BORISLAV TRIFONOV BOYNOV
versus
JUDITH TARUVINGA N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 14 & 21 January 2022, 21 March 2022

Urgent Chamber Application

Adv.T.Mapuranga for the applicant
Mr.T.Kangai - for 2nd respondent.

CHILIMBE J

Background to the urgent application.

[1] Having heard and dismissed this application, I received a request for the fuller reasons for my decision. The reasons are set out hereunder. Before me is an urgent chamber application for the stay of proceedings in the magistrate`s court sitting at the Harare;-first respondent presiding. The applicant was arraigned before first respondent to answer a charge of Theft of Trust Property as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] [the Code] .

[2] The facts giving rise to the charge were set out as follows;-the applicant, was manager of a block of flats named Bath Mansions situate at 32 Bath Road in Avondale, Harare. A dispute arose, between one Rajendrakumar Jogi, cited as the complainant in the criminal proceedings against applicant in the magistrate`s court, and, among others, an entity known as Technoimpex JSC (Private) Limited. This dispute, whose further particulars need not detain us, related to the block of flats in question and escalated into litigation .The litigation resulted in an order by the Supreme Court, in case number SC 503 of 20, on 2 December 2020.The Supreme Court order provided, (among other matters), by paragraph 1(c) that;-

> "With effect from 1 January 2021 rentals payable by the tenants of the flats shall be paid into an escrow account managed and administered by Messrs *Coghlan, Welsh & Guest* Legal Practitioners".

[3] Messrs *Coghlan, Welsh& Guest* declined the appointment and could thus not assume the mandate and function of escrow agent. Resultantly, the firm could not accept any payments of rentals in question. This non-assumption of agency by the law firm was unanticipated by the

affected parties. Applicant, in particular submitted before me that this position of non-agency then placed him into a quandary. He was stuck with rentals that he had received from the tenants and unable to handover the funds as directed by the Supreme Court order. It is these rental receipts, amounting to a total of USD$7 700-00, which then gave rise to the charge against applicant.

[4] The protest by applicant before his trial, during that trial, in the papers before me and in the separate review application filed before this court has been consistent. He argues; - (a) how can the funds that I received constitute trust property in the first instance when I was not supposed to receive them in terms of the Supreme Court order, and (b) how can it be said that I failed to account for them when the escrow agents appointed in terms of the same Supreme Court order declined the mandate and refused to accept the money? It may be pertinent to state that the applicant received the rentals concerned in January and February 2021 after, and well aware of, the Supreme Court order directing that rentals be remitted to Messrs *Coghlan, Welsh and Guest.*

[5] Prior to commencement of trial proceedings before first respondent, the applicant filed a request for further particulars, raising points (a) and (b) as stated above. Dissatisfied with the State`s response thereto, the applicant then filed an exception and a plea to the charge .Again, the basis of his contestation issues from the matters that he had raised when seeking further particulars to the charge. The exception was opposed by the State, whose opposition found favour with the first respondent. Accordingly, the exception was dismissed after argument.

[6] Still unsatisfied with such ruling, the applicant filed an application before this court, under case number HC 6431/21.He sought, in that application, a review of first Respondent`s decision to dismiss the exception. The review application is pending before this court, whilst the proceedings before first Respondent in the Magistrate`s Court were set to continue on 18 February 2022.This being the reason then that the applicant approached this court to hear this present application HC 7089/21 on an urgent basis, seeking a stay of the trial proceedings. It is necessary to state that the first respondent had ruled against an application for adjournment. The applicant sustains, even in these present proceedings, the argument that since he was (a) not entitled to receive the rentals from the tenants in terms of the Supreme Court order and (b) in any event, *Coghlan, Welsh and Guest* had refused to act as recipient of the rentals the charge of theft of trust property could not be founded.

