ZHOU HAIXI
versus
NEVER KATIYO N.O.
and
NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 22 September 2015

Urgent Chamber Application

W Chinamhora, with *C Chinyama,* for the applicant
P Kapasura, for the 1st respondent
T Mapfuwa, for the 2nd respondent

HUNGWE J: The applicant seeks a provisional order interdicting the first respondent from proceeding with the trial proceedings currently under way in the court of the Regional Magistrate, Chinhoyi, in case number RCHN 57-8/15 pending the final determination of an application for review brought by the applicant under case number HC 6307/15. That application is pending in this court. Prior to filing the present application, the applicant had approached the first respondent with a written application for stay of proceedings pending the determination of the review application. First respondent dismissed that application on 10 September 2015. In his founding affidavit, the applicant presently states as follows:

> "8. What this means is that my trial will continue on the 15th September 2015 before the same magistrate whose impartiality and independence I strongly do not believe in. I am advised that justice must not only be seen to be done but same must be seen to be done and in this particular instance I do not see any measure of justice in the irony of my being tried by the same judicial officer who sent Movement Mavengere to demand a bribe from me to facilitate my release at a time when I was incarcerated at Chinhoyi Remand Prison under unfounded allegations of theft of motor vehicle which motor vehicle I have purchased using my personal resources from outside Zimbabwe."

Upon hearing the parties regarding urgency, I ruled that the matter be heard on the basis that it was urgent. The applicant maintained that he feared that he would not get a fair

hearing in light of the fact that the first respondent had sent someone to solicit for a bribe. He had caused that person's arrest. That is reason why, he believes, his application for recusal was dismissed. In other words, the first respondent was bent on convicting him because he had set a trap for his emissary and frustrated his designs to extort money from him. The first respondent was, at that juncture, not represented nor had he filed any response to the application. The second respondent was represented. The second respondent opposed the application on the basis that there was no factual basis for the fears expressed by the applicant as the matter was proceeding normally. In respect of the bribe allegations, the second respondent averred that the police investigations did not establish any link between the applicant and the first respondent. As a result, the police had charged the said Movement Mavengere ("Movement") or ("Mavengere") with fraud only.

Apparently, in his founding affidavit, the applicant made bald claims that second respondent was indeed complicit in the solicitations by the said Movement. When I put the point to Mr *Chinyama* that without some link being established on the papers between applicant and first respondent, it would not been fair and reasonable for the application to have been mounted in the first place, he applied to file a supplementary affidavit. Second respondent consented to the request to have the matter postponed for the purpose of securing the relevant information by way of a supplementary affidavit. In the meantime, I directed that the first respondent be approached with a view to filing some response to the various allegations being made against him since, in my view of the matter, it would have been unfair for the hearing to proceed without first respondent being heard.

At the resumed hearing, the applicant filed a transcript of certain conversations between the applicant's agents and Mavengere. The papers did not establish the fact that Mavengere had indeed been sent by the first respondent. First respondent had also filed his notice of opposition and opposing affidavit in which he set the record straight regarding the allegations. By then *Advocate Chinamhora* was appearing for the applicant, with Mr *Kapasura* appearing for the first respondent.

In his heads of argument Mr *Chinamhora* argued that if the criminal proceedings were to go ahead, the review proceedings would be rendered *brutum fulmen* in the event that this court grants the relief sought in that review application. As such the matter was urgent. As for the other requirement Mr *Chinamhora* argued that should the trial proceed as the first

applicant was minded to do, and the applicant is subsequently convicted, and imprisoned through a process tainted by lack of impartiality and other procedural irregularities, no amount damages can repair that harm. Regarding the prospects of success, he submitted that applicant enjoys huge prospects of success. He relied on the dictum by Uchena J (as he then was) in *Matapo & Ors* v *Bhila & Anor* HH-84-10 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 if 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 unfavourably 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."

Mr *Chinamhora* intimated that because the person alleged to be the first respondent's emissary for collecting the bribe was on remand; and that the allegations against the first applicant were serious, therefore, should first respondent continue to preside over the matter, an impression would be created in the mind of a reasonable layman that first respondent would be biased against the applicant. Bias need not be proved at this stage. I agree only to a point. Whilst it is true that "the character, professionalism, experience or ability as to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration," it is only when there are objective circumstances giving rise to the appearance of bias which must be shown on a balance of probability. (*Old Mutual Investment Group* v *M & S Driving School* HH 191-14).

I now turn to consider the prospects of success of the review application and the test applicable in the case.

When faced with an application for recusal, a magistrate must consider and weigh up two important obligations; namely the duty to hear every case that comes before him or her

and the duty to apply the law impartially, without fear, favour or prejudice. Impartiality does not require the magistrate to be neutral but rather, it is

> "… a state of mind in which the magistrate is disinterested in the result and is open to persuasions by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to the issues." *(R v S (R D)* [1997] 3 SCR at 119). In *South African Commercial Catering and Allied Workers Union and Others ("SACCWU") v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) @ para 13 the Constitutional Court of South Africa defined impartiality as:
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> > 'That quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the judge's own predictions, preconceptions and personal views- that is the keystone of a civilised system of adjudication.'"

In *The President of the Republic of South Africa & Ors* v *The South African Rugby Football Union & Ors* 2000 (1) SA 1; 1999 (10) BCLR 1059 *("SARFU")* the court had to decide an application for recusal of five of its judges. The fourth respondent had made the application on several grounds the most notable of which was that the judges in question had had a long standing association with President Mandela, the first applicant, and that they had been members of the same political party. In considering the merits of the application the Constitutional Court developed a test for recusal in general term thus:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or would not bring an impartial mind to bear upon the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel."

A similar test is applied in other jurisdictions such as the United Kingdom, (*Hampshire County Council v Gillingham and Another* 5 April 2000 (unreported); *R* v *Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet Ugarte (No 2)* [1999] 1 ALL ER 577: Canada *(R* v *S (RD))* (supra); and Australia (The Council of Chief Justices of Australia) "*Guide to Judicial Conduct*" (2002) art 3.2.

Similarly, Article 2.5 of the *Bangalore Principles of Judicial Conduct* expresses the same test in the following similar terms:

> "A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially."

In order to satisfy the test for recusal the perception of bias must be reasonable in two respects: (a) the perception must be reasonable, in other words it must be based on reasonable grounds and there must be a reasonable apprehension that the magistrate will be biased; an apprehension that the magistrate may be biased is not sufficient. (*S* v *Roberts* 1999 (4) SA 915 (SCA); *S* v *Shackell* 2001 (4) SA 1 (SCA) at p 19). In addition the person apprehending the bias must be a reasonable and objective person in the position of the litigant who is informed of the facts. (See *SACCWU* case supra). In the present case, as I have demonstrated, there has not been established, even after the filing of the supplementary affidavit, that there was some form of communication or link between the first respondent and Mavengere. The transcripts of the conversations between applicant's agents and Mavengere which the applicant obtained, presumably from the mobile telephony service providers, would have easily established, at least on a balance, if any communication existed, however tenuous, between the first respondent and Movement Mavengere. I did not hear applicant's counsel to argue that these transcripts added value to the present application.

What is being sought in this application is an interim interdict. Before an application for an interim interdict can succeed, it is trite that the applicant has to satisfy certain minimum requirements. These are:

(1) that the right which is sought to be protected is clear; or

(2) that (a) if not clear, it is prima facie established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing his right;

(3) that the balance of convenience favours the granting of interim relief; and

(4) the absence of any other remedy.

See *Econet Wireless (Pvt)* v *Minister of Information* 1997 (1) ZLR 342 (H) at 344G-345B; *Watson* v *Gilson Enterprises & Ors* 1997 (2) ZLR 318B (H) at 331D-E; *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings Ltd & Ors* 2001 (1) 212 (H) at 213G – 214B.

The existence of a right is a matter of substantive law; whether that right is clearly or only prima facie established is a matter of evidence. See B Prest *Interlocutory Interdicts p 47;* Erasmus *Superior Court Practice* pp E8-6A. I am prepared to hold that by virtue of section 69 of the Constitution the applicant enjoys an inalienable right to a fair and public trial within

a reasonable time before an independent and impartial court. That is the right which they seek to enforce in HC 6307/15 which is pending before this court. That right therefore is clearly established. In order to establish a well-grounded apprehension of irreparable harm to himself if the interim interdict is not granted, the applicant argued that if the interim interdict is not granted, he fears that his right to a fair trial will be irreparably prejudiced. He contends that there is no other available remedy to the harm which he fears, may result.

The cardinal principle to observe is that these courts are reluctant to issue orders that in effect stall trial proceedings, unless the circumstances clearly require it. The review application which is pending before this court could only be brought on the grounds set out in s 27 (1) (b) or (c) of the High Court Act, *[Chapter 7:06]*. What constitutes an irregularity in the proceedings such as would qualify the bringing on review unterminated proceedings was considered in *Masedza* (*supra*). Consistent with the thread that runs through the cases cited by DEVITTIE J in the *Masedza*'s case is what appears in the Namibian matter of *S* v *Bushebi*, **1998 NR 239** (SC) where the following was stated by Leon, AJA, at p. 241F, namely:

> "The phrase 'irregularity in the proceedings' as a ground for review relates to the conduct of the proceedings and not the result thereof. In *Ellis v Morgan, Ellis v Dessai* **1909 TS 576** Masson J said this at 581:
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> > 'But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party, from having his case fully and fairly determined.'"

Further at p. 241I the Court pointed out:

> "However, where the error is fundamental in the sense that the lower court has declined to exercise the function entrusted to it by the statute the result of which is to deny a party the right to a fair hearing, the matter is reviewable."

The applicant in the present case seeks this court's intervention so that his fears of bias are not realised since he believes the presiding magistrate is biased. Such fears as he may at this stage entertain are not in my view reasonably entertained. In my view even if his fears were reasonably entertained, he has not demonstrated the inadequacy of the remedies which

are available should his worst fears come to pass. He can, if so advised, appeal or bring the matter under review. He must first demonstrate that these remedies cannot cure the harm feared before he can qualify to approach this court for such an unusual relief. He would have sought bail pending the final determination of such an appeal or review. In the view that I take of the matter, a party to uncompleted proceedings who wishes to succeed must make a strong case which demonstrates that '….a grave injustice must otherwise result or ……. justice might not, by other means, be attained' *(Walhaus & Ors* v *Additional Magistrate, Johannesburg* 1959 (3) SA (A) 113 at p 120).

I am satisfied that in the present matter, no grave injustice might occur should this application be dismissed nor can it be said that justice might not by other means be attained. In any event, as I have demonstrated above, the fear held by the applicant is not reasonably entertained. The tests applicable in matters of this nature do not support the contention that the balance of probabilities favour the grant of the relief sought. The opposite is, in my view, the only tenable position; lest such a precedent creates chaos in the proper administration of justice. To hold otherwise would open floodgates since judicial officers would have to recuse themselves upon every flimsy allegation of impropriety unduly made or raised by a party to proceedings. The interests of justice require that trial matters be expedited and bring some finality to litigation. If there is any irregularity, a review or appeal after the final determination of those proceedings exist to cure the same. Unless a party can demonstrate that there are rare circumstances calling for this unusual intervention before finality, my view is that the matter must first reach some finality before it is brought under review before this court. Unless a sound and proper basis is laid, an application of this nature, temporary or final, is premature in most criminal proceedings. It is important to bear in mind in the present matter that granting the order sought, albeit provisionally, would, in effect operate against the right to a speedy trial. In any event what is sought to be interdicted is a duty to finalise a matter before him which in my view, must be balanced with the protection of the right to a fair trial which the applicant seeks to enforce. That right is under no present danger at all. He must undergo his trial and endure it to its just conclusion before he can seek a remedy of review. In any case, it appears obvious to me that the said Movement devised a plan to extort money from the applicant using the first respondent's name.

Even if I am wrong in holding that there is no *prima facie* case made by the applicant in the present application, I am certain, upon application of the above principles, that his application for review pending in this court does not carry the prospects of success that he believes it does. As such no case for the grant of the order sought has been made.

In the result the application is dismissed with costs.

C Chinyama & Partners, applicant's legal practitioners
Attorney-General's Office, 1st respondent's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners