THE STATE
versus
KENCOR MANAGEMENT SERVICES (PVT) LTD.

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 9 January 2017

Review Judgment

CHATUKUTA J: This matter was referred for review by the court *a quo* with the following comments:

> "This matter came before me for trial *de novo* on the 4th of July 2016. The matter was being dealt with by my brother magistrate Mr E Makomo, who recused himself at the close of the state case because of reasons contained of record. The legal practitioners of the accused argued that I could not deal with the trial without the proceedings of my brother magistrate being set aside by the High Court.
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> I am in agreement with her argument after reading:
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> *AG* v *Gavaza* 1984 (2) Zim 212 SC, which held that:
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> > 'as a matter of practise, where the Judicial Officer is a magistrate the proceedings are submitted for review by the High Court and a declaration of nullity is made leaving the way open for a fresh trial to be brought….'
>
> In light of the above, the record is placed before you for a declaration of nullity so that a fresh trial may be heard."

The background to the matter is that the accused was charged on 15 June 2016 with contravening s 13 (2) of the Labour Act [*Chapter 28:01*]. It was alleged that the company withheld or unreasonably delayed paying wages due to the complainant without the relevant Minister's permission. The accused pleaded not guilty to the charge. The State lead evidence from the complainant and closed its case. The accused applied for discharge at the close of the State case on the basis that the State had failed to establish a *prima facie* case warranting the placement of the accused on its defence.

It appears that before the trial magistrate had determined the application for discharge, the complainant prepared a written complaint against the prosecutors who had dealt with the matter and the accused's legal practitioner. A copy of the complaint was unceremoniously slipped under the trial magistrate's door despite the fact that the complaint was not against him.

The trial magistrate was concerned that the letter contained issues that would compromise his impartiality. He consequently recused himself before determining the application for discharge.

The matter was reset for continuation on 4 July 2016 before a different magistrate. The accused objected to the continuation of the trial before the magistrate and applied for its removal from remand pending the setting aside of the proceedings on review, hence the referral of the matter on review. The accused relied on the provisions of 180 (6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Section 180 (6) reads:

> "Any person who has been called upon to plead to an indictment, summons or charge shall, except as is otherwise provided in this Act or in any other enactment, be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded:
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> Provided that:
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> (i) where a plea of not guilty has been recorded, whether in terms of section two hundred and seventy-two (*272*) or otherwise, the trial may be continued before another judge or magistrate if no evidence has been adduced;
>
> (ii) ……"

In the present matter, evidence was adduced from the complainant before the State closed its case. The accused would have been entitled to a verdict had the trial magistrate not recused himself. The matter could therefore not continue before another magistrate as rightly submitted by the accused. The procedure that should be adopted under the circumstances was discussed, as rightly noted by the new trial magistrate, in *AG* v *Gavaza* 1984 (2) ZLR 212. In that case the Supreme Court had the occasion to discuss s 163 (5) of the Criminal Procedure and Evidence Act [*Chapter 59*], which was similar to s 180 (6). GUBBAY ACJ (as he then was) remarked at 216 B-D that:

> "The position then which obtains is that s 163 (5) of the Act contemplates that the judicial officer before whom the accused has pleaded remains available to hear the whole of the trial. If he should become no longer available by reason of retirement, resignation or discharge from the service, death, physical or mental incapacity which is likely to persist for a considerable period, or recusal, he becomes *functus officio.* The proceedings are aborted and become void. As a matter of practice, where the judicial officer is a magistrate, the proceedings are submitted for review by the High Court and a declaration of nullity is made, leaving the way open for a fresh trial to be brought. (See also *S* v *Makoni & Ors* 1975 (2) RLR 75, *S* v *Godfrey & Ors* G-S 100 1976)."

In *Gavaza*, there was no indication on record whether or not any of the abortive events cited therein had occurred. However, the ratio which emerges from the judgment is that recusal by the trial magistrate is one such abortive event.

A case in point where the trial magistrate had recused himself/herself is *Zackey* v *Magistrate of Benoni & Anor* 1957 (3) SA 12 where WILLIAMSON J observed at 14 A that:

> "But it seems to me that (a decision to recuse oneself) must amount to a decision that the court has no jurisdiction to hear the matter. Once that is decided, the court cannot be properly seized of the matter at all, and all the proceedings before that court prior to the recusation being accepted must logically become a nullity."

In *S* v *Gwala* 1969 (2) SA 227 @ 229 A, KENNEDY AJP observed at 229 A that:

> "Clearly, such officer becomes *functus officio* upon his recusal and, the prosecutor desiring to proceed with the case, it becomes necessary to have a completely new hearing. Equally so the death of a magistrate, his resignation or dismissal could give rise to the opening of a case *de novo* against an accused person."
> (See *S* v *Tsangaizi* 1997 (2) ZLR 247 (H)).

The reason why another magistrate cannot continue with a trial commenced by another magistrate and where evidence has been adduced appears to be that, a trial magistrate must, in arriving at a determination, consider among other factors the credibility of the witness(es). The trial magistrate would of necessity be influenced by the demeanour of the witness(es). Such a determination cannot, in my view, be arrived at on the basis of evidence contained in the record and adduced before another magistrate.

Whilst it is difficult to comprehend the reason advanced by the trial magistrate in the present matter for recusal where no impropriety was levelled against him, the trial magistrate is now *functus officio*. It serves no purpose to dwell on the propriety of his decision more particularly where the recusal is not the issue for determination in this review. The trial magistrate having recused himself, the trial must proceed afresh.

It is accordingly ordered that:

1. The proceedings commenced before recusal be and are hereby quashed.
2. The matter is remitted for trial *de novo* before the magistrate who referred the matter for review.

CHITAPI J: agrees …….