MICHAEL KAWANZARUWA
versus
TRIAL MAGISTRATE MATOVA N.O.
and
THE STATE
and
WILLIAM BERTRAM GIBBONS
and
TAFADZWA CALVIN SENGWE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 8 October 2024 & 17 October 2024

Review application

E. Mavuto for the applicant
Mrs. F. Kachidza for the second respondent

DUBE-BANDA J:

[1] This is an application for a review of criminal proceedings. This application concerns unterminated criminal proceedings at the magistrates' court, in which the applicant and three co-accused stand charged with the crime of Fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The applicant seeks that the trial magistrate's decision dismissing his recusal application be reviewed and be set aside and that the trial start *de novo* before a different magistrate. The second respondent opposes the relief sought.

[2] The trial commenced on 12 February 2020 and the applicant and co-accused pleaded not guilty to the charge and presented their defence outlines. The prosecution adduced evidence from five witnesses and closed its case. At the close of the case for the prosecution, the applicant made an application for a discharge in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The application was dismissed.

[3] I do not intend to overburden this judgment with a lot that has happened since the beginning of this trial. Suffice to state that the applicant has changed a number of legal practitioners, made application after application i.e., applications for a postponement; application for a discharge at the close of the case for the prosecution etc. Consequent to the dismissal of the application for a discharge application, he sought to challenge it by way of review ("first review"). He filed

a chamber application for stay of the proceedings pending the determination of the first review, which application was granted on 23 June 2022. On 11 July 2022 the court struck off the first review application on the premise that it was fatally defective. In the middle of the defence case the applicant sought the recusal of the trial magistrate. The application was refused, prompting him to refuse to participate in the trial. The applicant then filed this review application seeking the order stated above. In case HC 3560/24 this court granted a stay of proceedings pending the determination of this review application.

[4] The applicant takes issue with the trial magistrate's refusal to recuse himself and withdraw from the trial. He seeks that the proceedings be reviewed on three grounds. These are:

i. The first respondent's (trial magistrate) finding that the applicant's application for recusal had nothing of substance when the founding affidavit avers that he was bribed by the complainant to convict him, is so grossly irregular and is so outrageous in its defiance of logic that no sensible court having applied its mind would have arrived at it.
ii. The first respondent's decision to order the continuation of trial without furnishing the applicant the requested written reasons for dismissing the application for recusal is a serious gross misdirection which triggers this Honourable court's reviewing powers.
iii. The trial court's decision to dismiss applicant's application for postponement and have access to the written ruling for recusal to enable him file a review application is an infraction on applicant's right to fair trial as set out in section 69(1) of the Constitution.

[5] In his founding affidavit, the applicant avers that he raised a formal compliant of corruption against the trial magistrate. He avers that the magistrate has been incensed by the complaints and allegations made against him, which in his ruling described as malicious. It is averred further that the magistrate is eagerly waiting for a revenge. According to the applicant, the refusal to postpone the trial after the dismissal of the recusal application, and the refusal to provide written reasons for the dismissal shows that the magistrate is biased against him. It is averred that the magistrate will not be impartial, and therefore he must be removed from the trial.

[6] The second respondent contends that there is nothing of substance to confirm that the trial magistrate is biased. It is averred that the mere fact that the applicant made a complaint to the

Chief Magistrate and Zimbabwe Anti-Corruption Commission ("ZACC") does not show that the trial magistrate would be biased against him. It is averred further that there was nothing wrong or irregular in the magistrate dismissing the recusal application. It is argued that the allegations made by the applicant have not been proved to incense the trial magistrate to seek revenge. Counsel submitted that there is no reasonable apprehension of bias. The applicant would receive a fair trial. The decision of the trial magistrate does not constitute a gross irregularity. The case has been pending for a long time and it must be brought to finality. Counsel submitted that the application be dismissed.

[7] This is a mid-stream review application. It is an established principle of our law that the superior courts will not ordinarily interfere with unterminated proceedings in a lower court. The court's power to interfere is exercised sparingly and only in those cases in which the court is satisfied that grave injustice may otherwise result or where justice might not by other means be obtained. In *Mamombe & Ors v Mushure & Ors* CCZ 4/22 the court stated that the 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. See *Attorney- General v Makamba* 2005 (2) ZLR 54 (S).

[8] The superior courts' marked reluctance to interfere in unterminated proceedings stems primarily from the effect that such a procedure has upon the continuity of proceedings in the lower courts; the undesirability of hearing appeals and reviews piecemeal; and the fact that redress by other means, such as review or appeal, will ordinarily be available after the completion of the matter. See *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) at 119H – 120A; *Motata v Nair and Another* 2009 (1) SACR 263 (TPD) at 267 at paragraph [12]. Therefore, not every allegation of an infringement of fair trial rights will engage the review jurisdiction of this court midstream. An irregularity must be "sufficiently serious as to undermine basic notions of trial fairness and justice" to engage the jurisdiction of this court before the completion of the trial.

