TENDAI LUXTON BITI
verses
REGIONAL MAGISTRATE
V P MUCHUCHUTI-GUWURIRO N.O
and
THE STATE
and
MICHAEL REZA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 November 2021 and 23 February 2022

Opposed Application for Review

S M Hashiti and W Mubaiwa, for the applicants
T Mapfuwa, for the respondents

CHITAPI J: The bulkiness of this application gives the impression that the matter before me is complicated and involved yet it is a straight-forward application in which the applicant applies for relief as set out in the draft order as follows:

> "IT IS ORDERED THAT:
> 1. The first respondent's decision made on the 13th of October, 2021 in dismissing the application for a postponement and ordering the hearing to proceed in the absence of applicant's legal practitioners be and is hereby set aside.
> 2. The proceedings in *State* v *Tendai Laxton Biti* CRB HreP 11362/20 pending first (*sic*) before first respondent be and are hereby set aside.
> 3. The criminal proceedings against the applicant in *State* v *Tendai Laxton Biti* CRB HreP 11362/20 be and are hereby permanently stayed.
> 4. The first and third respondents be and are hereby removed from involvement either as magistrate or prosecutor in the applicant's matter in Case No. CRB HreP 11362/20.
> 5. There shall be no order as to costs."

Despite the orders sought being straight forward, the founding affidavit spans 34 pages containing 249 paragraphs. I shall advert to in summary in due course.

As I understand from the relief sought, the applicant seeks an order that the decision of the first respondent to dismiss the applicant's application for postponement be set aside, an order that the first respondent, who is the presiding magistrate and the third respondent, who is the prosecutor should be ordered recused from dealing with the criminal trial against the

applicant. The applicant also seeks a permanent stay of his prosecution as well as the setting aside of the court proceedings in question.

The applicant is a senior legal practitioner of this court. He is a serving member of Parliament for Harare East Constituency. In his founding affidavit he deposed that he has represented that constituency since 2000 barring some interruptions. That is no mean feat. That makes the applicant a public figure in regard to which the public keeps an eye on and an interest in his doings. A public figure is newsworthy and should expect that the smallest conduct on his or her past which would not raise interest in the public eye does so for him and everyone in similar stead. I make the observation aforesaid to relate to the applicant's depositions that he became the subject of media frenzy and demonization by the former Minister of Justice Mr Patrick Chinamasa who was the Acting Secretary for Information for ZANU (PF) political party and by the Permanent Secretary of the Ministry of Information, Publicity and Broadcasting Services Mr Nick Mangwana who commented on media with Mr Chinamasa convening a press conference to denounce the applicant for allegedly assaulting a woman during the week when the nation was observing a campaign against gender based violence. These are issues which do not directly bear on the merits of the application but were included in the founding affidavit. They shall remain side issues which do not conduce to the proper determination of the application.

The applicant also devoted a lot of time setting what he described as the background to this case. That background related to his representation of the accused in the case *S v Katsimberis* and to details of what that case was about. The applicant devoted pp 8 -11 of the founding affidavit. As I understood the background alluded to, its purpose was to show how the applicant encountered the complainant. The background did not have to be that long because at the centre of the review and justaposed with the relief sought would simply be for the applicant to establish on a balance of probabilities that the first and third respondents conducted themselves in a manner or in ways which justify that the relief sought should be granted./

To the extent that some background to the application is considered important, I will set it out in brief. The applicant was charged with the offence of assault and appeared before the first respondent for trial on 18 June 2021. The charge sheet alleged that on 20 November 2020 and outside court number 17 within the corridors of the Magistrates court building, the applicant assaulted Tatiana Aleshima by threatening the complainant and pointing his right

fore-finger towards the complainant. It was alleged that the applicant was at the same time shouting at the complainant at the top of his voice whilst uttering the words: "You Tatiana you are stupid, very stupid, stupid, stupid idiot". The charge further alleged that in so conducting himself, the applicant intended to inspire fear or a belief in the complainant that physical force was about to be applied upon her or the applicant foresaw the real risk or possibility that the complainant would feel that force was about to be applied upon her but continued in his conduct notwithstanding the realization of the risk or possibility.

The facts as set out in the outline of the State case were that the complainant had been inside Court 17 as an interested spectator in a case in which the applicant was defending the accused called George Katsimberis on a fraud charge committed on the company which the complainant worked for. The complainant was in the company of two of her workmates. When the complainant was walking out of the court room, it was alleged that the applicant then assaulted here in the manner alleged in the charge sheet which I summarized and shall not repeat details thereof.

The record shows that when the case against the applicant was called on 18 June 2021, the State was represented by Mr *Reza* with Mr *Chirambira*. The applicant was represented by Mr *Muchadehama*. Counsel for the applicant indicated that he had instructions from the applicant to apply for the recusal of State counsel Mr *Reza* from prosecuting the case. Counsel for the applicant submitted that he also had instructions to apply for an exception to the charge. Counsel further submitted that, depending on the outcome of the application for exception he was instructed to make a Constitutional Court application. The applicant's counsel wanted a postponement to allow him time to put his application together. Counsel wanted to place before the court, the record of a different case involving the applicant as an accused person in which a fellow Regional Magistrate had ordered that Mr *Reza* should recuse himself as prosecutor in that case. The application for postponement was opposed by the prosecution. The first respondent was not inclined to postpone the case for purposes of making the application for a postponement to 8th July 2021 as requested by counsel for the applicant. I do not find it necessary to go through the arguments put forth by counsel nor to analyse the ruling of the first respondent because the decision to dismiss the application is not the subject of this review. It suffices to record that the first respondent stood down the application to 2.15pm to enable the applicant's counsel to put his house in order and make his application for the postponement. The application was subsequently made and it spilled over to the afternoon of the following

day because of time constraints due to the other engagements which the applicant's counsel needed to attend to on the morning of 9 June 2021.

On the following day, the 9th of June 2021 the applicant's counsel again sought a postponement. In other words, counsel came to court to apply that the trial should be postponed, not for purposes of preparing for trial but for purposes of getting adequate time to return to court to apply for a postponement of the commencement of the trial. The first respondent was not impressed by what she perceived as an act of taking advantage of the court by the defence. The first respondent then stood down the matter for thirty (30) minutes to 3.30pm to allow applicant's counsel to go through a record of proceedings in another matter which he wanted to made reference to.

The formal application for postponement was then made after the thirty minute adjournment. The application was dismissed. The defence counsel then made application for the recusal of Mr *Reza,* the third respondent as prosecutor in the case. The application for the prosecutor's recusal was similarly dismissed by the first respondent on 11 June 2021. The trial had to be proceeded with following the dismissal of the application. The trial did not however proceed because a different legal practitioner Mr *Makoni* is the one who had attended court in place of the applicant's usual counsel Mr *Muchadehama*. Mr Makoni submitted that Mr *Muchadehama* had a difficult diary for the month of June. Counsel suggested the 6th and 7th July 2021 as available dates for Mr *Muchadehama*. Mr *Makoni* moved for the trial to be postponed. After hearing submissions from the prosecutor in opposition to the postponement, the first respondent postponed the matter to 18 June 2021. In her ruling on the postponement, the first respondent stated as follows as appears on pp 173-174 of the transcribed record:

> "BY COURT
> Clearly this court will observe the constitutional right of the accused to be represented by his lawyer of choice Mr *Muchadehama*. This court is alive to the fact that he is a very busy lawyer who explained his June itinerary to the court. He gave the 28th (*sic*) of June as the earliest date he can make reasonable accommodation to attend to this matter. This court will hold him to that word. The date proposed by the State is obviously out of reach as accused's lawyer will not be available. The matter will be postponed to a convenient date for all the parties for progress to happen in this matter. Appear in this court on the 18th of June. I will put it at 11.15 in light of the earlier engagement which Mr *Muchadehama* told the court on that date."

Witnesses and the applicant were warned to return to court on 18 June 2021. On 18 June 2021, the applicant was reportedly representing an accused person in court number 20. The trial of the accused was held over to commence at 3.00pm instead of 11.15am since the

applicant was engaged in another court. Mr *Muchadehama*a was not available and a different legal practitioner Mr *Bamu* was appearing for the applicant. He submitted that he was instructed to apply for a postponement of the trial to 8th July 2021 or to any date convenient to the court. The reason for the postponement was the non-availability of the applicant's counsel of choice, Mr *Muchadehama*. The submissions made were that Mr *Muchadehama* was appearing in the Supreme Court on the same day at 9.00am. The trial was stood down to 2.15pm to accommodate both Mr *Muchadehama's* Supreme Court engagements and to allow for the presence of the applicant who was also engaged in court 20 as defence counsel in an ongoing trial.

At 2.15pm, Mr *Muchadehama* was not available. The record did not indicate whether or not Mr *Muchadehama* had spent the whole morning in the Supreme Court or whether he was still in argument in that court that afternoon. Mr *Bamu* who stood in as applicant's counsel made submission in support of an application for the postponement. He first suggested that the matter be postponed to 6 July 2021. He however discounted that date because the applicant and the prosecutor were scheduled to be defence counsel and State prosecutor respectively in the case pending in court 20. In respect of 7th July 2021 Mr *Bamu* submitted that the applicant was due to be appearing in the High Court in some matters whose details were not disclosed. Mr *Bamu* then suggested the 8th July 2021 or any other date convenient to the court.

The application for postponement was strongly opposed by the prosecution. The prosecution submitted that the date of trial continuation had been suggested by Mr *Muchadehama* counsel further submitted that the indications were that the applicant was intent on avoiding trial. Counsel submitted that there was no proof submitted to the court that Mr *Muchadehama* had a Supreme Court engangement. Counsel suggested Mr *Muchadehama* should be censured by the court for wilfully absenting himself from court. Counsel submitted that the State was ready to have the trial rolled over to the following day.

In response, Mr *Bamu* produced the notice of set down of the Supreme Court matter in which Mr *Muchadehama* was appearing. Counsel however opposed the postponement of the trial to the following day because he would not have sufficient time to acquaint with the case. Counsel indicated that the applicant had raised an exception which counsel would not be able to advance unless given adequate time. Counsel persisted that the date of 8th July 2021 remained the most feasible.

In her ruling the first respondent accepted that Mr *Muchadehama* had a Supreme Court engagement. The first respondent gave Mr *Muchadehama* the benefit of doubt about Mr *Muchadehama's* wilful absenteeism by holding that the court would accept that Mr *Muchadehama* finished his Supreme Court engagement too late for him to come to court for the applicant's trial. The first respondent noted in the ruling that under the circumstances the matter had to be postponed. She also considered that the suggestion by the prosecutor that the trial should proceed on the following day was not feasible because albeit the day being a Saturday and a court day, the applicant's counsel, Mr *Muchadehama* had not been consulted on his availability. The first respondent acceded to the application for postponement. She postponed the trial to 8 July 2021 being the date chosen by the applicant's counsel. Two unnamed witnesses were in attendance. The record shows that the witnesses were warned to appear on 8 July 2021.

On 8 July 2021, the scheduled trial date, there was some drama. The applicant did not appear in court when the case was called. Mr *Muchadehama* was in attendance. He submitted that the applicant was within the precincts of the court house in the car park. A letter was produced to the court presumably to explain why the applicant had chosen not to enter the court room. The prosecutor strenuously opposed a postponement sought by Mr *Muchadehama*. The prosecutor moved for the issue of a warrant of arrest against the applicant for defaulting court. The long and short of the drama was that the applicant had reportedly been in contact with a person who tested positive to Covid-19. The applicant finally attended in the court room so that the court would see his physical being. The first respondent immediately excused the applicant to go outside the court room whilst arguments on postponement of the matter continued. I must comment on the drama. I am aware that the matter on review is as with any criminal prosecution a serious one because it impacts on a citizen's liberty rights. The court or judicial officer remains human and when I humanely pictured the scenario, I could not help but acknowledge how the Covid-19 pandemic affected every facet of life. I could picture the fear and concern of everyone in court and how the applicant was an instant outcast who upon being physically seen was ordered out of the court room, not because of who he was or that he was an accused person but because of the fear of the risk that he could have contracted and could in turn in fact others with Covid-19 virus by reason of this exposure to an infected person. It goes without saying that everyone must remain vigilant and continue to follow guidelines on prevention of the spread of Covid-19 virus and its variants.

The drama aforesaid aside, the trial was postponed by consent to 28 July 2021. Mr *Muchadehama* submitted that he was instructed to file an exception to the charge. He indicated that he had already prepared a draft of the application. Time lines for filing and responding to the exception were agreed to and recorded. The exception was supposed to be filed by 20th July 2021, the response by 22 July 2021 and the reply by 26 July 2021. The exception and the response were timeously filed. The reply was filed on 31 August 2021.

From the endorsements on the original record cover which I perused, the record having been filed in terms of r 62(5) of the High Court Rules 20221 which obliges that the Clerk of Court whose proceedings have been brought on review to lodge the original record and copies. According to the record, post 28 July 2021, the applicant's case was in court on the following dates: 04/08/21
26/08/21
20/09/21 – warrant of arrest issued and called after default enquiry
07/10/21
13/10/21
18/10/21 – this application also filed with High Court
21/10/21

On 22 October 2021 following hearing of an urgent chamber application to stay the applicant's trial pending the review, I granted the stay. The applicant's trial has since then remained stayed and the matter is being postponed since that date. The postponements I have set out post 28 July 2021 need ventilation.

There is no indication that there was anything which took place in court on 28 July 2021 other than that the matter was postponed to 20 September 2021 on which date a warrant of arrest was issued against the applicant for non-appearance in court at the appointed time. The warrant was however cancelled upon the applicant offering an excuse for his default which the court accepted. The matter was postponed to 7 October 2021 on which date the first respondent delivered the court's ruling on the applicant's application to quash the charge. The application was dismissed. The decision to dismiss the application was not challenged on review in this application. It suffices to record that the gravamen of the applicant's application to quash the charge was that the charge did not disclose any cognisable offence. In short the applicant's contention was that even if the details of what transpired between him and the complainant as charged were proved, no offence would be constituted on that *actus reas*.

Following the dismissal of the motion to quash the charges, the trial had to proceed. It was not to be after the first respondent had ruled that the applicant should plead to the charge. The applicant's counsel Mr *Muchadehama* applied for postponement of the trial. He submitted

that he had only come to court for the ruling on the motion to quash the charge. He submitted that he had given verbal notice to the State before the court sat that depending on the outcome of the motion to quash the charge, he was instructed to make an application for referral of the matter to the Constitutional Court. He further submitted that he had instructions to also file an application for the review of the decision to dismiss the motion to quash the charge. Counsel stated that he also needed to consider the ruling and formulate grounds for review. Counsel submitted that the application for review would be filed as an urgent application.

On behalf of the second respondent, the State counsel in opposing the application for postponement submitted that it should have been clear and obvious in terms of the law that the applicant as an accused person would be required to plead to the charge following the dismissal of his motion to quash the charge. Counsel further submitted that the court did not on postponing the application for purposes of a ruling, indicate that the date of postponement was for purposes of delivering the ruling only and not to proceed with the trial in the event that the application failed. It was the second respondent's standpoint that the applicant was intent on avoiding trial.

I do not intend to dwell much on the application for the postponement because albeit the applicant's counsel having indicated that a review application would be filed against the order to dismiss the motion to quash the charge, no review application was filed despite the threat or expressed intention to do so. The first respondent dismissed the application for the postponement as being without merit. It was her reasoning that the grounds for the postponement were not meritorious. She made a finding that the applicant's counsel as a senior legal practitioner ought to have been aware that if the motion to quash the charge was dismissed, case would have to proceed to trial. The first respondent also reasoned that the fact that an accused seeks to have his or her trial postponed on the basis that he or she wants to decide on whether or not to seek a review of an interlocutory decision or to apply for referral of his or her case to the Constitutional court was not a good ground to justify a postponement. I should at this stage refer to s 171 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] which deals with the procedure where an exception has been pleaded as an issue by the accused. The provisions of the said section read:

> "**171 Exceptions**
> (1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment, summons or charge.

(2) When the accused pleads and excepts altogether, it shall be on the discretion of the court whether the plea or exception shall be disposed of first."

The law is therefore clear that following dismissal of the exception, the accused is required to plead to the indictment. *In casu*, the first respondent ordered that the trial proceeds which was in conformity with s 171 aforesaid.

The matter did not proceed to trial as directed by the first respondent. The first applicant's counsel Mr *Muchadehama* submitted that he had given verbal notice to the prosecutor that he would apply for a referral of the matter to the Constitutional Court. Counsel submitted that he placed reliance on the provision of s 175(4) of the Constitution. The provision thereof reads:

"175. Powers of courts in constitutional matters
1. ……
2. ……
3. ……
4. If a constitutional matter arises in any proceedings before a court, the person presiding over that court may, and if so requested by any party to the proceedings, must refer the matter to the Constitution court unless he or she considers the request is merely frivolous or vexations."

Counsel made the application for referral. However before he did so, Mr *Muchadehama* prefaced the application with a comment wherein he protested the dismissal of the application for postponement following the dismissal of the exception.

Counsel commented as follows on p 202 of the application:

"Your worship we already indicated that accused person intends to make an application for referral of the matter to the Constitutional Court. I can advise your worship that there were documents that we want to relate to. Just to give notice to the court that in regard to the dismissal of the application for postponement, the accused person reserves his rights because he is not happy about the court's ruling to the extent that what the court has just done is to shut the door to the access to justice for the accused person when clearly he has rights to approach the High Court…."

The prosecutor objected to Mr *Muchadehama's* comment that the court had by refusing to postpone the case, "shut the door to access to justice for the accused…". Counsel would have been aware that a court does not consider the happiness of a litigant be it the accused or the State when determining a matter. There was no point in advising the first respondent that the applicant reserved his rights in relation to his unhappiness with the dismissal of the application for postponement. Once the decision was made, then counsel and the applicant would be required to abide by the decision unless the decision is set aside on review or appeal as the case may be. The exercise of any rights of the applicant arising from the postponement

would not depend on the first respondent having to do anything since she was *functus officio* in relation to the application after ruling on it. The statement was therefore intended to simply tell the first respondent that the applicant did not agree with the first respondent's judgment. It is wrong for counsel to tell a judicial officer that counsel and his client do not agree with a judgment. The justice system in regard to functioning of the court is self-correcting. A person aggrieved with a judicial decision given in court subject to rules of court has a right to escalate the matter to a higher court. Counsel's comment that the first respondent had shut the doors of access to justice to the accused was totally disrespectful of the court and would have no positive effect in advancing the first applicant's cause. It was simply an affront to the judicial authority not to be repeated. The dignity and integrity of the court must be respected at all times by counsel. Section 164(3) of the Constitution provides that court orders and decisions bind the State and all persons to which they apply must obey them. That is how it should be like. The first respondent was commendably unmoved and simply directed counsel to make his application.

Turning to the constitutional application made, applicant's counsel made submissions outlining the grounds of the application and then called the applicant to give evidence. I need to be cautious in relation to the application for referral because it was not concluded. Therefore, to comment on its merits may be prejudicial to both the State and the applicant if the review application fails and proceedings must continue from where they were left off.

The trail of the applicant's trial was that the application for referral commenced on 7 October 2021 as already alluded to. The matter was postponed to 13 October 2021 for continuation. The applicant was to continue with his oral testimony. The date was agreed to. The applicant confirmed in para 138 of his founding affidavit that his counsel Mr *Muchadeham*a had on 8 October 2021 received a letter from the Master of the High Court to attend a meeting scheduled for 13th October 2021. The meeting according to a letter from the Judicial Manager of Aquarium Trading holdings (Pvt) Ltd was scheduled for 8.30 am being a final Creditor and Shareholders meeting to consider the judicial manager's final report. The applicant's legal practitioner upon receiving the letter advised the prosecutor that the matter should be stood down to 11.15am to allow him time to attend to that meeting. The applicant appeared at court at 9.00am with another legal practitioner Mr *Bamu* who stood in for Mr *Muchadehama*.

When the matter was called, Mr *Bamu* applied for a postponement of the matter on the basis that Mr *Muchadehama* was engaged at the Master's office. The applicant in this regard deposed in para 144 of the founding affidavit that the absence of his legal practitioner was not his fault because the legal practitioner had been summoned to a Superior Court, the High Court of Zimbabwe. The Master of the High Court is an administrative functionary of the High Court. The Master's office is not a Superior Court nor is it a Court. Section 3(1) of the Administration of Estates Act, [*Chapter 6:01*] creates the officer of the Master of the High Court. The section provides as follows:

> "3. **Master and other Officers**
> Subject to the law relating to the Public Service, There shall be –
> (a) a Master of the High Court; and
> (b) a Deputy Master of the High Court; and
> (c) an Assistant Master of the High Court at Bulawayo; and
> (d) such further Assistant Masters of the High Court and other officers as may be necessary for the proper administration of this Act; whose offices shall be public officers and form part of the Public Service."

Courts are established by s 162 of the Constitution and the Master of the High Court is not listed therein as a court. Further whilst s 162 (h) of the Constitution speaks to judicial authority also vesting in "other courts established by or under an Act of Parliament", the Master's Office is not created as a court but a public office like any other Government office. It must follow that business at the Master's office would not take precedence over court business. I therefore set the record straight for posterity.

The proceedings relating to the postponement which was refused ground this application as stated by the applicant in para(s) 6 and 7 of this founding affidavit. I will restate them because of the need not to lose focus due to the fact that the application deals with many other issues which are not directly connected with or relevant to this application. The applicant stated as follows:-

> **"6. Nature of application**
> 6.1 This is an application for review of first respondent's decision of 13 October, 2021 wherein she dismissed my application for postponement and ordering my trial to proceed in the absence of my lawyer.
>
> 6.2 The application is being brought in terms of r 62 subr 2 of the High Court Rules, Statutory Instrument 202 of 2021 as read with the provisions of Section 26-29 of the High Court Act (Chapter 7:06).
>
> **7. Grounds of application**
>
> 7.1. The decision of the first respondent was grossly irregular and irrational.

2. First respondent's decision was illegal and illegitimate
3. First respondent's decision was unconstitutional and breached applicant's right to legal representation codified under section 70 of the Constitution of Zimbabwe and his right to a fair hearing codified under section 69(1) of the Constitution.

4. Bias in the proceedings on the part of the respondents."

I must therefore note that the applicant did not specifically seek the review of any other decisions made by the first respondent. This would include the decision to dismiss the applicant's application for the recusal of Mr *Reza*, the third respondent, the dismissal of the motion to quash the charge and the dismissal of all applications for postponements previously made.

Relating now to the application for postponement made by Mr *Bamu*, it is important to refresh and record that the stage at which the case was, was that it had been postponed from 7 October, 2021 when the applicant was still giving evidence in support of his application for referral of his case to the Constitutional Court. The application for postponement appears on pp 220 to 230 of the record. Mr *Bamu* submitted that he was applying for the matter to be postponed to any of the dates which he suggested being 21-22 October, 2021; 25 October and 8, 9 and 10 November. He submitted that the primary reason for the postponement was as set out in a letter dated 12th October, 2021 which the first respondent confirmed to be on record. The letter is not part of the review transcribed record. The letter is however part of the original record. It is permissible for the court in any matter before it to refer to court records where records provide information relevant to the fair determination of a matter before the court. See *Mhung*u vs ……..1986 (2) ZLR 171 (SC) where the principle that in general, the court is always entitled to make reference to its own records and proceeding and to take note of the contents thereof is expressed.

To the extent that the letter formed the crux of the reason for the applicant to seek the postponement, I will set out its contents

"12 October 2021:

The National Prosecuting Authority
Harare
Attention – Mr M. Reza
Dear Sir

STATE v TENDAI LUXTON BITI CRB NO. HRE P 11362/20

We refer to the above matter which set (*sic*) for continuation on 13 October, 2021 starting at 0900 hours – the matter was remanded from 7 October, 2021."

We write to advise that on the 8th October, 2021 we received a letter advising us of a creditors meeting before the Master of the High Court arising from judicial proceedings in Case number HC 2020/14. A copy of the letter is attached hereto for your information:

> "We are not sure how long the matter will last or what number it is on the roll.
> In the light of the above we write to request that the matter be postponed to 21 October, 2021 or stood down to 1115 hours to enable our Mr *Muchadehama* to attend.
>
> Unfortunately, Mr *Muchadehama* will not be able to continue with the hearing after 1400 hours due to unforeseen circumstances beyond his control.
>
> We thank you in advance for your co-operation, understanding and assistance.
>
> Yours faithfully
>
> MBIDZO, MUCHADEHAMA AND MAKONI
> Cc Clerk of Court."

The cause or the justification for the postponement was that Mr *Muchadehama* had chosen to attend to a matter in regard to which his invitation or advice of its set down was communicated to him after the applicant's trial had been postponed. In short counsel gave preference to the second matter in the full knowledge that the applicant would be continuing with his testimony before the first respondent since the case had been adjourned whilst the applicant was on the stand testifying in support of his application.

Mr *Bamu* submitted that Mr *Muchadehama* was attending "to a matter in the High Court before the Master of the High Court" and that there was no indication as to when the proceedings could be concluded. As such Mr *Bamu* submitted that it was prudent to postpone the matter to another date than to stand the matter down and risk that another application for postponement would again be made.

Mr *Bamu* submitted that there was a second reason for seeking a postponement as opposed to standing down the matter. He submitted that there were proceedings under way which necessitated a transcript of a court record to be prepared and be availed to the applicant. Counsel submitted that a request for the transcript had been made to the Clerk of Court. The applicant reportedly needed to use the transcript in the current proceedings. Counsel submitted that even if the transcript was availed in the course of the day, the applicant would require time to go through the transcript and walk the first respondent through it. Counsel persisted in the

prayer for a postponement to any of the dates suggested by him subject to the convenience of the court. The details of the requested transcript was not disclosed by Mr *Bamu*.

The second respondent through submission made by the third respondent opposed the postponement. He submitted that the matter was long outstanding finalization yet it was a simple assault case. Counsel submitted that the case had been punctuated by frivolous and vexatious applications for postponement. Counsel submitted that the matter should be stood down to 1115 hours as suggested in the letter by applicant's counsel instead of postponing the matter to another date. Counsel also suggested that Mr *Bamu* could proceed to lead the applicant in his testimony with Mr *Muchadehama* taking over when the pitched up.

In reply Mr *Bamu* submitted that Mr *Muchadehama* in his letter had suggested a postponement to 21 October in the main and a stand down of the matter in the alternative. Counsel submitted that he motivated the prayer for postponement on the second consideration that the applicant required a transcribed court record for use in the application under way. Counsel again did not disclose details of the record nor its relevance to the applicant's application. Counsel also submitted that he could not take over the applicants' representation because he was not privy to what had gone on previously. Counsel then stated on p 223 of the record:

> "… for those reasons your worship I would persist with the application for a postponement but in the alternative the matter may be stood down to 11:15."

The first respondent made an interim ruling. She commented that it was not in dispute that Mr *Muchadehama* was appearing before the Master of the High Court. She also noted that Mr *Muchadehama* had suggested in the alternative that the matter be stood down to 1115 hours. She also commented that the second ground for seeking a postponement being the need for a transcript of a record of proceedings was a new matter being introduced in the midst of the applicant testifying and that the application had been commenced without the aid of the record. The 1st respondent also commented that the history of the matter showed a plethora of several applications for postponement initiated by the defence. Specifically the first respondent stated as follows on p 224 of the record:

> "Be that as it may. The history of the matter shows a plethora of several postponements applications initiated by the defence. This court has already stated that it must expeditiously deal with cases as a constitutional objective. Under the circumstances the matter will be stood down to 11.15."

At 1115 am or on resumption, Mr *Muchadehama* was not available. The second respondent through the third respondent urged the court to note that court orders should be followed and the proceedings should continue because in any event, according to his calculations there had been seven postponements already.

The first respondent stood the matter down for five minutes to enable the applicant to contact his legal practitioners so that the court could decide how to proceed since the applicant had indicated that he was not sure whether his legal practitioners were on their way. Mr *Bamu* subsequently appealed. He submitted that Mr *Muchadehama* was still engaged at the High Court. He submitted that a Mr Chakwanya from the High Court was the one presiding over the proceedings and that Mr *Muchadehama* had advised that confirmations of his engagement could be made with the said Mr *Chakwanya*. The first respondent then stated as follows on p 226 of the record:

> "BY COURT
> I think maybe State if you could assist us in having the necessary verifications whether indeed Mr *Muchadehama* is there to make the confirmations with the office of the Master. I think that will assist the court."

The first respondent briefly adjourned court for the confirmations to be made. Specifically the first respondent stated:

> "BY COURT
>
> "so the court will just stand down briefly just for you to confirm whether Mr *Muchadehama* is there at the High Court."

One resumption, the third respondent submitted that he had contacted a senior official from the Masters office, a Mr *Madi* who confirmed that there had been indeed a meeting of Aquarum Trading under judicial management. He reported that he had been referred to the official who presided over the proceedings, a Mr *Femberwi* who indicated that the meeting had ended around 9.30 am.

Mr *Bamu* submitted that he was not privy to what the third respondent had reported. He submitted that the information which he had from Mr *Muchadehama* was a message at 11.28 am wherein Mr *Muchadehama* stated that "he was stuck at the Master's Office: Counsel requested for a brief adjournment so that he would contact Mr *Muchadehama*. The first respondent after expressing concern that the court was having to adjourn for verifications granted Mr *Bamu* an indulgence to contact Mr *Muchadehama*. The court remained sitting and excused Mr *Bamu* from the court room to call Mr *Muchadehama*. Mr *Bamu* managed to contact

Mr *Muchadehama*. Counsel submitted that Mr *Muchadehama* had reported that Mr *Femberwi* had only been assisting Mr *Chapwanya*. Mr *Muchadehama* reportedly told Mr *Bamu* that there were consultations in progress with Mr *Chapwanya* who wanted clarification in relation to master's fees. The first respondent ruled as follows as appears on p 229 of the record:

> "By COURT
>
> From both counsels it is clear that Mr *Muchadehama* is still not appearing at the Masters Office as was the position in the morning. Defence has submitted that there were further directions which were given which they are following up on which he is now attending to. We have two conflicting versions from the defence and from the state on the status of the matter at the Masters' Office currently. Mr *Muchadehama* knows very well that he was supposed to be appearing before the court at 11.15. He could have delegated other directions (*sic*) to other lawyers to resolve the fees issue. He has simply decided not to prioritize these proceedings and buy time to justify the postponement to the 21st of October, 2021. The court has insisted in making meaningful progress in this matter and the court will proceed with the proceedings.
>
> Be that as it may both counsels are clear that currently Mr *Muchadehama* is not appearing but attending to other further directions. Mr *Muchadehama* knows very well that he was supposed to be appearing."

After the ruling Mr *Bamu* asked to be excused after consulting with the applicant. The proceedings then continued with the applicant as a self-actor. The applicant then submitted that what the first respondent had done amounted to an abuse of his rights in that he had been deemed legal representation. He submitted that the decision of the first respondent gave more credence to the prayer for referral of the matter to the Constitutional Court. The protests of the applicant to having to represent himself span pp 231-244. The applicant was to all intents and purposes criticizing the court for its direction. It was really an exercise in futility because the decision had already been made that the matter proceeds. The applicant did not apply to get time to engage the services of alternative counsel. The applicant insisted on complaining that he had been denied the services of his legal practitioner of choice. The legal practitioner had been adjudged to be in willful default. Therefore by protesting and seeking that Mr *Muchadehama* should represent him, it meant that the case had to be reopened and the postponement already refused be granted. In my view the first respondent was very patient in allowing for the criticism of her order to continue unabated. The applicant went on to continue with his evidence and as I have already indicated an urgent application was filed before the High Court to stay proceedings pending the determination of the review application.

I turn to consider the grounds of review. Before I do so however, I need to consider some depositions of the applicant in the funding affidavit which regrettable show use of

intemperate language. In para 145 of the founding affidavit, the applicant in commenting on the dismissal of the application for postponement made by Mr *Bamu* on 13 October, 2021 stated:

> "145. Naturally and again without even adjourning the court, the first respondent, instinctively dismissed the application for a postponement to the 21st of October 2021. Once again she made reference to her much loved constitutional provision section 165 (1) (b) which I have referred to above"

In para 162 of his affidavit, the applicant stated:

> "162 I pointed out that the first respondent was clearly biased and further that she clearly was weaponizing the law against me. I also pointed out right in her face that at times I felt like I was being prosecuted by three prosecutors, herself on the bench and Mr Reza and his co-prosecution Mr *Tafara Charambira*."

The above pronouncement show scant respect for the first respondent and amounted to a personal attack on the first respondent. The rules of practice and procedure is very simple. When a litigant is not happy with a decision, the litigant does not attack or criticize the person of the judicial officer for the decision. The decision must be obeyed until set aside by a competent court with power to do so.

Another issue which the applicant raised is an issue which was not raised before the first respondent. The applicant deposed in para 165 that the first respondent had taken a personal interest in the matter in that she personally telephoned the office of the Master to verify whether or not Mr *Muchadehama* was present at that office. The applicant averred that for that reason, the first respondent's conduct was unbecoming and that she was unfit for office of magistrate. To corroborate his criticism on the conduct of the first respondent, the applicant stated that he placed reliance on the affidavit of Mr *Muchadehama*. I considered the supporting affidavit of Mr *Muchadehama*. What is contained therein in reference to the conduct of the first respondent is disturbing not because it is true but because counsel chose to vilify the first respondent based on unverified information. Counsel deposed that he had spoken with a Mr *Gapare* who, without solicitation, told him that the first respondent had called hi*m to enquire whether counsel was at the Masters' office. He further deposed that Mr* Gapare had told the first respondent in turn that he, Mr *Gapa*re had gathered from Mr *Femberwi* that the meeting had adjourned at 9.30 am. There is no confirmation provided that Mr *Gapare* was contacted by the first respondent in person. Mr *Muchadehama* in the supporting affidavit, then made a conclusion not supported by the record of proceedings on what transpired at court. Counsel deposed as follows:

> "25. It must be from the first respondents' calls to Mr Gapare that first respondent got the impression that I was not at the Master's Office, a suggestion which is factually incorrect. 25.1 So when applicant made an application for postponement to allow me to attend, her mind was already tainted and clouded"

When one reads Mr *Muchadehama's* above quoted depositions, one gets the impression that Mr M*uchadehama* did not consult with Mr *Bamu* who stood in for him. Had he done so, counsel would have appreciated that the first respondent did not doubt that counsel was at the Masters Office. The first respondent's ruling which I have duplicated in full acknowledges as common cause the fact that Mr *Muchadehama* was at the Masters Office. The issue was about Mr *Muchadehama's* failure to attend court at the time which he had suggested of 11.15 am. The first respondent asked the prosecution to confirm whether Mr *Muchadehama* was still engaged at the Masters Office or High Court as the applicant put it in the founding affidavit. There was in my view nothing wrong with that because the prosecutor was opposing the postponement on the basis that Mr *Muchadehama* ought to have been at court at 11.15 hours. If a court directs that the prosecutor should satisfy himself of information which the prosecutor is not prepared to accept, there is nothing wrong with that.

There is nothing based on what went on at court as per the court record to suggest that the first respondents' mind was clouded or tainted. The trial of proceedings is very clear. The first respondent gave Mr *Bamu* more than one chance to contact Mr *Muchadehama* which he did. Mr *Muchadehama* was in a no show for trial. The first respondent did not base her decisions on the allegation made by Mr *Muchadehama* that she believed that counsel was not at the Masters Office. On the contrary, the decisions was based upon the consideration that Mr *Muchadehama* had made a deliberate decision to attend to another matter which was preceded by the applicant's matter. The applicants' case had already been set down for continuation before notification of the matter which Mr *Muchadehama* chose to give priority to had been advised to him. Counsel did not explain in his affidavit why he gave preference to attend a judicial management administrative meeting in place of a court engagement. He did not explain why Mr *Bamu* whom he seconded to appear for the applicant could not have instead attended the creditors and shareholders meeting with Mr *Muchadehama* attending court where the matter was partly heard. It is also Mr *Muchadehama's* deposition that the meeting was in fact finished before 11.15 hours. Counsel however chose to deal with an outstanding issue of Master's fees which in all probability could have been dealt with at any other time so that court business was prioritized. The fact that

Mr *Muchadehama* undisclosed client had come from Gweru did not present sufficient excuse for counsel not to give priority to court attendance.

Mr *Muchadehama* deposed in para 29 of his affidavit that because both the first and third respondents called the Master this was a disturbing fact which suggested that there was connivance between the two and that the two were co-ordinating about the applicants' case outside the court room. The allegation is astounding coming from a senior legal practitioner in the stead of Mr *Muchadehama*. It has already been noted that the allegation that the first respondent telephoned Mr Gapare was not supported. Counsel did not explain why he did not obtain written confirmation or affidavits from any of the mentioned staff of Masters Office to set out what transpired since Mr *Muchadehama* was not party to the alleged conversations. It was after all Mr `who in para 26 of his affidavit aversed that the personality made enquires with Mr Femberwi whether or not anyone had called him to enquire about his presence at the Master Office on 13 October, 2021. In para 27 of Mr M*uchadehama's* affidavit, he confirms what the third respondent, Mr Reza told the court that he had telephoned the Masters Office and spoken to Mr Femberwi who confirmed that the meeting at the Masters Office had adjourned at 9.30 am. This is what appears in the court record. The alleged connivance and co-ordination between the first and third respondents is not supported by any credible evidence and is nothing more than just baseless attack on them. The record is very clear on how the case against the applicant progressed. I did set out the trail at the beginning of this judgment. Mr *Muchadehama's* accusations against the first and third respondent that they may be acting in connivance against the applicant is alarming and I can only comment that counsel should avoid being emotive. Counsel has an obligation to help to protect the integrity of courts. This cannot be achieved by making baseless attacks against the judicial officer, prosecutor and indeed any other officer of the court including the accused and witnesses.

The issue I must determine despite the morass of paperwork filed of record which includes a letter of complaint to the Law Society of Zimbabwe by the complainant and the response by the applicant, the report on the final creditors and Members meeting of Aquarum Trading (Pvt) Ltd (under judicial management) record of proceedings in case No. HC 9780/18 involving the applicant and Magistrate Mapfumo is simple. The issue is whether the proceedings on 13 October, 2021 were irregular in the manner alleged by the applicant and if so the appropriate order to grant.

This application is in the nature of a review of uncompleted proceedings pending before a court with competent jurisdiction to deal with the matter. It is trite that the review court must exercise restraint to interfere with the functions of the subordinate court to avoid chaos in the functioning of the justice system. In the case of *Prosecutor General of Zimbabwe v Intratek Zimbabwe Private Limited* SC 67/20 the Supreme Court re-affirmed the courts' approach to review of incomplete proceedings as laid down in the case of *Attorney General* v *Makamba* 2005 (2) ZLR 54 where it was stated at p 64 as follows:

> "The general rule is that a superior court should interfere in completed proceedings of the lower courts 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 a seriously prejudice the rights of the litigant.'

MAKARAU JA (as then she was) added as follows on p 7 of the *Prosecutor General of Zimbabwe* vs *Intratek* case:

> "Thus, put conversely, the general rule as that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings vitiating the proceedings irreparably may superior courts interfere with ongoing proceedings. The rational for the general rule may not be hard to find. If superior courts were to review and interfere with each and every interlocutory ruling made during proceedings in lower courts finality in litigation will be severely jeopardized and the efficiency of the entire court system severely compromised.
>
> Further it is not every irregularity and adverse interlocutory ruling or decision that amounts to an irreparable miscarriage of justice. Some such lapses get corrected or lose import during the course of proceedings. And in any event as observed by *STEYN CJ in Ishmael and Ors* v *Additional Magistrate and Anor (supra),* it is not every failure of justice which amounts to a gross irregularity of trial. Most can wait to be addressed upon appeal or review after judgment."

As already noted the applicant raised four grounds of review. The first ground was that the decision of the first respondent was grossly irregular. The ground is not clear. An irregular decision is one which is incompetent or unlawful. *In casu* the applicants' prayer for postponement was refused after the first respondent had considered submissions made by applicants counsel and the prosecutor. It was within the first respondents' jurisdiction to either grant or refuse the postponement. The refusal of the postponement was a regular decisions. A lot of noise was made by or on behalf of the applicant on the fact that the prosecutor made follow ups to confirm whether the applicants' legal practitioner was at the Masters Office. The first respondent is on second as having advised the prosecutor to satisfy himself on the whereabouts of the applicants' legal practitioner. There is nothing wrong with what the first

respondent did. In fact it is commendable because all that the first respondent did was to require the prosecutor instead of him continuing to make submission in the dark to get in touch with Mr *Muchadehama* to simply resolve the issue of his non-attendance. A court will be within its right to direct counsel to engage on a matter before addressing the court. It was confirmed by Mr *Muchadehama* in his affidavit that indeed Mr *Reza* contacted a Mr Gomberwa from the Master's Office to follow up on Mr *Muchadehama's* whereabouts. The fact that Mr *Bamu* stood in for Mr *Muchadehama* did not act as a bar to the prosecutor seeking to engage with Mr *Muchadehama* as the two were the counsels in the matter which was partly heard.

In respect to allegations that the first respondent took it upon herself to follow up on the whereabouts of applicant's counsel, I have already indicated that the allegation was unsubstantiated and hearsay in nature. If Mr *Gapare* whom Mr *Muchadehama* allegedly spoke to had confirmed having a conversation with the first respondent, then the evidence would have required an answer from the first respondent. I have considered the submission by counsel for the applicant that the first respondent should have spoken. Authority was placed on the case of *TM Supermarkets (Pvt) Ltd* v *Chimhini* SC 49/18 wherein reliance was had to the judgment of MCNALLY JA in the case of *Blue Ribbon Foods Ltd* v *Dube & anor* 1993 (2) ZLR 146. The learned judge stated therein at p 150 BC:

> "In review proceedings where allegations of procedural impropriety or bias one commonly made (these having grounds which justify review) the presiding officer whose conduct is in question may, if he wishes, file an affidavit to clarify such matters as he may wish to clarify. And in a proper case though I would think exceptional case, he may be represented by counsel but only on that issue. It is not for him to enter into the merits of the case of to defend his decision…"

Counsel for the second and third respondents in turn cited the case of *Leopard Rock Hotel (Pvt) Ltd* v *Warrant Construction (Pvt) Ltd* 1994(1) ZLR 255 to the effect that in a case where the review relates to the conduct of the arbitrator, umpire or judge, or adjucating body, there are two choices which the decision maker may adopt which are either to file an affidavit setting out facts which may in the opinion of the person whose decision is to be received assist the court. Such facts would have to be colourless and not tailored to favour one party. The other choice is not to say anything and abide the decision of the court. In the case *of Sparkless Services (Pvt) Ltd and Anor* v *State and Anor* HH 135-17, MAKONI J (as she then was) stated as follows on p 3 of the cyclostyled judgment:

> "… I would add the third option is to take no action and abide by the court's decision. It might be comforting for magistrates to know that reviews are dealt with on the basis of what is contained in the record which they compile during proceedings. The court will only be

> enquirying whether there were any irregularities in the course of the proceedings which would warrant interference. The opposing affidavit by the magistrate does not add value to the review proceedings except in so far as it clarifies facts."

In casu, the first respondent was not expected to clarify any fact. A fact is something which has been established or asserted and is shown to have happened. There was no fact established in relation to allegations that the first respondent telephoned Mr *Gapar*e whilst on the look-out for the applicant's counsel. No irregularity by the first respondent was established on that score. There was no need for the magistrate to answer hearsay of the nature presented by the applicant's counsel.

The second ground of review was that the decision of the first respondent was grossly unreasonable and violated the applicant's right to a fair trial by denying the applicant legal representation. Firstly the right to legal representation is a fundamental right. It is however not an absolute right. The exercise of the right must also operate to further rather than stifle the due administration of justice. *In casu*, the applicant's counsel chose to attend to a meeting of creditors and shareholders at the Master's Office. I have already indicated that the Master's Office does not equate to the High Court. The principle that an inferior court must give preference to a superior court does not apply. The applicant's counsel did not explain satisfactorily as to why he considered that he should prioritize the meeting to court attendance. He knew that the court was waiting for him. Even his stand in colleague Mr *Bamu* was in touch with the applicant's counsel but applicant's counsel chose not to come to court. The first respondent under the circumstances did not commit a gross irregularity nor was the decision to refuse the postponement so unreasonable or so outrageous that no court applying its mind to the facts would not have come to such a decision.

The effect of the dismissed postponement meant that the proceedings had to continue. The applicant chose to persist that the decision to dismiss the postponement was wrong. His submission in this regard were unconsequential because the decision had already been made to dismiss the application. The applicant did not seek to assert his rights to engage alternative counsel. The attitude he took was to continue with the proceedings under protest. It is true that the applicant did not have a hand in the absence of his legal practitioner. However he chose to vilify the court to the extent that the applicant deposed in his affidavit that he told the first applicant in her face that she was violating his rights. The applicant's approach was confrontational and unacceptable.

In respect to whether the applicant suffered prejudice or if yes, whether the prejudice is irreparable, one must consider the nature of the constitutional application which the applicant was in the middle of making when filing the review, it could not be said to be a difficult application. As I understood the submissions of applicant's counsel made at the beginning of the application, the same was based on the fact that the applicant's rights were being violated by his being subjected to trial upon a charge which does not ground an offence. It is a matter of law I think. The applicant is till free to engage legal representation at any stage of the proceedings. He can do so now if he wishes.

The third ground was that the decision to refuse the postponement was actuated by malice and that the first respondent had developed an interest in the case and was biased. At the risk of being repetitive, the point has already been deposed of. There was no evidence of personal interest in the case on the part of the first and third respondents. The problem with the case is that the applicant has taken a view that the first and third respondents are prejudiced towards him. The applicant in para 180 of the founding affidavit stated:

> "180 The record will show that she (first respondent) has been giving me adverse ruling in almost all my applications before her."

Sadly the applicant did not challenge any of the rulings since the present review basically concerns itself with the refusal by the first respondent to postpone the hearing. The record does not show that the first and third respondent were actuated by malice or bias in the discharge of their functions.

The fourth ground of review was that the conduct of the third respondent was actuated by malice. From the record, the third respondent made submissions to oppose the postponement sought by the applicant on account of the absence of Mr *Muchadehama*. I considered his submission. He is excitable in expression and so is the applicant to a greater extent. Being tautologous as appears from a reading of the papers which I have to consider simply makes the job of the judge more difficult in that the judge must remain focused on the issue requiring determination. I have remained minded not to lose track by being lost in the paperwork. The issue remains whether the conduct of the first and third respondents provide proven grounds to justify an interference with the proceedings. The first and third respondent did not conduct themselves in any irregular matter. There was not established any justifiable grounds to order their recusal from the case. In fact the applicant complained that his assault case was placed before a regional magistrate with the Deputy Prosecutor-General.

The submission is that the applicant is being persecuted. From a review perspective there is nothing unreasonable about that. The choice of court and prosecutor is a decision for the Prosecutor-General and for as long as the court has jurisdiction it must deal with the matter.

In relation to the relief sought, the applicant prays for a permanent stay of his prosecution. Such an order is not proper to make. It does not arise from the fact or cause of review. The applicant can make that application separately. The applicant has prayed for the setting aside of the proceedings against him. I have already determined that there was nothing procedurally or legally incompetent and therefore irregular which the first respondent committed as would justify the setting aside of the proceedings nor indeed to justify the first respondent's recusal from the case. The same applies in relation to the third respondent. There are no proven and justifiable grounds to warrant an order that the third respondent be recused from the case.

In the result, I make the following order:

1. The application for review of proceedings in Case No. CRB 11362/20 is dismissed.
2. The trial of the applicant must proceed from where it was when proceedings were stayed by this court pending the determination of final relief in this application.
3. The applicant is free to exercise his right to engage a legal practitioner of his choice including Mr *Muchadehama.*
4. There is no order of costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
National Prosecuting Authority, second and third respondent's legal practitioners