FUNNY MACHIPISA
versus
NGONI NDUNA N.O.
and
THE NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
CHIKOWERO and MANYANGADZE JJ
HARARE, 20 May 2022 & 6 July 2022

Opposed Application

Professor L Madhuku, for the applicant
Mr A Muziwi, for the respondent

MANYANGADZE J: This is an application for a review of the decision of the first respondent handed down on 20 September 2021 in the Harare Regional Court, sitting as a designated anti-corruption court. The application arises out of the first respondent's refusal to return a verdict of not guilty after upholding the applicant's exception to the charge that was read out at the commencement of his criminal trial.

The facts of the matter are common cause. A brief outline therefore is as follows: - The applicant is employed by the City of Harare as Acting Director of Housing and Community Services. Sometime in June 2021, he was arraigned before the first respondent facing a charge of "criminal abuse of duty as a public officer, in contravention of s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The gist of the allegations against him are that he irregularly and fraudulently allocated non-existent stands to various persons who were seeking land from the city council.

The applicant pleaded not guilty and also excepted to the charge. As a basis for the exception, he cited certain irregularities such as failure to specify how he showed favour to the persons allocated stands. The exception was taken in terms of s 170 of the Criminal Law Code. The first respondent upheld the exception. After upholding the exception, he directed that the second respondent amends the charge. This would enable the trial to proceed on the amended charge. The applicant then demanded a verdict of not guilty. He contended that after his exception was upheld, he was entitled to a verdict of not guilty.

During submissions that were made on that point, the State conceded that the applicant was indeed entitled to a verdict of not guilty. In his ruling, the first respondent refused to return

a verdict of not guilty, as demanded by the applicant, notwithstanding the concession made by the prosecution.

Aggrieved by the first respondent's refusal to return a verdict of not guilty, the applicant filed the instant application. The basis of his application is stated as follows, on p 2 of the notice of the application:

> "Illegality: The decision by the first Respondent [in *State* v *Funny Machipisa* ACC 158/20] not to return a verdict of "Not guilty" after upholding the applicant's exception, which exception had been taken in terms of s 180(4) of the Criminal Procedure and Evidence Act [*Chapter:9:07*], is illegal as a contravention of s 180(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The applicant was entitled, as of right, to a "Not guilty" verdict once an exception which he had taken after pleading "Not guilty" had been upheld."

The specific relief the applicant seeks is couched, in his draft order, in the following terms:-

> "(1) That the decision of the 1st respondent [**in State v Funny Machipisa ACC 158/20**] not to return a verdict of "Not guilty" after upholding the applicant's exception, which had been taken in terms of section 180(4) of the Criminal procedure and Evidence Act [Chapter 9:07], is illegal and is set aside.
> (2) Consequently, the applicant is found not guilty of the charge of Criminal Abuse of Duty as a Public officer as defined in 174 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] [**in State v Funny Machipisa ACC 158/20].**
> (3) That the 2nd Respondent pays the costs of this application on an attorney and client scale, if it opposes the relief sought."

In substantiating his push for a not guilty verdict, the applicant averred that the first respondent's decision was tainted by either "*gross irregularity*" or by being "*clearly wrong*." He contends, in paragraph 12 of his heads of argument, that the not guilty plea which he tendered must inevitably be followed by a not guilty verdict. It cannot "*hang in the air waiting for an amended charge*." He highlights that s 180(6) of the Criminal Procedure and Evidence Act provides that any person who has pleaded is entitled to a verdict. Thus, the first respondent's decision is in violation of this provision and as such constitutes a gross irregularity.

Further to that, the applicant contends that s 180(6) should be read with s 8(b) of the Criminal Procedure and Evidence Act, which makes an acquittal mandatory whenever charges are withdrawn after plea.

The other leg of the applicant's argument is that the decision in question is clearly wrong. We do not see much of a difference with the preceding argument of gross irregularity. Indeed, the applicant himself points out, in paragraph 20 of his heads of argument, that "*the same arguments made*" above would apply (that is, in respect of gross irregularity).

In countering the applicant's averments, the second respondent contends that there was no irregularity in the first respondent's decision. He acted in accordance with the law. The second respondent points out, in para(s) 7-8 of its heads of argument, that the first respondent has the discretion to direct the prosecution to amend the charge, among other options.

The second respondent further contends, in para 8 of its heads of argument, that an order to amend a charge is an interlocutory ruling. It is a ruling made in the course of on-going, uncompleted proceedings. Superior courts do not interfere with uncompleted proceedings of lower courts, save in exceptional circumstances showing gross irregularity. The second respondent argues that no gross irregularity has been proven in the manner in which the court *a quo* conducted the proceedings before it, warranting interference by this court.

It is significant to note that the applicant accepts that the proceedings before the first respondent fall into the category of unterminated proceedings. This is clear from para(s) 6-8 of the applicant's heads of argument, wherein he acknowledges this important fact and refers to the law applicable.

The law governing intervention by superior courts in unterminated proceedings in lower courts is clearly set out in numerous case authorities. These include *Dombodzvuku and Another* v *Sithole N.O and Another* 2004 (2) ZLR 242(H), *State* v *John* 2013 (2) ZLR 154(H), *Prosecutor-General of Zimbabwe* v *Intratek Zimbabwe (Pvt) Ltd and Others* SC 67/20, *Prisca Mupfumira and Another* v *Munamato Mutevedzi and Another* HH 200/20.

The fundamental principles that emerge from these cases are that:

- The High Court's review powers over proceedings of the lower courts can be exercised at any stage of such proceedings.
- These review powers are exercised only in exceptional circumstances of proven gross irregularity.
- The irregularity must go to the root of the proceedings, resulting in a miscarriage of justice which cannot be cured by any other means.
- The interlocutory decision complained of must be clearly wrong such that it seriously prejudices the rights of the litigant adversely affected by it.

In *Attorney-General* v *Makamba* 2005(2) ZLR 54(S), at 64 B -D MALABA JA (as he then was) stated the legal position in the following terms:

> "The general rule is that a superior court should intervene in uncompleted proceedings in the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to 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 *Prosecutor-General of Zimbabwe* v *Intratek Zimbabwe (Pvt) Ltd and Others*, (*supra),* MAKARAU JA (as she then was) stated, at p 8 of the cyclostyled judgment:

> "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. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with on-going proceedings."

In casu, the pertinent question is -Does the first respondent's decision fall into the exceptional category reflecting gross irregularity? We think not.

An examination of the first respondent's ruling shows that he took guidance from the applicable law.

To begin with, he exercised the discretion provided for in s 171 of the Criminal Procedure and Evidence Act, where an accused person decides to both plead and except to the charge. Section 171 reads:

> "(1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment, summons or charge.
>
> (2) When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed of."

The first respondent exercised his discretion in terms of subjection (2) and dealt with the exception first. What was he then going to do with the plea of not guilty, which had been tendered together with the exception?

The first respondent was guided by s 170(3), which allows amendment of the indictment, summons or charge provided such amendment does not prejudice the accused in his defence. This section provides as follows:

> "Any court before which any objection is taken in terms of subsection (1) or (2) may, if it is thought necessary and the accused is not prejudiced as to his defence, cause the indictment, summons or charge to be forthwith amended in the requisite particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

A significant aspect of the first respondent's ruling is the distinction he draws between the upholding of an exception and the quashing of the charge. These are different courses of action provided for in s 170(1). The accused either excepts to the charge, or makes an

application to have the charge quashed. In the instant case, the accused excepted to the charge. The first respondent upheld the exception. He did not quash the charge. The upholding of the exception left room for amendment of the charge. The quashing thereof would not have left such a room. In any case, as the first respondent noted, correctly in our view, the Magistrates' Court is restricted to dealing with exceptions, in s 170(2). The quashing of a summons, indictment or charge, it appears, is a power exercised by superior courts.

It seems the applicant conflated the two courses of action. In his submissions, he referred to exception and quashing interchangeably. This is reflected in para 15 of his heads of argument, wherein it is averred:

> "The interpretation being made above to s 180(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is consistent with the logic and principle behind s 8(b) of the Act which makes an acquittal mandatory whenever charges are withdrawn after a plea. Quashing charges after a plea by upholding an exception taken together with the plea, ought to have the same effect: there is no longer any charge to which the plea can attach." (underlining added)

The first respondent also dealt with the applicant's reference to s 180(6) and s 8 (b) of the Criminal Procedure and Evidence Act. Section 180 (6), the one the applicant relies on in demanding a verdict of not guilty, reads:

> " any person who has been called upon to plead to any indictment, summons or charge shall, except as is otherwise provided in this Act or an any other enactment, be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded:…"

Section 8(b) provides:

> "8 The Prosecutor-General or any person conducting criminal proceedings on behalf of the State may –
>
> a) ……..
> b) at any time after an accused has pleaded to a charge but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge"

It is important to note that the cited sections are not providing for entitlement to a verdict in unterminated proceedings, such as the ones *in casu*. The scenario in s 8 (b) cannot be equated to the instant case. In s 8 (b), the State would have withdrawn charges after plea, thus effectively stopping the prosecution. An amendment to the charge does not fit into the same scenario. The prosecution of the accused is still an on-going process, albeit on an amended charge. The first respondent explains this situation as follows, at pp 7-8 of his ruling;

> "The accused successfully raised an exception to the original charge. The court is only empowered to have the charge amended to take account of accused's concerns over the charge.

> The amended charge is not a new charge for accused to demand a verdict against the charge he had pleaded to. It is still the same charge now perfected as per accused's demand. An accused who has pleaded to a charge in respect whereof the prosecution has so been stopped, shall be entitled to a verdict of acquittal in respect of that charge. See *S* v *Hendricks and Another* 1976 (3) SA 721 (C). In this case the prosecution has not been stopped. It's still going on. So one cannot demand a verdict in midst of a trial."

Our analysis of the first respondent's ruling, as shown above, does not reflect a gross misdirection in the approach he took. Neither can it be said that he was clearly wrong in his interpretation and application of the law.

In oral submissions made towards the close of the hearing of this matter, Mr *Muziwi*, on behalf of the State, shifted his position. Contrary to his initial stance, he conceded that the order of the court *a quo,* refusing to return a verdict of not guilty and allowing amendment, should be vacated.

However, he did not go so far as to concede that a not guilty verdict should be returned. He submitted that instead of directing that the charge be amended, the trial magistrate should have allowed the prosecution to prefer a proper charge. Put differently, after upholding the exception, the first respondent should have simply left it open to the prosecution to institute proceedings afresh.

Counsel for both parties appeared to converge on this approach. In this regard Professor *Madhuku,* on behalf of the applicant, submitted that the accused in such a situation would have been *discharged, without being found not guilty*. This is somewhat nebulous terminology. It leaves proceedings hanging and inconclusive, with no clarity as to the way forward.

The crucial question is - are we faced with terminated or unterminated proceedings? Professor *Madhuku* appeared ambivalent on this aspect. In his heads of argument, he clearly approached the matter on the basis that the court is dealing with unterminated proceedings. He tried to persuade the court that the proceedings fall into the exceptional category warranting the court's intervention.

However, during oral argument, he ended up submitting that:

> "These are not unterminated proceedings strictly speaking. Once you have pleaded you are entitled to a verdict. Because you have pleaded not guilty and there is no charge, the choice has been taken away, by the court itself."

As already indicated, when the court upheld the exception, it did not quash the charge. Hence the amendment. So, these were unterminated proceedings.

After careful analysis of the first respondent's ruling, and the submissions made on behalf of both parties, we are unable to uphold the concession made on behalf of the State. We

maintain the finding that these are unterminated proceedings, whose circumstances do not justify intervention by this court. The test for intervening in unterminated proceedings is high, as repeatedly emphasized in the case authorities. It is not only high but exceptionally high. In our view, the circumstances obtaining in the instant case do not call for such intervention. We find no gross irregularity in the first respondent's ruling.

In the result,

IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. Each party bears its own costs.

CHIKOWERO J: Agrees……..…

Lovemore Madhuku Lawyers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners