STANLEY NYASHA KAZHANJE
versus
THE HONOURABLE MAGISTRATE HOSEA MUJAYA N.O.
and
THE PROSECUTOR GENERAL OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 10, 11 & 14 June 2019

Urgent chamber application

S. Hashiti, for the applicant
T. Mapfuwa and *B. Vito*, for the respondents

KWENDA J:

INTRODUCTION

The applicant is on trial at the Harare Regional Court for the Eastern Division. The trial was postponed to the 14th June 2019 for continuation. Applicant is a former Board Chairperson of Zimbabwe Power Company (ZPC) having been appointed to the Board by the then Energy Minister, Hon Dzikamayi Mavhaire, as he then was. Applicant was initially facing two charges in the alternative.

The main charge was Criminal abuse of office as defined in section 174(1) of the Criminal Law (Codification and Reform) Act Chapter 9:23; it being alleged that in January 2016 he unlawfully acted contrary to his duty as a public officer, he received a sum of $10 000.00 from Intratek Zimbabwe(Pvt) Ltd (Intratek) paid into his (applicant's) CBZ bank account as consideration to influence his decisions during deliberations on a contract awarded to Intratek known as the Gwanda Solar Project. That charge was withdrawn by the State.

The trial progressed on the alternative charge which is concealing from Principal a personal interest in a transaction it being alleged that he participated in deliberations to approve awarding of Gwanda Solar Power Project to Intratek without disclosing his relationship with Intratek thereby deceiving his employer, ZESA Holdings (ZESA). It is alleged that in so doing the applicant contravened section 173 of the Criminal Law (Codification and Reform Act)

[*Chapter 9:23*]. The State Outline expound the allegations. Every member of the Board, of which applicant was, is required to declare conflict of interest pursuant to the provisions of the Corporate Governance Framework for State Enterprises and Parastatals: November 2010.The Gwanda Project contract was consummated without a bank guarantee. It is common cause that according to the applicant his relationship with Intratek is that Intratek engaged him to give technical assistance in preparing a bid a bid for the Gwanda Solar Project when the initial tender was floated and he received payment in the sum of $10 000.00.

The applicant denied the charge. The applicant stated that he never received a bribe from Intratek of Wicknell Chivayo. He denied favouring Intratek or Wicknell Chivayo in relation to the Gwanda Solar Project. He further alleged that a company for which he is director did consultancy work for Intratek prior to Intratek's involvement with ZPC. Upon performance of the contract by applicant, payment was made by Intratek and received by him. He did not influence any decision and the other board members were educated and professional who made decisions collectively and would not pander to any improper influence. He averred that if anything, he raised important queries during the deliberations. He was not an employee of ZESA but board chairperson. The Gwanda Solar Project contract was awarded by The State Procurement Board prior to his engagement a chairperson. He had no power to or influence to prevent or the tender process. ZESA was not deceived. His company is which dealt with Intratek is Terminal Engineers and he disclosed his involvement with that company (Terminal Engineers). He suggested that it is ludicrous to believe that he would be bribed by a paltry $10 000.00 to influence decisions on a two hundred-million-dollar project.

The State called various witnesses during the trial and their evidence will be referred to only to the extent that is relevant to this application. At the close of the State case the accused applied for discharge in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

> **"198 Conduct of trial**
> (1) ……
> (2) …….
> (*a*…….
> (*b*) ……..
> (3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

The trial Court dismissed the application and ordered the applicant to his defence. Applicant is aggrieved by the decision. He filed a Court Application for Review simultaneously with an urgent chamber application for stay of the trial proceedings before first respondent pending the outcome of the review application. The applications were filed simultaneously on the 6th June 2019 to the extent that where it is necessary to refer to the High court Review case number there are blank spaces.

The grounds of review are

1. The first respondent's decision to put applicant on his defence is irrational, grossly irregular, outrageous and defies logic and no reasonable court having applied its mind would arrive at that decision.
2. The first respondent grossly misdirected himself in disregarding exculpatory evidence of the State witnesses which negated a prima facie case.
3. The first respondent's decision unprocedurally facilitates the State to bolster its case through defence evidence which is untenable at law because the applicant has no onus to prove his innocence.
4. The first respondent violated the presumption of innocence by reversing or shifting the onus to applicant.
5. The decision to put applicant on his defence where there is no prima facie case is contrary to the law.
6. …..
7. The first respondent put the applicant on his defence without giving reasons and arrogated to himself a discretion he does not have.

The applicant initially sought a provisional order containing the following reliefs: -

1. In the interim an order staying criminal trial before first respondent set to continue on 13 June 2019 pending the High Court review.
2. On the return date, a final order for permanent stay of the trial proceedings.

The certificate of urgency could have been hurriedly prepared since it states that the application for review is in terms of section 198(3) of the Criminal Procedure and Evidence Act. That cannot be correct. It also says the first respondent did not give reasons for his decision. That, again, is not correct because the reasons are on record.

Of note, however is that the certifying lawyer submitted that the application for review has merit because first respondent did not demonstrate how the State established a *prima facie* case. The lawyer referred to the matter of *Isaura Masinga and Ms Sande NO and Prosecutor General HH 372/19* in the certificate of urgency which he said is on all fours with the present case and applicant is at risk of incriminating himself should the matter proceed to the defence case. Leaving the matter to proceed to the defence case would be a violation of applicant's right to a fair trial and protection of the law. In the grounds of application, applicant further submits that if this Court does not intervene on an urgent basis the trial will proceed because the first respondent refused applicant's request to stay proceedings pending the High Court review.

URGENCY

The trial is set to proceed on the 13th June 2019 and first respondent has refused to stay proceedings as requested. The matter is therefore urgent. The parties before me agreed that a magistrate court matter is usually postponed to a definite date for continuation which usually not too far. *See sections 165 and 166 of the Criminal Procedure and Evidence Act* [Chapter 9:07] which speaks of a period not exceeding fourteen days unless the accused agrees. That is a clear guideline to magistrates that completion of trials should not be unduly delayed. The parties agreed that an application for stay of proceedings is on the face of it urgent because where a magistrate has refused an application to stay proceedings, he/she will proceed on the appointed date unless ordered by a superior court to stay proceedings.

DRAFT ORDER

I raised concerns with the draft provisional order. The interim relief is sound but the final relief to be sought on the return date of permanent stay of proceedings before first respondent has no basis in the circumstances of this case. Although I am presiding on the return date but any provisional order approved by me must have competent terms. Permanent stay would render the application for review unnecessary because it would have the effect of terminating the criminal proceedings before first respondent for good. In response to the query, applicant's counsel applied for amendment. He applied to amend the interim relief sought to read that the criminal trial before first respondent be stayed pending the application for review and additionally that the parties file their respective notice of opposition, answering affidavit and heads of argument in case number HC 4184/90 (the review matter) before the return date.

He also applied to amend the final order to be an order setting aside the first respondent's decision to put applicant on his defence and acquitting him.

The application for amendment still presents challenges notwithstanding that it was not opposed by the State. The provisional order is not a *rule nisi;* so it has no return date which is specific or easily ascertainable with certainty. The interim relief would obviously be intended to be a structured setting time lines within which the parties should file papers so that the application for review can be disposed of with minimum delay. As long as the return date is not known, no effective timelines can be defined and progress of the review matter remains at the sole discretion of the applicant. As soon as the interim relief is granted there will be no reason for him to take urgent steps to call the return date.

The above cited challenges illustrate the problems presented to this Court by applications of this nature. Once the interim relief of stay of execution is granted it becomes difficult to imagine what the final relief will be. The interim and the final order can only be distinguished by the purpose of the stay. In the interim an order for stay can be granted **pending the return date**. On the return date the Court can confirm the interim/ provisional order **pending review**.

The amendment sought, particularly the final order is very attractive and logical on paper as a way of curtailing the procedure. Clearly, after stay of execution has been granted pending review of a lower court's decision, the only other relief sensible is an order setting aside the lower court's decision. In approaching the Court with two applications, the applicant essentially seeks only two reliefs. In the interim he seeks stay of proceedings and finally he wants the decision of the magistrateto be set aside. My attention was drawn to the matter of *Genius Kadungure* v *The Hon Makwande NO and Prosecutor General HH 800/18* where this Court heard an application for criminal review on an urgent basis. That matter is clearly distinguishable. It was concerned with deprivation of liberty. It was concerned with terminated bail proceedings. Further, the *Kadungure* case (*supra*) was filed as an urgent application for review.

The challenge with the amendment sought in this case is that the application before me is an application for stay of execution only. I am not seized with the review which is a separate application filed on the 6th June 2019. The period within which the State must file opposing papers has not passed. Notwithstanding the attractiveness of the idea, in the circumstances of this case, it is not practical to import a draft order in the application for review which is in its

infancy and make it part of this urgent chamber application for stay of proceedings. The applications have not been consolidated. In any event, applications for review are in terms of Order 33 of the Rules. While the procedure laid out in Order 32 applies to reviews filed in terms of Order 33, it appears an urgent review presents challenges in dealing with on an urgent basis because of the requirement and time set out in Order 33 rule 260 for the preparation and lodging of the transcript. The transcript must be submitted in twelve days. I believe these are working days. The application to amend the draft order cannot succeed.