The dispute before the court

[7] The second respondent opposed the application on two grounds .Firstly, there was no basis for the applicant`s complaint against the charge and facts preferred against him in the lower court. The charge, as framed and supported by the facts including their amplification by the further particulars supplied, properly set out the nature of the allegations against him. The charge also met all the essentials of a valid charge, as stipulated in s 46 of the Criminal Procedure and Evidence Act (*Chapter 9:07*) .The facts showed that applicant received rentals which he was not meant to collect. Having done so, he either failed to account for the money or converted the money .His conduct was inconsistent with obligation in as far as dealing with the rentals was concerned. It was also argued that the matters traversed by the applicant in his exception amounted, in effect, to a defence or full response to the charge. This meant that the applicant was adequately appraised of the allegations raised against him and could (and did) plead to the charge. On that basis, the exception could not be sustained and was properly dismissed by first respondent. Any residual issues raised by the applicant were in fact triable issues meant to be properly examined through the process of a trial.

[8] Secondly, *Mr.Kangai* for the second respondent argued that there were no grounds to justify a departure from the well-established principle of our law which discourages interference by superior courts, in unterminated proceedings of the lower courts. He also raised the argument that in any event, no prejudice would befall the applicant if the trial continued. The trial court was at liberty to punish the alleged defects in the state papers through (a) ordering a discharge at the end of the state case (b) acquittal at the end of the trial or (c) proceed and find the applicant guilty of some other charge, as provided for in s 274 of the Code. Finally, the applicant could have recourse to the suite of legal remedies open to him at the end of trial in the form of an appeal, review or other option.

The basis of the application

[9] It is necessary to restate that this application for stay of the proceedings in the lower court is underpinned by the pending application for the review of the lower court`s decision to dismiss the exception to the charge which the applicant had mounted in that court.

[10] It was argued on behalf of the applicant that this pending review application enjoyed excellent prospects of success. As such, it would thus be impractical, inconvenient and prejudicial to the applicant if the proceedings in the lower court to were to proceed given their sure fate of reversal by the review court. The applicant would needlessly incur expense, endure

the rigours of trial, or even face the risk of incarceration. It was also submitted that the trial before first Respondent would be rendered a nullity if it were permitted to proceed before the resolution of the review application. On that basis, it was argued that the applicant was likely to suffer irreparable harm if the trial is not stayed. I was thus urged to avert that undesirable and unjust eventuality by issuing an order staying the trial proceedings in the magistrate`s court.

Principles applicable to the review and, or stay of unterminated proceedings

[11] The key consideration is whether or not the proceedings before the first respondent should be stayed until the conclusion of the said application for the review filed in this court under case number HC 6341/21. It would be useful to commence, in that respect, with the guidance issued by UCHENA J (as he then was) in *Matapo & Ors* v *Bhila N.O and Anor HH 84-10* and reported in 2010 (1) ZLR 321 (H).The learned judge remarked as follows (at page 2 of the judgment);-"Generally this court does not encourage the bringing of unterminated proceedings for review.

[12] CHITAPI J also enunciated the reason why superior courts are generally reluctant to interfere with unterminated proceedings of the lower courts. In *Jason Max Korerai Machaya & Others* v *The State and Another HH 442/19* ,the learned judge stated as follows (at page 11);-

> "What the courts have done is to adopt an attitude or approach which allows for and observes the need for the criminal justice to flow by not unnecessarily interfering in uncompleted proceedings. The rationale for the approach is legally sound. The inferior courts are established by law to determine cases placed before them to finality. The approach of this court should therefore be to respect the complete exercise of jurisdiction by those courts and to exercise review and appeal powers after the conclusion of the proceedings. There is a plethora of cases in this and other jurisdictions which provide that this court will not intervene in uncompleted proceedings save in exceptional circumstances where an injustice which cannot be redressed by other means in due course may otherwise result".

[13] The rationale behind this principle was articulated by the Supreme Court in *Prosecutor General of Zimbabwe* v *Intratek Zimbabwe (Private) Limited and 3 Others SC 27-20*. ("*Intratek*") by MAKARAU JA (as she then was), who cited with approval, the dictum of MALABA JA (as he then was) in *Attorney-General* v *Makamba 2005 (2) ZLR 54 (S)* at 64C;-

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

[14] The learned judge of appeal in *Prosecutor General* v *Intratek* then restated the basis of the superior courts` reluctance to interfere in unterminated proceedings of the lower courts .In

doing so, she sounded the common sense reminders touching the foundation of our system of justice. The following excerpts distilled from the judgment in Intratek [pages 7-8] ,are instructive in issuing guidance on how to dispose of the matter before me;-

1. "….a superior court should be slow to intervene in unterminated proceedings in a court below and should confine the exercise of its power to those cases where grave injustice might otherwise result or where justice by other means may not be obtained
2. "…Thus, put conversely, the general rule is that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings".
3. "…If superior courts were to review and interfere with each and every interlocutory ruling made during proceedings in lower courts, finality in litigation will be severely jeopardised and the efficacy of the entire court system seriously compromised."
4. "…Further, it is not every irregular and adverse interlocutory ruling or decision that amounts to an irreparable miscarriage of justice. Some such lapses get corrected or lose import during the course of the proceedings".
5. "…it is not every failure of justice which amounts to a gross irregularity justifying intervention before completion of trial. Most can wait to be addressed on appeal or review after final judgment."

[15] Notwithstanding this strict approach, litigants must, by all means bring these applications because review proceedings form a critical aspect of the justice delivery system especially in criminal proceedings. It is on this basis that CHITAPI J cautioned, in *Machaya and Ors v The State and Others* (supra),[at page 11] that never must these applications be treated as a nuisance. They must be considered on the basis of applicable legal principles.

> "This court has of recent been inundated with applications for review of uncompleted proceedings in the magistrates' court. The filing of the applications has been viewed in some quarters as a ploy to delay trials or finalization of ongoing and pending trials. The filing of review applications at any stage of the criminal proceedings is permissible at law. It is part of due process in the application of the rules of procedure. The rule of law must be observed".

[16] The question may then be asked as to how to determine, on a practical basis, when to interfere with unterminated proceedings in the lower courts. UCHENA J, (as he then was) in *Matapo and others v Bhila* (supra) [at page 2], also gave the simple guideline in his famous *dictum:*

There are, however circumstances which may justify the reviewing of unterminated proceedings. This means this court will not lightly stay proceedings pending review. An application of this nature can only succeed if the application for review has prospects of success.

[17] In *Priccilar Vengesai v Hosea Mujaya and Another* HH 163-22, the court suggested at page 6-7,a seven (7) point checklist which I will also consider in dealing with the matter before me.I set out the "checklist" below;-

i. that there are exceptional circumstances

ii. arising from a proven irregularity

iii. the irregularity has the effect of vitiating the proceedings

iv. resulting in miscarriage of justice

v. there is a nexus between the miscarriage of justice and the interlocutory order which is clearly wrong

vi. and that there is proven serious prejudice to the rights of the litigant

vii. the prejudice cannot be redressed by any other means.

[18] It is necessary to note the following;-In *Machaya and Ors v The State and Others* (*supra),* a total of eight (8) applicants faced 23 counts of criminal abuse of office allegedly committed between the period 2005 and 2013. In *Matapo v Bhila*, the court was persuaded by, and cited the remarks of Devitte J in *Masedza & Ors* v *Magistrate, Rusape & Anor* 1998 (1) ZLR 36 which went thus; [at page 47];-

> "If an allegation of bias has been proved the proceedings, are a nullity. Therefore it would be unjust to require that the accused go through the motions, if he is convicted, (sic) of the sentencing process, followed by an appeal or review in respect of proceedings proved to be abortive at the stage of the application for recusal. Thus, in *S v Herbst* 1980 (3) SA 1026 (C), where the facts showed that the magistrate's conduct of the proceedings might have created the impression 'in the mind of the right-minded layman that he was unfavourably disposed towards the applicant', the court intervened in unterminated proceedings by setting aside the proceedings and referring the matter for hearing de novo before another magistrate. It was not necessary, the court stated, to show that the magistrate was in fact biased."

[19] The main concern of the court in *Bhila* therefore was that proceedings could be rendered a nullity because a biased lower court augured negatively for an accused. I must take into account the distinctions arising from the facts of *Machaya* and *Bhila* against those in the present application before me, although the principles enunciated in both *Machaya* and *Bhila* still apply with equal force. In casu, there two counts of one simple charge backed by a set of fairly straightforward facts.

[20] Further, whilst the alternative prayer in the review proceedings filed by applicant under HC 6341/21,which form a basis of the present application includes a request that the matter proceeds before a different court, the focus is not so much on bias of the first Respondent which is raised as a secondary issue. The real issue is whether or not the charge preferred against the applicant is consistent with the requirements of the law.

Based on the above principles, what are the applicant`s prospects of success on review?

[21] Taking the approach or test prescribed in *Matapo* v *Bhila*, the question to ask is;-What are the applicant`s prospects of success on review? In assessing such prospects of success the following are the key indicators;-

Propriety of the charge

[22] The applicant first attacked, via an exception, the propriety of the charge preferred against him in the trial court. I must now assess, (a) the veracity of this attack, which forms the backbone of the review application, as I must also consider (b) the prospects of success of that argument of review .Section 146 of the Criminal Procedure and Evidence Act sets out the essentials of a valid charge. This section was articulated in *Saviour Kasukuwere v Mujaya and Anor* HH 562/19 where the court stated as follows regarding propriety of a charge,(at page 4);-

> Secondly, the indictment, summons or charge "shall set forth the offence with which the accused is charged in such manner, and with such particulars "as to time and place of the commission of the offence and the person, if any, and the property if any, against whom the offence was committed "as may be reasonably sufficient inform the accused of the nature of the charge" (own underlining). The words "reasonably sufficient" denote that the context or situation of a particular case will determine what is reasonably sufficient to inform the accused of the nature of the charge. The simplicity of the case before the court in terms of facts, the law or both are relevant considerations in informing the degree of particularity of what must be alleged in the charge as would pass the scale of "reasonably sufficient." The bottom line is that the detail."

[23] Where a charge fails to meet the standards prescribed above, an accused will be within his or her rights to except to the charge in terms of s171 of the Criminal Procedure and Evidence Act.In doing so, the excipient is merely asserting their right to a fair trial, which right will be obstructed by an unclear charge .In *State* v *Job Sikhala* HMA 4-20, MAWADZE J stated thus at page 5;-

> "As was pointed out in the case of Rex v Alexander & Ors 1936 AD 445 in which the learned Judge said;
> "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."
> As is stated by the learned author *John Reid Rowland in Criminal Procedure in Zimbabwe* 1997 Edition at 16-15 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 188 (G)".

In order to assess the propriety of the charge against the above principles, (for purposes of gauging the prospects of success on review), it would be necessary to revert to the actual

complaint filed against that charge by the applicant in both the trial court as well as the review application.

The exception brought by the applicant

[24] The essence of applicant`s exception is captured by the following excerpt from his application before first respondent;-

1.1.1 The two charges themselves allege that the accused collected rentals and merely failed to account for the money or hand it over to the escrow agents-Messrs Coghlan Welsh and Guest making it clear that the accused was entitled to collect and account but

1.1.2 The particulars in paragraph 3 alleges that the accused was not supposed to touch the rentals.

1.1.3 Put differently, applicant is saying (a) the state admits that I had nowhere to place the funds since Coghlan Welsh and Guest declined to accept the money, so there is no failure to account and (b) that the money was not even supposed to be received by me so there cannot be a relationship creating trust property obligations.

The gist of applicant`s complaint.

