HH 24-04
HC 747/04

WITNESS MAHATA
versus
CAROLINE ANNE CHIGUMIRA N.O.
(in her capacity as the presiding magistrate)
and
ATTORNEY GENERAL N.O.

HIGH COURT OF ZIMBABWE
OMERJEE J
HARARE, 28 January and 4 February, 2004

Criminal Review in Chambers

G Chikumbirike for the applicant
Mrs E Mwatse and *Mrs Mabeza* of the Attorney-General's Office on behalf of the second respondent

OMERJEE J: The applicant has brought this matter by way of review and is asking the High Court to exercise its review powers under sections 26 & 27 of the High Court Act [Chapter 7:06]. The relief sought is as appears in the draft order filed together with this application. The circumstances leading to this application are well set out in the Applicant's grounds for review and appear to be common cause. They will, therefore, not be repeated save in so far as they are relevant and have a bearing in the determination of this matter. The First Respondent did not file any response despite service having been effected at her office. The Second Respondent and the investigating officer attached to C.I.D. Frauds filed papers by way of opposition.

It is settled that the High Court has wide powers conferred upon it to review decisions made by inferior courts and in particular, can review a decision on the grounds of gross irregularity, interest in the matter and/or bias.

The present application is premised on the following grounds -

A. Interest on the matter and/or bias

The First Respondent presided over the bail application involving the applicant on 31st December, 2003 and he was admitted to bail. It is apparent that the Police felt aggrieved by what they perceived to be irregularity in the proceedings of 31st December 2003. The true nature of the Police complaint is easily inferred from events that were to unfold shortly thereafter. The First Respondent and other participants were questioned by the police on the 6th January, 2004. On Friday 9th January 2004 the First Respondent presided over a bail application brought in terms of section 126 of the Criminal Procedure & Evidence Act [Chapter 9:07] ("the Code"). Following a hearing the First Respondent decided to rescind her earlier decision admitting the applicant to bail and ordered that he be placed in custody.

It was submitted on behalf of the Applicant that the fact of the questioning of First Respondent by the Police regarding her handling of this case followed by her presiding over the same matter a few days later was not proper. It was submitted on behalf of the Applicant that this scenario would cause in the mind of the applicant, the reasonable apprehension that the First Respondent would not act fairly. The test applicable in such matters is not proof of actual bias, but a reasonable apprehension of bias - see *Masedza and Ors* v *Magistrate Rusape and Anor* 1998(1) ZLR 36H at 44H-45B where the learned judge stated as follows -

> "At the heart of the test for recusal lies the principle that justice should not only be done but be seen to be done. See *Appel* v *Leo & Anor* 1947(4) SA 766 (W); *S* v *Radebe* 1973 (1) SA 796 (A), LORD DENNING MR in *Metropolitan Properties Co (FGC) Ltd* v *Lannon & Ors [1969]* 1 QB 577 at 599 puts in succinctly -
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> > 'In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or to the mind of the chairman of the Tribunal, or whether it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expenses of the other. The court looks at the impression which would be given to other people. Even if he was as unbiased as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit...'".

Significantly counsel for the Second Respondent in their submissions conceded that given the particular background of this matter, the impression of bias or interest in the course, was unavoidable when the First Respondent presided over proceedings on the 9th January, 2004. It is of course common cause that the presiding Magistrate was subsequently arrested and placed on remand on allegations of corruption arising from her handling of this matter.

The issue is therefore would a fair minded person, having knowledge that being unhappy with the decision, the Police had formally questioned the First Respondent, not apprehend that the First Respondent would be tainted by bias in her decision? I am constrained to respond in the affirmative. In my view the First Respondent ought to have recused herself from this matter on the 9th January, 2004.

B. <u>Gross irregularity in the proceedings</u>

The applicant contends that the proceedings, the subject matter of this application, were not done in accordance with the provisions of s

126 of the Code and this therefore constitutes a gross irregularity. That this court should exercise its review powers and declare as a nullity, the decision purportedly made in terms of that section by the first respondent. In particular he urges that s 126 can only be invoked in "a situation where the court on facts discovered by it" exercise its power to revoke bail already granted. That *in casu*, because it was not the court's own discovery, but that of some other person, which triggered the invocation of s 126 a situation which is not contemplated by the section, the magistrate was wrong to proceed by way of that section so the argument goes.

This argument does not persuade me. Clearly on a proper construction of s 126 it is implicit that either party to a criminal proceeding, upon discovering facts not originally placed before the court, is entitled to bring an application pursuant to s 126 for an order to alter or add to the conditions of the recognizance or revoke bail all together, as the case may be. In fact it is hard to contemplate a situation where the court on its own, will discover such facts, without some outside agency having to bring them to its attention. The reason simply being that the court is not in the business of finding and/or gathering of facts. The court is in the business of taking into consideration facts placed before it in order to arrive at a judicial decision.

However the above observation does not end the matter of gross irregularity *viz* the invocation of s 126. Put differently, can it be said that the first respondent acted correctly in invoking s 126?

As already stated it is permissible for a magistrate to alter, add to, or revoke bail by virtue of s 126 (1). However, an order can ONLY be made in terms of this subsection if based on new facts or in the language of proviso (ii) to s 126(1) -

> "a magistrate shall not act in terms of this subsection unless facts which were not before the magistrate who granted bail are brought to his attention".

It is clear that it is a prior requisite that there must be new facts in existence before a magistrate can act in terms of s 126(1). Where no new facts exist, an order purportedly made in terms of this section will constitute a gross irregularity.

In the present case it appears that the matter was placed before the magistrate because there was some disquiet on the part of the police as to how bail originally denied was subsequently granted. Can this be considered a new fact as contemplated by s 126? The police attitude as to whether bail should be granted or not, in the circumstance of this case, was not a new fact. No doubt this fact was present at the first appearance of the applicant on 24th December, 2003 when the bail application was deferred. This is implied by the assertion by the prosecutor that in all probability police investigations would be completed in mid January 2004. The factor of police attitude was investigated at the subsequent hearing of the 31 December. In any

event it is a normal factor, which is inevitably considered by a court when exercising its discretion on the question of bail. In short it existed at the time when the court considered the granting of bail.

To reinforce this point, it is perhaps important to restate the well established legal position pertaining to the decision of bail. This position was summarised in *Bull* v *Minister of Home Affairs* 1986(3) SA 870 (ZS) as follows:

> "It is a fundamental and long tradition of the criminal procedure of Zimbabwe that the Courts, and not the Executive, should decide whether a person brought before the Court to face criminal charges should be allowed bail or be kept in custody (*viz* whether he should be deprived of his liberty) pending his trial or the withdrawal of the charges. It is right and proper that it should be so, for the Courts are well equipped to deal with the balancing act involved in the need to preserve the liberty of the individual whom our law presumes innocent until proven guilty, on the one hand, and the interest of the due administration of justice, on the other hand."

From the above statement it cannot be gainsaid that the decision on bail is within the domain of the court and therefore the attitude of the State i.e. the prosecution or the police through the prosecution, is merely a relevant factor to be considered. Ultimately the court has to exercise its discretion to arrive at its own decision.

It is again significant that counsel for the Respondent submitted that notwithstanding the complaint from the police, the attitude of the prosecution was to distance themselves from the proceedings. Indeed from a reading of the record it is apparent that the prosecution team then consisting of two prosecutors who had not dealt with the previous application adopted the position that they had not called for the enquiry

of the 9th January. Secondly, the record reveals that the prosecution was not itself dissatisfied at the earlier grant of bail to the applicant. Counsel for the respondents in the present hearing, conceded that in the circumstances of this case, it could not properly be submitted that new facts had been placed before the Court. I am constrained to agree. Given this background I have doubts if such is what was contemplated by section 126 as constituting new facts.

Having regard to the circumstances of this case as appear in the papers filed, it is my considered view that no new facts were placed before the first respondent and therefore she could not act in terms of s 126(1).

In short the order revoking bail, purportedly made in terms of s 126(1) was based on an error of law and therefore a nullity. It is pertinent to point out here, that the High Court has power to review decisions of inferior courts on grounds of error of law, if the error amounts to a gross irregularity, that is, if it is substantial, material or manifest in that it causes a miscarriage of justice. See *Bridges & Hulme (Pvt) Ltd* v *Magistrate, Bulawayo & Anr* 1996(1) ZLR 542 H.

C. Conclusion

On the basis of the aforegoing this Court has no option but to conclude that the application has merit. As alluded to above the concern of the Police relates to the perceived irregularities in the manner bail was granted. The proper course was for the Attorney General to request the High Court to review the proceedings relating to the grant of

bail by the Magistrate in order for the High Court to review the irregularity. It must be remembered that a review is not an appeal from a decision, but a review of the manner in which the decision was made. It was an error on the part of the State to purport to bring an application in terms of s 126(1) as already explained above. The State is at liberty if it so desires, to lodge review proceedings against the grant of bail on 31st December, 2003.

In the result the application for review succeeds. The order of the First Respondent of the 10th January, 2004 rescinding bail be and is hereby set aside. The order of the First Respondent of 31st December, 2003 still stands.

Chikumbirike & Associates, legal practitioners for applicant
Office of the Attorney-General, for second respondent