

REPORTABLE (46)

MUNYARADZI MAWADZE
v
THE STATE

SUPREME COURT OF ZIMBABWE
BHUNU JA, KUDYA JA & MWAYERA JA
HARARE: 2 NOVEMBER 2023 & 31 MAY 2024

T. Mpofu, for the appellant

T. Kangai, for the respondent

BHUNU JA:

INTRODUCTION

1. This is an interlocutory appeal against the judgment of the High Court (“the *court a quo*”) dismissing the appellant’s application for recusal of the presiding judge in the *court a quo*. The appeal is brought without leave as the question of leave does not arise. This is because the dismissal of an application for recusal has the effect of a final and definitive order. In *Moch v Nedtravel* 1996 (3) SA 1 (A) the Appellate Court held that no leave is required in such an interlocutory appeal. No issues arise from that observation in this case. I therefore proceed to determine the appeal on the merits.

FACTUAL BACKGROUND

2. The facts giving rise to the appeal are by and large common cause. They are however, unique and astounding.

3. The undisputed facts are that the appellant is a young man barely out of his teens. He is the son of a senior serving judge of the court *a quo*'s bench. He stands charged with the capital crime of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] allegedly committed in the course of a robbery in common purpose with two other accomplices.
4. Undoubtedly, the appellant is facing a very serious offence, but for his age he would be staring the death sentence in the face. In his case he faces the prospect of life imprisonment. Owing to the eerie outlook of doing the messy job on a fellow judge's son, the bulk of the judges in the court *a quo* with the exception of the presiding judge *a quo*, have understandably elected to recuse themselves from the case.
5. Having found a willing judge to preside over the trial, the matter proceeded to trial before the learned presiding judge *a quo*, without any objection from the defence. The appellant was jointly charged with two other accomplices. At the commencement of the trial, the appellant successfully applied for a separation of trials. The application was granted on 5 October 2022. Aggrieved, the respondent gave notice of its intention to appeal against the order granting separation of trials.
6. On 6 February 2023 the respondent sought a postponement to facilitate service of an amended State Outline to the defence. The defence consented to the postponement on account that the trial was at short notice and in any case the appellant's counsel of choice, Mr *Mpofu* was unavailable. The trial was then postponed to 8 February 2023 by consent of the parties.

7. At the resumed hearing on 8 February 2023, the stand-in legal practitioner for the appellant, Mr *Hwacha* sought a further postponement owing to the unavailability of the appellant's counsel of choice Mr *Mpofu*. Despite proof that the appellant's counsel of choice was engaged in other courts, the learned presiding judge dismissed the application and ordered that the trial shall proceed the following day, the 9th of February 2023.
8. In an apparent state of hopelessness and desperation, Mr *Hwacha* informed the court that he neither had the mandate nor sufficient knowledge of the facts of the case to represent the appellant. As such, he was standing down to the role of a watching brief because he had just taken over the matter from another legal practitioner. He further advised the court that the appellant had been previously granted *pro deo* counsel in terms of the Legal Aid Act [*Chapter 7:16*].
9. Before the trial could commence on 9 February 2023, the learned judge *a quo* ruled that the trial shall proceed with the appellant being assigned *pro deo* counsel. The appellant protested at the prospect of being accorded a *pro deo* counsel he did not want. He reiterated that he wanted to be represented by his counsel of choice Mr *Mpofu*. His protests came to no avail as the order directing that he shall be represented by *pro deo* counsel was still extant. The matter was then postponed to 13 February 2023 for trial.
10. During the intervening period, three lawyers turned up as *pro deo* counsel in turn, but for professional reasons sought to be excused from representing the appellant. The learned judge *a quo* had therefore no option but to oblige the postponement resulting in the matter being postponed by consent to the 27 February 2023, a date initially suggested by the defence but rejected by the trial judge.

APPLICATION FOR RECUSAL

11. On 27 February 2023 the learned trial judge *a quo* was met with an application for recusal in place of the envisaged trial. The application was premised on the appellant's apprehension that he would not receive a fair trial at the hands of the presiding judge *a quo*. This was due to the alleged perceived dissonant bias allegedly displayed by the learned presiding judge *a quo* over the appellant's request for a postponement to facilitate representation by a lawyer of his choice. He submitted that an unfair impression had been created that he was feigning delaying tactics to prejudice the ends of justice. He contended that the learned judge's conduct evinced a departure from even-handed impartial justice expected of those who hold judicial office.

