NORTON TOWN COUNCIL
versus
THE STATE
and
PRESIDING REGIONAL MAGISTRATE, HOSEA MUJAYA N.O.
and
CHRIST CITADEL INTERNATIONAL CHURCH
(Represented by LINDANI NDABA)

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 16 March & 15 September 2021

Court Application for review

A Muchadehama, for applicant
F Kachidza, for the 1st respondent
M I Mutero, for 3rd respondent

MANZUNZU J: This is an application for review seeking to set aside the decision by the 2nd respondent dismissing applicant's application for discharge at the close of the State case and putting applicant to its defence.

The application is opposed by the 1st respondent.

The background to this application is common cause. Following the death of one Lovejoy Mwandiyambira on 4 December 2014 by electrocution two institutions Christ International Church (the Church), Norton Town Council (the Council) and one Engineer Usheunesu were jointly charged for culpable homicide as defined in s 49 (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Act). Their trial is before the second respondent. At the close of the State case the accused applied for discharge on the basis that the State had failed to prove a *prima facie* case. Accused 3 was acquitted at the close of the State case. The application for discharge by the Church and the Council were dismissed by the court.

It means the defence case was to proceed for accused one, (the church) and two (the Council). The Council has brought this application seeking an order in the following terms;

"IT IS ORDERED THAT:

1. The application for review succeeds with costs.
2. Second respondent's decision of the 10th September 2019, dismissing applicant, Norton Town Council's application for discharge at the close of the State case be and is hereby set aside and substituted with the following;
   "The second accused Norton Town Council, be and is hereby found not guilty, acquitted and discharged"
3. Second respondent to pay the costs of this application."

The applicant laid down the following grounds for review;

1. "The second respondent's decision was grossly irregular.
2. The second respondent was also grossly unreasonable and irrational.
3. The second respondent's decision was mulcted with bias and malice."

It is applicant's case that having been arraigned with two others before the second respondent facing allegations of culpable homicide, the State relied on the evidence of four witnesses. The State alleged applicant was negligent when it allocated 3rd respondent a stand to build a storey building church below an existing 11 kv power line and that it failed to supervise the construction of the church thereby exposing the deceased to the power line.

The applicant further alleged that it emerged from the evidence of the State witnesses that the stand was allocated to 3rd respondent by the Ministry of Local Government and not the applicant. Further that the applicant had no duty to supervise the construction of the church as that was done by an independent engineer engaged by 3rd respondent.

In opposition the 1st respondent concedes that it was not the applicant which allocated the stand to 3rd respondent but rather the Ministry of Local Government. That position was confirmed by the evidence of Chatongoza from NSSA and engineer Murambiwa from ZETDC. 1st respondent also confirmed the engagement of an independent engineer by the 3rd respondent to supervise the construction of the building.

The issue before the trial court was whether or not the State established a *prima facie* case against the applicant. The 2nd respondent's ruling, which is now subject of review, implies that a *prima facie* case was proved against the applicant.

It is trite that a superior court will only interfere in unterminated proceedings of a lower court in exceptional circumstances of gross irregularity or where not to do so may result in grave injustice. In *Attorney-General* v *Makamba* 2005 (2) ZLR 54 (S) at 64 C-E MALABA JA, as he then was, had this to say; "The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts 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." The learned Judge cited with approval the words of STEYN CJ in *Ishmael & Ors* v *Additional Magistrate Wynberg & Anor* 1963(1) SA 1(A) at p 4 that:

> "It is not every failure of justice which would amount to a gross irregularity justifying intervention before completion …. A superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its powers to "rare cases where grave injustice must otherwise result or where justice might not by other means be obtained".

The onus is on the applicant to show on a balance of probability that the court *a quo* has run into error which might result into a grave injustice. In *Dombodzvuku and Anor* v *Sithole N.O & Anor* 2004 (2) ZLR 242 MAKARAU J, as she then was, said,

> "While the statute granting the review power does not place any limitation on the exercise of that power, this court has in practice rarely exercised the power in relation to proceedings pending before the lower court. In practice, the court will withhold jurisdiction pending completion of the lower court's proceedings to make an orderly conduct of court proceedings in the lower court. It would create a chaotic situation if any irregularity or unfavourable ruling on an interlocutory matter were to be brought on review before the completion of the proceedings in the lower court. The court's aversion to disrupting the general continuing of proceedings in the lower court assumes ascending importance especially in cases where no actual or permanent prejudice will be occasioned by the applicants. The power is however exercised in all matters where, not to do so, may result in a miscarriage of justice."

In Masedza and Ors v *Magistrate Rusape and Anor* 1998 (1) ZLR 36 in dealing with the review powers of the High Court over uncompleted proceedings of the magistrate court, the court laid down three circumstances under which the court may interfere, these being that:

(i) If the interlocutory decision results in an irregularity which is gross

(ii) If the decision sought to be impugned will seriously prejudice the rights of the litigant or

(iii) The irregularity is such that justice might not by any means be attained.

A look at case law shows that a general principle has been established. The general rule is that the court should be slow to interfere in unterminated or uncompleted proceedings before the inferior courts. The exception to the general rule is that the court will intervene in rare situations where grave injustice will result.

In terms of s198 (3) of the Criminal Procedure and Evidence Act, Chapter provides that:

> "(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

This is the stage when the State has failed to prove a prima facie case against the accused. In *S* v *Bvuma & Anor*, 1987 (2) ZLR 321 at 323 the court set the requirements where a court will be at liberty to discharge the accused at the close of the state case. These are;

a) Where there is no evidence to prove an essential element of the offence
b) Where there is no evidence on which a reasonable court, acting carefully might properly convict
c) Where the prosecution evidence is so manifestly unreliable that no reasonable court could safely act on it.

While acknowledging that the applicant did not allocate the stand to 3rd respondent and that it had no supervisory role to the construction of the building the 2nd respondent nevertheless dismissed the applicant's application for discharge. The reason which persuaded the 2nd respondent to put applicant to its defence was the fact that applicant was alleged to have been involved in the setting out of the foundation. A reading of the ruling by the 2nd respondent is not so clear as to the evidence which established a prima facie case against the applicant. After acknowledging a document which was produced with the consent of the parties, which document had the effect to absolve applicant from liability, the ruling goes on to state that, "I am not certain whether there should be any legal basis to attach to this or this was simply a question of accused number 2 abrogating their duties." Further, the ruling goes, "I have already hinted that accused 2 may have to be required to make some explanations about their involvement. They had jurisdiction over that piece of land. After all there are certain explanations which were referred to in the report which were being attributed to the accused number 2's representative in this trial."

It was argued for the applicant that the decision by 2nd respondent was unreasonable and irrational in the face of the fact that the applicant did not allocate land to the 3rd respondent. In respect to the second allegation relating to failure to supervise, no finding was made that the applicant failed to supervise the construction work. No evidence was led to prove the duty to supervise by the applicant. I agree with the applicant that the refusal of discharge at the close of the State case is grossly unreasonable and bad at law in that the court's findings are not

congruent with the decision reached. I am inclined to grant the order without the need to grant costs against the second respondent for a decision taken in the discharge of his judicial function.

Disposition:

IT IS ORDERED THAT:

1. The application for review succeeds with no order as to costs.
2. Second respondent's decision of the 10th September 2019, dismissing applicant, Norton Town Council's application for discharge at the close of the State case be and is hereby set aside and substituted with the following;
   "The second accused Norton Town Council, be and is hereby found not guilty, acquitted and discharged,"

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
National Prosecuting Authority, 1st respondent's legal practitioners