NKOSANA MUZONDO
versus
SASTON MUGARI MUMVEREKI
and
THE HONOURABLE MAGISTRATE MR VITORINI (N.O)

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA
HARARE, 16 November 2015 and 13 January 2016

Opposed matter – Review

Ms *B T Munjere*, for the applicant
1st respondent in default
2nd respondent in default

MUNANGATI-MANONGWA J: This is an application for the review of proceedings conducted by the second respondent sitting at Gutu magistrates' court on 22 January 2014. The application is made in terms of s 27 of the High Court Act [*Chapter 7:06*]. The application was opposed, however at the hearing there was no appearance for the first respondent, there being a letter on record that the first respondent was to abide by the court's ruling whilst the Civil Division did not appear on behalf of the second respondent.

The brief history of the matter is as follows: the first respondent was arraigned before a local court for constructing dwellings in an area belonging to another village. The Chief found him to have violated an agreement pertaining to usage of the land in issue and he fined him a beast. The first respondent appealed to the magistrate court and after various procedures not necessary to delve into, the matter had to be heard *de novo*. It is out of this fresh hearing that the complaint before the court arose.

The applicant's grounds for seeking review are stated as follows:

1. "The adjudicating authority had an interest in the cause, was biased and or acted maliciously"
2. "There were gross irregularities in the proceedings or decisions made"
3. "The adjudicating authority did not act in a manner that was fair to the applicant."

The applicant had applied for default judgement on the basis that the other parties were not in attendance. I refused to grant same as the court had issues *viz* the application itself. I sought clarification from the applicant's counsel on various issues. In the end judgement was reserved.

In his argument to buttress the allegation that the adjudicating authority had an interest in the cause, was biased and or acted maliciously the applicant relied on the exchange or dialogue between Mr Hungwe the legal practitioner for the applicant at the court *a quo* and the second respondent the sitting magistrate. The applicant averred in his affidavit that the magistrate had "lashed out" at his legal practitioner. The alleged fall out arose out of a production of a letter which had been written by the applicant's lawyers to the Clerk of Court which sought the clerk to give confirmation on the state of affairs obtaining at the respondent's village. The applicant alleges that the following were statements that the presiding magistrate made;

i) "When you do not have business in your office please, do not write such useless and rubbish letters."
ii) "I am not reading the letter from a legal perspective but even an ordinary person in the street can interpret it to be rubbish…."
iii) "I was angry when the Clerk of Court brought this letter to me. Personally I am not amused by this letter".

The applicant indicated in his affidavit that his legal practitioner's "professionalism and competence was challenged in court." After this alleged tirade, the applicant's legal practitioner applied that the second respondent recuses himself given the comments and attitude so displayed. The second respondent being the presiding magistrate denied ever uttering these words and confirms he refused to recuse himself. In his affidavit, the second respondent denied using the alleged words, he restates that he had indicated to Mr Hungwe that the letter to the Clerk of Court was inappropriate in its vague request directed to the Clerk of Court. He gave a defined reprimand, and the applicant was confusing firmness with emotions, according to him, there was never an emotional outburst. I hasten to add that the letter which became the subject of exchange was before the Court as an annexure and I had difficulty in appreciating what it is the Clerk of Court was supposed to do. Below is the relevant extract

> "When the matter was postponed it was agreed that the status would be maintained pending appeal.
>
> Saston and his subjects have continued constructing houses at the disputed area before the matter has been finalised by the Honourable Court. Please confirm that this is the position so

> that the affected parties can enlist the services of police to drive the delinquent party from the dispute of land."

The second respondent commented on the letter as follows: "How can the Clerk of Court confirm what is happening in the village."

Thus when Mr Hungwe sought to present this letter as proof of having applied for a date, the second respondent disputed same as the letter to the Clerk of Court had nothing to do with that.

What is patently clear is that the record before the court does not reveal that there was an exchange between the parties in the words and tone alleged by the applicant. Ms *Munjere* the legal practitioner who appeared on behalf of the applicant admitted to this fact.

What is on record is that the court, after Mr Hungwe alleged that he had sought a trial date, read out the aforementioned letter and enquired;

> "….were is the request for a date."

The court then commented as follows

> "Lawyers are officers of the court who should be aware of procedure. The writing of letters which are out of place is unacceptable. We will proceed. This matter is coming for trial let's hear the plaintiff's case."

It is at this juncture that Mr Hungwe indicated "we have lost confidence" and sought the second respondent's recusal which was turned down.

A review turns on the proceedings complained of. In such instances the record of the proceedings is paramount as it bears evidence on what transpired.

Rule 260 of this court's rules provides that:

> "(1) The Clerk of the inferior court whose proceedings are being brought on review, shall, within twelve days of the date of service of the application for review, lodge with the registrar the <u>original record</u> (my emphasis) together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review requiring copies of the record for their own use shall obtain them from the official who prepared the record."

In casu, there is no compliance with this rule. The Clerk of Court did not lodge the original record with the Registrar neither was the typed copy provided certified as true and correct copy. I note that a space was provided for signatures by the presiding magistrate and the transcriber and those spaces are not signed. This rule makes for a peremptory provision. The requirement for an original record to be presented (raw as it may be) is to give the court first hand information which is important for consideration during the process. The typed versions have to be certified as true and correct copies so as to assure the court that the

proceedings have been correctly captured. This is so, as the whole essence of a review is to scrutinise the proceedings as conducted.

As matters stand, due to the failure to comply, there is controversy as to what transpired in court. What the applicant alleges transpired in court is denied by the presiding magistrate and is not borne by the record. This is the predicament which the rules meant to curb. The party seeking review must ensure that the clerk of court complies with the peremptory rule as it is that party which will stand to be prejudiced.

It is noted that the applicant was happy to rely on the furnished record as he did not raise issue regarding how the proceedings were captured. In that regard, given the contents of the record, I find no basis to conclude that the adjudicating authority had an interest in the cause, or was biased or acted maliciously. What is apparent is a caution which in my view did not go overboard. A reasonable man may not form the impression that the trial will not be conducted fairly. Presiding officers should not be afraid to raise issue regarding conduct of lawyers for fear that litigants may seek their recusal. As stated in *Masedza & Ors* v *Magistrate Rusape & Anor* 1998 (1) ZLR 36 (HC) there has to be reasonable apprehension of bias, so, the test is whether or not in the eyes of a reasonable man the conduct of a presiding officer is likely to compromise attainment of a fair hearing. I hasten to add that the attitude of a presiding officer or his belief that he will be impartial and not sustainable to bias is not considered.

Given the facts of the matter and what appears from the record, there are no grounds for recusal. The presiding magistrate could still proceed to conduct the hearing with interests of justice being aptly served.

The other ground raised by the applicant pertains to an irregularity in the proceedings. The applicant alleges that as the second respondent had indicated that the matter was to continue and denied the applicant the right to take the matter on review, an about turn to then allow the process constituted an irregularity.

Of note is the fact that, while the court was not prepared to stay proceedings to allow the applicant to take the matter on review, the first respondent's legal practitioner was amenable to postponement to enable that process to kick in. The record indicates that the matter was referred by consent.

I find nothing untoward and prejudicial to the applicant as it was his wish to have the matter taken on review on the issue of recusal.

The third ground that the applicant raised for review was that the adjudicating authority did not act in a manner that was fair to the applicant in that "the second respondent refused to grant an interim order to maintain the *status quo* pending finalisation of the matter and the intended application for review".

The applicant's legal practitioner Mr *Hungwe* had applied for recusal of the presiding magistrate. He then sought to have the court hear an application for the maintenance of what he termed the "*status quo*".

His submissions were as follows:

> "All the plaintiff is asking is for this court to protect order since parties are fighting, there is anarchy. If the court is of the view that it cannot grant the application, we withdraw our request for recusal and ask the court to hear the matter and make a decision on merits in order to protect order and prevent anarchy".

The refusal of this application is what has been termed unfair conduct by the applicant. The applicant's legal practitioner Miss *B.T Munjere* was at pains to support the ground of unfairness premised on those facts.

As the court *a quo* remarked, the applicant wanted the presiding officer to recuse himself, at the same time he wanted the officer to entertain an application. This was not only improper but unprocedural. Further as the court *a quo* indicated, the application was premised on certain factual allegations that there is anarchy in the village with people literary fighting, the facts could not in the court *a quo*'s view be adduced from the bar. There was no affidavit before the court nor was oral evidence led from the applicant. It was only Mr Hungwe's word. The dismissal of the application did not point to any unfair conduct on the part of the adjudicating authority. The ruling therefore that the application for an interim order was not properly before the court was sound and fairly reached.

The grounds stipulated in s 27 of the High Court Act not having been satisfied the application cannot succeed.

In the premise the following order is made.

1. The application for review be and is hereby dismissed.
2. The matter is referred to the court *a quo* for continuation of trial.
3. Respondent to pay costs.

Hungwe & Partners, applicant's legal practitioners