THE STATE
versus
MR CHINYAMA
and
MR HUNGWE

HIGH COURT OF ZIMBABWE
MAWADZE & TAGU JJ
HARARE, 11 June 2015

Review Judgment Contempt of Court

TAGU J: This is a review matter from the Provincial Magistrate Mashonaland West, Chinhoyi who convicted and sentenced the now accused two Legal Practitioners for Contempt of Court in contravention of s 71 (3) of the Magistrates Court Act [*Chapter 7: 10*]. s 71 (3) of the Magistrates Court Act says:

> "If any person wilfully disobeys or neglects to comply with an order of a magistrate issued under the powers conferred upon him by this Act, the magistrate may by warrant signed by him impose on the offender a fine not exceeding level five or commit him to prison for a period not exceeding six months, or both impose such a fine on him and commit him to prison for such a period:"

The facts of the matter are that on 2 February 2015 the two defence counsels appeared at Chinhoyi Magistrates court representing one Themba P. Mliswa in a bail application in case CRB CHN 96/15. The matter was remanded to 3rd February 2015. The two defence counsels despite that they reside in Harare committed themselves to be at court by 8.30am for the continuation of the bail application. The following day at 9.00am both counsels were not present in court. The Public Prosecutor Mr Matura told the presiding Magistrate that one of the lawyers Mr Chinyama had phoned and indicated that they were in the corridors of the National Prosecuting Authority (NPA) in Harare. The prosecutor applied that the matter be stood down to 11:11am in the spirit of fair play, and to allow the lawyers to arrive. The lawyers managed to arrive late at 1450pm.

At 1450pm Mr *Chinyama* apologised to the Magistrate for their failure to appear in court at 8.30am. This is what he said-

> "We have to apologise for our no show in the morning. After adjourning yesterday, I advised the state counsel that it was prudent to approach the head office first with a view regarding the

> possible admitting of accused to bail. I thought I would meet Mr Mutangadura or Mr Dube but I failed. I then phoned the state counsel at mid night I think he was shocked. One of the law officers advised us to bring the Form 242 at head office today in the morning at 1000am. That was not to be. We eventually saw Mr Dube at 12 pm who then told us that we could get to Chinhoyi since they were sending written confirmations to Mr Matura. We harboured under the mistaken belief that by engaging the other party we will save this court from lengthy submissions. We seriously apologise to the court for keeping it waiting for all this time."

The magistrate could not accept the apology. He summarily convicted the two lawyers for being in contempt of court. His reasons were that whilst the court had no misgivings for the counsels' conduct for wanting to obtain 'a consent to bail' by the NPA at least one of them should have been available for court to commence at 8.30am whilst the other pursued a consent to bail. By so doing no time would have been wasted. He dismissed the explanation in the following words-

> "I will not accept the apology. You are both found guilty of contempt of court for failing to appear at 8.30am."

The two were each sentenced to pay a fine of $50.00 or in default five days imprisonment.

The Provincial Magistrate who presided over the matter has now referred the record of proceedings for review to this Honourable Court with the following comments:

> "May you please lay the above record before the Honourable Judge of the High Court for review with the undersigned's following remarks.
>
> > 'On reflection the court feels that it was too harsh with the two lawyers. It is the court's considered view that a caution without a conviction and a fine for contempt would have been justified under the circumstances.
>
> I however, will remain guided by the Honourable Judge.'"

The issue of no-attendance by Legal Practitioners in court was long considered by the Courts of Appeal. In the case of *Weston* v *Courts Administration of the Central Criminal Court* [1976] 2 ALL ER 875 (CA), Lord Denning MR at 881h – j remarked:

> "I have no doubt that if a solicitor deliberately fails to attend – with intent to hinder or delay the hearing and doing so – he would be guilty of a contempt of court. He would be interfering with the course of justice. But in this case the conduct of the solicitor was not done with intent to hinder or delay the hearing. He took the view that, in fairness to the accused, the case could not be forced on for trial at such short notice before he was ready and that, as it was bound to be adjourned, he did not propose to attend. That was, I think, a serious discourtesy and even a breach of duty. But it did not affect the trial of the street trader. His trial was, in fact, adjourned; and it was, in fact, heard in the following week at the earliest moment that it could have been"

The same sentiments were said by Gubbay CJ in the case of *S* v *Mushonga* 1994 (1) ZLR 296 (S), where it was held that-

> "Non-appearance by a lawyer in a case may go beyond mere discourtesy and amount to a criminal contempt of court; provided always that the intention, whether actual or constructive, was to interfere with the process of the court and the administration of justice…..In most cases of alleged contempts by legal practitioners the matter should simply be referred to the Law Society for investigation and possible disciplinary action. Only in an exceptional case, such as where the legal practitioner has used scurrilous language in facie curiae, should the court invoke its criminal jurisdiction to deal with the matter."

What the two authorities recognise is that the crime of contempt is only committed if the accused had actual or legal intention to bring the administration of justice into contempt.

In *casu*, the issue to be decided is whether or not the two accused had intention to violate the dignity or authority of the court by not appearing in court at the stipulated time? The circumstances of this case are that the accused persons were trying to obtain the consent of the NPA with the view of curtailing proceedings. Their intention was not to bring the administration of justice into contempt. Nor was it their intention to violate the dignity or authority of the court. What the learned Provincial Magistrate either overlooked or accorded insufficient weight to is the fact that the accused had communicated or attempted to communicate with officials of the court their intention not to appear in time. They had phoned the public prosecutor in advance. This was brought to the attention of the magistrate.

In my view, as the learned magistrate later realised, this was a case where the court should have cautioned the accused without a conviction and a fine for contempt of court. The accused's no-appearance at 8.30am did not manifest an actual or constructive intention to disrespect the court or bring the administration of justice into contempt as contemplated in s 71 (3) of the Magistrates Court Act [*Chapter 7.10*]. The case did not even warrant being referred to the Law Society for investigations.

In terms of the powers vested in me in terms of s 29 of the High Court Act, [*Chapter 7.06*], I set aside the conviction and sentence and direct that the accused, if they had paid the fines, to be refunded in full.

In the result, the conviction and sentence are set aside. The Provincial Magistrate is directed to recall the accused, advise them of the order and reimburse them the fine paid, if any was paid.

MAWADZE J agrees……