FARAI CHAUKE
versus
REGISTRAR OF THE HIGH COURT
and
K MARONGA NO

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 20 April 2016

Unopposed Chamber Application

The applicant in person
No appearance for 1st and 2nd respondents

KUDYA J: The present application is a microcosm of many such applications that inundate the Harare High Court from time to time. The assistant criminal registrar appoints *pro deo* counsel for criminal trials on the cause list for each term. Many legal practitioners dutifully accept the honour. Others like the present applicant take umbrage at the appointment and in the process unjustifiably accuse the assistant criminal registrar of exercising her statutory duty with malice aforethought, procedural unfairness and discriminatory practice. I heard the application in chambers on 20 April 2016 and dismissed it on the turn. On 21 April 2016, the applicant sought written reasons for my determination. These are they.

On 10 February 2016 the second respondent appointed the applicant *pro deo* counsel for a criminal trial set down for 7 March 2016 to represent one of the five accused persons indicted for murder. In line with convention, the letter of appointment, amongst other instructions, directed the applicant counsel if he was unable to undertake the defence to "apply forthwith to a judge to be excused and when excused to (surrender) the papers to the judge's clerk". The applicant's founding affidavit does not disclose compliance with those instructions. In his oral submissions before me in chambers applicant contended that he instead wrote to the second respondent seeking recusal on the ground that she could not have gone round 300 law firms in Harare between his last appointment in September 2015 and 10 February 2016. The letter was not graced with a response. He attended at the second

respondent's offices and his high handed demand for the roster she allegedly used to appoint *pro deo* counsel, was in my view, properly rebuffed.

There is further correspondence on file that does not strictly form part of the application. I refer to it to provide context to my determination of the application. Apparently on 3 March 2016 the trial prosecutor in the *pro deo* matter wrote to the second respondent and copied the letter to other counsel appearing in that matter. He sought removal of the scheduled case from the roll in view of the failure to indict three of the accused persons for trial. The applicant, however, appeared on the trial date as his *pro deo* client had been indicted. The trial did not commence and the matter was removed from the roll.

On 8 March 2016, the applicant filed the present chamber application for directions. It was served on the second respondent on the same day and on the first respondent on the next day. The respondents did not oppose the application. In a letter dated 15 March 2016 the second respondent withdrew the appointment of the applicant and on the same day the first respondent failed to persuade the applicant to withdraw the application. On 21 March the applicant returned the *pro deo* papers previously dispatched to him on appointment. In the meantime the application remained in abeyance until 15 April 2016 when the applicant insisted that it be laid before a judge in chambers for determination, especially of para 2 of the draft order.

The draft order was couched in these terms:

IT IS ORDERED AND DIRECTED THAT:

1. Application is allowed with no order as to costs
2. First respondent is ordered and directed to make sure that the appointment of any *pro deo* counsel by his office or by and through second respondent or any of the first respondent's assistants be carried out in a transparent and fair manner and that all lawyers and law firms shall be treated equally and fairly.
3. Applicant be excused from acting *pro deo* in CRB 182/15.
4. Second respondent be directed to appoint another *pro deo* counsel within 48 hours from the date of this order.
5. If the second respondent insists that applicant must continue with CRB 182/15, then she is directed to provide applicant with a roster of how she has been appointing *pro deo* counsel between 2015 up to now.

The application was laid before me in my capacity as head of the Criminal Division of the High Court on 19 April 2016 for allocation. I immediately allocated it to myself and set it

down for hearing in chambers on 20 April 2016. In his oral submissions the applicant abandoned paras 3, 4 and 5 in the draft order. They had been overtaken by events following the withdrawal of his appointment on 15 March 2016 and the subsequent appointment of another *pro deo* counsel in his stead. He sought the relief set out in the second paragraph of the draft order.

In his founding affidavit he sought to be excused on the ground that he had just completed another *pro deo* matter, that of *S* v *Honzeri* CRB 133/2014, in September 2015. He contended that the second respondent could not have allocated *pro deo* matters to at least 120 of the 300 law firms he alleged were based in Harare between September 2015 and March 2016. He thus *inter alia* sought the order against first respondent to treat all legal practitioners and law firms fairly in the allocation of *pro deo* work. On the surface, his contentions appeared attractive. They however failed to stand up to close scrutiny. He conceded in his oral submissions that his founding affidavit erroneously suggested that he had been appointed *pro deo* counsel in September 2015 when in fact he had been so appointed in 2014 on a date he could not recall. He further conceded that his subsequent appointment would not depend on the date he completed the prior *pro deo* matter but on the date he had been appointed for that matter. The principle that, generally, an applicant in notice of motion proceedings must stand or fall by his founding affidavit is fully entrenched in our law.[1] The applicant failed to establish by his founding affidavit the absence of a credible and functional *pro deo* allocation system in the criminal registry. It was on the basis of these concessions that I was satisfied that he had failed to establish on a balance of probabilities firstly that he had been re-appointed unfairly and secondly the necessity for the generic relief contemplated in paragraph 2 of his draft order. These concessions graphically served to highlight his reluctance to be reappointed *pro deo* counsel for the trial commencing 7 March 2016.

In addition, I took judicial notice of the existence of a credible and functional allocation system revealed in an earlier matter in point that I presided over on 12 April 2016, both of which I brought to the applicant's attention in the course of his oral submissions. Apparently on 1 October 2015, in response to judicial concerns over the low quality of *pro deo* counsel appointed in criminal trials in the High Court, a meeting consisting of representatives of judges in the Criminal Division and the Registrar of the High Court, the Prosecutor General's Office and the Law Society convened and resolved to implement a new

[1] *Dajen (Pvt) Ltd v Durco (Pvt) Ltd* 1998 (2) ZLR 255(S) at 257E; *Bopoto v Chikumbu & Ors* 1997 (1) ZLR 1(H) at 5 E and Herbstein & van Winsen: *The Civil Practice of the High Court of South Africa* 5ed at p 440

pro deo allocation system with effect from 1 January 2016. The Law Society provided the Registrar with a list of all eligible legal practitioners in alphabetical order who could competently handle *pro deo* criminal trials in the High Court which the assistant criminal registrar has been religiously following. She has been intermingling experienced and green legal practitioners in the allocation process. The appointment of the applicant, whose surname comes early in the alphabetical pecking order confirms the existence of this new practice. When I brought the existence of this practice to the applicant during his oral submissions, he appeared appreciative of the new system.

In hindsight, his letter of 21 April 2016 clearly demonstrates that he was merely feigning appreciation of the system. However, on the basis of the defects in his founding affidavit and the existence of the new system that I took judicial notice of I indicated in my oral reasons dismissing his application in its entirety that:

a. The Registrar had a functional *pro deo* allocation system implemented with effect from 1 January 2016;
b. He was properly appointed as *pro deo* counsel for the trial commencing on 7 March 2016;
c. The trial in question did not take off and he was replaced;
d. He remained eligible for appointment in 2016 for any fresh matter that the respondents may elect to allocate him.

It was for these reasons that I dismissed the application with no order as to costs.

Uriri Attorneys at Law, applicant's legal practitioners