PECHI INVESTMENTS (PVT) LTD

VERSUS

MAURICE MUTATSI NYAMUDA
T/A EBUNANDINI RESTAURANT

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 25 OCTOBER 2010 AND 18 NOVEMBER 2010

Advocate Moyo for applicant
Respondent in person

Application for recusal

CHEDA J: This is an application for recusal. The main case deals with a request/prayer for eviction of respondent from a property known as stand 464 Bulawayo Township, Bulawayo which is situated at 123 George Silundika Street, Bulawayo and costs on an attorney and client scale.

Briefly, the background of this matter is that on the 17th September 2004 applicant entered into a lease agreement with respondent in respect of a lease of the above property for 11 months from 1 September 2004 to 31 July 2005 which was renewable until 31 July 2006 and thereafter respondent was to continue to lease the property on a monthly basis if he so wished. In January 2008 resolved to terminate the lease agreement and gave respondent 3 months notice which effectively was to terminate on the 30th of April 2008. However, further negotiations were made culminating in the parties mutually agreeing that Respondent vacates the property on the 30 September 2008. A memorandum to that effect was proposed and signed by both parties. However, respondent did not vacate the said property, a situation

which resulted in these proceedings. The reasons for such failure are an integral part of the main proceedings before this court.

The above referenced cases were supposed to be heard together as they involve the same issues and same parties as per this court's order of the 5th March 2009.

Applicant applied for a notice of set down which was granted and the matter was set down for hearing on the 12th October 2010. The notice of set down was served on respondent the same day. Upon receipt of the said notice of set down, respondent filed what he termed "Request for Postponement", which reads as follows:

> "**REQUEST FOR POSTPONEMENT**
>
> I refer to the above matter and to your notice of set down dated 12/10/10 which was received on the same day the 12/10/10 in the afternoon. Please note that the notice period given (3 days) is inadequate and inconsistent with the stipulated two weeks notice as per the rules of this Honourable Court.
>
> May I also advise that I need to engage an Advocate for this matter which is so complicated due to the number of points of law involved. As a result I propose that this matter be removed from the roll for the good of both parties.
>
> By copy of this letter the Honourable Judge who will preside over this case is respectfully advised not to bother to read the case, since we are not ready for the matter to be heard.
>
> DATED AT BULAWAYO THIS 14TH DAY OF OCTOBER 2010.
>
> (*SIGNED*)
> MCM NYAMUDA
> t/a Ebunandini Restaurant
> 123 G. Silundika Street
> BULAWAYO
>
> TO: THE REGISTRAR
> HIGH COURT OF ZIMBABWE
> BULAWAYO

AND TO: JOEL PINCUS, KONSON & WOLHUTER
215 YORK HOUSE
8TH AVENUE/H. CHITEPO STREET
BULAWAYO (ESE/PM/Is)"

Respondent did not attend the hearing on the 18th October 2010. Advocate *H. Moyo* for applicant applied for a default judgment on the basis that respondent should have appeared in court to seek postponement. While she was indeed entitled to apply for default judgment I did not grant it for the following reasons:

(1) the respondent is a layman and a self-actor,

(2) that the matter is very important to the parties, and

(3) that on many occasions such default judgments often result in applications for rescission, which applications can be avoided as they waste both the litigants and the courts' time.

Needless to say that Advocate *Moyo* was not happy with my decision. The postponement was granted and couched in the following terms:

"IT IS ORDERED THAT:
(1) the matter be and is hereby postponed to the 25th of October at 1415 hours.
(2) applicant must serve respondent with a notice of set down.
(3) in the vent that respondent is in default for whatever reasons the matter will proceed in his absence.
(4) no other postponement will be allowed by this court, and that
(5) costs will be costs in the cause."

On the day of the hearing, both parties were present. Respondent was however, not properly dressed, as he was putting on a short-sleeved shirt with neither tie nor jacket. I must remark here that respondent is a self-actor who has professionally drafted all his documents before the court and is fully conversant with the rules of this court as evidenced by the

presentation of his case. In addition, thereto, he has a very good command of English and seems to have mastered the relevant legal terms used in this court. In fact he is amongst very few self-actors who can articulate their cases so well.

Above all, he struck me as a very intelligent man indeed. One can not certainly take away that skill from him. Infact he is a rare self-actor.

For that reason I did not believe him when he stated that his failure to dress properly was due to his ignorance as he struck the court as a very educated man who was very familiar with the basic court procedure and court etiquette.

It is pertinent to note that when he appeared in court on the 25th October 2010, he did not bring his file with him. One of the terms of the order of the 18th October 2010 was that the matter was to proceed on the 25th October 2010 without fail. However, respondent, still appeared in court without his file or documents in readiness for hearing.

On the 25th October 2010 during the hearing, respondent interjected when applicant was making submissions. He applied for a postponement on two grounds that:

(1) he wanted to seek legal representation, and

(2) he had not had time to go through his papers as the notice of set down was handed to him on the evening of the 24th October 2010.

Advocate *Moyo* in response, contradicted him and sated that respondent was not being truthful to the court because service was effected by the instructing legal practitioner, Mr *Pineas Madzivire* who happened to have been present in court.

In order to clarify this issue I asked the legal practitioner, Mr *Pineas Madzivire* to take the witness stand and give evidence. His evidence was that on the 18th of October 2010, he proceeded to respondent's place of business and found one Sebastian Nyamuda (the Manager for respondent) who refused to accept service for and on behalf of respondent, his reason for refusal was that he was not authorised to receive documents for and on behalf of a third party. Mr *Madzivire* took the documents back to his office whereupon he was advised by the senior partner to go back and re-serve on whoever was present. He went back and again found Sebastian who for the second time refused to accept service. He then left the notice of set down on Sebastian's desk. It was also his evidence that while he was at respondent's offices he saw three other people sitting there and one of them he now recognized as the respondent. Respondent cross examined him but he stuck to his evidence. I found him to have been a truthful witness who had no reason to lie to the court.

After cross-examination, respondent also took the witness's stand. He stated that his failure to attend court on the 18th of October 2010 was because he was under the impression that his "Request for postponement" was enough to excuse him from attending court. With regards to service of the notice of set down for the 25th of October 2010 he stated that he was not present in the premises as he was in Harare and only arrived on the evening of the 24th of October 2010 when the hearing was on the 25th October 2010 at 1000hours. On Mr *Madzivire's* averments that he was in fact present he denied this and went further to state that Mr *Madzivire* must have seen his brother

When questioned as to why he did not bring his file or documents with him when he knew that the matter was set down for hearing on the 25th October 2010 he stated that he was of the view that the matter was going to be postponed as he wanted to seek legal representation. Although he told the court that Mr *Madzivire* must have seen his brother, he made no efforts to lead evidence from his brother to counter that assertion. His brother's evidence was in my opinion necessary as it could have helped the court to see whether or not they looked alike.

Advocate *Moyo* argued that the matter should proceed as respondent was aware of all the issues involved since he drafted all his papers and even filed his heads of arguments as far back as May 2009. She further argued that the time required for legal representation would have been adequate from the time he was served with a notice of hearing on the 12 October 2010 to date.

After hearing the evidence led in court I made the following findings:

(1) that respondent had been deliberately avoiding the hearing, hence, his non-attendance on the 18th of October 2010 thereby seeking a postponement by filing his notice of intention to do so but failing to come to court to apply for the said postponement.

(2) on this day he was vague when asked as for how long the postponement to seek legal advice should be. He had been equally vague with regards to the time he required to look for legal representation in his "Request for postponement" filed of record.

(3) He was casual in his dressing on the 25th of October 2010, when he was aware that he was coming to court.

(4) he was present when Mr *Madzivire* effected service on Sebastian on the 18th of October 2010.

(5) that he was not genuine when he stated that he wanted the matter postponed in order to seek legal advice as he had always been aware of the pending hearing but chose not to take any steps whatsoever in securing the said legal representation in the time. He failed to do so between the 18th and 25th October 2010 when he had the opportunity to do so.

Mr *Madzivire* is a legal practitioner and an officer of this court. He has no personal interest in this matter other than that of his client. He has no reason to lie that respondent was present when he was not because it was not a requirement to effect personal service anyway. Therefore, the mention of respondent's presence does not enhance the effect of service at all, but, was in my view mentioned to buttress the truthfulness of his averments and nothing else.

I find that respondent was an untruthful witness as it is clear to me that he has been trying to avoid this matter being heard. He lied that he was not present on the 18th of October 2010 yet Mr *Madzivire* saw him. It is Mr *Madzivire's* evidence that although he did not know him then and was seeing him for the first time, he is the same person whom he saw when he effected service on the 18th of October 2010. I found respondent not to have been a credible witness as far as this aspect of the case is concerned and I, therefore, reject his explanation in relation to his application for postponement.

As he had came to court without his file and/or documents, on the 25th October 2010, I was of the view that he should be given a second chance to read and bring his documents the following day, that is, 26th October 2010and possibly seek legal representation. I, therefore, again exercised my discretion and postponed the matter to the 26th October 2010 to which he agreed to.

On the 26th of October 2010 the parties appeared and this time he was properly dressed, but, again he had no file or documents and sought a further postponement on the following grounds:

(1) that since I had made a finding that he was not truthful in his evidence with regards to Mr *Madzivire*'s attendance at his premises on the 18th October 2010 he was of the opinion that I was going to be biased against him in the event that I heard this case on the merits, and

(2) that he still wanted legal representation in the person of an Advocate.

I will deal with the issue of legal representation first. A litigant has a legal right to instruct a legal practitioner of his choice at his own expense. This is his constitutional right. Respondent as a self-actor has always been aware that all pleadings have been closed and as such is fully aware of the disputed facts and issues involved, hence the contents of his heads of arguments filed of record. It is trite that a litigant should be allowed to exercise his right to legal representation, but, my view is that this right should not be used to frustrate a legitimate due process.

These courts have time without number emphasized that litigation must come to an end at some point. In my view a postponement of a case should be done when the applicant for such postponement has a just cause for doing so, not merely to use it as a matter of course. After all a legal right can never be absolute but is subject to the convenience and rights enjoyed by others. Asked why he had not instructed a lawyer to date or at least from the 18th of October 2010 when he first indicated that he wanted to instruct an Advocate, his response was that he presently had no money and also that he required at least two months to do so. This type of attitude towards litigation is not acceptable, particularly when he admitted that he has been using this property to conduct his restaurant business from October 2008 to date without paying rentals even token rentals for that matter. In as much as a postponement can be granted to allow legal representation, such postponement should not be granted were it is clear that it is designed to postpone the day of reckoning. It is under those circumstances that further postponement should not be granted.

His second point is that the matter should be postponed in order to allow another judge to preside over his case. His reason is that since I had already found that he was not truthful when he told the court that he was not present on the 18th of October 2010 when service of the notice of set down was effected, it means that I am already biased against him as I have made a character classification of him.

Our law allows recusal where the judicial officer has a bias which interferes with his impartiality. The reason for this approach is to provide a safe escape or exit for those judicial

officers who find themselves in situations where the conclusion of the existence of bias is inescapable. This is based on purity of motive in the performance of judicial work.

A test of judicial bias was laid down in *Slade v The Pretoria Rent Board* 1943 TPD 246 where it was stated that the test of judicial bias is not whether there has been actual bias, but whether there is a real likelihood of bias, or whether a reasonable man in all the circumstances might suppose that there was an improper interference with the course of justice.

In *S v De vries* 1964 (2) SA 110 it was held that disqualification arises whenever the judge's or magistrates' relation to the parties is such, or his interest in the case is such or his knowledge of the facts of the case or of the antecedents of the parties is such would tend to bias his mind at the trial. Further in *Head and Fortuin v Woolaston, N.O and De Villiers N. O* 1926 TPD 549, at 558 STRATFORD J stated:

> "I agree that possibility of bias and not actual bias is all that the plaintiffs have to prove, but they must prove facts from which the possibility can be inferred".

It is now settled law that the allegation of bias must be proved see *Masedza and others v Magistrate Rusape and Another* 1998 (1) ZLR 36 (11C) referred to in *Matapo v magistrate Bhila and Attorney General* HH 84/10 (not yet reported).

This principle was also illuminated in *Yoffe v Koppies District Licensing Board* 1948 (3) SA 748 at 752 where Van Den Heever J. P stated:

> "Obviously the facts from which that possibility may be inferred must be special to the particular case not a general consideration on the ground of which vaguely bias be conjectured."

> In casu respondent objects to the present court continuing with hearing the parties on the merit. The fact of the matter is that the court's finding was based on *viva voce* evidence where the demeanour of the witnesses came into sharp focus. Whereas the

next stage of the case relates to the merits. In my view as the decision will be based on papers filed of record and not oral evidence the court is not disqualified to hear the main arguments. As the authorities have already made it clear that, the test is the reasonable likelihood of bias and not mere conjecture.

A judicial officer's training leaves him reasonably equipped to keep an open mind throughout the adjudication of a matter before him at the sametime being guided by the judicial oath of office of dispensing justice without fear or favour, affection or ill will. In *R v T* 1953 (2) SA 479 at 482 E-H CENTILIVRES, C. J. had this to say: "Thus there is nothing to prevent a Judge, who has refused provisional sentence on the ground that the probabilities as disclosed in affidavits are in favour of the defendant, from hearing the principal case, nor is there anything to prevent a Judge who has granted absolution from the instance from sitting in a further case between the same parties where the facts alleged are the same as those alleged in the previous case. --- it is sufficient to say that there is no rule in South Africa which lays down that a Judge in cases other than appeals from his judgments is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case. There would be as little justification for such a rule as for a rule which laid down that a Judge who in a judgment expressed his opinion as to the correct interpretation of an Act of Parliament could not sit in a subsequent case between different parties where the same question of interpretation was involved." (my emphasis)

It is now settled law therefore that the test for bias is the reasonableness of a litigant. In the case of *Silwana and Another v Mnagithate*, *District of Piketberg*, *and Another* 2003 (5) SA at 603 – 604 quoted with approval in Matapa's case (supra) FOXCROFT, J. ably stated:

"In decisions in recent years Judges have been reminded that one should not be unduly sensitive about applications for recusal. As Howie, J. A. (as he then was) said in *S V Roberts* 1999 (4) SA 915 (SCA) (1999(2) SACR 243), ------ and also the remarks in *S v Malindi and Others* 1990 (1) SA 962 (A) at 969 G where CORBETT, C. J. said that:

"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 African Motor Acceptance Corporation (Edams) 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." (my emphasis)

In the case of *South African Commercial Catering & Allied Workers Union & Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC), at p 714 to 715 the South African Consitutional court per CAMEROON, A.J.A. dealing with the concept of apprehension of bias stated:

"The court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in S v Roberts, 23 decided shortly after Sarfu, where the Supreme Court required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. It is no doubt possible to compact the 'double' aspect of reasonableness in as much as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As CORY, J. stated in a related context on behalf of the Supreme Court of Canada:

> 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'

"The 'double' unreasonableness requirement also highlights the fact that mere apprehension on the part of a litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudicating this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law."

The court called on judicial officers to perform a delicate balancing act, that of making a finding of the existence of reasonableness in the apprehension of bias against a surprise approach but judicial officers at the mere mention of the word bias. In the test case of *Take and Sure Trading CC and Other v Standard Bank* if SA Ltd 2004 (4) SA 1 Harms HA observed that:

"Everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator. This common-law right is now constitutionally entrenched. Present a reasonable apprehension of bias, the judicial officer is duty bound to recuse him or herself. The law in this regard is clear, having been the subject of recent judgments of both his court and the constitutional court, and does not require any restatement. It is nevertheless convenient for present purposes to quote the following extracts from a constitutional court judgment for purposes of emphasis and because they are particularly germane to this case.

The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.

At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

That is one side of the coin. The other is this:

> A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.
> The same applies to civil proceedings: a judge is not simply a 'silent umpire'. A judge is not a mere umpire to answer the question "how's that?" LORD DENNING once said:
>
> 'Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence.'

A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (and more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then

> unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of mandate does not, contrary to popular belief, entitle a party to a postponement as of right.
> A balancing act by the judicial officer is required because there is a thin divided line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration."

The emphasis is on the need for judicial officers to adopt a robust approach. The courts should therefore, where bias is alleged bear in mind the possibility of lack of bona fides on the part of the applicant. Above all it should be borne in mind that applicant bears a weighty onus in proving not only his reasonableness but that of his apprehension.

In Zimbabwe the correct legal position is that highlighted in *Matopo and Others v Magistrate Bhili and Attorney General* HH 84/10 at p 7 (not yet reported) UCHENA J stated:

> "The need for firm control of proceedings is called for as a supine approach will result in avoidable backlogs. The need for efficient court management by judicial officers must however give in to the delivery of quality justice, which must be seen to be done. In short a judicial officer must be firm and fair, allowing genuine applications for postponement, and turning down those made for dilatory purposes."

In casu the question which falls for determination is whether or not respondent's apprehension of bias on the part of the court is reasonable and whether or not respondent himself is reasonable. Respondent has been a self-actor through-out the litigation process. As pointed out above he is one of the few self actors who articulates themselves very well. In that regard, I find that he was not reasonable in apprehending bias as he understands the legal principles and also that despite all his flimsy excuses, I had been bending backwards to accommodate him in the circumstances where I should possibly not have. As of the 5th May

2009 he had been aware that the day of hearing was nigh, but, on the 18th, 25th and 26th of October 2010 has been throwing all tricks in order to avoid the matter being heard. This is born out of by the following facts;

(1) his failure to appear in order to apply for a postponement on the 18th October 2010.

(2) his assertion that he only became aware of the hearing on the 24th October 2010 though this does not help him much as he had already filed his heads of arguments as way back as the 5th May 2009.

(3) his appearance in court on the 25th and 26th October 2010 without his file or documents on the anticipation that his request for postponement would be acceded to.

I also hold the view that bearing in mind that the court has not even looked at the merits of the case, therefore, his apprehension is also unreasonable.

It is clear from the authorities that the double requirement approach places a heavy burden on the part of the litigant who alleges bias. In my mind respondent has dismally failed to pass this tough test which for all intents and purposes is designed to curb abuse of such a noble principle.

This to me, is an abuse of the legal system. In my mind, the fact that the court pointed out these ills based on facts in an interlocutory application of this nature does not and will not influence the court in hearing submissions on the merits of this matter.

I come to this conclusion bearing in mind the need for good case management, fairness and the need to curb the unnecessary increase of backlogs in our courts, see *Matopo v Magistrate Bhili*

and Attorney General (supra). I further make this conclusion with full knowledge that justice should not only be done but be seen to be done at all times.

Advocate *Moyo* also submitted that in the event that a postponement is granted, respondent should be placed on terms, with regards to a date of hearing, payment of costs on a higher scale and that respondent should not be heard before settling the said costs.

As set out above, on two occasions, the court has bent backwards to allow respondent to appear in court so as to present his case but all those efforts have been met with one flimsy excuse after another, all, in my view, designed to avoid a hearing. I am, therefore, persuaded to accede to applicant's submissions through its legal representative that this matter should be heard without further ado.

The following order is therefore made, that:-

(1) this matter be and is hereby set down for hearing on 25th November 2010 at 1415 hours

(2) respondent be and is hereby ordered to pay wasted costs for the 18th, 25th and 26th October 2010 at attorney and client scale.

(3) respondent be and is hereby ordered to settle applicants costs before the hearing date failing which he should not be heard.

(4) that the matter shall proceed on the 25th November 2010 irrespective of whether or not respondent has secured a legal representative.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners