the following remarks:

> "The words "*stare decisis*" are Latin words which mean that things that have been decided should be left to stay undisturbed. The meaning of the doctrine of *stare decisis* is that when a point of law has been once solemnly and necessarily settled by a decision of a competent court it will no longer be considered open to examination or to a new ruling by the same tribunal or those which are bound to follow its adjudication.
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> The doctrine of *stare decisis* is therefore a rule of precedent or authority, addressed to lower courts and members of the public who are decision-makers, to the effect that decisions of the higher courts on particular points of law presented to and passed upon by those courts are law. Lower courts are bound to obey them in similar cases in future until they are overruled, even though a rigorous adherence to them might at times work individual hardship."

[14] CCZ9/19.

Consequently, it is ordered as follows:

1. The decision of the first respondent dismissing the applicant's application for discharge at the close of the State case under case number HREP 9372/19 be and is hereby set aside.
2. Applicant be and is hereby discharged at the close of the State case under case number CRB HRE P 9372/19.
3. Each party to bear its own costs.

DEME J:…….

KATIYO J:……...Agrees

T K Hove and Partners, applicant's legal practitioners