12. The application for recusal found no favour with the learned judge *a quo*. He dismissed it offhand on the basis that it constituted a disguised attack on his rulings on the numerous applications for postponement. He perceived the application as an unwelcome invitation to defend his rulings. He thus dismissed the application for recusal without any further ado.

ISSUES FOR DETERMINATION

13. The appeal raises only one issue for determination as to whether or not the court *a quo* erred in dismissing the application for recusal.

THE LAW

14. The law regulating the question of recusal of a judicial officer is fairly simple and straight forward. In *Mupunga v Minister of Justice Legal and Parliamentary Affairs & Ors*

CCZ 07/21, the Constitutional Court immaculately articulated the object and purpose of recusal of a judicial officer when it said:

“It is self-evident that at the heart of recusal is the need to protect the right to a fair hearing, which in turn lies at the heart of the rule of law. Put differently, an application for recusal is invariably an allegation that a litigant’s right to a fair hearing as constitutionally guaranteed, is under threat of violation” See *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Company (Pvt) Ltd*...2001 (1) ZLR 226 at 233.

15. A year later the Constitutional Court went a step further in *Mawere & Others v Mupasiri & Others* CCZ 2/22 and clarified that the law of recusal is essentially a law against bias as one of the aids propping up the constitutional guarantees and safeguards to the right to a fair trial. In elucidating the point it had this to say at p 6 of the judgment:

“The law of recusal is settled. It is the law against bias. Quite apart from the constitutional guarantees in favour of the right to a fair trial before an independent and impartial court provided for in s 69 of the Constitution, the common law practiced in this jurisdiction has long recognized and applied the law against bias. ... It is an additional safeguard to that which the common law has long provided.”

16. While the primary target for the law of recusal is actual bias, it nevertheless also extends to the perception of bias to warrant the recusal of a presiding judge or official. Where there is perceived bias, the judicial or presiding officer need not be guilty of actual bias. It is sufficient that in the minds of right thinking men and women the official be portrayed as being biased.

17. To that extent, the recusal procedure seeks to protect the rule of law, justice and fairness in the adjudication of matters in the courts and quasi-judicial bodies. It is a safety valve against bias, arbitrariness and abuse of colossal judicial power even in the absence of actual bias.

18. In delivering his ruling on the application for recusal, the learned trial judge correctly articulated the applicable law and was alive to the attendant hidden pitfalls. At paras 7 to 9 of his cyclostyled judgment he had this to say:

“7. The jurisprudence in this jurisdiction is that an application for recusal is in essence a conversation between the apprehensive litigant and the court in which conversation the other party can listen in. See *Mupunga v Minister of Justice Legal and Parliamentary Affairs & Others* CCZ /07/21; *Mawere & Others v Mupasiri & Others* CCZ 2/22 ...

8. In approaching this application, I bear in mind what was stated in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Diamond Insurance Co. (Pvt) Ltd* 2001 (1) ZLR 266 (H), namely that a judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. It should not be regarded as a personal attack on the judicial officer, but an exercise of the litigant’s constitutional right to a fair trial. The right to seek recusal of a judicial officer must be protected.”

THE APPLICABLE TEST FOR RECUSAL

19. The applicable test for recusal is settled as was determined in *Pomelo Mining (Private) limited v Annadale Trust and Another* SC 90/19 in which the court said that:

“Where it is sought to disqualify a person from exercising judicial function on the basis of bias or lack of impartiality, the test to be applied is an objective and not subjective one. The question to be answered is whether there exist grounds upon which a reasonable person would think there is a genuine likelihood of the adjudicator not determining the issues fairly and on the basis of the evidence and arguments presented”

20. I now turn to determine the appeal on the merits based on the law, the evidence and the applicable test before me.

ANALYSIS AND DETERMINATION

21. Section 69 of the Constitution confers on every person accused of committing a crime, the right to a fair trial within a reasonable time before an independent and impartial court.

22. The appellant is apprehensive that he is unlikely to receive a fair trial at the hands of the learned trial judge *a quo* in flagrant violation of his constitutional right to a fair trial. His anxiety stems from the rather abrasive and unduly hasty manner with which the learned judge *a quo* sought to dispose of the matter in apparent flagrant disregard of the appellant's rights to a fair trial.

23. His complaint is that with only four days' notice his matter was abruptly set down for trial. Due to the brevity of the notice period, his legal practitioner of choice Mr *Mpofu* was unavailable to attend to his case due to prior commitments. When the appellant's legal practitioner of choice, Mr *Mpofu* could not avail himself on 9 February 2023, the learned judge *a quo* ordered that the appellant be provided with *pro deo* counsel against his will. The supposed three *pro deo* counsel declined the brief to represent the appellant in unison one after the other for professional reasons.

