ROBERT DOMBODZVUKU
and
ARTHUR SHINGAI MUTASA
versus
V SITHOLE N.O.
and
THE ATTORNEY–GENERAL

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 25 October 2004

Urgent Application

Mr *Muskwe*, for applicants
Mr *Butau-Mocho*, for respondents

MAKARAU J: The applicant were arraigned before the first respondent, a Regional Magistrate in Harare, facing ten counts each of contravening s 4 (a) of the Prevention of Corruption Act [*Chapter 9.16*]. They both denied the charges. It was alleged against both that on various dates, they, being public officers, did several specified acts that were contrary to or inconsistent with their duties for the purpose of showing favour to persons they were dealing with. Immediately after pleading not guilty, the accused persons filed an exception to the charges, alleging that the charges against them were incompetent as they were not public officials but were employees of a company incorporated with limited liability in accordance with the laws of the country. The trial magistrate dismisses the exception after holding that the applicants are public officials. In so holding, the trial magistrate held that CMED (Private) Limited is a statutory body as defined in the Prevention of Corruption Act and as such, its employees are public officials for the purposes of the Act. Aggrieved by this decision, the applicants filed an urgent chamber application, for the urgent review of the decision. As the main ground of review, the applicants argued that the decision by the first respondent was grossly unreasonable or was so outrageous in its defiance of logic that no sensible person, applying his mind to it would have arrived at that decision.

The interlocutory decision by the first respondent was handed down on 24 August 2004. The urgent application before me was filed on 14 October 2004, a period in excess of 30 days having elapsed from the date the decision was handed down. The main trial of the matter is set to resume on 10 November 2004 and it is feared that the applicants will suffer irreparable prejudice should I not interfere at this stage. It has been stressed in this court that a matter does not become urgent as the date of reckoning looms. Rather, a matter is urgent when the facts giving rise to the cause of action arise and the matter cannot wait then. Pleas by legal practitioners that if the matter is not treated urgently because the date of reckoning is fast approaching are misplaced and unimpressive.

In *casu,* it was tersely stated in the certificate of urgency that the application was filed in October because the record of the matter was not readily accessible. Nothing is said of the delay in the founding affidavit. It is trite that facts giving rise to the urgency of an approach to a judge in chambers are to be placed and found in the founding affidavit. A certificate of urgency is not testimony before the judge but is merely the opinion of the legal practitioner that the matter is urgent, based on the averments made in the founding affidavit. Such trite observations are made herein on account of the recurrence of the error in a number of allegedly urgent applications that have been placed before me and the insistence by legal practitioners in such that "facts" in the certificates of urgency should be construed as evidence before me. They are not.

Although I formed the impression that the matter is not urgent and could have dismissed it on that basis, I proceeded to hear argument on the merits of the matter so that the application would be resolved on its merits for the benefit and convenience of the parties.

The power of this court to review criminal proceedings of the magistrates' court at any stage of the proceedings in the lower court is not in dispute. S 29 of the High Court Act [*Chapter 7.06*] grants this court extensive power to review the criminal proceedings of the magistrates court. It is specifically provided for in s29 (4) that this court or a judge of this court may *mero motu* call for a record and review the criminal proceedings of the lower court if it comes to the court's or the judge's notice that any such proceedings may not be in accordance with real and substantial justice. The powers conferred on the High Court and its judges by this section can be exercised at any stage of the proceedings.

While the statute granting the review power does not place any limitations on the exercise of that power, 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. See *Ndlovu v Regional Magistrate, Eastern Division and Another* 1989 (1) ZLR 264 (H); *Levy v Benatar* 1987 (1) ZLR 120 (SC) and *James C Makamba v V Sithole N.O. and Another* HH 83/04. In the last cited case, this court intervened in an uncompleted trial to set aside the decision of the trial magistrate to put to his defence, the applicant in circumstances where there was no *prima facie* case against him. The basis of the court's intervention in that matter was that to allow the matter to proceed would irreparably prejudice the applicant upon whom an unconstitutional onus of proving his innocence had been thrust.

In *casu,* Mr *Muskwe* has craftily sought to attack the decision of the first respondent on the basis that it is grossly unreasonable, as he was keenly aware that to simply label it an incorrect interpretation of the law would see him out of court. Incorrect decisions are redressed by way of an appeal while irregular decisions may be corrected by way of review.

A decision is said to be grossly unreasonable if it is completely wrong and is not merely a different way of looking at the issue. (See *Tenesi v Public Service Commission* 1996 (1) ZLR 196 (H)).

As observed in *Oskil Properties v Chairman, Rent Control Board* 1985 (2) SA 234 (SEC), the onus resting upon a litigant seeking to set aside the exercise of a discretion on grounds of unreasonableness is considerable. In my view, the task is Herculean if it is an interpretation of the law by a judicial officer that is sought to be impugned as being unreasonable. An incorrect rendition of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that on

the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable. As GARWE J as he then was observed in *Zambezi Proteins (Private) Limited and Others v Minister of Environment & Tourism and Another* 1996 (1) ZLR 378 (H), not every mistaken exercise of judgment is unreasonable and not every reasonable exercise of judgment is right.

In my view, there is nothing irregular in the decision by the first respondent that may compel me to use my review powers at this stage of the proceedings. The decision by the first respondent was arrived at after hearing argument from both counsel and it was a carefully considered decision. The decision represents the first respondent's interpretation of the law and it can only be an incorrect decision and not an irregular one. The first respondent did consider the relevant provisions of the Act creating the offence and of the Act creating CMED (Private) Limited before making a ruling. She engaged in a logical process. The decision that she arrived at is not far removed from the material that she was dealing with. She did not spin a coin or consult an astrologer to reach at her decision. She was called upon to interpret the meaning of the term "statutory body" as defined in the Prevention of Corruption Act and she rendered her interpretation. The issue before her admitted of only two possible answers. Either the contentions by the applicants were correct or they were not. There was no third possibility. The first respondent reasoned in favour of the one and against the other of the two possible answers. That the applicants are of the view that a different interpretation ought to have been made does not make the decision of the first respondent grossly unreasonable. It is my view that the applicants have fallen into the all too often error of thinking that anyone whom we disagree with is being unreasonable.

At this stage, it appears improper that I determine whether the first respondent's decision is correct on its merits, as I am not sitting as an appeal court. It suffices in my view to find that it is not a decision that is so outrageous in its defiance of logic that no sensible person applying his or her mind to it would have arrived at.

Although Mr *Muskwe* did not advance this position, it appears acceptable in this jurisdiction to attack decisions of inferior tribunals on the basis of reasonableness simpliciter that are not grossly unreasonable. See *Zambezi Proteins (Private) Limited and Others v Minister of*

Environment & Tourism and Another supra. It is my view that even if this ground had been raised and advanced in argument, I would not have found the decision of the first respondent to be unreasonable.

On the basis of the foregoing, it is my finding that there is no ground upon which I can review the proceedings of the first respondent.

In the result, the application is dismissed with costs.

Muskwe & Associates, applicants' legal practitioners

Attorney- General's Office, respondents' legal practitioners