

HH 139-/09
HC 1811/09
Ref Case Numbers:
B427-9/09
HC CA 294-300/09
B122-8/09
B30-40/09
B35-6/09
CRB 8887-91/08
8894-95/08
SC 35/09

THE STATE
versus
KISIMUSI E DHLAMINI
and
GANDHI MUDZINGWA
and
ANDRISON MANYERE

HIGH COURT OF ZIMBABWE
BHUNU J
Harare, 25 April 2009

BHUNU J: During the week beginning 13 April 2009 HUNGWE J was in South Africa scheduled to return about a week later. Before leaving for South Africa we had agreed to swap duties.

This matter came before me as an application for leave to appeal against his order granting bail to the first three respondents under case number B427- 9/09. In the normal ran of things such applications are determined by the presiding judge. I however, considered the application to be so urgent such that it could not wait for the return of HUNGWE J. There being no objection to my presiding over the matter and considering it proper I agreed to preside over the matter.

I initially heard the application on 14 April 2009 and it was postponed to 15 April 2009. The case was heavily contested and the preparation of the judgment painstaking. Conscious of the need to determine the matter in the shortest possible time I worked over time but I only managed to complete writing my judgment on 16 April 2009 and it was delivered on 17 April 2009.

What this means is that it took me a day to prepare judgment. While preparing judgment I was oblivious of any *dias inducia* or deadline. If there was one no one brought it to

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my attention. If it had been brought to my attention I would have issued my order with reasons to follow. All along I was of the honest view that as the court was seized with the matter this interrupted the running of time against the applicant as is the case with prescription.

The three respondents I am told were released on 17 April 2009 on the basis that the seven day period prescribed by s 121 of the Criminal Procedure and Evidence Act [*Cap 9:07*] had expired on 16 April without the applicant having lodged its appeal in the Supreme Court.

The applicant now applies for an order canceling the warrant of liberation, re-arrest of the three respondents and the suspension of the bail granted by HUNGWE J on the basis that the respondents' liberation was irregular and to that extent unlawful.

At the commencement of the hearing counsel for the respondents raised an objection *in limine* seeking my recusal primarily on the basis that the allegations made in paragraphs 6.3 to 6.4 of the opposing papers concerning the way I handled the matter place me in an invidious position such that I cannot make an objective determination of the matter.

The allegations made in the opposing papers are basically that the alleged delay is attributable to me. They also question why the matter had to be placed before me instead of the presiding judge. They have also pointed to a pending application before PATEL J where they allege that the police are now illegally guarding the three respondents at the instance of the applicant. Their other complaint is that in my judgment I appeared to review HUNGWE J's judgment.

The question of recusal is to a large extent subjective. Having searched my conscience I am not convinced this is a case in which I can properly preside without it appearing that my vision has been clouded with the dust of the conflict. I consider that the ends of justice can properly be served if the application is determined by another judge who has not handled this matter before.

I accordingly recuse myself and withdraw from presiding over this application.

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