[25] Advocate *Mapuranga* for the applicant contended that the Criminal Code defined theft of trust property in s 113 (2) and made it a requirement that the accused must hold the trust property lawfully. It was further contended on behalf of the applicant that second respondent had in fact admitted that applicant had no right to take or handle the property concerned. Put differently, the applicant was no longer supposed to receive the rentals for Bath Mansions following the issuance of the Supreme Court directive that the rentals be paid to an escrow agent. This admission, according to applicant, rendered the charge of theft of trust property fatally defective because, for such charge to stand, the accused must have been lawfully permitted to receive or possess the property.

[26] The first Respondent`s finding on the above exception was that "*The charge is very clear and the offence is clear. The state has not contradicted itself in any way"* (See the last page of the court`s ruling in CRB HREP 322/21 appearing on page 47 of the review application bundle).In that respect, the exception was dismissed.

Definition of the charge of theft of trust property in the Code

[27] The offence of the theft of trust property is set out in s113 (2) and (3) as read with s112 of the Criminal Code. First, "trust property" is defined as follows in s112;-

> "trust property" means property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following—
> (a) hold the property on behalf of another person or account for it to another person; or
> (b) hand the property over to a specific person; or
> (c) deal with the property in a particular way;

[28] Next, the offence itself is set out in s113 which states that ;-

(2) "Subject to subsection (3), a person shall also be guilty of theft if he or she holds trust property and, in breach of the terms under which it is so held, he or she intentionally—

(a) omits to account or accounts incorrectly for the property; or
(b) hands the property or part of it over to a person other than the person to whom he or she is obliged to hand it over; or
(c) uses the property or part of it for a purpose other than the purpose for which he or she is obliged to use it; or
(d) converts the property or part of it to his or her own use.

(3) Subsection (2) shall not apply if—

(a) the person holding or receiving the property has properly and transparently accounted for the property in accordance with the terms of the trust; or
(b) the person disposing of the property retains the equivalent value thereof for delivery to the person entitled thereto, unless the terms under which he or she holds or receives the property require him or her to hold and deliver back the specific property".

[29] Firstly, the definition of "trust property" in s 113, as well as the offence itself in s112 practically come laced with built-in defences which an accused can raise. The legislature circumscribed a generous array of situations which effectively exempt a person genuinely possessing or dealing in trust property from criminal liability. Outside the parameters drawn by those exemptions, the offence sustains. Secondly, nowhere is s 112 and 113 is the word "lawfully" used to qualify the definition of possession of trust property. Whilst the lawfulness of possession of trust property, by the nature of the definition of trust property itself, can be said to be implied or presumed, it is not set out as a specific or explicit requirement or element of that offence in s 112. And where a concept is held as a presumption, then the exact nature (and effect) of such a presumption will depend on the circumstances of a matter.

[30] In the review judgment of *S* v *Henry Ganda* HH 224-15, MAFUSIRE J defined the key obligations falling on one in possession of trust property as (a) that a person must hold the property, (b) that they must hold it subject to certain conditions and (c) that they must account for it. Again, the court did not, in that matter stipulate that lawfulness was a strict requirement to possession of trust property.

[31] Flowing from the above qualification in Ganda, what becomes critical when considering the issue of applicant`s possession of the rentals is how exactly the applicant he came into possession of the rentals. The Supreme Court order had stipulated that rentals were to be paid, not to applicant, but to *Coghlan, Welsh and Guest* so how did he end up receiving or accepting receipt of the rentals? Intrinsic to that question will be how then was he supposed to deal with the property? It is important to note that the state has made an allegation in the charge that the "*accused failed to account for the money or hand it over to Messrs Coughlan*

Welsh and Guest ...” (emphasis on underlined part) .It becomes therefore a matter of the state to provide evidence to the court outlining the applicable conditions which governed the applicant`s possession of the funds, including his obligations thereto. These considerations can only be ventilated by examining the circumstances in which the accused came to hold, receive and control the trust property concerned. The applicant`s attack of the charge cannot, in my view, be sustained as it tendered particulars sufficiently amplified to enable him to plead. The component of the lawfulness or otherwise of possession becomes a matter for the trial court to deal with during trial.

