PATRICK DUBE

Versus

THE STATE

And

S. NDLOVU N.O.

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 6 & 14 AUGUST 2020 AND 14 OCTOBER 2021

Application for Review

T. Tavengwa for the applicant
B. Maphosa for the respondent

TAKUVA J: This is an application for review that has an interesting background. The applicant appeared before a magistrate sitting at Entumbane in Bulawayo on a charge of contravening section 113 of the Criminal Law (Codification and Reform) Act Chapter 9:23, "theft of trust property". Upon pleading not guilty a full trial was conducted with five witnesses leading evidence on behalf of the State. When the State closed its case, the applicant moved the court *a quo* to discharge him. However, the court found that the State had made out a *prima facie* case and accordingly the applicant was ordered to present his defence.

Aggrieved by this decision, applicant filed an application for review on one ground namely:

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

Applicant sought the following relief:

"1. The decision of the 2nd respondent of dismissing the applicant's application for discharge at the close of the state case be and is hereby set aside.
2. Applicant is discharged and acquitted at the close of the state case.
3. There be no order as to costs".

This application for review was filed on 20 June 2019 and was placed before MABHIKWA J who dismissed it on 21 May 2020. Dissatisfied, applicant noted an appeal in the Supreme Court under SC-42-20. The Supreme Court on 30 July 2020 granted the following order:

"1. The appeal be and is hereby allowed.
2. The judgment of the court *a quo* is hereby set aside.
3. The matter is hereby remitted to the court *a quo* for a determination before a different judge after the parties have been afforded an opportunity to make submissions". (emphasis added)

Upon receipt of this order and being fully aware that it related to matter number HC 1470/19, *Mr Tavengwa* had this matter enrolled on the unopposed roll for the 6th of August 2020. The relief he sought was couched in the following terms:

"1. The respondent is barred by reason of failure to comply with Rules 232 and 233 of the High Court Rules.
2. The decision of the magistrate of dismissing the applicant's application for discharge at the close of the stat case be and is hereby set aside.
3. Applicant's discharged and acquitted at the close of the state case.
4. No order as to costs".

What the applicant requires has never been in any shadow of doubt. It is that he be acquitted at the close of the State case. With that in mind, his legal practitioner argued in motion court that I order applicant's acquittal on the basis that the respondent had no right of audience in that they are barred. The respondent had applied for the matter to be referred to the opposed roll on the basis of the Supreme Court order. *Mr Tavengwa* for the applicant strenuously argued that respondent had failed to comply with order 32 rules 232 and 233. He further strongly submitted that the Supreme Court order does not exempt the

respondent from following court procedure, that is they cannot be heard as long as the bar is in effect.

The alleged failure to comply with rules 232 and 233 occurred between June 2019 and August 2019. What in my view is noteworthy is that this was a year before the Supreme Court's decision of 30 July 2020. Without the benefit of the reasons for setting aside the decision of MABHIKWA J my interpretation and understanding of the 3rd paragraph of the Supreme Court order is that when the matter is commenced afresh both parties should be afforded an opportunity to make submissions. The order remitting the matter does not distinguish between points *in limine* and the merits. It does not seem proper to me for the applicant to run to this court with the Supreme Court order and insist that the respondent should not be heard because he is barred when on the other hand the Supreme Court has said respondent should be afforded an opportunity to be heard.

Assuming *Mr Tavengwa* is correct about respondent's failure to comply with the rules of this court, he should have set the matter down on the opposed roll. It would have been up to *Mr Tavengwa* to apply that the matter be dealt with as unopposed in view of the respondent's failure to comply with the rules. The application will essentially be one for a default judgment. The respondent may if it so wish apply for the upliftment of the bar. The point here is that the Supreme Court order will have been complied with in my view.

I take the view that since the Supreme Court order requires both parties to be afforded an opportunity to make submissions, it fundamentally and essentially means the matter is opposed. Therefore it would be procedurally irregular and improper to set this matter on the unopposed roll.

Accordingly the matter is removed from the roll of unopposed matters with no order as to costs.

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners