HB 62/17
HC 3265/15

NATIONAL FOODS LTD

And

DUBE AND TASK CONTRACTORS

And

CLITON NCUBE

Versus

MS GLADMORE MUSHORE

And

THE PROSECUTOR GENERAL

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 FEBRUARY & 23 MARCH 2017

Application for Review

S. Chamunorwa for the applicants
W. Mabhaudhi for the respondents

MAKONESE J: 1st and 2nd applicants appeared before a Provincial Magistrate sitting at Bulawayo facing two counts of contravening section 4(a) (c) (d) and (e) of the Factories and Works Act RGN number 302 of 1976 as read with section 33(3) of the Factories and Works Act (Chapter 14:08). Third applicant was being charged with one count of culpable homicide. At the close of the state case the defence applied for discharge of all the applicants on the grounds that the state had failed to establish a *prima facie* case against any one of them. The application was made in terms of section 198(3) of the Criminal Procedure and Evidence Act (Chapter 9:07). The application was dismissed by the court *a quo*.

This application is for a review of the court a quo's decision, dismissing the application for discharge at the close of the state case. The state did not oppose the application. The matter

was enrolled on the unopposed roll. I directed that the applicants file heads of argument in support of the review application addressing the following issues.

1. Whether or not a single judge can set aside the order of the trial magistrate;
2. Whether or not this is a matter in which the High Court sitting as a review court can intervene.

The applicants have since filed their detailed submissions and I am indebted to the applicants for their submissions. Before dealing with the merits of the application and the legal issues involved it is necessary to set out the background to this matter.

Background

Count one

On the first count the allegations are that on 17th March 2014 at National Foods, Steelworks, Bulawayo, National Foods, represented by Kevin Ncube and Dube Task Contractors, one or both of them failed to take all reasonable measures to ensure that safety standards are observed by all persons on the premises.

Count two

On the second count it is alleged that National Foods, Bulawayo represented by Kevin Ncube and Dube Task Contractors one or both of them failed to take all reasonable steps to ensure that protective clothing and appliances are worn on the premises.

Count three – culpable homicide

On the third count it is alleged that on the 17th March 2014 at around 05:15 hours at National Foods Bulawayo, Cliton Ndlovu unlawfully caused the death of Domingo Ndlovu by negligently failing to realise that death might result from his conduct and despite realising that death might result from his conduct negligently failed to guard against that possibility.

The brief facts surrounding the matter as contained in the state outline are that the deceased, Domingo Ndlovu aged 26 years was employed at National Foods as an off-loader. On 17th March 2014 around 05:15 hours was offloading maize from wagons. He had climbed on top of a wagon offloading maize when Cliton Ndlovu opened the outlet valve without checking for him. Domingo Ndlovu was trapped in the maize and died. The allegations against the applicants are essentially that they acted negligently thereby causing the death of the deceased.

In the court *a quo*, the state called a total of nine witnesses. The first six witnesses are all employees of either 1st or 2nd applicants. The seventh witness, Evelyn Nomagugu Mthombeni is an inspector with the National Social Security (NSSA). The eighth witness is a police officer and the last witness Zebediah Mavuna is a cousin to the deceased. The first six witnesses gave similar evidence regarding the events of 17th March 2014 that led to the death of Domingo Ndlovu. All six witnesses professed ignorance over why the deceased was in the wagon that was yet to be off-loaded. There was consensus that deceased was not supposed to be in that wagon until it had fully emptied. For the purpose of sweeping the remaining maize access to the wagon was to be gained through the side doors. The witness said at the commencement of each shift there was a briefing on safety measures. It was further indicated that it was not the deceased's responsibility to open up the top hole as this was the function of the supervisor.

The evidence of the first six witnesses exonerated the applicants. They were more of defence witnesses than witnesses for the state. The seventh state was a NSSA Inspector. During her investigation of the incident leading to the death of Domingo Ndlovu she failed to establish why the deceased had entered the wagon that was still to off-load its contents. From the evidence of the first six state witnesses deceased's act of entering the wagon at that stage was unprocedural and hence this was unforeseen. The NSSA Inspector could not impute any criminal liability to any of the applicants. The Inspector conceded that lack of protective clothing and appliances did not contribute to the death of the deceased. She further conceded that deceased's death was not due to failure to take reasonable measures to ensure safety standards.

The eighth witnesses merely told the court that during investigations it was established that there was a video footage that captured some of the events of the night in question. The last state witness was the deceased's cousin. This witness was neither at the scene of the accident nor called as an expert witness. Nothing of essence could be established from this witness. At the end of the case for the prosecution there was no meaningful evidence that could remotely lead a reasonable court, acting carefully to convict.

The court *a quo* dismissed the application for discharge in only one paragraph of its eight page ruling. The court reasoned as follows:

> *"in conclusion the court would not want to dwell much in my ruling for I would be pre-empting my final judgment. However, I will briefly point out that it has been noted that indeed the court agreed with the state that the evidence of the court has to take care of is the Inspector from NSSA for she is the one who should answer to the issues that are before the court, these other witnesses who are said to be exonerating the accused are just lay men and there is reasons for the court to make an inference in that those are people still employed by the accused, they might lose their jobs therefore the court is just there to disregard or take the opinion of the expert witness. It is pertinent to note that death occurred and it was just after deceased had talked to his workmates, it is confirmed in the video footage, but accused 3 went on to open the discharge value therefore it is felt that the accused are to answer explain in their defence." (sic)*

It is contended by the applicants that the decision of the court *a quo* in dismissing the application for discharge at the close of the state case is grossly outrageous in its defiance of logic that no reasonable court faced with the same facts would have arrived at the same decision. The applicants aver that this is a proper case where this court should exercise its powers of review.

The legal position

In the case of *AG* v *Makamba* 2004 (2) ZLR 63 (S), the Supreme Court held at page 66C, that a judge of the High Court can only exercise their powers of review:-

> *"... if another judge has agreed with the exercise of the power in that particular case."*

The Supreme Court relied on the proviso to section 29(5) (b) of the High Court Act (Chapter 7:06). I tend to agree with counsel for the applicants, that, with the great respect to the Supreme Court, this was an erroneous finding. This is so because section 29(5) (b) of the High Court Act only applies to:-

> "*a judge of the High Court before whom the record of criminal proceedings in a Magistrates' Court has been laid in terms of sections 55, 57 or 58 of the Magistrates' Court Act (Chapter 7:10)"*

In my view, and with the greatest respect to the Supreme Court, an application such as the one being made in the present application and the one in *AG* v *Makamba (supra*) is not covered by section 55, 57 and 58 of the Magistrates' Court Act.

In the determination of the main matter in *AG* v *Makamba* 2005 (2) ZLR 54 (S), the Supreme Court did not revisit the issue to correct itself. The court then set aside the decision of the High Court based on other considerations other than the one which suggested that a single judge cannot review criminal proceedings. The court missed the opportunity to rectify its error.

In the application before me, I have been requested to determine the review application sitting as a single judge. I am satisfied that the proviso to section 29 (5) (b) of the High Court Act does not apply in this matter. This application is not before me in terms of sections 55, 57 or 58 of the Magistrates' Court Act. I am therefore entitled to review the proceedings of the court *a quo* sitting as a single judge. However, having come to that conclusion I am aware that I am bound by the doctrine of *stare decisis*. This principle of our law dictates that an inferior court is bound by the decisions of an appellate court. The doctrine enjoins me to uphold the law as set out by the Supreme Court. In essence the doctrine is that once a law has been determined by the appellate court, future cases that deal with facts that are relevant to the issue and where the facts are considerably identical, the lower court is bound by the decision of the superior court. The High Court in this instance is obliged to abide by the decision in *AG* v *Makamba* 2004 (2) ZLR 63 (S), which respectfully, I contend ought to be revisited.

In *AG* v *Makamba* 2005 (2) ZLR 54 (S), the court reiterated that the general principle that applies in matters of this nature is that:-

> *"A Supreme 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."*

In this matter, the applicants complain that the decision of the trial magistrate is "clearly wrong" as to seriously prejudice the rights of the accused persons. I have already set out the background to this matter and the conclusion arrived at by the trial court. There can be no doubt that the decision of the court *a quo* is so outrageous as to defy logic.

In *S* v *Kachipare* 1998 (2) ZLR 271 (S) GUBBAY CJ (as he then was) stated at 276D-E that:-

> "There is sound basis for ordering the discharge of the accused at the close of the case for prosecution where:
> (i) There is no evidence to prove an essential element of the offence: See *AG* v *Bvuma & Anor* 1987 (2) ZLR 96 (S)
> (ii) There is no evidence on which a reasonable court, acting carefully, might properly convict: See *AG* v *Mzizi* 1991 (2) ZLR 321 (S)
> (iii) The evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it: See *AG* v *Tarwirei* 1991 (1) ZLR 575 (S)"

I have carefully examined the evidence placed before the trial magistrate and find that the decision to refuse a discharge at the close of the state case was clearly flawed. Once it was established that the evidence at the close of the state case was unreliable, there was no basis for placing the accused persons on their defence. It is clear that the dismissal of the application for discharge was intended solely to strengthen the state case. It is trite law that an accused person may not be placed on his defence simply to buttress the state case.

It is my view that the decision of the court *a quo* is so outrageous in its defiance of logic that it calls for this court's intervention in its use of review powers.

In *Dombodzvuku and Anor* v *Sithole & Another* 2004 (2) ZLR 242 (H), MAKARAU J (as she then was) stated as follows at page 245B:

> *"The power of this court to review criminal proceedings of the Magistrates' Court at any stage of the proceedings in the lower court is not in dispute. Section 29 of the High Court Act (Chapter 7:06) grants this court extensive power to review the criminal proceedings of the Magistrates' Court. It is specifically provided in section 29 (4) that this court or a judge of this court may mero mutu call for a record and review the criminal proceedings of the lower court if it comes to the court's or judge's notice that any such proceedings may not be in accordance with real and substantial justice. The powers conferred on the High Court and its judges by this section can be exercised at any stage of the proceedings."*

I am satisfied that in the matter before me a good case has been established for the relief sought. I accordingly make the following order:

1. It is ordered that the decision of the 1st respondent in case number CRB 1379/15 delivered on 22 October 2015 be and is hereby set aside and substituted with the following:

   "The application for discharge at the close of the state case be and is hereby granted and the accused persons are found not guilty and acquitted."

2. There shall be no order as to costs.

Takuva J …….. I agree

Calderwood, Bryce Hendrie & Partners, applicants' legal practitioners
The Prosecutor General's Office, respondents' legal practitioners