[9] The application is predicated on the contention that the trial magistrate is biased against the applicant. In terms of s 69(1) of the Constitution every accused person has the right to a fair trial by an impartial court. The test for bias on the part of a judicial officer is objective, i.e., whether as a matter of fact, there is a reasonable belief that a real likelihood of bias exists. The party seeking recusal must show a reasonable apprehension, based on objective grounds, that

the trial will not be impartial. See *S v Jakarasi* 1983 (1) ZLR 218 (S); *S v Mutizwa* HB 4/06; *S v Chipande* HB 238/2000; *Mahlangu v Dowa & Ors* 2001 (1) ZLR (1) 47 (H).

[10] The proper test to recusal is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judicial officer has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by evidence and submissions of counsel. In considering an application for recusal, the court, as a starting point, presumes that judicial officers are impartial in adjudicating disputes and it is the applicant who bears the onus of rebutting the presumption of judicial impartiality. The presumption of judicial impartiality is not easily dislodged. It requires cogent and convincing evidence to be rebutted. See: *S* v *Nhire & Anor* 2015 (2) ZLR 295 (H); *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co. (Pvt) Ltd* 2001 (1) ZLR 266 (H). The Constitutional Court of South in case of *Bernert* v *ABSA* 2001 (3) SA 92 (CC) para [35] had this to say:

> "The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, 'Judges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."

[11] I turn to consider whether the applicant's complaint that the trial magistrate's dismissal of the recusal application amounted to a serious irregularity is warranted; and if so, whether this court's review jurisdiction at this stage is indeed engaged. The recusal application was predicated on the complaints the applicant made against the trial magistrate to the Chief Magistrate, Judicial Service Commission (JSC) and ZACC. The gist of the complaints is that he will not get a fair trial because the trial magistrate has been compromised by the complainant. He seems to suggest that he has evidence that the complainant paid the trial magistrate to convict him. The Chief Magistrate declined to deal with the complaint administratively, and advised the applicant to seek remedies available at law. The JSC investigated the complaint and exonerated the trial magistrate. The applicant contends that ZACC is still seized with the investigation of the complaint.

[12] In the ruling dismissing the recusal application the trial magistrate stated that the applicant made a "malicious complaint" against him. The applicant suggests that the use of the phrase "malicious complainant" suggest that the trial magistrate has been irked by these complaints. This is the phrase that caused me most trouble and really exercised my mind. However, I have come to the conclusion that the phrase "malicious complaint" without more does not connote annoyance or anger on the part of the trial magistrate. At this stage I am not prepared to read what has been suggested by the applicant in the use of the phrase ""malicious complainant." I take it to be rather too remote.

[13] In determining where the justice of this matter lie, I take into account that the trial magistrate has been cleared by JSC. There is no evidence that ZACC is investigating the matter, except the *ipse dixit* of the applicant. A matter pending before ZACC must have a reference number or some documentation to show that it is under investigation. There is none in this case. There is nothing cogent in this case to support the contention that ZACC is investigating the complaint against the trial magistrate.

[14] The application for recusal came after the application for a discharge was refused and the applicant put to his defence. After the refusal of the recusal application, the applicant refused to take further part in the proceedings. He says he did not want to participate in case he sanitises gross irregularities committed in this trial. It is trite that once a court makes a ruling it is binding until it is set aside on appeal or review. A litigant cannot be permitted to refuse to participate in court proceedings as a protest that his or her application has been dismissed. This is wrong and cannot be countenanced because it can bring the administration of justice into disrepute. This conduct of the applicant weighs heavily against him in this case.

[15] The principle of finality is also relevant in this matter, in that the trial started in 2020 and is now in the defence case. It is in the interest of justice that it be brought to finality without further delay. I also take into account the interests of the three co-accused person who have a right to a speedy trial within a reasonable time. The right to a fair trial is not a preserve of the applicant, the complainant and the witnesses also have a right to a fair trial.

[16] Furthermore, it must be assumed that the trial magistrate because of his oath of office to administer justice without fear or favour, and his training and experience can disabuse his mind of any irrelevant matter and determine the matter on the basis of the facts and the law. The mere apprehensiveness on the part of the applicant that a trial magistrate will be biased is not enough. The court must carefully scrutinise the apprehension to determine whether or not it is reasonable. On the facts of this case, I do not think the apprehension of bias is reasonable.

[17] The jurisprudence is that the superior courts should be very slow in interfering with the unterminated proceedings of lower courts, unless 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. This case cannot be located within the exception. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Such will bring the administration of justice into disrepute. In this case, in the event the applicant is convicted, whatever he is complaining about can be dealt with on appeal or review. My view is that the applicant has not met the high threshold requirement for this court to interfere with unterminated proceedings of the lower court. The review jurisdiction of this court has not been engaged at this stage. It is for these reasons that this application cannot succeed.

In the result, I order as follows:

The application be and is hereby dismissed.

DUBE BANDA J: ……

Maposa and Ndomene, applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioners