FREDRICK CHARLES MUTANDA

versus

THE STATE

and

KUDAKWASHE JARABINI

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 2 May 2011 and 23 May 2012

Ms *L Chipato*,for the applicant

**Unopposed Application**

BHUNU J: The applicant was placed on remand in the Magistrates’ Court on 29 November 2011 on three counts of fraud and two counts of theft as defined in s 136 and 113 of the Criminal Law Codification and Reform Act [*Cap 9*:*23*] under case number CRB 8384/11.

He is also jointly charged with one Justice Majaka in another charge of fraud under case number CRB 8385-6/2011.

The applicant appeared in the Magistrates’ Court for trial on 13 December 2011 before magistrate Jarabini. The trial commenced on that date and was subsequently postponed to 17 February 2012. A perusal of the record of proceedings shows that the proceedings were conducted in a rather acrimonious, hostile and aggressive atmosphere not conducive to the due administration of justice. Counsel for the accused Ms *Chipato* did not help matters by resorting to abrasive coarse intemperate language unbecoming of a legal practitioner both in her *viva voce* submissions in court and written communication to the Attorney General’s office.

On 15 February, two days before the hearing date Ms *Chipato* addressed a vitriolic 18 page letter to the Attorney General’s office attacking both the magistrate and the prosecutor. Her concluding remarks in the penultimate paragraph of the letter give a graphic illustration of her combative mood and caustic unrestrained language. She wrote in the following vein:

“It has also since been brought to our client’s attention that a ruling may have already been prepared in anticipation of the next hearing date, wherein the application for further remand shall be dismissed and our client found guilty of breaching bail conditions, with him being sentenced to 1 year in custody, with 6 months being suspended on the usual conditions. We are not quite sure whether Esquire Mutevedzi is aware of this. Whilst we find this to be shocking, we would be grateful if you would look into it. Should this be the case, we shall not hesitate to immediately make the necessary application to the Supreme Court for violation of our client’s rights, miscarriage of justice, and abuse of office, coupled with a claim for damages against all parties concerned. Kindly revert to us on this urgent aspect of this case.”

At the resumed hearing on 17 February 2012 the prosecutor quite properly in my view drew the court’s attention to the disparaging remarks made by Ms *Chipato*. He again quite correctly expressed the view that Ms *Chipato* could be guilty of contempt of court and criminal defamation.

Confronted with a situation where the applicant’s lawyer was making unsubstantiated allegations of judicial misconduct and threatening to sue him, the trial magistrate quite understandably decided to recuse himself from the case. In my view this was just about the only honourable thing to do in the circumstances of this case.

What is surprising is that Ms *Chipato* now blames the prosecutor for drawing the presiding magistrate’s attention to her apparently disparaging, contemptuous and defamatory remarks about him. In a letter dated 20 February 2012 addressed to the Attorney General’s Office she wrote complaining bitterly and attacking the prosecutor for drawing the magistrate’s attention to the letter. This is what she had to say:

“Reference is made to the above matters, and our letter of 15th of February 2012 to which we still await your response.

You would by now have been made aware that the presiding magistrate has made a ruling this morning wherein he has recused himself from the proceedings. We do wish to draw to your attention that the afore said letter to our surprise, introduced and submitted by the public prosecutor, Mr Obi Mabahwana at his own instance to the Honourable Court, on the grounds that he was raising a complaint against the undersigned as to the contents of that letter, which we felt at that time, and also raised in our submissions in response that the letter was not meant for the Honourable Court’s attention, but was meant for the attention of your office as we had raised genuine queries about the whole matter, which queries still remain unanswered and still require your response. This is on record.

...

The State’s attitude is thus surprising in that instead of responding to us, The State proceeded to make submissions to the Honourable Court accusing the undersigned of being contemptuous and criminally defamatory of the Honourable Court - and nothing could be further from the truth-thereby making the letter of public record, when there are issues at this stage that needed to be brought to your attention as was done, without the need for the public’s or the Honourable Court’s involvement in any way. Indeed the magistrate ruled today that the issues raised by defence in that letter which ‘have spilled to the bench’ through the actions of the State were not petty.

...

In the meantime we wish to reiterate that, as we stated in our submissions in response to those of the State about the letter, we shall be challenging the entire proceedings held thus far. Our stance to challenge these proceedings has not changed and we shall do so on 6 March 2012.”

Upon recusing himself the presiding magistrate has now sent the record of proceedings to the High Court for nullification of the proceedings complained of to facilitate a trial *de novo* before a deferent magistrate. Thereafter Ms *Chipato* true to her word filed this application seeking the following orders that:

“1. The application for review be and is hereby allowed.

2. The proceedings in the matter of The *State* v *Fredrick Charles Matanda*, Provincial Magistrates Court CRB 384/2011 and CRB 8385/2011 are confirmed as not being in accordance with real and substantial justice.

3. The proceedings in the matter of The *State* v *Fredrick Charles Matanda*, Provincial Magistrate Court CRB 8384/2011 and CRB 8385/2011 be and is hereby set aside.

4. The proceedings in the matter of *The State* v *Fredrick Charles Matanda*, Provincial Magistrate Court CRB 8384/2011 and CRB 8385/2011 be and is hereby permanently stayed.

5. The applicant be and is hereby discharged from the proceedings in the matter of *The State* v *Fredrick Charles Matanda* , Provincial Magistrate Court CRB 8384/2011 and CRB 8385/2011.

6. The first respondent be and is hereby ordered not to arrest the applicant on any charges arising out of the same facts as those under the matter of *The State* v *Fredrick* *Charles Matanda*, Provincial Magistrate Court CRB 8384/2011 and CRB 8385/2011.

7. The first respondent be and is hereby ordered not to arrest the applicant on any charges arising out of facts pertaining to CAPS Holdings Limited.”

What boggles the mind is that the applicant and his lawyer blamed the presiding magistrate for injudicious conduct but did not want him to know about it. One wonders why they would want to be secretive about it if there is any truth or substance in the allegations.

It is alarming that in para 7 of the draft order they seek immunity from arrest for any offences the applicant may have committed against the complainant. This type of conduct betrays a concerted effort to obtain an acquittal and immunity from prosecution through the back door if not devious means.

It thus emerges quite clearly, that after succeeding in hounding the presiding magistrate from the proceedings by levelling apparently unsubstantiated, defamatory and contemptuous allegations against the trial magistrate they now seek to use the High Court to avoid trial and gain immunity from prosecution by devious means. This type of conduct is unethical and an extreme abuse of the review process requiring some form of censure from the Law Society and the prosecuting authorities should the allegations against the presiding magistrate turn out to be baseless and unfounded. Sight should not be lost that apart from their mere say so, wild speculation and conjecture, the applicant and his lawyer have proffered no shred of evidence tending to show that the presiding magistrate is indeed guilty of the serious allegations they have levelled against him. They have not even bothered to disclose the source of their information or suspicion. They have therefore, not laid any basis for the serious allegations they have levelled against the trial magistrate.

In his Handbook *Legal Ethics for Zimbabwean Lawyers* BD Crozier at p 15 states that:

 “A legal practitioner should avoid criticism of the bench, save in a proper manner. Baseless allegations of bias on the part of a judicial officer are improper. For that well established legal principle he then cites the instructive remarks of GUBBAY CJ in the case of *Ex parte Immigration Officer* 1993 (1) ZLR 122 (S) at 125D where the learned Chief Justice observed that:

‘Although decisions of courts are properly subject to scrutiny and criticism by members of the public, including legal practitioners, judicial officers are prohibited by custom from defending themselves. Their inability to do so imposes a special responsibility upon the legal practitioner. He should avoid openly criticising proceedings in which he himself has been involved, for otherwise there is a risk that this criticism may be, and may appear to be, partisan rather than objective’”.

I am in total agreement with those wise sentiments. Litigants and legal practitioners must be warned strongly against making idle unsubstantiated malicious, slanderous and scurrilous allegations against judicial officers and court officials. That type of conduct can only bring the due administration of justice into disrepute. The need to protect the dignity and integrity of the courts and court officials cannot be over emphasised. This is for the simple reason that the courts and judicial officers derive their right to preside over the affairs of the subjects of the State from the Constitution and to that extent the people of Zimbabwe. A baseless attack on the judiciary therefore necessarily constitutes an affront on the Constitution and the generality of the people of Zimbabwe.

It is also of crucial importance that proceedings in the lower courts should be allowed to flow smoothly without undue interference from this court. Assuming that there was some merit in the allegations levelled against the magistrate, once he had recused himself from the proceedings and sent the record for review for the proceedings to be set aside to facilitate a trial *de novo,* it was no longer necessary for the applicant to mount an application for review seeking the same relief. The mere fact that there might have been procedural irregularities does not necessarily mean that the applicant is innocent of the crime charged. The parties must have their day in court and the matter determined on the merits before a different magistrate.

I hasten to point out that nothing must be swept under the carpet in this case. There must be a proper investigation of the allegations levelled against the presiding magistrate. If he is guilty as alleged then the law should take its course and the same should apply to the legal practitioner and her client should the allegations be found to be baseless.

For the foregoing reasons the application cannot succeed. It is accordingly ordered:

1. That the application be and is hereby dismissed in its entirety.
2. That the Registrar be and is hereby directed to serve a copy of this judgment on the Attorney General, the Judicial Services Commission and the Secretary of the Law Society.

*Linda Chipato Legal Practitioners*, applicant’s legal practitioners

*The Attorney General’s Office*, 1st respondent’s legal practitioners