AMANDA MURIDZO
and
DAVID MAZOWI
and
SHELTER KACHIRIKA
versus
BIANCA MAKWANDE
and
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8 April 2022

Court Application for Review of Criminal Proceedings

J Gusha, for the applicants
R Chikosha, for the respondents

CHITAPI J: The three applicants are accused persons in case number ACC 62-64/19 pending before the first respondent, a regional magistrate for Eastern Division, Harare. The applicants are collectively charged with the offence of bribery as defined in s 170(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The first applicant was employed by the Judicial Service Commission as a magistrate and was based at Karoi Magistrates Court. The second applicant was a respondent in a maintenance case which the first applicant presided over and it is from the alleged conduct of the applicants in that case that the allegations of bribery against them arise. The third applicant was employed by Judicial Service Commission as a clerk of court at Karoi Magistrates Court.

The applicants appeared before the first respondent for trial on 19 February 2018 at Harare wherein they pleaded not guilty to the charge. The brief facts of the allegations against the applicants were that on 27 August 2018, one Sinafi Chidoko, described as the former wife of the second applicant filed under case number M377/2018, and against the second applicant a maintenance claim for her and two minor children of the union she had with the second applicant.

The claim was for payment of $250.00 monthly maintenance. The case was set down for hearing on 11 September 2018.

It was alleged that during the month of September, prior to trial, the second and third applicants acting in connivance hatched a plan to influence the first applicant to favourably determine the maintenance case in favour of the second applicant. The third applicant allegedly approached the first applicant and sold the plan to which it was alleged that the first applicant agreed to. When the matter was heard on 11 September 2018, the first respondent granted the maintenance claim in the sum of $50.00 against the claimed amount of $250.00.

It was further alleged that on 1 October 2018, the second applicant filed an application against his former wife, the applicant in the maintenance case, for a protection order under case number PRO 233/18. It was alleged that the application was dealt with by the first applicant who granted the application. It was alleged that on 2 October 2018, the second applicant initiated an Ecocash transfer of $20 using his Ecocash number 0776428271 into the third applicant's number 0773702780. The third applicant in turn transferred the same amount into the first applicant's account number 0778508863. It was alleged that the said amount was intended to be a reward to the first applicant for having favourably dealt with the second applicant's cases.

It was alleged that subsequent to the protection order case, the second applicant's former wife filed an application under case number 311/18 for the upward variation of the maintenance order of $50 by another $50. The first applicant presided over the case on 23 October 2018 and granted a variation of $20 as offered by the second respondent. It was alleged that in granting the variation of $20 the first applicant was influenced by the $20 bribe previously paid to her through the Ecocash transfer already referred to.

It was alleged that an anonymous caller tipped off the second applicant's former wife that money was exchanging hands amongst the applicants and that she would never win a case against the second applicant. A taxi driver was said to have similarly tipped the former wife about the money exchanges. These rumours resulted in the former wife making a report to the provincial magistrate in Chinhoyi. The matter was referred to the police for investigations and it was through the subsequent investigations that the transaction involving the $20 was discovered.

The trial commenced with all the applicants pleading not guilty to the charge. They filed a joint defence outline in which they denied that a bribe ever changed hands. The averred that there was no nexus between their conduct and the cases which the first applicant presided over. It is not necessary for purposes of this review to interrogate the defence outline because this matter was brought on review before the defence case was opened which necessarily means that the defence outline was not evidence of the applicants as it had not been introduced or adopted as such.

The trial commenced and the second respondent led evidence from three witnesses before closing its case. The applicant pursuant to the provisions of s 198 (3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] applied for their discharge and a verdict of not guilty. The provisions of that section provide as follows:

> "(3) If at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged on the indictment, summons or charge or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty".

The application and scope of the above provision is a settled area of procedural law. There have been many decisions of the superior courts on the matter. In the case *Prosecutor General* v *Musvaire and Ors* HH 816/15, HUNGWE J (as he then was) held that there were only three recognized grounds upon which an application for the discharge of the accused at the close of the state case could succeed. The learned judge after considering various authorities listed the grounds as:

(a) that there is no evidence to prove an essential element of the offence - *Attorney General* v *Bvuma* 1987 (2) ZLR 96 (S) at 102.

(b) that there is no evidence on which a reasonable court, acting carefully might properly convict - *Attorney General* v *Mzizi* 1991 (2) ZLR 321 at 323 B.

(c) that the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court acting carefully could convict *Attorney General* v *Tsvangirayi* 1997 (1) ZLR 575 (S) at 576.

The learned judge also stated that where a trial court places reliance on any other ground outside of the three, that court would in so doing commit a misdirection of law. It must be pointed out that in the event that where any of the three grounds are established the trial court has no discretion to allow the trial to continue. The accused must be discharged and a not guilty verdict returned. I also commend for reading in regard to the approach of the court to such an application, the judgement of DUBE BANDA J in the case of *S* v *William Hlambelo* HB 251/20. The judgement is well written and instructive.

Having set out the law on the scope and application of the provisions of s 198(3). I proceed to discuss how this application should be approached generally. The applicants seek the review of the second respondent's decision to dismiss their application for their discharge at the close of the state case. By this review, the applicants seek that this court or judge of this court should interfere with the proceedings against the accused before their completion. Such a remedy may be competently granted. However, the review courts or judge should be slow to interfere with the discharge of the judicial function of the trail court unless not to do so would result in irreparable injustice to the accused. The authorities are clear on this approach to the review of uncompleted proceedings.

In the case *Lee Waverly John* v *State & Anor* HH 117/14 MATANDA MOYO J refreshed on the court's approach as aforesaid when she stated as follows on page 3 of the cyclostyled judgement:

> "Generally it is not desirous for a higher court to interfere in an incomplete trial before an inferior court. John Reed – Rowland in his book Criminal Procedure in Zimbabwe says this on p26;
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> > "The High Court's statutory power of review can be exercised at any stage of criminal proceedings before an inferior court. However, in uncompleted cases, this power should be sparingly exercised. It would only appropriate to do so in the rare cases where otherwise grave injustice might result or justice might not be obtained. For example, if grave irregularity or impropriety occurred in the proceedings, it would be appropriate for the High Court to consider the matter. Generally however it is preferable to allow the proceedings to run their normal completion and redress by means of appeal or review".

The learned judge endorsed the approach enunciated by the respected author. She noted that whilst the High Court had jurisdiction to review proceedings of inferior courts and tribunals at whatever stage the proceedings were at, the court should only do so in those rare cases where

not to do so would result in a grave injustice occurring. The learned judge stated that the general approach should therefore be to allow the proceedings to be completed where after a dissatisfied party may seek redress by way of appeal or review.

The above principle was reiterated by MAKARAU JA (as she then was) in the case *Prosecutor General* v *Intratek* and 2 Ors SC 67/20. The learned judge stated as follows at p 7 of the cyclostyled judgement:

> "The general rule on when a superior court should interfere with unterminated proceedings of a lower court was settled in *Attorney General* v *Makamba* 2005 (2) ZLR 54 (5) where MALABA JA (as he then was) had this to say at 64C:
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> > The general rule is that a superior court should interfere in uncompleted 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 seriously prejudice the rights of the litigant".

The learned judge referred to the South African case of *Ishmael & Ors* v *Additional Magistrate Nymberg & Anor* 1963 (1) SA 1 (A) where it was observed that superior courts should be slow to interfere in uncompleted proceedings of the inferior court and only do so where a grave injustice would occur or justice could not by other means be attained.

The learned judge remarkably and in simple wording explained the court's approach as follows at p 8 of the judgement:

> "Thus, put conversely, the general rule is 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 on-going proceedings.
> The rationale 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 efficacy of the entire court system seriously compromised".

The court's approach is well laid. An accused person on trial ought to appreciate and respect the criminal justice system. The principle of subsidiarity should be observed. In its simplest definition, the subsidiarity principle connotes that a lower authority be given and be allowed the leeway to exercise its independence in relation to its functions in relation to higher authority. Within the context of the court system, the lower court should be given room to perform

its judicial functions without unjustified interference by the superior court. It is improper for the accused on trial to have one foot in the trial court and another foot at the door of the superior court seeking that if an interlocutory decision which that accused is not happy with is made, the accused immediately enters the High Court to seek a review of the lower court's decision. Invariably that application is accompanied by an urgent application for stay of proceedings pending review. The system as MARAKARAU J remarked in the Intratek case becomes compromised because a case will then be under determination in two courts at the same time which causes confusion and lack of smooth finality to cases.

It must follow then that the approach which I adopt in this review is to be slow in interfering with the proceedings unless the applicants have established on a balance of probabilities that the Regional Magistrate decision to dismiss the applicant's application for discharge suffered from an irregularity or irregularities of such a nature that grave injustice might result or that justice may not obtained unless I set aside the decision.

My reading of evidence and line of cross examination of the accused shows that critical or material persons facts were not in dispute. The interpretation or conclusions to draw from those facts are what would then ground points of departure. It must be kept in mind that when considering the application for discharge at close of state case, the court is not concerned with the accused's defence but with the state evidence led against the accused. The application amounts to an analysis of the state evidence to determine whether the state evidence grounds a *prima facie* case on the charge and that the evidence is such that if not controverted or rebutted, a guilty verdict against the accused would be returned.

The precis of the state evidence led from the three state witness was as follows:

Taengwa Chibanda. He is employed by the Judicial Services Commission as a magistrate. He was the provincial head magistrate covering Karoi Court where the first applicant was based and all three applicants resided in Kroi. At the instance of the acting chief magistrate, the witness investigated a letter of complaint against the applicants. His investigations revealed that an amount of US$20 had been transferred from the Ecocash account of the second applicant into that of the third applicant and from the third applicant's account into the first applicant's account. The witness stated that, he confirmed that the first applicant was handling or had handled maintenance

cases in which the second applicant was being sued by his erstwhile wife namely Sinafi Chidoko. Sinafi Chidoko's is the one who had forwarded a letter of complaint on the applicants' alleged corrupt dealings in relation to her case to the chief magistrate. The witnessed stated that the he asked for report on the matter from the first and third applicants. He testified that the third applicant explained that she had some relationship with the second applicant and that as regards to the first applicant, the third applicant owed the first applicant some money for diapers.

The witness further testified that members of the Judicial Services Commission are not allowed to receive money from litigants who are to be treated as and are in fact their clients. They equally should not receive money from legal practitioners. The witness further stated that the monetary transactions were not permitted when it was suggested to the witness that the payment from the second applicant was for a debt, he responded that he could not say whether the payment was for a debt or not but emphasized that it was not permitted to for the court officials to transact with a litigant. He maintained that the trial of the Ecocash transactions was established from the litigant to the Clerk of Court and then to the magistrate, that is, from second to third and lastly to first applicant. The witness testified to Ecocash statements showing the telephone numbers of the applicants in transactions which were for the period May to October 2018. When put to him that at the time when the transaction of $20 passed hands the first applicant did not preside in the maintenance court application, the witness stated that his brief was to find out if there was a link in transactions and he stated that he connected the paper trial. The witness testified that the court record on the maintenance proceedings was not elaborate and one could not follow the record how the determination was reached. One could not therefore not tell how the amounts awarded were arrived at. The witness fairly conceded that the $20 moved from the accounts of the three applicants and that it was not for him to say what the purpose of the money nor of the name to be given to the transaction was.

The next witness was Paul Mishoni. He was the investigating officer. He testified that the investigated Ecocash transactions passed over to him by the provincial magistrate Mr Chibanda who was based at Chinhoyi. He materially testified that he considered Econet Ecocash transaction records for the lines used by the three applicants. He noted that the sum of $20 had on 20 October, 2019 had been transferred from the account of the second applicant, then a similar amount of the

third applicant and again from the account of the third applicant into that of the first applicant, a similar amount. He testified that the account of the second applicant was 0776 428 271. The second applicant transferred $20 into the account of the third applicant. The third accused's account held $18.91 and the $20 credit increased the balance to $38.91. Upon transfer the $20 to the third applicant the second applicants account remained with a credit of $24.91. The second applicant sent a further $6 into the third applicants account. The witness stated that the third applicant transferred $20 to the first applicant in turn on the same date.

