LEE-WAVERLY JOHN
versus
THE STATE
and
RODGERS KACHAMBWA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 3 March 2014 and 13 March 2014

Opposed matter

S. Mahuni with *V. Mutati*, for the applicant
I. Muchini, for the respondent

MATANDA-MOYO J: Applicant at the onset of the proceedings raised two preliminary points. Firstly he submitted that there was no opposition by the respondents before me. The respondents filed a notice of opposition on 23 July 2013. An opposing affidavit by Rodgers Kachambwa was filed together with the notice of opposition. I shall quote the opposing affidavit verbatim;

> "IN THE MAGISTRATES COURT CRB No. R 847/12
>
> FOR THE EASTERN DIVISION CASE No
>
> HELD AT HARARE
>
> In the matter between:
>
> LEE WAVERLY JOHN APPLICANT
> vs
> THE STATE 1st RESPONDENT
>
> SIMON ROGERS KACHAMBWA NO 2ND RESPONDENT
>
> ---
>
> OPPOSING AFFIDAVIT
>
> ---
>
> I have gone through the application for review of the court proceedings up to the close of the case for the State and my ruling I made in favour of the State.

The application is opposed in its entirity. The review cannot shop the resumption of the trial.

I will refer to the Applicant and his lawyer to the case of Attorney General v Makamba SC 74/04 dated 30 August 2004 which is clear on the applications similar to the one before me.

Sworn before me this 16 day of July 2013

_____
Deponent

_____
Commissioner of Oaths."

Counsel for applicant submitted that that the above affidavit refers to a matter in the magistrate court and has no bearing on the present case. Substantively there is nothing in the affidavit I agree with applicant's submissions. The affidavit was written for a matter before the magistrate court. It is not meant for this matter. Again the contents of the affidavit do not state the reasons why the application is opposed. There are no factual averments therein. The ruling by the magistrate has not been properly admitted into evidence. If such ruling was to be an annexure to the opposing affidavit then, it must be properly referred to in that affidavit. It was my finding therefore that there was no opposing affidavit filed. Without such opposing affidavit no heads can be filed.

Again counsel for applicant argued that the respondents are barred. Respondents were served with applicant's heads of argument on 23 September 2013. Respondents had up to 7 October 2013 to file their heads. They did not do so. Respondents filed their heads on 27 February 2014. Such heads were filed without Condonation from this court. I found that indeed respondents were barred. Without Condonation having been made by this court respondents could not be heard.

I then proceed to hear applicant on the merits. Applicant sought a review of the second respondent's decision placing applicant on his defence on the following grounds;

"1. The irrationality or outrageousness of the 2nd respondent's decision of dismissing the Applicant's application for discharge at close of state case when the evidence led in court clearly show that the state failed to prove a *prima facie* case against the applicant. Put differently 2nd Respondent dismally failed to objectively consider the evidence which clearly exonerated the applicant from any wrong doing."

The brief background to the matter is that the respondent pleaded not guilty before the magistrates court to a charge of fraud as defined by s 136 of the Criminal law (Codification and Reform) Act [*Cap* 9:23]. At the conclusion of the state case the respondent applied for discharge in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Cap* 9:07]. The application was dismissed. He now seeks review of that decision.

Generally it is not desirous for a higher court to interfere in an incomplete trial before an inferior court. John Reed – Rowland in his book *Criminal Procedure in Zimbabwe* says about this on p 26;

> "The High Court's statutory power of review can be exercised at any stage of criminal proceedings before an inferior court. However, in uncompleted cases this power should be sparingly exercised. It would only be appropriate to do so in those rare cases where otherwise grave injustice might result or justice might not be obtained. For example, if grave irregularity or impropriety occurred in the proceedings, it would be appropriate for the high court to consider the matter. Generally however, it is preferable to allow the proceedings to run their normal completion and seek redress by means of appeal or review."

Section 29 of the High Court Act [*Cap* 7:06] gives the High Court extensive review powers in criminal proceedings of the magistrates court. Such powers are exercisable at any stage of the hearing. However as stated above such powers should be used sparingly whilst proceedings are still incomplete so as to discourage the overflow of the High Court with incomplete proceedings of the magistrates court. The High Court should not usurp or interfere with incomplete proceedings before the magistrates court to allow the magistrate to independently deal with the discretion imposed on him/her. The High Court should only interfere where actual and permanent prejudice will be occasioned to the applicants. The applicant must provide proof that he/she will suffer prejudice should the High Court not interfere at this stage.

Applicant averred that the decision of the magistrate is irrational and outrageous. The particulars for the fraud were that;

> "In that on various separate periods but during the period extending from 1 February 2006 to 2 February 2012and at Kwekwe Consolidated Gold Mines, Kwekwe, Lee Waverly, John, unlawfully misrepresented to Carslone Enterprises (Pvt) Lt that he was the new owner or director of Kwekwe Consolidated Gold Mines (KCGM) through an omission to disclose the permanent dereliction of the mine by previous owners and directors whose whereabouts are currently unknown to the prosecutor, that is to say, the accused, holding himself out as a director and new owner of KCGM, tributed the mine to Carslone Private Limited, thereby causing prejudice to the good

> reputation and good administration of the Registrar of Companies office and the Ministry of Mines and Mining Development."

Applicant argued that Carslone Enterprises denied that it was the complainant in the matter. The evidence of Mirirai Chiremba, a representative of Carslone Enterprises exonerated applicant. Chiremba testified that Carslone Enterprises did not suffer any prejudice. The witnesses from the Companies Office also testified that her office suffered no prejudice. She testified that in terms of papers held by her office applicant was a director of KCMG. No evidence was led from the Ministry of Mines and Mining Development. Evidence by the investigating officer was hearsay evidence and should have been rejected by the court. In his ruling the magistrate conceded that the evidence of Chakanyuka from companies Office was of no assistance. He also found that Mirirai Chiremba's evidence showed his company benefitted financially and there was no prejudice on his company. The magistrate found that there was evidence that the applicant improperly and fraudulently acquired directorship and control of KCGM.

From a reading of the magistrate's ruling there is no evidence that applicant committed the offence he was charged with. A specific charge was put to the applicant but the magistrate seems to be of the view that the evidence led so far *prima facie* establishes guilty of fraudulently acquiring directorship of KCGM. The charge put to the applicant herein involves misrepresentation to Carslone Enterprise that he was a director of KCGM causing prejudice to the good reputation of Carslone Enterprise, Registrar of Companies Office and the Ministry of Mines. No evidence was led to show prejudice of good reputation of the three entities. I am satisfied that the evidence led did not prove a *prima facie* case against defendant warranting him being put to his defence. Whilst it is correct that in terms of s 157 of the Criminal Procedure and Evidence Act it is not necessary to identify the person who have been defrauded, in this case such persons were mentioned. It became essential to prove the elements of the offence vis-a-vis those persons, which respondent failed to do. No misrepresentation were proven to have been made to Carslone Enterprises.

I am satisfied that to allow the applicant to be placed on his defence would irreparably prejudice him. The magistrate's ruling is tantamount to placing the onus on the applicant to prove his innocence. The constitution has already placed the onus on the state to prove the guilt of an accused person. See *Ndlovu* v *Regional Magistrate Eastern Division and Anor* 1989(1) ZLR 264(H) and *Makamba v Sithole N.O. and Anor* HH 83-04.

The decision by the trial magistrate is not supported by evidence led and hence it is unreasonable. In fact the decision is completely wrong consideration being had to the evidence submitted before the magistrate. I am of the view that the decision defies all logic and is completely wrong.

In the result the application succeeds and it is ordered as follows;

1) The decision of the second respondent of dismissing the applicant's application for discharge at the close of state case under case number R 874/12 be and is hereby set aside.
2) Applicant is discharged and acquitted at close of state case.
3) There be no order as to costs.

Messrs Mahuni & Mutatu, applicant's legal practitioners
Attorney General's Office, respondents' legal practitioners