THE STATE
versus
MUNYARADZI MAWADZE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 2 March & 3 March 2023

ASSESSORS: 1. Mr *Mhandu*
2. Mr *Shenje*

**Application for a postponement**

*T Mukuze,* with *Ms C Mutimusakwa,* for the State
*T Mpofu, with S Hwacha,* for the accused

**DUBE-BANDA J:**

1. This is an application for a postponement of a trial. It is necessary to briefly sketch the background events leading to this application. However, for a detailed background to this application, see: *The State v Mawadze* HH 676/22; *The State* v *Mawadze* HH 675/22; *The State v Mawadze* HH 688/22; *The State* v *Mawadze* HH 101/23; *The State* v *Mawadze* HH 170/23.
2. Briefly, the accused made an application for my recusal from this matter. The application was dismissed. See: *The State* v *Mawadze* HH 170-23. Consequent to the dismissal of the recusal application, Mr *Mpofu* Counsel for the accused rose and informed the court that the accused intends to appeal the ruling. Counsel requested that this matter be postponed to a date available to the court in April 2023, for the purposes of according the accused time to prosecute his intended appeal.
3. If necessary a court may postpone a case to a later date. The court's powers to do so are regulated by s 166 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which says "a trial may, if it is necessary or expedient, be adjourned at any period of the trial, whether evidence has or has not been given." The decision whether to postpone criminal proceedings is in the discretion of the court. When a court considers

an application for a postponement, whether it by the State or the defence, the following two basic principles have to be considered: that it is in the interest of society that guilty persons should be duly convicted and not discharged due to an error which could have been avoided had the case been postponed; and that an accused is deemed to be innocent and therefore has a right to a speedy hearing. I will add that in considering an application for a postponement of a criminal trial, the court must also consider the accused's right to a fair trial and the interest of justice.

4. Counsel made it categorically clear that he was not seeking leave to appeal, because leave was not a requirement in such a case. It was contended that the ruling refusing recusal was appealable without leave of court. Counsel referred to s 44 (2) of the High Court Act [7:06] as authority for the contention that leave to appeal is not a requirement is such a case. Counsel argued further, that even if leave to appeal is required this is an issue to be resolved by the Supreme Court. It was not for this court to make such an inquiry, otherwise it will be encroaching into lane of the Supreme Court.
5. I asked Mr *Mukuze* Counsel for the State to make submissions on whether the ruling refusing recusal was appealable without leave or not. First, Counsel argued that indeed leave to appeal was not a requirement in such a matter. Counsel then made a turn and submitted that leave to appeal was a requirement, and referred to section 44(5) of the High Court Act [*Chapter 7:06*] in support of the contention that leave to appeal was required.
6. My view is that this court in considering this application, it must factor into the equation whether the proposed appeal has any prospects of success. Otherwise it will not be in the interest of justice for this court to accede to such an application and postpone criminal proceedings when the intended appeal will suffer a predictable failure or is manifestly doomed to failure. It is for this limited purpose that this court will have to carry out an inquiry whether in such a case leave to appeal is required as a matter of law or not.
7. I am fortified in this view by the fact that in applications for leave to appeal to the Supreme Court arising from criminal convictions and sentences this court is required out to carry a careful analysis of both the facts and the law that provided the basis for the judgement. An application for leave to appeal must set out, clearly and specifically, the grounds upon which the accused desires to appeal. When determining whether or not to grant the application for leave to appeal, the dominant criterion is whether or not

the accused has a reasonable prospect of success on appeal. If this court after carrying out a careful analysis of the matter finds that the appeal has no prospects of success, it is enjoined to refuse leave to appeal. See: *S* v *Smith* 2012 (1) SACR 567 (SCA); *Baloyi* 1949 (1) SA 523 (A). In performing such a task this court will not be pronouncing itself on the issue (s) that the Supreme Court has to determine. I intend to apply the same principle in considering this application.

8. This application is anchored on the intended appeal against this court dismissal of the recusal application. If the intended appeal will not be valid, it will not be in the interest of justice to postpone this matter.
9. Mr *Mpofu* argued that leave to appeal is not required. Counsel relied on s 44(2) of the High Court Act. Section 44 (2) is not relevant to this inquiry, because it clearly speaks to a person convicted on a criminal trial held by the High Court. In this case the accused has not been convicted of any crime, he has in fact not pleaded to the charge or charges after the separation of trials judgment. See: The *State* v *Mawadze* HH 688/22; *Shongwa* 1955 (2) SA 100 (O). In turn s 44(5) of the High Court Act says:

> Subject to rules of court, where a judge of the High Court has made an interlocutory order or given an interlocutory judgment in relation to any criminal proceedings before the High Court—
>
> (*a*) the person against whom the criminal proceedings are being or will be brought; or
>
> (*b*) the Prosecutor-General;
>
> may, with the leave of a judge of the High Court or, if a judge of that Court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against the interlocutory order or interlocutory judgment.

10. Section 44(5) renders it peremptory that leave to appeal is a requirement in criminal proceedings in the High Court where the appeal is against an interlocutory order or judgment. The inquiry then turns to whether the ruling refusing recusal is interlocutory or final. In *Zweni* v *Minister of Law-and-Order* 1993 (1) 523 (A) at 532l to 533B, the court said:

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586I-587B; Marsay v Dilley1992 (3) SA 944 (A) at 962C-F). The second is the same

> as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another1992 (4) SA 202 (A) at 214D-G)."

11. The recusal judgment is not final in effect, if needs be or on good cause shown, it is susceptible to alteration by this court. It is not definitive of the rights of the parties, i.e. a criminal trial is finalized by either the acquittal or the sentence of an accused. Any ruling or judgement made in between is interlocutory. Therefore, the judgment in *The State* v *Mawadze* HH 170-23 is interlocutory. A reading of s 44(5) shows that it is appealable with leave of this court, failing which with the leave of a judge of the Supreme Court.
12. What this means therefore is that the intended appeal, to the extent that leave has not been sought or granted will be invalid. See: *S* v *Strowitzki* 1994 NR 265 (H); *S* v *Munuma and Others* [2013] NASC 10 @ para 6. My view is that it will not be in the interest of justice for this court to accede to such an application and postpone criminal proceedings on the basis of an intended appeal which will suffer a predictable failure or manifestly doomed to failure. Without leave to appeal having been granted by this court or a judge of the Supreme Court, the intended appeal will be still-borne. This court cannot ignore this fact. This court cannot accede to an application for a postponement of the matter pending the filing of an appeal that will be still-borne. All this must be juxtaposed with the principle that unreasonable delay in the hearing of a criminal trial is not only prejudicial to the accused, but brings the criminal justice system into disrepute. See: *Sochop* 2008 (1) SACR 552 (C).
13. I take the view that it will not be in the interest of justice to postpone criminal proceedings pending an intended still-borne appeal. This aspect is dispositive of this application. And having made a finding that the intended appeal has no prospects of success, I do not find it necessary, at this stage to inquire into the other jurisdictional requirements to be met in an application for a postponement and other issues taken by the parties. In the circumstances, this application must fail.

In the result, it is ordered as follows:

The application for a postponement be and is hereby by dismissed.

*National Prosecuting Authority,* State's legal practitioners
*Dube, Manikai & Hwacha,* first accused's legal practitioners