24. The appellant made it clear and vehemently protested that he did not want to be represented by *pro deo* counsel except his legal practitioner of choice Mr *Mpofu*. His protests fell on deaf ears as the learned trial judge *a quo* dug in and was adamant that the trial should proceed with the appellant being represented by *pro deo* counsel against his will. The order to proceed to trial was despite the fact that the State had evinced its intention to appeal against the learned judge's interlocutory ruling on the crucial question of separation of trials. It was therefore undesirable for the trial court to proceed to trial without the issue of separation of trial being resolved.

25. Section 70(1)(d) of the Constitution confers on an accused person the right among others to be represented by a legal practitioner of one's choice at his or her own expense. It provides as follows:

“70 Rights of accused persons

(1) Any person accused of an offence has the following rights—

- (a) to be presumed innocent until proved guilty;
- (b) to be informed promptly of the charge, in sufficient detail to enable them to answer it;
- (c) **to be given adequate time and facilities to prepare a defence;**
- (d) **to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner.**
- (e) to ...”(Emphasis provided)

26. It appears to me that the trial judge *a quo* was unduly in haste to dispose of the matter for reasons best known to himself. In his haste to dispose of the matter he indulged in behaviour that portrayed him as entertaining some bias towards the appellant in the eyes of the proverbial reasonable man.

27. His conduct in giving the appellant only four days to prepare for his trial in the absence of his preferred legal practitioner, his attempt to foist *pro deo* legal practitioners on the appellant against his will and his bid to proceed with the trial regardless of the State having given notice to appeal on the question of separation of trials, is a damning indictment on the learned judge's neutrality and impartiality.

28. The learned judge *a quo* only paid lip service to the legal principle that a judicial officer should not be unduly sensitive to criticism. This is because having made that observation, he proceeded to attack the appellant as a litigant bent on discrediting his adverse rulings

on the appellant's numerous applications for postponement. His utterances in this respect portray him more as an adversary rather than a neutral arbiter. By so saying he entered the boxing ring and ceased to be the impartial referee in the legal contest. One cannot therefore resist drawing the inference that the learned judge's perception of the appellant had been clouded by the dust of the conflict.

29. Mr *Mpofu* introduced the novel but not legally tested medical principle that the learned judge was suffering from subconscious bias. He interpreted this to mean that the learned judge went overboard in his bid to demonstrate to the world that he was impartial in his handling of a fellow judge's son's case. Those who have read *Far From the Madding Crowd* by Thomas Hardy will remember that Farmer Oak's dog drove his entire flock of sheep down the cliff with horrific fatal consequences in a bid to please. I am therefore inclined to accept as a general human trait that in the euphoria to please, one may overstep and stray into the wilderness of error.
30. In the absence of expert evidence on the meaning and effect of the term "subconscious bias", I would however hesitate to elevate it to a valid legal terminology to determine the learned judge's psychological mental status at the time he presided over the matter. I prefer to determine the matter on the concrete evidence before me.
31. In response Mr *Kangai* submitted that the court will be setting a dangerous precedent if each time a judge makes an adverse ruling against a litigant, the litigant responds by seeking the judge's recusal.

32. In principle, there is substance in the respondent's submission. The only difficulty is that the submission does not relate to the circumstances of the case at hand. The application for recusal was not based on the adverse rulings per se, but the learned judge *a quo*'s alleged conduct and utterances in the course of determining the applications for postponement and his recusal.
33. Undoubtedly the learned judge owing to his conduct and utterances objectively displayed unmistakable characteristics of apparent bias as already stated elsewhere in this judgment. An impartial and neutral judge does not foist a legal practitioner on a litigant. He or she does not blame a litigant for requesting his or her recusal. Neither does he give a litigant inadequate notice for trial nor endeavour to proceed with a matter in the face of an unresolved pertinent notice to appeal. Unfortunately the learned judge *a quo* was found wanting in all these material respects.
34. We accordingly hold that there is merit in the appellant's appeal. In conclusion we are of the opinion that this is a case ill-suited to be presided over by a sitting judge on the same bench with the appellant's father. This, in my view, is a case best suited to be presided over by a retired or foreign judge to avoid upsetting the judicial tone.
35. In the final analysis it is ordered that:
1. The appeal be and is hereby allowed.
 2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

"The application for recusal be and is hereby granted.

KUDYA JA : I agree

MWAYERA JA : I agree

Dube Manikai & Hwacha, appellant's legal practitioners

The Prosecutor General National Prosecuting Authority, respondent's legal practitioners