

SPARKLES SERVICES (PVT) LTD
and
GODFREY MUNYAMANA
versus
THE STATE
and
MAPFUMO FRANCIS (NO)

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 3 August 2016

Unopposed Roll

R Mahuni, for the applicant

MAKONI J: On the day of hearing this matter, I issued an order in the following terms:

- “1. The decision of the 2nd Respondent of dismissing the Applicants’ application for recusal in Case No. CRB 12586/15 be and is hereby set aside.
2. That the proceedings in case number CRB 12586/15 commence *de novo* before another Magistrate.
3. That there be no order as to costs.”

I indicated that reasons will follow later. These are they.

The applicants were arraigned before the magistrate court facing one count of fraud. The trial commenced. The state closed its case. The defence applied for discharge at the close of the state case.

On 7 April 2016 the second respondent dismissed the application and ordered that the applicants commence the defence case. Instead the applicants applied for a postponement of the matter on the basis that they needed to consider the decision to dismiss their application and whether they needed to invoke the review procedure. The application was dismissed on the basis that the applicants ought to have known the matter could proceed to the defence case. The matter

was kindly deferred to 14 April 2016. In the meantime the applicants filed an application for review of the decision of the second respondent.

On 14 April 2016, the applicants made an application for a postponement of the matter on the basis that they had filed an application for review and an urgent chamber application for stay of the criminal proceedings pending the determination of the application for review. The application was dismissed on the basis that the pending applications were not an order of court staying proceedings.

The matter was postponed to 25 April 2016. On that date, the second applicant appeared with a letter from his doctor that he was not feeling well. He applied for a postponement which application was dismissed. The matter was finally postponed to 27 April 2016.

On 27 April 2016, the applicant's legal practitioner was engaged in the bail and motion courts at the High Court. He sent a letter to that effect with the applicants. The court refused to accept the letter but stood the matter down to 11:15. At 11:15 another legal practitioner appeared and applied for a postponement to 5 May 2016 at 14:15hrs as that was the only time available. The matter was however postponed to 3 May 2016. On that date another lawyer appeared and applied for a postponement to 15 May 2016 at 14:15hours. The court again refused. The public prosecutor indicated to the applicants that they could proceed to make the application for recusals to the magistrate as indicated in their letter of 26 April 2016. The legal practitioner then requested to meet the trial magistrate and the prosecutor in chambers where the legal practitioner indicated his intention to apply for the recusal of the magistrate. The application was dismissed and the applicants filed the present application.

The applicants grounds for review can be summarised as:

- (1) gross unreasonableness of the decision of the magistrate in dismissing the application for recusal.
- (ii) Bias on the part of the magistrate which would result in a gross violation of the applicant's inalienable right as enshrined in s 69 (1) and 70 (1) (a).

The application was served on the respondent's and none of them opposed the application. The order was granted, on the unopposed motion roll it was made clear that the

application was being granted for the sole reason of the notice of opposition filed by the second respondent.

Since the application was not opposed, it will not be necessary for me to look at the law relating to recusal of a presiding officer and the review of untermiated proceedings.

I felt compelled to write this judgment after having perused the notice of opposition filed by the trial magistrate to the application for review of his decision to dismiss the application for discharge. This was cited by the applicant, in the present matter to show bias on the part of the presiding magistrate. It was the applicant's contention that after having had sight of the notice of opposition, they had grounds for suspecting that justice will not be administered in an impartial and unbiased manner.

In para 8 (iv) the second applicant states the following:

"I submit that the use of the following words in the above mentioned paragraphs of the ruling dismissing applicants' discharge application, have led the 1st applicant to entertain a genuine apprehension that the matter would not be impartially adjudicated"

The applicants complain that:

- (i) The trial magistrate went beyond merely standing by his ruling.
- (ii) The conclusive views expressed by the second respondent on the guilty of the accused before his defence case were the basis for his apprehension on bias.
- (iii) Both the trial magistrate and the prosecution were represented by the same legal practitioners in opposing the application for review and the urgent chamber applications.

I had occasion to deal with the propriety of a trial magistrate deposing to an opposing affidavit in *Makandi Tea and Coffee Estate (Pvt) Ltd v The Attorney General of Zimbabwe N.O* and *Gapara N.O* HH 595/15. I relied on the authority of *Leopard Rick Hotel (Pvt) Ltd v Warrent Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) 278 B-F where the following was stated:

"Such belief in the mind of the reasonable litigant is bound to be heightened by the fact that not only has the arbitrator refused to recuse himself, but he has descended into the arena of battle by actively participating in the proceedings for his removal and making common cause with the party maintaining that he should not recuse himself"

7. The court continued at 279B-F

"In my view, in circumstances such as these, an arbitrator, umpire, judge or other adjudicating body has one of two choices. The first is that he could file an affidavit setting out facts which he considers may be of assistance to the court. So long as such facts are stated colourlessly, on-one could object, but if the affidavit should err

plainly in support of one of the parties it might expose the adjudicator to the odium of the court.

It is most undesirable that any arbiter or other adjudicator of a dispute should appear to be pitching camp with, or rendering assistance to, one of the contestants to the dispute before him. For the other party is likely to gain that impression that the arbiter and his adversary are conspiring against him. And such an impression would reinforce his belief that the arbiter is biased against him. See the remarks of MCNALLY JA in *Blue Ribbon Foods Ltd v Dube NO & Anor* 1993 (2) ZLR 146 (S) at 148. When the arbiter makes common cause with one of the parties in such proceedings, any facade of justice is shattered; the arbiter is seen to have descended into the arena with the possible consequential blurring of his vision by the dust of battle. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation.

The second choice of the arbitrator or umpire when served with notice of motion for his removal, or to set aside his award, is to take no action and abide by the court's decision."

In *casu*, the applicants can be excused for believing that the respondent had pitched camp with or rendering assistance to the one of the contestants, who is the State, in this matter. Both respondents were represented by the same legal practitioners which created the impression, in the minds of the applicants, that the respondents were conspiring against them. The second respondent expressed some very strong views regarding the culpability of the applicants before they had presented their defence case. The applicants can be excused for believing that were the trial to continue before the same magistrate, it was for purposes of going through the motions of a trial when the arbitor had already made up his mind.

At p 3 of the cyclostyled judgment in *Makondi Tea Estates supra* it made the following remarks:

"The proper approach in this matter would have been for the second respondent to set out facts which he considered would be of assistance to the court and end there. In the alternative, he would have asked a representative of the first respondent to file the opposing affidavit rather than file an affidavit where he clearly supports one side."

I would add the third option, is to take no action and abide by the court's decision. It might be comforting for magistrate to know that reviews are dealt with on the basis of what is contained in the record which they compile during the course of proceedings. The court will merely be enquiring whether there were any irregularities in the course of the proceedings which would warrant interference. The opposing affidavit by the magistrate does not add much value to the review proceedings except in so far as it clarifies facts.

It is for the above reasons that I decided to set aside the second respondent's decision not to recuse himself. The other reasons proffered by the applicants such as dismissal of applications for postponement.

- i) On the basis that the applicants needed to prepare for their defence case after the application for discharge was dismissed is devoid of merit. The applicants must have been prepared because an application can either be granted or refused.
- ii) That the second applicant was sick. The medical report he produced did not suggest that he was not fit to stand trial but that he be allowed to sit down during the proceedings.
- iii) That the applicant's legal practitioners had matters in the High Court. There is a possibility that the legal practitioner might have double booked himself. The best course would have been for him to instruct another legal practitioner rather than send the applicants with a letter to the court.

In the result, the decision by the second respondent to refuse an application for his recusal, in the face of the notice of opposition he deposed to, is so unreasonable that no reasonable authority could ever have come to it. I will therefore make the following order.

- 1) The decision of the second respondent of dismissing the applicants' application for recusal in case number CRB 12586/15 be and is hereby set aside.
- 2) The proceedings in case number CRB 12586/15 commence *de novo* before another magistrate.
- 3) There be no order as to costs.

Mahuni Gidiri Law Chambers, applicant's legal practitioners