

MAYDEEP INVESTMENTS (PVT) LTD

And

MERSPIN

Versus

CECIL MADONDO

And

ASSISTANT MASTER N.O.

And

DEPUTY SHERIFF, BULAWAYO N.O.

And

STANBIC BANK LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 10 FEBRUARY AND 21 APRIL 2005

Ms N Ncube, for the applicant
S B A Longhurst, for the 1st respondent

Urgent Chamber Application

NDOU J: The applicant sought an order in the following terms:

“Terms of the final order sought

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

1. Pending the outcome of the review proceedings issued in case number HC-193-05 in this honourable court the writ of execution issued in case number 1542/04 be and is hereby suspended.
2. The 3rd respondent be and is hereby prohibited from attaching, disposing or alienating any property whether movable or immovable belonging to the applicants.
3. The 4th respondent be and is hereby directed to stop payment on the bank cheque made out to 1st respondent’s legal practitioners Messrs Gollop and Blank.

4. The 1st, 2nd and 3rd respondents are ordered to pay the costs of this application.

Interim relief

1. That the writ of execution in case number 1542/04 be and is hereby suspended pending the argument of this application.
2. Fourth respondent be and is hereby ordered to stop payment on the cheque made out to 1st respondent's legal practitioners, Messrs Gollop and Blank."

The 1st respondent raised a point *in limine* in which he sought that I recuse myself. I accepted his contention and recused myself and indicated that my reasons for doing so will be given in due course. These are my reasons. I previously dealt with a matter involving the 1st respondent as a judicial manager of the 2nd applicant, HC-113-03. I rule in favour of 1st respondent against an employee of the 2nd applicant. The employee was not satisfied and noted an appeal against my decision. In the meantime the parties appeared before my brother, CHIWESHE J in interlocutory application arising from the matter I dealt with. My brother ruled in favour of the 1st respondent and the employee was not satisfied and he followed with another application. In the latter application he specifically applied that my brother judge and I recuse ourselves on account of having previously determined the issues between the parties. We conceded to his request resulting in the matter being transferred to High Court Harare. That application is the one referred in the draft order in *casu*.

In *casu*, a lot of issues arise emanating from the said order from which I recused myself. An inference may be drawn that I am interpreting a final order from the matter from which I recused myself. It must be assumed, by virtue of oath of office that I took, that I can disabuse my mind of any irrelevant personal beliefs or pre-disposition. However, an impartial judge is a fundamental pre-requisite for the

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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. 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.

In this matter although the 1st respondent was the successful party in the matter I previously presided over, it was not in his personal capacity but as judicial manager of 2nd applicant. He is now being sued by 2nd applicant and another over the fees for acting on behalf of 2nd applicant. The fees include work the 1st respondent did for the 2nd applicant in the case that I recused myself. In the circumstances, the 1st respondent's perception of predisposition is a reasonable one. The test is an objective one. Having held that the 1st respondent's perception is reasonable I then upheld the application for recusal.

Lazarus & Sarif, applicant's legal practitioners

Gollop & Blank c/o Ben Baron & Partners, 1st respondent's legal practitioners