

PRISCA MUPFUMIRA
versus
MUNAMATO MUTEVEDZI N.O
and
NGONI MASOKA
and
THE PROSECUTOR GENERAL
and
THE JUDICIAL SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 11 July & 23 November 2023

Review of unfinished criminal trial proceedings.

T Mpofu and *A Rubaya* for the applicant
T Chirambira, *T shonhai* and *G Ziyadhuma*, for the 1st & 3rd respondents
No appearance, for the 2nd respondent
ABC Chinake, for the 4th respondent.

KWENDA J: This application was filed on 3 May 2021 following a ruling by the first respondent dismissing an application for separation of trials. The first respondent was presiding at the applicant's trial on two corruption charges namely criminal abuse of duty as a public officer, a crime defined in s 174(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and corruptly concealing a transaction from her principal as defined in s 172 of the Criminal Law (Codification and Reform) Act. The trial proceedings stalled as a result of an order of this court staying the trial before the first respondent pending the outcome of this review. The order staying the trial did not put the applicant on any terms regarding prosecuting her application for review. It was therefore capable of operating as a permanent stay despite being couched as an interlocutory order. In an earlier application for the review of the same criminal trial, I cautioned as follows with regards the inherent risks attendant in the issuance, by this court, of provisional orders of stay of proceedings interfering with trials in the lower courts as opposed to leaving the lower court to regulate its own processes. The remarks are at p 19 of the cyclostyled judgment in *Mupfumira & Anor v Mutevedzi & Others* HH 200/20

“Both the return day and progressing the review are party driven processes which are left to the applicant, who might not want to be tried. While that is happening the trial court loses control over its own process (the trial). In the discussion that ensued, counsel for the applicants agreed that instead of the provisional order sought I could grant a structured order aimed at speeding up the review process.”

In that case we quickly disposed of the main application for review because the structured order meant that the process became judge driven. It is therefore desirable that in those cases where the judge interferes with the flow of a criminal trial, he or she must then become seized with the review and dispose of same expeditiously. In the earlier matter, CHIKOWERO J and I, dealt with the review whereupon quickly remitted the matter to the first respondent’s court for continuation of the trial.

CHIKOWERO J and I set the matter down at the behest of the second respondent. The applicant was content with letting sleeping dogs lie. While this review was pending, two developments took place. The first development was that the first respondent was appointed as judge of the High Court on 29 September 2021. On 22 February 2022 the applicant’s counsel filed supplementary heads of argument, without leave of the court, notifying this court that the first respondent had been elevated to higher judicial office, by which they meant the High Court. They submitted that in terms of s 6 of the Magistrates Court Act [*Chapter 7:10*] every court shall be presided over by a magistrate and s 2 of the Act defines a magistrate as a person appointed to hold a magisterial office in terms of the Act. The first respondent was initially appointed as a magistrate in terms of s 7(1) of the Magistrates Court Act. At the time he was presiding at the applicant’s trial, he had risen through the ranks to become Chief Magistrate in terms of s 7(3) of the Magistrates Court Act. In terms of s 8 of the Magistrates Court Act, the Chief and the Deputy Chief Magistrates possess the powers and jurisdiction of a regional magistrate in any regional division and of a provincial magistrate in any province. At the trial the first applicant was exercising the function of a Regional Magistrate. The first respondent was, therefore, as Chief Magistrate, an employee of the Judicial Service Commission. Upon appointment to the office of judge of the High Court, he ceased to be an employee of the Judicial Service Commission. A judge of the High Court is no man’s employee. See *Kika v Minister of Justice & Parliamentary Affairs & Others* HH 264/21. They submitted that the first respondent was, by virtue of his appointment, as judge of the High Court, disqualified from presiding at the applicant’s trial. They argued that the first respondent could not be magistrate and judge at the same time. He could not be ‘His Worship’ and ‘His Lordship’ in the same

body. He could not be an employee of the Judicial Service Commission and an independent constitutional appointee at the same time. The applicant also argued that, when presiding at the applicant's trial, the first respondent was doing so in terms of the oath of office of magistrate administered in terms of s 9 of the Magistrates Court Act. The oath became moribund when he relinquished that office. On appointment as judge of the High Court he was now governed by oath of a judge administered in terms of s 185(2) of the Constitution. Counsel anticipated a contra argument that the first respondent had acquired inherent jurisdiction upon his appointment to the bench and thus could proceed with the matter, anyway. The applicant submitted that the first respondent necessarily resigned from the office of magistrate when he was appointed judge of the High Court. They quoted *Manfred Nathan in Common Law of South Africa, Vol IV, African Book Company Ltd* at p 2037, para 2038 where the author says jurisdiction, in so far as the person to whom it is conferred and who exercises it is concerned, is terminated...where a judge or magistrate is deprived of office. The first respondent was deprived of office when he effectively resigned by operation of law, on his appointment to the High Court bench. He became *functus officio*, lost jurisdiction and the proceedings before him became a nullity. They cited *Chimuza v Dzepasi* HH 487/15, *S v Likwenga and Ors* 1999 (1) ZLR 498, *S v Tsangaizi* 1997(2) ZLR 47. They submitted that, in contra distinction with a magistrate, a judge could competently complete a matter post resignation as that is specifically provided for in s 186 (4) of the Constitution. See also *Monderwa Farm Pvt Ltd v B J B Kirstein (Pvt) Ltd* 1993 (2) ZLR 82 (SC), *S v Muvadi HMA* 32/21, *S v Gwala & Others* 1969 (2) SA 227, *S v Makoni & Others* 1975 (2) RLR 75 *ad Attorney General v Gavaza* 1984 (2) ZLR 212 (S), *S v Brian Mugodhi* HH 104/. In *S v Tsangaizi (supra)* at 249 E this court stated that when in the course of proceedings, a judicial officer ceases to have jurisdiction, the proceedings, up to that stage, become abortive. An accused person may not demand a verdict since the judicial officer who was presiding is incapable of rendering one. The partly heard matter becomes a nullity and may be commenced afresh. There is no requirement that such proceedings should be set aside first before being commenced afresh.

When the matter came up for argument we took judicial notice of the fact that, indeed, the first respondent had been appointed to the High Court bench because that is a notorious fact. We would have been disinclined to allow evidence to be placed before us, ostensibly, as heads of argument. The development was not part of the original application before us. Ordinarily the applicant would have required leave of the court to file a further affidavit to add

to the facts she presented in her founding affidavit. Further, heads of arguments are filed in terms of the rules of the court. While counsel may not be precluded from relying on cases not cited in his heads of argument, in practice, notice is given, to give the opposite party the opportunity to familiarise with the law. In this case, however, no proof was required of the first respondent's appointment as a judge since he is a member of this bench. That being the case, the legal issues raised by the applicant were live and we had to deal with them.

However, applicant's counsel advised us, in court, that the Judicial Service Commission agreed with the applicant and was willing to allocate the matter to a magistrate to be dealt with afresh. The State was unaware of that position attributed to the Judicial Service Commission. We postponed the matter to the 3rd of March 2022 for the parties to confirm the position of the Judicial Service Commission. On 3 March 2022 an affidavit sworn to by the Secretary of the Judicial Service Commission was placed before us, with our leave. The Secretary was of the view that the first respondent relinquished his jurisdiction and power as a magistrate when he was appointed judge. He had therefore become *functus officio*. Proceeding with the applicant's trial became a nullity and had to be commenced afresh. We therefore removed the matter from the roll with the consent of the State.

We are aware that a key State witness is now deceased. It appears the death forced the State to reconsider its acquiescence to a fresh trial because the unavailability of the late witness' evidence could have a bearing on the strength of the State case. Subsequent to our removing the matter from the roll, the National Prosecuting Authority wrote to the Judge President enquiring about the outcome of this review, insinuating that the office was still awaiting a judgment on the merits. This was notwithstanding the fact that we removed the matter from the roll by consent. The consensus was that as soon as the trial commenced afresh, this application for review would be withdrawn. The letter was not copied to us, as the judges who were seized with the review. It was also not copied to the applicant's counsel. That was clearly wrong. The Judge President need not be bothered with enquiries regarding matters which are allocated to a judge or judges unless the query is beyond the judge(s) seized with the matter or the judge(s) has/have failed or neglected to attend to the query. The Judge President does not interfere with the judicial function of judges. See s 165 of the Constitution. Domestic remedies must be exhausted first before escalating the query (which would be administrative) to the office of the Judge President. All administrative enquiries must be addressed to the Registrar. Secondly, the opposite party must always be made aware of correspondence relating to a case. Be that as it

may, we condoned the omissions by the National Prosecuting Authority since, clearly, the oversights appeared genuine.

We, *mero motu*, ordered the joinder of the Judicial Service Commission as the fourth respondent, since our earlier decision to remove the matter from the roll had been informed by the position taken by it. It was inevitable that our determination of this matter would affect the Judicial Service Commission and, as such, the dispute between the applicant and the State could not be resolved effectively without involving the Commission. In addition to that, the legal opinion expressed by the Secretary was now being resisted by the State. At our request, the Judicial Service Commission filed heads of argument. We are grateful for the contribution made by counsel for the Judicial Service Commission at such short notice. By and large, the Judicial Service Commission maintained its position that the proceedings became a nullity when the first respondent was appointed judge of the High Court. In heads of argument filed by *Mr Chinake*, for the Judicial Service Commission, counsel quoted renowned authors Landsdown & Campell in *South African Law and Procedure* (formerly Gardener and Landsdown) Vol V, *Criminal Procedure and Evidence* at p 489:

“If before verdict has been arrived at in a criminal trial, where the Accused has pleaded not guilty, and no evidence has been adduced, the Presiding Judge, Regional Magistrate or Magistrate is for any reason, not available to continue the trial, such trial may be continued before any other Judge, Regional Magistrate or Magistrate of the same Court”

See the case of *S v Boorman* 1981 (2) SA 852 at C

Where, however, evidence has been led and there supervenes the death of the presiding judicial officer or his incapacity, other than of a temporary nature the proceedings must be regarded as a nullity.

