**Nduna ruling barring Mtewa from representing Chin'ono**

**In the Regional Court for the Eastern Division**

**Held at Harare**

**In the Matter Between**

**The State**

**And**

**Hopewell Chin'ono The Accused**

**RULING: APPLICATION FOR DISQUALIFICATION OF OPPOSING COUNSEL**

The accused duly represented, reappeared before the court on 13th August 2020. He was pursuing his admission to bail pending trial on the allegations he is facing. The allegations have been restated over a number of times. A history of the matter is necessary.

On the 22nd of July 2020 accused had his initial appearance before this court. His placement on remand was not opposed. He promptly applied for bail pending trial. After three days of submissions and mainly cross-examination of two state witnesses, the application for bail was not granted. That was on the 24th of July 2020. Exercising his right of appeal, accused took the decision to the High Court. He appealed. The appeal failed. He has therefore reappeared for a bail rehearing. However, before his quest was heard, the state indicated that they had an advance issue which the state desired heard and decided first before the bail issue. The state's concerns emanate from posts on a Facebook wall hoisted under the names of the Lead Counsel for the accused. I will restate the posts;

1. Where is the outrage from the International Community that Hopewell Chin'ono is being held as a political prisoner?

2. His life is in serious peril. Raise awareness about his unlawful imprisonment. Do not let him be forgotten
3. You or someone you love could be the next one abducted from your home and put in leg irons

SPEAK OUT

The state alleges these posts are attributable to the lead counsel herein one Beatrice Mtetwa to be precise and that as a result she must be debarred from appearing before the court as she has become personally involved so as to diminish her objectivity as an officer of the court. The defence or the lead counsel specifically denies anything to do with the posts and aver that even if it is so, accused's right to a lawyer of his choice cannot be taken away so lightly and that the state has adopted the wrong procedure by bringing the contempt allegations before the victim to adjudicate. The above posts appear on the Wall or page styled Beatrice Mtetwa and the Rule of law. Further, the state submits that the lead counsel was recently censored by the High Court when the bail application went on appeal. The state referred to a passage on page 15 in S v Hopewell Chin'ono HH519/2020. I will revert to this part later.

The foremost issues for the court to decide are therefore the following;

- Whether or not the posts scandalise the court, thereby being contemptuous
- Whether or not the lead counsel should be held to the said posts
- Whether or not the state has brought up contempt proceedings and if so have they acted properly
- If (3) above is answered in the negative, what is the nature of the state's application?

In order to answer the first question, the posts must be read objectively, and be ascribed the meaning which an objective man would upon reading the posts award them. These posts relate to real events of a trial involving the accused Hopewell Chin'ono who following his arrest has been appearing before this court and the High Court. It has been a very publicised appearance right from the

arrest. It must be noted that when accused was arrested it is not in question that the first publication was from the stable of Zimbabwe Lawyers for Human Rights of that arrest. They styled the arrest an abduction. They sponsored the notion that accused's whereabouts were not known following that abduction. That arrest and its management featured in the bail hearing before me. I will refer to it. It came out very clearly and was not disputed that a team of police officers led by D/S Mberi approached accused's residence. It was a team comprised of uniformed and un-uniformed police officers. In the process, accused's lawyer and co lawyer in these proceedings arrived at the scene and observed the arrest of the accused. The lawyer Mr Mtisi was then advised by the leader of the arresting team that accused was to be taken to Harare Central Police Station's Law and Order Section for further management. Mr Mutisi followed to the station. Accused was detained thereat with the full knowledge of the lawyer.

I would define the term "arrest" as follows;

To seize (someone) by legal authority and take them into custody and in this context for the purposes of bringing him to court.

However, what came out of the Zimbabwe Lawyers for Human Rights was that they championed the arrest of accused as an abduction. I understand abduction to mean the seizure of someone without any legal basis for some unlawful purposes. It's tantamount to a kidnapping.

So clearly we have a very experienced lawyer who comes out into the public domain to advise the world at large that Hopewell Chin'ono a journalist who is exposing corruption has been abducted in Zimbabwe by state agents. The lawyer does so at a time he is well informed of the factual and legal basis of that arrest. To demonstrate the mala fide conduct; when accused appeared in court neither his remand nor his arrest was challenged. The lawyers; quite a handful of them proceeded to apply for bail advising and assisting each other. This was done because the lawyers obviously believe in the lawfulness of the arrest and the subsequent remand proceedings. A person is placed on remand successfully if there is reasonable suspicion that an accused committed an offence alleged against him. The following cases detail on this requirement;

S v STOUYANNIDES 1992 (2) ZLR 126 (SC)

MUCHERO & ANOR v ATTORNEY-GENERAL 2000 (2) ZLR 286 (SC)

MARTIN v ATTORNEY-GENERAL & ANOR 1993 (1) ZLR 153 (SC)

Despite this, the world was advised that the accused was abducted. I have seen it fit to relate to this because it gives out clearly the context within which the post in question must be viewed and the attitude inherent in them. At that moment the lead counsel whose conduct the state want impugned comes to the fore.

The posts then clearly continue to portray that picture of a legal system and a court that is perpetuating the alleged abduction. The posts rebrand the accused to be a political prisoner and this court to be complicity in the dealing with the alleged now political prisoner. The world is being invited to outrage.

There is a letter which was authored by the lead counsel where the same sentiments are replete. This is not the only letter which the lead counsel wrote and forced the clerk to deliver personally to my attention. There is another which again bore the same sentiments. The first was written on the 24th of July 2020 and the second which found its way to the high court was authored on the 27th of July 2020. Both these letters characterise the court and the legal system in picture portrayed in the Facebook posts at Beatrice Mtetwa and the rule of law.

Clearly the posts demean the court severely. However, whether the contempt is in the face of the court or not in the face of the court, it is important that it should be borne in mind by courts themselves that the court should use its summary powers to punish for contempt sparingly. Courts should not display an undue degree of sensitiveness about this matter of contempt and they must act with restraint on these occasions. However, it is the expectation of the very courts that those tasked with the prosecution of offences take action when the conduct of contempt has become the modus of operation of a given individual.

Counsel submitted that the offence of scandalising the court is inconsistent with the protection of freedom of expression which is guaranteed by the Constitution. Given that freedom of expression is the lifeblood of democracy, this is an

important issue. And there is no doubt that there is a tension between freedom of expression and the offence of scandalising the court or contempt of court. But the guarantee of freedom of expression is subject to qualification in respect of provision under any law. It is limited (1) "for the purpose of … maintaining the authority and independence of the courts" and (2) shown to be "reasonably justifiable in a democratic society". The offence of scandalising the court exists in principle to protect the administration of justice. It must be recorded that proceedings on the offence of contempt of court are admittedly rare and it is recorded that in England none have been successfully brought for more than sixty years. But it is permissible to take into account that in younger democracies, the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court in such young democracies is greater:

see Feldman, Civil Liberties and Human Rights, in England and Wales, 1993, 746-747;

Barendt, Freedom of Speech, 1985, 218-219.

Moreover, it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a court unrelated to its performance on the bench. It exists solely to protect the administration of justice rather than the feelings of a court. There must be a real risk of undermining public confidence in the administration of justice. So a court which deals with allegations of inciting public violence is publicised and portrayed as dealing with perceived political opponents and causing illegal detentions is clearly being held to extreme disrepute in the eyes of the public.

By their nature, therefore, the posts are indeed scandalising the court. The lead counsel premised her charge that this court must not be called to deal with the alleged contempt since it is the victim. Firstly that is not what the state has called the court to do. The case referred to in In re: CHINAMASA 2000 (2) ZLR 322 (SC) is different from this matter. In that, the court issued a summons for Mr Chinamasa to appear because Mr Chinamasa was alleged to have disparaged the court in the press and he was the Attorney general; the equivalent of today's Prosecutor General. The court not have directed him to cause his own prosecution.

This is clearly a different issue from what is being pursued by the state in this application.

The state essentially is saying that the lead counsel is the author of the posts or is complicity in the authorship of the posts and by that conduct the lead counsel has shown that she is no longer detached from the case to continue appearing in it. That is my understanding of their prayer and position. She is now personally involved so as to lose the requisite objectivity of an officer of the court. That is the state's application.

The lead counsel's position is to deny that she is not the page handler and has nothing to do with scribblings on its wall. However, in the same breath, it's acknowledged that the Facebook page was opened when a documentary entitled Mtetwa and the Rule of law was being produced. That documentary was profiling the lead counsel and her alleged prowess in court in human rights-related cases. In a nutshell lead counsel is aware of the existence of the page and approved it is coming into being. The lead counsel called to the witness stand from the bar co-counsel to give evidence on what was claimed to have been a conversation between the counsel and Mr Mabhaudhi. The conversation, it was alleged was touching or referred to the incapacitation of lead counsel. The accused was also called to the witness stand and he gave evidence on how he knew the coming into existence of the page Mtetwa and the Rule of law. He told the court what has been captured above as the purpose of its existence.

On the other hand, the lead counsel's position is that the prayer by the state is contrary to the constitutional framework in which criminal trials are held. It is only accused who has that right to expel his lawyer of choice and no one else. She upgrades the state's claim to be an allegation of contempt of court against her and that the state should have proceeded by her prosecution rather than to seek to punish accused by disgorging his lawyer of choice from his case. It is further argued that the application by the state breaches her fundamental right to a fair trial by an independent court. She says this court is the one allegedly insulted and disparaged, hence unfit to preside over what she understands to be a contempt of court trial of herself. Clearly this latter position is wrong. That is not the state's

prayer. The prayer by the state is as summarised above as far as I understood it. I will repeat it to put the matter straight; It is not a contempt of court trial or proceedings against the lead counsel. These are proceedings concerned with the conduct alleged to be unbefitting of an impartial and objective lawyer which it is the duty of counsel to be as an officer of the court.

Defence Counsel like a public prosecutor has the mandate to present her case in the utmost diligent manner and within the confinements of the acceptable decorum of a legal process. He or she must not exhibit an attachment to the case which goes beyond the acceptable professionalism of a lawyer so as to be personally involved; or so as to appear to be serving multiple constituencies. See SMYTH v USHEWOKUNZE & ANOR 1997 (2) ZLR 544 (SC) whose fly note which correctly captures the court's decision on the issue states that;

Legal practitioner – prosecutor – conduct and ethics – duty of impartiality and detachment – interdict against a prosecutor who had demonstrated personal involvement, vindictiveness and bias

A legal practitioner's first duty is to uphold and advance the interests of justice because he or she is an officer of the court. In this regard, a legal practitioner's duty to the court is greater than their duty towards their clients, except as is regards their duty not to disclose the confidences of the client to the court. This can be achieved by acting impartially and making decisions dispassionately in court. Legal practitioners must be truthful, honest, candid and fair in all their dealings. This is an all-embracing and inflexible rule.

Above all, lawyers must not act in contempt of court by, for example, insulting a judge or magistrate. See R v Silber 1952 (2) SA 475 (A); R v Rosenstein 1943 TPD 65.

If a lawyer has fallen off the rails, and conduct herself as was the position in SMYTH v USHEWOKUNZE & ANOR(supra) he or she is disqualified from continuing to act in the matter. A legal practitioner's interest in the matter he is in charge of should not be beyond his profession otherwise it becomes unethical. In Central

African Building Construction Company (Pvt) Ltd v Construction Resources Africa (Pvt) Ltd HH112/10 the court held thus of such counsels;

"… He (a legal practitioner) has aligned himself so closely with his client's case that this court can be forgiven for stating that he has displayed an interest in the case going beyond that of a legal practitioner

And continued,

….A legal practitioner's duty is to protect the interests of his client and to give legal advice. It is not the function of the legal practitioner to then step into the shoes of the client and to perform acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client…..It is important that a legal practitioner should at all time retain his independence in relation to his client and the litigation which is being conducted….

It Is not only in Zimbabwe where a court, in the exercise of its inherent powers of supervision, may disqualify counsel found to be in conflict of interest with respect to a case before the court. In America In re Gopman, 531 F.2d 262, 266 (5th Cir. 1976); Estates Theatres, Inc. v. Columbia Pictures Indus., 345 F. Supp. 93, 95 n.l (S.D.N.Y. 1972) it was noted that the court can exercise such powers. It was further held that when opposing counsel is in a serious conflict of interest, it is clearly the duty of an attorney to move for disqualification. Some motions or applications to disqualify opposing counsel, however, may be nothing more than tactical devices to delay the proceedings or to remove opposing counsel, not because of the purported conflict of interest, but because opposing counsel is dangerously competent.

Therefore, the position taken by the state is legally possible if it is supported by the facts of the case.

Is the wall hoisting the allegedly offensive posts related to the lead counsel?

The evidence called from Mr Chin'ono and in the submissions of counsel, it is clear that the wall and lead counsel are not strangers to each other. They are actually bedmates. The documentary Beatrice Mtetwa and the rule of law

Facebook page were created to market according to Mr Chin'ono the lead counsel's prowess as a human rights defender. Obviously the lead counsel authorised and approved its coming into existence. In that breath, she acceded to posts being made on it which posts are relevant to herself. She cannot be seen assuming that Lore Cornways is posting to say now this particular post has nothing to do with her. Because the posts are offensive to the very function of courts in which lead counsel appears, she was expected to have registered her disapproval of that with the said Lori Cornways. She cannot wash her hands like Pontius Pilate of the Bible. Lead Counsel's position is almost on all fours with counsel in Charles Kwaramba vs The Honourable Justice Bhunu N.O Sc46/2012.

The applicant a lawyer was representing some 29 accused persons. He addressed a press conference from wherein he was allegedly quoted as uttering words imputing mal-conduct against the Honourable Judge. The Honourable Judge reprimanded the applicant in his judgment. The applicant took issue with the reprimand and went with it on review to the Supreme Court. It was held as follows;

Essentially the applicant's complaint is that the learned Judge should not have severely reprimanded him for his conduct or misconduct. The applicant does not seem to appreciate what is expected of him as a legal practitioner and an officer of the court. On the applicant's own account, the Daily News ascribed to him the remarks it published in its newspaper. The remarks ascribed to him do not only scandalise the learned Judge but were also made while the matter was sub judice. There is a time-honoured practice which has crystallised into law that prohibits the making of inappropriate statements on matters pending before the courts. I have no doubt in my mind that the statements ascribed to the applicant grossly transgressed the sub judice rule and clearly constitute contempt of court, in that they scandalise the court by ascribing to it political motivation in its judgment. The inescapable inference is that the remarks were made not only to bring the court into contempt in the eyes of the public but also in an attempt to influence the outcome of the bail application and consequently the course of justice. The applicant should consider himself lucky that he was not prosecuted for contempt of court.

Legal practitioners who show such blatant disrespect and contempt for the courts have no business appearing before the courts. In my view, serious consideration should be given to the introduction of more stringent measures to protect the dignity of the courts from being impaired by reckless utterances.

The Apex court then went on to find that Mr Kwaramba in the circumstances had a duty to denounce the publication and put the record straight if he had been misquoted. The same applies herein. Her failure to do so and seek to portray that she was unaware of that is mischievous. Even when she became aware she never addressed that part.

The lead counsel's conduct is also seen in the letters she has written to the court. She has written two letters and caused these to be part of the record. The other one was commented on at the High Court. One was written on 24th July 2020 after submissions had closed in court. By that letter lead counsel made a further submission on the application. It was not served on the state but went straight into the record. It was captioned;

"for the attention of magistrate NDUNA, Esq"

I will reproduce it;

"Given the informal nature of bail proceedings, our obligation to be of assistance to the court and the for the completeness of the record of proceedings, we correct the gross misrepresentation by the state that the Defence referred to the standard of proof required for an accused to be placed on remand and that the defence referred to this as being proof beyond a reasonable doubt. As the application was not challenging placement on remand and related purely to the admission to bail, there was no reference to the standard of proof required for the placement on remand.

The only reference to the state bearing the onus of proof related to the provisions of Section 117(2) of the Criminal Procedure and Evidence Act[Chapter 9:07] where we relied on Kwenda, J's comments in Nguwaya vs The State HH 443/2020 at page 4 of the cyclostyled judgment where the Honourable Judge stated as follows; In the court a quo, the appellant was entitled to bail unless the state

proved beyond a reasonable doubt that one or more of the grounds listed in Section 117(2) existed justifying detention in custody". We confirm that a copy of the judgment was handed in to the court for its convenience and that it is necessary that the court record reflects the correct information as opposed to the deliberate misrepresentation by the state. We, therefore, request that this clarification be placed on file.

Yours faithfully