LAXTON TENDAI BITI
versus
FRANCIS MAPFUMO N.O
and
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 13 July 2021 and 11 January 2022

Urgent Chamber Application

Muchadehama, for the applicant
F Nyahunzvi, for the 2nd respondents

MANGOTA J: The applicant, Tendai Biti("Biti") is leader of the People's Democratic Part and Vice – President of the Movement for Democratic Change- Alliance. He filed this application under s 27 of the High Court Act as read with r 62 of the High Court Rules, 2021. He is reviewing the decision of the magistrate who, on 31 August 2018 and sitting at Harare:

i) dismissed Biti's application for permanent stay of proceedings which relate to Biti's alleged violation of the Electoral Act and s 36 of the Criminal Law Codification and Reform Act.
ii) placed Biti on remand on charges of contravening s 66 (A) (i) of the Electoral Act, [*Chapter 2:13*] and s 36 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]
iii) granted Biti bail of $ 5000.

Biti's grounds of review are that:

a) the magistrate's judgment was grossly unreasonable and irrational - and
b) the decision of the magistrate's judgment was/is malcited with bias and malice on the part of the magistrate.

He couched the draft order which he is moving me to grant to him in the following terms:

"IT IS ORDERED THAT:

1. 1st respondent's decision of 31 August 2018 dismissing applicant's application for permanent stay of proceedings be and is hereby set aside and substituted with the following

   "1 The application for permanent stay of proceedings be and is hereby granted"
2. The respondents shall pay the costs of this application.

Biti's application for review centres on the events which immediately preceded and succeeded Zimbabwe's 30 July 2018 election. The events commence with Ms Charity Charamba's televised announcement of 1st August, 2018. She was the spokesperson for the Zimbabwe Republic Police. She announced on the Zimbabwe Broadcasting channel and on various media platforms that the police wanted to interview Biti at the Harare CID Law and Order section. The interview, it was alleged, would assist the police to investigate the killings that had taken place earlier in the day.

Biti's narrative is that, following the invitation which the police extended to him he, on 1 August 2018, instructed his legal practitioner, one Aleck Muchadehama to attend to the law and order section of Harare Central Police station where he met detectives Murira and Mudyirwa who advised Biti, through Muchadehama, that they had no business with Biti and that the latter was not required at Harare Central Police station.

Biti claims that he did not go to the police station because he was aware of an extra-judicial force ("the force") which was operating in the country and which would use State institutions such as the police to undertake unlawful action on persons who belonged or were associated with the opposition party. He states that he wanted to ascertain, through his legal practitioner, that there was no other force which operated under the guise of the police service. He claims that the force attempted on his life on 26 July 2018 when he was addressing rallies within the Harare East constituency and at the offices of his law firm on the afternoon of 3 August 2018. It, he avers, harassed his 70-year old mother at the latter's house, number 2 Poland Way Glen Lorne, Harare and his brother one Stephen Biti when the latter was taking his son to Howard School on 6 August 2018. The force, he claims, attacked the following members of his staff when, on 5 August 2018, it way-laid:

a) his driver one Jerrifanos Murambwi whom it pursued as he drove Biti's Toyota motor vehicle from Kamfinsa shopping centre to Waterfalls;
b) his other driver one Alla Charambira as he drove Biti's Mercedes benz E 280 which it shot at in Highlands – and

c) an MDC Alliance staff member one Farai Gwenhure who was driving a Honda Fit which he had to abandon at Avonlea shopping centre.

The force, Biti claims, did not desist. It, on 5 August 2018, went to the house of the mother of his friend, number 19 Waffle Road, Highlands, Harare where it assaulted maids and his friend's nieces demanding to know of Biti's whereabouts. He alleges that it harassed his friend's 94-year old mother. He claims that on 4 August 2018 one Jeremiah Bhamu, a legal practitioner with Muchadehama & Makoni legal practitioners, visited, at his instance, the police's law and order department from where he inquired why the police were sending people to Biti's home to attack his relatives. The police, according to him, indicated that they did not know anything, had nothing against Biti and were not looking for him. He alleges that, on 6 August 2018, one Harrison Nkomo, a legal practitioner, called at the law and order section of Harare Central police station from where he queried as to why the police were saying they were not looking for Biti when some people were trying to abduct members of his family and him. Mr Nkomo, Biti states, wrote to the Police Commissioner- General on 7 August 2018 committing himself to surrendering Biti to the police with certain guarantees.

Biti alleges that the above-stated occurrences coupled with the events of 1 August 2018 as read with the reports which he received from Glen View, Highfield, Dzivarasekwa, Chitungwiza and from as far as afield as Buhera, Mutoko and parts of Manicaland created in him the reasonable apprehension that his life was in danger. He avers that he felt that the State did not have the capacity to protect him, that the police were not in charge and that the force was in charge of what was then happening in the country. He states that he made up his mind to flee Zimbabwe. He avers that he anticipated that, once the dispute was settled and a President sworn in, it would be safe for him to return to Zimbabwe. He alleges that he decided to flee from Zimbabwe to Zambia which, in his view, was best suited because of its one-stop-border arrangements. He states that his companions and him left Harare around 7 pm of 7 August 2018. These comprised his aide, one Clever Rambanapasi, his legal practitioner one Ngobizitha Mlilo, the latter's driver one Godfrey and his brother-in-law, one Tawanda Chitekwe. His companions and him reached Chirundu Border Post at 4 am of the following day, according to him. They, he alleges, drove through into Zambia and, on reaching the border post, he gave his passport to his aide, Clever Rambanapasi, whom he instructed to seek political asylum. Clever Rambanapasi, he claims, handed his passport to the Zambian immigration officer who advised that he would seek a directive from his head office in Lusaka. He states that, whilst his companions and him were on the Zambian side of the border, someone knocked at the window

of his car, identified himself as a detective who was based at Chirundu and he indicated that he wanted to take Biti back to Zimbabwe. He alleges that he told the policeman that:

i) he (the policeman) did not have extra-territorial jurisdiction because he (Biti) was in Zambia- and

ii) he had applied and sought for political asylum.

He states that the policeman told him that the place where they were was a one-stop border post and that Biti was therefore still in Zimbabwe. He alleges that he retorted and told the policeman that once he crossed the river he was in Zambia. He claims that, as he argued with the policeman, he got out of the car and shouted to the State security agents whom he told that they had no jurisdiction to arrest him and that he was not returning to Zimbabwe where they wanted to kill him. He avers that there was chaos and drama when the State security agents tried to abduct him and put him onto a vehicle to take him back to Zimbabwe. The Zambian authorities, he claims, eventually intervened and insisted that he should be brought into immigration offices. He states that the Zambian immigration officials interviewed him and asked for full details of his asylum application. He avers that they drove his companions and him to the Zambian side of Chirundu police station. He states that a few minutes later it became clear that Zimbabwe State security agents had driven into Zambia in pursuit of him. He alleges that after an hour or so their Zambian hosts told his companions and him that it was no longer safe for them to be driven to Lusaka without reinforcements because the Zimbabwean State security agents who were on the Zambian roads were of such a large number that they outnumbered the Zambians. He claims that, at 2 pm of 8 August 2018, a call came to the officer-in-charge, Chirundu, Zambia police station directing that Biti and his companions be surrendered to the Zimbabwean authorities at Kariba border post and not at Chirundu. He alleges that the idea of being surrendered to the Zimbabwean authorities terrified him. The State security agents' attempt to abduct him at Chirundu caused a lot of fear in him, he claims. The United Nations High Commission for Refugees had been alerted of his case and was working with the Zambian authorities to grant his companions and him a right of free passage, according to him. He claims that Norway, the Netherlands and South Africa were willing to accept his companions and him. He states that he was in touch with diplomats and embassies across the world. He avers that the Dutch Embassy, the Norwegian Embassy and the United States Embassy offered to transport his companions and him from Chirundu to Lusaka the following day. The journey to Lusaka became abortive, according to him. He alleges that he instructed Zambian lawyers to file an urgent application with the Zambian High Court seeking

