FAIRCLOT INVESTMENTS (PVT) LTD
and
GRANT RUSSEL
and
PARAGON PRINTING (PVT) LTD
and
MARK STRATHERN
versus
PROVINCIAL MAGISTRATE SHANE KUBONERA
and
THE STATE

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE 15 February & 11 May 2022

Review Matter

T Biti, for the applicants
A Muziwi, for the respondents

BACHI-MZAWAZI J: This is an application, brought in terms of ss 26 and 29 of the High Court Act, [*Chapter 7:06*] as read with r 62 of the High Court rules, SI 202 /21. Applicants seek to have the interlocutory decision of the first respondent dismissing their application for exception to a criminal charge pending before that court set aside, citing irrationality and gross irregularity as the grounds for review.

On 11 November 2021, I presided over an urgent chamber application for the stay of the same proceedings now under review. Through mutual consensus of the parties and upon satisfying myself that the circumstances of the case justified granting the relief sought I granted not an interim but a final order. As a rule of practice this court was consequently seized with this application for review.

Brief Factual Background

A brief overview of the facts, is, that, the first applicant, is a duly incorporated Company, Fairclot Investments (Pvt) Ltd, and its Director is the second applicant, whilst Paragon Printing and Packaging (Pvt) Ltd, a duly incorporated Company, and its director, are the third and fourth applicants respectively. The provincial magistrate Shane Kubonera and the state are the first and second respondents. The first two applicants have long standing legal battles with the complainants in the criminal proceedings before the first respondent, in their capacity as representatives of a company called, Augur Investments OU. By and large it is common cause and is evident from the record that the first two applicants and the company called Augur Investments OU had a fall out on their contractual obligations surrounding the construction of the Harare Airport road which filtered both into the High and Supreme Courts resulting in a multiplicity of counter lawsuits and judgments. At the centre stage of these disputes is a piece of land known as Stand 654 Pomona Township, Borrowdale. Both the mentioned opponents claim legal title to the land, with the first two applicants claiming that, that piece of property is still subject to continuous and pending litigation. It is against this back ground that the first applicants engaged the third and fourth applicants to erect a bill board with the alleged offensive material giving rise to the criminal charge of public nuisance.

The Main Dispute

In the criminal proceedings before the first respondent , the applicants after tendering a plea, launched a three facetted exception to a charge of Criminal Nuisance, in contravention of s 46 as read with third schedule s (2)(v) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Their main objection is that, the charge as juxtaposed against the contents of the contentious words in the billboard did not disclose an offence. They argued that the contents of the billboard did not interfere with the ordinary comfort, convenience, peace or quite of the public or any section of the public thereof. In their two legged Constitutional invalidity attack, applicants contend that, s (2(v) of the third schedule, of the Criminal Law. Codification and Reform Act [*Chapter 9:23*], is too wide, vague and general and imprecise. As such, they are invalid and unconstitutional as they violate an accused person's rights to a fair trial and equal protection and benefit of the law in contravention of subs 68(3) and 56(1) of the Constitution of Zimbabwe respectively. On that basis, applicants also urged the trial court to refer the matter to the

constitutional court in terms s 175(4) of the constitution for the determination of their constitutional invalidity arguments. In opposition the state argued that the charge was not defective, it disclosed the offence charged.

The Trial Court's Decision

The trial court turned down the application on the defective charge, and did not make a determination on the Constitutional arguments ruling that, a determination on the appropriateness of the charge, whether it disclosed an offence or not cannot be made at that stage but only after hearing evidence. In light of court *a quo's* decision, the urgent chamber application for stay of those incomplete proceedings pending review was brought before this court, simultaneously with that for review.

Applicant's Case

It is pertinent to note that the tenor of the arguments advanced by both litigants in all the two suits referred to herein, that is the urgent chamber and the current application, are in all material respects the same. Applicants maintain, the same argument that, words that warn members of the public not to transact in a property subject to litigation falls short of being a criminal nuisance as they are neither inconveniencing nor discomforting to the public or any section thereof. They relied on the cases of *State* v *Job Sikhala,* HMA O4-2020 and *The Liberal Democrats & 4 Ors* v *President of Zimbabwe* N.O. CCZ 7/18 amongst several others, in support of their submissions. They urge the court to make a finding that the trial court's decision, to proceed with the matter and then determine on their exception after hearing evidence is grossly irregular and irrational as the court had a duty to interpret the words against the charge before it as it stands. It is their contention that, interpreting the said words in juxtaposition was a legal point not a fact finding mission necessitating the calling of evidence. They argue that, the failure of the court to interpret the words so as to make a determination whether they disclosed an offence or not was an irregularity warranting the interference of those proceeding on review. Applicants argued that allowing the matter to proceed in that regard was just as good as proceeding with a defective charge willy-nilly. At the review hearing counsel for the applicant relinquished their constitutional submissions relying only on the ground, that the charge as it was did not disclose an offense. Applicants conceded that, because the words of impugned section where too wide and broad they indeed

where capable of embracing any feasible act or conduct as a criminal nuisance including theirs, until such time they had been repealed.

Respondent's Case

The respondents pointed out that the words as reflected on the bill board fall within the scope and ambit of s 46 as read with s 2(v) of the third schedule of the Criminal Law Codification and Reform Act [*Chapter 9:23*], hence it discloses an offence and the court's decision was not grossly irregular or irrational.

The Issue

In light of the above arguments, the issue that lies for consideration is whether or not the decision of the trial court was grossly irregular and irrational to warrant interference on review?

Review Proceedings in General and The Law

The review procedure is a legal avenue available to litigants who in the continuance of their constitutionally sanctioned rights to a fair trial and access to justice, pursue in order to have a second chance at justice before an upper judicial body. Like appeals, they are both constitutionally and statutorily provided for. Just as there are two sides to a coin and to the way different individuals perceive a given set of facts these procedures ensure the necessary checks and balances. Section 70(5), of the Constitution. Amendment No. 20 0f 2013, the supreme law of the land, the Constitution provides for this recourse, after termination of criminal proceedings, and ss, 26 to 29 of the High Court Act [*Chapter 7:06*], statutorily delineates, this remedy and its parameters.

MATHONSI J, as he then was, in case of *Shava* v *Primrose Magomore N.O. & Anor (*HB 1001019) of 2017citing the case of *Mukwemu* v *Magistrate Sanyatwe N.O.& Anor* ,2015 (2) ZLR 417 (H) 420 C-D highlights:-

> "There can be no doubt that while it is a necessary feature of every adversarial system of justice that there should be a higher court in the hierarchy of the courts to correct judicial errors, that procedure should not be abused".

In this regard, the applicants are within their rights to approach this court on review. Given that a final order to stay the proceedings had been granted pending review it is imperative that the review proceedings be finalized.

Un-Terminated Proceedings of Lower Courts

However, as a general rule courts are reluctant to interfere with the un-terminated proceedings of a lower court unless there is a gross miscarriage of justice. Although in HUNGWE J, (as he then was), in *S* v *Rose* HH71/12, chronicles in detail the requisite sections and punctuates by stating that it is a remedy available at any stage of criminal proceedings if the interests of justice so dictate. In essence, incomplete criminal proceedings are prone to intervention by the Upper Courts in isolated but deserving circumstances.

Whilst superior courts play an oversight role over the subordinates courts and judicial bodies by ensuring the necessary checks and balances as earlier stated, to safeguard the interests of justice, they can only interfere with interlocutory proceedings of the lower courts if continuation will result in irreversible gross miscarriage of justice. In *Robert M Gumbura & 6 Ors* v *Francis Mapfumo N.O. & Anor* SC 59/19, it was held that, it is established law that, superior courts, as a general rule, are reluctant to unnecessarily interfere with the incomplete proceedings or interlocutory decisions of their lower courts. In my opinion this is to safeguard against potential abuse by litigants bent on derailing and frustrating the smooth flow of the criminal justice system and the general respect and reverence of decisional autonomy of the subordinate courts.

In *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) at 64 C-F MALABA JA (as he then was) pronounced that:-

> "The general rule is that a superior court should only 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."

See, *Shava* v *Magomore N.O. & Anor,(supra)*; *Ndlovu* v *Regional Magistrate, Eastern Division and Anor* 1989(1) ZLR 264(H) at 269C, 270G; *Masedza and Ors* v *Magistrate Rusape & Anor* 1998 (1) ZLR 36 and *Matapo* v *Bhila N.O.& Anor* 2010ZLR321 H.

Most recently in the SC 59/2019 *Robert M Gumbura & 6 Ors* v *Francis Mapfumo N.O. & Anor,* GWAUNZA DCJ, MAKONI JA & BERE JA, observed as follows:-

> "It is settled law that a superior court will not readily interfere with unterminated criminal proceedings of a lower court except in exceptional circumstances. These include instances where grave injustice would occur if the superior court does not intervene and where there is gross irregularity resulting in a miscarriage of justice. One such instance is where there is a probability of the proceedings being a nullity. "It would be prejudicial to the accused, and a waste of time and resources, for the trial court to carry on with a trial likely to be declared a nullity".

Notably, from the foregoing this court is guided by the stated legal disposition in proceedings of this nature and can only intervene with the pending criminal proceedings before the first respondent herein if its decision on dismissing the applicant's exception to the criminal charge was grossly irregular or irrational. See, *S* v *John* HH 242-13 and *Achinulo* v *Moyo and Anor*, 2016 (2) ZLR416.

Analysis of the Facts, Evidence and the Law

In the present case, the court's decision was that it was premature to make a determination, at the initial stage of the trial, on whether the charge against the backdrop of the contents of the billboard disclosed an offence or not. In its discretion the court felt it wise to make that decision after hearing evidence.

Applicants argue that, decision not to interpret the words alongside the charge sheet did not need factual evidence as it was a legal point that called only for the court's legal mind and application of the law .Therefore, the decision was grossly irregular or irrational.

Inevitably, the irrationality or otherwise of the trial court's decision can only be measured against the contents of the bill board, the charge sheet within the context of the impugned legislative provisions.

The Bill Board

The contentious, bill board erected by the third and fourth applicants , at the behest of the first and second applicants, on the 10 December 2021, along Borrowdale road was framed as follows: "PUBLIC NOTICE CHIZIVISO (WEST Property "Pomona City" Project) Members of the public are hereby warned that, the land on which the Pomona City Housing Project is being developed is the subject of litigation, Case Numbers, HC 4599/19, HC5989/19, HC10315/19, Title deeds for the property are held at escrow having been pledged as Number HC 4599/19, HC5989/19 HC10315/19 security for a debt which has not been settled. Purchase of stands is therefore the risk of the purchaser. Inserted by, Fairclot Investments (Pvt) Ltd , P.O. Box H103, Hatfield, Harare, cell phone number +263772 226 691.

The Charge Sheet

As stated earlier on, following the publication of the billboard the applicants were arraigned before the first respondent facing charges of criminal nuisance. The charge sheet reads as follows:-

> "In that on the 10th of December 2020 and along Borrowdale Road opposite Celebration Centre, Borrowdale Harare, FAIRCLOT INVESTMENTS represented by GRANT RUSSEL,

> GRANT RUSSEL in his own capacity, PARAGRON PRINTING represented by MARK STRATHERN, MARK STRATHERN in his own capacity, one or all of them, unlawfully and intentionally placed an offensive material on a bill board, "Cautionary statement to the members of the public, Pomona City Housing Project, land subject to litigation. Title Deed of land has been pledged as security. Case Number HC 4599/19, HC10315/19. Purchase of stands is at the risk of the purchaser", thereby causing false alarm to the public knowingly that such action is likely materially to interfere with the ordinary comfort and convenience of the public or possibility that such actions is likely to create a nuisance.

The Section giving rise to the charge

Sections 46 as read with third schedule (2)(v) of the Criminal Law (Codification and Reform)Act [*Chapter 9:23*] reads as follows:-

> "Any person who does any of the….. specified in the 3rd Schedule shall be guilty of criminal nuisance and liable to a fine not exceeding level five or imprison for a period not exceeding six months or both"

Acts that constitute criminal nuisance are defined in section (2)(v) of the third Schedule of the Criminal Law (Codification) and Reform Act Chapter 9:23 as:-

> "Employs any means whatsoever which are likely materially to interfere with the ordinary comfort convenience, peace or quite of the public or any section of the public or does any act which is likely to create a nuisance or obstruction, shall be guilty of a criminal nuisance".

In view of the above, in criminal litigation a charge is what informs the arraigned person of the wrongs he or she had done. It details how the misfeasance was committed and to whom it was committed against. The place, time and the manner are essential ingredients of the charge and charge sheet. Personnel tasked with the preparation of charge sheet must be alive and thorough as to the specifications of a charge sheet. From this perspective there are three stations where a charge should be vetted and tested. The police the, prosecution set down office and the office of the trial magistrate. In turn, the police officer who frames the charge, the set-down officer who vets the docket, and the trial magistrate are a three man tag team who each, once the baton stick is passed to him should ensure that a charge sheet is well framed. Each member should also be bold enough to correct, accept correction or to downright reject a defective charge. This means that the compiler of the docket, or the framer of the charge sheet must acquaint themselves with the governing laws so as to ensure that the charge is not defective. In my view, it is not in the interest of justice and serves no purpose to continue with a trial in the face of a defective charge waiting for an accused person to raise an objection.

In, *Kasukuwere*, case below, CHITAPI J, citing, *Rex* v *Alexander & Ors* 1936 AD 445, stated as follows:-

> "the purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piercing sections of the indictment or portions of Sections to gather what the real charge is on which the Crown intends to lay against him".

The cases of *Zvinyenge & Ors* 1987 2 ZLR 42 (s), *S* v *Chamurandi* HH 182-86 , *S* v *Vhere* HH -211/ 86, all spell out in certain terms of the importance of well formulated charge sheets. Some defective charges are curable and some are incurable and vitiates the charges. See, *Siphimbili* 1995(2) ZLR 337.

Having noted the above, an accused person has a right to object to a charge if it does not disclose an offence or is defective. This objection to the charge is what is termed an exception. Applicants exercised their rights as provided in s171 of the Criminal Law and Procedure Act [*Chapter 9:07*] to except to a charge after they had tendered a plea, which in their view was defective or did not disclose an offence. I need not reinvent the wheel as the law pertaining to both exceptions and charges were aptly detailed by CHITAPI J, in the case of *Saviours Kasukuwere* v *Hosea Mujaya & Ors* HH 562/19 at page where he pinpointed that:-

> "Such an application is provided for by law. It is an antecedent to a trial and is no less important than a trial itself inasmuch as it is in fact part and parcel of trial proceedings. An exception to a charge application must be meticulously dealt with by the presiding judicial officer. The application sets the ground for a fair contest between the State as the accuser and the accused person. A fair trial and hearing starts at this stage. An accused who excepts to a charge must not be regarded as a time waster but asserting his or her rights to a fair trial".

In terms of section 171 of Act, [Chapter 9:07] above, an accused person can except to a charge before or after tendering his plea. John Reid Rowland in Criminal Procedure in Zimbabwe 1997 Edition at 16-15, stated that the common or usual ground of an exception to the charge is that it discloses no offence see also *S* v *Gabriel* 1970 (1) RLR. In my view the charge discloses the offence as charged.

Section, 171 of the Criminal Law Procedure and Evidence Act, [*Chapter 9:07*], on exceptions reads:-

> "(1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment

(2) When the accused pleads and excepts together, it shall be the discretion of the court whether the plea or exception shall be first disposed of.

In the current case, the applicants spontaneously pleaded and excepted to the charge in question. As such, the trial court exercised its discretion in terms of s 171 (2).

Findings

Irrefutably, a bill board by its very nature is a feast for the eyes of the public. It is in the public domain and undeniably for public consumption. As was correctly pointed out by the applicants, the words in the section subject to the dispute are wide and broad. They do cover a multiplicity of actions. Applicants have already conceded that the words as they stand are a dragnet that captures any action. However, they argue that there is no discomfort and, or inconvenience that has been visited on the public as, a bill board that warns the public not to purchase land saddled with legal encumbrances which may result in them losing out is not a public nor a criminal nuisance. They say that the court a quo was supposed to make a ruling on that fact even in the absence of evidence, therefore that ruling was grossly irregular and or irrational. On analysis, in light of these admissions, it is my considered opinion that, the interpretation of the words borne by the bill board within the context of the legislative provision lies with the primary court.

The degree and extent of the repugnance, discomfort and inconvenience, like the court of first instance noted can only be tested after hearing evidence. Accordingly, the trial court had the discretion to make a finding on whether the words disclosed a charge at the initial stage and preempt the trial or to make a decision at the conclusion of the state case or the trial. Either way, I am not convinced that its decision was irrational or grossly irregular to warrant the interference of this court.

Disposition

The first respondent's discretion to make a finding after hearing more evidence cannot be faulted. It is neither irrational nor grossly irregular. I therefore find no reason to interfere with the incomplete proceedings before the primary court.

Accordingly it is ordered that the application for review is dismissed with costs.

Tendai Biti Law, for the applicants
National Prosecuting Authority, for the second respondent