

STATE
versus
JOHANNES TOMANA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 13, 14, 15 February 2017 & 18 August 2017

Criminal Trial- application for recusal of judge – Revised for errors

J Chingwinyiso, M Musarurwa, T Hove, T Makoni, for the applicant
T Mpofu and S Hashiti, for the respondent

CHITAPI J: “Much ado about nothing.”; “Storm in a tea cup.” One cannot find a better phrase to aptly describe the comedy of errors displayed by the National Prosecuting Authority and in particular its Acting Prosecutor General. An important and serious case involving a high ranking Government and Constitutional appointee in the stead of the Prosecutor General who is the head of the National Prosecuting Authority, albeit on suspension, was reduced to a huge fuss over a trifle. Incidentally William Shakespeare, the great English poet, play-writer and actor was the author of both comedies “Much ado about nothing” and “Comedy of errors.” The trifle of course is the recusal of the judge, myself, from presiding over the accused’s trial. I do not however suggest that an application for recusal of a judge is trivia. It arises from the right to a fair hearing by an impartial and independent tribunal. The trivia arises from the fact that it is a simple procedural application which does not go to the resolution of the merits of a case and ought not to derail or delay the due administration of justice.

Ordinarily, an application for recusal of a judicial officer from presiding over a matter placed before him is a routine procedure. Such applications seldom take the form of protracted argument as obtained in this case. Usually where parties are legally represented, counsel will discuss the concerns of the party who seeks to have the judicial officer recuse himself/herself beforehand. It should never be a hide and seek game. The party with concerns

may in the process of their discussion disclose such matters unknown to the other party as would inform the other party of the reasons why he or she believes that a particular judicial officer should not handle the matter. Normally, counsel will then make a courtesy call upon the judicial officer concerned and the party seeking the recusal will advise the judicial officer of the concerns of his or her client. The judicial officer may at that stage find that the concerns raised ground good cause for recusal. In such a case, the judicial officer will simply agree to the recusal and cause the matter to be allocated to another judicial officer. The issue in other words is dealt with administratively. Where the judicial officer is not inclined to recuse himself or herself because there is in his or her opinion no just cause for the recusal, he or she will direct that formal application is made in open court upon the matter being called. The judicial officer will then make a determination on the application.

Applications for recusal of the judicial officer where formal application is necessary are under the ordinary course of procedure dealt with summarily. The judicial officer will pronounce his or her recusal or refuse the motion at the end of argument so that proceedings are not delayed further over who should preside over them. Regrettably in this case I had to reserve judgment because of the conduct of the National Prosecuting Authority and its Acting Prosecutor General, the latter being the culprit or spoiler who sought to throw a monkey wrench in the works or put simply who conducted himself in a manner which was inimical, pernicious or detrimental to the smooth conduct of proceedings in this matter. The bungling by the Acting Prosecutor General and his seeming disdain or disrespect for the authority of the court or myself necessitated the need to cause a transcription of the proceedings to be prepared for posterity and reference.

Background

The accused person is facing 6 counts of criminal Abuse of Duty as a Public Officer as defined in s 174 (1) (a) of Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. In the alternative he faces 6 counts of defeating or obstructing the course of justice in contravention of s 184 (1) (b) of the same enactment. On 16 November, 2016, the accused person was indicted to the High Court for his trial by the Provincial Magistrate in terms of the relevant provisions of ss 65 and 66 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. The indictment papers were prepared by or on behalf of the Acting Prosecutor General who signed them. The Acting Prosecutor General was obliged in terms of s 66 (7) of the same Act to and did lodge copies of the indictment papers whose service he cause to be made upon the accused person. Once indicted or committed to the High Court for trial the case became

deemed as pending trial before this court. The trial date was fixed as 13 February, 2017 by the Acting Prosecutor General.

It is necessary at this stage to note that administratively, at High Court Harare the National Prosecuting Authority has three criminal trial court rooms allocated to it. There is also another court which exclusively deals with bail applications. There are also two Criminal Appeals Courts devoted to dealing with Criminal Appeals. These 6 counts are created for discharge of the prosecutorial mandate of the National Prosecuting Authority as set out in s 258 of the Constitution of Zimbabwe (2103) as read with s 12 of the National Prosecuting Authority Act, [*Chapter 7:20*] and for disposing of bail applications and appeals.

My judgment however focuses on the criminal trial courts. To state the obvious, the criminal trial courts are court A, B and D. Administratively, the National Prosecuting Authority is the one which sets down its cases in the said courts. The Authority prepares the court roll or cause list each High Court term. The Authority's set down office is based at and operates from its offices. The question then arises, "How does a judge become seized with a criminal trial?" The procedure is that the administrative head of the High Court, through divisional heads simply assigns a judge to a particular court for a certain period. A duty roster is prepared and does not depend upon the cases set down by the National Prosecuting Authority in a particular court. The duty roster is not a secret document and the National Prosecuting Authority knows before the beginning of each court term as to which judge will be presiding in each of the criminal trial courts.

I have set out the above administrative process to show that the National Prosecuting Authority knew long before the trial date of the accused person that the judge who was presiding in Court A in which the case was enrolled was myself. It was not as if a judge, myself, was specifically assigned by the court administration to deal with the case *in casu*.

It will therefore be apparent when I deal with the merits of the recusal application that the Acting Prosecutor General must have known who the presiding judge in court A in the first term of 2017 was. By not seeking the recusal of the judge from presiding over the case before the set down, it meant that the National Prosecuting Authority and its Acting Prosecutor General did not have any qualms with the judge whose background and past connection with the Authority and the accused were matters within their peculiar knowledge and largely public knowledge because the fact of the judge having been a past board member of the National Prosecuting Authority was public knowledge. The appointment to the Board was gazetted in the Government Gazette.

