HB 345-16
HC 2950-16
XREF HC 2883-16

NQOBILE KHUMALO
versus
THE PRESIDING MAGISTRATE N.O (MR MZINGAYE MOYO)
and
THE PROSECUTOR GENERAL N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 25 NOVEMBER 2016 AND 1 DECEMBER 2016

Urgent Chamber Application

P Muzvuzvu for the applicant
Respondent in default

MATHONSI J: In the practice of law the world over it is an accepted principle that legal practitioners are officers of the court. As such they assist the court in dispensing justice and owe the court a duty to not only bring to its attention legal pronouncements on the law that are useful in the resolution of disputes but also to disclose to the court the truth which, in any event, is the cornerstone of the justice delivery system.

In that regard legal practitioners, as members of the noble profession, are expected to treat the court with respect and be diligent in the discharge of their duties. They occupy a privileged position under the wings of the court as perhaps the last bastion in the defence of individual rights and liberties and therefore are not expected to resort to obfuscation in their defence of accused persons brought before the courts. As much as legal practitioners are allowed to be as tenacious as possible in defending their clients they still have a duty towards the court. A legal practitioner has the right to criticize the court's judgment but the right to freedom of expression does not permit the making of wild and unproven comments imputing corrupt or improper motives on judicial officers as this would create a real and substantial risk of impairing public confidence in the administration of justice. See *In re Chinamasa* 2000 (2) ZLR 322 (S).

In this application , the applicant seeks an order stopping criminal proceedings in the magistrates court of Filabusi pending a review by the High Court of refusal by the presiding

magistrate, who is the first respondent in the application, to recuse himself at the behest of the applicant.

The applicant was arraigned before the first respondent on a charge of contempt of court in contravention of s182 of the Criminal Law Code [Chapter 9:23]. The charge arose out of a court order issued by the High Court on 20 November 2015 interdicting the applicant from interfering with one Claver Masiiwa's control of certain property the latter had purchased from a company known as Trianic Investments (Pvt) Ltd.

Although the court order was served on the applicant on 3 December 2015 he allegedly violated the court order by continuing to interfere with Masiiwa's control of the property and using the said property as his own. The conduct complained of led to charges being preferred against the applicant aforesaid. He initially appeared in court on 25 October 2016 but sought a postponement to a later date. The matter was then remanded by consent for trial on 10 November 2016.

When the matter was called on that date the applicant's counsel immediately launched an application for recusal of the trial magistrate. Without leading any sworn evidence or producing any proof and indeed without taking an oath himself, the legal practitioner launched a volley of unmitigated and very serious accusations against the trial magistrate. Firstly he claimed that on 8 November 2016 the magistrate had been spotted at Filabusi shopping centre conducting a conversation with one Councillor Ngwenya in the presence of the complainant. He did not indicate what was wrong with a magistrate conversing with a local councillor.

Secondly he stated that some time before, the trial magistrate had presided over a civil case involving two parties namely Mhandu and Mswela in which he found in favour of Mswela. He claimed that Mswela is a friend of the complainant in the criminal case and that he had since established that the magistrate was later "roped into the mining business that Mswela had taken from Mhandu."

The legal practitioner did not even suggest that the decision of the magistrate in that civil matter was wrong and whether it was ever contested. He however suggested that the aspect of the magistrate going into business with a former litigant was at the instance of the complainant.

Thirdly the legal practitioner claimed that upon the arrest of his client on the charge he is facing the officer in charge had disclosed to him that he was under pressure from "court officials" to take the matter to court. As a result the docket had been processed and taken to court in one day. It turned out that the accused person was taken to court on a summons. At no time was he detained. The legal practitioner did not allude to any evidence to the effect that it was the trial magistrate who had put the officer-in-charge under pressure or that the magistrate had any interest in the matter.

It was for the foregoing reasons that the legal practitioner asked the magistrate to recuse himself. Before responding to the application the public prosecutor desired to investigate what may have been wild and unguarded, if not unsubstantiated accusations. He requested a 30 minute adjournment to enable him to do so.

When the court resumed, the legal practitioner did not even allow the prosecutor to respond. Turning the entire proceedings into a circus, he made further accusations against both the magistrate and the public prosecutor. He claimed the while they were outside the court room after the short adjournment the complainant had rushed to his vehicle where he was overheard talking on the phone to an unknown person. He was saying to that person; "we need to increase the amount of money, may you get ready."

The legal practitioner suggested that the complainant was preparing to increase the bribe money presumably paid to the magistrate and/or prosecutor. He said after that phone call the complainant had rushed to the public prosecutor's office. He was not done. He went on to claim that he had observed the office-in-charge he had spoken about earlier, hovering around the magistrate's chambers. To him the magistrate had summoned the officer-in-charge for a reprimand presumably for having revealed to the accused person that the magistrate had exerted pressure on him to bring the docket to court.

It is needless to say that all these allegations were refuted by both the public prosecutor and the magistrate. The prosecutor stated that on the day the complainant was alleged to have met the magistrate he was nowhere near Filabusi. He was at his farm in Chegutu. He drew attention to the fact that no link had been established between the complainant and Mswela or

Mhandu, pointing out that the court could not be expected to recuse itself on flimsy and baseless allegations.

The magistrate refused to recuse himself giving sound reasons. He stated in his ruling that he did not know the complainant. He pointed out that he was not engaged in any mining business and that even if the complainant had been overhead making the statement complained of in a telephone conversation that statement was meaningless.

After that determination, the trial could not commence because the legal practitioner for the accused person stated that he had three more applications to make. He did not disclose the nature of those applications and did not make any of them. The matter was then postponed to 23 November 2016 presumably to allow the applicant to make the three applications.

On 16 November 2016 the applicant filed a review application in this court, HC 2883/16, contesting the refusal of the magistrate to recuse himself. Only one ground of review is raised in that review application namely that;

> "The respondents (the magistrate and the prosecutor general- not the public prosecutor seized with the matter in Filabusi) have shown bias against the applicant in the proceedings on CRB 338/16 and therefore should recuse themselves from the trial."

Apart from the fact that it is well-nigh impossible for the Prosecutor General to recuse himself from his constitutional mandate of prosecuting suspects, no bias is shown throughout the three page founding affidavit of the applicant upon which the review application is based. Instead it regurgitates the allegations made by counsel in the magistrates court from the bar, almost word for word.

A day before the trial was set to resume, the applicant then filed this urgent application for a stay of the criminal proceedings pending review.

The applicant is asking this court to intervene in uncompleted proceedings of a lower court where that court has issued an interlocutory order which he is not happy with. The general rule is that a superior court should intervene in such proceedings 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. See *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) 64 C – E.

A superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its power to rare cases where grave injustice must otherwise result or where justice might not be obtained by any other means. See *Ismail and Others* v *Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) at page 4; *Ndlovu* v *Regional Magistrate, Eastern Division and Another* 1989 (1) ZLR 264 (H) 269C, 270G.

The case of *Masedza and Others* v *Magistrate, Rusape and Another* 1998 (1) ZLR 36 (H) is on all fours with the present matter. In that case the applicants had become aware of certain facts during the course of their trial. They applied for the recusal of the magistrate who refused. The trial was then postponed to enable the magistrate's decision to be taken on review. They then applied for the stopping of the criminal proceedings pending review on an urgent basis just like what the present applicant has done.

In dismissing the urgent application for stay of criminal proceedings because the application had no merit, DEVITTIE J made the following remarks at 37 F- G which I fully associate myself with:

> "In determining the power of a superior court to intervene in unterminated criminal proceedings a distinction must be drawn between an appeal and a review. Herbstein and van Winsen, *Civil Practice of the Supreme Court of South Africa*, 4th edition page 932 explain the distinction:
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> > 'The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of the trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by evidence would be a matter of appeal and not a review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity.'

> Where, in unterminated proceedings an interlocutory decision is sought to be set aside on grounds that the court has made a wrong decision in the proper discharge of its functions the appropriate procedure is by way of appeal. The general principle is that an appeal will be entertained only after conviction."

See *S* v *John* 2013 (2) ZLR 154 (H)

The applicant has sought the recusal of the trial magistrate because of perceived bias. Indeed it is trite that in an application for recusal the court is not concerned with actual bias but with whether an appearance of bias would be created in the mind of a reasonable person aware of the relevant facts. See *S* v *Bailey* 1964 (4) SA 514 (C); *Masedza and Others* v *Magistrate, Rusape and another, supra* at 44D.

None of the allegations were proved or even substantiated. They were made in the most callous manner by a legal practitioner displaying a lamentable disrespect and a complete disdain of the integrity of the court to which he is an officer. He did not even have the courtesy to appraise the court as to the source of his information. A legal practitioner cannot just shoot up and make fanciful accusations against a judicial officer which he has not investigated and knows very well that he cannot prove in order to sow the seed of uncertainity in the proceedings, play to the gallery embarrassing the court in public and in the process scandalize the court oblivious of the damage to public confidence in the administration of justice all in the name of delaying the proceedings for the benefit of a contemptuous litigant with no respect for the courts. It is unacceptable and should in fact be penalized.

I have no doubt that even the review application that has been filed, to the extent that it relies on the single ground of bias, has not the slightest chance of succeeding. I therefore cannot exercise my discretion in favour of the applicant to stop unterminated criminal proceedings. There are simply no grounds for the magistrate to recuse himself.

Mr Muzvuzvu was unfortunate to appear as a correspondent on behalf of Mugiya and Macharaga the legal practitioners of the applicant who are based in Harare. He and myself exchanged missiles on the conduct of Norman Mugiya at the magistrates court in Filabusi which is far from satisfactory and is clearly contemptuous of the court. I also desired to know whether the applicant was entitled to seek shelter under the wings of this court if he is facing contempt of court charges for failing to obey a lawful order issued by this court. *Mr Muzvuzvu* acknowledged

the difficulty that he had been put into by his correspondents and to his credit offered to withdraw the application.

In my view a litigant should not be allowed to file a frivolous and vexatious application as a fishing expedition, just to test the waters. Upon realizing that the waters run deep, he then beats a hasty retreat. If the application is devoid of merit it is susceptible to being dismissed.

While still at it I must mention in passing that section 85 (1) of the constitution allows any person acting in their own interests to approach the court alleging that a fundamental right or freedom contained in chapter 4 has been infringed. Subsection (2) of section 85 provides that an approach to the court in terms of subsection (1) of s85 shall not be denied only on the basis that the person has contravened a law. In my view those constitutional provisions do not detract from the time-honoured legal position that people are not allowed to come to court seeking assistance if they are guilty of contempt of an order of the same court. It occurs to me that if a litigant who is contemptuous of an order of this court were allowed to seek the court's assistance when he has not complied with the court order then the court risks compromising its integrity and being reduced to a circus. I conclude therefore that this case is distinguishable from that contemplated by s85(2) of the constitution which relates to the enforcement of a fundamental human right. It certainly is not a fundamental human right of the applicant to disobey a lawful order of this court. If he wants protection from this court he must bring himself fully under the authority of the court not to pick and choose what the court should do.

This is a matter in which I would have considered awarding costs against Norman Mugiya *de bonis propriis* if the respondents had appeared. However, although I had directed the applicant to serve the notice of set down upon the respondents owing to the exigency of the application which was filed a day before the resumption of trial, *Mr Muzvuzvu* did not produce proof of service of the notice of set down. As it is I am unable to say whether the respondents were aware of the set down date. But even without opposition the application is glaringly without merit and cannot be granted.

In the result, the application is hereby dismissed with no order as to costs.

Mugiya and Macharaga Law ChamberC/o Muzvuzvu & Mguni Law Chambers, applicant's legal practitioners