PRINCE ZVAWANDA
versus
THE STATE
and
FADZAI MTOMBENI NO.

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 22 June 2015 & 19 July 2017

Opposed Application

R. Mahuni for the applicant
F. Kachidza for the respondent

ZHOU J: The applicant appeared before the Magistrates Court at Harare on a charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against him are that on 18 June 2014 and at Herald House, Corner George Silundika Avenue and Sam Nujoma Street, Harare, the accused and one Amos Ngoshi or one or more of then misrepresented to some homeseekers by flighting an advertisement in the *Herald* newspaper that a proposed subdivision of land in Kuwadzana area which is composed of 271 stands each measuring 300 square metres belonged to one or more of them and that the stands were on offer for sale at a price of US$7 500. It was further alleged that in actual fact the applicant and his accomplice knew that the land did not belong to them but belonged to the City of Harare and was intended for allocation to co-operative societies. The applicant and his accomplice allegedly intended potential home seekers to act upon their misrepresentation to their prejudice. The misrepresentation had a potential prejudice of US$2 053 500.00. The applicant pleaded not guilty to the charge. The state led evidence from witnesses who responded to the advertisements which had allegedly been published by the applicant advertising the stands which belonged to the complainant. After the State had closed its case the applicant applied for discharge in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The second respondent, who is the presiding magistrate dismissed the application. The other person

who was being charged together with the applicant was acquitted. The applicant has now approached this court on review seeking the setting aside of the judgment of the Learned Magistrate on the ground that it is irrational or outrageous in its defiance of accepted standards that no person who had applied her/his mind to the facts before her or him would have come to the conclusion reached by her when she dismissed the application for discharge.

It is only in exceptional circumstances that this court will intervene in uncompleted proceedings of a lower court, see *Attorney-General* v *Makamba* 2005 (2) ZLR 54(S); *Dombodzvuku & Anor* v *Sithole NO & Anor* 2004 (2) ZLR 242(H) at 245D-F. In the present case the Magistrate's refusal to discharge the applicant at the close of the case for the prosecution is based on findings of fact, which factor on its own would not constitute a gross irregularity or irrationality entitling this court to interfere on review. See *Attorney-General* v *Makamba* 2004(2) ZLR 63(S).

The state called Nyasha Gumbo whose evidence indicates that the land which the applicant advertised belonged to the complainant. The applicant takes issue with the witness's evidence regarding the value of the property in question as well as the size of the stands for that area which he put at 200 square metres which was different from the 300 square metres advertised by the applicant. The witness stated that the potential prejudice to home seekers would be more than US$2 million. The US$162 600 was a value based on the potential prejudice to the City Council and is based upon the value of the unserviced land, whereas the purchasers were being invited to pay specific figures as the purchase price per stand. Those are clearly matters of detail rather than substance and do not affect the substance of the allegations. If the applicant was advertising a different piece of land from that identified as belonging to the applicant that is the issue which he should deal with in his evidence. The witness was very clear that the applicant had no authority from the complainant to advertise that land for sale.

The second witness, Dzvetsva Dzviti communicated with the applicant about the location of the stands which the applicant had advertised for sale. Those stands did not belong to the applicant but to the complainant. The third witness, Monica Muropa is the one who went to meet the applicant in connection with the advertisement of the stands. She was taken to the land in question by the applicant himself. She was shown the land belonging to the City of Harare which had been allocated to the witness's cooperative by the City of Harare. After being shown

the land where the stands were located she was given an account number for the purpose of depositing the "purchase price".

Thus the witnesses gave a coherent version that cannot be dismissed in terms of s 198(3). The Magistrate clearly applied her mind to the evidence and came to the correct conclusion that an application for the discharge of the applicant at that stage was not supportable. It is reckless for the applicant to suggest in the face of that evidence that the decision of the Learned Magistrate to dismiss his application was irrational or outrageous in its defiance of logic or acceptable moral standards. Such an allegation requires evidence to prove not just that the decision was wrong or unreasonable, but that it was so grossly unreasonable or irrational that the court must have taken leave of its senses or that "something else can be inferred" from the decision *Nyoni* v *Secretary for Public Service, Labour & Social Welfare & Anor* 1997 (2) ZLR 516(H) at 526B-528F; *Patriotic Front – Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305(S) at 325-6. The inquiry at this stage where review is sought on the grounds alleged does not justify interference with the decision of the lower court merely because the reviewing judge might have come to a different conclusion. The application *in casu* makes no attempt to establish the requirements of the test involved in seeking to impeach the decision of the Learned Magistrate on the grounds alleged.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.

Mahuni & Mutatu, applicant's legal practitioners
National Prosecuting Authority, respondents' legal practitioners