It should also be noted that the existence of the National Prosecuting Authority Board derives from s 259 (10) of the Constitution as read with s 8 of the National Prosecuting Authority Act. The judge as is common cause and upon a reading of the National Prosecuting Authority Act was a ministerial appointee who did not owe his appointment to the Prosecutor General or any member of the National Prosecuting Authority as listed in s 4 of the National Prosecuting Act. The judge therefore did not owe any allegiance to the Prosecutor General but to the Authority and the State. Admittedly, whilst the Prosecutor General was and is the board chairperson of the Authority, he has no power to appoint or dismiss a board member. The relationship between the judge as a board member has to be considered as professional where the duties of non-executive board members are clearly spelt out in the constitution and the National Prosecuting Authority Act. In particular in the exercise of its mandate, the board would and was guided by s 260 (1) of the Constitution which guarantees the independence of the Prosecutor General in exercising his or her functions. Section 259 (10) of the Constitution is clear that the function of Board is to employ persons who will assist the Prosecutor General in discharging that office's sanctions. Section 6 of the National Prosecuting Authority Act reinforces the independence of the Prosecutor General from being subject to the Board. In short the Board superintends the human capital side of the Authority except for the Prosecutor General. The issue of the relationship between the Board and the Prosecutor General has to be ventilated in summary because as will become apparent in this judgment, the Acting Prosecutor General raised it as a ground for recusal of the judge noting that the judge had been a Board member of the National Prosecuting Authority with the accused as chairperson in his capacity as Prosecutor General. In other words the Acting Prosecutor General's view was that the statutory professional relationship between the Prosecutor General and the judge as board member was good ground for the judge to recuse himself from presiding over the present case. It is also important to note at this stage that whilst the judge was appointed board member of the Authority in or about December, 2014, the indictment against the accused person relates to the period 20 October, 2009 to 3 June, 2010 in respect of the first 5 counts and to 29 January, 2016 in respect of the 6th or last count. The judge was not a board member during the periods mentioned in the indictment. The National Prosecuting Authority Act was gazetted on 11 July, 2014. The Board and National Prosecuting Authority was not in existence by June 2010. The judge had long been appointed to the High Court bench on 7 September 2015 by the time the allegations against the accused person of 29 November 2016 in count occurred. These considerations would have been

relevant and played in the mind of the judge in considering whether he saw or felt cause to unilaterally recuse himself from presiding over the case.

The facts alluded to above were within the knowledge of the National Prosecuting Authority and hopefully its Acting Prosecutor General before the accused's trial date. Any other relationship which the judge may have had in interacting with the National Prosecuting Authority and its Prosecutor General when the judge was still a practising legal practitioner would have been known by that office. The question which begs for an answer is why the National Prosecuting Authority was content to have the judge sit in the matter and only make a turn round after the hearing of the case had commenced and certain orders and directives given. Is it because the National Prosecuting Authority was expecting a pre-conceived result and became apprehensive that its expectations may flounder? The timing of the application cannot escape speculation or conjecture as to whether or not it was well meaning and devoid of other extraneous considerations other than the pursuit of fair, just, impartial and transparent justice deliverance.

Events of 13 February 2017

On the morning of 13 February 2017, the lead prosecutor Mr *Chingwinyiso* made a courtesy call in the judge's chambers with two of his assistant prosecutors and the accused's counsel Mr *Mukweva*. After introducing themselves, I asked the prosecuting team if they were ready to proceed and if the defence team was also ready to proceed. I was advised that the defence had served the prosecution with an application in court that morning and that the prosecution had not been made aware before hand of this application. I directed that whatever application it was should be dealt with in court. I was advised that the lead defence counsel, Advocate *Thabani Mpfungu* could not come to chambers as he was arranging to postpone another matter.

The rest of what then transpired thereafter is captured on record and the same has been transcribed. It will be noted that I proceeded to court without any hint by the prosecuting team whatsoever that my presiding over the trial was an issue. When the case was called and after counsel introduced themselves, Mr *Mukweva* for the accused person formally advised the court that Advocate *Thabani Mpfungu* whom he had instructed to represent the accused person was still tied up in another court in a civil matter. The court allowed the defence a brief adjournment for defence counsel to find out the position with Advocate *Mpfungu* on his availability. The court also asked Mr *Mukweva* whether the trial would be proceeding. He indicated that the defence intended to make an application which had been

prepared and served on the prosecution team in court. He submitted that the application had been served late because counsel prepared it late. Mr *Mukweva* indicated that the application would be made by Advocate *Mpofu*.

State Counsel Mr *Chigwinyiso* raised his objections to how the defence had sought to serve the application in court. He indicated that the application could not be considered as having been served without a return of service in the form of the stamp of the National Prosecuting Authority to evidence that it had been received. Mr *Chigwinyiso* sought a deferment of the case to the following day. The court was not inclined to postpone the case before it was put in the picture of what exactly the application was about and before the issue of the availability of Advocate *Mpofu* was dealt with.

Before adjourning the case, the court asked counsel whether the application had been filed because there was no copy of the same on record. Mr *Mukweva* indicated that he had just had the application issued by the Registrar and had brought all stamped copies to court. I did not consider that this was proper because the Registrar should have returned the copies of the application for the record. I directed Mr *Mukweva* to let the court have copies of the application and he handed over the bar a photocopy of the application on which the name of the accused was inscribed in long hand in the name citation with the originally typed name cancelled on the first page headed application for constitutional relief. The next page was the accused's affidavit and there was no alteration to the citation of the parties' names. The next document was the draft order and the typed name "Martin Dinha" in the heading was cancelled and the cancellation initiated or signed for. The accused's name was substituted in long hand where the typed name "Martin Dinha" had been cancelled. The court adjourned the case to 11.15am to allow time for State and defence counsels to discuss the application and agree a way forward. The adjournment of 30 minutes would also afford the court time to read through the application and for Advocate *Mpofu* to avail himself. The court also advised counsel that it did not want to let the case be bogged down in "unnecessary technicalities". Defence counsel was also ordered to prepare sufficient copies of the application for the court.

When the court resumed, Advocate *Mpofu* apologized for his delayed attendance and for not timeously placing his intended application before the court and served the State timeously. He also apologized for the mix up in the name of the accused on the cover of the application. He handed over the bar a corrected copy of application. The substance and content of the application was the same as the one handed over by Mr *Mukweva* prior to the adjournment. Advocate *Mpofu* further submitted that the State and defence counsels had

liaised over the application and agreed that it be made the following day at 11.30am with the state counsels having undertaken to file their response by 10.00 am. I directed Advocate *Mpofu* to place on record what the gist of the application was because the court needed to appraise witnesses and other interested parties who sat in the court room of the reason for postponing the matter. To simply state that the case was being postponed for purposes of making an undisclosed application as to its nature or purport would not have been sufficient or proper.

Advocate *Mpofu* then submitted that he would be making an application supported by the accused's affidavit to declare the prosecution of the accused void on account of certain provisions of the constitution and for alternative relief that the prosecution be stayed pending determination of the constitutional process under way whereby His Excellency the President of Zimbabwe had invoked the provisions of section 187 of the Constitution. Section 187 aforesaid deals with the removal from office of judges and applies to the Prosecutor General.

In response Mr *Chigwinyiso* introduced a 4th member of his prosecuting team, a Mr *Timothy Makoni*. He acknowledged that the defence had filed an amended application but submitted that what was before the court were just papers because he could not agree that the State had been served with the application until such time that a copy of the application had been served at the offices of the National Prosecuting Authority and its date stamp franked thereon. He submitted that once this formality had been followed, the prosecution would then be able to respond accordingly possibly by 10.00 am. I asked Mr *Chigwinyiso* whether in essence he was submitting that the State needed time to consider the application. Mr *Chigwinyiso* submitted that even if the prosecution and the court were in possession of the application, there was still no application until the same had been franked by the National Prosecuting Authority at their offices. Herein started the comedy of errors, the much ado about nothing or storm in a tea cup. I ruled that the court did not see any logic in his reasoning and insistence that the application could only be treated as being properly before the court if it was served on the offices of the National Prosecuting Authority and its magic date stamp franked on it.

I ruled perhaps to the chagrin of the prosecuting team that it had been served with the application and was expected to respond to it and that it would assist the court if a written response was similarly filed. The court was not referred to any rule in criminal procedure which requires that a written application objecting to an indictment being tried can only be deemed proper if it has been served at the offices of the National Prosecuting Authority and

its stamp franked on the copy served upon the authority. Applications to quash an indictment as was sought in the main by the accused are made before the accused pleads. The law and in any event logic and common sense dictates that the State is given reasonable notice of such application. Sections 170, 171, 178 and 179 of the Criminal Procedure and Evidence Act are instructive. It just defies logic for the State Counsel to admit that he has been handled a copy of a filed application but will not recognize it as such until a copy thereof has been served at his head office. Such attitude was farcical.

Notwithstanding the attitude of the prosecutors, I asked whether in view of the nature of the application, they were content with being given until 10.00am to file a response or they needed more time. Mr *Chigwinyiso* then suggested that the State be given until 2.15 pm the following day to file its response. I then agreed to grant the indulgence to 2.15 pm. I then asked the Prosecution team whether there were any witnesses to be warned. Witnesses Messrs Mabahwama, Uladi, Dube, Sergeant Shumba, Mutsonziwa and Hove were called into court. I explained the deliberations which had gone on, the late filing of the defence application, the need for the State to respond in writing thereto, the nature of the application and the agreement by the State and defence counsel to defer the hearing to the next day. I confirmed with Mr *Chigwinyiso* that he could advise the witnesses to avail themselves at short notice. It was agreed that the witness be discharged from attendance until called after the determination of the application.

As regards the accused person, the record will indicate that I then said, “Stand up P.G. I am postponing this case by consent to 2.15 tomorrow and you are ordered to appear at that time. Thank you all”. In referring to the accused person as P.G (Prosecutor General) I did not realise nor anticipate as I was later to discover that I had annoyed or irritated the Acting Prosecutor General to whom the reference was reported. The developments which followed can only be described as I have indicated as a big fuss over a trifle. The Acting Prosecutor General perhaps determined to guard his territory of power decided that the judge, myself should recuse myself from the case. It is very important to point out that recusals of a judicial officer are an everyday occurrence and occur as part of the judicial function. But how did the prosecution go about it?

Events of 14 February, 2017

In the morning of 14 February, 2017, my administrative head, the Judge President called me to his chambers. He handed me a copy of a letter addressed to him by the Acting

Prosecutor General. It was copied to the Registrar and to the accused's legal practitioners. The Judge President advised that he was passing on the letter to me because as the presiding judge I had to singularly decide on the issues raised and that his passing over the letter to me was all that he considered proper to do. For the avoidance of doubt, the contents of the letter was as follows and it is reproduced here because it was not a confidential communication as will be apparent.

“Monday, 13 February, 2017

The accused was indicted for trial commencing on 13 February 2017.

Prosecution counsel and the accused's instructing legal practitioners appeared in chambers before the learned Justice T H Chitapi, the judge assigned the matter for a courtesy and to inform him as to the readiness of the parties to proceed.

The learned judge was informed that the State was ready to proceed and had its witnesses present to testify but had not been furnished with the accused's defence outline despite the fact that the accused was indeed already for trial on 16 November 2016.

The accused's instructing legal practitioner informed the learned judge that no defence outline had been prepared but the defence intended to make an application and was awaiting the arrival of instructed counsel Mr *Thabani Mpofo*. The judge adjourned the matter to 11:15 hours.

Shortly before the matter was called in court the defence produced a document which “purported” to be an application. “Purported” because the document does not in the least comply with the rules of court regarding form, substance and manner of service of court applications. Furthermore the face of the so called “application for constitutional relief” shows that it was a page prepared for a certain Martin Dinha. The said Dinha's particulars are scratched out in pen and substituted with Johannes Tomana.

Attached to it is an affidavit of the accused and a purported draft order also drawn presumably from an application filed in respect of the said Marin Dinha whose particulars are scratched out and the accused's particulars handwritten in.

After hearing submissions the court ordered the State to file a written response to the application by 11:45 on 14 February 2017.

During the proceedings captured on tape the learned judge repeatedly referred to the accused as “Prosecutor General.”

I am of opinion that the learned judge has improperly conducted himself and the proceedings. First of all Mr Tomana was suspended by H.E. The President of the Republic of Zimbabwe, Cde Robert Gabriel Mugabe on 7 July 2016. Simultaneously the President appointed and swore in Advocate Ray H Goba as Acting Prosecutor General. It follows that Mr Tomana, the **accused** is not in office and accordingly not “the Prosecutor General.” In other words the office/position is occupied by Adv Ray

H Goba. Accordingly, any reference to the **accused** as Prosecutor General is grossly improper and fails to distinguish between the person and the constitutional office.

The learned judge's conduct may reasonably be perceived as improper deference to the accused likely to taint his judgment in dealing with the matter.

It is common knowledge that the learned judge previously served on the Board of the National Prosecuting Authority under the chairmanship of the **accused** before his appointment to the bench. This may help explain the learned judge's conduct during the hearing; the improper deference to the accused and improper indulgencies granted to him.

For these reasons I fear that the proper administration of justice is likely to be prejudiced if Justice Chitapi is to continue presiding over the matter. The public's perception of justice is likely to be diminished in regard this prosecution.

I accordingly, and with the greatest respect to the learned judge submit that he is singularly unqualified to preside over this matter.

I would wish my concerns to be brought confidentially to his attention in order for him to apply his mind to the matter, to make an appropriate decision and avoid a formal application in court.

