DEXTER TAWONA NDUNA
and
MUNYARADZI SIMANGO
and
TAKEMORE MAPHOSA
versus
THE STATE
and
JUDITH TARUVINGA NO.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 17 & 31 OCTOBER 2018

Urgent Chamber Application

I Mataka, for applicants
T Mapfuwa, for 1st and 2nd respondents

TAGU J: The applicants are seeking a provisional order interdicting the respondents from proceeding with the criminal proceedings which are at defence stage and currently under way against the applicants at Chegutu Magistrates Court in case number CRB CHG 674-76/18 pending the final determination of an application for review brought by the applicants under case number HC 9109/18. That application for review is pending in this court. The first respondent is The State which is responsible for Criminal prosecutions on behalf Zimbabwe and is represented by an officer responsible for the applicants' trial. The second respondent whom I shall refer to as the magistrate is the one presiding over the applicants' trial.

The applicants were arraigned for trial on allegations of intraparty political violence which rocked their party's primary elections (ZANU. PF). The first applicant is facing three criminal charges at Chegutu Magistrates Court all of which are political violence cases under case numbers CHG 677/18, CHG 675/18 and CHG 674-76/18. On three previous occasions the trial could not kick off because of the first applicant who came up with one explanation or the other yet the

witnesses were available. On the 1st of October 2018 the matter could not kick off in the morning because the first applicant indicated that his legal practitioner of choice one Mr Arthur Marara was not available. One Mr Mukunduri was sent to relay the message.

From the transcript of the record produced as annexure "A" Mr Mukunduri told the court that he represented third accused (the first applicant). He submitted to the Magistrate that he was standing in for Mr *I Mataka* for Chimbari Legal Practitioners together with A. Marara and Associate. He said Mr *I. Mataka* had told him that he was seized with an electoral petition EC1918/18 for first applicant which was still pending at the High Court. However, the matter was dragging because the first applicant had engaged the services of an advocate namely Advocate Zhuwarara from the advocate chambers. He further submitted that the first applicant was the key witness in the matter and was set to testify. On that basis Mr *Mataka* had instructed him to seek the indulgence of the court to have the first applicant's matters pending before the court removed from remand. In actual fact he had advised him to seek refusal of further remand to have these matters finalized since they were not certain when they would have the matters finalized. He finally suggested that once the electoral petition matters were finalized they can have the first applicant summoned and have his cases finalized. He promised to bring proof that the first applicant's legal practitioner was indeed attending a High Court hearing.

The state opposed the application for postponement and stated that the court had previously given 1 October 2018 as the last date of postponement and the witnesses were duly told. His challenge was that there was no evidence from the High Court, Mr Zhuwarara or Mr Marara on what Mr Mukunduri was saying.

The Magistrate after hearing submissions could not have none of that and stood the matter down to 11.15 AM to enable the first applicant to get in touch with his legal practitioner. In her brief reasons for refusing further postponement and or removal of first applicant from remand the Magistrate stated that the matter was firstly set for trial on 20 August 2018 but the first applicant defaulted court and a warrant of arrest was issued against him. The warrant of arrest was latter cancelled on 31 August 2018. All the three applicants were remanded to 11 September for trial but the first applicant defaulted again citing electoral court commitments. A warrant of arrest was again issued against the first applicant only to be cancelled on 28 September 2018 and the matter was again postponed to 1 October 2018 for trial. She said there was no justification for further

postponement or refusal of further remand since High Court petitions should not cause other criminal courts to be suspended. Besides the Magistrate noted that there was no proof of such High Court petitions involving first applicant. In any case the Magistrate noted that The State and the witnesses were ready to proceed to trial. She finally stated that the Court had been paying witnesses who had been religiously attending court.

Mr Mukunduri then asked to be excused as he had a matter to attend at the Regional Court. He was duly excused.

When the matter resumed at 11.45 AM the applicants had failed to get in touch with their legal practitioner of choice. The trial then resumed. The applicants gave their defence outlines. At the close of the day the state had closed its case and indicated that the matter was to be postponed to 8 October 2018 for the defence case to resume. Meanwhile the applicants rushed to this court and filed an urgent chamber application for review on 4 October 2018 seeking the following relief on the basis that their Constitutional right to legal representations had been violated by the refusal to postpone the matter or have the accused removed from remand until such time that their legal practitioner was available. The interim relief sought is as follows-

> **"TERMS OF THE FINAL ORDER**
> IT IS HEREBY ORDERED THAT
> . The Provisional Order granted by court on the ----------of October 2018 is hereby confirmed.
> . The criminal proceedings in CHG674-76/18 be and are hereby stayed pending the finalization of the application for review in HC 9109/18.
> . There shall be no order as to costs.
>
> **TERMS OF INTERIM RELIEF GRANTED**
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> 1. The criminal proceedings against the Applicants in CHG674-76/18 are hereby stayed pending the return date.
>
> **SERVICE OF THE PROVISIONAL ORDER**
> Service of the provisional order shall be effected by the Applicants' Legal Practitioners"

In his founding affidavit which was supported by the second and third applicants the first applicant stated among other things that there was no basis in the era of modern constitutional jurisprudence for a court of law to deny an accused person legal representation. The applicants submitted that they were denied the right to a fair trial in terms of the precincts of the constitutional provisions which their legal counsel was to amplify in the Heads of Argument. They further suggested that if the Magistrate tried to proceed with the trial they were going to apply for her recusal. In their view the decision of the Magistrate was so outrageous in its defiance of logic such

to such an extent that no reasonable person who applied his/her mind to the matter would have reached the same conclusion. They said they would be prejudiced and that they had no other remedy other than to make this urgent chamber application for stay of the criminal proceedings in CHG 674- 76/18 which was to proceed on 8 October 2018 pending the determination of their application for review.

Mr T Mapfuwa who represented the respondents submitted that the applicants were not likely to suffer any prejudice if the trial was ordered to proceed to finality because the applicants had several remedies available to them. Firstly they can apply for the recusal of the trial Magistrate, secondly, they can make an application to recall the witnesses so that they are crossed examined by their defence counsel, thirdly, they can appeal against the judgment in the event that they were convicted, fifthly, they can make an application for review of the judgment. Sixthly, and lastly they may be acquitted.

He further submitted that the applicants were not denied an opportunity to seek legal representation and argued that even on 1 October when the matter was set to proceed with the knowledge of their legal practitioners, when the legal practitioners failed to attend the trial in the morning the matter was stood down to 11.15 AM to enable the applicants to sort their issue with the availability of a legal practitioner who was present hence the court *a quo* cannot be faulted for starting the trial when no legal representative had been made available or engaged by the applicants by 11.15 AM on 1 October 2018. He disputed the allegations by the applicants that the court *a quo* erred in letting the witnesses sit in court as the trial progressed during and after applications for postponement was made as revealed on page 7 of the transcribed record. He therefore submitted that the application for review lacks merit and would not succeed. He finally submitted that Superior Courts are highly critical of interrupting a criminal trial for purposes of having certain issues decided except in exceptional circumstances and the applicants failed to show such exceptional circumstances. For this contention Mr Mapfuwa cited the cases of *Albert Matapo, Silas Asarezi Shonhiwa, Phillip Chivhurunge,Ruperts Chimanga, Lucky Mhungu and Bigknows Wairesi* v *Magistrate Bhilla and The Attorney General* HH-84-10; and *Zhou Haixi* v *Never Katiyo N.O. and National Prosecuting Authority* HH-774/15.

In response Mr *Mataka* conceded that he had not read those cases cited by the counsel for the respondents and was not sure if the facts of those case were similar to the present case, but maintained that there were exceptional circumstances in that the Magistrate allowed witnesses, 18 Riot Police officers armed with FN Rifles fully loaded with twenty rounds of ammunition each, (6) 9mm pistols and teargas canisters to sit in the gallery, some on the dock and some behind the applicants during trial.

It is trite law that Superior Courts do not encourage the bringing of unterminated proceedings for review unless there are exceptional circumstances. For this contention I rely heavily on the dictum by UCHENA J (as he then was) in *Matapo & Ors* v *Bhila & Anor* supra where the following appears:

> "Generally this court does not encourage the bringing of unterminated proceedings for review. There are, however, circumstances which may justify the reviewing of unterminated proceedings. This means this court will not lightly stay proceedings pending review. An application of this nature can only succeed if the application for review has prospect for success." In the case of *Masedza & Ors* v *Magistrate Rusape & Anor* 1998 (1) ZLR 36 (HC) DEVITTIE J at p 47 said:
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> "If an allegation of bias has been proved the proceedings are a nullity. Therefore it would be unjust to require that the accused go through the motions, if he is convicted, (sic) of the sentencing process, followed by an appeal or review in respect of proceedings proved to be abortive at the stage of the application for recusal. Thus, in *S* v *Herbst* 1980 (3) SA 1026 (C), where the facts showed that the magistrate's conduct of the proceedings might have created the impression 'in the mind of the right minded layman that he was unfavourable towards the applicant, the court intervened in unterminated proceedings by setting aside the proceedings and referring the matter for hearing de novo before another magistrate. It was not necessary, the court stated, to show that the magistrate was in fact biased."

From the above quotation it is clear that a Higher Court may intervene in unterminated proceedings were bias has been proved and the application for recusal has been refused. *In casu* no bias has been alleged against the Magistrate. Further no application for the magistrate's recusal was made. The basis for the application for review in this case is basically that the applicants were not afforded an opportunity to be represented by a legal practitioner of their choice and that the magistrate had refused to postpone the matter and or to remove the first applicant from remand. Mr *Mataka* submitted that in his view if an application for recusal had been made or is to be made the magistrate is going to dismiss it. This point was found by the counsel for the respondents to be baseless because it was made without any evidence but a mere speculation.

I must now turn to decide whether the application for review has prospects of success or not.

The main allegations raised by the applicants are that they were denied legal representation. It is indeed a cardinal rule that an accused must be accorded a fair hearing. This entails that an accused should be afforded the opportunity to be represented by a legal practitioner of her or his choice at his or her expense. This is a constitutional requirement. However, in the present case it cannot be alleged that the applicants were not afforded the opportunity to be legally represented. The facts as they appear in the papers are that the applicants have always been represented by legal practitioners. But what happened was that on three previous occasions when the matter was set down for hearing it is the defence counsel or defence counsels who absented themselves together with the first applicant. A clear reading of the papers filed of record show that even the first applicant in this case absented himself thereby frustrating the commencement of the trials. It cannot be disputed that warrants of arrest were issued against the first applicant and later cancelled. It cannot be far -fetched to say when these warrants were cancelled it was at the behest of the applicant's legal practitioners. It can also not be far-fetched to suggest that the legal practitioners were present when the next dates of trial were being announced in court but come the trial date the legal practitioner and the first applicant absented themselves.

On 1 October 2018 when the trial Magistrate said enough was enough the applicants had been previously warned that 1 October 2018 was going to be the last date the matter was to be postponed to. On that day the counsel for the applicants again absented themselves. Before the Magistrate ordered that the trial was to procced she had to stand the matter down in the morning to 1145AM so that the applicants could sort out their issue of legal representation. Come 11:45AM no legal practitioner came prepared for trial. In fact a Mr Mukanduri a legal practitioner representing the first applicant appeared in the morning of that day unprepared for trial but had instructions from Mr *Mataka* to apply for removal of the first applicant from remand. Mr *Mataka* had not communicated with the Public Prosecutors. When that application was turned down Mr Mukanduri, a legal practitioner asked to be recused so that he could go and attend to his Reginal Court matters without assisting the applicants to secure legal representation.

What must be noted is that when the Constitution of Zimbabwe affords accused persons right of legal representation it is not blind to the fact that there other players as well whose rights to have their matters dealt with expediciously who are also protected such as complainants, witnesses and The State. This right to legal representation has limits and need not be abused. In

my view the Magistrate did not err at all in refusing a further remand or removing the applicants from remand. A Magistrate is an administrator of his or her court. I find that the applicants and their lawyers were the ones stalling the progress of the court hearing and for these reasons I find that the application for review lacks merit and may not succeed. I further found it a bit bizzare that the Magistrate, who is a trained and professional officer would allow witnesses to sit in court during proceedings (this was however, disputed by the counsel for respondents) and over 18 armed riot police officers to chase out people in the gallery and occupy the dock where accused persons were seated with loaded FN rifles and teargas canisters and (6) 9mm pistols being brandished? What buffles my mind is if at all the police officers who were in plain clothes entered the court room with such guns how did the applicants know that the magazines were loaded and how did they know that the 3 FN rifles were fully loaded with twenty rounds each? To me this is clearly a misrepresentation of facts which I will leave to the officer dealing with the review application to decide but personally I am not convinced.

I am fortified in my view to dismiss this application by what UCHENA J (as he then was) said in *Albert Matapo & Others* v *Magistrate Bhila & Anor* supra said from page 5 -7 of the cyclostyled judgment whose facts were almost similar to the one in the present case, where the following appears-

> "The magistrate's handling of the applications for postponement must be tested against the reasonableness of the applicants and the reasonableness of their apprehension of bias. The magistrate was aware that the applicants' case was coming before him for trial. He knew their legal practitioner had been in court in the early part of that morning. The rescheduled time for the trial of the applicants' case had arrived. The legal practitioner was no longer in attendance without having been excused. The State wanted to proceed with the trial. The fact that the trial was scheduled to take off means the applicants' legal practitioner must have prepared their defence outlines. He would have done so with instructions from the applicants. There was therefore no impropriety in the magistrate's order that the applicants should give their defence outlines. They were expected to be ready with their defence outlines as they knew that the trial date was approaching. They could simply give their defence outlines as per the instructions they had given to their practitioner. Though the second and third applicants were not represented, they too knew of the trial date, and should have been prepared to give their defence outlines on the trial date…..The magistrate was entitled to make a value judgment on the applications for postponement as they were marred by appearances of delaying tactics. The applicants' apprehension of bias on this aspect is not reasonable and cannot therefore be countenanced in law.

> A judicial officer is expected to manage his court in the interest of justice and the efficient administration of justice. The circumstances in which the applications for postponement were dismissed must be therefore be carefully considered. A judicial officer can in a proper case insist that a scheduled trial must take off. That would not in the absence of other apparent motives be an indication of a reasonable appearance of bias to reasonable litigant."

I with great respect share the same sentiments. Further UCHENA J (as he then was) said in the same judgment while quoting HARMS JA in the case of *Take & Save Trading CC & Ors* v *Standard Bank of South Africa Ltd* 2004 (4) SA 1 (SCA) which I entirely agree with, if used in the context of a magistrate, at page 6 -

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides . A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done….A supine approach towards litigation by judicial officers is not justifiable ether in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.
> A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration."

Given the facts and circumstances of the present case I entirely agree with UCHENA J that-

> "The need for firm control of proceedings is called for as a supine approach will result in avoidable backlogs. The need for efficient court management by judicial officers must however give in to the delivery of quality justice, which must be seen to be done. In short a judicial officer must be firm and fair, allowing genuine applications for postponement, and turning down those made for dilatory purposes."

In conclusion I am satisfied that the Magistrate and The State were merely exercising firm control of the proceedings in circumstances where they were justified to suspect delaying tactics on the part of the first applicant and his legal practitioner. I therefore cannot stay proceedings on the alleged Magistrate's refusal to grant the applicants a postponement or removal from remand because their legal practitioner had not come to court at the agreed time. If Mr *Mataka* was genuinely involved in the electoral petition court one wonders why he did not assign another legal

practitioner to ether handle the electoral petition matter or the current matter. The urgent chamber application for stay of criminal proceedings has no merit and I will dismiss it.

IT IS ACCORDINGLY ORDERED THAT

1. The application for stay of the criminal proceedings in CHG 674-76/18 pending the finalization of the application for review in HC 9109/18 be and are hereby dismissed.
2. The criminal proceedings in CRB CHG674-76/18 be and are hereby ordered to proceed to the defence case.
3. The applicants to pay costs of suit.

Chambati Mataka & Makonese, applicants' legal practitioners
National Prosecuting Authority, 1st and 2nd respondents' legal practitioners.