

SIHUBE BUS COMPANY (PVT) LTD

And

R D MOYO VEHICLE HIRE (PVT) LTD

Versus

GOLDEN NDLOVU

And

GOLDEN MOTORWAYS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 29 NOVEMBER 2002 & 1 APRIL 2004

T Ndlovu for applicant

Ms N Ncube for respondents

Opposed Application

NDOU J: On 7 February 2002 my brother Judge issued an *ex parte* provisional order in the following terms:

“Terms of final order sought

Whereupon after reading documents filed of record-

It (is) ordered:-

That you show cause to this honourable court why a final order shall not be made in the following terms –

Final Order

1. That the provisional order be and is hereby confirmed.
2. That the respondents be and are hereby ordered to bear the costs of this application on the attorney and client scale.

Interim Relief Granted

Pending the confirmation or discharge of this provisional order the applicant is granted the following relief:

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- (i) That the first and second respondents be and are hereby ordered to release to applicant and/or deliver to applicants the following motor vehicle spares within 24 hours of service of this order –
 - 4 steer box (right hand)
 - 10 turbo 825
 - 2 shot 6 speed gearbox
- (ii) In the event that the respondents fail to comply with (I) above the deputy Sheriff or her lawful agents be and is hereby authorised to remove from stand number listed in (I) (sic) above and deliver them to first respondent at Sihube Bus Company, stand number 6469 Wobum Road, Thorngrove, Bulawayo”.

The matter was initially set down before my brother Judge who had granted the provisional order. My brother Judge recused himself apparently on the basis that he previously associated with the applicant’s legal practitioners. Further my brother Judge was said to be personally known to the Managing Director of the second applicant.

Ms *Ncube*, for the respondents raised a point in *limine* arising from this recusal. She does not seem to attack the recusal as such but its timing. It is beyond dispute that the prior association between my brother Judge and the applicants’ legal practitioners and second applicant’s Managing Director occurred before his appointment as a Judge. That being the case, contends the respondent, my brother should not have granted the provisional order. In other words he should have recused himself when the matter was initially brought before him. In other words, I am asked to decide that the timing of my brother’s recusal was wrong, and on that basis discharge the provisional order. I will deal with this later in my judgment. I, however, propose to deal with the principle of recusal. In *S v Malindi* 1990 (1) SA 629 (A) at 969 G-I, CORBETT CJ said –

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“The common law basis of the duty of the judicial officer in certain circumstances to recuse himself was fully examined in the case of *S v Radebe* 1973 (1) SA 796 (A) and *South African 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” – *Council of Review, SA Defence Force v Monnig* 1992 (3) SA 482 (A) and *Silwana v Magistrate for District of Piketberg* [2003] 2 ALL SA 350 (C).

In *Sager v Smith* 2001 (3) SA 1004 (SCA) at 1009 MTHIYANE AJA also observed –

“In *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) ... The Constitutional Court further elaborated on that test. It follows that the test of a ‘reasonable apprehension of bias’ replaced that of ‘a reasonable suspicion of bias’ previously favoured by this court ... The difference would appear to be one of semantics rather than substance.” *President of the Republic of South Africa and Ors v South African Rugby Union and Ors* 1999 (4) SA 147 CC at 171

It is also worth noting that “Judges who are recused, and submit to be recused, do not necessarily admit that if they had to go on with the trial, they would do an injustice.” – *Slade v Pretoria Rent Board* 1943 PD 246 at 252.

In *S v Roberts* 1999 (4) SA 915 (SCA) at 923 HOWIE JA said –

“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 after recusal should have occurred renders the further ‘proceeding a nullity’.”

Coming back to the facts of this case the critical question is whether I can say my brother Judge was wrong or right in failing to recuse himself at the start of the

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application? Is it competent for me to make such a determination? I hold the view that I cannot, procedurally, visit the decision of a fellow High Court Judge on the timing of his recusal and decline to confirm the provisional order on that basis. From Ms *Ncube's* submissions it seems clear to me that question here is whether a reasonable, objective and informed person would on the correct facts of this matter reasonably apprehend that my brother Judge has not brought an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submission of counsel. According to the South African Constitutional Court in *President of the Republic of South Africa and Ors v SARFU, supra*, paragraph 48,

“the reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predisposition. They must take into account the fact that they have a duty to in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for the fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

I agree this is the correct approach but it is being addressed to the wrong forum.

Accordingly, I dismiss the application raised in the point in *limine*. It is ordered that the application for the confirmation of the provisional order issued by this court on 25 March 2002 be considered on its merits.

Cheda & Partners, applicant's legal practitioners
Lazarus & Sarif, respondents' legal practitioners