KENES SIBANDA

AND

PROVINCIAL MAGISTRATE N.O KEZI COURT

AND

PUBLIC PROSECUTOR N. O KEZI COURT

AND

ATTORNEY GENERAL N.O

AND

MINISTER OF JUSTICE N.O

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 18 JUNE 2009 AND 28 MARCH 2013

Miss N. Ndlovu for the applicant
Mr F. Museta for the respondents

Judgment

CHEDA J: On the 18th June 2009 this matter was heard before me in chambers. After hearing both counsel I dismissed the application and undertook to give my reasons later these are they.

This is an application for interdicting the magistrate court Kezi from proceeding with case number Matobo CR 17/04/09 pending the finalisation of case No. HC 903/09. The allegations as presented by the State are that applicant was charged with stock theft. He pleaded not guilty, but, was convicted and the matter was postponed to the 21 May 2009 for sentence by consent of both counsel.

The historical background of this matter is that applicant first appeared in court before first respondent on the 27th April 2009. He was remanded in custody to the 7th May 2009, he was unrepresented at the time. He was further remanded to the 14th May 2009 for trial. On

his appearance on the 14th May 2009 he was being represented by Miss *N Ndlovu*. Her legal practitioner applied for a postponement in order to enable her to prepare for the trial, the application was granted and the matter was postponement to the 21st May 2009.

On the trial date counsel for applicant failed to appear in court in the morning resulting in the matter being adjourn to 12:15am. She again did not appear then and the trial proceeded in her absence. Upon enquiry as to the whereabouts of his legal practitioners, it is said applicant professed ignorance and stated that he had last seen and spoken to her on the 14th May 2009 when she applied for bail.

It is first respondent's evidence in her affidavit that at that stage she came to the conclusion that applicant was then unrepresented and allowed the trial to commence.

On the 28th May 2009, applicant's legal practitioners appeared in court and some misunderstanding between first, second respondent on one hand and herself on the other took place. The misunderstanding was on the basis that first respondent should not have allowed the trial to continue on the 21st May 2009 in her absence. This was despite the fact that she had not communicated her failure to attend either to the public prosecutor or to first respondent.

The argument then spilled into the court, but, the matter was then postponement to the 19th June 2009 after judgment had been handed down and applicant was convicted. After conviction, applicant's legal asked for a postponement to the 19th June 2009 in order to prepare for sentence.

However, instead of preparing for sentence, she filed an application for review on the 11th June 2009 and this urgent application on the 12th June 2009. I express no opinion about these activities and I will only deal with the urgent chamber application.

Applicant has argued that the proceedings that were due on the 19th June 2009 should stop as they were likely to result in him being sentenced to a mandatory imprisonment term. It is further his contention that in the event that the sentence is passed he will suffer serious prejudice.

In order to determine this matter it is unavoidable to visit the application for review as it is the reason for this application. In his application for review, applicant averred that he was

denied the right to defend himself in terms of section 18(3)(d) and (e) of the Court of Zimbabwe. He further argued that as a result of such denial his rights to a fair trial as guaranteed under section 18(2) and 18(a) of the Court of Zimbabwe were infringed.

In order to determine this matter it is inescapable to examine his legal practitioners' conduct in the whole matter. I find as a fact that applicant's legal practitioners appeared in court on the 14th May 2009 whereupon she requested for a postponement to continue with the trial on the 21st May 2009. However, she neither communicated with any of the respondents or any court official for that matter, nor appeared in court herself for the said postponement. She simply defaulted. The reason for that default is not difficult to see. She had deceived the court into believing that she was going to attend court as per her request for the purposes of the conclusion of the trial. She was aware that if she appeared on the agreed date she would have had difficulty in seeking another postponement. Her reason for not attending court as per the postponement by consent, in my view, is that she was still preparing her application for review solely to derail the conclusion of the matter on the 21st May 2009. I base my conclusion on her failure to give a convincing reason about her failure to attend. In her supporting affidavit, she stated that her failure to attend was due to the fact that she was attending to applicant's bail application and other administrative issues, which she deliberately chose not to elaborate on.

In an application of this nature, it is highly necessary for deponent to take the court into his/her confidence by making a full disclosure of his/her failure to attend. This is so because applicant's legal practitioner is an officer of the court and, therefore, has a duty to respect the court. It is trite that a legal practitioner has a duty to attend court when he/she is expected to do so, failure to do so without the excuse or inability (such as illness) or leave of the court is misconduct, which may, depending on the circumstances, be regarded as serious, see E.A.L Lewis, Legal Ethics: A guide to Professional Conduct for SA Attorneys. Juta and co, Ltd 1982, at p153. A legal practitioner must at all times act with proper respect for the court in order to avoid impairment of its authority and dignity.

Respondents described applicant's legal practitioner's behaviour and conduct as extremely discourteous in that she was "throwing indiscriminate accusations" at them. This to

me sounds like a riotus behaviour which was uncalled for. While one understands her anger, unjustified as it was, there was a need for self-control on her part. E.A.L Lewis *opere citato* at p14 states:

> "The legal profession undoubtedly imposes strains both mental and nervous upon those who practice it and it is exceptionally easy to allow these strains to reveal themselves in one or other expressions of feelings which involves discourtesy. It is the duty of every attorney to endeavour to curb away tendency to discourtesy in all his relationships, professional and otherwise"

After all courtesy is the inseparable companion of virtue. Applicant contends that should the hearing proceed; he would not have been accorded a fair trial. It is indeed, his constitutional right to a fair trial. I agree with him as the law is clear in that respect. In *Nhari v Public Service Commission* 1999(1) ZLR 513 (s) at 518 B-C, GUBBAY CJ stated:-

> "It is, to my mind, a matter of considerable importance, both in the interests and administration of justice, that every person who enjoys the fundamental right to be represented by a legal practitioner before a court or other adjudicating authority established by law should be accorded every opportunity of putting his or her case clearly and succinctly to such body. Almost invariably that function can only be performed properly when it is presented by a person trained and experienced in law."

I find that applicant and her legal practitioner were aware of the 21st may 2009 as a trial date, but, the legal practitioner chose not to attend and did not communicate her failure to first or second respondents. That failure was deliberate as the reason given is unconvincing.

In view of her conduct, it cannot be said that applicant was denied a fair trial when his legal practitioner wilfully defaulted. After all her request for a postponement was to enable her "prepare" mitigation before sentence.

These are the reasons for the dismissal of this application.

Coghlan and Welsh, applicant's legal practitioners
Attorney General's Office, respondents' legal practitioners