REPORTABLE (31)

Judgment No. SC 46/12
Appeal No. 211/12

CHARLES KWARAMBA v

THE HONOURABLE MR JUSTICE BHUNU N.O.

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 1, 2012

Before CHIDYAUSIKU CJ, In Chambers

The legal practitioners representing Mr Charles Kwaramba (hereinafter referred to as "the applicant") placed before the Registrar of this Court the following letter:

"**REQUEST FOR DIRECTIONS**

We act on behalf of Mr Charles Kwaramba at whose instance we write.

Mr Kwaramba, who is a legal practitioner and an officer of this Court, was representing accused persons in the case of *Tungamirai Madzokere and 28 Others* Case No. CRB 55/12.

He applied for bail on their behalf and in the judgment dismissing the bail application the court also made adverse findings against Mr Kwaramba. A copy of the judgment is attached.

Some time ago we received instructions from Mr Kwaramba to seek a review of the decision as he felt that there were irregularities in the manner the court arrived at the decision affecting him.

As we were preparing the application, we noticed that there is a challenge with regard to review proceedings before the Supreme Court. Section 25(3) of the Supreme Court Act seems to suggest that there is no right to approach the Supreme Court for review as a court of first instance. However, sections

17(h) and 25(1) of the same Act both seem to confer review powers on the Supreme Court.

In light of the above, we became very averse to filing an application without first seeking the Court's directions on the matter.

We note, however, that, in terms of section 25(3) of the Act, the Supreme Court or a Judge of the Supreme Court can give directions whether a review in the nature of this one can be instituted before it in the first instance.

We attach a draft copy of the application which is intended to be filed.

We therefore request you to kindly place our request before a Judge for directions.

We look forward to your urgent attention to the matter."

It would appear to me that two requests emerge from the above correspondence –

(1) The legal practitioners for the applicant are seeking the opinion of a Judge of the Supreme Court as to whether in terms of s 17(h) or s 25(1) of the Supreme Court Act [*Chapter 7:13*] (hereinafter referred to as "the Act") the applicant can launch a Court application for review of the judgment of the Honourable Mr Justice BHUNU (hereinafter referred to as either "the respondent" or "the learned Judge") in a bail application made by the applicant on behalf of his clients in the High Court. Put differently, the legal practitioners are enquiring whether their client has a cause of action in terms of s 17(h) or s 25(1) of the Act; and

(2) The legal practitioners for the applicant request that a Judge of this Court give directions in terms of s 17(h) or s 25(3) of the Act that a review of this matter be instituted.

Section 17(h) of the Act provides:

> "**17 Supplementary powers of Supreme Court**
>
> For the purposes of this Part, the Supreme Court may, if it thinks necessary or expedient in the interests of justice –
>
> …
>
> (h) exercise any of the powers of review conferred upon the High Court by section 29 of the High Court Act [*Chapter 7:06*]: …".

While s 25 of the Act provides:

> "**25 Review powers**
>
> (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
>
> (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
>
> (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or particular review shall be instituted before or shall be referred or remitted to the High Court for determination."

I will not entertain the first request because it is essentially a request for legal advice. This Court does not proffer legal advice to litigants. The applicant will have to make his own decision whether or not it is competent to make such an application in the light of the relevant provisions of the law and the previous decisions of this Court.

As regards the second request, applications for directions are made by way of Chamber application. It is inappropriate to do so by way of a letter addressed to the Registrar of this Court for placement before a Judge of this Court. I will, however, overlook that inadvertence and deal with this request for directions as if it has been made by way of a Chamber application, hence this judgment.

I have considered the request for directions and concluded that on the facts of this case it is not competent for a Judge of this Court to issue directions for the review of a High Court judgment in terms of s 25 of the Act. See *Chairman, Zimbabwe Electoral Commission and Anor v Bennett and Anor* 2005 (2) ZLR 296 (S) and *Nherera v Kudya N.O.* 2007 ZLR 253 (S).

The background facts to this request are as set out by the applicant in his proposed Court Application for Review. The proposed Court Application for Review is attached to the letter to the Registrar. The following are the facts.

The applicant is a legal practitioner practising law in Harare in partnership with others under the name and style of Zimbabwe Lawyers for Human Rights. He was one of the legal practitioners representing accused persons who are accused of

murdering a police officer in June 2011. He is one of a team of about four legal practitioners representing about twenty-nine accused persons. The trial of the accused persons commenced on 4 June 2012 in the High Court. The applicant, on behalf of the accused persons, made a bail application, which the State opposed. The court, presided over by MR JUSTICE BHUNU, reserved its judgment. The trial continued while awaiting judgment on the bail application.

The incident that gave rise to this application for directions then occurred. It would appear that, while awaiting judgment on the bail application, there was an article in the *Daily News* newspaper stating the following:

> "Human rights lawyer Charles Kwaramba, who is representing the 29 MDC activists, said the law is not being applied fairly.
>
> It just goes on to show that there is no equal application of the law. This is a classical example. Here we have police officers who are supposed to protect the people being accused of murdering a civilian for a dollar.
>
> On the other hand, we have 29 civilians who have been in prison for over a year now, being accused of killing a cop. So far there is no evidence that points at them, but the speed of arrests shows that the police wanted to arrest them because they are MDC. There were no investigations when the 29 were arrested.
>
> One wonders how the Shamva cops (got) $50 bail each in a murder case while the 29 activists are failing to get the same even when there is no evidence.
>
> Kwaramba said the moment that a person is labelled MDC justice is politicised."

The newspaper article, by use of quotation marks, purports to quote the applicant as the origin of the above remarks. The applicant admits that he was asked to comment on the manner in which the wheels of justice were turning in the matter. He also admits that he expressed disappointment at the lengthy stay of his clients in remand prison. He contends that any other lawyer would have felt the same. The applicant's

stance on the *Daily News* article is contained in pars 4.6 to 4.12 of the founding affidavit of his proposed Court application. He states the following:

> "4.6 I then made the bail application which the State opposed. The court reserved its judgment. The trial went on while awaiting judgment on the bail (application). The incident which gave rise to these allegations then occurred.
>
> 4.7 It is true that there was an article in the Daily Newspaper stating what the Honourable Judge repeated at page 3 of his (cyclostyled) judgment.
>
> 4.8 It is also true that the article quoted lawyers including Dewa Mavhinga and myself.
>
> 4.9 It is true that I was asked to comment (on) the manner that the wheels of justice were turning in the matter. It is true that I expressed disappointment at the lengthy stay of my clients in remand prison. I do not think any lawyer could have felt otherwise.
>
> 4.10 It is true that I was invited to make a comparison of our case with the Shamva case. I declined the invitation indicating that I did not know much about that case but commented that if the cases were similar then like-accused must be treated alike as this is the position of the law. In fact, I got much of the details of the Shamva case from the interviewing journalist. I did not know about it. I did not even know much about the circumstances of the murder.
>
> 4.11 So, while the article contained some correct information, it also contained inaccuracies. Statements such as 'THE LAW IS NOT BEING APPLIED FAIRLY', (and) 'THERE IS NO EQUAL APPLICATION OF THE LAW' were wrongly attributed to me. I deny using these words.
>
> 4.12 Although the article was to some extent true, it contained several inaccuracies, which inaccuracies probably created the wrong impression in (the) minds of readers including the Honourable Judge."

The learned Judge, disturbed by the above article, summoned all the legal practitioners in the matter to his Chambers on the Monday following publication of the article. In his Chambers he expressed his concern over the contents of the article and asked the legal practitioners to comment on the issue. The applicant indicated to the learned Judge that the article was inaccurate and that there was no intention

whatsoever on his part to attack the court or make adverse comments. He tendered his apology to the respondent if the wrong impression had been created. He advised the respondent that newspapers were notorious for writing stories with a twist that sold papers. In short, the applicant alleged that the newspaper had misquoted him or misrepresented him. He assumed that the matter had been resolved.

However, on 19 June 2012 the court delivered its judgment in the bail application. In the course of that judgment the learned Judge castigated the applicant for his communication with the newspapers. The learned Judge has this to say at pp 2-4 of the cyclostyled judgment:

> "There has been, however, an unfortunate development in this trial in that one of the defence team of lawyers, Mr Kwaramba, instead of adducing the required evidence according to law, has now decided to play to the gallery and the press in a bid to secure the release of his clients without complying with the law by demonising and attacking the dignity and integrity of this Court and the Judiciary of this country in general. He is quoted in an article in the *Daily News on Sunday* of June 10 (2012) at p 4 as follows:
>
> > 'Human rights lawyer Charles Kwaramba, who is representing the 29 MDC activists, said the law is not being applied fairly.
> >
> > It just goes on to show that there is no equal application of the law. This is a classical example. Here we have police officers who are supposed to protect the people being accused of murdering a civilian for a dollar.
> >
> > On the other hand, we have 29 civilians who have been in prison for over a year now, being accused of killing a cop. So far there is no evidence that points at them, but the speed of arrests shows that the police wanted to arrest them because they are MDC. There were no investigations when the 29 were arrested.
> >
> > One wonders how the Shamva cops (got) $50 bail each in a murder case while the 29 activists are failing to get the same even when there is no evidence.
> >
> > Kwaramba said the moment that a person is labelled MDC justice is politicised.'

With respect Mr Kwaramba's remarks cannot reasonably be true. They are being made at a time when the very same police he is attacking have arrested ZANU PF activists in Mudzi for allegedly murdering an MDC member in politically motivated violence. They have since been denied bail by this very Court. See *David Chimukoko and Others v The State* H-H-254-12.

It is a well documented truth and our Court records and law reports are replete with MDC members charged with treason or murder, including its leader, who owe their lives to this very Court that Mr Kwaramba has the audacity to publicly demonise and denounce as an enemy of the MDC. This is not to mention countless others charged with various offences including fraud and insulting the President who also owe their freedom to the very Judiciary that Mr Kwaramba seeks to demonise and portray as being partisan and biased against the MDC. See

1. *State v Sonny Nicholas Masera* H-H-50-04;

2. *S v Tsvangirai & Ors* 2003 (2) ZLR 88;

3. *S v Tsvangirai* 2004 (2) ZLR 210;

4. *The State v Roy Leslie Bennett* HH-79-10;

5. *The Attorney-General v Roy Leslie Bennett* SC 7/11;

6. *The State v Elton Mangoma* HH-136-11.

Just to mention but a few.

This Court's mission is to dispense world class justice to all manner of people without fear or favour. Right now as I speak the MDC President is busy defending in the Supreme Court this Court's landmark judgment issued in his favour against his arch rival the President of ZANU PF and Zimbabwe.

That puts to shame Mr Kwaramba's ill conceived malicious remarks in the press bent on bringing the due administration of justice into disrepute.

Mr Kwaramba deliberately misrepresented the facts and the law to mislead gullible members of the public and the press when he launched that caustic inflammatory but baseless attack on the Bench and the Judiciary in general. The simple answer to his insincere rhetoric question is that Parliament has decreed that where a person is alleged to have killed a law enforcement officer, and in this case a policeman, the Court is prohibited from granting the accused bail until such time he or she has adduced evidence to the Court's satisfaction establishing the existence of special circumstances justifying his (or her) release. The same considerations do not apply to a person or police officer who is alleged to have killed any person other than in circumstances falling under section 117(6) of the Act."

The learned Judge further stated in his judgment at pp 4-5:

> "In his demonisation of the Judiciary, Mr Kwaramba was well aware that the Shamva case was different from this case. This explains why in all his lengthy addresses and submissions in open court he never mentioned the Shamva case or sought to draw any similarities between the two or any other case because he knew that they were different and that different legal considerations applied.
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> In judgment Number HH 182/12 I took the trouble to draw his attention to s 117(6) and to explain its legal implications to his apparent satisfaction such that he abandoned his ill conceived bid to appeal against my order inviting him to comply with the legal requirements prescribed by law. Having failed to take refuge in the Supreme Court he now seeks solace in the media and gullible members of the public together with some obscure self styled, shallow minded if not bogus lawyers whom I have never encountered at the courts in my 31 years in the Judiciary.
>
> For him to then turn around, attack and denigrate this Court on the basis of a case reference and arguments he never advanced in open court so that they could be subjected to legal scrutiny smacks of dishonest, slanderous, contemptuous and unethical conduct on his part."

The learned Judge, after an analysis of the facts and applying the law to the facts, dismissed the bail application.

The applicant objects to the learned Judge's remarks on four grounds, set out in the proposed Court application for review, namely -

> "1. There are/were gross irregularities in the proceedings or decision.
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> 1.1 The applicant was not given an opportunity to be heard.
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> 1.2. The findings against the applicant were made in a case in which he was not a party.
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> 1.3 The applicant's rights to the protection of the law and to legal representation were violated.
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> 1.4 The respondent's findings were not borne out by the facts before him."

It is on the basis of these facts that I am now requested to give directions in terms of s 25(3) of the Act that a review be instituted or the matter be referred or remitted to the High Court for determination.

Before a Judge of the Supreme Court issues directions in terms of s 25(3) of the Act, he or she has to be satisfied of the existence of an irregularity that needs determination or correction which has occurred. Generally speaking, an irregularity occurs when a judicial officer takes into account factors that he should not take into account or fails to take into account factors he should take into account in the process of the making of a determination the judicial officer is seized with. An irregularity also occurs where the law is misapplied or an incorrect procedure is followed.

The court *a quo* was seized with a bail application. The learned Judge had to determine whether or not bail should be granted. There is no allegation that in making the determination to grant or refuse bail the learned Judge took into account wrong factors or failed to take into account factors which he should have taken into account. No misdirection in the determination of the bail application is alleged. Put differently, no irregularity is alleged in the determination of the bail application. The remarks complained of by the applicant were *obiter* and were not part of the *ratio decidendi* of the determination of the bail application. Sections 17(h) and 25 of the Act confer concurrent review jurisdiction on the Supreme Court with the High Court over inferior tribunals. What this means is that a Supreme Court Judge, in the exercise of jurisdiction conferred by ss 17 and 25 of the Act, has the same review jurisdiction as a High Court Judge. A Judge cannot order the review of a judgment of another Judge of the same jurisdiction. Thus, from a jurisdictional standpoint, the

request is not competent. See *Chairman, Zimbabwe Electoral Commission and Anor v Bennett and Anor supra* and *Nherera v Kudya N.O. supra*.

Essentially the applicant's complaint is that the learned Judge should not have severely reprimanded him for his conduct or misconduct. The applicant does not seem to appreciate what is expected of him as a legal practitioner and an officer of the court. On the applicant's own account, the *Daily News* ascribed to him the remarks it published in its newspaper. The remarks ascribed to him do not only scandalise the learned Judge but were also made while the matter was *sub judice*. There is a time-honoured practice which has crystallised into law that prohibits the making of inappropriate statements on matters pending before the courts. I have no doubt in my mind that the statements ascribed to the applicant grossly transgressed the *sub judice* rule and clearly constitute contempt of court, in that they scandalise the court by ascribing to it political motivation in its judgment. The inescapable inference is that the remarks were made not only to bring the court into contempt in the eyes of the public but also in an attempt to influence the outcome of the bail application and consequently the course of justice. The applicant should consider himself lucky that he was not prosecuted for contempt of court.

Legal practitioners who show such blatant disrespect and contempt for the courts have no business appearing before the courts. In my view, serious consideration should be given to the introduction of more stringent measures to protect the dignity of the courts from being impaired by reckless utterances.

Upon the publication of the article in the *Daily News* I would have expected the applicant to immediately issue a statement disassociating himself from the contents of the article and denying that he ever uttered the words ascribed to him by the *Daily News* newspaper. That is what one would expect of a person falsely accused of saying things he never said. I also would have expected the applicant to have urgently sought audience with the learned Judge to assure him that he never said the words ascribed to him. Instead, he only offered a wishy washy explanation upon being asked about the matter by the learned Judge. He made no effort to correct the impression conveyed to the public that the court is partial and that the applicant was the source of the allegation. The applicant is the author of his own misfortune. He should be more circumspect in the way he conducts himself.

I accordingly decline to give the directions requested.

Dube, Manikai & Hwacha, applicant's legal practitioners