PRISCA MUPFUMIRA
versus
NGONI NDUNA N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & MANYANGADZE JJ
HARARE, 3 March & 11 April 2023

Chamber application for Review of Unterminated Proceedings

G R J Sithole with A Rubaya, for the applicant
No appearance for the 1st respondent
M Mabhaudhi with L Masuku, for the 2nd respondent

CHIKOWERO J:

INTRODUCTION

1. After everything has been said and done, we take the view that the applicant has taken the first respondent's decision dismissing her application for discharge at the close of the case for the prosecution on review because she considers that the decision was wrong. She has not succeeded in demonstrating that this is one of those rare cases where a superior court ought to interfere with unterminated proceedings pending before an inferior court. Accordingly, the application is dismissed.

THE BACKGROUND

2. The applicant is the former Minister of Public Service, Labour and Social Welfare in the Government of Zimbabwe.
3. She is on trial before the first respondent, sitting as a designated Anti – Corruption Court, on a charge of Criminal abuse of duty as a public officer as defined in S 174(1)(a) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]*
4. The allegations are that at a time when she was still serving as a Minister and hence a public officer she acted contrary to and inconsistent with her duties by giving specific instructions to the management of the National Social Security Authority (NSSA) to enter into a housing project with a company called Drawcard Enterprises (Private)

Limited (Drawcard). In other words, the unlawful instruction was designed to circumvent the requirement that NSSA goes through its own internal processes culminating in obtaining Board approval as well as going through tender procedures before NSSA could lawfully enter into the housing project contract. The prejudice to NSSA was that it did not benefit from the safeguards inherent in obtaining Board approval and tender procedures before contracting with Drawcard. On the other hand the applicant's specific instructions to NSSA management to contract with Drawcard favoured the latter because it did not compete with anybody before "winning" the job and entering into the contract with NSSA.

5. The court discharged the Acting General Manager of NSSA following an analysis of a concession by the prosecution that it had not established a *prima facie* case against that then co-accused person.
6. We have noted that one Mukondomi, the Ministry's representative on the NSSA Board at the material time, gave detailed testimony concerning a meeting held on 19 June 2017 at the Met Bank Building. The witness and her colleagues at NSSA received instructions from the applicant's office to attend that meeting. Attendees were the applicant as Minister; a Mr Masoka; the Chief Executive officer of NSSA; NSSA Directors of Investments and Legal Advice Herbert Hungwe and Mrs Sibiya respectively; the witness and Metbank officials. The latter made a presentation on housing investment.
7. The charge was based on the follow up meeting held at Anesu Building in Harare. It was held in the then NSSA Board Chairman's office. In attendance were among others some of the NSSA Board members, who included, Mukondomi; the applicant in her capacity as the Minister; the NSSA Chief Property Investment officer called Chihota and Metbank officials. Chihota was at the level of middle management at NSSA. At this meeting the Metbank officials made additional presentations on the housing investment at the end of which, according to the evidence of Chihota and Mukondomi,the applicant issued a verbal instruction to Chihota to ensure that a housing investment contract was signed between NSSA and Drawcard within forty – eight hours. Thereafter, according to the evidence placed before the 1st respondent by the prosecution, the applicant put Chihota and Mukondomi under pressure to ensure that the contract was signed.

8. Evidence on record indicates that as far as Chihota and Mukondomi were concerned, the correct NSSA internal procedure before entering into an investment contract is this. The potential investors make their presentations before the NSSA Management Investment Committee, which then makes its comments and recommendations to the Board Investment Committee which in turn also forwards its comments and recommendations to the full NSSA Board. That Board then sits, deliberates and makes its resolutions. The applicant, as Minister, gives policy directions to the Board in the national interest. Tender requirements needed to be complied with.
9. The first respondent dismissed the application for the discharge of the applicant herein. He was satisfied that, on the face of it, the evidence adduced by the prosecution established that the applicant participated in the events that led to the hand picking of Drawcard. We are mindful of the fact that the allegations are that the applicant issued specific instructions to NSSA middle management to make sure that the contract was signed between NSSA and Drawcard within forty- eight hours of the Anesu Building meeting.
10. In light of the evidence on record, which we have painstakingly gone through, can it be said that the decision to dismiss the application for discharge at the close of the case for the prosecution was grossly irregular as to seriously prejudice the rights of the applicant? We have elsewhere in this judgement already answered that question in the negative. Before setting out our reasons for so holding, we turn to the law.

