THE STATE
versus
MUNYARADZI MAWADZE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 7 & 9 March 2023

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

**Application for a leave to appeal the recusal judgment**

*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 by the accused for leave to appeal to Supreme Court. It is necessary to set out the background and facts against which this application arose and the trajectory of the case up to this point. 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; *S v Mawadze* HH 173/23.

[2] The accused made an application for a postponement, and the application was refused: See: *The State* v *Mawadze* HH 101/23. Consequent to the dismissal of the postponement application, the accused made an application for my recusal. The recusal application was dismissed. See: *The State* v *Mawadze* HH 170/23. Thereafter he made another application for a postponement of the matter, and it was dismissed. See: *The State* v *Mawadze* HH 173/23. Consequent to the dismissal of the second postponement application, the accused made this application for leave to appeal the recusal judgment. See: *The State* v *Mawadze* HH 170/23.

[3] The judgment is assailed on a number of grounds, most of which deal with various individual aspects on which this court based its reasons for the dismissal of the recusal application. The judgment sets out the court's reasoning in detail and I do not propose to repeat those reasons here. The grounds of the proposed appeal have been articulated as follows:

i. His Lordship *a quo* erred in not dealing with the full and merited basis upon which the application for his recusal was made and so erred in failing to relate to the pointed arguments relied upon by appellant in support of his application.

ii. A fortiori, his Lordship *a quo* erred in resolving the application on a basis other than that on which it was argued and making his determination rest on an authority that he had not canvassed with the parties.

iii. His Lordship *a quo* erred in not holding that his decisions and directives against which the appellant complained were so fundamentally faulty as to give the objective impression that he had departed from the strict standard of even-handed justice expected of those who hold judicial office.

iv. In relating to the question of subconscious bias, his Lordship *a quo* misdirected himself in focusing attention on his personal circumstances as he perceived them without at the same time applying the objective standard of the reasonable man.

v. His Lordship *a quo* erred in not coming to the conclusion that his decisions and directives, unsupported as they are by the law, led to the objection impression that he was an active victim of subconscious bias and was by that reason absolutely disqualified from sitting.

vi. His Lordship *a quo* erred at any rate in not coming to the conclusion that his decision to yield to the unlawful preference by the state to start with appellant's trial, undermined under the circumstances, the extant order for the separation of trials and gave the objective impression that he was unfairly taking away from the appellant what he had lawfully given him.

[3] The recusal judgment is interlocutory.

[4] Mr *Mpofu* counsel for the accused argued that in order to succeed in an application for leave to appeal, the accused must establish that his proposed appeal has prospects of success. Counsel cited the following authorities in support of his argument: S v *Tengende* 1981 ZLR 445; *S* v *Mutasa* 1988 (2) ZLR 4 (SC); *Woods & Ors* v *The State* SC 60/93; *Rubaya* v *The State & Ors* SC 84/19. Except for the *Rubaya* case, these authorities speak to leave to appeal sought at the termination of criminal proceedings, i.e. after the sentence has been imposed.

[4] In terms of the common law an appeal should not be decided piecemeal, and usually the court of appeal will exercise its powers only after the termination of the trial. The common law principle against piece-meal appeals is of longstanding and was expressed

> by INNES CJ, more than a hundred years ago in the matter of *Smith* v *James*, 1907 TS 447. At the root of this principle lies the idea that appeals ought not to be launched piecemeal, because such an approach tends to thwart the speedy and final disposition of criminal proceedings.

[5] Section 44(5) of the High Court [*Chapter 7:06*] which permits a litigant aggrieved by an interlocutory judgment of this court in criminal proceedings to appeal to the Supreme Court, subject to leave having been granted by the High Court or, failing which by a judge of the Supreme Court makes inroads against this principle.

[6] Therefore one can say that leave to appeal an interlocutory judgment in criminal proceedings must be the exception, rather than the norm. This is consistent with what was said in *Rubaya* v *The State & Ors* SC 84/19, where the court dealing with an application for leave to appeal an interlocutory judgment had this to say:

> "I must tread carefully considering that this is a matter which is unterminated and in which the High Court still has to pronounce itself on the evidence placed before it. In fact, that is one reason why superior courts will not ordinarily sit in judgment over matter that are still before the lower courts except in very rare situations where a grave injustice would occur if the court does not intervene. Superior court are always very slow to intervene in the unterminated proceedings of a lower court except in cases of gross irregularities in the proceedings or where it is apparent that justice might not be attained by other means. See *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S) at 64 (C). It is undesirable to express a view on unterminated proceedings and in the process interfere with the judicial discretion of the lower court still seized with the matter."

See: *Mamombe and Another* v *Mushure N.O and Another* (4 of 2022) [2022] ZWCC 4 (10 June 2022).

[7] The jurisprudence regarding leave to appeal in unterminated criminal proceedings in this jurisdiction is similar to the position in South Africa and Namibia. In appropriate and exceptional circumstances leave to appeal prior to the termination of criminal proceedings may be granted. This principle was applied in *S* v *Majola* 1982 (1) SA 125 (AD) and *S* v *Augustine* 1980 (1) SA 503 (A).

[8] In *S* v *Majola* 1982 (1) SA 125 (AD) leave to appeal after conviction but before sentence was granted. It had come to light after conviction but before sentencing that the accused had never been consulted by his legal practitioner as to whether he wanted to testify in his defence. And the fact that he had not given evidence had strongly influenced the trial court's conviction. The facts of this case where held to constitute exceptional circumstances to grant leave to

appeal before sentence. See: Commentary on the Criminal Procedure Act (Act 51 of 1977) *Du Toit et al* 31-11.

[9] Similarly in *S* v *Augustine* 1980 (1) SA 503 (A), exceptional circumstances existed which permitted a departure from the general principle against piece-meal appeals. In the *Augustine* case the appellant was convicted of culpable homicide. Before sentence was imposed it came to light that the person who had died was not the one who had been stabbed by the appellant and that the person who had been stabbed by the appellant only sustained slight injuries. This fact was held to constitute exceptional circumstances to grant leave to appeal before the termination of the criminal trial. See: Commentary on the Criminal Procedure Act (Act 51 of 1977) *Du Toit et al* 31-11.

[10] In the *Majola* and *Augustine* cases it was inevitable, because of the grave irregularities that had occurred that the Supreme Court of Appeal would set aside the convictions. This constituted exceptional circumstances to determine the appeals before termination of the criminal trials.

[11] In the Namibian case in *S* v *Malumo* (2) (4 of 2010) NASC 10 (14 September 2010), the High Court declined to grant leave to appeal against an interlocutory judgment, and a petition was made to the Supreme Court. The Supreme Court dismissed the petition on the premise that no exceptional circumstances existed to entertain the appeal before the termination of the criminal proceedings. Further in the Namibian case in *S* v *Masakhe* (SA 13 of 2010) [2011] NASC 9 (22 August 2011), notwithstanding that the High Court had granted leave to appeal, the Supreme Court struck off the appeal from the roll holding that no exceptional circumstances existed to entertain the appeal before the termination of the criminal trial. Notwithstanding the fact that these two Namibian cases were concerned with the admissibility of admissions and confessions, the point made was that leave to appeal unterminated criminal proceedings was not for the mere asking, a litigant must establish exceptional circumstances to succeed. This is consistent with the common law principle against piece-meal appeals. These are foreign judgments and they have persuasive effect in this jurisdiction.

[12] The following authorities: S v *Tengende* 1981 ZLR 445; *S* v *Mutasa* 1988 (2) ZLR 4 (SC); *Woods & Ors* v *The State* SC 60/93 are strictly distinguishable from this case in that they set out the test after the termination of the criminal proceedings, i.e. after sentence. In this case the accused has not been convicted of any crime, he has in fact not even pleaded to the charge

or charges after the separation of trials judgment. More is required of a litigant who seeks leave to appeal an interlocutory judgment prior to the termination of criminal proceedings.

[13] In the alternative, Mr *Mpofu* argued that even if the principle of exceptional circumstances was law in this country, the accused has succeeded in establishing such circumstances. It was submitted that failure to grant an application for recusal, when it should have been granted, means that the whole proceedings going forward would be invalid. Therefore, to save judicial resources it is important that leave to appeal be granted and so that the Supreme Court pronounces itself on the matter at this stage.

[14] Taking into account the principles articulated above I now turn to consider the proposed grounds of appeal to determine whether they measure up to the acceptable threshold.

[15] The first ground of appeal viewed on a contextual basis, shows that the accused has taken the platform of this application for leave to appeal to further ventilate his disgruntlement of the court's ruling in the postponement judgment. The accused mounted an elaborate attack on the ruling, and packaging the attack under the guise of the principle that it shows bias in the sense of a 'departure from the standard of even-handed justice which the law requires from those who occupy judicial office.' In fact the attack was a disguised invitation to the court to come to the defence of postponement judgment. The reasons for the refusal of the postponement application are clear in the judgment. See: *The State* v *Mawadze* HH 101/23. Even if the court *erred* or misdirected itself in the postponement judgment, such cannot be taken as symptomatic of bias. Whether the accused agrees with such reasons or not is not the inquiry, but they cannot in the mind of a reasonable, objective and informed person be explained on the basis of bias.

[16] The second ground goes on a tangent. The recusal application was not resolved on the basis of the judgment in *The State* v *Mawadze* HH 273/20. In turn the application was resolved on the principle that the accused had failed to establish proper grounds for recusal. This is explicit in *The State* v *Mawadze* HH 170/23 @ 32 where it is said:

> "In conclusion, the fact that a judicial officer makes a ruling against a litigant does not amount to a ground giving rise to a reasonable apprehension of bias. Further, it is not for the court to determine the sequence of the separated trials. Neither is it the law that such trials separated trials must be presided over different judges. Again, the contention anchored on unconscious bias negates the fact that judges are trained and required to be impartial, that is, to approach a matter with a mind open to persuasion by the evidence and the submissions of counsel. Further the law presumes a judicial officer to be impartial in the adjudication of disputes, and that such

> presumption is not easily dislodged. Further, I neither have a close and personal relationship with the accused's father to ground a recusal. Again, the allocating authority neither informed me of the fact that the judges stationed at the Harare High Court declined to deal with the accused's matter, nor do I know the reasons given for such a decision. In the circumstances, the accused has failed to establish proper grounds for recusal, and it is for the above reasons that this application must fail."

[17] The contention that the recusal judgment was resolved on the basis of *The State* v *Mawadze* HH 273/20 cannot be correct. The recusal judgment (*The State* v *Mawadze* HH 170/23) makes the point that notwithstanding the fact that in *The State* v *Mawadze* HH 273/20 the court was dealing with a bail application, however the recusal principles are the same whether a judicial officer is dealing with a bail application or criminal trial, no judge is permitted to preside when the objective facts show that he or she is conflicted or biased. Therefore, it is incorrect to say the recusal application was resolved on the basis of *The State* v *Mawadze* HH 273/20. It was simply resolved on the principles applicable in a recusal application.

[18] Regarding ground number three, the decisions and directives complained of must be understood in the following context: In *The State* v *Mawadze* HH 170/23 2 para. 3 the court said:

> "On 8 February the accused continued with his application for a postponement which he had started on 6 February. The application was anchored on the unavailability of counsel, Mr *Mpofu.* The application was refused. See: *The State* v *Mawadze* HH 101/23. Immediately after the refusal of the application, Mr *Hwacha* the intrusting attorney informed the court that he had neither the mandate nor instructions to represent the accused in the trial. He said his role in the matter going forward was reduced to a watching brief. The net effect of the position taken by Mr *Hwacha* was that the accused was left without legal representation. At that stage the court would not countenance to proceed with the trial in the absence of legal representation for the accused."

[19] It is in this context that the court directed that a legal practitioner be appointed to represent the accused. Ultimately it is the court that must ensure that an accused gets a fair trial, and legal representation is at the centre of the right to a fair trial. The directive that a legal practitioner be appointment to represent the accused was made in the context of the accused's right to fair trial and no more. At that stage the accused was without legal representation. And such directives cannot objectively be said to be symptomatic of bias.

[20] Grounds numbers four and five fundamentally overlap with one another and simply gives reasons why the presiding judge must recuse himself and amounts to criticism against

the findings of the court in the recusal application. These grounds relate to what is referred to as subconscious bias, and how it is said it manifested itself in the postponement judgment. The point made in the recusal judgment and the same point I make here is that the accused is not a sitting judge. His father is a judge. And I do not have a close relationship with the accused's father. My view is that a reasonable, objective and informed person on these facts would not conclude that I will not bring an impartial mind on the adjudication of this case.

[21] The sixth ground of appeal deals with what is alleged to be the court's yielding to the unlawful preference by the State to start with the accused's trial, instead of starting with the trial of the other two individuals who were initially jointly charged with him. This argument was repeated in this application that such deprives the accused of the benefit arising from the separation of trials judgment. In the recusal judgment @ para 21 the court said:

> "Turning to the argument that the separated trials must be presided over by different judges, it is trite that under the common law a court that has granted a separation of trials has no power to determine the sequence in which the trials ought to take place. See*: Matsiya* 1945 AD 802. Generally, though the case proceeds against the remaining accused, however it still remains with the State to decide the sequence of the trials. The court may, at most, suggest that a particular sequence would best serve the interests of justice. But it remains the prerogative of the State to determine the sequence of the trials."

[22] This is a criminal matter. This court has no power to direct the prosecution as to who to prosecute and when to prosecute. The accused cannot insist that the trial of the other two persons be commenced before his, such is novel and unknown in the history of criminal trials. The court's hands are tied. It is the prerogative of the State to determine the sequence of trials. On these facts no reasonable, objective and informed person may infer bias and impartiality on the part of the presiding judge.

[23] The argument that these criminal proceedings going forward will be invalid and a nullity is not correct. The accused is an aggrieved litigant. He is aggrieved by the dismissal of his postponement application. The recusal application was just an expression of the disgruntlement with the dismissal of the postponement application. I am not satisfied that this is a case where an injustice or let alone a grave injustice will occur in the proceedings calling for interference at this stage.

[24] The accused has not shown a misdirection on the legal principles applied in the recusal application, nor a misdirection on the facts, other than criticism and conclusions drawn by him on his analysis of the facts. Instead of providing exceptional circumstances for the granting of

leave to appeal at this stage of the criminal proceedings, this application amounts to a mere extension of his recusal application.

[25] Although the court has adequately dealt with its reasons for not granting the recusal application, the accused expresses persistent disagreement, which manifests itself in the current application before court. The contention of bias against the presiding judge is anchored on the manner in which this court dealt with an application for postponement. A litigant who is dissatisfied by a court judgment, cannot be permitted to elevate that dissatisfaction to a ground for recusal.

[26] For the aforesaid reasons I am respectful of the view that the accused has failed to show that there are exceptional circumstances to grant leave to appeal before the termination of these criminal proceedings. Even if for a moment one applies the low threshold i.e. the prospects of success test, the accused has no such prospects at all in this case. This is the procedural hurdle which the accused has to overcome, he has not. It is for these reasons that this application must fail.

In the result, **IT IS ORDERED AS FOLLOWS**:

"The application for leave to appeal the recusal judgment in *The State* v *Mawadze* HH 170-23 be and is hereby dismissed."

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