[32] Further, the applicant does not, as noted deny having taken possession of the rentals which the state is alleging constitute trust property. The applicant vehemently denies that the rentals which he received, given the circumstances which prevailed when he so took the funds, should be defined as trust property. But it is also noted that not once has applicant explained what happened to the rentals. No explanation appears in the record of proceedings before the magistrate, neither was any tendered in the papers before me, nor for that matter, in the review application. The applicant has not shed any light as to what he did, or what became the fate of the rentals he collected or received from the tenants at Bath Mansions. This was so notwithstanding the allegations by the state that he converted the money to his own use. Further, there were persistent inquiries (seeking to establish the fate of the rentals) raised well before criminal proceedings were instituted against him. Annexures F,G,H,I,J and K to the review application, all letters exchanged between various lawyers representing the respondents in the Supreme Court matter SC 503/20 capture the relevant inquiries regarding the rentals. None of the noted “wide array of exemptions” intrinsic in the definitions of the offence in s112 and s 113, were cited by the applicant in explaining his possession of the rentals.

[33] In particular, Anexture G, being a letter addressed to Messrs *Mugabe Mutumbwa* by *Rubaya-Chinuwo* legal practitioners on 15 March 2021 sought to establish (a) “*how much was collected”* (b) *“the person who collected it”* and (c) *“where the money is kept right now”*.Annexture H also a letter exchanged between the same law firms dated 19/3/20 specifically noted “*that the property managed (*applicant) *collected rentals for January and February 2021 and was yet to account for them*”.

[34] It would not be remiss surely, given the above questions raised by *Rubaya-Chinuwo* and others, to anticipate an inquiry along the following lines, arising from the above concerns;-

> Q-Did you receive the rentals from Bath Mansions` tenants?
> A-Yes

Q-Why
A-In my capacity as manager,
Q-Did you intend to convert them to your own use?
A-No
Q-What then did you intend to do with them?
A-Remit them to CWG in terms of the Supreme Court Order.
Q-Did you remit the money to CWG?
A-No, they declined
Q-What did you do with the money?
A- (An explanation from the accused)

[35] In that regard, clearly, an inquiry into whether or not the rentals which the applicant admits he received in his capacity as property manager, automatically converted into trust property to be handled and passed on to the rightful person would be (a) reasonably necessary and (b) one falling within the purview of first respondent in the proceedings before her.The issue is raised that Messrs *Coghlan, Welsh and Guest* declined escrow agency so applicant was stuck with the funds and that the duty to account fell away. I note that the Supreme Court matter had a total of 8 parties, seven of them respondents. Of those respondents are some whose interests were protected by *Rubaya-Chinuwo* attorneys. The pursuit of the rentals by *Rubaya-Chinuwo*, in defence of their clients` interests, can only be described as tenacious. Given this background, the effects or consequences of the non-availability of the escrow agent`s services, would need to be examined. Only through such an examination would the exact circumstances of how the applicant came to possess the money, and what he was obliged to do with it, would be ascertained.

Will the proceedings before the first respondent be rendered a nullity?

[36] It has been argued on behalf of applicant that given the there is absolutely nothing to profit from if the proceedings before first respondent are permitted to proceed. It was further contended, as noted in (7) above that putting the applicant through the rigours of a trial carries so many disadvantages for him. In *Walhaus & Others* v *Additional Magistrate Johannesburg & Another* 1959 (3) SA (AD) 119D at ….it was held that;-

> "[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."

[37] This *dictum* places in perspective the complaint by the applicant that trial will soil his robes with inconvenience. Such are the natural and unavoidable consequences of being arraigned to face a criminal trial. Regrettably, they form the necessary pain demanded by the

administration of justice where the hierarchical order of the courts must be respected. The same principle was expressed in *Robert Dombodzvuku & Another* v *V.Sithole N.O & Another* HH 174-2004, by MAKARAU J (as she then was) at page 3;-

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

Without delving into the merits of pre-empting the discretion of the learned trial magistrate, it would seem to be self-evident that there are so many issues which the trial could rightly ventilate, matters which fall under the ordinary purview of a trial court based on the principles enunciated by the Supreme Court in the *Intratek* judgment.

[39] In addition the matters arising from the questions posed in the lawyers` letters would similarly require ventilation. An examination or contestation of these matters before a court would not be a fruitless enterprise given the nature of the charge preferred against the applicant. One may also pay heed to the fact that the applicant is alleged to have collected the rentals from Bath Mansions` tenants in January and February 2021 after the Supreme Court order had been issued. There is also an aspect of the applicant`s defence (and admitted, possibly improperly by the state) that would ideally be examined by the trial court. The applicant argued in his exception that "…*the money was not even supposed to be received by me so there cannot be a relationship creating trust property obligations".* The conclusion borne by the underlined part of the preceding statement is presumably an interpretation of the following part of the Supreme Court order which read "… *rentals payable by the tenants of the flats shall be paid into an escrow account…"* It is arguable, and therefore triable, that the Supreme Court order, especially the part underlined, can only be read as having completely ousted the applicant`s right, as manager, to receive the rentals. Clearly, these are matters to be properly considered by the trial court in assessing not only the sustainability of the charge of theft of trust property raised against the applicant, but establishing, in the process, his liability or otherwise at law. In that respect, the trial court would be at large, as submitted by Mr.*Kanga*i, after conduct of such an inquiry, to discharge the applicant at the end of the state or defence case, accept a withdrawal after plea or convict the applicant.

[40] In addition to, or associated with the exercise of the above options, the trial court could, proceed to convict on any other charge deemed appropriate in terms of s274 of the Code which provides that;-

> "274 Conviction for crime other than that charged
> Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged".

This is more so in view of the allegation stated in paragraph 8 of the state outline which went;-

> *"*Having collected the money which was supposed to be held in trust pending the determination of the matter before the Supreme Court, the accused proceeded to expend the money to his use (*sic*)."

Advocate *Mapuranga* argued that in order for the trial court to exercise the above option, the charge before it must be valid as an initial requirement. Section 274 cannot be used to cure fatally defective charges. As a principle of law, that argument is plausible. The authorities are quite clear that where a charge does not meet the requirements of validity, then such charge becomes incompetent. But in the present matter, the validity of the charge is in fact not in issue. The extant decision of the trial court was to uphold the validity of the charge by dismissing the applicant`s exception. What remains is for the reviewing court to decide on the correctness of that dismissal. Accordingly, it cannot be stated as a definitive position that at this stage, that the discretion vested in the trial court to convict on the basis of s 274 stands ousted.

[41] In this respect, I would associate with the views of the first respondent in making a finding that the charge as framed enabled the applicant to plead to the allegations raised against him. On that basis, sitting as a non-appellate and non-reviewing court, I would be reluctant to interfere with the proceedings in the lower court.

"The rule in Mupfumira and MUTEVEDZI N.O"

[42] In *Prisca Mupfumira and Another* v *MUNAMATO MUTEVEDZI N.O and Another (supra)* this court laid out an important principle regarding applications of this nature. I deliberately sidestepped the issue until now for reasons set out below. In *Mupfumira v Mutevedzi* the court took a position to clarify the procedure parties ought to adopt when seeking a stay of uncompleted criminal proceedings. I will quote *in extenso* from the judgment of KWENDA J at page 22;-

> "The power to postpone or adjourn criminal trial proceedings in the Magistrates Court reposes in that court. In other words, where the accused person has applied for review of incomplete trial proceedings the process which this court becomes seized with is the review application

> and not the actual trial taking place in the magistrate's court. The trial magistrate can postpone the trial (s 165 of the C P & E Act)) or adjourn the trial (s 166 of the C P & E Act) when it deems it necessary and expedient. The judicial officer in the magistrates' court whose decision is taken up on review has no obligation to stay the trial proceedings before him/her but should exercise his/her discretion judiciously guided by s 165 and 166 of the C P & E Act. The decision of the trial court granting or refusing postponement or adjournment binds the parties. *A direct urgent chamber application to this court to stay or stop the proceedings in the lower court is not provided for in criminal procedure and is, in essence, an application to review and set aside the trial court's decision disguised as an urgent chamber application.* An order of this court staying or postponing trial proceedings in the magistrates' court effectively sets aside and replaces the trial court's decision either refusing or granting a postponement even if it does not state that in so many words. *The decision of the trial court can only be set aside and replaced by two judges concurring* and, **if on review**, only after grounds for review like bias or irrationality or illegality have been shown to exist by the party seeking the decision to be set aside or replaced." [Italicised portions my emphasis]

[43] This issue was neither pleaded in the founding and opposing papers nor was it argued on behalf of the parties. As such I am unable to readily apply it to the facts in the present matter on the basis that (a) the parties did not interrogate it and (b) I have already made a finding that is dispositive of the application. Nonetheless, the reasoning of the court in *Mupfumira & Another* v *MUTEVEDZI .NO and Another* is in essence, an extension of the principle discouraging interference with unterminated proceedings of lower courts.It further endorses the position stated in the authorities cited in this case regarding the need for a robust interrogation of applications seeking the interference by superior courts in unterminated criminal proceedings before the lower courts.

Diligent prosecution of interlocutory applications

[44] Relevant to the rule in *Mupfumira and MUTEVEDZI N.O*, is the earlier guidance issued in *Jason Machaya* by CHITAPI J who emphasised the importance of pursuing a speedy resolution of criminal review applications involving unterminated criminal proceedings. He exhorted applicants, the state as well as trial magistrates to ensure that any applicant who benefits from an order of stay of proceedings is put strictly to terms. In similar vein, the need to expedite conclusion of interlocutory and other applications necessitating a stay of proceedings requests, was also recognised, albeit perhaps drawing from the specific (and slightly different) circumstances of that particular matter, in *Rita Mbatha & Another* v *Vincent Ncube and Another* SC 97/18.MAKARAU JA (as she then was) disposed of a matter as follows (at page 8);

> " Having found that I cannot stay the execution of the order of the Magistrates` Court, I must dismiss that part of the application seeking stay of execution of the eviction order .However, in view of the fact that the respondent has not opposed the fact the application that the matter be

> heard on the earliest available date, and the facts of the dispute require that the matter be finalised at the earliest, I will grant the second application seeking an early hearing date".

[45] The need for a logical approach in disposing urgent applications for stay of proceedings pending the hearing of review applications was also dealt with by KWENDA and CHOKOWERO JJs in *Prisca Mupfumira and Another v MUNAMATO MUTEVEDZI N.O and Another* (*supra*), and by MAKARAU J (as she then was),in *Robert Dombodzvuku & Another* v *V.Sithole N.O & Another (supra).*In the two matters, the court proceeded to dispose of both the urgent application for stay of proceedings concomitantly with the review application itself.

[46] The respective approaches adopted by the courts in the cases cited in (37),(38)and (39) should be taken as yet another timely reminder of the need for diligent prosecution and expeditious closure of matters not just applicants, but by all concerned, courts included. Secondly, where a stay of proceedings is refused, it must be accepted that the inconveniences associated with a concurrent prosecution of primary proceedings and interlocutory applications become inevitable. Parties can avoid or mitigate those risks (real or perceived) by driving for a speedy closure of the interlocutory applications.

[47] Disposition

1. The application for a stay of the proceedings before the first Respondent in Harare Magistrate`s Court CRB Number HRE P 3225/21, pending the finalisation of a review application before this Honourable Court under Case Number 6431/21, be and is hereby dismissed.
2. There shall be no order as to costs.

Messrs Mugabe, Mutumbwa & Partners, applicant`s legal practitioners,
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