HB 226-16
HC 1755-16
XREF HC 1699-16
XREF HC 2006-16

ALPHONSUS OBIOMA ACHINULO
versus
W. MAPHIOS MOYO N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 18 AUGUST 2016 AND 25 AUGUST 2016

Urgent Chamber Application

L Nkomo for the applicant
No appearance for the 1st respondent
T Muduma for 2nd the respondent

MATHONSI J: A superior court should always be slow to intervene in unterminated 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. Although this court's review power may be exercised to grant a mandamus even before the termination of a case if there were gross irregularities in the proceedings or it is apparent that justice might not be attained, the general rule is that this court's power of review is exercised only after termination of a criminal case.

The applicant was arraigned before a provincial magistrate in Gwanda charged with theft in contravention of s113 (2) (c) of the Criminal Law Code [Chapter 9:23] the allegations being that he stole a sum of $70 533, 34 belonging to the partnership of Enfund and N & S Partnership proceeds from the sale of 43 stands belonging to the partnership which were sold on behalf of the partnership by Umzingwane Rural District Council and the money given to the applicant. It is alleged that instead of using the money to purchase reticulation pipes and pay plumbers laying the pipes on behalf of the partnership the applicant used the money for other purposes.

The applicant pleaded not guilty to the charge and in his defence outline he stated that he received the proceeds of the sale of the stands in his capacity as the Finance Director of the

Partnership, he having been one of the two partners, the other being Nicholas Masuku who is the complainant in the matter. The latter was the operations director.

The money was to be used for, among other things, fuel and oils, pipes for servicing, casual wages, repairs and maintenance of equipment as well as office expenses. When he received the money he used it for that purpose. He therefore disputed stealing the money and maintained that some of the money was actually collected and used by the complainant. Indeed evidence led on behalf of the state showed that the complainant is the one who received the sum of $2400-00 in count 3 which he says he used to pay wages. The complainant's gripe was that the applicant had not properly accounted for the rest of the money.

At the close of the case of the prosecution the applicant made an application for discharge in terms of s198(3) of the Criminal Procedure and Evidence Act [Chapter 9:07] which enjoins the trial court to discharge an accused person at that stage where there is no evidence to prove an essential element of the offence; there is no evidence on which a reasonable court, acting carefully, might properly convict or the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it. See *S* v *Kachipare* 1998 (2) ZLR 271 (S) 276 D-E; *Attorney General* v *Bvuma and Another* 1987 (2) ZLR 96 (S) 102 F-G; *Attorney General* v *Mzizi* 1991 (2) ZLR 321 (S) 323B; *Attorney General* v *Tarwirei* 1997 (1) ZLR 575(S) 576G; *S* v *Tsvangirai and others* 2003 (2) ZLR 88(H).

The applicant's counsel submitted that there was "no iota of evidence" linking him to the commission of the offence and that putting him to his defence would amount to bolstering the state case unable to stand on its own. The evidence of the state was manifestly unreliable that no reasonable court acting reasonably could safely rely on it. The requirements of theft had not been satisfied. As the state had failed to establish a *prima facie* case the trial court was required to acquit by virtue of the peremptory provisions of s198(3) of the Criminal Procedure and Evidence Act [Chapter 9:07].

In response counsel for the state conceded that the money forming the subject of the charge belonged to the partnership of both the applicant and the complainant. He also conceded

that he was entitled to a discharge in respect of count 3 relating to the money which the complainant admitted having collected and used.

The learned provincial magistrate would have none of it. In his determination of the application for a discharge at the close of the state case he surprisingly did not address the usual question of whether the evidence adduced for the state had established a *prima facie* case for which the accused person could be called upon to answer. Instead he reasoned thus:

> "In a partnership like the one entered into by accused and the complainant, the property they acquire through such partnership belongs to both of them jointly and not individually unless duly apportioned. If one of the partners uses the property for whatever purpose, the other partner should be appraised fully and timeously. If the property or money is used for the benefit of the project, both parties need to know and agree. In this case complainant is entitled to know how the proceeds of the sale of the 43 stands was spent. Accused has a duty to explain satisfactorily to his partner. For accused to give a verbal explanation how the money was used is not enough. Accountability and transparency on the use of such money is required. Complainant has the right to know. Also the argument that accused was the owner of the proceeds of the sale of the 43 stands and therefore could not steal such is, to use the word used by the defence, nonsensical. The proceeds belonged to the partnership and not an individual. Accused could therefore steal this money though he was a [partner] if the other partner did not approve of his taking. To discharge accused without having fully explained to the complainant how the proceeds of the sale of the 43 stands at this stage would amount to a gross miscarriage of justice. As I said earlier on, for accused to say I paid wages with this money, I bought fuel and oils or other equipment without documentary evidence to prove accountability is clearly not adequate and does not suffice.
> Accountability on the use of these funds was required. Complainant is entitled to know. There is nothing civil about this case at this stage."

So the applicant was put to his defence not because the state had proved the essential elements of the theft as provided for in the law, or, put it another way, not because the state had established a *prima facie* case, but merely because, as a partner in a partnership of himself and the complainant, he was required to account to his partner how the money he received was applied.

The applicant has now taken that decision on review in HC 1699/16 and as the respondents are agitating to proceed with the trial on 23 August 2016, he has filed this urgent application for stay of the criminal proceedings pending the review. *Mr Nkomo* for the applicant

pointed to a number of misdirections in the decision but highlighted the failure by the magistrate to acquit the applicant even in count 3 where the state conceded that the money in that count was received by the complainant and applied for other purposes. If the complainant did not commit an offence so did the applicant. Above all this points to the fact that the court did not deal with the application at all but merely dismissed it for no reason.

I have said that this court will not interfere in unterminated 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:
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> > '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 unterminated proceedings in a court below and should generally speaking confine the exercised of its powers to 'rare cases where grave injustice must otherwise result or where justice might not by other means be obtained.'
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> 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."

In that case the Supreme Court went on to quash the decision of the High Court on review substituting an acquittal where the Regional Magistrate had refused an application for discharge at the close of the state case. It remitted the matter for continuation of trial.

In *Masedza and Others* v *Magistrate Rusape and Another, supra*, DEVITTIE J was confronted with a similar situation as obtaining in the present case as the applicants had sought a stay of criminal proceedings which were not complete to enable them to pursue a review application against the decision of the trial magistrate refusing an application for recusal. The following appear at 37 F-G of that judgment:

"In determining the power of a superior court to intervene in unterminated criminal proceedings a distinction must be drawn between an appeal and a review. Herbstein & van Winsen, *Civil Practice of the Supreme Court of South Africa* 4ed p932 explain the distinction:

> '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 the 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. <u>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.</u>'

Where, in unterminated proceedings an interlocutory decision is sought to be set aside on grounds that the court has made a wrong decision in the proper discharge of its functions the appropriate procedure is by way of appeal. <u>The general principle is that an appeal will be entertained only after conviction.</u>" (The underlining is mine)

The court dismissed the urgent application for stay of criminal proceedings because the recusal application had no merit. See also *Ginsberg* v *Additional Magistrate of Cape Town* 1933 CPD 357; *S* v *John* 2013 (2) ZLR 154(H).

What is clear therefore is that this court will only exercise its review jurisdiction to intervene in unterminated criminal proceedings where the irregularity is gross or where it is such that an injustice might not be attained by other means.

In the present case the provincial magistrate was asked to determine an application for a discharge of the applicant at the close of the state case. Considerations in such an application centre around the existence of a *prima facie* case for which the accused person is called upon to answer. Where no such case exists the accused person is entitled to an acquittal.

I must however pause there a while and mention that at the moment I am not sitting in judgment over the review application. The present assignment however requires me to take a peep into that application to see whether it is worth staying proceedings for, a process which involves the exercise of a discretion. It would be an injudicious exercise of a discretion were I to

stay unterminated criminal proceedings where the court is unlikely to exercise its review powers in favour of the applicant.

I have quoted the judgment of the provincial magistrate above to demonstrate that he appears to have allowed his mind to wander off the field of discourse. In the end he did not address the application before him at all. In criminal proceedings it is a salutary principle of our law that the accused person bears no onus to prove anything. The trial court appears to want him to come to court and account to the complainant how he used the money that he received. Yet it is common cause that he was entitled to receive the money and was also entitled to use it. This lends weight to the argument that this may well be a civil dispute where no criminal case may have been established.

It is also common cause that the dispute between the parties was also pending in this court as a civil matter in HC 1722/12 and that the parties signed an agreement resolving the same dispute. In my view the reasoning of the magistrate in response to the application for discharge goes beyond mere faultiness or otherwise of the decision. It also relates to the method of the trial, where an accused person is put to his defence not because a *prima facie* case has been established but merely to account to his partner. It is prejudicial to an accused person to perpetuate a trial for that reason.

In light of that I am prepared to exercise my power to interfere with the criminal proceedings even though unterminated in order to afford the applicant the opportunity to explore a review of the validity of that decision. As stated in *Mukwemu* v *Magistrate Sanyatwe N.O and Another* HH 765/15 (as yet unreported), it is a necessary feature of every system of adversarial administration of justice that there should be a higher court in the hierarchy to correct judicial errors. What the trial court did in this matter in requiring the applicant to render an account equates to what confronted MAFUSIRE J in *S* v *John, supra* where the accused person was put to his defence in order to "clear" his name.

In the result the provisional order is hereby granted in terms of the draft order.

Messrs R. Ndlovu and Company, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners