JOSPHAT MUKWEMU
versus
MAGISTRATE SANYATWE N.O
and
THE PROSECUTOR GENERAL

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23 and 30 September 2015

Urgent Chamber Application

C. Warara, for the applicant
Ms *S. Fero,* for the respondent

MATHONSI J: If it had not been that it goes to the very root of the Declaration of Rights contained in *Chapter 4* of the Constitution of Zimbabwe, in particular the right of every person to choose and be represented by a legal practitioner of their choice before any court of law, tribunal or forum, it would have been comic indeed.

On 17 July 2015 at about midday, a commuter omnibus was making its way to Guruve along Mvurwi-Kanyemba road after allegedly picking up a passenger at an undesignated zone, when the applicant, a Municipal Police Officer at Mvurwi Town Council, pounced. He allegedly emerged from the tall grass wielding some spikes which he threw in front of the moving commuter omnibus. Sensing danger as the spikes no doubt would have slit his tyres into smithereens, the driver is said to have swerved but lost control of the vehicle which overturned and was extensively damaged.

For his troubles, the Municipal Police Officer was charged with contravening a section of the Road Traffic Act [*Chapter 13:11*] and enlisted the services of Charles Warara, a legal practitioner, to conduct his defence. After a false start, the trial was set to commence on 18 August 2015 before the first respondent sitting at Guruve Magistrates' court. Warara could not attend court for some reason or the other but sent his associate Raymond Wenyeve, to appear in court and apply for a postponement to enable the accused person's lawyer to attend.

The magistrate would have none of it. Although Wenyeve had been recalled from leave to do the honours and had no prior knowledge of the case, the first respondent dismissed the application for a postponement and directed that the trial commence immediately. He would not hear of a referral of the matter to the constitutional court on the ground that the applicant's right to a fair trial and to be represented by a legal practitioner of his choice was being violated. And commence the trial did even under those circumstances and at the end of the day it was remanded to 25 August 2015 for continuation of trial, a date unilaterally set by the first respondent.

As it turns out the lead counsel for the accused person, Warara, could not attend court on that date as well forcing the unfortunate Wenyeve to retrace his steps back to Guruve magistrates court. Once at that court, the ubiquitous Wenyeve launched another bid to have the matter referred to the constitutional court on the basis of a violation of the accused person's fundamental right to a fair trial and denial of legal presentation of his own choice. He also made an application for the first respondent to recuse himself on suspicion of bias.

While making his application, he must have made remarks which infuriated the magistrate, who not only dismissed the application, but also ordered his immediate arrest for contempt of court even as the legal practitioner was busy addressing the court. Wenyeve was handcuffed by a prison officer and detained until his release at lunch time. Now that is some piece of work by any standards.

The conduct of the judicial officer brings to contention the remarks of Fali Nariman: Judges' Are They Like Emperors, where he said:

> "That Judges must have modesty and humility, that they must know their limits and that they must not behave like emperors is sound advice".

The learned author concluded in that article by saying:

> "No, we don't need judges who behave like emperors. What we do need are those; whom the lust of office does not kill; whom the spoils of office cannot buy; who possess opinions and a will; who have honour, and will not lie …., who live above the fog in public duty and in private thinking".

A judicial officer must create an environment in his court which is not only conducive to fairness, fair trial and justice, but also be seen to be upholding the rights of accused persons. In his court, justice must not only be done, it must also be seen to be done. Where legal practitioners performing their duties of representing accused persons in court, no matter how tenacious they are in the pursuit of their client's rights, are arrested while sheltering under court privilege, then all pretensions at fairness are thrown out through the window. In

fact, the whole process of the administration of justice is turned into a mockery and in its place is substituted the law of the jungle, that only might prevails.

A judicial officer must always guard against the excesses of power, against the abuse of judicial authority to settle personal scores. Ms *Fero*, who appeared for the second respondent, submitted that she had indeed confirmed with the public prosecutor handling the criminal trial that the first respondent had ordered the arrest of a legal practitioner representing his client in a court of law. She was also of the view that it was the first of its kind, rendering her powerless to even begin to oppose the application.

As far back as 1859, John Stuart Mill had made the point in his book, On Liberty that:

> "The sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection (……..) the only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others".

We live in a tolerant society that recognises the constitutional right of accused persons to be represented by counsel of their choice in defence of criminal charges. There should never come a time when the business of representing others becomes a hazardous exercise because a legal practitioner may be dragged away from the bar kicking and screaming while conducting a defence at the whim of a judicial officer. We must be able to draw the line somewhere and say: this cannot be done?

This case also brings into the fore the offence of contempt of court. It is sometimes referred to as "scandalising the court" or "murmuring judges". Given its parentage in the 18th Century, it is unsurprising that this form of contempt tends to deny an accused person the usual constitutional protections that should be guaranteed. It also creates judicial uncertainty and courts have generally found it difficult to articulate the ingredients of the offence. For one thing one struggles to grasp both the *actus reus* and *mens rea* elements of the offence.

In the present case, a legal practitioner was making submissions before the court to the best of his ability when he offended the magistrate. Acting as both the prosecutor, judge and executioner, the magistrate ordered that the legal practitioner be handcuffed and detained. There was no recourse to any other authority thereby sealing the fate of the hapless legal practitioner.

Indisputably, it is a necessary feature of every system of adversarial administration of justice that there should be a higher court in the hierarchy to correct judicial errors and to curb the excesses of judicial officers like the first respondent. Such errors should be capable of being corrected, reversed or varied at a higher level. I state the obvious when I say that in

an adversarial system, litigants should have an unrestricted right of appeal or review to serve as a check on the exercise of judicial power in cases where litigants are aggrieved.

Our system provides the applicant with a remedy, that of seeking a review of the proceedings in this court where the applicant is aggrieved. The applicant chose that route and filed an application for review in HC 8260/15 which application is now pending and is yet to be determined.

Even after the drama involving the arrest of a legal practitioner while discharging his duties in court, the first respondent's attention was drawn to the fact that the proceedings had been brought before this court on review. He was asked to defer the criminal trial until the determination of the review application in HC 8260/15. Predictably the first respondent refused. Instead he has directed that the trial resumes on 24 September 2015, never mind the pending review application.

The applicant has now been forced to bring this urgent application for a stay of the criminal proceedings before the first respondent who is itching to proceed tomorrow. In that review application, the applicant argues that he has a reasonable apprehension that the first respondent is biased and that his conduct throughout the proceedings means that there is no way the applicant can have a fair trial. For that reason, before the trial resumes, he deserves to be heard by this court on that application.

In my view, the dispassionate manner in which a judicial officer is supposed to conduct proceedings is missing in this matter. In fact the first respondent appears determined to try the applicant without further ado and will pull all the stops to achieve that, as if an accused person has no rights at all and as if life itself depends on the trial proceeding. This is a criminal matter in which the offence was allegedly committed on 17 July 2015. The trial was ordered to commence on 18 August 2015, exactly one month later. There has been no delay whatsoever and as such one wonders what informs the decision of the judicial officer to proceed with the trial with indecent haste at the expense of justice and fairness.

In order to succeed in securing a stay of proceedings pending the review application, the applicant must establish those factors which would entitle him to a temporary interdict, namely, a *prima facie* right, an injury actually committed or reasonably apprehended, the absence of similar protection afforded by any other ordinary remedy and a balance of convenience favouring the grant of the interdict for interdict it is when the respondents are barred from proceeding with the trial; *Boadi* v *Boadi & Anor* 1992 (2) ZLR 378; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S).

I am satisfied that all the above requirements have been met and that this is an appropriate case for a stay of the proceedings in the criminal court to allow the applicant to pursue the remedy of review which is available to him at law.

Accordingly, the provisional order is hereby granted in terms of the draft order as amended.

Warara and Associates, applicant's legal practitioners
The Prosecutor General, respondents' legal practitioners