THE MERITS

The applicant submitted that contrary to the allegation of non-disclosure in the charge and state outline, the key State witnesses gave out in evidence that the applicant made the necessary disclosure. Applicant submitted that Saidi Sangula, called by the State stated in his evidence in chief that 'at one meeting the issue arose involving perhaps Intratek and at that point, he did say I consulted these people at some point in my previous life'. Saidi Sangula was further asked by the Prosecutor whether at any stage either prior or after the contract the applicant disclosed his interest in Intratek to which he responded 'I think I have said in the morning, where he indicated that he had consulted with Intratek in his other life and I will state that when the matter arose at Holdings level…he did point out to his colleagues that he had made that sort of disclosure…'. He was asked whether in his opinion that would be sufficient disclosure whereupon he refused to commit himself.

The other witness was Partson Mbiriri, the former permanent Secretary, who in answer to a question by the Prosecutor whether applicant had disclosed he said 'Yes he did. He asked to meet me….'

In its ruling on the application for discharge the trial court found that the '...State has to concede that there were witnesses who were not categorically saying the accused person did not disclose his prior interests in Intratek during the time he was chairperson of the board and chairing meetings. A question which needs addressing is if the accused person was obliged to make a declaration, to whom was he supposed to do that?'

Applicant submitted that the trial court acted irrationally by placing applicant on his defence in the face of such evidence and findings. Applicant submitted that the trial Regional magistrate had no discretion in the matter and he ought to have acquitted. He submitted that

putting the applicant on his defence where the law requires him to be acquitted is a violation of his right to a fair trial and protection of the law. He submitted that the mere fact of enduring a trial which is not merited is a gross violation.

Applicant's counsel cited *Isaura Masinga* v *Ms Sande NO and Anor* (*supra*). He also quoted extensively from the matter of *Jennifer Williams & Ors* v *Pathekile Msipha. NO SC 22-10.* The *Jennifer Williams* case underscores the importance of constitutional adjudication on contravention of fundamental human rights and freedoms and the objectives to be achieved. The court with inherent jurisdiction like the High Court, is enjoined in such adjudication to make any order that would preserve a state of affairs that would as far as possible prevent substantial prejudice and injustice. The Court, once seized with a matter, has inherent powers to regulate its proceedings. The likelihood of the applicant suffering irreparable harm should the application be refused is dependent on the nature of the harm and not magnitude. In that particular case the Supreme Court held that proceeding to trial before the determination of the main application was harmful to and a violation of the fundamental right to protection of the law. In this case applicant's counsel, based on his interpretation of the *Jennifer Williams* case went as far as submitting that any wrong decision is reviewable whether proceedings have terminated or not and that reviews of incomplete proceedings should be unrestricted, the only consideration being whether there is merit in the application. He relied on section 29(2) (b) (iii) of the *High Court Act* [*Chapter 7:06*].

This application is opposed by the State. The State could not file opposing papers due to time constraints. The State counsel made oral submissions. The import of the submissions is that the applicant has a case to answer. The trial magistrate did not misdirect himself in ordering applicant to his defence. The minutes of the deliberations were produced in court and the first item on the agenda was disclosure of interest. No such disclosure by the applicant is recorded in the minutes. The State further submitted that the applicant was required in terms of government policy, which he was familiar with, to make written disclosures to the Energy minister, Minister for State Enterprises and Parastatals and the Board. There is no written record of such a disclosure by him. The requirement is contained in article 3 of the Corporate Governance Framework for State Enterprises in Zimbabwe.

The State submitted that the deliberations in which applicant partook and chaired were concerned with the implementation of the contract awarded to Intartek. The State submitted that the argument that objectively no harm ensued or that applicant had no capacity to influence

the award or performance of the tender is immaterial. That decision is not up to the court but was at the discretion of the Board after formal full disclosure by applicant. The disclosure envisaged is the full nature of his dealings with Intartek. The State Counsel submitted that the Superior court should be wary of interfering with proceedings pending in the court *a quo* unless there are exceptional circumstances. The State submitted that applicant has an explanation to give because while he says his company did consultancy work for Intrartek in 2014, payment was only received by him in 2016 and by some unexplained coincidence, at the time the implementation of the Gwanda Solar Project became the subject of deliberations at ZPC. He further submitted that the money was paid into the applicant's personal account and not the company for which applicant was director and shareholder. All that is for applicant to explain.

In replication, applicant's counsel clarified that in 2014 ZESA floated a tender for the Gwanda Solar project. Intratek consulted the applicant and he rendered consultancy work in contemplation of submitting a bid. ZESA withdrew the tender before Intratek could bid. The tender was revived later. The applicant did not provide consultancy work again when the tender was revived. After due process it was awarded to Intratek. He submitted that the applicant and his company known as Terminal Engineers are one and the same. He is its *alter ego* and it is his *alter ego* and that explains why the $10 000 .00 was paid into his personal bank account. Actually all payments for consultancy work were made into his personal bank account and the company did not have a functioning bank account. The replication from the 'bar' is an unintended admission that the applicant has an explanation to give which if not given might result in the court inferring corruption or bribery which are all competent verdicts. (See Fourth Schedule to the Codified Criminal Law. dealings. bribery

THE LAW

A common thread running through all cases cited by the applicant and in fact all cases known by this Court, is that Superior courts are very slow to interfere with proceedings in the lower court. There ought to be exceptional circumstances justifying interference, let alone imposing a decision on a lower court of competent jurisdiction. The situation in the case of *Isaura Masinga* v *Ms Sande NO and anor* (*supra*) is a typical example of exceptional circumstances or compelling reasons for a superior court to intervene to avert or stop a harmful trial. The review judgment reveals that this court was clearly outraged by the decision of the

court *a quo* in refusing an application for discharge and had no kind words for the court *a quo.* This Court commenced the judgment as follows: -

'Just what was the magistrate in this matter thinking? Was she even thinking at all because there is nothing in the ruling in the application for discharge at the close of the State case made by the applicant to show that the magistrate applied her mind to the evidence and task at hand. As a result, the magistrate's decision to put applicant on her defence when the State did not even attempt to establish a prima facie case against her threatens grave injustice and clearly justice cannot be achieved by any other means except the early intervention by this court.'

The reason for the outrage is that the prosecution preferred a certain charge against the applicant for which she was called upon to answer but went on to prove a different charge altogether. The particulars of the offence as set out in the charge were not only different but irreconcilable with what was eventually proved in evidence although the section under which the applicant was charged remained the same. Put differently the conduct constituting the offence as alleged was completely different from conduct revealed by the State evidence. The injustice and gravity of the misdirection was graphically put by this Court as follows: -

> 'So with the charge and the essential elements of it right in front of her, the trial magistrate went on to rule on a completely different case, the result of being blindfolded and being led down a garden path by the prosecution preferring one charge and proceeding to prove another."

I do not see how the *Isaura Masinga* case can be said to be on all fours with this matter. Suffice it to say that in the *Isaura Masinga* matter, this court, after making such observations and scathing remarks against the trial court and in that state of extreme outrage, still had the mind to caution as follows:

> 'This court will ordinarily not sit in judgment over a matter before an inferior court except in very rare circumstances where a grave injustice would occur if it does not intervene. While it is correct that this court has review jurisdiction over unterminated proceedings it is always slow to intervene in unterminated proceedings of an inferior court except in cases of gross irregularities in the proceedings or where it is apparent that justice may not be attained by any other means." See *Achimulo* v *Moyo* NO 2016 (2) ZLR (H) at 417-C

The principle that a superior court will only interfere in unterminated proceedings of an inferior court in exceptional circumstances of gross irregularity vitiating the proceedings or in rare cases of grave injustice has been hallowed by repetition over a number of years in judicial

pronouncements. See *Ndlovu* v *Regional Magistrate, Eastern Division & anor* 1989(1) ZLR 264(H) at 269 C-270g; *Masedza & Ors* v *Additional Magistrate Rusape & Anor* 1998 (1) ZLR 36 (H) at41C, *Ismael* v *Additional Magistrate Winberg and Ano* 1963 (1)) SA 1 (A) at p 4; *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) at 64.

> "The general rule is that a superior court should intervene in uncompleted proceedings in a lower court 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 a litigant"

There are policy considerations behind this approach Magistrates have jurisdiction to try criminal offenders and to pronounce the guilt or otherwise of those that are arraigned before them. While this court has jurisdiction to supervise the magistrates court in terms of s 171 (1) (b) of the Constitution, it is undesirable to interfere with proceedings before they are completed because it upsets public order and the smooth operations of the courts. Above all it is not like a person aggrieved by an interlocutory order does not have recourse. He or she can bid time and challenge the decision by way of appeal.'

I fully associate myself with the above expose of the law and could not put it any better. The legal system is one and this court must not be seen to be unduly usurping or taking over the function of another court of competent jurisdiction despite the hierarchy of courts. The same principles underpin the decision in the *Jennifer Williiams* case (*supra*) and *the Kadungure* case (supra). The legal position is therefore settled

APLICATION OF LEGAL PRINCIPLES TO THIS CASE

The applicant mentions Wicknell Chivhayo in his defence outline. I scrutinised the charge and State outline anxiously and I was unable to find how the name became relevant to his defence to the allegations contained in the Charge and State outline. Disclosure means full disclosure not a cursory reference to a relationship. The applicant did not disclose in a board meeting that he had, in his personal capacity rendered technical assistance to Intratek for the Gwanda Solar project. It does not make any difference that the technical assistance was not used to bid for the original tender floated. Intartek eventually, successfully submitted a bid for the same project. He had input in preparing the original bids. His claim that his input during

preparations by Intartek to bid for the first tender has no connection with the eventual bids is up to him to explain. He must explain what he means by that since it was the same solar project.

The absence of minutes revealing the formal disclosure to the board calls for explanation. Minutes of board meetings are kept primarily for transparency and this is especially so in a public enterprise. ZPC or ZESA Holdings could be companies in the eyes of the law but they are State Enterprises managed in the public interest. The shareholder is the State, which means the people of Zimbabwe. Disclosure is therefore not due to peers in the board but to the entire citizenry. Board member would not be making the full disclosure contemplated, at law, if they whisper informally amongst themselves and nod their heads in agreement with no record of it. That is what is implied by the State witnesses. Cursory disclosure and failure by applicant to disclose that he rendered technical assistance to Intratek in preparing bids for the Gwanda Solar Project and that he received payment may have been deceitful non-disclosure calculated to make his involvement with Intratek appear innocuous. That again is up to him to explain. It is hard to fathom by any stretch of imagination that he would have wanted a contract arising from the bid he was technically involved to tumble. The explanation as to how the payment by Intratek ended up in applicant's bank, that his engineering company is his alter ego, that it had no bank account, that his technical involvement was not utilised in bidding for the second tender, that he did not deal with Chvhayo, the full details of his disclosure and why his disclosure was not made and recorded in minutes of the board are all issues to be explained by him. It is up to him to explain how he ended up giving technical consultancy to a prospective bidder for his employer's project.

It is up to him to explain the absence of a resolution by the other board members that he could proceed to chair deliberations on the performance of a contract he had contributed to facilitate on behalf of Intartek. It is not necessary for the State to prove the prejudice suffered. I therefore understand the trial magistrate when he says the issue at stake is to whom was the applicant supposed to disclose.

Sight must not be lost of the fact that Chapter IX of the Criminal Law Codification and reform Act [*Chapter 9:23*] is concerned with bribery and corruption. It casts the net very wide. There are no less than five offences there ranging from bribery, corruptly concealing a transaction from principal (Section 172) and corruptly concealing personal interest from principal (s 173). If a person is charged with one all the others offences are permissible verdicts.

See Fourth Schedule. In terms of s 198(3) of the Criminal Procedure and Evidence Act an accused is not entitled to an acquittal if the proven facts expose him to a possible conviction on a permissible verdict.

Not only courts should be slow, but counsel must be wary of inviting the High Court to comment on the evidence adduced in a matter before another court. That tends to make inroads in the accused's right to a fair trial before an impartial court. See section 69 of the Constitution. It is not advisable to purport to waive this right. A trial court must be free from outside influence, whatever the source. The problem does not arise if the intervention is on procedural issues only. However, applications of this nature based on the submission that 'a decision by the *court a quo* is so outrageous in its defiance of logic that no reasonable court acting carefully could arrive at the same conclusion' invites a superior Court and experienced mind to express an opinion on the evidence in proceedings that are pending in another court, thereby breaching the *sub judice* principle. I asked applicant's counsel whether he was alive to that danger whereupon he replied in the affirmative, adding that it is a risk worth taking when one is certain of the prospects of success.

CONCLUSION

I conclude that the first respondent's decision is not irrational and having applied my mind to the facts, I arrived at the same conclusion that the applicant has a case to answer.

I order as follows

1. The application is dismissed.
2. The trial will proceed as ordered by first respondent.

Mhishi Nkomo Legal Practitioners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners