STEPHEN CHATUKUTA
versus
MAGISTRATE CHICHENA N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 21 May 2024 and 14 February 2025

Court Application For Review

E Mavuto, for the applicant
R Chikosha, for the 1st and 2nd respondent

TAKUVA J: This is a court application for review in terms of Rule 59(1) of he High Court Rules 2021 SI 202/2021 as read with s 27(1)(c) of the High Court Act [*Chapter 7:06*].

BACKGROUND FACTS

The applicant was arraigned before the first respondent on 8 August 2023 on charge on Frand as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Applicant pleaded not guilty and the matter proceeded to trial with the second respondent leading its evidence in a bid to prove its case. There after the second respondent closed its case and the applicant proceeded to apply for discharge in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The Act). The application was opposed by the second respondent. The first respondent made a finding that the second respondent had established a *prima facie* case against the applicant.

Aggrieved by the decision, applicant filed this review application in terms of s 27(1)(c) of the High Court Act [*Chapter 7:06*] seeking the following relief.

> "1. The decision of the first respondent dismissing the applicants application for discharge at the close of the state case under case no CRB HRE P 1149/21 be and is hereby set aside.

2. Applicant be and is hereby discharged and Acquitted at the close of the State case under case Number CRB HRE P 1149/21. Alternatively, that a trial *de novo* be conducted before a different magistrate.
3. Each party to bear its own costs."

THE LAW

I am being asked to interfere with unterminated proceedings in the court *a quo* on the ground that the magistrate committed a gross irregularity warranting interference by this court to prevent a miscarriage of justice.

The principles governing interference by a superior court with the proceedings of a subordinate court are well established. In *Prosecutor General of Zimbabwe* v *Intratrek Zimbabwe (Pvt) Ltd (2) Wicknell Munodaani Chivayo (3) L Ncube N.O* SC 59/2019, PATEL JA (as he then was) quoted with approval the following passages per OGILIVIE THOMAPSON JA in *Walhaus & Ors* v *Additional Magistrate, Johannesburg & Anor* 1959(3) SA 113(AD);

"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. No statutory provision exists directly sanctioning such a course. It is true that by virtue of its inherent power to restrain illegalities in inferior courts, 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 LANSDOWN (6th ed. Vol. 1p750) 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 a 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." (the underlining is mine).

In our jurisdiction the position is no different and has been adopted by our courts for exactly the same reasons. See *Levy* v *Benator* 1987(1) ZLR 120 (SC) at 123-124," *Ndlovu* v *Regional Magistrate Eastern Division and Anor* 1989(1) ZLR 264(HC).

See also *Lee-Waverly John* v *The State and Anor* HH 117-14 at p 3 where it was observed that the High Court should only interfere where actual and permanent prejudice will be occasioned to the accused.

In *casu,* the applicant has complained about the magistrate's approach to the assessment of the evidence and the decision arrived at. I do not find any exceptional circumstances in that process warranting interference by this court.

This in my view is not one of those rare cases where grave injustice might otherwise result if this court fails to intervene. There is nothing to suggest that justice might not by other means be attained. In the event of a wrong conviction. The applicant has a right of appeal.

Accordingly, it is ordered that;

1. The application for review be and is hereby dismissed.
2. There is no order as to costs.

Maposa and Ndomene Legal Practitioners, applicants' legal practitioners
National Prosecuting Authority, respondents' legal practitioners

TAKUVA J:……..