THE LAW

11. In *Mamombe and Another* v *Mushure N.O and Anor* CCZ 4/22 the principle is reiterated that superior courts should be very slow in interfering with the unterminated proceedings of lower courts. The exception is where there is a gross irregularity or a wrong decision by the lower court that will seriously prejudice the rights of a litigant or accused person. Even that is not the end of the matter. The irregularity or wrong decision must be that which cannot be corrected by any other means. In *Mamombe,* the court lists numerous decisions of the courts in South Africa and of this country where in this principle has been observed.
12. We find the judgment in *Walhaus and ors* v *Additional Magistrate Johannesburg and Anor* 1959 *(3) SA 113(AD)* particularly illuminating in this regard. Therein, at 119D-120 E Ogilvie Thompson JA said :

"If, as appellants contend, the magistrate erred in dismissing their exception and objection to the charge, his error was that, in the performance of his statutory functions he gave a wrong decision. The normal remedy against a wrong decision of that kind is to appeal after conviction. The practical effect of entertaining applicant's position, would be to bring the magistrate's decision under appeal at the present, unconcluded, stage of the criminal proceedings against, them in the magistrate's court. It is true that the Supreme Court may, in a proper case, grant relief – by way of review, interdict or mandamus – against the decision of a magistrate's court, given before conviction… This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansd own (6th end, vol. 1 p . 750) state:
'While a superior court on review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in the court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or justice might not by other means be attained……..

In general however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal would ordinarily be available.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's courts……

[The] prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction."

13. Although the above sentiments were expressed in circumstances where the interlocutory decision challenged was the dismissal of an objection to a charge and the refusal to uphold an exception to the charge, the principle expressed therein applies with equal force to the circumstances of this matter- where we are concerned with a review of a decision refusing to discharge at the close of the case for the prosecution.
14. We note that in *Lee-Waverly John* v *The State and Anor* HH 117/14, the court stressed that this court should only interfere with unterminated proceedings before the magistrate's court where actual and permanent prejudice will befall the accused.
15. While not exercising review powers at this stage we note that s27(1)(c) of the High Court Act [*Chapter 7:06*] lists "gross irregularity in the …..decision" as one of the grounds for review.
16. We start with the ordinary meaning of the word "gross". The Oxford Study Dictionary at p 282 contains the following:

"gross 1……

2……...

3 glaringly obvious, outrageous, gross negligence……."

Gross negligence is given as an example to underline the difference, so it seems to us, between ordinary negligence and gross negligence. We have noted that for a decision to be grossly irregular it has to reach the threshold of being outrageous, not just wrong. It has to be glaringly obvious that the decision is wrong. This to us suggests that the decision must be so very wrong, not just wrong.

17. Since the applicant relies on the reasons for the decision to contend that the decision itself is grossly irregular, we again resort to the same dictionary for the ordinary meaning of the pertinent words. This is what we find at p 716:

> "unreason: (noun) lack of reasonable thought or action"
>
> "unreasonable:1……..
>
> 2. excessive, going beyond the limits of what is reasonable or just."

These definitions suggest to us that there is a range within which persons or decision makers are allowed to disagree without either of them being unreasonable. They are allowed to think differently and render different decisions using the same material without their decisions attracting the character of being unreasonable. It is only when some parameters are exceeded, in the thinking process, that the resultant decision becomes unreasonable. Even that is not enough. The decision has to be grossly unreasonable before review powers are invoked.

18. We consider case law. In *Oskil Properties (Pty) Ltd* v *Chairman of the Rent Board and Others* 1985(2) SA 234 (South Eastern Cape Local Division) the point is there made that merely because the reviewing Court is of the opinion that the decision challenged was wrong is no basis for interfering with that decision. In *Oskil Properties* (*supra*) van Rensburg J expressed himself thus at 236J -237E :

> "It was correctly stressed by counsel who appeared for first respondent that the powers of the court in a matter of this nature are limited. As the matter is not an appeal but a review, the court would not be entitled to interfere merely because it was of the opinion that the decision of the Control Board was wrong. It would be entitled to interfere only on one of the recognized grounds pertaining to the review of decisions of quasi-judicial bodies. The Legislature has appointed the Control Board as the final arbiter in its special field and, in the words of Holmes JA in *National Transport Commission and Another* v *Chetty's Motor Transport (Pty) Ltd* 1972(3)(SA) 726(A) at 735F-H, which remarks apply to the present matter:
> 'right or wrong, for better or worse, reasonable or unreasonable, its decision stands-unless it is vitiated by proof on review in the Supreme Court that:
> a) The Commission failed to apply its mind to the issue in accordance with the behests of the statute and the tenets of natural justice: in other words that, de jure, it failed to

> decide the matter at all. Such failure could be established by reference to mala fides, improper motive, arbitrariness or caprice. The list is not exhaustive; or
> b) the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid- a formidable onus.'
>
> It should be emphasized that a Court of law will not interfere with the exercise of its discretion by a quasi-judicial body merely on grounds that it was unreasonable. To warrant interference on grounds of unreasonableness, the unreasonableness must be so gross that something else can be inferred from it."
>
> (all underlining is ours, for emphasis.)

19. We are aware that there was no discretion involved in deciding whether the prosecution had made out a *prima facie* case. See s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. That said, the applicant, if there were a basis to interfere now, would still have had to discharge the formidable onus of demonstrating that the decision to dismiss the application was grossly unreasonable to so striking a degree as to justify the drawing of the inference that the first respondent failed to apply his mind to the issue before it. That is no light thing considering that the first respondent is a Regional Magistrate sitting as a designated Anti-Corruption Court. Regional Magistrates are the most senior judicial officers in the magistracy. They only deal with criminal matters. They not only have vast experience in presiding over criminal trials but have also developed expertise in this area by virtue of specializing in such trials. We do not dismiss the application on the basis that the matter is before a Regional Magistrate. We highlight the level of that bench only for the purpose of drawing attention to the onerous task that the applicant would have assumed in seeking to upset that Court's decision on the basis that it was grossly irregular.

20. In *Tenesi* v *Public Service Commission* 1996(1) 208(H) MALABA J (as he then was) at 208G-209C referred to *Secretary for Transport and Anor* v *Makwavarar*a 1991(1) ZLR 18(S) where KORSAH JA said:

> "In Secretary of *State* v *Tameside Metropolitan Borough Council* [1977] AC 1044 at 1025-1026; [1976] 3 All ER 665(CA) at 671e-h LORD DENNING MR cautions that:
>
> > 'No-one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view. All the more so when a man – be he a judge or a Minister – is entrusted by Parliament with the task of deciding whether another person has acted, is acting or is proposing to act unreasonably. Especially when the one who has to decide has himself his own views – and perhaps his own strong views – as to what should or should not be done. He must be very careful then not to fall into the error – a very common error – of thinking that anyone with whom he disagrees is being unreasonable. He may

himself think the solution so obvious that the opposite view cannot be reasonably held by anyone. But he must pause before doing so. He must ask himself:

'Is this person so very wrong? May he not quite reasonably take a different view? It is only when the answer is: 'He is completely wrong. No reasonable person could take that view' that he should condemn him as being unreasonable."

21. A useful approach is adverted to in *Tenesi* (*supra*) at 210 G – H where HIS LORDSHIP referred to *Mhlanga* v *Muranda & Ors* HH 136/92 where SMITH J said at 3 – 4:

> "In *Secretary for Transport & Anor* v *Makwavarara* 1991 (1) ZLR at 24 – 25 KORSAH JA said:
>
> 'The High Court, in the exercise of its review powers over the determination of quasi-judicial bodies, must place itself in the position of the tribunal whose determination is being reviewed and assess the reasonableness of the determination on the basis of the evidence actually put before the tribunal.'"

22. We are fully aware that the first respondent is a court of law and not an administrative body. We reiterate that it exercised no discretionary powers in arriving at the decision sought to be reviewed. With those riders in mind, we refer to *Zambezi Proteins (Pvt) Ltd & Ors* v *Minister of Environment and Tourism & Anor* 1996 (1) ZLR 378 (H) where, at 386 F – 387 A, GARWE J (as he then was) said:

> "Whilst the law is clear that an authority must exercise its statutory powers reasonably, the position is now settled that the court is not empowered to usurp the discretion of the public authority. In his book, *Administrative Law 6 ed*, HWR Wades states:
>
> 'Within the bounds of legal reasonableness is the area in which the deciding authority has genuine free discretion. If it passes these bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look into its merits … two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'
>
> In other words, not every mistaken exercise of judgement is unreasonable and not every reasonable exercise of judgement is right."

23. In *Dombodzvuku & Anor* v *Sithole N.O. & Anor* 2004 (2) ZLR 242 (H) MAKARAU J (as she then was) said at 246A – C said:

> "A decision is said to be grossly unreasonable if it is completely wrong and is not merely a different way of looking at the issue… the onus resting upon a litigant seeking

> to set aside the exercise of a discretion on grounds of unreasonableness is considerable. In my view, the task is Herculean if it is an interpretation of the law by a judicial officer that is sought to be impugned as being unreasonable. An incorrect rendition of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at, cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable …" (our emphasis)

APPLICATION OF THE LAW TO THE FACTS

24. This survey of case law demonstrates that if we had found justification to interfere now it would have been no light thing to find that the decision attacked was grossly irregular. We are not presently concerned with the correctness or otherwise of that decision, otherwise we would be prematurely and unprocedurally exercising appellate jurisdiction before the conclusion of those proceedings.

25. We reiterate that we have studied the record of the proceedings unfolding before the first respondent. We do not see anything or any basis to descend in that arena when regard is had to the evidence placed before that court. The case for the prosecution was clear. It was simple. According to the prosecution, the applicant committed the offence at the Anesu Building meeting by issuing verbal instructions to those members of the NSSA middle management present at that meeting to enter into a contract with Drawcard. The evidence of Mukondomi and Chihota was pertinent in this regard. Whether the proceedings of that meeting were minuted is immaterial for our purposes. The record of proceedings discloses the applicant's pivotal involvement in the favourable positioning of Drawcard right from the Metbank Building Meeting, the Anesu Building Meeting and the applicant's unrelenting pressure upon Chihota and Mukondomi to hurriedly conclude the contract. The first respondent took the view that there was *prima facie* evidence that in acting as she did at Anesu Building the applicant paid no regard to her Ministerial oath of office as set out in the Constitution as well as the dictates of s 27 (1) of the National Social Security Authority Act [*Chapter 17:04*].

26. All in all, the nine grounds for review are, at the end of the day, a grouping of grounds of appeal and argument to motivate such grounds. They miss the point. Oral argument at the hearing aptly demonstrated this. Mr *Sithole* was at pains to convince us that the evidence adduced on behalf of the prosecution was manifestly unreliable that no reasonable court could safely act on it. He cited *S* v *Kachipare* 1998 (2) ZLR 271 (S). We think that, without realising it, counsel was effectively arguing an appeal of the decision refusing to discharge. That demonstrates that this is not one of those rare matters calling for our interference at this stage.

In the event that the applicant is convicted, she may present such argument in an appeal against such a decision.

27. Similarly, submissions that the charge did not disclose an offence ought to have been taken by way of exception, not in an application for discharge and certainly not in an application which was meant to be one for review. Indeed, whether the evidence led thus far ultimately proves the charge is a matter which may or may not arise on appeal, if the matter reaches that stage. See *Undenge* v *S* SC 23/21.

28. The first respondent's decision did not amount to the crafting of a new charge. The applicant was put on her defence to answer the charge arising from her *prima facie* specific instructions issued at the Anesu Building Meeting.

29. The acquittal of the Acting General Manager had nothing to do with the basis on which the applicant was put to her defence. It was never the case of the prosecution that the one acquitted issued the specific instructions in question to members of NSSA middle management.

30. Questions as to the sufficiency of evidence and credibility of witnesses for purposes of securing a conviction did not fall for consideration by the first respondent in rendering his decision.

DISPOSITION

31. The present is an appeal conveniently packaged as a court application for review of unterminated proceedings. All that the applicant seeks is an acquittal without going through the full rigours of trial. The application is an abuse of court process.

1. In the result, the application be and is hereby dismissed.

CHIKOWERO J:……..

MANYANGADZE J:……..…….

I Agree

Rubaya and Chatambudza Legal Practitioners, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners