

AUBREY CUMMINGS [2]
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO: 7 & 14 February 2018

Criminal appeal

Mr *M.D. Hungwe*, for the appellant

Ms *S. Busvumani*, for the respondent

MAFUSIRE J:

- [1] This was meant to be a criminal appeal. It did not proceed. The appellant asked for my recusal. I obliged. The matter was removed from the roll. My Brother, MAWADZE J and I, felt it unprofitable to get embroiled in the merits of an application for recusal. But our decision in this regard should not be taken as having set a precedent. We avoided tussling with Counsel purely so that justice might be seen to be done. The reasons for seeking my recusal were nebulous. Here are the facts.
- [2] On 6 June 2017 the Regional Magistrate’s Court at Masvingo convicted the appellant on two counts of rape. He was sentenced to fifteen years imprisonment three of which were suspended for five years on the usual condition of good conduct.
- [3] The appellant appealed to this court against both conviction and sentence. Pending the appeal, he applied for bail. I heard the application. By judgment no HMA 33-17 handed down on 4 July 2017[“*the bail judgment*”], I dismissed the application. The major ground for dismissing the bail application was that the appeal had no prospects of success on the merits. Even though the applicant was not a flight risk, I judged that it was in the interests of justice that the operation of the judgment of the court *a quo*, and the execution of the sentence, should not be interfered with. The appellant did not appeal the bail judgment.

- [4] Some few minutes before the start of the hearing of the appeal, Counsel for both parties approached me in Chambers. Mr *Hungwe*, for the appellant, advised that the appellant was feeling very uncomfortable with me being part of the appeal panel. It was said that in the bail judgment, I had expressed very strong views about the lack of prospects of success of the appeal. As such, he felt I was likely to remain unmoved by whatever else he might say on appeal.
- [5] The issue was being raised at the eleventh hour. Yet the appeal had been set down for hearing several months in advance. In fact, the hearing had been twice postponed. On no occasion had any intimation been given that my recusal would be sought. Mr *Hungwe* explained that he himself had no issue. He had come prepared to argue the appeal. However, the appellant had, at the last minute, raised the matter and had insisted that he felt he would not get a fair hearing if I remained on the appeal panel.
- [6] In the event that I recused myself, Mr *Hungwe* suggested that a new panel could be reconstituted, or that the record could be transferred to the Harare station. Ms *Busvumani*, for the State, saw no conflict or difficulty if I remained on the panel. However, she had no real objection to the appellant's request.
- [7] I intimated to Counsel that I did not consider myself to be conflicted, or in any way incapacitated as to warrant my recusal, but that nonetheless, I did not want to be seen as wanting to cling onto the matter as if I had cultivated a special interest in it. I said I would discuss the matter with MAWADZE J.
- [8] In court, Counsel made formal submissions on the request for recusal. The matter was removed from the roll.
- [9] We have said that our decision in the present matter should not be taken as having set a precedent because the request insinuates that justice is justice only when a litigant wins a case, and that it is not justice when they lose. What the recusal application in this matter boils down to is that, if I had granted the application for bail, the appellant would have been quite happy to let me sit on the appeal panel. On that kind of logic, there is no reason

why the State, if I had granted bail, should not have sought my recusal also. The administration of justice simply does not function that way.

[10] It is of course, the right of every litigant to seek the recusal of a judicial officer who may be conflicted, or whose impartiality is not guaranteed. A judicial officer should not unduly take a recusal application as a personal affront. Section 69[2] of the Constitution says that in the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law: see *Mangenje v TBIC Investments [Pvt] Ltd / TBIC Investments [Pvt] Ltd & Anor v Mangenje*¹

[11] Recusal is the stepping aside, or disqualification of a judicial officer from a case on the ground of personal interest in the matter, bias, prejudice, or conflict of interest. It is a rule of natural justice. No man should be judge over his own cause, or *nemo iudex in sua causa*: see *Council of Review, South African Defence Force & Ors v Monning & Ors*² and *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors*³. Thus a judicial officer who has cultivated an interest in a matter before him or her, be it financial, personal or whatever else, is required by the rules of natural justice that he or she should recuse himself or herself: see *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd*⁴; *S v Mutizwa*⁵ and *Mahlangu v Dowa & Ors*⁶.

[12] However, recusal is not just there for the asking. It is important to realise that judicial officers have a duty to sit and decide cases before them and in which they are not disqualified. They should not too readily accede to suggestions of bias or other interest in the matter. The High Court of Australia put it this way in *Re JRL: Ex parte CJL*⁷:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of

¹ 2014 [2] ZLR 401 [H]

² 1992 [3] SA 482 [A], at p 491E – F

³ 1999 [4] SA 147, at p 168D - E

⁴ 2001 [1] ZLR 226 [H]

⁵ 2006 [1] ZLR 78 [H]

⁶ 2011 [1] ZLR 47 [H]

⁷ (1986) 161 CLR 342 [HCA], at p 352E – F

appearances of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

[13] A judicial officer whose recusal has been sought has to decide the application in the first instance. If he or she refuses the recusal, and that decision is wrong, it can always be corrected on appeal: *President of RSA, supra*, at p 169 D. In essence therefore, this is an exception to the rule against someone becoming judge over their own cause.

[14] By reason of their training, experience, conscience and intellectual discipline, it must be assumed that judges are able to administer justice without fear or favour, and capable of judging a particular controversy fairly on the basis of its own circumstances. It must be assumed that they are able to disabuse their minds of any irrelevant personal beliefs and predispositions: *President of RSA, supra*, at p 177D - E; also *Mahlangu, supra*, at p 50C – F.

[15] Furthermore, on being appointed, every judge takes and subscribes to the judicial oath “... ***to do right to all manner of people after the laws and usages of Zimbabwe, without fear or favour, affection or ill-will***”: see *Associated Newspapers, supra*, at p 232D – F. There is a presumption that judges will carry out their oath of office. That is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high: *President of RSA, supra*, at p 172E – F.

[16] An apprehension of bias that is whimsical or morbid cannot be a ground for seeking recusal. Some examples may help:

- In *S v Collier*⁸ an application for the recusal of a magistrate on the ground that he was white was refused.
- In *Mutizwa* above, recusal sought on the basis that the presiding magistrate had a reputation for imposing stiff sentences was refused.
- In *Associated Newspapers*, an application for recusal by one set of shareholders in a newspaper printing and publishing company on the ground that the presiding judge had been a former temporary editor and columnist allegedly of a rival newspaper or competitor was refused on the basis that the applicant had not established any link

⁸ 1995 [2] SACR 648 [C]

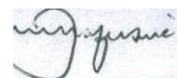
between the judge and the other party in the main application who also happened to be a co-shareholder in the newspaper printing and publishing company.

- In the *President of RSA* case above, recusal based on alleged professional and/or political and/or family ties between most of the justices of the Constitutional Court of South Africa and the appellant, who happened to be the then sitting president of the country, was refused.
- In *Mahlangu*, the judge's recusal was sought on the basis that she was married to a member of the police force. The alleged link was that the respondents were also members of the police force. The judge's husband had little or no day to day dealings with the respondents who were either his superiors or subordinates. Recusal was refused.
- In *Mangenje* above, which was a simple and straightforward application for directions, I refused a request for my recusal which was predicated on my having dealt with some aspect of the dispute between the same parties, where it was clear that the request was morbid and impetuous.

[17] It is hoped that the above exposition of the law on recusal, and the few examples given, will lead to a greater understanding of why this particular case shall not be taken as having set a precedent. The phenomenon of a two judge High Court station dealing with all manner of cases, the situation obtaining at Masvingo currently, may be around for an unforeseeable future. A matter may have several facets, such as this one, requiring judges to make interim decisions or orders, before the main dispute is adjudicated upon. Therefore, every case will naturally have to be dealt with on its own merits.

[18] The matter was removed from the roll by consent, pending administrative arrangements by the Registrar, in consultation with the parties, to have the record transferred, or to have the matter re-set down.

14 February 2018



Mawadze J: I agree _____

Kadzere, Hungwe & Mandevere, legal practitioners for the applicant
National Prosecuting Authority, legal practitioners for the respondent