The Accused in this event, unless already released on bail or warning, must remain in custody and may be put on trial again.”

In *S v Sullman* 1969 (2) SA 385 SA AD at 391 A it was held that a fresh trial is required in all circumstances where the presiding officer is effectively permanently unavailable to continue with the trial.

The State argued that the position at law is that barring death or incapacitation administrative arrangements could be made to recall a magistrate who has either retired or resigned, to complete the case. The case relied on is *Chimuza v Dzapasi* HH 487/15 wherein MWAYERA J (as she then was) with the concurrence of TAGU J, said at p 3 of the cyclostyled judgment: -

“I subscribe fully to the sentiments echoed by BARTLETT J in *S v Likwenga and Ors* 1999(1) ZLR 498 wherein he quoted with approval Gillespie J’s reasoning in *S v Tsangaiza* 1997 (2) ZLR 47. Both judges were of the opinion that where a magistrate retires or is incapacitated or recuses him/herself or becomes *functus officio* the proceedings are a nullity. The proceedings

are deemed abortive and have to be started afresh before a different magistrate. In situation where a magistrate will have transferred or resigned before completing a partly heard matter the correct and expedient approach is to utilise administrative remedies of recalling the magistrate to come in and complete the partly heard matters. Also in the case of a resigned or retired magistrate like *in casu* again administrative remedies of recalling and having the individual take oath of office to finalise the partly heard matter would cure the anomaly of delay of proceedings starting *de novo*.”

The State also argued that the first respondent now has superior oath in the form of the oath of office he took on his appointment as a judge of the High Court. The State further submitted that a judge of the High Court has inherent jurisdiction and could therefore fall back on the same to continue with the trial

We proceeded to hear oral argument on whether the first respondent could, at law, proceed with the trial despite his appointment as a judge of the High Court. We did so despite our *prima facie* view that the State’s concerns were not justified because the unavailability of the key witness, through death, could be catered for under s 255(1) and (2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The import of ss 255(1) and 255(2) of the Criminal Procedure and Evidence Act, read together, seems to be that the evidence of any witness given at a former criminal trial of an accused on the same or a different charge and recorded in a document purporting to be a transcript of the original record of the said evidence and certified as correct under the hand of the person who transcribed it; shall, subject to certain specified conditions being met be admissible in evidence on the trial of the accused for any offence. The issue is not before us and we make no definitive finding with respect to the applicability of s 255 of the Criminal Procedure and Evidence Act to the circumstances of this case.

The oral arguments presented to us on behalf of the parties were, to a very large extent, a regurgitation of the written arguments. Having considered the contrasting views, we are persuaded by the position taken by the Judicial Service Commission. A criminal trial aborts and a fresh trial is required when, as was stated in *S v Sullman* 1969 (2) SA 385 SA AD at 391, in all circumstances where the presiding officer is effectively permanently unavailable to continue with the trial. The circumstances which make the presiding officer permanently unavailable depend on the peculiar circumstances of the situation. It may well be terminal illness, incapacitation, death or even, in the case of retirement or resignation, unwillingness or any circumstance which renders of the presiding officer permanently unavailable. In this case the first respondent has become permanently unavailable in the sense that the law prevents him from returning to the magistracy to complete the case. He is now a member of the superior

courts which supervises the magistracy. It is clumsy that he would, in one body, be part of the superior courts and at the same time a member of the inferior courts subject to supervision by his colleagues. He would be required to take the oath of magistrate without renouncing the oath he took on his appointment as judge of the High Court. The effect of that would be, for the duration that he is deployed to the magistracy, he would be appointed to more than one court, a situation prohibited in s 183 Of the Constitution. Magistrates' judicial independence is compromised by virtue of their being employed by the Judicial Service Commission.

In the result we order as follows:

1. The applicant's trial aborted on the appointment of the first respondent as judge of the High Court.
2. The Prosecutor General may, at his or her discretion, institute a fresh trial of the applicant on the same charges in any court with jurisdiction.
3. There shall be no order as to costs.

CHIKOWERO J: I agree.....

Makwanya Legal Practice, first applicant's legal practitioners

Mushoriwa Pasi, second applicant's legal practitioners

National Prosecuting Authority, first & second respondents' legal practitioners