GEORGIOS KATSIMBERIS
versus
VONGAI MUCHUCHUTI-GUWURIRO N.O.
and
NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 17 May 2024

Court Application for Review

T Chinyoka, for the applicant
No appearance for first respondent
F Nyahunzvi, for the second respondent

MUTEVEDZI J: In my judicial experience, I have observed that lawyers as a species, notwithstanding their success or lack of it, enjoy the attention they generate. It is their privilege but, in that glory, they must not forget crucial lessons. For instance, it cannot be forgotten that although the great Tshaka Zulu's cow-horn formation and scorched earth policy were a stroke of genius, highly effective and revered military strategies during his reign, they are now so outdated that they would be laughable in any warfare today. In the same vein legal practitioners and prosecutors must accept that litigation adroitness also keeps evolving. In the criminal proceedings before the first respondent in this case, the prosecutor and counsel for the applicant are involved in a legal dogfight. The allegations contained in the papers before me show that both of them have resorted to aggressive and abrasive methods, ostensibly to protect their respective principals' interests. Admittedly, each lawyer has their own method of advocacy but my view is that, a near riotous approach to litigation is unnecessary in this era where cutting edge techniques are available for a legal practitioner or a prosecutor to effectively discharge his or her mandate.

The confrontation between counsels aside, I must mention from the onset that there is no disguising that when an applicant beseeches the High Court to review a lower court's interlocutory decision or to direct how the proceedings must be conducted in that court that request is nothing short of asking the court to exercise its review jurisdiction to interfere in the proceedings or decision(s) of the subordinate court. In that case, the applicant must, as of

necessity allege and prove that there exist exceptional circumstances why the High Court must do so in addition to pleading one or more of the grounds for review provided under s 27 of the High Court Act [*Chapter 7:06*] or the common law basis of gross irregularity in the proceedings and/or gross unreasonableness/irrationality in the decision. My view on this issue is firmly grounded on the decision of the Constitutional Court in the case of *Joanah Mamombe & Anor* v *Faith Mushure N.O. & Anor* CCZ 4/22. I will, later in this judgment return to explain the principle.

The background, the parties and the applicant's case

Sometime in March 2024, I was allocated an urgent court application in which the applicant wanted me to interdict the first respondent from proceeding with an application for referral of certain constitutional issues to the Constitutional Court which he had initiated. The provisional stay was grounded on a pending application for review of the referral proceedings which had been earlier filed with this court. I heard arguments in that application but before I could determine it, I was assigned to deal with the substantive court application for review. That assignment was in line with a practice first advocated for by my brother KWENDA J in the case of *Prisca Mupfumira & Anor v Munamato Mutevedzi N.O. & Anor* HH 200/20 where he remarked that the procedure of seeking the stay of criminal proceedings through urgent chamber applications is one that was never envisaged under the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He proceeded to suggest that it was ideal that the judge before whom the application for stay is set must also deal with the substantive application for review if the courts are to prevent these processes from being used to defeat the ends of justice. At p 25 of the cyclostyled judgment HIS LORDSHIP held that:

> "The practice of filing urgent chamber applications to stay criminal trials without exhausting remedies available in the court should therefore stop. Had it been the intention of the legislature to require that criminal proceedings which are the subject of review should be adjourned pending review, it would have included such a provision in either the Constitution or the High Court Act or Criminal Procedure and Evidence Act or in all these laws."

I fully subscribe to the same logic. In addition, my own view is that the determination of an application for stay of criminal proceedings pending the hearing of a review necessarily involves the court or judge discussing or commenting on the strengths and weaknesses of the main review application. No matter how subtly that could be done, it remains untidy because such analysis and or remarks may at the very least influence and at worst bind the judge or court which would subsequently determine the review. In this case, I therefore thought it was neater to simply deal with the substantive application for review. In any case, with the parties

agreeing that the matter had already been postponed to a later date and that it would not be continued with until the substantive review was determined, the applicant had effectively obtained the same remedy which he was seeking from the court. The application for stay therefore became moot due to the reasons I have highlighted. It is now of academic importance and in the exercise of my discretion to deal or not to deal with a moot case I opt not to make any determination on it.[1]

At a case management meeting which followed the allocation of the review application to me, I gave the parties timeframes within which to file their pleadings. They all observed them and I am indebted to both counsel for that. I set the hearing of the substantive application for 25 March 2024.

As earlier hinted, the genesis of this court application is a raging and unterminated criminal matter which is being presided over by the first respondent at Harare magistrates' court. The accusations and counter accusations which appear in the papers make the arguments so convoluted that without singling out the real issues, the court could have easily been led down a garden path. But stripped to its bare essentials, the contest between the parties is in the court's view, a banality. The facts of the criminal case do not even matter. What does is simply that the applicant Georgios Katsimberis is facing a charge of fraud. At some stage during the criminal proceedings, the applicant felt aggrieved by the conduct of the second respondent's representative, a prosecutor called Michael Reza. His alleged transgressions were enumerated and documented in this application. Paraphrased, the applicant's scruple about the propriety of the prosecutor's conduct was that he had refused to supply the defence with state papers in the guise that it was not necessary to do so because prosecution had no intention to use them during trial; that he had lied to the court on several occasions; that he has brazenly published court proceedings in the main stream and social media platforms; that he has consorted with third parties connected to the complainants and that he has caused the court record to be so doctored that it is no longer a true record of the trial.

As a result of the applicant's unhappiness with the above issues, he decided that it was in his best interests to apply for a referral of certain constitutional issues to the Constitutional

[1] See the cases of *ZIMSEC v Mukomeka and Others* SC 10/2020 on the proposition that a court is allowed to exercise its discretion on whether or not to determine a moot case and *Khupe & Anor v Parliament of Zimbabwe & Ors* CCZ 20/19 where MALABA CJ, at pp. 7-8 held that: "A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court's jurisdiction ceases and the case becomes moot …."

Court for its determination. That application is pending before the first respondent. Once again, I find it unnecessary to burden this judgment with the finer details of the referral application save to state that in the midst of making that application, the applicant through his counsel petitioned the first respondent to direct the prosecutor to leave his lofty position and responsibilities on the bar, take to the witness's stand, swear to tell the truth as a witness and testify in relation to the litany of accusations made against him. To support that request, the applicant relied on s 244 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter the Code). The applicant further alleges that after making that application, the first respondent without giving reasons refused to compel the prosecutor to become a witness. Instead, the first respondent arrogated to herself a non-existent discretion. She purported to interpret the Constitution of Zimbabwe, 2013 as proscribing the calling of a state prosecutor to testify. Because of the first respondent's refusal to grant the application, so the argument went on, the applicant was compelled to close his application without calling Michael Reza, a crucial witness to his cause. After turning down the request, the first respondent directed that the trial would proceed. Soon thereafter, the applicant, dissatisfied with the first respondent's decision as described above, filed an application for its review. Despite the filing of the application for review, the first respondent, so the court was told, threatened that the trial would still proceed. The applicant said he felt helpless. He was left with no option but to seek through the urgent court application alluded to earlier, an injunction stopping the continuation of the proceedings until after the determination of the present application for review. The relief which the applicant petitioned the court to grant in the application for review is couched as follows:

1. The decision of the first respondent made on 1st February 2024 in case No. CRB R473/20 refusing to compel Michael Reza to be sworn in as a witness be and is hereby reviewed and set aside.
2. All proceedings that have taken place in case No. CRB R473/20 after the decision referred to in paragraph 1 above be expunged from the record.
3. There be no order as to costs.

In essence therefore, the applicant wishes that I overturn the first respondent's decision to refuse to compel the prosecutor to testify in a case in which he was the state's counsel. The applicant's basis for the above relief is that the first respondent purported to exercise a discretion which she did not have at law because the prosecutor was a competent and compellable witness whose case was made more riveting by the good and sufficient reasons which the applicant advanced for his calling. Further the point was made that the first respondent did not give reasons or gave grossly irrational reasons why she refused to compel

the witness to testify; that the first respondent made an unlawful decision in that she purported to interpret the Constitution in circumstances where she did not need to do so, had not been called to do so and irrationally determined that the second respondent was entitled to rights under Chapter 4 of the Constitution. The applicant concluded by alleging that the first respondent's decision was grossly irregular. It unfairly and unnecessarily limited the applicant in the prosecution of his case.

The second respondent's case

Whilst the first respondent chose not to participate in the application and did not file any papers the second respondent did. I must however hasten to comment that the National Prosecuting Authority's opposition of the application was pre-eminent for its brevity. The argument was unsophisticated. It was that the calling of a prosecutor to testify in a trial in which he is the state's counsel remains unheard of in this jurisdiction. In reality, so it was said, the procedure of seeking to call a prosecutor to the witness stand to explain allegations levelled against him amounts to placing him on trial to defend himself against the applicants' accusations. Counsel for the second respondent further argued that the applicant, instead of seeking this review had other remedies at his disposal which he could have utilised. These included applying for the recusal of the prosecutor if he thought that he was no longer objective; reporting the prosecutor's alleged corrupt practices to the Prosecutor-General or the investigative agencies in the country. Further, the second respondent argued that the first respondent's decision was neither grossly unreasonable nor irrational. In other words, it argued that the applicant had not met the threshold set for the grant of the relief that he sought.

Interestingly, the second respondent additionally averred that the application for referral to the Constitutional Court is frivolous and vexatious and merely designed to stall proceedings from reaching their logical conclusion. The second respondent was off the mark. I immediately pause here to comment on and summarily dispose of the second respondent's argument regarding the groundlessness of the referral application. It is misplaced. I remark so because this court cannot make a determination of the frivolity or vexatiousness of an application which is not before it. That decision is the province of the second respondent after the parties would have exhausted their arguments. As will be discussed later in this judgment, the issue which this application raises is simply whether or not I must interfere and impugn the first respondent's decision to refuse to compel the prosecutor to testify for the applicant in the application for referral.

If I can summarise it accurately, the second respondent's notice of opposition raises only two issues namely:

a. that the applicant wishes to put the trial prosecutor on trial via the back door; and
b. that the applicant has not satisfied any of the grounds for review stated in s 27 of the High Court Act or the common law basis of gross unreasonableness or irrationality.

The third ground was off course the attempt to allege that the application for referral to the Constitutional Court lacks seriousness and is vexatious. I have without much ado already dealt with the point and ruled it off side. It need not detain the court further in these proceedings.

The applicant's answering affidavit

The applicant's answering affidavit buttresses the points made in the founding affidavit. What comes out is that the application for review is premised entirely on the second respondent's refusal to compel Michael Reza the trial prosecutor to testify for the applicant. The other issues are peripheral and are simply the reason why the prosecutor's testimony was required. I am fortified in making this conclusion by the applicant's averments both in his founding and answering affidavits.

Further in the answering affidavit, the applicant contended that the second respondent's notice of opposition was in name only because it was so tepid that it amounted to a concession that he was entitled to the relief which he sought. The applicant further deprecated the argument by the second respondent that he had alternative remedies such as applying for recusal of the prosecutor from handling the criminal trial or reporting his transgressions to the investigative agencies because those remedies did not afford him the same protection and benefit as that derived from utilising s 244 of the Code.

The parties' heads of argument

Both the applicant and the second respondent filed extensive heads of argument which I will advert to in the course of the judgment.

Submissions at the hearing

At the hearing the parties persisted with their arguments as per their papers. Both counsels emphasised their standpoints made in the papers concerning the competency and compellability of witnesses. They both agreed that it was apparent that the contestation between the parties revolved around the interpretation of s 244 of the Code. On one hand Mr *Chinyoka*'s view was that as long as the application for referral of a constitutional issue to the Constitutional Court was grounded on a criminal trial, such an application could be classified as a criminal

proceeding. He argued that there could not be a separation between the application and the main proceedings. Once that conclusion was arrived at, it followed that a witness in such an application is the witness who is envisaged by s 244. If the witness is not specifically excluded by s 246 or s 247 he/she becomes competent and compellable. On the other hand, Mr *Nyahunzvi* made the point that the application for referral and the main criminal proceedings are distinct. He argued that the referral application falls into the realm of constitutional proceedings and cannot be labelled as criminal proceedings. I will once again return to deal with the issue in due course.

The issues for determination

The question which stands for determination in this application is whether or not the applicant has made a case for the interference by this court in the unterminated proceedings before the first respondent for referral of a constitutional issue to the Constitutional Court? The corollary question to that is whether or not the refusal by the first respondent to compel the prosecutor to testify for the applicant (accused) in the same matter he was prosecuting a gross irregularity in the proceedings warranting this court's interference?

The law

I stated in the opening paragraph of this judgment that this application requires me to exercise my review powers over the proceedings and decision of the first respondent in the criminal case and the application for referral to the Constitutional Court which are pending before her. I am convinced that an exposition of the law regarding when a superior court may interfere with the proceedings of a lower court will be dispositive of the issues before me. The starting point will be the principle stated in the case of *Joanah Mamombe & Anor* v *Faith Mushure N.O. & Anor* (*supra*) at pp 4–5 where MAKARAU JCC remarked that:

> "In a long line of cases from this jurisdiction and elsewhere, the admonition is repeatedly sounded and explained, that superior courts should be very slow in interfering with the unterminated proceedings of lower courts. The exception is made for cases where there is a gross irregularity or a wrong decision by the lower court that will seriously prejudice the rights of a litigant or accused person and which irregularity or wrong decision cannot be corrected by any other means."

The same point was made in the case of *Attorney General* v *Makamba* 2005(2) ZLR where MALABA JA (Now CJ) held that:

> "The first point taken in the appeal was that the learned judge ought not to have exercised the review powers vested in him by s 26 of the High Court Act because there was no allegation or proof of any gross irregularity in the proceedings or decision of the lower court warranting review. The general rule is that a superior court should intervene 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."

In *Jason Machaya & Ors* v *The State & Anor* HH 442/19 this court added its voice to the call for restraint in interfering with unterminated proceedings of lower courts. It held at p 11 of the cyclostyled judgment:

> "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."

The law is therefore clear. A litigant can only ask the High Court to interdict a lower court from proceeding with a matter before it or interfere with its interlocutory decision in exceptional circumstances. To succeed it must be proved that the proceedings are afflicted with a gross irregularity or that the decision made by the lower court is not only wrong but that its wrongness cannot be corrected by any other means except an order restraining the lower court or that that the clearly wrong interlocutory decision will amount to serious prejudice to the applicant resulting in a miscarriage of justice. As such a magistrates court's interlocutory decision could be wrong but still not qualify as a motivation for this court to intervene before the proceedings terminate. The wrongness must be so glaring and so serious such that it either cannot be corrected by any other means such as an appeal or a review after the completion of the case or is such that if not immediately rectified it would result in a failure of justice. These principles are not built on idle foundations. I wish to add that the rationale for the rule against haste interference by the superior courts in the unterminated proceedings of inferior courts emanates from the unitary court and legal systems which Zimbabwe subscribes to. Admittedly there is a hierarchy of the courts but all of them essentially operate within what I would characterise as the same pipeline. As to where in the pipeline each court is positioned is dictated by the level of jurisdiction conferred on the court. As a result, each court is as important as the next one. The courts under a unitary court system cannot and must not exert their big brother complexes on each other where at the hint of the most insignificant infraction, the lower court is threatened with a report to a superior court. If that were to be allowed, the smooth conduct of judicial proceedings in lower courts would severely be jeopardized. Litigation would invariably be a start stop process. For instance, that it has inherent jurisdiction

does not grant the High Court power to malevolently wade into the proceedings of a subordinate court and interfere in its decision making. Once the magistrates court has properly assumed jurisdiction and a case has commenced before it the respect that the High Court must accord to those proceedings is so complete that it views any unjustified invitation to intervene in the unterminated proceedings as being meddlesome. Put bluntly, this court literally loathes such pre-emptive interventions.

Application of the law to the facts

Once the law has been laid, it leaves me to through the application for purposes of analyzing whether or not the applicant has demonstrated the existence of a gross irregularity/irrationality or that the decision of the first respondent was so wrong that it must not be allowed to stand lest it actuates irreparable prejudice on the applicant. In passing I would comment that it is the same analysis that must be undertaken in an application for stay pending review. In fact, it is for the inevitability of conflating the application for review and the one for stay that the approach taken by the applicant to file an application for stay which is separate from his prosecution of the main review is more often than not ill advised. In my opinion an application for stay of criminal proceedings pending the determination of a review is not different from an application for stay of execution pending appeal in civil procedure. It is intricately connected to the prospects of the applicant's success in his main application for review.

In casu, I have already stated that I must examine whether or not the applicant is entitled to the relief he seeks by making reference to the grounds of review proffered in the application which must demonstrate the existence of the requirements already discussed above. The applicant is unequivocal about what he seeks on review. For purposes of completeness, I restate the applicant's grounds. In para 6 of his founding affidavit, he put them as follows:

> "6. I am seeking to review specifically the first respondent's ruling of 1st February 2024 on the basis that:
>
> a. in refusing to compel the trial prosecutor Michael Reza to testify, the first respondent purported to exercise a discretion that she does not in law possess since the said Michael Reza is a compellable witness and good, sufficient and unrebutted reasons were advanced for calling him
> b. the first respondent failed to give reasons why, or gave grossly irrational reasons why she refused to compel a witness in court called by the defense to take the witness stand
> c. the first respondent made a decision that was unlawful in that she purported to interpret rights in the Constitution in circumstances where she did not need to do so, had not been called upon to do so and irrationally determined that the second respondent is in effect entitled to rights under chapter 4 of the Constitution…
> d. the first respondent made a grossly irregular decision which unfairly, unjustly and

unnecessarily limits the applicant in the prosecution of his ongoing matter…"

A closer examination of the above grounds for review reveals that the four grounds can be compressed into two. The first complaint is that the first respondent did not give reasons for her decision or that the reasons were irrational. The second is that the decision to refuse to compel the prosecutor to become a witness is wrong and unlawful. Both those reasons appear to stem from the applicant's conviction that the first respondent wrongly interpreted s 244 of the Code when she refused to direct Michael Reza to testify in circumstances where Reza was a competent and compellable witness. I wish to deal with these issues commencing from the fabled s 244 and my interpretation thereof because it is clear to me that there are two if not three ways of looking at it. First if the words used in s 244 are as plain as Mr *Chinyoka* argued both at the hearing and in his heads of argument, then they must be literally interpreted and do not need the aid of any instrument of statutory construction to decipher their meaning. Second, if that literal meaning is taken, the question which arises is: does what the applicant is advocating for fall within that literal meaning? Third if the literal interpretation would result in a repugnance did the Legislature intend to exclude more people than those who are mentioned in the Code?

On one hand s 244 provides as follows:

"244 No person to be excluded from giving evidence except under this Act

> Every person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a **criminal case** in any court in Zimbabwe. (Bolding is for emphasis)."

On the other hand, the preamble to the Code proclaims that it is:

> "An Act to consolidate and amend the law relating to procedure and evidence in criminal cases and to make provision for other matters incidental to such procedure and evidence."

Clearly therefore the Code's application is confined to criminal cases. True to that purpose the application of s 244 is equally restricted to criminal cases. It does not and cannot apply to the procedure in other branches of the law. The competency and compellability to testify as witnesses, of the persons targeted by the provision does not go beyond testifying in a criminal case. For instance, the provision cannot be used as a basis to compel a person to testify in a delictual claim for damages. As an upshot, the question which then must be asked is what is a criminal case? In answer to that question counsel for the applicant in his heads or argument referred me to the dicta in the case of *Williams and Ors* v *Director of Public Prosecutions: Western Cape* [2020] ZAWCHC 187; [2022] All SA 269 (WCC) where MARRAIS J held the following:

> "In both juristic and statutory usage, the word trial has come to be used as an appropriate description for criminal proceedings in which a verdict is required to be given, and if the verdict be guilty, a sentence imposed, irrespective of whether or not any triable issue has been raised by the accused's plea. In colloquial language it may it may have a narrower meaning and be confined to a proceeding in which a triable issue f fact has been raised by the accused's plea … Nonetheless it has always been recognised that there are distinct phases of a trial. I leave aside the preliminary extra curial aspects of a trial and confine myself to what happens in court when the proceedings commence."

Whilst I am indebted to the reference, I failed to see how it assists counsel in his argument that an application for referral to the Constitutional Court is a criminal proceeding. My view, drawn from a reading of the above *Williams* authority is that broadly speaking, a criminal case is a proceeding in which the state, often represented by an official called a prosecutor, who is an employee of the government or a body conferred with the powers to institute the prosecution of people accused of committing crimes, prefers a criminal charge against a person accused of the commission of that offence. Further only the government or a private person after obtaining a certificate from the Prosecutor General can initiate a criminal prosecution. All interlocutory applications (that are criminal in nature) which are made within the criminal trial/case are regulated by the Code. Needless to state, the level of proof required to secure an accused's conviction is proof beyond reasonable doubt. Most importantly, at the end of a criminal trial a verdict of guilty or not guilty must be pronounced. If a verdict of guilty is returned the imposition of a sentence must follow.

As already stated, the source of strife in this case is an application for referral of a constitutional issue(s) to the Constitutional Court. Given my understanding of a criminal proceeding as described above, it ought to be asked whether such an application is a criminal proceeding? I doubt that it fits into that definition. I will illustrate why I entertain that apprehension.

Mr *Chinyoka's* argument was that s 244 deliberately refers to a criminal case and not a criminal trial because a *criminal case* is a phrase that is broader than the term *criminal trial* for it encompasses all the processes and interlocutory matters attendant on the allegation made by the state against the accused including the investigative part. On the authority of *Williams* case, he is right because the holding therein was that a criminal case includes the extra curial phases, that is the out of court stages such as the arrest and other preliminary considerations. Counsel then made further reference to authorities such as *Chihava & Ors* v *Principal Magistrate & Anor* 2015 (2) ZLR 31(CC) and *Chombo* v *National Prosecuting Authority & 2 Ors* CCZ 8/22. From my reading of the cited authorities the issue in all of them revolved around the method

of instituting an application for referral of a constitutional issue. In fact, the question for determination was 'before which forum must the application be made?' The debate was whether it must be brought on motion in a court separate from the one presiding over the proceedings from which the issue arose or whether it must simply be made before the same court. The decision in all the cases was that the application could not be separated from the proceedings which birthed it. Crucially, none of authorities dealt with the **identity** of the application for referral or the procedure which must be adopted in calling the testimonies of witnesses where that became necessary. My views are fortified by the holding of the Constitutional Court in *Chombo* v *The NPA* (*supra*) where it remarked that:

> "If I have correctly understood its *ratio decidendi*, then *Chihava* is authority for the simple proposition that where any person is before any court on a non-constitutional matter, but intends to seek redress for the alleged breach of his or her fundamental rights and or freedoms arising in connection with the matter, he or she must raise the alleged breach before that court and invoke the provisions of s 175(4) if he or she intends to have the matter determined by this court. The party may also petition that court directly for any appropriate relief. The net effect of this position is that any purported approach to another court in terms of s 85(1) under the circumstances, is not only impermissible but is a nullity as the Constitutional jurisdiction of all other courts, the High Court included, is not only arrested but is lost by operation of law."

Clearly, the cited authorities are distinguishable from the issue at hand. The question whether a referral application stemming from a criminal case is a criminal proceeding is not as open and shut as the applicant wants the court to believe. It is debatable. That discourse stems from three main aspects. To begin with, I stated earlier that everything which happens in a criminal case (trial) is regulated by the Code. I am yet to hear of or deal with anything outside the Code which can be described as part of a criminal trial. Secondly, unlike the procedure governing the making of applications for referral, criminal procedure cannot be extended to other branches of the law. Thirdly, the conduct of criminal trials is not regulated by the Constitution of Zimbabwe. The little that appears about criminal trials in the Constitution relates to the broad principles such as the rights of arrested and detained persons and the right to a fair trial. The nuts and bolts of how criminal proceedings are carried out remain the domain of the Code.

When analysed, I note that the application for referral of a Constitutional issue to the Constitutional Court follows a course which is not identical to criminal procedure. It is not a procedure that is mentioned in any part of the Code, which in essence is the Bible of criminal procedure and the adduction, presentation and admissibility of evidence in criminal matters. Instead, a referral application is directly regulated by the Constitution under s 175(4) thereof.

It is therefore part of constitutional litigation. In defining constitutional litigation, I can do no more than refer to *The Handbook on Constitutional and Electoral Litigation in Zimbabwe,* Law Society of Zimbabwe 2018 at p 31 where the author posits that:

> "It is the sum of those legal proceedings concerning themselves with adjudication of constitutional issues or questions. In section 332 of the Constitution a constitutional matter is defined as 'a matter in which there is an issue involving the interpretation, protection and enforcement of this Constitution'. In other words, whenever a court finds itself having to interpret, protect or enforce the Constitution, such proceedings qualify as constitutional adjudication. …proceedings, which …deal with a 'higher law', meaning the law of the Constitution as the supreme and fundamental norms in the order of legal principles. It is in fact the impugning of constitutional provisions in legal proceedings that distinguish constitutional and common law litigation, among other factors which separate these two forms of litigation."

If Parliament had intended a referral application to be part of criminal procedure it surely would have made provision for it in the Code. Instead, the procedure is elaborately provided for in the Constitutional Court Rules, 2016 under r 24 thereof. Unlike under criminal procedure, the abduction and admissibility of evidence in applications for referral is most relaxed. Evidence can be tendered from the bar; it can be made through affidavits or through *viva voce* testimonies. Further, that method unlike criminal procedure is not confined to criminal cases but is extended to all other branches of the law where a constitutional matter arises in any proceeding before a court subordinate to the Constitutional Court. It shows that the use of the procedure is indiscriminate when it comes to divisions of the law. The calling of witnesses to testify during the making of such an application is provided in r 24(4) of the Constitutional Court Rules which provides that:

> "(4) where there are factual issues involved, the court seized with the matter shall hear evidence from the parties and determine the factual issues."

Critically, the provision in those rules does not say that the court seized with the matter shall hear evidence from the parties in accordance with the procedure for *calling witnesses provided under the law which the dispute before the court relates.* I do not think that the rules of the Constitutional Court would have provided for the procedure of making an application for referral if the intention of the legislature had been that when a constitutional matter arises during criminal proceedings the court seized with the matter would simply follow criminal procedure in relation to the calling of witnesses. I harbour serious misgivings that it would equally have been intended that the nature of the referral envisaged under s 175(4) of the Constitution and the procedure of calling witnesses would mutate depending on the law applicable in a particular case. Rather the clear intention of the law maker was that the referral should fall under the realm of constitutional litigation and that the rules would apply similarly

from one branch of the law to the other. It is for that reason that the calling of witnesses to aid the resolution of factual issues is the same regardless of the nature of the proceedings from which the alleged constitutional issue arises.

To characterise a referral application as a criminal proceeding betrays a failure to appreciate its true identity. The application for referral of an issue to the constitutional court means exactly that. It is intended to be a procedure of bringing before the Constitutional Court those constitutional issues which arise in the course of proceedings before a subordinate court. In that process the subordinate court not only acts a sieve through which chaff is prevented from reaching the apex court by determining whether or not the request for referral is frivolous and or vexatious but is also a distiller of factual disputes which it must resolve if any such arise before the referral is made.[2] The application cannot and does not end with a verdict of guilty or not guilty for the applicant as required by the definition of a criminal case/trial. Yet all other interlocutory applications that can be made by an accused during trial are not only expressly provided for in the Code but are also directly connected to a determination of the accused/applicant's guilt or innocence. In addition, the referral procedure is intended to enforce the constitutional concept that issues of constitutional importance that arise in the course of proceedings before a court other than the Constitutional Court must reach the apex court without delay and without going through the rigours of protracted litigation.[3] Lastly, the application of the *expressio unius est exclsuio alterius* rule which literally translated, means the express mention of one thing excludes the other further buttresses my argument. The syntactical mention of all the interlocutory applications which exist in criminal procedure and the exclusion of the application for referral from that line up illustrates its *sui generis* nature.

The above observations convince me that an application for referral cannot be classified as a criminal case even in circumstances where it is linked to the trial of the applicant for a criminal charge. Given these conclusions I would find it illogical to use s 244 to compel a prosecutor to testify in proceedings which clearly cannot be characterised as a criminal case. For that reason, my considered view is that unless the applicant has another argument not disclosed in the papers his contention that the first respondent's decision was grossly

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[2] In the case of *Douglas Muzanenhamo vs. Officer in Charge, CID Law and Order & Ors* CC 3/13 @ p7
The Constitutional Court explained that it is undesirability to bring cases with disputes of fact to the Constitutional Court when it said matters of evidence and credibility generally stand beyond the practical remit of that Court. 7

[3] See *Handbook on Constitutional and Electoral Litigation in Zimbabwe,* Law Society of Zimbabwe, 2018 at p. 31

unreasonable and or so wrong at law to make it an exceptional case for the interference by this court in the unterminated proceedings is wholly unmerited.

The matter does not however end there.

Assuming that I am wrong in finding that the application for referral which arises from a criminal case is not a criminal proceeding the applicant was still required to show that the first respondent's decision was grossly unreasonable or irrational or that it was afflicted with any of the s 27 grounds. I will once again demonstrate that the law supports the view that it is not only wrong but also farcical to call a prosecutor to testify as a witness in a matter in which he is prosecuting.

I indicated earlier that Mr *Chinyoka* argued that the provisions of s 244 are plain; that they must be literally interpreted and do not need the aid of any instrument of statutory construction to decode their meaning.

It is an open secret that our criminal procedure borrows heavily from its South African counterpart. In fact, s 244 of the Code is not only in *pari materia* but is also identical to s 223 of the South African Criminal Procedure Act, 1955 (as substituted by s 29 of the Criminal Procedure Amendment Act 1963) in saying:

> "Every person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a criminal proceeding."

Commenting on the South African provision, author Hoffmann L.H. in his celebrated text, *The South African Law of Evidence*, 2nd Ed, argues that given the above provision one might imagine that all that one has to do is to look at the remainder of the Act to see which witnesses are specifically excluded and mentioned as incompetent or not compellable. He then laments that matters are not that simple because the law makes reference to other methods of identifying incompetent witnesses. The same challenge afflicts our law. The list of incompetent and not compellable witnesses given in ss 246 and 247 of the Code is not exhaustive. I will demonstrate why that is so. But first if s 244 of the Code is literally taken it means exactly what it says. Its ordinary meaning is that **every** person not expressly excluded by the Code from giving evidence shall be competent and compellable to testify in a criminal case in any court in Zimbabwe. The word every in its common usage denotes all. It means without exception. Taken from that angle, there is no faulting Mr *Chinyoka's* argument that Michael Reza could be compelled to become a witness. But that is only half the story because s 244 is followed by an explanatory note in s 317 of the Code. I am not sure why the provisions were put so far apart given the admirable syntax of subjects in the Code! This is however a danger

that confronts every lawyer in the interpretation of statutes. I have previously cautioned legal practitioners against reading statutory provisions in isolation. S 317 provides that:

> **"317 Cases not provided for by this Part**
> In criminal proceedings, in any case not provided for by this part, the law as to the admissibility of evidence and to the competency, examination and cross examination of witnesses in force in criminal proceedings in the Supreme Court of Judicature in England shall be followed in like cases by the courts of Zimbabwe."

It must follow, drawing from s 317 that if in terms of English law, a witness is incompetent to give evidence, that witness would similarly be incompetent to give evidence in Zimbabwean courts despite not having been listed under ss 246 and 247 of the Code. In its wisdom, the legislature resisted the temptation to list all incompetent and not compellable persons in those provisions. Instead, the law directs everyone to the English system of law to identify the additional persons or groups of persons who may not be competent to give evidence in particular cases. In that regard, there is no gainsaying that s 244 of the Code must be read together with the law which obtained in the Supreme Court of Judicature of England. I use the word obtained because of the requirements of s 318 of the Code. It is couched as follows:

> **"318 English Laws applicable**
> The laws in force in the Supreme Court of Judicature in England which are applied by this Act shall not include any amendment thereto made on or after 1st June 1927, by any statute of England"

The provision illustrates that our courts can, if they turn to English law, only apply those rules of competence which were in force in England before 1 June 1927. The magic behind that date beats me but all said and done, and for purposes of completeness my understanding is that when the fragmented provisions of the Code (being ss 244, 317 and 318) which deal with competence and compellability of witnesses are fused, s 244 **should** read as follows:

Every person not expressly excluded by this Act ***or by the law in force in the Supreme Court of Judicature in England before the 1st June 1927*** *from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in Zimbabwe.*

Given the above conclusion it is imperative that I turn to the English law principles applicable at the relevant time to examine which persons apart from those mentioned in the Code were not competent and compellable to testify as witnesses. I admit at the outset that there is a dearth of authorities regarding the competence and compellability of a prosecutor but there is plenty in relation to other court officials such as judicial officers and legal practitioners.

See the cases of *Hendricks* v *Davidoff* 1955 (2) SA 369 (C); *Elgin Engineering Co (Pty) Ltd* v *Hillview Motor Transport* 1961 (4) SA 450 N. I must also mention that South Africa has a provision similar to s 317.[4] The only difference being that the cut-off date in South African law is 13 May 1961. I believe therefore that South African authorities which make reference to English law on this subject are relevant to Zimbabwe provided they relate to the situation before 1st June 1927. For instance, CENTLIVRES CJ in the case of *Ex parte Minister of Justice: Re R* v *Domingo* 1951 (1) SA 36 at p 43 put it as follows:

> "Today it is almost impossible to imagine a judge or magistrate leaving the bench, going into the witness box to give evidence for or against a prisoner, returning to the bench, and at the conclusion of the evidence and argument, solemnly commenting upon the demeanour of himself in the witness box or without any comment accepting the evidence given by himself."

Authors D.T. Zeffertt and A.P. Paizes in their text, *The South African Law of Evidence*, (Formerly Hoffmann and Zeffert) 2nd Ed. at p 265 equally rejected the notion that judicial officers may be competent witnesses in their own cases when he remarked that:

> "Although there may be some doubt as to whether the judge or magistrate trying a case is technically an incompetent witness, his giving evidence even on a formal matter is regarded as so serious an irregularity that the conviction is invariably set aside."

In my view there is no room for the doubt that the author generously apportions to this issue. When a judicial officer gives evidence in the full knowledge that the proceedings would be vitiated on that basis, he/she will simply be taking technicalities too far. If courts are to remain the dispute resolution mechanisms that they are created to be, a judicial officer must remain neutral in the proceedings. He/she sheds off that neutrality if and when he/she gives evidence for or against either side. It must not be debatable that judicial officers cannot testify in matters that they are trying. The same considerations must apply in Zimbabwean law.

In England, the competence of judicial officers to testify as witnesses was discussed at length in the *Halsbury's Laws of England, Civil Procedure* (Volume 11 (2020), paras 1-496) where the authors were unequivocal that:

> "A judicial officer who is sitting alone on the trial of a case cannot ***because of his position, be a witness during that trial.*****"** (The bolding is for emphasis)

The same position was approved in the cases of *R* v *Whitehead* (1866) LR 1 CCR 33 and *Jacobs* v *Layborn* (1843) 11 M &W 685. Additionally, even in instances where a judge or

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[4] S 206 of the South African Criminal Procedure Act 51 of 1977 provides that:

> "The law as to the competency , compellability or privilege of witnesses which was in force in respect of criminal proceedings on the 13th day of May 1961, shall apply in any case not expressly provided for by this Act or any other law."

The law prior to the above date was by virtue of s 292 of the same Act, the law of England.

magistrate was sitting with others the law as held in the cases of *R* v *Galway Justices* (1897) 31 ILT 160; and *Mitchell* v *Croydon Justices* (1914) 111 LT 632 was that such judicial officer could give evidence but once they did, they could not return to the bench or take any further part in the trial. My conclusion is that the rule was designed to ensure that once tainted by showing allegiance to another side an officer of the court loses the objectivity expected of him/her and must withdraw from the case.

The proposal that a prosecutor could act as both state attorney and defence witness is akin to the debate of *Attorney as Advocate and Witness* in which Arnold Rochvarg[5] opined as follows:

> "An attorney who is representing a client at a judicial trial is not permitted to also be a witness at the same trial. This prohibition on an attorney acting as both an advocate and a witness at a trial appears in every state's rules of professional conduct. This rule, often referred to as the "lawyer as witness" rule, has application in attorney disciplinary proceedings, rulings on the admissibility of evidence, motions seeking disqualification of an attorney who intends to testify, legal malpractice cases, and petitions for the award of attorney's fees. "

There is no difference between the roles of a prosecutor and a legal practitioner in court. What a legal practitioner is not permitted to do, a prosecutor is equally prohibited from doing. If a legal practitioner cannot testify as a witness in a case in which he is representing a litigant it must follow that a prosecutor can also not do so in a case in which he is prosecuting. The conflict of interest would be outrageous. As Zeffert and Paizes point out, if that were to be permitted, there would be nothing to possibly stop a prosecutor or a legal practitioner from requiring a judge or a magistrate to remove his/her robes momentarily and become a witness to testify about allegations of his/her unethical conduct or other misdemeanour arising from his/her handling of the case before the court. In that moment like the applicant wanted the court to accept, nobody would care about the arrangements as to how the court would record and control the proceedings. The absurdity that the proposal brings is glaring.

What I note from the above is that the prohibition against judicial officers and legal practitioners testifying in their own cases was/is premised on policy considerations. Those considerations must co-exist with the rules of competence and compellability of witnesses. The public policy in issue in all these cases is that on one hand, an accused who wishes to have his/her matter adjudicated upon fairly must be allowed to call any evidence which supports

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[5] Arnold Rochvarg, *The Attorney as Advocate and Witness: Does the Prohibition of an Attorney Acting as Advocate and Witness at a Judicial Trial Also Apply in Administrative Adjudications Arnold Rochvarg University of Baltimore School of Law, arochvarg@ubalt.edu, 2006*

him/her but on the other, the rule is that the integrity of court processes must be protected by ensuring that court officials do not become personally involved in the cases they handle by oscillating between their official roles and being witnesses.

The fear by a prosecutor or a legal practitioner for that matter to be dragged away from the bar and hurled into the witness' stand to answer questions (worse with the threat of answering such questions as a hostile witness like in this case) regarding how he/she has discharged his/her duties must be completely removed if legal professionals are to remain of any help to the courts. It is vital that they remain so. Recently the Supreme Court of India in the case of *M Mathias & Ors* v *NCDRC & Ors* (2024)[6] was of the view that:

> "Lawyers cannot act as a "mouthpiece" for their client even after payment of fees as lawyers have duties to the court and their opponent… that lawyers do not have control over the outcome of a case due to the complexity of legal issues, which involve intricate statutes and case laws, and often lack a definitive answer. This unpredictability is further fuelled by the adversarial nature of legal proceedings, where outcomes are also dependent on the strategies of the opposing side. Further, unlike the medical profession where science can help establish a universal standard of care, no such objective standard can be applied across the legal profession as each lawyer has their own style of advocacy. These obligations are likely to conflict with the duty towards the client. For instance, as a part of a lawyer's duty toward the court, they must "refuse to represent clients who insist on unfair means".

If such protection is not guaranteed prosecutors and legal practitioners would be cowed into discharging their functions with one eye looking behind their shoulders to ensure that they do not snare themselves into anything that may push them into the invidious position of being put on 'trial' for performing their functions. Where a legal practitioner or a prosecutor acts unethically, the remedy is not to make them a witness. It is to seek their recusal from the case in the ordinary way that such recusal may be obtained. The adversarial legal system is intrinsically connected to the observance of the above principle. See *Waugh* v *British Railways Board* [1980] AC 521 at 535. What a prosecutor or a legal practitioner does in court or the utterances that he/she makes do not affect him/her alone. They may easily caricature the entire justice delivery chain. A prosecutor, in the execution of his duties, must not therefore be viewed as an individual but as a court official and a representative of an indispensable institution in the criminal justice system. He/she could be compelled as an ordinary person but not as a prosecutor in a case he/she is prosecuting. As admitted already, the Code does not specifically exclude a **prosecutor** from testifying as a witness. In fact, it does not specifically exclude any other office from testifying. What it does is that it excludes certain individuals

[6] https://indianexpress.com/article/explained/explained-law/supreme-court-lawyer-service-9330304/: accessed on 16 May 2024

from giving evidence in court. Those individuals appear in ss 246 and 247. Section 246 prohibits the specified individuals from giving evidence on the ground of mental incompetency resulting from intellectual impairment or from intoxication. S 247 prohibits spouses from testifying against each other except in particular crimes. Because it is not the subject of this judgment I would in passing hazard to explain the rationale for these prohibitions. Clearly the former groups of individuals are not allowed to testify because they simply do not have the capacity to so. The reasoning for prohibiting the latter group from testifying against each other is probably that doing so will strain the marital relationship. It is intended to protect the marriage institution. What matters, as already stated is that the exclusion of offices and other individuals not covered by the Code are discernible from the English laws as dictated by s 317. I have already equally accepted that the competence of prosecutors in this regard isn't clearly defined in English law and that the exclusion of judicial officers and legal practitioners resulted from the policy considerations I have outlined above. I do not see any reason why the same considerations cannot be extended to prosecutors. In any event s 176 of the Constitution provides that:

> "The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to **develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.**" (Bolding is for emphasis)

By virtue of the power reposed in this court by the Constitution to develop the common law, I have no hesitation to extend the exclusion of court officials from participating as witnesses in cases that they are presiding over or representing a client in, to cover prosecutors in cases which they are prosecuting. My primary reason for the extension is that it would be a catastrophe if a prosecutor were to be compelled to testify in the same trial that he/she is handling, on the basis of what he/she saw or did in court in the course of his/her duties. In fact, such course would render any criminal proceedings in which that would happen a complete circus. The course I take is supported by the South African Constitutional Court decision in the case of *President of the Republic of South Africa & Ors* v *South African Rugby Football Union & Ors* 2000(1) SA 1 (CC). In that case, the Constitutional Court extended the exclusions from being compellable to include the President of that country. It remarked at para 263 of the judgment that:

> "The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice."

The distinction between officers of the court and other people competent and compellable to be called as witnesses is like that of day and night. The *nemo judex in causa sua* rule, whose basis is that no one can be the judge in their own cause underpins the above policy considerations. I am not insinuating that officers of the court are not competent and compellable witnesses in different matters regarding a case that they would have presided over or taken part in. The point I make is that once a prosecutor appears in court as an officer of the court in a criminal matter before the court, that prosecutor is divested of his/her competency and compellability to testify in the same matter as a witness either for the prosecution or for the defence unless he/she first steps down voluntarily or is required by some law to so withdraw from the case.

The law, it seems, never closed its eyes to the considerations I raise above. It is for that reason that the courts were empowered by s 245 of the Code to be the final arbiters on the question of the competency and compellability of witnesses in criminal trials. It means that a court can properly refuse to compel an otherwise competent and compellable witness to testify. By that alone, counsel's argument that the first respondent exercised a discretion which she did not have becomes stillborn. Section 245 provides as follows:

> "**245 Court to decide questions of competency of witnesses**
> It shall be competent for the court in which any criminal case is depending to decide upon all questions concerning the competency and compellability of any witness to give evidence."

It appears to me that s 245 grants the trial court a discretion to decide whether a witness is competent and or compellable. It has the final say where there is disputation as to the competency and compellability of a witness. As with all discretion it must be exercised not whimsically but judiciously as they say. Where it has a discretion the court has power to refuse to compel an otherwise compellable witness to testify. I find the dicta in the case of *Bunning* v *Cross* [1978] HCA 22, 141 CLR 54 (HCA), particularly apposite in this regard. The court in that case was firm that a court can, where it is allowed to do so, exercise its discretion to refuse to do something which appears permissible in circumstances where the 'broader questions of high public policy' dictate so. It further stated that unfairness to the accused is only one factor which could play a part but that public policy considerations could be more important. See also the case of *S* v *Forbes & Anor* 1970 (2) SA 594 (C) which supported the finding in *Bunning* v *Cross*.

The challenge as I see it in this case, is that as happened in the case of *S* v *Safatsa* 1988 (1) SA 868, the applicant never requested the court to exercise its discretion in his favour. His

counsel appears to have been convinced that because of the obligatory nature of s 244 the court had no alternative but to simply order the prosecutor to take the witness stand and testify for the applicant because he was a competent and compellable witness. Counsel was bold and forceful in his conviction that the court was not entitled to decide on the compellability of Michael Reza to testify. Instead, by rule of law (s 244) his client was entitled to have Reza compelled to testify. Looked at from that perspective s 244 would give off the façade of an all-consuming provision which makes even court officials presiding over a trial susceptible to the rules of competency and compellability as witnesses in the same trials in which they are officials. But as highlighted earlier, nothing is like what it appears to be. It would be the embodiment and personification of an absurdity resulting from a literal interpretation of a statutory provision. Provisions in a statute must not be read as silos but in conjunction with others which give them context. If that had been done in this case, the helter-skelter which followed the first respondent's ruling would have been avoided because she had the power to make that decision.

What obtained in the instant case is intriguing. The prosecutor who in essence is legal practitioner for the state in the litigation, was asked to relinquish his role and become witness for the other side not for purposes of giving favourable evidence for that party but for purposes of being cross examined in the hope that such cross-examination might assist the applicant in advancing his application for referral of some constitutional issue to the Constitutional Court. The law simply can't work like that. It cannot be allowed. In any case, the declaration of a witness as hostile is not that straight jacketed. There are procedures which must be followed. A party cannot call a witness to testify solely for purposes of declaring him/her hostile. The hostility of the witness must not be known before he/she testifies. It is something that must come as a surprise to the party who called him/her in the full belief that the witness was going to give evidence which is favourable to his/her/its case. In the instant scenario, the applicant intended to call Michael Reza not for purposes of advancing his cause because he knew before hand that Reza had no evidence favourable to his case. All that the applicant wanted was to portray the prosecutor as unethical because of the alleged indiscretions earlier described in this judgment.

In the end I construe the law to require some minimum requirements to be satisfied before a court can declare a witness compellable to testify. These would include among others a disclosure to the court on what the proposed witness's testimony would be; a summation of, in what manner and with what prospects of success is the witness's testimony going to help the

applicant's case and more critically in this case whether or not compelling the witness to testify would not open the administration of justice to ridicule and trash the public policy consideration aimed at protecting the integrity of court processes. The applicant, in the course of his application *a quo* did not even begin to address those issues.

From the above perspective I am once again unable to accede to the applicant's view that this is an exceptional case in which I must take the unconventional route of interfering with the unterminated proceedings before the first respondent.

That the first respondent did not give reasons for the decision or that the reasons given were irrational.

In a further argument, the applicant pointed out that the first respondent did not give reasons for her decision or that if she did, the reasons were irrational. That assertion appears inaccurate. To put the issue into context it is necessary to reproduce the critical portion of the first respondent's ruling. It went as follows and the errors therein are the first respondent's:

> "It is correct the state counsel is not expressly excluded by the Act. That may be so because the Legislature did not envisage a scenario such as this one which the court finds itself in. The court in assessing the factors at play has the following questions:
> 1. who will be representing the state and will embark on cross examination of Mr Reza if he is to take to the witness stand in a matter in which he is representing the state?
> 2. Does it mean that defence counsel is now directing these proceedings during the period the state will be handicapped?
>
> Again from their explanations it appears the defence is fixed on getting explanations from the state counsel without really applying their mind on the integrity of court proceedings. The defence has not cited a specific legal provision which allows that to happen. They also did not provide case law where such a scenario has ever occurred. Equally so the process of securing the attendance of a witness is well espoused in section 229 of the Criminal Procedure and Evidence Act. It starts with the party requesting the other party to compel the other party in terms of s 229(2) then if that route does not work then a subpoena is pursued and if that does not work then the matter is referred to the attention of the magistrate. It does not say when the witness is seated on the bar and he is not aware that he will be required as a witness then he is ambushed. Court proceedings are not ambush proceedings but are done in a disposition characterised by respect and warmth. The amicability and amiability of the court must be preserved at all times. Public confidence in the administration of justice is guaranteed when proceedings are done in a manner that preserves the integrity of the court. As much as legal practitioners are allowed to be as tenacious as much as possible in forwarding the rights of their clients they still have a duty towards the court to maintain the integrity of the proceedings. The route suggested by the defence would obviously not secure the integrity of the proceedings. The accused is at liberty to call any other witness to support his constitutional referral. Besides the issues he wants the state counsel to explain have already been placed by him in his application for referral."

I agree that the reasons could have been more elegantly expressed but inelegance on its own would not take away anything from the reasoning of the first respondent. It is clear that principally, her view was that the applicant's request to have Reza compelled to testify was not

supported by the law when she said counsel had not cited any specific provision which permitted that course. It was that, adopting such a course went against the grain of preserving the integrity of court proceedings and that when s 244 was enacted the legislature had not anticipated a situation such as the one that faced the court. I do not see any irrationality in that. Maybe it is necessary for me to restate what this court held in the case of *Dombodzvuku & Anor* v *Sithole N.O. & Anor* 2004(1) ZLR 242 (H) at p 243: where it remarked that:

> " .. an incorrect interpretation of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking the decision must go further and show that, on the facts before the court, the decision defies 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."

Later at p 246 the learned judge continued and said:

> "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. She engaged in a logical process…. She did not spin a coin or consult an astrologer to reach at her decision…. 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."

The threshold as depicted in the above authority is very high. A decision can be wrong without necessarily being grossly unreasonable. In fact, the law appears to disbar a superior court from interfering with the unterminated proceedings of a lower court merely on the basis that the decision is unreasonable. It can only do so where that decision is **grossly** unreasonable. The term grossly unreasonable means manifestly unreasonable. It means the decision is so outrageous in its defiance of logic that no court acting reasonably could have arrived at such a decision. It connotes unreasoniblity or unacceptability to a very great extent, degree or intensity.[7] The difference between gross unreasonableness and unreasonableness can be equated to that between gross negligence and ordinary negligence. The former is a higher standard or version of the latter. The same goes for gross irrationality. A grossly irrational decision is one that approximates it having been made in the absence of any intellect. It must have been made pursuant to the application of an arbitrary method of deciding cases akin to the throwing of lots. Where a court employs some semblance of reasoning based on acceptable thought processes the fact that the decision is ultimately wrong does not slap it with the ignominy which comes with gross unreasonableness or irrationality or make the decision so wrong that it will prejudice the rights of the litigant and cause a miscarriage of justice.

[7] See https://www.collinsdictionary.com/dictionary/english/grossly-unfair

Similarly in the instant case, whilst the applicant has a right to disagree with the first respondent's interpretation that s 244 does not permit the calling of a prosecutor to testify for an accused in a matter which he is prosecuting and to regard that interpretation as wrong, it is an entirely different matter to seek to impugn it as being grossly unreasonable or irrational. The criticism that the applicant directs at the decision does not make it grossly unreasonable. It does not bring the case anywhere near what MAKARAU JCC was thinking of in *Joanah Mamombe & Anor* v *Faith Mushure N.O.* (*supra*) when she stated that the exception is only intended for cases where there is a 'gross irregularity or a wrong decision by the lower court that will seriously prejudice the rights of a litigant or accused person and which irregularity or wrong decision cannot be corrected by any other means.'

In the case of *Reserve Bank of Zimbabwe* v *Granger & Anor* SC 34/2000 the Supreme Court had the following to say:

> "A gross misdirection of facts is either a failure to appreciate a fact at all or a finding that is contrary to the evidence actually presented, or a finding that is without factual basis or based on misrepresentation of facts"

As already said, the reasoning of the first respondent is not difficult to follow. She fully appreciated the facts and the issues which were before her. Her findings were based on her interpretation of the law. If her decision is wrong, it cannot be said to be so wrong that it is impossible to have it corrected by any other means after the proceedings have terminated or that it will prejudice the rights of the applicant. I am once again constrained to hold as I hereby do that this further argument by the applicant also lacks merit.

Disposition

It must go without saying that the arguments advanced by the applicant in this case fall well below the standard which is required to qualify his case as an exceptional one in which this court is forced to interfere with the unterminated proceedings before the first respondent. The authorities discussed above maintain the stance that proceedings in a lower court or its decision can only be meddled with where a superior court finds a gross irregularity in the proceedings or the interlocutory decision is clearly so wrong that it will prejudice the rights of the accused if it is not immediately corrected. Either way, the common law review grounds of gross irregularity in the proceedings and/or gross unreasonableness in the decision are factored in. For these reasons the application must fail.

Costs

The second respondent argued that the applicant must be visited with costs on the higher scale of attorney and client. In its view, the applicant's application was hopeless from the beginning and that he must have seen the dismissal coming. I do not agree. As illustrated above there were novel issues which were raised and which the court dealt with. The applicant's case was certainly arguable. As a result, I do not see any reason why I should depart from the rule that costs should follow the cause and award costs on the ordinary scale.

In the circumstances, it is ordered as follows:

1. The applicant's application is dismissed in its entirety
2. The applicant shall pay the second respondent's costs of suit

Mutumbwa, Mugabe and Partners, applicant's legal practitioners
The National Prosecuting Authority, second respondent's legal practitioners