SIBONGILE SIBANDA

Versus

NINTSHA SIBANDA

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 5 FEBRUARY 2007 AND 15 MAY 2008

Appellant in person
Respondent in person

NDOU J: The appellant's husband was at some stage a staff member at Plumtree Magistrates' Court. One of the main issues she raised is that the learned trial magistrate should recuse herself as she was working with her husband who is in the centre of the dispute between the parties. The appellant was informed that her displeasure was understandable and was advised that arrangements would be made for a Bulawayo Magistrate to come to Plumtree to preside over the matter. Indeed a Bulawayo Magistrate came and he raised a query with the pleadings and the applicant was directed to "redraft" the same. The matter was postponed for this purpose. When the trial resumed, she was surprised to see that the Plumtree magistrate who had earlier on recused herself was presiding. Her objections fell on deaf ears and the Plumtree magistrate heard the matter resulting in the application being dismissed with costs. All this information is not contained in the record of proceedings. We enquired from the respondent, and she indeed confirmed the explanation given by the appellant. What we have is an incomplete record of proceedings. One of the issues determined by court *a quo* is not reflected at all in the record. We are, therefore, unable to deal with the question of recusal. The trial magistrate did not record the appellant's application for recusal. She did not record why she revoked her earlier ruling which had resulted in a magistrate from Bulawayo coming to deal with the

matter. The record must reflect everything that occurred during the trial. We highlighted this disturbing trend in *Masveto* v *Masveto* HB-51-04 and *Ncube* v *Ntombi* HB-49-05. The record must at the very least contain the date of the proceedings, any judgment or ruling given, any evidence adduced in court , any objections made during the course of the trial and all the proceedings of the court in general. All material evidence including demonstrations and inspections must be properly and intelligibly incorporated in the record – *Arthur* v *Bezuidenhout & Meiny* 1962(2) SA 566A; *Msorwa* v *Munyuki* 1994 (2) ZLR 261 (SC) at 264H; *Goronga* v *Nezungai* HH-120-03 at 9 and *Hays* v *Bar Council* 1981 (3) SA 1070 (ZA) at 1085 – see also section 5 of Magistrate Court Act [chapter 7:10] and Order 21 Rule (1) and (2) of the Magistrates' Court (Civil) Rules, 1980.

The inadequancy of the record of proceedings of the court *a quo* is such that it is very difficulty if not impossible for us to determine the merits of the appeal. The parties are in agreement that the record is not a true record of what transpired.

Accordingly, in the interest of justice the order made by the court a quo dismissing the appellant's claim with costs is hereby set aside and the matter is referred back to the Plumtree Magistrate Court for a fresh hearing by a magistrate from outside Plumtree magistrates or who did not work with the appellant's husband. There is no order as to costs.

Cheda J ……. Agree