that his companions and him be granted asylum, or that, if there was any decision to deny them asylum, that the same be reviewed. The Zambian High Court, he states, issued the order at 12 noon of 8 August 2018. The order, he claims, directed the Zambian Immigration Department to present Biti and others at the High Court in Lusaka at 8 am of 9 August 2018. He states that Zambian refugee law provides that a person who claims asylum is not obliged to act for seven (7) days. He alleges that international law provides that a person who seeks political asylum cannot be returned to the country from where he is fleeing. He claims that, where an application for asylum has been denied, the applicant has the right to appeal or review. Zambian Immigration and Deportation Act, [*Chapter 123*], he avers, provides that one cannot be deported without due process or without the issuance of a valid deportation order which is known as a warrant of deportation or Form 16. He states that the officer-in-charge at Chirundu police station, Zambian side, hid Biti and his companions at the police station for the night. He claims that at 4 am of the following day, two legal practitioners from Zambia gave his companions and him a copy of the court order which had been served on the Zambian:

i) Minister of Foreign Affairs
ii) Minister of Home Affairs
iii) Director-General of Police - and
iv) Director-General of Immigration.

He avers that at 5 am four or five Zimbabwean details came to where his companions and him were hiding, pointed at Tawanda Chitekwe, Ngobizitha Mlilo and him. He alleges that he waved the court order which he had and insisted that he was not going to go anywhere without their legal representatives and without guarantees that he would be taken to Lusaka. The details, he claims, left and returned a little while later with three soldiers who were dressed in Afghan or Syrian style. He states that he realised that, if he resisted, the soldiers would shoot at his companions and him. He alleges that his companions and him involuntarily got out of their hiding place and he kept on demanding to know where they were being taken to as well as where their lawyers were. He claims that he was made to ride on to a Zimbabwean car and they were driven straight to the border. He avers that, when the car in which he was stopped outside the border, he screamed and waved a flag indicating that he was being abducted and that the only place he should be taken to was Lusaka High Court before JUSTICE YANGAYILO. The security agents from Zimbabwe and Zambia did not listen to him, according to him. He alleges that his companions and him were driven through a little road which does not cross the bridge but goes through a mountain to Chirundu police station, Zimbabwean side. He states that, when

they were ushered into the police station, he screamed indicating that he was being abducted and he waved his court order. He avers that he was taken into an office from where Chief Superintendent Jealosy Nyabasa recorded, through his legal practitioner, a warned and cautioned statement from him. He claims that he told Mr Nyabasa that:

i) he had been abducted- and

ii) his presence in Zimbabwe was unlawful

He states that he handed the court order to Mr Nyabasa together with the letters from his legal practitioners which indicated service of the court order on the authorities in Lusaka. He claims that 90% of the contents of his warned and cautioned statement was devoted exclusively to his protest and his indication that he had been abducted as well as that the proceedings were illegal and that he should be in Zambia. He alleges that, after the statement had been recorded from him, he was put onto a Toyota Quantum motor vehicle with more than fifteen (15) armed officers guarding him and was driven to Harare. He was, according to him, arraigned before the first respondent who is a magistrate on the afternoon of 9 August, 2018.

The above-mentioned matters constitute the context in terms of which this application must be considered. The application, lit has already been stated, was filed under s 26 of the High Court Act [*Chapter 7:06*] ("the Act"). The section confers power on me to review all proceedings and decisions of all inferior courts, tribunals and/or administrative authorities which are in this country and, where warranted, to correct such or set them aside. As is evident from papers which Biti filed, he is moving me to review unterminated proceedings of the court of the magistrate.

SECTION 29 (2) (b) (iii) of the Act allows me to do so as well. It reads:

> "If, on a review of any criminal proceedings of any inferior court or tribunal, the High Court considers that the proceedings-
> a) ……..
> b) are not in accordance with real and substantial justice, it may, subject to this section-
> i) ……: or
> ii) …….:or
> iii) Set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgement or make such order as the inferior court ought in terms of any law to have given …on any matter which was before it in the proceedings in question; or
> iii) ……..".

I decided to hear this application for review not because I consider that the decision of the court *a quo* was not in accordance with real and substantial justice. I heard it at the instance of Biti who alleges that the proceedings of the magistrate were not in accordance with real and substantial justice. He moves me to set them aside and order a permanent stay of his

prosecution. I cited the section merely for purposes of showing the source of the power which I have to review unterminated proceedings of the magistrates' court. Whether or not the proceedings in question constitute a miscarriage of justice as Biti alleges will become clear in this judgement. My view is that they do not.

My power to review unterminated proceedings of inferior courts and tribunals as well as administrative authorities does not lie only in s 29 of the Act. Case authority supports the provisions of the Act. It was, for instance, stated in *Dombodzvuku & Anor* v *Sithole* 2004 (2) ZLR 242 at 245 B that:

> "The power of this court to review criminal proceedings of the magistrates' court at any stage of proceedings in the lower court is not in dispute. Section 29 of the High Court Act [*Chapter 7:06*] grants this court extensive power to review the criminal proceedings of the magistrates' court. It is specifically provided in s 29 (4) that this court or a judge of this court may, *mero motu*, call for a record and review the criminal proceedings of the lower court if it comes to the court's or the judge's notice that any such proceedings may not be in accordance with real and substantial justice. The powers conferred on the High Court and its judges by this section can be exercised at any stage of the proceedings".

The Supreme Court and this court later qualified the wide discretion which this court conferred upon itself to interfere with unterminated proceedings of the inferior courts, tribunals or administrative authorities. It was, for instance stated, in *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) at 64 C-E that:

> "The general rule is that a superior court should intervene in uncompleted proceedings of the lower court only in exceptional circumstances of proven gross irregularity vitiating the proceedings giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the right of the litigant". (emphasis added)

The above *dictum* was echoed by this court in *Jani* v *Officer in Charge Mamina & Ors* HH42289/12 wherein it was stated that:

> "The High Court will only exercise its review powers of unterminated proceedings in exceptional cases where grave injustice might otherwise result or where justice might not by any means be attained." (emphasis added)

State v *Rose* HH71/12 hazards the test which the superior court which is being moved to review uncompleted proceedings of the inferior court must employ. It states that:

> "The test when a superior court could intervene in unterminated proceedings is whether a grave injustice can be done to a litigant. The intervention can be done if the injustice is so gross that it is incapable of correction by way of ordinary review or appeal or where it is unconscionable to wait for the conclusion of the proceedings before seeking review in the normal way". (emphasis added)

The question which begs the answer is, can it, on the strength of *State* v *Rose*, be suggested that Biti's placement on remand and his subsequent prosecution, if any, would amount to such a grave injustice on him as cannot be corrected by way of an ordinary review or appeal. Put differently, the same question is, is it unconscionable for Biti to wait for the conclusion of the proceedings for which he appeared at the court of the magistrate before he seeks review or appeal on the same with the net effect that, if he proves his case on review or appeal on a balance of probabilities, he will have the proceedings of the court *a quo* set aside.

Biti does not state the prejudice which he is likely to suffer if he was to wait for the completion of the proceedings for which he is currently on remand. He does not assert the injustice which his remand and subsequent trial would visit upon him if the decision of the magistrate is not set aside now. His application for review is not premised on any prejudice or injustice which he will suffer. His application is premised on the allegation that the courts in Zimbabwe do not have the jurisdiction to try him in circumstances where he was, as he puts it, abducted from Zambia to which he fled to Zimbabwe and back to Harare where the court *a quo* placed him on remand and granted him bail. He premises his application more on the court's alleged lack of jurisdiction to try him on the two charges which the State preferred against him than on any prejudice or injustice which he would suffer if the court in Zimbabwe were to try him for the two offences.

Biti makes two statements on the issue of the court's jurisdiction to try him for the two offences. He asserts, on the one hand, that, because Zimbabwe's authorities abducted him from Zambia to Zimbabwe, their conduct is unlawful as a result of which the court should decline to exercise its jurisdiction over him. He places reliance for his assertion on such case authorities as *S* v *Beahan* 1991 (2) ZLR 98 (S) at 111 B-C; *S* v *Ebrahim* 1991 (2) SA 553 and *Jestina Mukoko* v *AG* 2012 (1) ZLR 321 (S). He states, on other hand, that his abduction from Zambia to Zimbabwe taints the conduct of the Zimbabwean authorities with unlawfulness making the court in Zimbabwe to be deprived of the requisite jurisdiction to try him. He therefore moves me to set aside the decision of the magistrate and to order a permanent stay of his prosecution.

Biti, it is pertinent, should clarify the ground upon which he relies for his review. It is one thing for him to allege, as he is doing, that the court should decline its jurisdiction over him. It is quite another for him to state that the court does not have the jurisdiction to try him. The one is premised on considerations of policy. It confers a discretion on the court to hear or to refuse to hear the matter which relates to the charges which the State preferred against him.

The other is premised on the law. The court, in the second set of circumstances, has no choice but to accept that it has no jurisdiction, at law, and it cannot therefore try him.

The question which arises from Biti's founding papers is: Did the Zimbabwean authorities abduct him from Zambia to Zimbabwe as he alleges. A corollary question which flows from the first is, if he was abducted as he insists he was, did the Zimbabwean authorities commit any offence which would entitle the court in Zimbabwe to either decline its jurisdiction over him or accept the simple fact that it has no jurisdiction to try him. Does the alleged abduction of him by Zimbabwe's authorities, goes the argument, constitute an offence which disenables the Zimbabwean court to try him.

The answer to the above question is in the negative. It is so because abduction is not a crime in Zimbabwe. There is no crime which is known as abduction in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. If abduction was part of Zimbabwe's law, it would have fallen under PART V of [*Chapter 9:23*]. The part relates to crimes which involve infringement of liberty, dignity, privacy or reputation. It deals with such crimes as kidnapping or unlawful detention, pledging of female persons, criminal insult or criminal defamation. Abduction is wholly absent from that part or any other part of the Criminal Law (Codification and Reform) Act.

It follows, from the above-stated matter that, if Biti was abducted from Zambia to Zimbabwe by Zimbabwean authorities, as he puts it, the latter did not commit any crime which would entitle the court to decline its jurisdiction over him on considerations of policy or disenable it to try him. Abduction is not a cognisable crime in Zimbabwe.

The finding of the magistrate is that Biti was not abducted from Zambia to Zimbabwe. Biti, he observed, was handed over to the Zimbabwean immigration officers by their Zambian counterparts. Zimbabwean immigration officials, in turn, handed him over to the police. The issue of abduction, the magistrate correctly observes, does not arise.

The finding of the magistrate cannot be incorrect. It is well within the confines of the law. Biti could not be abducted by Zimbabwean authorities when abduction, as has already been observed, is not a crime in Zimbabwe. Zimbabwean authorities committed no crime. All they did was to receive Biti from the Zambian immigration officials and hand him over to the police who wanted to interview him in connection with the two offences which had been preferred against him.

Biti's assertion is that the Zambian and Zimbabwean authorities abducted him from Zambia to Zimbabwe. That assertion is self-defeating. It, by his own argument, deprives the

courts of both countries of the requisite jurisdiction over him. The court in Zimbabwe would not have the jurisdiction to try him for the two offences which he is facing. The court in Zambia would, by the same token, have no jurisdiction to hear his application for asylum.

The salutary principle of our law is that a litigant should not approbate and reprobate in one and the same matter. Biti, as a litigant, should not therefore blow both hot and cold as he is doing *in casu*. He cannot assert that the court in Zimbabwe has no jurisdiction over him but the court in Zambia has jurisdiction over him when he states, as he is doing, that both the Zambian and the Zimbabwean authorities abducted him from Zambia to Zimbabwe. He cannot properly stand before the Zambian court when the authorities in Zambia are as a guilty of abducting him as their Zimbabwean counterparts are. He, it is evident, submitted to the jurisdiction of the court *a quo* when he:

i) applied and was granted bail by it – and

ii) applied for alteration of his bail conditions which it duly considered.

He cannot now turn around and assert that the court which he moved to grant bail to him should either decline to hear him or, worse still, does not have the jurisdiction to try him on the ground of him having been allegedly abducted by Zimbabwean authorities from Zambia to Zimbabwe. The argument which he premises on two conflicting set of circumstances cannot hold.

Biti's journey from Zimbabwe to Zambia constitutes the gravamen of his cause. He alleges that he fled to Zambia following his persecution by agents of the State of Zimbabwe. The persecution, he insists, extended to such members of his family as his mother and his brother one Steven Biti. It also extended to the 94-year old mother of his friend, according to him. All those persons, himself included, suffered at the hands of some unknown and unidentified assailants whom he refers to as the military junta. These instilled such unprecedented fear in him that he made up his mind to flee the country into neighbouring Zambia, he avers.

Biti's statement of the alleged persecution of his person, his close relatives and friends remains without any substantiation. It has no testimony from anyone else other than from himself. None of the persons whom he alleges were persecuted deposed to an affidavit in support of his averments. None of them gave any reason as to why they did not do so. He, on his part, advanced no reason as to why the alleged victims of agents of the State did not depose to affidavits which would support his claims.

The second respondent who is standing-in for the State in the arrest and prosecution of Biti describes the latter as a fugitive from justice. He denies that Biti was ever abducted and/or

persecuted. He asserts that no member of Biti's family was ever attacked. He denies that the mother of the friend of Biti was attacked.

The above-stated position places the statement of Biti on a balance. One cannot tell, with any degree of certainty, if his life was in danger as he would have me believe. One cannot tell as well if the lives of his mother, his brother and the mother of his friend were in danger. If they were, as he states, one is left to wonder why they did not depose to affidavits in support of his application. They should have placed me into their confidence. They should, in other words, have shown the unpalatable situation which they allegedly suffered at the hands of agents of the State. Alternatively, they should have reported their unacceptable ordeal to the police. The probability of the matter is that none of Biti's relatives or close friends suffered any persecution.

Biti's statement is that he chose Zambia as his first destination when he fled from Zimbabwe. He avers that the one-stop border arrangement which is at Chirundu persuaded him to take that route. He describes, in full, the essence of the one-stop border post concept which is at Chirundu. He does so in paragraphs 89 and 90 of his founding papers wherein he states as follows:

> "89. The boarder at Chirundu is a one-stop-boarder. To get into Zambia, one has to cross the Zambezi river into Zambian territory where immigration and customs formalities of both leaving and entering into Zambia are processed."
> "90. Equally for someone to enter into Zimbabwe from Zambia at Chirundu one has to cross the Zambezi river to enter into Zimbabwe where again both immigration and customs formalities are concluded."

The significance of the above-mentioned concept can hardly be over-emphasized. It shows, in clear terms, that a person who is leaving Zimbabwe and entering into Zambia should cross the Zambezi river and come onto the territory of Zambia whereon the Zimbabwean and Zambian officials are housed. Judicial notice is taken of the fact that the traveller's first port of call on arriving at the officials is at the Zimbabwean immigration and customs officers who would process his travel documents to leave Zimbabwe. His next port of call, it is also noted, is at the Zambian immigration and customs officers who would process his travel documents to enter into Zambia.

It follows, from a reading of the above-stated set of matters, that a traveller who is leaving Zimbabwe to go to Zambia may be on the territory of Zambia physically but not legally. He will only be legally in Zambia both physically and legally when he has been granted leave

to leave Zimbabwe and leave to enter into Zambia by the Zimbabwean and Zambian immigration and customs officers respectively.

The statement of Biti is that his companions and him crossed the Zambezi river and entered into the territory of Zambia at 0545 hours of 8th August 2018.He states, in paragraph 95 of his founding papers, that, on reaching the Zambian side of Chirundu border post, he gave his passport to Mr Rambanapasi, his aide, whom he instructed to seek political asylum. Mr Rambanapasi, he claims, handed his passport to a Zambian immigration officer and claimed asylum on Biti's behalf. The officer, he avers, advised that he would seek a directive from Lusaka.

The above is the long and short of what Biti claims he did when he reached the Zambian side of Chirundu border post. He makes no mention of his passport anywhere else other than only on this occasion. The fate, or otherwise, of his passport remains unmentioned and therefore unknown. He, on his part, does not state if he ever approached the immigration and customs officials of Zimbabwe with a view to having his passport processed to leave Zimbabwe. Nor does he state that the Zambian immigration officers processed it to enable him to legally enter into Zambia.

The fact of the matter is that Biti was physically in Zambia. He was, however, not legally in Zambia. His being on the territory of Zambia did not translate into making him subject to the laws of Zambia. This is a *fortiori* the case when he did not leave Zimbabwe and when his application for asylum, if ever such occurred, does not show that it was successfully considered by the Zambian immigration department. He, it would appear, continued to hover in-between the two countries, namely Zambia and Zimbabwe, during the period that he remained at Chirundu border post. He could not enter into Zambia outside the defined parameters which are characteristic of the one-stop-border concept.

Biti and his companions were neither in Zimbabwe nor in Zambia during the period that they remained at Chirundu border post. They were on what is normally referred to as the no-man's land. This is a common feature at the border of two contiguous neighbouring countries. The one-stop-border post concept which is at Chirundu does not make the concept of the no-man's land as clear as it should be where no such exists as is the case at Chirundu.

Because Biti and his companions did not enter Zambia, the immigration authorities of Zambia remained constrained to issue Biti with a deportation, or an extradition, certificate. It is for the mentioned reason, if for no other, that they used what was termed a hand-over/ take-over certificate which, as the magistrate correctly observed, is a government document. Biti

and his companions had presented Zambia's immigration officials with a *fait accompli*. The officials recognised the fact that Biti and his companions had physically entered onto the territory of Zambia. They required some evidence which showed that Biti and his companions had physically left their territory. The certificate therefore constituted the requisite evidence.

Other than the statement which he makes, Biti produces no evidence which shows that he applied for asylum. The averments which he makes in his founding papers show that he could not have applied for asylum. He states in paragraph 86 page 13 of the record that:-

> "86. I… felt that it was in the best interest of everyone that I leave Zimbabwe. I anticipated that once the election dispute had been settled and a President sworn-in, it would be safer for me to return to Zimbabwe."

Biti, it is evident, did not intend to remain outside his country of origin for a period which was longer than necessary. He knew that the election dispute would not take more than one month to resolve. He could not, therefore, have applied for asylum which would have made him to remain on foreign land for more than one month. His statement which is to the effect that he applied for asylum is, accordingly, devoid of merit.

The circumstances which led Biti to apply, on an urgent basis, to the Zambian High Court remain as unclear as he states the same. The contents of his application remain unknown. He did not avail the same to the court *a quo* or to me. He states, in paragraph 143 of his founding papers, that his companions and him instructed their Zambian lawyers to apply to the Zambian High Court seeking that they be granted asylum or that if there was any decision to deny them asylum, the same be reviewed.

It is not clear why the application included Biti's companions when it has not been alleged anywhere in his papers that these were also under persecution which he alleges he suffered at the hands of State Security agents in Zimbabwe. Secondly, Biti does not advance any reason as to why he applied to the court in Lusaka for asylum. He knows as much as anyone does that such an application is an administrative act which falls under the executive, and not the judiciary, arm of the State. How he expected the High Court in Lusaka to grant his application for asylum remains a matter for anyone's guess. Further, how he expected that his companions who did not apply for asylum would have their application successfully considered by the court in Lusaka beats the mind of any right thinking person.

Biti advances two reasons for the application which he alleges his companions and him made to the High Court in Lusaka. They applied for asylum, according to him. I have already discussed the impropriety of that application in the preceding paragraphs of this judgement. He

alleges that they applied that the court should review the decision of the executive, if his application for asylum has been turned down.

I am not privy to the rules of the High Court of Zambia. I am therefore not certain if the procedure which the legal practitioners of Biti and his companions adopted finds support from the rules of the High Court of Zambia. The view which I hold of the same is that what the legal practitioners did, with the best of their intention, runs in direct conflict with the rules. A *fortiori* on the issue of review which has some set guidelines which any reviewing authority has to consider and cannot not easily depart from.

A review being what it is, is based on the decision of the court *a quo* or the administrative authority. The applicant in a review application impugns the proceedings which bring about the result which constitutes his ground of complaint or the decision itself. It more often than not attacks the manner in which the decision was arrived at or the irregularities which characterise the proceedings, if any Matters such as whether or not the court *a quo* or the administrative authority or tribunal lacked jurisdiction to hear and determine the application, whether or not the decision-maker acted with bias or malice are a common feature of any review. All the stated matters constitute an applicant's grounds for review.

Biti does not state what he advanced as his grounds of review when he moved the court in Lusaka to review matters which were no yet before it. He did not say that he would attach the reasons for the decision of the Minister of Home Affairs in Zambia to his review application. He did not know how his application for asylum, if any, would be decided. Yet he claims to have pre-empted it by the application which had no reasons or grounds for review. The English adage which goes "more haste less speed "would, in my view, have rendered the application more meaningful than otherwise.

The application which Biti and his companions made to the Zambian High Court on 8th August 2018 was in the form of an *ex parte*. The order was issued on the same day at 12 noon, according to Biti. He claims that it was handed to his companions and him at about 4 pm of the same day. The order, he avers, had two letters which showed that it had been served around 1:00 pm of 8 August, 2018 upon the Ministers of Home Affairs and Foreign Affairs as well as upon the Directors-General of Immigration and Police.

The Lusaka High Court order appears at p 263 of the record. It shows, in clear terms, that Biti and him alone was/ is the applicant. Biti, therefore, made a misstatement when he alleged, as he did, that his companions and him applied for asylum. The order directed that Biti

remains in the custody of Zambian Immigration officers who would facilitate his appearance before Judge Yangailo at the High Court in Lusaka at 8:00 hours on the 9th day of August 2018.

It is inconceivable that the immigration officials of Zambia made up their mind to disregard the High Court order which directed them to deliver Biti to the High Court in Lusaka at 8 am of 9 August, 2018. The appearance of the matter is that this is what they did. They would inexcusably have done so if the assertion of Biti which is to the effect that the court order was served on them at 1 pm of 8 August, 2018 is anything to go by. The probability of the High Court order having been served on the immigration department before Biti was removed from Zambia to Zimbabwe cannot be regarded as a far-fetched matter. Biti produced no evidence which supported his claims which are to the effect that the order was served on the immigration officials of Zambia earlier than the time that the same immigration officers handed his companions and him over to their Zimbabwean counterparts.

It is trite that he who alleges must prove. Biti should have substantiated his claims on the above-stated matter. He did not. The immigration department of Zambia would have had no reason to disobey the order of its court. It remained bound by the same. The probability of the matter is that the order had not been brought to its attention when it handed Biti and his companions over to the immigration officers of Zimbabwe. It, in other words, could not disobey what it had not been made aware of.

Police officers from Zimbabwe saw the Zambian High Court order. The investigation officer, one Nyabasa, confirmed his sight of the order. He states, correctly in my view, that the same had no effect on him. He was not a party to the same. He was not therefore bound by it. At any rate, he had in his possession the warrant of arrest which the court in Harare issued to him. It authorised him to arrest Biti and bring him before the court for remand in respect of the two offences which had been preferred against him.

The narrative of Biti suffers from one simple defect. The defect is that he made a number of statements which he does not substantiate. He, for instance, makes mention of the experience which he alleges he suffered at Chirundu border post. He speaks of Zimbabwe's State agents' attempt to abduct him from Zambia and take him back to Zimbabwe, the tug-of-war which occurred at Chirundu where he was used as the rope between State security agents, on the one hand, and some women who were at the border, on the other, the increase in numbers of Zimbabwe State agents on the Zambian side of the border and many other events which he claims occurred at Chirundu border post. His companions, it stands to reason, went through whatever he went through, if ever such occurred. He does not give them the opportunity to

substantiate his story. He also offers no reason why his companions, who it is clear, are very close to him refrained from telling of what they and him went through.

It is evident, from a reading of the above – analysed matters, that no law or protocol was violated when Biti found his way back to Zimbabwe. The magistrate's finding was to an equal effect. He correctly ruled, as I am doing, that Biti was properly before him and that he had the requisite jurisdiction to try him. I agree. There is nothing in the papers which Biti filed which justifies that the proceedings which are pending before the court *a quo* should be interfered with. Biti should, therefore, appear before the court of the magistrate and have the two charges which the State preferred against him heard and determined.

Biti's application for review is devoid of merit. He, on his part, failed to prove his case on a balance of probabilities. The application is, accordingly, dismissed with costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioners