HH 49-2004 HC 79/04

IAN HUGH MACMILLAN

and

EWAN ALEXANDER MACMILLAN

and

COLLEN ROSE

and

CLARE LYNN BURDETT

**versus**

PROVINCIAL MAGISTRATE HARARE

and

ATTORNEY GENERAL

and

COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE

HUNOWE J

HARARE 9 January 2004

**Application for Review**

Mr G. *C. Chikumbirike,* for the applicants

Mrs *Mabh~a* with her *Mr Shava,* for the respondents

HUNGWE J: This is an application for review of the decision of the Magistrate dismissing the application made in that court for the 1st respondent to recuSe himseff when an application to place the applicants on remand was placed before hith It was brought under ~ certificate of urgency on 6 January 2004. I àirected that the respondents file their opposing papers, if they were so disposed to oppose, and that both parties file their heads of argument, indicating too that the matter will be ~et cowri today for argument.

In this application for a review, the applicants sought the follo~ng order:

IT IS ORDERED THAT:

1. The decision of the 1 st respondent refusing to recuse himself and placing the Applicants on remand be and is hereby set aside

2. The applicants be and are hereby released from prison custody forthwith.

3. The 3rd Respondent be and is hereby interdicted from rearresting the Applicants or similar charges as appear in AnnexureS 'B, 'C and 'E'.

4. All charges pertaining to ~ontraVeniflg the Mines and Minerals Act, Gold Trade Act, and Ci~stomS and Excise Act be consolidated together in one indictment arid that the charges be preferred against the Applicants at t1~ ~ir trial."

The background to the applicatior is as follows. Applicants were arrested

on. 3 November 2003. They appeared bef:re the first respondent on 7 November

2003 on CRB 137 14/03. That appearance was consequent upon an order which I granted requiring the investigating officer to bring the applicants to court in HC 9198/03.

They therefore had not been brought to court within 48 hours of their arrest as the police were obliged to do in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. If there was some other legal basis for holding them, the papers before me do not state it.

Applicants were refused bail in their initial appearance before 1st respondent on 7 November 2003.

On appealing to this court (KARWI J) they were granted bail in B 17607/03. They were released on bail.

On 12 December 2003 when reporting to CID Fraud in fulfilment of their conditions of bail, 1st, 2nd and 4th applicants were arrested. Third applicant surrendered himself to Police on 16 December 2003. They were charged with offences similar to those which they were already on bail.

On 19 December 2003 the Magistrate granted them bail on the "fresh" charges. Upon the pronouncement of the grant of bail the State immediately invoked the provisions of section 122(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The effect of that provision is to suspend the judgment granting bail for seven days, during which period the Attorney General is to decide whether to appeal or not. If the Attorney-General decides to appeal, the accused will he held in custody till a judge determines the appeal. If the Attorney-General does not so decide, he is to notify the magistrate within those seven days. The accused will be released forthwith.

The state representatives did not file their notice of appeal within the stipulated time nor was the magistrate advised of the Attorney-General's decision prompting the applicants to seek an order for release from this court.

This court (GUVAVA J) duly granted the order of release on 2 January 2004. The basis for such release was that section 122(2)(a) became operative where no notice of appeal was filed within the seven day period.

On the same day when this court issued an order effectively releasing the four, the 2nd and 3rd respondents caused them to appear before the 1st respondent again on similar charges, for the second time. It was their 3rd time being placed on remand for similar charges. In fact State Counsel advised GUVAVA J of this third appearance and that the applicants will not be released!!

Present counsel for the applicants then made the application for recusal which is subject of this application for review. 1st respondent threw out the application for recusal. He then proceeded to refuse the applicants bail.

The applicants cite two grounds for review of the proceedings in the court *a quo, viz:* bias and gross irregularity.

On behalf of the applicants, Mr *Chikumbirike,* argued that as the magistrate, the 1st respondent, had previously denied the applicants bail, the applicants reasonably feared that he may fail to impartially determine their application as a result of prejudicial bias. He pointed to the fact that despite being denied by 1st respondent, this court had subsequently granted them bail. This must have stung him as it clearly showed that his decision was wrong. Secondly, the proceedings of the initial remand were founded upon facts similar to those upon which bail had been granted. Bringing these proceedings and opposing bail on similar facts in which bail was granted is abuse of process amounting to a gross irregularity which this court should set aside on review in the exercise of its wide powers of review.

In opposition to this application 1st respondent contended that he correctly rejected the application for recusal made against him. He does not however elucidate the approach he took or the principle he applied

or the authorities he relied upon, for his ruling.

In S v *Roberts* 1994 (4) SA 915 at p 922 et al HOWIE JA set out the development of the test for bias thus:

"Bias in the sense of judicial bias has been said to mean 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'. See *Franklin and Others v Minister of Town and Country Planning* [1948] AC 87 ($HL_1$) at 103; [1947] 2 All ER 289 at 29613-C). What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be 'manifest to all those who are concerned in the trial and its outcome, especially the accused'. See S *v Rail* 1982 (1) SA 828 (A) at 83 1 H-832A.

It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further 'proceedings' a nullity. *Council of Review, South African Defence Force, and Others v Monning and Others* 1992 (3) SA 482 (A) at 495B-C*; Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 9G.

For too long, however, the legal test for the appearance of judicial bias was uncertain. This was because it was variously and, with respect, at times confusingly stated both here and in England. The way in which the test has now come to be formulated in South Africa can be traced in the following recent pronouncements of this Court.

In S *v Malindi and Others* 1990 (1) SA 962 (A) at 969G-I it was said:

'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v Radebe* 1973 (1) SA 796 (A) and *South Africa Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.'

Then, *Monning's* case foreshadowed a switch from 'likelihood' to 'reasonable suspicion' but left the choice of formulation open. At 490C-G it was said:

'It may be that this formulation [likelihood of bias] requires some elucidation, particularly in regard to the meaning of the word "likelihood": whether it postulates a probability or a mere possibility. Conceivably it is more accurate to speak of "a reasonable suspicion of bias". Suspicion, in this context,

includes the idea of the mere possibility of the existence, present or future, of some state of affairs. *(The Oxford English Dictionary sv* "suspicion" and "suspect"); but before the suspicion can constitute a ground for recusal it must be founded on reasonable grounds.

It is not necessary, however, to finally decide these matters for, whatever the correct formulation may be, I am satisfied that the Court *a quo* was correct in holding that the court martial did not pose the correct test when deciding the recusal issue (see reported judgment at 875J-876B) and that the circumstances were such that a reasonable person in the position of second respondent could have thought that … "the risk of an unfair determination on an issue such as this was unacceptably high".

(See reported judgment at 881H-I).'

(The reported judgment mentioned at the end of that extract is the judgment in *Monning's* case of the Full Court of the Cape Provincial Division reported in 1989 (4) SA 866 (C).)

Later, in BTR Industries South Africa (Pty) and Others v Metal and Allied Workers' Union and Another 1992 (3) SA 673 (A) it was finally laid down (at 6931-J) •

*'that in our law the existence of a reasonable suspicion of bias satisfied the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias'*.

The Court went on (at 694A) to approve the statement by the Court *a quo* in *Monnirig's* case that

*~provided the suspicion is one which ~night reasonably be entertained, the possibility of bias where none* is *to he expected serves to disqual~fy the decision maker'*

and *at* 694J referred to the requ~red suspicion as one which 'might reasonably be entertained by a lay litigant'.

Adoption of the reasonable suspicion test in preference to the real likelihood test was confirmed in Mach's case at 8H-I.

Thus far, therefore, the requirements of the test thus finalised are as follows as applied to judicial proceedings:

( 1) There must be a suspicion that the judicial officer might, not would, be biased.

(3) The suspicion must be that of a reasonable person in the position of the accused or litigant.

(3) The suspicion must be based on reasonable grounds.'~

The test as applied in ourjurisdiction is net different. It is an objective one. The inquiry is whether a reasonable litigant wo~ild fear bias.

As ROBINSON J pointed out in *Muringi v Air Zimbabwe & Anor* 1997 (1) ,ZLR 357 (H) at 376:

"In *Leopard Rock Hotel (Pvt,) Ltd vs Wa/len Construction* (Pvt) *Ltd* 1994 1 (ZLR) 255 (S) the Supreme Court Leid that the test as to whether the person concerned was disqualified .o act on the ground of bias was an objective one. In this respect KORS.~H JA stated at 275 A:

'a common theme which runs throughout the authorities is therefore, that the test to be applied is an objective one. One does not inquire into the mind of the person challenged co determine whether or not he was not or would be actually bia~4. Thus the character, professionalism, experience nr Rh~1ity as to make it unlikely despite the existence of circumstance suggesting a possibility of bias arising out of some conflict of interest that he would yield to i:.~famy, do not fall for consideration. And further down: at 275 C KOR~AH JA referred to the conclusion reached by CLAYDEN J (as he thcn was), after a careful perusal of relevant cases in *Appel* vs *Leo & Ar~cther* 1947 (4) SA 766 (W) at 774 that "the test to be applied is an objecti~~c test, the possibility in fact of bias, and not actual bias.'

As far back as 1963 when the point arose before him in *Foya & Matirnba*

*v R and Jackson N.O.* 1963 (1) SR 329 at 3~3 CLAYDEN CJ stated:

"I consider therefore that what th~ applicants had to show was not necessarily personal animosity towards them. If they showed that the position was such that a reasonable person in their position would have thought that he would not have a fair trial in the circumstances and that there was nothing in further facts disclosed to indicate that that was not a real likelihood, that would be enough."

Considering the history of tIieir appearance on initial remand and how they obtained the grant of bail cothd it be said objectively that the applicants' fear that they may not receive a fair hearing unreasonably held? I think not.

The applicants had been brought to court on three occasions on similar charges arising out of basically one course of conduct i.e. exportation of gold to South Africa. This is alleged to have occurred within a twelve-month period.

Second and third re~pond~r~ts had indicated that they intended to appeal against the grant of bail but hd not pursue that appeal.

They succeeded in obtaining a warrant to hold applicants in custody for seven days. When this court ord~red their release yet another arrest was effected. Section 322 of the Code crovides for the course open to police. The respondents have not argued that that section was inapplicable.

Such conduct by the Police &3 has been demonstrated in this particular case must be deprecated in the stro~igest terms.

An impression is created of ~a serious determination to frustrate court orders. That impression only reinforces the view held in certain quarters that there is no respect for the rule of l&w by the Executive branch of Government. The police force should be the last arm of Government to reinforce such a view. If it was believed that the appellants are not entitled to bail an appeal ought to have been the proper course to take rather than repeatedly arresting suspects who are on bail and who have not shown the slightest inclination to breach their conditions of bail.

Respondents argued that they had uncovered more grounds for possibly charging the applicant. Whilst tHs may be so, that does not warrant a persistent assault on the hberti, of ~ e rnc~ividua1 r'i tne ~'annei displayed here

These courts would be failing in their duty to uphold the 'Constitution and the individual liberties that we all cierish should they turn a blind eye on such ~ibject abuse ofprocess.

As was stated by Justice Fl~ANKFURTER in *McNabb v USA* 332 (87) ED19at825-826

*"A democratic society, in which respect for the dignity of all man is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is riot in itself an assurance of soberness of judgment. Disinterested,iess in law enforcement does not alone prevent disregard of cherished ltherties. Experience has therefore counselled that safeguards must be placed against the overzealous as well as the despotic. The lawful instructior~ of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately*

*uested in the various participants zpon whom the criminal law relies on its*

*ujndication.*

In the exercise of its judicial func~ions, a magistrate court is the first post of case for all suspects after their arr~ 'its. It is at that court that a decision between incarceration and liberty is made. It may be quickly freely and fairly decided or it may take days, if not weeks, for such a decision to come.

An applicant for bail, like any other litigant, trusts that the tenets of fairness, transparency, impartiality, lack of interest in the cause and liberty will be observed. That is a reasonable litigant. On the other and, some litigants see conspiracy by the whole system against them. They smell a rat in every corner, They cannot accept that their cases would be fairly handled. They hold this believe without any basis. It is a fear spawned by the mere fact of their arrest. This category of suspects or litigants is an unreasonable lot. They cannot objectively assess their predicament. The h~!iefs they hold cannot be said to be reasonably held as they are not based on sund grounds.

~ Yet when they seek a recusal of a judicial officer residing in their case he should objectively weigh their objection.

An application for recusal seems to ~e an attack on the professionalism of the judicial officer. Yet it is not. It merely is an expression of the sometimes unreasonably held fear by litigants that they may not receive a fair hearing for stated reasons. Unless it is clearly vexatious a judicial officer must therefore reluctantly dismiss ~ch application as a f~'iiure to do so would tend to confirm their fear; lest it is said why would he inthst in trying my case if he had no interest?

In the jru~tanf ~L~~SC? the fearexpres~sed was that on the same facts, the same presiding officer has refused us bad. He is unlikely to do the same, moreso as the High Court order had shown him to have been wrong.

I do not think that that fear was urn ~asonably held bearing in mind the history of this matter. On that ground a~ne 1st respondent ought to have recused himself. He did not. It does not ma~ ter that he proceeded to fairly deal with the matter. After he failed to recuse hi~seIf the proceedings were a nullity susceptible to being set aside.

In my respectful view society ought 1:0 be assured that the checks and balances enshrined in the constitution exi~s~ for the safeguard of the liberties of the individuals. These are enshrined as ~uarantees to citizens not window ~dressing. Whether one is suspected of c3mn-iitting an offence or not the presumption of innocence remains an only safeguard against overzealous

individuals in the policing arm of the S~ate. Once the police have effected an arrest, and instituted due process, it is no longer up to the police to decide whether or not a suspect should be held ~n custody. That is the function of the Courts. A view to the contrary cannot be allowed to prevail. These proceedings render themselves reviewable as they display a clear example of abuse of the due process by the police.

In the result I find that the trial court misdirected itself in failing to grant the application for recusal. As such I am free to correct the proceedings in that court. I will therefore issue the following order:

1 . The decision of the first respondent refusing to recuse himself and placing the applicants on remand ~ and i~ hereby set aside.

2. The decision placing the applicants. oii remand for the further 27 counts in CRB No. 60-3/04 is hereby set aside.

3. The applicants be and are hereby rcleascd from prison custody forthwith

4. The third respondent be and is hereby. interdicted from re-arresting theY applicants on similar charges as a~~pears in annexures B', 'C' and 'E' of the papers and arising out of the same facts.

5. All charges pertaining to contraver;ing the Mines and Minerals Act, Gold Trade Act,

Customs and Excise Act and any other charges that might arise from the same facts, be consolidated together in one indictment ~nd ~That the charges be preferred against the applicants at their trial.

*Chikumbirike & Associates,* legal practitioriers for applicants

*Attorney-General's Office,* legal practitioner5 for the respondents