The witness testified that the third applicant claimed to have been in love with the second applicant. He stated that when he went through messages between the second and third applicants he did not find any love messages. The witness however testified that from the call history there were several phone exchanges between the second and third applicants. In relation to the payment to the first applicant by the third applicant, the witness testified that the third applicant stated that she was paying a debt for baby diapers pampers and undergarments supplied to her by the first applicant. The witness stated that on questioning the first applicant about the supply of the diapers, pampers and undergarments the first applicant could not produce any document, invoice or other document to show that she supplied the items mentioned by the third applicant. The witness testified that the first applicant did not have nor produce any document or other proof that she was engaged in any form of informal trading. He admitted that there were other transactions between the second and third applicants ranging from $1 to $10. The interest was however on the $20. It was the witness for the evidence that he recorded a statement from the second applicant's former wife who was better that she applied for $250 maintenance for three minor children but was awarded $50. The witness testified that he formed the impression that the first applicant and second applicants were using the third applicant as a conduct or runner in relation to the exchange of money which he believed was a bribe paid to the first to the first applicant by the second applicant.

The witness in cross examination fairly conceded that there was a marked frequently of calls between the second and third applicants. He agreed that they could have been in a love relationship and that there would be nothing unusual of they sent each other money. He admitted that there were other money transfer transactions between them. He testified that other transactions were not of much interest but the $20 because its history was that there the amount was transferred

by the second applicant into the third accused's account and the third applicant within 10 minutes of the credit transferred it into the account of the first accused. The witness testified that the applicants provided transaction details to the provincial magistrate which were not authentic and did not watch the ones obtained from Econet following a court order having been made ordering Econet to supply the records. He testified that the applicants provided a print out to the Provincial Magistrate which had the missing page. The missing page is the one which had evidence of the transaction forming the basis of the charges against the applicants. The witness also stated that the case originated from another person who tipped the second applicants' former wife that money had charged hands involving the three applicants for purposes of having her claim compromised in favour of the second applicant. It was the follow up on the report which triggered the investigation.

The next piece of evidence was the production and acceptance into the record as common cause evidence, the Econet print outs to evidence the $20 transaction. The last witness was Sanafi Chidoko, the complainant in the maintenance matter. She testified that she was currently a student at Mkoba Teachers College Gweru. She was the former wife to the second applicant. She knew the first and third applicants as the magistrate who dealt with her maintenance cases and the Clerk of Court at Karoi Magistrates Court respectively. Second applicant filed. She confirmed that she filed a maintenance claim for payment of $250 against the second applicant and the first applicant presided over the case. She was granted $50.00. The second applicant was challenging paternity. She testified that on the second occasion she approached the court for an upward variation of maintenance because she needed to secure other accommodation because the second respondent had sold the house where she was staying and the messenger of court had served her with an eviction order. The third application according to the witness pertained to a protection order application against her by the second applicant who claimed that the witness was insulting him. The first applicant presided over that case as well. The witness that she in relation to the upward variation of maintenance she claimed $50 but she was granted $20. She testified that she did not believe nor suspect that the proceedings would be influenced by any of the applicants. She testified that the third applicant had been helpful to her when she sought a $50 variation and offered to telephone the second applicant before advising the witness to file a variation application. She

testified that she was not satisfied with the amount of the variation because the second applicant. She testified that she was no satisfied with the amount of the variation because the second applicant could afford to pay the $50 more if one considered his payslip including his commitment to look after his other children.

The witness testified to her pursuit of justice and stated that she consulted ZWELA a woman's voluntary organization and she was assisted to prepare papers to apply that she joined in the proceedings relating to eviction. She then subsequently received a call from a good Samaritan who advised her of the shenanigans of the applicants. The person assisted her to write a letter of complaint to the Chief Magistrate. The investigations testified to at the trial were put into motion. She complained about hour proceedings were handled and her being denied audience by the first applicant even though she would have raised her hand to speak. These would be matters for appeal or review and the evidence in this regard did not really have direct relevance.

Under cross examination the witness insisted that it was the first applicant who dealt with her cases. The greater part of the cross examination touched on the witness disgruntlement on how her matters were dealt. It is not necessary for me to comment on that line of cross examination because the real issue was the transaction of $20 involving a litigant and court officials namely the magistrate and clerk of court. The witness did not know of the transaction in issue until tipped that there was something untoward Going on. She was advised to report leading to internal investigations by the provincial magistrate and Zimbabwe Anti-Corruption Commission. The state closed its case.

The applicant filed a written application for discharge at the close of the State case. The state responded in opposition. In her ruling the first respondent analysed the State evidence. She properly noted that most of the evidence was not in dispute. She properly captured the crux of the matter in her ruling on p 154 of the record in the following terms:-

> "As alluded most of the evidence is not disputed. Accused 1 sent money to accused 2 which money was then immediately sent to accused 3. Accused 1was a litigant in cases which were determined by accused 3. Accused 2 was a clerk of court who was aware of these cases by virtue of being the clerk of court and being informed of the issues by accused 1's wife.
> Can this court faced with such evidence dismiss the evidence as hypothetical and a fishing expedition. This court thinks not. A judicial officer is expected to be independent. She must make her decisions without any influence from another. She must not receive any consideration whatsoever for the decision.

> The records which re contained in the record (*sic*) coupled with the evidence of the complainant that is of accused 1's estranged wife, clearly shows that accused 3 was dealing with civil issues relating to accused 1.
> Accused 1 from the evidence led so far sent money to accused 2 through ecocash which money was then sent to accused 3 on the very day. Even if this court was to accept that there was a love relationship between accused 1 and 2, the question would still remain- why was money sent to accused 3 who was a judicial officer dealing with cases relating to accused 1……"

The learned magistrate noted that the facts adduced and not contested raised a *prima facie* case against the accused. The regional magistrate was of the view again quite rightly that essential elements of bribery had been laid out, these, being, the exchange of money on the same day and about the same time amongst the three applicants, the fact that the second applicant was a litigant and source of the money and the complainant rebuttal that the second and third applicants were lovers by the second applicant's erstwhile wife. The regional magistrate stated that it was anomalies that the third respondent would be transferring money to a magistrate where the money is traced to a litigant. The regional magistrate properly accepted that the circumstantial facts established a *prima facie* case of bribery.

The applicants put forward seven grounds of review. The numbering is recorded as ground1 then 1.1 to 1.6. A reading of the grounds do not show that they all derive from ground 1 which is the main ground. The applicants averred that the regional magistrate's decision to place the applicants on their defence is:

> "So outrageous in its defiance of logic that no sensible court having applied its mind to the facts of the case would arrive at it…."

In considering the above ground, the court can only found the ground to be established if the applicants show that the decision reached was either unlawful, grossly unreasonable or procedurally irregular or unfair this principle is in legal parlance referred to as the Wednesday principle and is now legislated in s 3(1)(a) of the Administrative Justice Act [*Chapter 10:28*] which provides that an administrative authority should act lawfully reasonably and in a fair manner. See *Zimbabwe School Examination Council* v *Victor Mukomeka Chingasiyeni Govhati* SC 10/20. The applicants would need to establish that the first respondent did not apply the correct test in determining the application for discharge. The applicants would have to show that the decision to dismiss their application for discharge was so outrageous, egregious and defied legal and moral

standards to an extent that it could reasonably be inferred that the first respondent must have taken leave of her senses to come to such decision. This ground is a difficult ground to establish became generally speaking the ground implies that the judicial officer was out of synch with the appreciation of the evidence led or the decision reached could not be said to be based upon or to derive from the evidence.

In ground 1.1 the applicants alleged that the decision to place applicants on their defence was a perfunctory one which was devoid of reasoning process. The applicants averred that the first respondent plucked the decision from the abstract. I assume that the applicants' real complaint is that the decision was not supported on the evidence. It is clear that the regional magistrate listed circumstantial facts from which a prima facie that the applicants committed the offence of bribery could be inferred as well grounded. The common cause facts have been dealt with. One can simply the crucial fact. The first applicant was the magistrate in cases in which the second applicant was a litigant. The third applicant as clerk of court had a working relationship with the first applicant. The third applicant also claimed to be in love with second applicant who in turn transferred money to the third applicant who immediately transferred a similar amount to the first respondent. In such a situation it defies logic and common sense for any reasonable person not to infer that a case of bribery has been prima facie established. If any decision could be said to be outrageous in its defence of logic and common sense, it would have to be a decision not to place the applicants on their defence to explain such a naked act of improper conduct bordering on criminality.

In ground 1-2 the applicants averred that the first respondent failed to appreciate the applicant's defences that payment to the first applicant was for a debt due by the third applicant clearly shows the misapprehension of the law on the part of the applicants or their legal practitioners. At the close of the State cases, there is no defence case to relate to. These could be a defence position revealed by cross examination when that the accused null pay is put to the State witness. The court can only relate to a defence and assess its availability upon it being given by the accused person.

It was accepted that the matter was to be decided on circumstantial evidence which meant that in the end, the most reasonable interference which excludes all other reasonable inferences

which may be drawn would be the one to draw. Where there is a duty to speak or explain an unusual and seemingly improper transaction as was entered into by the three applicants, their explanation becomes part of the circumstantial evidence to be considered together with all other circumstances to reach a decision on the guilt or innocence of the applicants. The regional magistrate was correct to find that State had established a *prima facie* which required answers. A *prima facie* case is one wherein if there is no response to the evidence, the *prima facie* case would be sufficient to found a conviction on the charge.

The applicants also averred that the state had not shown that the money was a bribe because the second and third applicants had exchanged money in other transactions and thus no inference of a bribe could reasonably be made. It was alleged that the first applicant was non-shown to have presided over the second respondent's cases. This submission is false. The first applicant was according to the evidence the presiding officer in the cases aforesaid. It was not important that the money did not change hands on the actual debts of the hearings. The crud of the matter was and remains for the applicants to give a reasonable explanation of the transaction.

The applications averred that first respondent unprocedurally allowed court records which had not been referred to in the State outline to be produced the applicants also averred that the production of court records was shocking and prejudicial to the applicants. The nature of the prejudice was not outlined. The applicants averred that the first respondent became an investigation, prosecution and court at the same. This ground does not have legal substance. The State outline clearly indicated that there were cases dealt with by the first applicant in which the second applicant was a litigant. A reference to such cases cannot have prejudicial effect. Courts will always refer to their records where necessary. The production of court records was not unprocedural nor irregular.

In the last ground for review the applicants averred that the first respondent reversed the *onus* of proof to by requiring that the applicants should prove why the first applicant was given and in the process the first respondent wrongly rejected the explanation of the applicants given in the defence outline. A defence outline as the name suggests is an outline. It sets out facts which the accused person intends to rely upon for his or defence.

Until the accused speaks to the defence outline and adopts it and to content as a piece of evidence fairing his testimony then the document remains just that, just an outline. The court cannot rely on the defence outline when assessing whether or not to discharge the accused at the close of the State case. These was no shifting of *onus* which appears from the record.

In conclusion, the application for the discharge of the applicants was routinely made maybe to test the waters. The evidence against the applicants clearly raised a prima facie of bribery. The applicants must explain the innocence of the trial of events. This is not a reverse *onus* requirement. The application for discharge was therefore properly determined and there was no irregularity or misdirection committed by the first respondent in his judgment. No grave injustice was shown to be likely to result if the matter proceeds to the defence case. Indeed this is a matter in which the requirement for the applicants to explain the innocence of their transaction of exchanging money is justified.

In the result the following order is made.

IT IS ORDERED THAT:

1. The applicants' application for review of the first respondent's decision to dismiss their application for discharge at the end of the state case is dismissed.
2. The first respondent is to proceed with the trial in terms of trial procedures.
3. There be no order of costs.

Gurira & Associates, applicant's legal practitioners
National Prosecuting Authority, second respondent's legal practitioner