AMOS CHIMBIRU
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINAMORA J:
HARARE, 16 May 2022

Setting aside a judgment made in error mero motu

CHINAMORA J: Sitting in bail court on 8 October 2021, I made an order in the following terms:

> **"IT IS ORDERED THAT:**
>
> The applicant shall be released from prison custody unconditionally"

It is this order that I seek to set aside *mero motu* having since realised that I made the order in error, as the order is null and void as I will explain. This matter came before me as an application for bail pending appeal. The applicant had been convicted of contravening Section 60A of the Electricity Act [Chapter 13:19] and sentenced to 10 years imprisonment. The State had filed a response on 15 September 2021 in which it commented that the applicant had been properly convicted and sentenced, and that there were no prospects of success on appeal.

When the matter came before me in bail court, I asked Counsel for the State to address me on whether the applicant had been properly convicted as I formed the view that the magistrate had not informed him of his right to legal representation. What I overlooked at the time is that the record had already come before the High Court and the proceedings had been confirmed to have been in accordance with real and substantial justice. I sincerely regret the grave oversight, which eventually led me to grant an order in error. At the time I asked for the State's comments as aforesaid, I believed that the failure to inform that applicant of his right to legal representation entitled me to review the matter in terms of section 29 (4) of the High Court Act [Chapter 7:06].

The State gave its response to my request on 5 October 2021, and commenced by saying:

> "The respondent, after a careful reading of the record of proceedings formulated the view that what the applicant alleges and what the record reflect are grounds of review. The court in terms of Section 29 (4) of the High Court Act has jurisdiction to review any criminal proceedings which comes to the attention of the a judge or court where the proceedings are not in accordance with real or substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court for review".

The State then proceeded to observe that the right of the applicant to legal representation was not explained to him as required by Section 163A of the Criminal Procedure and Evidence Act [Chapter 9:07]. However, as I have already observed that I had failed to notice that the record had already been reviewed, my view on Section 29 (4) of the High Court Act did not apply to the matter before me. In short, the record could not be subjected to a further review. Even if the record could have been capable of review, the order that I granted is still incompetent in that I did not seek the concurrence of another judge as required by Section 29 (5) (b) which provides that:

> "Provided that a judge of the High Court shall not exercise any of the powers conferred by subsection (2) (b) (i) or (ii) unless another judge of the High Court has agreed with the exercise of the power in that particular case".

On this second basis, the order which I granted was null and void. Since the grant of the order subject of this judgment, the Judge President kindly availed to me a copy of her judgment involving the same applicant in *Amos Chimbiru v The State* HH 657-20. This concerned a chamber application for extension of time to note an appeal. I readily confess that the judgment is extremely educative and eruditely deal with Section 163A of the Criminal Procedure and Evidence Act and has made me wiser on the implication of failure to advise an accused of his/her right to legal representation. The following passage from DUBE J's judgment is instructive:

> "The law is that the fact that a trial court has failed to advise an accused of his right to legal representation, though it may be an irregularity, does not necessarily render the proceedings unfair warranting the setting aside of the conviction and sentence. Proceedings will only be set aside where it has been shown that the proceedings are tainted with irregularities and the accused suffered prejudice as a result of the court's failure to inform him of his rights. In a case where the court has failed to inform the accused of his legal and other rights, but a reading of the record of proceedings informs that he became aware of the essential elements of the offence resulting in an unequivocal plea of guilty, the fact that he was not informed of his rights does not render the proceedings unfair and irregular. The entire record of proceedings must be considered to determine if the accused was prejudiced and unable to represent himself adequately".

The exposition in the Judge President's judgment has altered the view I had of Section 163A, which was in line with the decision in *S v Gouwe* 1995 (8) BCLR 968 (B). I now agree with the logic of the Judge President in *Amos Chimbiru v The State supra*. For this reason, the order that I granted would still not have been tenable, and ought to be rescinded and set aside.

I have looked at the Criminal Procedure and Evidence Act for a provision which allows me to rescind the order granted on 8 October 2021, but have been unable to find it. As a result, I now turn to common law to see if it allows me to do so. Prof Erasmus in *Superior Court Practice* at B1 – 306 says:

> "At common law a judgment can be set aside on the grounds of fraud, *justus* error (on rare occasions) in certain exceptional circumstances when new documents have been discovered, and also where judgment had been granted by default".

In *casu*, there is no question of fraud. However, I believe that I can set aside the order on the basis of *justus* error. In this respect, in *Muchechesi v Field* NO 1997 (2) 191 at p192G-193A, it was held that "*justus* error" must be an error by the court induced from non-fraudulent means. See also *Mudzingwa* v *Mudzingwa* 1991 (4) SA 17 (ZS); *Deary v Deary* 1971(1) SA 227 (C) at 230 C – E; *Mukundadzviti v Mutasa* 1990 (1) ZLR 342 (H) at 345E.

Before coming to a determination, I must remark that this case starkly brings to the fore the need for a judge dealing with a matter they wish to review to examine carefully whether, indeed, the matter can be reviewed. In *casu*, it slipped my attention that the matter had previously been subjected to review by this court. The matter could therefore not be reviewed again. If the judge nonetheless believes that the matter is capable of review, he/she must bear in mind that the concurrence of another judge is imperative. There is the inherent danger, as I have learnt from this case, of embarking on a review exercise while sitting as a single judge, especially in bail court. Regrettably, this is a cruel lesson that I will carry into the future.

In conclusion, I am satisfied that taking into account all the factors set out above and the authorities I have referred to, the order I granted on 8 October 2021 should be set aside. Accordingly, I grant the following order:

1. The order granted under B1834/21 is hereby rescinded and set aside.
2. The Registrar of the High Court shall reinstate for hearing the bail application under B1834/21.

National Prosecution Authority respondent's legal practitioners