

THE STATE

Versus

MARTIN CHIPANDE

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Ndlovu and Mr Bazwi

HWANGE CIRCUIT COURT 6 OCTOBER 2020

Recusal *mero moto*

Mrs M. Cheda for the State

Mr. E. Mashindi, for the accused

DUBE-BANDAJ: The accused's trial was set-down for today, i.e. 6 October 2020. He is charged with the crime of murder. Before the accused could plead, I alerted the prosecution and the accused's defence counsel of my previous association with the now deceased person. I disclosed that I knew the now deceased during his lifetime, and I was in some instances his legal adviser. I raised the issue of my recusal with the parties. It is trite in this jurisdiction that a judicial officer may recuse himself or herself *mero motu*, i.e. without any prior application, and this happens in practice now and again.

But whenever it occurs, the judicial officer who raises recusal should cross the high threshold needed to satisfy the test for recusal. The application for recusal or where it is raised *mero motu* by a judicial officer, cannot be done in *vacuo* or on the judicial officer's predilections, preconceived, unreasonable personal views or ill-informed apprehensions. To do so would be to cast the administration of justice in anarchy where judicial officers would be at liberty to make choices of which cases to preside over and which not/or applicants to go on a judge forum shopping hoping to get the one who might be favourable to their cases. Judicial officers have a duty to sit in any case in which they are not obliged to recuse themselves. See *Sikunda v Government of the Republic of Namibia* (1) 2001 NR 67 HC at 83I-J; *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008(2) NR 753 SC at 769H-770A. *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725) at 173; *S v Malindi and others* supra at 969 G-I.

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 for a recusal. The test for recusal has been stated and restated in this jurisdiction and elsewhere and that test 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.' The test is objective. See *President of the Republic of South Africa and other v South African Rugby Football Union and other, supra at 177D-G*.

It is now settled law that in certain circumstances 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 likelihood of bias on the part of the judicial officer, that is, that he will not adjudicate impartially. Again, 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 that continuing to preside over a matter after recusal should have occurred renders the further "proceeding" a nullity. See *Albert Matapo and Silas Sarezi Shonhiwa and Philip Chivhurunge and Ruperts Chimanga And Lucky Mhungu and Bigknows Wairesi versus Magistrate Bhila and The Attorney General* HH 84/10.

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 (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. See *Albert Matapo and Silas Sarezi Shonhiwa and Philip Chivhurunge and Ruperts Chimanga And Lucky Mhungu and Bigknows Wairesi versus Magistrate Bhila and The Attorney General (supra)*.

After all in considering the issue of recusal, the judicial officer should always take into account the circumstances of the case and above all ascertain what impression they would create upon a reasonable citizen and in the eyes of the public, In short any condition of things which, reasonably regarded, is liable to destroy his impartiality should disqualify him. See *Head and Fourtuin v Woolaston N.O and De Villiers, N. O* 1926 TPD 549; *Sladie v The Pretoria Rent Board* 1943 TPD246.

I requested both the State Counsel and Defence Counsel to make submissions on the recusal issue I had raised, they all agreed that in the circumstances I should recuse myself from this trial. The fact that I was known to the now deceased during his life time, and that in some instances I acted as his legal adviser, creates a reasonable basis for recusal. A reasonable, objective and an informed person armed with these facts, is likely to conclude that the judge would not bring an impartial mind to bear on the adjudication of the case.

In the result, I recuse myself from the murder trial of Martin Chipande.

National Prosecuting Authority, state's legal practitioners
Mashindi & Associates, accused's legal practitioners