The Honourable Judge President

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Advocate Ray H. Goba

Acting Prosecutor General"

The letter became public knowledge in circumstances which will be explained. It was stamped by the Registrar. However, at this stage it is necessary to note that what irked the Acting Prosecutor General was firstly the fact that the prosecuting team had been ordered to file a written response to the so called "purported application" which did not "in the least comply with the rules of court regarding form, substance and manner of service of court applications". He was also irked by the fact that the names Martin Dinha appeared on the papers but were "scratched out in pen and substituted with Johannes Tomana". He was equally irked by the fact that the judge (myself) had "repeatedly" (not true of course as the record will show) referred to the accused as "Prosecutor General". In his view the Acting Prosecutor General considered that the judge had "improperly conducted himself and the proceedings". The Acting Prosecutor General surmised that because he was appointed and sworn to act as such following the suspension (not dismissal) of the accused person, a reference to the accused as Prosecutor General was grossly improper and showed the judges

failure to distinguish between the person and the Constitutional office.” The improper deference to the accused person as Prosecutor General was according to the Acting Prosecutor General likely to taint the judge’s judgment. The Acting Prosecutor General then remembered that the judge had at one time served on the Board of the National Prosecuting Authority before he joined the bench and that the accused person was Chairman of the Board. He thought that the improper deference to the accused and improper indulgencies (whatever these were) were due to this past interaction.

It is of course not clear as to what indulgencies were being referred to. An application was filed officially with the court. It had to be replied to or best put, it was necessary that the State be given an opportunity to respond to it. The nature of the response was not dictated by the judge. Procedural objections could still have been taken in the response. What the judge ruled on was to overrule the prosecuting team when it sought to argue that it could not acknowledge that a filed application handed to it was not an application because it was not stamped by the prosecution office. At this juncture it is proper to leave the issue of the application because the same still has to be determined on merits. A ruling is however made that there was no improper indulgence extended to the accused person by the judge. If any indulgence was given, it was extended to the State at its request and by agreement with the defence that it needed time to prepare and file a response. The judge extended the time which the prosecutors had asked for to 2.15 pm the following day instead of 10.00am so that the State would get sufficient time as requested by it to respond.

What is in fact significant and deserving of censure is that the order of the court granted by consent of the defence and prosecuting team that the State response be filed by 2.15pm on the next day was by intervention of the Acting Prosecutor General defied. Instead of assisting his prosecuting team to file a response as ordered following request by the prosecuting team, the Acting Prosecutor General deliberately decided to torpedo the trial. Common sense would dictate that the State was supposed to prepare and file a response as undertaken by it and endorsed as an order by consent by the court. Thereafter the prosecution team would then have applied for recusal of the judge so that he does not determine the application. Only the Acting Prosecutor General can in his wisdom justify why an application which calls for a response can be answered by disregarding an order to file a response by the state but instead be answered by a letter asking the Judge President to confidentially tell a sworn judge to recuse himself. The letter does not make mention of the State’s response to the accused’s application. It is totally a protest at why the State was given an opportunity to

respond to an application and why the judge referred to the accused person on trial as Prosecutor General.

The Acting Prosecutor General was intent on undermining the authority and integrity of the court by mounting an attack upon the judge regarding how the judge had handled the case before him. It will be seen that the Acting Prosecutor General in his letter of protest complained that the application made by the defence counsel was a “purported” application which was in fact a document which did not comply in the least with the rules of court regarding “form” substance and manner of service of court applications.” For the obvious reason that the application aforesaid and remains pending determination, it will not be appropriate for me to rule on whether or not the Acting Prosecutor General was correct in his comment. The same applied to the Acting Prosecutor General’s comment regarding the alteration of names through crossing out by pen wherein the accused’s name was then written in ink. If these issues irked the Acting Prosecutor General, all that he should have been expected to do was to assist his prosecuting team to prepare a response encompassing his objections as undertaken by the team for the court’s determination.

The Acting Prosecutor General was of the view that his position was being undermined by the reference to the accused person as Prosecutor General. He felt that the correct reference should have been to refer to the accused person by the word “Accused”. The Acting Prosecutor General reasoned in the letter that the person on trial “Mr Tomana” was on suspension and therefore not in office. He considered that it was improper to refer to the accused person as “Prosecutor General.” It is not necessary to waste time debating such a flimsy and legally unsound argument. The accused person on trial was the Prosecutor General of Zimbabwe albeit on suspension pending the conclusion of a constitutional process instituted by the State President as appointing authority, to determine whether the Prosecutor General should be removed from office. The process of the removal from office of the Prosecutor General during his or her tenure of office follows the same procedure as that of the removal of judges from office. This is provided for in s 259 (7) as read with s 187 of the Constitution. Until his removal from office, the accused person remained the Prosecutor General and any reference to him as such was therefore proper. A judge on suspension and on trial for example remains a judge until removed from office. To refer to a person on trial by name or official designation should in fact be adopted by the courts. As a passing comment I have always referred to persons appearing before me by their names and titles be they accused persons or witnesses. Persons appearing in court should feel at home because the

courts are created for the people. In terms of s 162 of the Constitution, judicial authority derives from the people of Zimbabwe. There is no justification to demean the person on trial by referring to such person as accused as opposed to by his name. Anyone who has sat in a court that I preside will know that I refer to persons be they on trial, witnesses or counsel by their names and/or titles as a show of respect. Calling persons by their names in court should not be an issue which impacts negatively on justice dispensation. William Shakespeare in his works *Romeo & Juliet* wrote, "Whats in a name? That which we call a rose by any other name would smell as sweet." The Acting Prosecutor General was of the view that referring to the accused on trial by his official title showed deference to him and that such reference had the potential to cloud the judge's impartiality. He reasoned that because he was appointed and sworn by the President as Acting Prosecutor General, addressing the accused person as Prosecutor General was "grossly improper and failed to distinguish between the person and the constitutional office." I have already indicated that the accused person who was appearing before the court was the appointed Prosecutor General albeit on suspension. How a reference to him by his proper designation could be said to be "grossly improper" is baseless in law, logic and common sense.

The next issue raised in the letter was the past association between myself and the National Prosecuting Authority as a board member. I have already dealt with the issue. As can be seen from the letter, the Acting Prosecutor General considered that my past relationship of board member of National Prosecuting Authority chaired by the Prosecutor General in the person of the accused person provided an explanation for "the judges conduct during the hearing, improper deference to the accused and improper indulgences granted to him "(I am of course not clear as to the nature of the improper indulgences referred to because apart from indulging the defence counsel who was in other court and pitched up late, the only other indulgence granted by the court was to allow the state counsel time to prepare a response to the application filed by the defence counsel in the morning of the hearing. The Acting Prosecutor General reasoned that the administration of justice was likely to be prejudiced if I continued to preside over the matter and that the public's perception of justice was likely to be diminished in relation to the prosecution of the matter. The Acting Prosecutor General's opinion in this regard has no sound basis for the reasons I have given in the main that the cases which the accused person was indicted upon fell outside the period that I was connected with the National Prosecuting Authority. In addition the Board does not

discuss prosecutions but manpower issues. The letter does not indicate that the judge had prior knowledge of the cases.

Lastly, the Acting Prosecutor General committed a cardinal error of requesting the Judge President to deal with the matter confidentially in bringing his concerns to my attention. Whilst the Acting Prosecutor General may have been well meaning, his suggestion would have set a very dangerous precedent. The case had been called. Orders had been made in court including that the prosecution team files its response to the defence application by 2.15pm of the following day. Justice dispensation should not be done behind closed doors. To have expected the Judge President to have gone along with the Acting Prosecutor General's suggestion to discuss issues of recusal in private was clearly an offside move by the Acting Prosecutor General. The Acting Prosecutor General is strongly warned to desist from such unprofessional and unethical conduct in future. It was highly irregular of the Acting Prosecutor General to address the Judge President in the manner that he did concerning the conduct of a judge sitting over a matter without even having the courtesy to copy the letter to the judge concerned. As a senior advocate and Chief Law Officer of the State in criminal matters, he should have led by example. The Acting Prosecutor General and his team should simply have invited the defence team to my chambers and discussed the prosecution concerns as stated in the letter if the aim was to avoid making a formal application for recusal in open court.

I earlier indicated that I would deal with how the letter found itself in the public domain. The letter was copied to the Registrar of the High Court of Zimbabwe and to the defence counsel's law firm. The transcribed record will show that when the court hearing resumed on 14 February, 2017 the defence team raised the issue of the letter and its impropriety. Advocate *Mpofu* submitted that a copy of the letter had been handed or served on the defence team by the prosecution team. The defence took exception to the letter which they considered as impugning the integrity of the judicial process, vexatious and unethical. Advocate *Mpofu* submitted that it was proper to prepare a citation directing the author of the letter to appear before the court and purge his contempt of the court process. He also submitted that the Acting Prosecutor General had in the process of vilifying the judge, incited his subordinates the prosecuting team not to comply with the court directive to file a response to the application by the defence counsel. He noted that the application only comprised two pages and there was nothing complicated about the application as would have made it impossible for the prosecution team to prepare a response as undertaken by it. He attributed

the default in filing the response to open and calculated defiance of the authority of the court on the part of the Acting Prosecutor General who instead of getting his team to respond to the application, decided to devote his energy and time to writing a scandalous letter.

The lead prosecutor Mr *Chigwinyiso* submitted that his team realised that it had allocated itself too little time to research and prepare a response. He submitted that his team had covered substantial ground and would require “a day or so” to make a full response. He applied for the matter to be further postponed for a “day or two” in order to file a response to the application made “yesterday” and then to make a proper application as regards the issues raised by the Acting Prosecutor General.” The lead prosecutor submitted that the State response would be ready and filed by 17 February 2017.

With respect to the letter by the Acting Prosecutor General, the prosecution team could not speak to it or motivate it. To its credit, the prosecution team through the lead prosecutor submitted that upon reflection their boss had misfired by writing a letter to the Judge President concerning a matter before the court and more so without copying the letter to the presiding judge. In a lighter moment, I requested the lead prosecutor to look at the dock and tell the court how he would address the accused person. He gave a witty response. He said “I will answer the question from my Lord from a person who is dealing with soccer. A player who has been red carded still remains a football player. The Prosecutor General is still Prosecutor General whether suspended or not until he is removed from office.” He agreed that Advocate *Ray Goba* was Acting Prosecutor General discharging the duties of the Prosecutor General and that the Prosecutor General was the accused person before the court who however was on suspension. Mr *Chigwinyiso* then submitted further that the Acting Prosecutor General as the author of the letter was best placed to motivate it.

The court then postponed the matter at the instance of the prosecution team to the next day 15 February, 2017. The prosecuting team undertook that it would have filed a formal application for my recusal by 11.15 am and the Acting Prosecutor General would appear with the team at 2.15pm whereat he would motivate or explain his letter and deal with the application for my recusal. I indicated to the prosecution team that if it faced time constraints, the application could still be made orally because there was no rule which prescribed that an application for recusal of the judge be reduced to writing.

Advocate *Mpofu* submitted that the defence wanted the Acting Prosecuting General to be available. The court did not consider it necessary to prepare a subpoena or citation for the Acting Prosecutor General to appear before the court. The court considered that the Acting

Prosecutor General was an officer of the court and a legal practitioner duly sworn, admitted and registered as such by the High Court. Thus when required by the court to attend in relation to a matter which he has brought before court, the Acting prosecutor General in deference to the Court and the duties of his office did not require to be compelled by subpoena to appear before the court at its request or direction. Mr *Chingwinyiso* undertook to advise the Acting Prosecutor to appear before the Court on the following day. The matter was rolled over to the following day 16 February, 2016.

On 16 February, 2016 the prosecuting team appeared in court without the Acting prosecutor General. No application was made for him to be excused from attendance nor to explain why he was not in attendance. The lead prosecutor submitted that he relayed the message to the Acting Prosecutor General that he was required at court to explain the contents of his letter. The Acting Prosecutor General reportedly instructed his prosecuting team to tell the court that his explanation was contained in his affidavit supporting the written application for recusal. Mr Chingwinyiso further indicated that he had spoken to the Acting Prosecutor General in the morning and he had indicated that he was going to attend. As it was now 2.53 pm, the lead prosecutor indicated that he did not know whether the Acting Prosecutor General would pitch up or not.

Mr *Mpofu* submitted that the Acting Prosecutor General's conduct showed that he had no respect for the court because he deliberately refrained from presenting him before the court despite the court's directive. He submitted that the application for recusal in any event cited the judge as second respondent and yet the judge was supposed to determine it. To this extent, counsel pointed out correctly of course that the application was defective to that extent. He submitted that it was only fair that the Acting Prosecutor General be given 10 minutes to present himself before the court failing which the court should issue a citation for him to attend and explain his conduct.

The court however ruled that since the Acting prosecutor General had been given an opportunity to appear before the court and explain his letter and motivate the recusal but deliberately spurned the opportunity, he only had himself to blame if an adverse order or finding was made against him. There can be no doubt that the Acting prosecutor General displayed a recalcitrant attitude reminiscent of a stubborn unwillingness to defer to the court's authority. The court pointed out to the prosecuting team that it was the first time in its experience that the Government Chief prosecutor and legal practitioner exhibited such a belligerent and hostile attitude towards the authority of the court.

The Acting Prosecutor General discharges the duties of the Prosecutor General. The office of Prosecutor General is a constitutional appointment. Courts are also created by the Constitution. This court in particular is a superior court with inherent and unlimited jurisdiction over all matters, civil or criminal save as excepted by the Constitution. By adopting a hostile and stubborn attitude towards the authority of this court and/or a judge of this court in the discharge of his constitutional functions as such, the Acting Prosecutor General's conduct has the potential to create a constitutional crisis where one constitutional body undermines the authority of the other. The rule of law can only be threatened by such conduct. The conduct exhibited by the Acting Prosecutor General of creating a stand-off between the office of the Prosecutor General and this court as happened in this case where he refused to attend when called by the court must be deprecated and censured. The Prosecutor General admittedly and in terms of s 260 of the Constitution is independent and not subject to the direction or control of anyone. He should not however get carried away because the independence of that office is subject to the Constitution. Since this court has original and inherent jurisdiction which extends to all person and matters, the Prosecutor General unlike the President who enjoys immunity whilst in office in terms of s 98 of the Constitution, must and is expected to defer to the authority of the court and is not above the law.

Whilst the criticism of the Acting Prosecutor General's conduct may appear to be hard hitting, he only has himself to blame because he was given the opportunity to present himself before the court and explain his conduct in writing a letter behind a judge's back in an apparent attack on the judge and courts integrity and he deliberately refrained from doing so. Legal practitioners like the Acting Prosecutor General are senior officials of this court and should lead by example. Anything short of impeccable conduct on the part of the Acting Prosecutor General, the Prosecutor General and members of the National Prosecuting Authority as with any other legal practitioner of this court is a recipe for the breakdown of the due dispensation of justice and rule of law.

Having dealt with the issue of the unacceptable conduct of the Acting prosecutor General, I lastly deal with the application for my recusal. I have already pointed out it was defective to the extent of citing the judge (myself) as a party. It is trite that a party cannot be an arbiter where he is a party. I enquired from the lead prosecutor whether I should not engage a legal practitioner to represent me since I was cited by name as the second respondent. The citation of myself exemplified the comedy of errors on the part of the Acting Prosecutor General. He further committed to deposing to the Affidavit in support of the

application. A reading of the affidavit shows that he had no personal knowledge of what transpired in the court which led him to seek the recusal of the judge. He deposed that the application for my recusal was motivated by “certain objections ... raised and brought “to his attention by the Prosecution Team.” The transcribed record will show that the prosecution team did not raise any objectives against the judge except the fact that the team did not consider the defence application *in limine* to have been properly served as it had not been served at the offices of the National Prosecution Authority and stamped although it had been filed of record.

The acting Prosecutor took a calculated risk of deposing to the founding affidavit on matters which took place in court in his absence. The application does not include any verifying or supporting affidavit by any member of the prosecuting team to authenticate the so called objections which were allegedly raised. The Acting Prosecutor General would have been expected to be on the guard to refrain from adducing evidence in the nature of hearsay. The advisable course for him would have been simply to get one member of the prosecution team who could vouchsafe for what happened in court to depose to an affidavit to that effect.

After considering the contents of the founding affidavit and noting several distortions and untruths as to what the Acting Prosecutor General was alleging to have transpired in court, I asked Mr *Chinwginyiso* to advise the court on who had prepared the application. He responded that the application had been prepared by the Acting Prosecutor General in his office. The prosecuting team did not have a hand in its preparation. The team was however ready to motivate it based on the contents of the founding affidavit. I should mention that one other reason for directing that a transcription of proceedings be prepared were the distortions of facts noted in the affidavit of the Acting Prosecutor General.

In dealing with the reasons for seeking the judges recusal, the Acting Prosecutor General alluded to other grounds already contained in his letter to the Judge President. I have dealt with them and will not unnecessarily dwell on them.

The Acting Prosecutor General deposed that prior to 13 February 2017, “the State had been furnished with information from an independent source that the second respondent (myself) had prior knowledge of an application that was going to be made which was a surprise to the state because no application had been served upon it”. The independent source was of course not disclosed nor details of when and how the judge had obtained the prior knowledge. Mr *Chigwinyiso* could not provide further details. To disabuse the state of dangerous rumour mongering and gossip, I did advise the counsels that it was true that

through my clerk I have been advised the previous week that the defence counsel, for the accused person had indicated that he would be making an application on the date of trial, the nature of which was not disclosed.

The circumstances of how such communication was made are very simple and were open. In terms of section 66 (8) of the Criminal Procedure and Evidence an accused person who is legally represented is required to prepare and file a defence outline and list and summary of the evidence of any witnesses within 3 days of the trial date. When I was reading through the record of the present matter to prepare for the trial, the indictment papers being voluminous and in the preceding week, I noticed that there was no defence outline on record. I directed my clerk to check with the registrar whether a defence outline had been filed and could be in registry since the record was already in my chambers. I was advised that there was no defence outline filed. I then directed my clerk to contact the accused person's defence counsel and enquire as to whether a defence outline had been filed and for counsel to do so, if it was intended to file one so that I acquaint myself with the case before trial. My clerk then wrote a note to indicate that she had been in touch with Mr *Mpofu* who indicated that the defence would not be filing a defence outline but would be making an application. The nature of the application was not disclosed and neither was it of concern to the judge to have details of the same.

The judge happened to be dealing with another criminal trial which was set down until Friday 10 February, 2017. The prosecutor Mr S.W. Munyoro had wanted to postpone the matter to the following term on a date to be advised because the trial could not be completed by 10 February, 2017. It was then that I proposed that Mr Munyoro should instead postpone the trial underway to 13 February, 2017, the same date that the present matter was set to commence. A disclosure was made to Mr Munyoro that my clerk had been advised by the defence counsel that they would be making an application whose nature I did not know. Mr Munyoro was advised to arrange to utilize the slot allocated to this case and complete his case in the event that whatever application was going to be made by the defence had the effect of causing the present case not to commence. In the event that this matter commenced, then new dates for continuation of Mr Munyoro's case could then be arranged. The arrangement was agreed to. To then impute ulterior motive or improper conduct on such an open arrangements and to make it a ground for recusal yet all that the court intended to do was to ensure that the prosecution utilizes all available time to the court to clear its cases is with respect very unfortunate if not mischievous. In the absence of disclosure by the Acting

Prosecutor General as to his source of knowledge, the position regarding prior knowledge of the defence application on the part of the judge was as explained.

In passing, the Acting prosecutor General needs to appreciate that one of the reason why criminal cases set down sometimes fail to take off the ground is because of lack of prior preparation on the part of his officers by not following up on defence counsel to provide defence outlines and/or finding out on their positions with regards the accused's defence prior to the set down date. There is nothing irregular about a judge to whom a matter has been assigned directing his or her clerk to follow up on counsel and finding out the position with missing documents which are by law required to have been filed prior to trial. Failed or delayed take off of cases should be avoided. To wait to be told on the date of trial that the case cannot take off for reasons of the absence of a defence outline clearly shows dereliction of duty or lack of preparation on the part of the court and counsel. The approach of this judge (myself) has always been to require his clerk to contact counsel before trial where there has been non-compliance with the provisions of s 66 (8) of the Criminal Procedure and Evidence Act. If as happened in this case, counsel advises that it is not intended to file a defence outline, the fact is endorsed on record and the judge is alerted that the trial may not take off. Other court commitments can then be put on stand by to be dealt with in the event of trial failure.

The Acting Prosecutor General in his founding affidavit repeated the same objection made in his letter that the judge improperly referred to the accused person as "Prosecutor General". He went a step further to indicate that the judge had used the word "Honourable" Prosecutor General. In his view the correct reference should have been to simply refer to the accused person as "ACCUSED". He reasoned that the title Prosecutor General could only be "legally" resumed or used to describe the accused person once his suspension has been removed. I have already dealt with the argument and ruled that since the accused person had only been suspended from carrying out his duties, such suspension did not suspend his appointment but the discharge of his duties. Simply put it would be correct for a bystander to remark that "The Prosecutor General of Zimbabwe is on suspension and that an Acting Prosecutor General was appointed to discharge the duties of the Prosecutor General until the latter's' fate has been decided. How the Acting Prosecutor General reasoned that there was a breach of court etiquette by calling the accused person by the title of his office defies logic. This case concerns the Prosecutor General who was indicted for trial after being charged for criminal transgressions. The prosecuting team knew that it was leading the prosecution of the

Prosecutor General. To reason that the team felt compromised and placed in an invidious position by the use of the words Prosecutor General in reference to the accused person is to raise a bluff or ruse if not a red herring.

The Acting Prosecutor General also deposed that the judge had referred to the accused person as “Honourable” Prosecutor General. There was never a time as the transcript will show that the word Honourable was used in reference to the accused. Whilst the matter was not argued, I venture to hold that I do not consider that the Prosecutor General, acting or otherwise should be referred to as “Honourable”. These honorifics sometimes get into people’s heads. The word Honourable is normally used in reference to the President, Prime Minister and cabinet members. It is also used in reference to members of Parliament. In some countries the President or Head of Government prepares a list of posts which are prefixed by the word Honourable. Judges are referred to as Honourables. It does not follow that because the process of selecting the Prosecutor General and his removal follow that of judges, the Prosecutor General equates to a judge and to similarly be referred to as Honourable. Even if I am wrong that the Prosecutor General is not referred to as “Honourable” the position remains that the Acting Prosecutor General was misinformed because no one referred to the accused person using the honorific “Honourable”.

This judgment has already dealt with the issue of the judge having once served on the Board of the National Prosecuting Authority. The issue was raised in the letter already dealt with and was repeated in the founding affidavit. The comments already made are accordingly repeated herein by reference. In short the matter for which the Prosecutor General was indicted had nothing to do with the Board of the National Prosecuting Authority. Additionally when the cases were allegedly committed, the judge was not a board member of the said Authority which had either not come into being or the judge had already left the Board. The Acting Prosecutor General deposed that the judge may harbor personal feelings towards the accused person on account of the interaction the two enjoyed on the board. What are personal feelings? Are they of hate or favoritism? Judges are sworn to discharge their duties impartially and without bias or malice. Where the judge perceives that his independence of thought may be effected or tainted by a prior association with a litigant, it is proper that the judge recuses him or herself.

The Acting Prosecutor General in his affidavit then deposed to the fact the judge had dealings with Munyaradzi Kereke, a rape convict wherein the accused in this case had refused to issue a *nulle prosequi* certificate which would have aided the institution of a

private prosecution. When Munyaradzi Kereke's bail application pending appeal was placed before the judge, he recused himself. The Acting Prosecutor General of course did not bother to acquaint himself with the full facts of the recusal by the judge. The judge recused himself principally because he acted as Munyaradzi Kereke's legal practitioner when police preferred the rape charges and the judge assisted with the recording of the warned and cautioned statement. The judge also had financial dealings with Munyaradzi Kereke and received remuneration from him for such work and services. The same does not obtain in this case and the parallel sought to be drawn does not apply.

The Acting Prosecutor General sought to explain his ill-advised overture of writing a letter to the Judge President imploring him to chivvy a judge presiding over a trial to voluntarily recuse himself. The fact that the judge may be a classmate or family friend of the Prosecutor General did not justify the manner in which the Acting Prosecutor General conducted himself. Whilst as I have already pointed out, he may have been well meaning, the fact remains that it should not be done that way. The public must never entertain a wrong belief that judges can be interfered with in their judicial functions by their bosses or other juristic persons like the National Prosecuting Authority. The independence of a judge is intrinsically connected with the rule of law. Litigants including the Acting Prosecutor General must play the game by the rules and be an example to the public that judicial independence must not be interfered with. Section 164 (2) (a) of the Constitution is very clear that no person including the State or any of its institutions should interfere with court functions. Where a litigant has an issue to raise concerning a matter before the court, such litigant should raise the issue openly and not needlessly. The public perception of behind the scenes correspondences between a litigant and judges is susceptible to so many wrong conclusions and erodes the confidence which the public reposes in the courts.

The Acting Prosecutor General lastly indicated that he did not have any personal motivation to question the integrity of the judge. He stated that "I am of the strong view that there is a real risk of bias, actual or subconscious on the part of second respondent (myself) and a real risk of a perception of bias in the mind of any reasonable person and that the proper administration of justice will not be served". One must be fair to the Acting Prosecutor General and accept that indeed he has not mount a personal attack on the judge.

The issue for determination after all has been said and done is whether or not, sufficient grounds have been established to disqualify the judge from presiding over this case. In other words, should the judge recuse himself as sought by the State?

A judicial officer and in the present case, the judge is sworn to protect and uphold the constitution. The judge is sworn to administer justice to all persons alike without fear favour or prejudice in accordance with the constitution and the law. The judge therefore has a duty to hear every case placed before him or her. This duty ensures that the constitutional right of litigants to a timeous justice dispensation is realised. If judges were to pick and choose and willy-nilly refrain from hearing cases for flimsy reasons, the system will not work efficiently. The status of the person appearing before the judge is immaterial. This is entrenched in s 165 (1) (a) of the constitution. Therefore in this case the fact that the person on trial is the Prosecutor General of Zimbabwe is immaterial because of the doctrine of equality of all in the eyes of the law.

A judge is required to act impartially but is not expected to be neutral. The two concepts of neutrality and impartiality are not the same. It is not possible to have a neutral judge who has no ideas, sympathies or opinions. Since a judicial officer is a product of his or her own life experiences, it is a myth to expect that he or she would not have opinions and sympathies. Impartiality however connotes a state of mind whereby the judge has no interest in the outcome of a case but is open to be persuaded by evidence and submissions made. Bias connotes a predisposition to a particular outcome or result. Bias can only be measured through conduct on the part of the judge from which a reasonable apprehension of bias can be inferred. Actual bias therefore needs not be established. It follows therefore that an apprehension of bias must be reasonably grounded. In my view, the test set out in the Canadian Supreme Court case of *R v S (RD)* [1997] 3 SCR 484 expresses the test for bias lucidly as follows:

“The test is what would an informed person viewing the matter realistically and practically – and having thought the matter through – conclude. This test contains a twofold objective element; the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person with knowledge of all the relevant circumstances including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case... ..The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies to all judges, regardless of their background, gender, race, ethnic origin or any other characteristic.”

The onus is therefore on the State to prove a real likelihood or apprehension of bias or impartiality on the part of the judge. The Acting Prosecutor General is no doubt an informed

person in the sense that he knows about the judicial tradition which entails the concepts of integrity and impartiality that guide the judge in the discharge of duty and the oath the judges swear to uphold.

The State is required to set out facts from which an apprehension of bias can reasonably be inferred. The Acting Prosecutor General first alluded to the fact that the judge referred to the accused person in court as Prosecutor General. The fact that the person on trial is the Prosecutor General was a matter of public knowledge. If a person in the court gallery were to be asked after the day's proceedings as to whose trial he attended he would say it is the Prosecutor General on trial. This reference has nothing to do with whether the Prosecutor General is on suspension and not discharging the duties of the Prosecutor General. The reference to the accused person by his title which the suspension did not strip him of was not improper as argued by the Acting Prosecutor General. A reasonable apprehension of bias could not reasonably be inferred on the part of the judge on account of the titular reference accorded to the accused person who in fact and in law was the Prosecutor General. Perhaps the Acting Prosecutor General felt that the reference aforesaid undermined his authority. If that be so, that was his subjective opinion which would not affect the objective perception of the facts.

The Acting Prosecutor General was unfortunately perhaps misinformed on how the proceedings in the court unfolded. He speaks to objections made by the prosecuting team of short notice given by the defence in filing their application, improper service and noncompliance with recognised rules of fairness. I have already indicated that everything that took place is on record. The Acting Prosecutor General was not in court. He based his depositions on hearsay. He was not the person best qualified to depose to the founding affidavit but a member of the prosecuting team. I have already dealt with the untruths and distortion of facts deposit in the founding affidavit. To cut a long story short and avoid repetition, the prosecuting team was allowed more time than it has requested to respond to the defence application. If there was an apprehension of bias, the bias was in fact extended to the State. A bystander would have questioned why the judge was giving more time to the prosecution team than it requested to respond to the defence application. In its wisdom, lack of it or being misdirected the prosecution team reneged on its undertaking to file a response. At its further request, another extension was given to it. It again reneged on the undertaking and to date the response remains outstanding. So much for the ethical and professional conduct of the prosecution team. No other words can describe its conduct other than to call it

defiance. The response would have dealt with all the objections sought to be raised if any. In my judgment, bias or an apprehension of bias on the part of the judge cannot reasonably be inferred in circumstances where the judge accedes to indulgences sought by a litigant and the litigant decides to ignore its undertakings. Bias is inferred from conduct. The conduct of the judge was, if one were to argue biased towards the State which was given all the time it sought to file a response to the defence application.

Allegations that the judge deferred to the accused person and called him by his title and that this would cloud the judge's judgment have been addressed. References to the judge's recusal in a matter involving Munyaradzi Kereke as already indicated was a red herring. That matter is not one of the charges which the accused person is on trial for. In any event as disclosed by the judge when he recused himself in the Kereke bail application, there was never any interaction between the National Prosecuting Authority or the Prosecutor General and the judge as legal practitioner in that matter. When Kereke was taken to court at which stage the Prosecutor General would have become involved, Kereke had engaged a different legal practitioner and all that the judge was privy to was the recording of Kereke's warned and cautioned statement. Therefore the inclusion of events concerning Kereke in this matter *vis -a- vis* the conduct of the judge has no merit whatsoever and is quite malevolent and vexatious.

In conclusion, I find that the machinations by the Acting Prosecutor General in writing a letter seeking that the Judge President interferes with the independence of the presiding judge, of refusing to appear before the court to explain his conduct, of citing the judge as a litigant to the application for recusal and of deposing to an affidavit and alluding to matters which did not happen in court and distorting facts were unbecoming, unethical and unprofessional. One will be forgiven for holding that the conduct was self-serving as opposed to pursuing the interest of justice. It was for the above observation that I prefaced my judgment by describing the conduct of the Acting Prosecutor General as creating a storm in tea cup and as an example of much ado about nothing.

Before I pronounce my order, I would like to refer to the helpful decided case of *Zhou Haixi v Never Katiyo and National Prosecuting Authority*, HH 774/15, a decision of HUNGWE J. Therein the learned judge quotes extensively cases on recusal of a judicial officer and bias, decided in this and foreign jurisdictions. The case is a must read for the discerning legal mind as it is very instructive. I however found the case of *R v S (supra)* to simplify the

concept of judicial recusal and bias in wording. The principles expressed therein are of universal application.

Disposition: After a careful consideration of the application and submissions by counsel for both the prosecution and the accused person, I rule that the State has failed to discharge the onus to establish cognizable grounds for the judge's recusal and the application is dismissed.

However *ex-abundata cautela*, it is recorded that this matter is not partly heard before me since the accused person did not enter a plea nor was the indictment put to him. I also did not deal with the preliminary issue of the defence application on the merits save to issue an order by request of the prosecution team to extend the time for filing of the state response to the defence application. Such response is still outstanding.

The State remains *dominis litis* to pursue the prosecution of the matter and the case does not have to be placed before me. It remains in the court in which it was set down that is court A and once reset any judge presiding in that court can deal with it. By consent of the state and defence counsels, the matter is postponed *sine die*.

National Prosecuting Authority, applicant's legal practitioner
Mukweva Ngwerume, 1st respondents' legal practitioners