PHINIAS NGARAVA
versus
NYASHA VITORINI N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 4 & 12 February 2020

Opposed Application – Review

Mr W Muchengeti, for the applicant
Ms F Kachidza, for the second respondent

CHAREWA J: This is an application for review of unterminated criminal proceedings in the Magistrate's Court.

The applicant was arraigned before first respondent on charges of theft of trust property as defined in s113(2)(d) of the Criminal Law (Codification and Reform) Act Chapter 9:23 in that

> "…on an unknown date in December 2016 and at Fidelity Life Towers, Corner Raleigh street and Sekuru Kaguvi street in Harare, (he), in violation of a trust agreement with **HUNDIVENGA MATSVERU** which required him to hold certain property, namely proceeds from the sale of Stand 258 Engineering, Highfields, Harare amounting to USD13521-50 and to keep the money on behalf of **HUNDIVENGA MATSVERU**, unlawfully and intentionally converted the proceeds to his personal use and failed to hand it over to **HUNDIVENGA MATSVERU** on demand by **HUNDIVENGA MATSVERU**."

At the close of the state case the applicant applied for discharge which was dismissed. It is this decision to put the applicant on his defence which applicant seeks to be overturned on review. He therefore seeks an order as follows:

> " The entire ruling by the 1st respondent in case number CRB 12018/18 Harare Magistrates Court, be and is hereby set aside and the application for discharge at the close of the state case be and is hereby granted with costs."

The grounds for review are couched as follows:

> "1. There is interest in the cause and bias on the part of the judicial officer concerned; and
> 2. There is gross irregularity in the decision made and the decision is grossly irrational".

The justification for these grounds as amplified in applicant's submissions may be summarised as follows:

1. That first respondent based his decision on his own grounds for discharge rather than those raised by applicant.
2. He made findings of fact which are not supported by the evidence.
3. He created and placed new burdens on applicant which do not exist at law.
4. He ignored the fact that applicant rendered a service to the complainant and is thus entitled to deduct his fees, after taxation, from the sale proceeds held in trust.
5. He discounted applicant's submission that this was a case of malicious prosecution.
6. He avoided addressing, in his ruling, that no *mens rea* had been established *prima facie.*
7. He deliberately overlooked admissions made by witnesses under cross examination.

Consequently such conduct by the first respondent amounted to a gross irregularity and is evidence of bias and interest in the cause.

Analysis

At the commencement of the hearing I allowed the respondent's application for upliftment of the bar, in the face of applicant's opposition, for failure to file heads of argument timeously as it was my view that no prejudice would be suffered by the applicant as his application would be determined on its own merits regardless of whether submissions were made on behalf of second respondent.

During the hearing, counsel for the applicant conceded that the superior courts are ever reluctant to interfere with unterminated proceedings of the lower courts unless there is gross irregularity or bias for which there is no remedy. He also conceded that in an application for discharge at the close of the state case, the trial court is merely concerned with whether a *prima facie* case is shown in order to warrant that the accused be put on his defence, and that therefore it is not necessary to find poof beyond a reasonable doubt.

Consequently, the only question that concerns me is whether I should find that there was in fact gross irregularity and bias, for which no remedy is available and thus set aside the magistrate's ruling.

I must state at the outset that allegations of bias or gross irregularity by the trial court are not predicated on whether or not the court is wrong or made any error. Nor can they be grounded by the fact that an accused is unhappy with the decision to put him on his defence.

There must be evidence of procedural irregularity in the manner in which the trial court conducted proceedings, and such procedural irregularity must be so grave and of such a nature as to cause irremediable harm to the accused. This presupposes that ordinary irregularities cannot ground an application for review of unterminated proceedings.

In casu, applicant does not show that he does not have any remedies should the magistrate have made any procedural errors, and therefore that he stands to suffer a grave injustice. In fact, the application reveals no complaint as regards the procedure followed by the magistrate. The complaint is predicated solely on the ruling by the magistrate, whereby he puts the accused on his defence. The litany of complaints at page 2 of this judgment all attack the ruling. It seems to me that if the first respondent made an error in his ruling, then that is grounds for appeal or even review at the conclusion of the case. In any case, the applicant still has an opportunity, when presenting his evidence in defence against the charge, to clear any misconceptions that the first respondent may be harbouring under. The applicant thus has a suitable remedy. The fear of any grave irremediable injustice is thus misplaced.

Further, in his application for discharge, the applicant attests to evidence which is not yet before the trial court and which evidence he could only adduce when presenting his defence. For example, that the trust account was continuously audited by qualified external auditors is not evidence that was before the trial magistrate in determining whether or not to discharge the applicant at the close of the state case. Nor is it evidence before the court at this stage that applicant rendered services for which he is entitled to deduct his fees against the funds held in trust, or even that a bill of costs has been raised. Neither is there evidence of malicious prosecution. Dismissal of the application for discharge therefore gives the applicant the opportunity to place this evidence before the court.

The truth of the matter is that the first respondent is only obliged to make a value judgment, whether, in his opinion, sufficient evidence has been led by the second respondent to raise a *prima facie* case in order to put the defendant on his defence. My own reading of the testimony led before the court a quo indicates that indeed, questions were raised that required an answer by the applicant. For instance, the complainant gave evidence that he instructed applicant to transfer the property in question to his daughter and further instructed him to defend divorce proceedings filed by the complainant's wife. The transfer to the daughter, for which applicant had charged $1 900 for his fees was not done, and instead, applicant signed a divorce consent paper for the sale of the property. The house was not even matrimonial

property to be included in the consent paper, having been purchased in 1998 before complainant married his wife in 2008. Further, the complainant's share of the proceeds of the sale were only tendered by applicant in October 2018 after the matter had been reported in January 2018 and trial had been set down. In addition, despite instructions to renounce agency for complainant, and even after complaints to the Law Society applicant did not do so. Further, it seems that documents (which are not in the purview of this court) were tendered to the court showing that the Sheriff did not in fact sell the complainant's house and evidence was led that applicant offered to give replacement property to complainant. Finally, the secretary of the Law Society gave evidence that the Council of the Law Society after having received correspondences with complaints against applicant, carried out investigations where after it resolved that there was improper conduct on applicant's part in that he passed an excessive bill meant to camouflage abuse of trust funds from the sale of matrimonial property (p 123-4) and referred the matter to the Law Society Disciplinary Tribunal.

In any case, my reading of the first respondent's ruling does not support the contentions ascribed to it by the applicant. It is brief and to the point: merely pointing out the issues which, in first respondent's view raise a *prima facie* case for which applicant must be put to his defence. I therefore do not agree that first respondent may have fallen into error by going further in his ruling than to suggest that in his view a *prima facie* case of abuse of trust funds had been made. There is thus no gross irregularity, in my view, which warrants that this court should interfere in these proceedings.

In any event, the record is incomplete as it does not contain the various exhibits that were produced before the first respondent, thus incapacitating this court from substituting its own decision. Therefore, I am not in a position, to order the discharge of the applicant either.

It is unfortunate that any perceived error by a judicial officer would be interpreted to amount to bias or interest in the cause, particularly where no extraneous evidence of bias or interest is given. This is more so given that the proceedings were, in my view, scrupulously conducted, to the extent that first respondent refused to allow the complainant to speak on documents he had received from the Law Society, and was candid enough to agree with the applicant's position on the law relating to discharge at the close of the state case. Moreover, the magistrate was well alive to his obligation to acquit where the evidence of the state witnesses was so discredited as a result of cross-examination or was so manifestly unreliable

as to render any reasonable tribunal unable to convict. I am of the view therefore that the allegations of bias or interest are spurious.

Disposition

Consequently, it be and is hereby ordered that the application for review of the decision to dismiss the application for discharge at the close of the state case is dismissed.

Messrs Muchengeti & Company, applicant's legal practitioners
The National Prosecuting Authority, second respondent's legal practitioners