FRANK BUYANGA SADIQI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 24, 25 and 30 November 2022

Criminal Review

KWENDA J:

Introduction

CHIKOWERO J and I heard oral submissions on the law in this matter because the law requires a judge to seek the concurrence of another judge before correcting proceedings of the lower court or tribunal. Where oral submissions are made, it is desirable for both judges to be present in case the Judges may both and each require clarification by counsel.

A story is told of the Arab and his camel. According to this classic tale, one cold night, a camel asked his master if he could put his head in the tent for warmth. "By all means and welcome," said the man; and the camel stretched his head into the tent. Soon after, the camel inquired if he could also bring his neck and front legs inside. Again, the master agreed. Finally, the camel asked, "May I not stand wholly within?" With pity, the master beckoned him into the warm tent. But when the camel entered it became clear that the tent was too small for them both. "I think," the camel said, "that there is not room for both of us here. It will be best for you to stand outside, as you are the smaller; there will then be room enough for me." And with that, the man was forced outside of his tent.

What is before us is a review of criminal proceedings following a process set in motion by me *mero motu* in terms of s 29(4) of the High Court Act [*Chapter 7:06*]. I could have reviewed the proceedings and if need be, obtained concurrence from another judge, peacefully in the comfort of my chambers. All hell broke loose when I decided to and did invite the legal practitioners who represented Frank Buyanga Sadiqi and the State, in their capacity as officers of the court, to assist me with the legal issues which I had identified. As soon as they arrived, Frank Buyanga Sadiqi's legal practitioners, three in number, ganged up

against me and presented furious argument aimed at ejecting me from the review process, accusing me of bias. If it was up to me and not a call of duty, I would have resolved never to do it again.

The legal practitioners applied for my recusal from the review process arguing that my conduct created apprehension that Frank Buyanga Sadiqi may not receive a fair hearing. I had given priority to the review in terms of s 29(4) of the High Court Act ahead of the Court application filed by the Prosecutor General. I was guilty of judicial bias in that I had created, on an objective basis, the apprehension that justice may not be done. They were not questioning my impartiality but what mattered are the views of ordinary people. He cited *Mcmillan & Ors* v *Provincial Magistrate* 2004 ZLR (1)17 and *Foyer and Matimba* 1963 ZLR 318 (3) T322. He conceded that there was no animosity between Buyanga and myself but argued that my mental state as a judicial officer was irrelevant. What was important was that Buyanga felt that he would not receive a fair hearing. My integrity was irrelevant and was not being questioned. He argued that I was biased because my *prima facie* view was recorded in the memorandum which I addressed to the Registrar pointing out areas of concern and that view was recorded. He argued that s 29 (4) was only applicable where there were no able bodied people who could not assert their rights.

I dismissed the application for recusal. I believe that this court has the constitutional mandate to sit and adjudicate. It also has the constitutional mandate and jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions. See s 171(1)(b) of the Constitution.

All the issues raised are answered by the provisions of s 29(4) of the High Court Act which I quote below

> **"29 Powers on review of criminal proceedings**
> ……
>
> (4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

The provisions can be broken down as follows:

1. A judge can exercise powers of review *mero motu* where the conditions set out in s 29(4) are met.
2. Section 29(4) is invoked when it comes to the notice of a judge that criminal proceedings of any inferior court are not in accordance with real and substantial justice
3. The power to review proceedings *mero motu* should only be exercised if the proceedings are not in accordance with real and substantial justice. In my view if the proceedings come to the notice of a judge through a newspaper report the view that proceedings are not in accordance with real and substantial justice would be on a *prima facie* basis and remain so until the judge peruses the record of proceedings
4. If on perusal of the record the judge finds no legal basis to review the proceedings he or she may abort the process
5. The proceedings to be reviewed do not have to be brought before him by way of court application or automatic review.
6. In my view the judge ought to be open and transparent by giving reasons for calling for the record. In addition, contrary to Mr Mpofu's assertion of judicial bias, a judge calls for a record of proceedings in the inferior court or tribunal in terms of s 29(4) only if he considers them not to be in accordance with real and substantial justice. In my view it is inappropriate for a judge to invoke s 29(4) without openly justifying that course of action.
7. The process is subject to the rules of procedure in the High Court and a judge may at his or her discretion seek assistance from legal practitioners as officers of the court on the legal issues arising on review.

Even after I had dismissed the application for recusal Mr Mpofu insisted on what he termed preliminary issues or objections. One such objection was that the procedure in terms of which I had invited the lawyers to assist was contrary to the law. We pointed out that he was at liberty to reject the invitation whereupon he withdrew the submission and indicated that he wanted to be heard in argument. The other objection submitted as part of the supplementary heads of argument after we had reserved judgment was that we were precluded from rendering judgment I because Buyanga has appealed against my refusal to recuse myself. The preliminary objections not only lack merit but are vexatious. A preliminary objection is a procedure in terms of which a party to a party driven litigation

objects at the hearing to an irregular step taken by his or her opponent. It is not expected that a lawyer would object to a judge driven process which is sanctioned by the High Court Act. The submission that we are precluded from rendering judgment in this matter is based on the law that execution of a judgment is suspended by operation of law when the judgment is appealed against. In other words, the *status quo* is restored. In this case however the status quo prior to the application for recusal did not preclude us from reviewing the proceedings of the default enquiry. My dismissal of the application for recusal took us back to the original position where I had called for the record in terms of s 29 (4) of the High Court Act

Background

The following is the background to the proceedings on review, as revealed by the record now before us: -

On 16 April 2020 this court, per MANZUNZU J granted the following order against Frank Buyanga Sadiqi and other respondents in the matter of *Chantelle Tatenda Muteswa* v *Frank Buyanga Sadiqi* HC 2149/20. The parts of the order operating against Buyanga reads as follows: -

1. "1st respondent (Frank Buyanga Sadiqi) be and is hereby ordered to return the minor child Daniel Alexander Sadiqi (born 14 August 2014) to applicant at Waterfalls Police Station within 24 hours of this order……
2. ……
3. ……
4. Failure of which, this order shall serve as a warrant of arrest for the 1st respondent throughout Zimbabwe for him to be brought before this court to show cause why he should not be found in contempt of this court.to comply… with paragraph 1 of thi interim order"

Buyanga has not complied with the order which remains extant. Instead, he fled the jurisdiction. He is however very active in our courts, thanks to his legal practitioners.

2. On 22 April 2020 provincial magistrate J Y Y Taruvinga issued another warrant of arrest against Buyanga at the behest of the Zimbabwe Republic Police who are investigating crimes of Kidnapping, Robbery and Contempt of Court allegedly committed by Buyanga. The cases are recorded under CID Law and Order DR 07/04/20 (Waterfalls CR 3495 03/2020). The warrant of arrest could not be executed for two and half years because Buyanga is a confirmed fugitive from justice who has put himself beyond the criminal jurisdiction of this country. See *Frank Buyanga Sadiqi* v *Chantelle Muteswa & Ors* CCZ14/21 where the Constitutional Court of Zimbabwe declared Frank Buyanga a fugitive who may not have audience in

Zimbabwean courts and get relief in Zimbabwean courts until he purges his fugitive status and contempt of the Zimbabwean Superior courts whose orders he has boldly refused to obey. The order reads: -

> "In view of the applicant's (Frank Buyanga Sadiqi) conduct in flagrant violation of various orders made by the Magistrates Court, High Court and the Supreme Court, this court accordingly withholds its jurisdiction to entertain the application in CCZ 19/21 and CCZ 21/21.
>
> Both matters are struck off the roll with the applicant paying the costs of both applications on the scale of legal practitioner and client."

The above quoted order is unambiguous. Buyanga has defied all courts from the Magistrates court to the Constitutional Court, which is the highest court in Zimbabwe.

3. In yet another case heard by this court *Frank Buyanga Sadiqi* v *Chantelle Tatenda Muteswa & Ors* HH 281/20 MAFUSIRE J had no kind words for Buyanga. The following appears at p 1 of his judgment: -

> "Someone should spare a thought for Daniel Alexander Sadiqi ("***the child***"). No one can ever wish to share his experience. Certainly, not this court. It is the upper guardian of all minor children in Zimbabwe. Daniel is a minor. He was born out of wedlock. His father is the applicant ("***Buyanga***"). His mother is the first respondent ("***Muteswa***"). They once stayed together. Now they are separated. Since then they have been at each other's throat, tussling for the child's custody, in the process, blindly lunging at each other with reckless abandon.
>
> Buyanga and Muteswa have practically played football with the child and have used the courts as their playground. The registry is clogged with their case. They have been to the magistrates' courts and the Children's Court. Now there are several appeals pending at the Supreme Court. No one seems spared: the police, immigration, the birth registry, government and even foreign airlines."

4. Buyanga has appealed against the various orders that have been granted against him in the High court. In one such appeal he appeared before UCHENA JA in an application for condonation and extension of time within which to appeal. See *Frank Buyanga Sadiqi* v *Chantelle Muteswa & Ors* SC 132/21. At p 3 of his judgment UCHENA JA also lashed at Buyanga's conduct in: -

> "Snatching the child and fleeing the jurisdiction of the court with him through undesignated exit points is in my view not in the best interests of the child."

He added

> "The snatching of the child and keeping him away from his mother for fifteen months is not in the best interests of the child…"

5. Frank Buyanga still refused to produce the child but still appeared in the Supreme Court in a bid to overturn the High Court judgment. The Supreme Court decided that enough was enough and denied him audience based on the dirty hands principle. See *Frank Buyanga Sadiqi* v *Chantelle Muteswa* SC 275/19 handed down on 19 October 2021 where the following order was made: -

    1. "The point *in limine* concerning the dirty hands principle in relation to the appellant (Frank Buyanga Sadiqi) be and is hereby upheld
    2. This court accordingly withholds its jurisdiction
    3. The appellant shall pay the respondent's costs."

6. On 11 November 2021 this court per MANGOTA J issued another warrant of arrest against Buyanga for his arrest for Contempt of court following his refusal to comply with this court's orders in case numbers HC 11865/19, HH 249/20 and HC 2149/20. The warrant of arrest remains extant and has not been executed because Frank Buyanga is on the run.
7. In the year 2021 there were several efforts at coercing the Provincial Magistrate, J Y Taruvinga to cancel the warrant of arrest issued by her in connection with robbery, kidnapping and contempt of court charges. She refused to budge and steadfastly defended the warrant of arrest.

    In a letter to her superiors dated 21 June 2021, the provincial magistrate said she had properly issued the warrant in terms of s 33(1) (c) of the Criminal Procedure and Evidence Act *Chapter (9.07]*. Her superiors were of the view that she ought not to have issued the warrant of arrest because the High Court had already issued another warrant per MANZUNZU J. They were wrong. The warrants issued by the High Court by both MANZUNZU J and MANGOTA J were a way of enforcing its orders following private law civil litigation. They were not issued for the purpose of Police investigations into crimes of robbery, contempt of court and kidnapping which is public law. It is trite the same set of facts can give rise to both civil litigation and criminal investigation. The warrant of arrest issued by JY Taruvinga was issued for the purpose of facilitating Police investigations into crimes of robbery, kidnapping and contempt allegedly committed by Buyanga.
8. Pressure was also brought to bear on the Provincial Magistrate in written correspondence by Buyanga's legal practitioners, Messrs *Rubaya and Chatambudza* to the Commissioner General of Police, Prosecutor General and the Provincial

Magistrate threatening to challenge the issuance of the warrant of arrest on review in the Superior courts.

9. The threats were vigorously resisted by the Prosecutor General. In a letter addressed to the lawyers dated 1 August 2022, one A Chogumaira, writing for the Prosecutor General, pointed out that Buyanga is a fugitive from justice who is wanted by the Police in connection with robbery, kidnapping and contempt of court and had lost his right to obtain relief in Zimbabwean courts.

> "The Supreme court and Constitutional Court made final and definitive findings that your client was in breach of the above court orders. Wherefore it is not competent for you to request the removal of an Interpol red notice in the absence of your client purging the aforesaid contempt as well as motivating the complainant to withdraw the charges."

10. Messrs *Mutuso, Taruvinga and Mhiribidi*, the legal practitioners representing Chantelle Muteswa in the criminal cases of contempt of court and kidnapping also protested. They complained in writing to Magistrate Taruvinga's superiors on 27 October 2022 about what they considered clandestine efforts to cancel the warrant of arrest issued to facilitate Police investigations into crimes allegedly committed by Buyanga. They contested the legality of the requested cancellation of the warrant in the absence of a review or appeal. They pointed out that Buyanga was a fugitive from justice who had been declared as such by Zimbabwean courts which had stripped him of the right of audience. Citing *Denhere* v *Denhere* CCZ 9/19 they argued that a magistrate court is bound by decisions of superior courts and could not possibly grant Buyanga relief in the face of the Constitutional court's pronouncement that Buyanga is a fugitive. They complained that the Court was in breach of the *audi alteram partem* rule by entertaining Buyanga without hearing the Zimbabwe Republic Police, Prosecutor General and the complainant, Chantelle Muteswa. In any event, the magistrates court had become *functus officio* when it issued the warrant of arrest and Buyanga could only get relief through an appeal or review both of which were out of time. Citing Articles 80 and 81 of the Interpol rules the lawyers argued that that the Interpol red notice could only be cancelled after the discharge of the grounds upon which the warrant of arrest was issued. The crimes of robbery, contempt of court and kidnapping were still under investigation.

11. Magistrate Taruvinga eventually relented under the barrage of correspondence and disapproval by her superiors whereupon on 28 October 2022 she wrote to her superiors in which she pleaded as follows

> "…I request that this matter proceeds by way of application and all interested parties be cited. The procedure is not expressly stated in the criminal procedure and evidence act hence this approach"

Proceedings *a quo*

It is against this background that Messrs *Rubaya and Chatambudza* legal practitioners filed a written application for the cancellation of the warrant of arrest issued by Magistrarte Taruvinga on 22April 2020. The application cited the State only. The lawyers did not cite the Zimbabwe Republic Police who hold the warrant of arrest and Chantelle Muteswa, who reported the alleged kidnapping and contempt of court charges. It may have escaped Magistrate Taruvinga's mind that her directive to cite all concerned had not been complied with because she heard and determined the application promptly without hearing interested parties. She made a brief ruling on the same day granting the application and cancelling the warrant of arrest. She granted the order in the following terms: -

> "The warrant of arrest erroneously issued against Frank Buyanga Sadiqi Ref CID Law & Order Hre DR 07/04/20 and Waterfalls CR 495/03/20220 issued on 22 April 2020 is HEREBY CANCELLED"

She gave as her reasons that she had heard the application in chambers. She realised she had issued the warrant of arrest against Buyanga in error and because the High court order in case no HC 2149/20 remained extant and her warrant was misplaced. She held that the State's objection to her jurisdiction in the application for the cancellation of the warrant of arrest was misplaced because she had jurisdiction to cancel the warrant in terms of s 33(4) of the Criminal Procedure and Evidence Act [*Chapter 9.07]* because she is the one who had issued it. She made the finding that Buyanga was not a fugitive because he had no pending case in Zimbabwe. She did not comment on the various judgments of the Constitutional Court, Supreme Court and High Court not obeyed by Buyanga which had been placed before her and form part of the record of proceedings. The ruling is dated 14 November 2022.

Proceedings in this court

Proceedings in this court were commenced by me *mero motu* in terms of s 29 (4) of the High Court Act

I hereunder quote the relevant portion of my directive to the Registrar of this court dated 16 November 2022: -

SUBJECT: STATE v FRANK BUYANGA

The above matter has come to my attention after reading a report in the Daily News of Tuesday 15 November 2022 at p 4 headed **"Businessman Buyanga could walk free"**.

It appears the Magistrates Court at Harare cancelled a warrant –

i. in the absence of the accused
ii. ostensibly because it was issued irregularly

On the face of it the Magistrate may have committed an error in –

i. conducting a default enquiry in the absence of the accused
ii. reviewing her own work

This therefore is to require you to place the record before me without delay and in any event within 24 hours of receipt of this memo for review in terms of s 29(4) as read with s 29 (2) of the High Court Act [*Chapter 7:06*] which reads as follows:

> "…….
> (4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it
> comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

The Registrar placed the record of proceedings before me on 17 November 2022, whereupon after perusal of the proceedings I remained of the *prima facie* view that the proceedings were indeed reviewable and in the exercise of discretion, considered it prudent to invite submissions from the legal practitioners who represented the State and Frank Buyanga Sadiqi in the court below during the proceedings under review on what the judge had identified as the areas of concern. The judge met the lawyers on 21 November 2022 and the following are the minutes of the case management meeting held in chambers: -

"**Review ito s 29(4) of the High Court Act [*Chapter 7:06]***

Minutes of case management meeting held in chambers on 21 November 2022

Having perused the above record of proceedings pursuant to the process commenced in terms of s 29 (4) of the High Court Act [*Chapter 7:06*] on 17 November 2022, I am of the *prima facie* view that there is a sound legal basis to review same.

I however, consider it prudent and in the interests of justice to invite argument from the Prosecutor General & Messrs *Rubaya & Chatambudza Legal Practitioners* who represented Frank Buyanga Sadiqi in the court below.

I therefore give the following directions;

1. This matter shall be cited as *Frank Buyanga Sadigi* v *The State*
2. Messers *Rubaya & Chatambudza* legal practitioners shall file heads of argument, serve the Prosecutor General and place same before me in chambers no later than 3pm on 22 November 2022.
3. The Prosecutor General shall file heads of argument and serve the 2nd respondent and place same before me not later than 1pm on 23 November 2022.
4. The parties shall appear to present oral argument in Court P on 23 November 2022 at 2.30pm.

The parties will be required to address the following in their heads of argument and oral submissions: -

1. Whether the default enquiry was properly before the magistrate, that is whether the written application which was the basis of the default enquiry is a criminal procedure provided for in the magistrates' court.
2. Whether in the circumstances of this case, it was procedurally regular for the magistrate to conduct a default enquiry in the absence of Frank Buyanga Sadiqi, the subject of the warrant of arrest.
3. Whether in the circumstances of the matter, the magistrate who committed the irregularity had the jurisdiction to correct the irregularity committed by her two and half years earlier.
4. Whether the magistrate acted legally in the face of earlier decisions by the Superior Courts with a direct bearing on the legal issues raised at the default enquiry.
5. Any matters relevant to the above."

The record of proceedings reveals the following:-

1. The proceedings under review were commenced by way of a written court application by Frank Buyanga Sadiqi dated 14th November 2022 before J Y Taruvinga, a provincial magistrate at Harare magistrates court.
2. The written court application was not issued by the Clerk of Court since it does not bear the Magistrates court date stamp and case number. The record does not contain a paper trail of how the written application was placed before the presiding magistrate. Messrs *Rubaya and Chatambudza* prepared a notice of set down, stamped by the Clerk of court on 14 November 2022 setting the matter for hearing on the same day at 1415 hours. The magistrate's ruling is dated the same day.

3. The court application was therefore prepared, set down, heard and determined on the same day.

Battered by the flurry of correspondences exchanged among her, her superiors, lawyers representing Chantelle Muteswa, the Prosecutor General and Buyanga's legal practitioners ansd in a desperate effort to douse the flame, the magistrate committed a lot of irregularities which are so gross that they vitiate the proceedings. Before disposing of the matter at hand I must make the following pertinent observations.

Section 165 (2) and (3) of the Constitution of Zimbabwe (Amendment No 20) Act 2013 is unambiguous on the independence of the judiciary and individual judicial officers.

> **"165 Principles guiding judiciary**
> (2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.
> (3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence."

In light of the above provision in the supreme law of the land, magistrates must always be cognisant of the distinction of the administrative function and the judicial function. Magistrate Taruvinga's superiors had no jurisdiction to entertain complains against, and express their disagreement with, the manner in which she had discharged her judicial function. All the various correspondence addressed to them by Buyanga's lawyers (in the first instance) and the counter arguments presented by the lawyers representing Chantelle Muteswa as well as the Prosecutor General were misplaced. Magistrate Taruvinga's superiors have no powers of review or appeal over their subordinates. The lawyers had recourse in the Superior courts and not in the administrative hierarchy of the magistracy. Inviting Magistrate Taruvinga's superiors to query the procedure adopted and decisions made by Magistrate Taruvinga in the exercise of her judicial function was an infringement of her judicial independence. Such conduct must therefore not be repeated.

Buyanga's status as a fugive from justice is well documented in the case of *Frank Buyanga Sadiqi* v *Chantelle Muteswa & Ors* CCZ14/21 where at p 7 of its cyclostyled judgment the Constitutional court made the following factual findings: -

> "Having regard to the clear evidence on record, there can be no doubt that the applicant has been and continues to be in flagrant violation of several extant orders of the High Court and the Supreme Court. These include the following:
>
> (i) Order of MANZUNZU J, dated 19 June 2019, that the applicant should not remove the minor child from Zimbabwe.

(ii) Order of Zhou J, dated 18 March 2020 that the applicant and the first respondent should exercise joint custody of the child.

(iii) Order of MANZUNZU J, dated 16 April 2020, that the applicant should return the minor child to Zimbabwe.

(iv) Order of UCHENA JA, dated 16 June 2021, that the minor child be brought back to Zimbabwe and presented to the court.

(v) Order of the Supreme Court, dated 12 October 2021, that it would withhold its jurisdiction on appeal by the applicant until he had purged his violations and brought the child back to Zimbabwe."

The legal implications of the factual findings are stated by the Constitutional Court at page 8 of the cyclostyled judgment; -

> "The doctrine of dirty hands is now firmly entrenched in this jurisdiction. In essence, it precludes any person who is in breach of an extant court order from seeking or receiving audience before any court, unless and until he has purged his violation of that order. The party concerned must first comply with the law and argue his case afterwards. In effect, he is not barred from approaching any court but must comply and approach the court with clean hands.
>
> In *Nhapata* v *Maswi & Anor* SC 38/16, at p. 5, GWAUNZA JA (as she then was) lucidly explained the twofold rationale underlying the doctrine. The first is that every court order, whether or not it is correctly pronounced, enjoys a presumption of validity until declared otherwise or set aside by a court of competent jurisdiction. It must be complied with. The second rationale, as succinctly articulated by CHIDYAUSIKU CJ, in *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* SC 07/03, is that the courts cannot connive at or condone any defiance of the law because citizens are obliged to obey the law of the land in order to gain access to the courts."

At p 13 to 14 of the cyclostyled judgment

> "There is a further dimension to the applicant's indisputably indefensible conduct that operates to exacerbate his casually contemptuous and insolent nonchalance. This arises from the fact that he is a fugitive from justice. According to the papers filed of record, emanating from the third respondent's Criminal Investigations Department and dated 7 July 2020, he has been placed on the Interpol Red Notice and is subject to a warrant of arrest for the crimes of kidnapping, robbery and contempt of court. In short, he epitomises the classic case of "a wanted criminal".
>
> The applicant's status as a fugitive from justice constitutes an additional factor placing him beyond the bounds of the Court's jurisdiction. This aspect was exemplified in the judgment of the High Court in *S* v *Neill* 1982 (1) ZLR 142 (HC), where the appellant had apparently failed to report to the Police as required by his conditions of bail and a warrant for his arrest had consequently been issued. The court declined to entertain his appeal and struck it off the roll. It reasoned as follows, at 145:
>
> "But the appellant is a fugitive from justice in the sense that, having been convicted by a court of this country, he has fled its jurisdiction and, by doing so, has effectively set its laws at nought. Whatever his motive was for so acting, he has shown by so doing that he is not prepared to accept or abide by decisions of our system of courts and the effect of those decisions if they should be to his serious disadvantage. And, by fleeing the country and still prosecuting his appeal, he is wanting to seek the relief which is available from these Courts, but without being prepared to submit himself to them if he is unsuccessful.

> Despite the concession by Mr *Deeks*, I am not at all sure that there is a discretion in the court where a litigant is a fugitive from justice. The matter, after all, is one of *locus standi in judicio*, the right and basis to approach the court for relief. And in our law it seems to be clear that the only category of person who has absolutely no right to institute proceedings at law is the fugitive from justice or outlaw."

Similarly, in the case of *Sylow* v *The State* HH 136-02, the court applied the reasoning in *Neill's* case, *supra*, and several other South African cases dealing with fugitives from justice. It declined to determine the appeal in the appellant's absence. It was held, at p. 13:

> "It would appear from the foregoing that the appellant is not in a different situation to *Chetty*'s case, where the court in that case considered him a fugitive from justice. As long as the appellant has not purged his contempt, that is, having breached the terms of his bail conditions by being out of the jurisdiction of this court, he must be regarded as a fugitive from justice. For this court to hear his appeal in his absence 'would be stultifying its own processes and conniving at and condoning the appellant's actions' ……..."

In conclusion we find that Magistrate Taruvinga committed the following gross irregularities which had the effect of vitiating the proceedings of the default enquiry she conducted and the ruling which ensued are as follows: -

1. In a master stroke she overturned two judgements of the superior courts that is the Constitutional Court judgment in *Frank Buyanga Sadiqi* v *Chantelle Muteswa & Ors* CCZ14/21 and the Supreme Court Judgment in Frank *Buyanga Sadiqi* v *Chantelle Muteswa* SC275/19
2. In circumstances where she was aware that the law of criminal procedure in the magistrate court did not provide for a written chamber application for a cancellation of a warrant of arrest, she ought not to have created the procedure because a magistrate court derives its jurisdiction from statute
3. She misconstrued the application before her. The application before her was for the cancellation of a warrant of arrest and not for a default enquiry. A default enquiry is a procedure governed by the Criminal Procedure and Evidence Act conducted in the presence of the person accused of default.
4. She failed to appreciate the difference between the procedure of setting aside an irregular proceeding and cancellation of an order. An irregular proceeding is proceeding proceeded with contrary to the law and is thus a nullity. Such a proceeding is a non-event in the eyes of the law. It cannot be cancelled. It can only be set aside by a court of competent jurisdiction. When the magistrate thought she was merely cancelling a warrant of arrest she was in fact setting aside her previous order thereby

reviewing her own work. She had no jurisdiction to do so. She had become *functus officio*.

5. The magistrate ought not to have entertained proceedings which had been not commenced through the clerk of court. Court proceedings are public records and ought to be treated as such. They must be kept as public records and in a manner accessible to the public. In this case the application was just handed to the magistrate without a case number. That is the only way the proceedings would have landed on the magistrate's desk for her to deal with.
6. The matter was set down in terms of set down prepared by Messrs *Rubaya and Chatambudza,* a procedure not provided for. The urgency with which the matter was disposed of raises more questions than answers. As stated before the matter was prepared on 14 November 2022, placed before the magistrate on the same day, served on the Prosecutor General on the same day, heard on the same day before the Prosecutor General could respond and he ruling made on the same day. There is no legal framework for such haste.

The grounds upon which this court can review the decision or proceedings of inferior courts and tribunals are set out in s 26 of the High Court Act. They are: -

> **"27 Grounds for review**
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
> (*a*) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (*b*) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (*c*) gross irregularity in the proceedings or the decision.
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

It is trite that at common law criminal proceedings may be reviewed on the grounds of illegality. A magistrate who refuses to be bound by the superior courts acts contrary to the law. After reviewing the papers on record we concluded that the default enquiry conducted by and before J Y Taruvinga on 14 November 2022 were not in accordance with real and substantial justice. The powers to be used in this case are set out in s 29(2) (iii) of the High Court Act.

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings—
> (*a*) are in accordance with real and substantial justice, it shall confirm the proceedings;
> (*b*) are not in accordance with real and substantial justice, it may, subject to this section—
> (i) …….;

(ii……..;
or
(iii) set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally, give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question; "

In the result we order as follows: -

1. The criminal proceedings before Provincial Magistrate J Y Taruvinga on 14 November 2022 culminating in the cancelation of a warrant of arrest issued on 22 April 2020 against Frank Buyanga Sadiqi Ref CID Law & Order Harare DR 07/04/20 and Waterfalls CR 495/03/2020 be and are hereby set aside.
2. The order cancelling the warrant of arrest is set aside and substituted with the following: -

   "The application for the cancellation of the warrant of arrest issued against Frank Buyanga Sadiqi Ref CID Law & Order Harare DR 07/04/20 and Waterfalls CR 495/03/2020 issued on 22 April 2020 be and is hereby struck off."

CHIKOWERO J:…… Agrees

Rubaya and Chatambudza, Frank Buyanga Sadiqi's legal practitioners
National Prosecuting Authority, legal practitioners for the State