MANGWIRO SIBANDA
versus
JANE HAPPIAH CHIKUMBA
and
ALTFIN INSURANCE COMPANY

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 6, 7 October 2015, 14 October 2015

Opposed Application-Recusal

Applicant in person
E Ndlovu, for the respondent

CHIGUMBA J: In an application for the recusal of a judicial officer, what must be proved is the mere possibility of bias, not actual bias. What is important when considering the circumstances of each case is the impression or perception that is created in the mind of right thinking people, not the applicant's subjective impression of bias. The test is an objective one. "A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. A judge whose recusal is sought should bear in mind that what is required, particularly in dealing with the application for recusal itself, is *conspicuous impartiality*. The Judge must ensure that justice is done. It is equally important that he should also ensure that justice is seen to be done. After all, it is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome. The approach of our courts to an application for recusal has been set out in a number of cases and the principle which they seek to enshrine is that no reasonable man should, by reason of the situation or the action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner. However the mere possibility of bias apparent to a layman would not be sufficient to warrant the recusal of a judicial officer".

The authorities which set out these cardinal principles were reviewed in the leading case on recusal, of *Standard Chartered Finance Zimbabwe Limited* v *Georgias & Anor*[1]. It is my considered view that in an application of this nature, a presiding officer is faced with the difficult and unenviable task of being a Judge in one's own cause. It involves revisiting the record of proceedings in the trial court, and combing through it, and objectively assessing the proceedings, in order to determine whether there is anything that the presiding officer said or did, which can be perceived as being unjustifiably favorable to one of the parties, at the expense of the other. The enforcement of the rules of procedure of the court, is subject to strict guidelines which nevertheless are applied to a certain extent at the discretion of the presiding officer. Judicial discretion is the power of a court to take some step, grant a remedy, or admit evidence or not as it thinks fit. Many rules of procedure and evidence are in discretionary form or provide for some element of discretion. In this case a determination will have to be made as to whether the decision to exclude documents that the plaintiff intended to produce in evidence before the court a quo, which documents had not been discovered in terms of the rules, and which the defendant objected to on the basis that it would be prejudiced, was motivated by bias.

The plaintiff is a self actor who brought an application for my recusal as the presiding Judge in a civil claim for the payment of USD$3 700-00 being the cost of repairs to his Toyota Sprinter motor vehicle, which was negligently damaged by the first defendant on 17 December 2011. The motor vehicle was insured by the second defendant at the material time. The plaintiff also claimed payment of consequential damages in the sum of USD$9 750-99 being the cost of hiring a replacement vehicle during the period 18 December 2011 to June 2012. Trial commenced on 6 February 2014. The defendants applied for absolution from the instance at the close of the plaintiff's case and their application was granted in a judgment dated 27 February 2014, HH92-14, which appears at record p 83 of the bundle of documents. The court found that;

> "…there is insufficient evidence before the court to support the plaintiff's averment that he hired a vehicle to use, with the first defendant's knowledge and consent. In any event it was not up to the 1st defendant to consent to such an arrangement once the 2nd defendant became seized with the matter. 1st defendant was insured against accident and damage. She referred the plaintiff's claim to her insurers who were processing it. No evidence was led that the plaintiff approached the 2nd defendant and advised that if his car was not repaired immediately, he would hire a vehicle to use for business and to take his children to school. No evidence was led that the 2nd defendant

[1] 1998 (2) ZLR 547(H)

> authorized the plaintiff to hire a vehicle for his use whilst his damaged vehicle was being repaired. Unfortunately, no evidence was placed before the court to support the plaintiff's claim about his vehicle being valued at USD$6 300-99. Independent verification of this averment would have enabled the court to assess whether the 2nd defendant's offer to pay the plaintiff USD$3 500-00 and write off the vehicle is fair and reasonable in the circumstances.
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> There is insufficient evidence generally, on a balance of probabilities, to establish a *prima facie* case in favor of the plaintiff, and against the defendants. The plaintiff failed to discharge the onus on him to prove his case. If follows that absolution from the instance is granted in favor of the two defendants. The plaintiff shall pay the defendant's costs".

The plaintiff appealed against this judgment on 18 March 2014. The grounds of appeal were that the trial court had erred and misdirected itself by disbelieving his evidence, by not accepting that the respondents had admitted that his complaints were genuine, by noting the judgment on the day of hearing before arguments, and by granting absolution from the instance. The respondents did not appear before the Supreme Court on 6 March 2015 when an order in default of their appearance was granted in which the appeal was allowed with costs, the decision of absolution from the instance was set aside, and the matter was remitted back to the court *a quo* for the continuation of the trial. During the course of prosecuting his appeal, the plaintiff had addressed a letter to the Judge President of the High Court in which he expressed dissatisfaction with the contents of the transcript of the record of proceedings before the trial court. He made allegations that the record of proceedings had been corruptly tampered with, and that it was not a true reflection of what had transpired in court. The trial Judge was asked to comment on the allegations. Part of the comments, which form part of the record, read as follows;

> "Mr. Mangwiro being a layman was not fully conversant with the High Court Rules. The court went out of its way to explain a few basics to him such as the fact that as plaintiff he must lead evidence in chief, produce any documentary evidence and be subjected to cross examination. The record speaks for itself on what transpired during the recording of his evidence in chief. It is absurd to state that the court "objected to the production of all evidence not discovered in terms of the rules". It demonstrates a patent inability to comprehend basic court procedures. The defendant made an application for the exclusion of each and every document which was not formally discovered. Mr. Mangwiro was allowed to respond. The court made a ruling after hearing both parties. If the court misdirected itself in any way, it would have been up to the Supreme Court to set aside the court's finding.
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> I would like to respectfully point out that the merits of the appeal were not fully ventilated by the Supreme Court. A perusal of the Supreme Court order of 6 March 2015 will show that it was granted in default of appearance by the defendants. The Supreme Court did not; to my knowledge give reasons for its default judgment.

> It is therefore clear, in my view, that the allegations leveled against my person by Mr. Mangwiro are malicious and mischievous. To suggest that I could have access to recorded tapes, and that I tampered with the tapes and deleted evidence and replaced it with something that did not take place in court, is again a reflection of Mr. Mangwiro's lack of appreciation and knowledge of High Court procedures.
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> The Judge's assistant is the custodian of all recording equipment, including tapes, during trial. After trial, the tapes are handed over to the transcriber who prepares the record of proceedings on request and on payment of the requisite fee. Mr. Mangwiro is challenged to kindly produce the evidence that he has that I personally, or through an agent caused the alleged tampering with the electronic record of proceedings. He is challenged further to produce what evidence he has of my alleged corrupt intentions.
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> This attempt to besmirch my character and tarnish my good name and that of *Ms Takawadii*, a senior legal practitioner is a result of figments of Mr. Mangwiro's imagination. The allegations that he makes are baseless and without foundation, and are not buttressed by any viable evidence. The allegations are serious and calculated to throw doubt on the moral fiber of a High Court Judge.
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> The idea that a Judge and a senior Legal Practitioner could sit down and systematically tamper with evidence is ridiculous. I doubt that either Ms *Takawadii* or I possess the requisite technical skills required in ICT, to erase and rearrange the electronic record. When regard is had to the quantum of the plaintiff's claim, it is apparent that very little financial gain would accrue to a corrupt minded person..."

Nothing further was heard from the applicant until 21 August 2015 when he again wrote to the Judge President to complain against the conduct of the High Court Registrar, in allegedly blocking him from being allocated a date for trial continuation. The applicant pointed out that justice delayed was justice denied. The letter was referred to the trial Judge, on 9 September 2015, with a request that the applicant be assisted with early trial dates, as requested. The matter was set down for trial continuation as directed by the Supreme Court, on 6 October 2015. On the day of the hearing the first defendant appeared in person, and advised that due to the short notice, her legal practitioner was not in attendance. She also advised that the second defendant had been placed in liquidation, and that she needed to contact the liquidator and collect the court papers in order for her to mount her defence, which had been previously handled by the second defendant, as her insurers. Despite vigorous opposition by the applicant, the court granted the first defendant a postponement of the matter to the following day, in the interests of justice.

The following day, the application for my recusal was placed before me by the applicant. I say application because it is in writing, but note that it is not a proper application in terms of order 32 of the rules of this court. There is no founding affidavit or sworn statement before the

court. The basis of the "request' for recusal, is that the applicant noted that the court conducted itself in a partial manner during the presentation of his case in February 2014. The applicant felt that the court could not change its mind after having found that the defendants had no case to answer. Reference was made to the response to the letter of complaint which is set out above, and the applicant averred that the court had prejudged him because he is a layman. The court was accused of being an interested party, and of "fuming" in its response to the applicant's complaint that the Judge had tampered with the electronic record of proceedings. The court was accused of having a "platform to suppress genuine complaints in your effort to revenge". The applicant alleged that the court has' a possibility of taking a defensive stance against the allegations raised, thereby rendering impartial judgment ineffective".

Counsel for the first defendant, Mr *Ndhlovu*, in response to the 'request' that the presiding Judge recuse herself, told the court that he had no meaningful submissions to make. He was constrained by the manner and form of the application, and merely submitted that in his view, the trial court could not be accused of exhibiting bias towards the applicant just because it found his evidence insufficient to establish his claim. In response, the applicant submitted that the Supreme Court had made a finding that the trial court was biased. On being asked to produce the reasons for the Supreme Court order, the applicant submitted that, in allowing the appeal, the Supreme Court had agreed with all the submissions and allegations in his heads of argument. It has been held that;

> "In an application to a judge to recuse himself, the test to be applied is not easily defined. Some cases favor the view that the test is whether, as a matter of fact, there is a real possibility of bias. Others accept that it is sufficient that there is a reasonable belief that a real likelihood of bias exists. However, there is no real difference between these approaches, since, unless there is a real likelihood of bias, a reasonable or right thinking man would not believe that there was such likelihood. In deciding whether this test has been satisfied, it is necessary to look, not only at the facts known by the applicant, but at all the relevant facts.
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> The applicant must show a reasonable fear, based on objective grounds, that the trial will not be impartial. It should also be remembered that Judges are trained and experienced in the administration of the law. The mere possibility of bias apparent to a layman is not itself sufficient to warrant the recusal of a judicial officer. On the other hand, a Judge should not regard an application for recusal as an affront. He should bear in mind that what is required is conspicuous impartiality *"Standard Chartered Finance Zimbabwe Ltd* v *Georgias supra,* head note."

In the case of *Leopard Rock Hotel Company Private Limited & Anor* v *Walenn Construction*[2], it was held, at p275, that;

In *E R (Donoghue)* v *County Cork* JJ [1910] 2 IR 271 at 275 LORD O'BRIEN CJ said:

> "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds - was reasonably generated - but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision." And after a careful perusal of relevant cases, concluded that "the test to be applied is the objective test, the possibility in fact of bias", and not actual bias.

See also *Divine Homes Private Limited* v *The Sheriff & 2 Ors*[3]where the applicant made spurious allegations against the trial Judge and his clerk.

In the case of *Maydeep Investments Private Limited and Merspin* v *Cecil Madondo & 3 Ors*[4], the Judge acceded to an application for his recusal because he had previously determined two separate matters between the same parties on the same issue. This is what the Judge said at pages 2-3 of the cyclostyled judgment;

> "….an impartial judge is a fundamental pre-requisite for the fair trial and as such a judicial officer should not hesitate to recuse herself or himself if there are reasonable ground on the part of a litigator for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial – *President of the Republic of South Africa & Ors* v *South African Rugby Union & Ors* 1999(4) SA 147 (cc) at 171; *Sager* v *Smith* 2001(3) SA 1004 (SCA) at 1009; *S* v *Malindi* 1990(1) SA 629(A); *S* v *Radebe* 1973(1) SA 796(A) and *Sihube Bus Co (Pvt) and Anor* v *Golden Ndlovu & Anor* HB-45-04.
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> The fact that in reality the judge was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to her or his impartiality that is important. In other words, not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding or continuing to preside over judicial proceedings – *Council of Review SA Defence Force* v *Monnig* 1992(3) SA 482(A); *Silwana* v *Magistrate for District for Piketberg* [2003]2 ALL SA 350(C) and *S* v *Robert* 1999(4) SA 915 (SCA) at 923."
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> See also *Roy Leslie Bennet* v *Emmerson Dambudzo Mnangagwa (in his capaciry as speaker of the Parliament of Zimbabwe)* [5], where Bennett requested the recusal of the Chairperson of the Committee on the grounds that he had moved the motion for the

[2] 1994 (1) ZLR 255 @ 275
[3] HH120-04
[4] HB34-05
[5] SC75-05

> establishment of the Committee on Privileges on this matter and therefore had an interest or was biased against him. The Committee ruled that no grounds of bias or conflict of interest had been established to warrant the Chairperson recusing himself from the proceedings."

The question for determination is whether, as a matter of fact, there is a real possibility that the Judge will be biased against the plaintiff, or the applicant in this matter, either because of the decision to absolve the defendants from the instance, or because of the allegations of tampering with the electronic record of proceedings, for corrupt intentions. The test is an objective one. Would any right thinking member of society, have reason to believe that there would be a real likelihood of bias in the circumstances of this case? We must look at all the relevant facts. A perusal of the record of proceedings will show that the trial court did not, so associate itself with one of the two opposing parties such that there is a real likelihood of bias or that a reasonable person would believe that it would be biased. The impression created in the mind of the applicant that he would not have a fair trial appears to be subjectively based on two things; the sustaining of the objections by the defence to the admission of documents which had not been discovered in terms of the rules, which led to the granting of absolution from the instance, and allegations that the record of proceedings had been tampered with, for corrupt purposes.

In my view, no right thinking member of society would find that there was a real likelihood of bias against the applicant just because the defendants were absolved from the instance. Absolution from the instance is a question of law. The Supreme Court did not base its order on a finding of any misdirection on the part of the court *a quo*. Such a finding would have assisted us to assess whether the trial court was motivated by bias, which is defined as an unfair preference for or dislike of something, a distortion of results, or the influence of somebody or something unfairly. Sustaining an objection to the admission of documents which have not been discovered in terms of the rules, cannot be said to be an unfair preference or dislike of the applicant. The rules of evidence exist for a reason, to regulate proceedings and to avoid ambushing the other side to its prejudice. The applicant did not deserve special exemption from the rules of evidence. In fact the court could be said to have exhibited bias towards him when it explained court procedure to him.

It has been held that the mere possibility of bias apparent to a layman is not itself sufficient to warrant the recusal of a judicial officer. However, the allegations of tampering with the record

of proceedings, and of corruption, which attempt to implicate not only the trial Judge, but counsel for the defendants who conducted the defence, and the Judge's assistant at the material time, in my view, transcend the mere possibility of bias apparent to a layman. These allegations are, by any stretch of the imagination, an 'affront' to the dignity of the court and to the character of the trial Judge. While the record of proceedings demonstrates '*conspicuous impartiality',* in my view, the allegations made by the applicant, need to be fully ventilated. The applicant must tender what evidence he has, that the electronic record of proceedings was tampered with. The allegations are calculated to bring through administration of justice into disrepute, and in these circumstances, it would be imprudent for the trial Judge to continue with the trail. There is no doubt in my mind that a right thinking member of society would not have any reason to believe that the allegations of tampering with the record which were made by the applicant, are true, or even possibly true. This is because the allegations are clearly baseless and without foundation.

The question that is exercising my mind is whether the allegations would give rise to an 'impression' that justice could no longer be seen to be done in this case. Clearly the applicant's loss of confidence in the abilility of the trial Judge to be impartial, although subjective, has tainted the proceedings in this matter. It is not the mere application for recusal that is an affront in these circumstances; it is the spurious nature of the allegations made by the applicant, and the fact that the Supreme Court did not have an opportunity to test the veracity of the allegations, because the appeal was granted in default of appearance by the respondents. As it is, the allegations stand, they form part of the record of proceedings before the Supreme Court. Given this scenario can it be said that we still have *conspicuous impartiality* in this matter? What perception has been created by the applicant's allegations of record tampering?

It has been held that the court must look at the impression that will be given to other people, not at whether there was a real likelihood that one side was favored at the expense of the other. 'Even if he was as impartial 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, and if he does, his decision cannot stand'.[6] Justice must be rooted in confidence. In my view that confidence has been destroyed in the circumstances of this case, not by any real likelihood

[6] Metropolitan Properties Ltd v Lannon [1968] 3 All ER 304 @ 310A-D

or real possibility of bias, but by the allegations that the record of proceedings was tampered with which allegations have not been ventilated, or verified, and which remain extant. Even though a right thinking person understands that no real bias has been proved by the applicant's allegations which remain untested, it is the mere possibility of bias which has tainted these proceedings. The appearance of bias in an inescapable conclusion that will remain in the mind of a right thinking person until the allegations of record tampering are dealt with on the merits.

For these reasons, the application for recusal is allowed, with costs to remain in the cause.

Messrs Mabundu Law Chambers, 1st respondents' legal practitioners