KENNETH MUKONO
and
CHARLES MANDISODZA
and
VHURANDENI MAKUKU
versus
SIMON RODGERS KACHAMBWA
and
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 25 November 2015 & 10 February 2016

Opposed Review

A Ndebele, for the1st and 2nd applicants
P Makurumure, for the 3rd applicant
E Makoto, for the 1st and 2nd respondent

TSANGA J: This is an application for review of unterminated proceedings in a criminal trial in a magistrate's court on the grounds of bias and procedural irregularities. The first and second applicants, Kennneth Mukono and Charles Mandisodza face a charge of fraud in terms of s136 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The facts centre on the alleged fraudulent transfer of certain immovable property into their company. Their lawyer Ms *Amanda Ndebele,* represents them on a *pro amicus* basis having been moved by their plight. The third applicant Mr Vhuradheni Makuku is the lawyer who effected the transfer of the property.

The application for review is largely, though not exclusively, premised on events which occurred at the regional court on 16 December 2013 where the first and second applicants allege that the magistrate sought to force them to their defence case in the absence of their legal practitioner of choice. To place the issue in context, prior to this day, the trial

had been scheduled for hearing on 6 December 2013. The first and second applicants' lawyer stated that she could not attend court on that day due to pregnancy related illness. She had been put on bed rest from the 4th till the 13th of December. The prosecutor had accordingly obtained a postponement to 16 December. The record also reveals at p 70 that when the Prosecutor Mr *Ngoma* sought postponement, he had indicated that from the correspondence he had received, the lawyer had stated that she would be going on maternity leave on 23 December and that **she could assign another lawyer**. The matter was postponed to 16 December subject to her fitness.

On the given date, she was still not well she and had sent a legal practitioner from a fellow practice to advise the court that she would be proceeding on maternity leave. The magistrate is said to have postponed the matter to 23 January 2014 and to have said that the first and second applicants should find another legal practitioner and also that the state would now firmly control the pace of the case. He is also said to have suggested that the lawyer for the third applicants could handle the defence case on behalf of all the applicants. An application for review was made on 16 January 2014 upon receipt of the proceedings. The applicants rely on 27 (1) (b) and (c) of the High Court Rules, 1971 which permits a review on grounds such as lack of jurisdiction, bias or gross irregularity in the proceedings.

At the hearing of the review, Ms *Ndebele's* argument was essentially two pronged, namely that bias emerged in this case from the gross irregularity in trying to force applicants to their defence without their defence lawyer of choice, and, secondly, that the notice of opposition supports the apprehension of bias. She highlighted that the magistrate's order that the matter be heard on 23 January 2014 when she would still have been away on maternity was in violation of her clients right to a lawyer of their choice. The case of *S* v *Chivara HH 42-12* was relied on in support of this contention. Whilst she recognised that the court has a right to manage its docket in the interests of justice, she submitted that the duty to do so must be exercised judiciously. She argued that in the face of a letter from a gynaecologist confirming that she was to deliver a baby anytime, it was quite clear that she was not in wilful default on the day in question when the magistrate made the decision to take charge in speeding up the case by allocating the applicants to the third applicant's lawyer. She also submitted that the notice of opposition filed by the magistrate was emotionally charged in tone and approach.

In the face of the magistrate's decision on 16 December 2013 that counsel for the third applicant should take over the case, it was also claimed on behalf of the third applicant that looking at the case retrospectively, there were cumulative procedural irregularities in the manner that the magistrate was handling the matter. Firstly, it was argued that it would not have been competent for the third applicant's lawyer to handle the matter on behalf of the other two applicants given the disputed allegations of collusion between the parties in the case before the magistrate. Counsel for the third applicant therefore equally sought for the magistrate's recusal.

It was further argued that it had been agreed that an expert witness would be called in the case yet the legal practitioner thereafter had not gotten the state's feedback on the calling of the expert witness but instead the state had gone on to dispense with the need for the expert witness before the opinion of the public prosecutor could be placed before the court. It was argued that the case before the magistrate's court centred on agreement of sale for which an expert's opinion was needed. It was contended that in the absence of expert opinion the State would not have been able to prove its case. Ms *Makurumure,* who appeared on behalf of the third applicant also argued that calling an expert witness by the defence would have amounted to a shift in the onus to prove that the signature in the agreement of sale was that of the complainant. By exonerating the state from this duty, she argued that the court was showing bias.

It was also alleged that during the state's presentation of its evidence, the trial magistrate had ordered that a recorder be stopped so that he could assist the complainant in giving evidence. Additionally, during an application for discharge at the close of the state case, it was said that the magistrate had made remarks to the effect that there was no way the third applicant could exonerate himself. This was said to point to the reality that the magistrate had already formed an opinion that the accused was guilty as charged. It was further contended that an accused can bring an application for review where the application for discharge is dismissed without consideration of all due facts. It was argued that all these factors, cumulatively, called for the actions for the trial magistrate to be reviewed.

On the other hand, Mr *Makoto* who appeared on behalf of the respondents emphasised the principle that the courts should be slow to intervene in uncompleted proceedings save in exceptional circumstances where the court has satisfied itself that there was indeed bias and

that gross irregularity which would result in prejudice to the accused.[1] He also emphasised that in so far as points of law are concerned, the correct approach is to wait until the matter is finalised and then to institute an appeal. He relied on the decision by Hungwe J in the case of *Jane Linda Rose* v *The State*[2] whereby the judge highlighted that if an accused perceives that a magistrate reached a wrong conclusion then the correct approach is to appeal not to seek a review. He argued that the decision not to call in the expert witness was because the state had decided that it had the evidence it needed before it, in light of the State not having its own handwriting expert. He contended that there was nothing to stop the defence from calling an expert witness if it so chose, if it was not satisfied with the court's decision to dispense with the expert witness.

As regards the decision by the magistrate to have the first and second applicants represented by third applicant's lawyer, Mr *Makoto* argued on behalf of the State that it is the court's discretion to expedite matters and that it was in the interests of all the parties involved that the matter be disposed of expediently. He argued that the decision could not be said to constitute bias since under the circumstances the right to a counsel of their choice had to be balanced with other rights. He said that there had been nothing wrong in the magistrate conducting himself in the manner that he did.

Mr *Makoto* also stated that overall the application for review was premised on delaying the finalisation of the matter rather than any real apprehension of bias. He therefore prayed for the application to be dismissed.

Analysis of grounds for review

As articulated by Hungwe J in the case of *S* v *Nhidza*[3] the threshold for a finding of real or perceived bias is high. There must appear to be a real likelihood of bias and surmise or conjecture will not do. The circumstances must be such that an ordinary person will think it likely or probable that the judicial officer would favour one side at the expense of the other.

According to Ms *Ndebele's* affidavit, between its start on 11 April and 6 December 2013 when she failed to attend, the matter had been postponed numerous times largely at the State's instance. She states that she herself had only been responsible for two postponements, one on 27 September 2013 when her mother had passed away and another on 11 October

[1] See *A-G* v *Makamba* 2005 (2) ZLR 54 (S)
[2] HH 71-2012
[3] *HH-619-15*

when due to a double booking, the court date had clashed with a workshop which she was running. Ms *Ndebele* did not at any point in her application allude to the correspondence referred to by the prosecutor in the record on 6 December 2013, where she is said to have sent word about her non availability on the day in question, her impending maternity leave, and the indication that she could assign another lawyer. It is therefore important to note that on 16 December 2013, when the magistrate cognisant of the fact that she was going on maternity leave, indicated that the applicants find another lawyer, that this was against the background of what had been stated on 6 December 2013 that she could assign another lawyer. It is therefore hard for me to see where it can be said that his conduct in setting the matter down for 23 January 2014, can be said to have emanated from bias against the applicants.

However, given that the reason why she was unavailable on 6 and 16 December 2013 and would certainly have been unavailable on the 23rd, was maternity related, it was somewhat unreasonable to insist on playing hard ball regarding the date of the resumption of the trial. She would have been away for a period of three months which she is legally entitled to. There was no reason for postponing the matter to a day when the magistrate knew fully well she would have been on maternity leave.

She is right in so far as she sought to challenge the allocation of a continuation date which simply dismissed the reality that the reason why she would have been away was because she would have been on maternity leave. Maternity leave is fully recognised constitutionally and by statute. Critically, there would have been nothing wrong in her initial decision indicating that she would assign someone to the case. She obviously changed her mind about assigning another lawyer and brought the review because she insists on representing her own clients and felt that she had been denied this right because of being on maternity leave.

The legal profession has changed rapidly over the years and more and more women are making inroads into this previously male dominated preserve, particularly in private practice. With such rapid change has also arisen the need for judicial officers to pay heed to what it means for women to juggle both familial and professional roles. Women clearly experience the effects of reproduction on their careers and have a heightened perception of the interplay of work, family, and reproduction. Perceptions of bias also of necessity differ as

a result of these different paths in life by men and women. What women experience as bias may not be regarded in the same vein by men. Women practitioners are right to challenge what in reality amounts to gender bias when confronted forms of unequal treatment in court on account of their reproductive role. Also better control of the court room by male judicial personnel in the sense of being more gender sensitive may arise from such exposures. They bring to the fore the need for gender conscientisation of judicial officers.

Gender insensitivity and gender bias needs to be addressed because of the harm it causes not just to the individual complaining of it but to the judicial system as a whole. *In casu*, whilst seemingly acknowledging her entitlement to maternity leave, in reality the magistrate appears to have displayed an unnecessary lack of cooperation and intransigence when it came to actually postponing the matter to a date when she would have been available, insisting as he did that the case be reassigned. Ms *Ndebele* has had to expend energy addressing the annoyance of the refusal to accommodate her maternity induced non availability. This is indeed a reality not encountered by her male counterparts. The reality is also that the refusal to postpone to a suitable date has had an adverse effect on the completion of the trial in the magistrate's court. Instead of a mere 90 day postponement that would have arisen from accommodating her maternity induced absence, this case has now remained uncompleted for over two years. Such delays, as we know all too well, do not augur well for confidence in the judicial system, more when they arise from gender insensitivity.

However, given the history of delays in this matter and that the suggestion of assigning another practitioner appears to have been initially suggested by her, I do not believe that the magistrate's refusal to postpone the matter to a date when she would have been available, inappropriate though it was, goes to the root of his ability to effectively handle this matter or that it was indicative of bias against the applicants. Materially, as acknowledged by Ms *Ndebele* the reason for the first respondent's refusal to postpone the trial to a later date was not because he did not believe that she was entitled to maternity leave but because he believed that there was no reason why the applicants could not engage another practitioner. The postponement on 6 December was in effect now the third postponement at her behest, whilst the further postponement on 16 December 2013, was the fourth. She was acting on a *pro amicus* basis. Ms *Ndebele* argues that the appointment of another legal practitioner would

have been prejudicial as the trial had reached a critical stage. She also argued that she could also not delegate without the clients consent.

The first and second applicant's lawyer is no longer pregnant and as the gravamen of her complaint on behalf of applicants is the right that they be represented by a lawyer of their choice, this is what should be done in this instance. She should continue to represent the applicants. There is no need for the magistrate to recuse himself in light of the totality of the facts surrounding the magistrate's order at that time. The facts, as observed, do not effectively impair the magistrate's ability to continue hearing this matter.

On the issue of discarding the need for the hand writing expert, what emerges clearly form the record is that the dispensing with this need was not for want of trying. All parties were made aware of the fact that the relevant state department did not have a hand writing expert. Also, it must be borne in mind that technically the case having been reopened after the state had closed its case, there was nothing untoward in the magistrate indicating that he would now rely on the evidence that had already presented, in light of the difficulty encountered by the state in bringing an expert. Ms *Ndebele's* argument in this regard as supported by counsel for third applicant that all parties should have been present for this final decision would not have changed much. In any event it must be borne in mind that the defence case is yet to present its case and indeed still has latitude in deciding what it would like to do to overcome the hurdle. There is again no reason for the magistrate to recuse himself on account of what all counsel were clearly aware of.

The allegation of bias on account of the magistrate's utterances that he would now dictate the pace of the trial also needs to be scrutinised in context. Counsel for the applicants concede that this was a trial characterised by numerous delays, many at the instance of the state and some at the instance of the first and second applicant's lawyer. Therefore for a magistrate to make the remark that he would dictate the pace would simply indicate that in light of the background of these postponements, he was simply intending to maintain a firm grip on the trial to push the matter towards the finalisation. Nothing unusual in that save as I have pointed out that refusal to delay the trial to a date when Ms *Ndebele* would have been back whilst fully cognisant of the reason for her non availability was indeed a rigid and gender insensitive approach towards exercising a grip on the pace of the trial.

I agree with the respondents' observation that no application for recusal was made before the trial magistrate at the relevant time when the application for discharge at the close of the state case was made. An attempt to allege bias several months down the line on account of the benefit of retrospective hindsight lacks merit. Since the Damascene moment is said to have arisen from the magistrate's refusal to take into account Ms *Ndebele's* pregnancy related non-availability, I have already canvassed the issue of why I do not think that the decision necessarily meant bias in the applicants' case. Whilst the statutory powers of review are exercisable at any stage during criminal proceedings before an inferior court as observed in the case of *Jane Linda Rose* v *The State* (*supra*), materially the giving of a judgment not justified by evidence is a matter of appeal and not review. This court is not sitting as an appeal court.

Equally, it is difficult for me to see how the magistrate's remark that the third applicant could not escape from what he had done can only be understood to impute sinister motives. It is common cause from the record and the facts that he transferred the property. I do not see why he seeks to read anything deeper into the observation beyond this reality. There is again no need for the magistrate to recuse himself on account of this observation.
Accordingly:

1. The application for review seeking the recusal of the magistrate lacks merit and is dismissed with costs.
2. The trial under case number R299-301/2013 be and is hereby remitted back to the magistrates court for completion by the same magistrate.

Musoni Law Chambers,1st and 2nd applicants legal practitioners
Mabundu Law Chambers, 3rd applicants legal practitioners
National Prosecuting Authority,1st and 2nd respondents legal practitioners