OLGA MUKWINDIDZA
versus
MUHAMMAD AKRAM
and
MAGISTRATE B PABWE N.O (MAINTENANCE COURT)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 June 2020 & 28 August 2020

Opposed Application

J Mafume, for the applicant
R Mahuni., for the respondent

MANGOTA J: On 3 June 2019 I reviewed the maintenance order which the second respondent issued. I reviewed it in favour of the applicant.

On 5 June, 2019 the first respondent appealed my decision. He did so under SC 316/19.

On 31 October, 2019 the applicant applied for leave to execute pending appeal. Her view was that the appeal of the first respondent was frivolous, vexatious and lacked merit.

The application for leave to execute was allocated to me. I instructed the registrar to serve notices of set down of the application on the parties. The registrar, through the sheriff, served notices of set down of the application on the parties.

On receipt of the notice of set down, the first respondent's legal practitioners wrote a letter to the legal practitioners of the applicant. They copied the same to the registrar of this court. The letter reads, in the relevant part, as follows:

> "It appears from the notice of set down that the matter is scheduled for hearing before Justice Mangota, the same judge who adjudicated on the matter now subject of appeal. In that regard we wish to advise you that we have been instructed by our client to seek the recusal of the Honourable Justice Mangota from dealing with the present matter."

The registrar referred the letter of the first respondent to me for my information. I returned the record of the parties' case to the registrar for allocation to another judge. On consultation with colleague judges, it became apparent to me that a request for recusal is not made through a letter which the first respondent addressed to the legal practitioners of the applicant and copied to the High Court registrar. I became alive to the fact that a party who seeks my recusal must make a formal application giving reasons for the same.

It is in the stated set of circumstances that I recalled the file from registry and proceeded to re-set the application down for hearing.

When the second notice of set down was served upon the first respondent, his legal practitioner wrote to the High Court Registrar. He did so on 15 June, 2020. He stated, in the same, that he was surprised that the application had been re-set down before me. He requested the registrar to place his letter which he copied to the legal practitioners of the applicant before me for what he termed further directions.

On the set down date, the legal practitioner of the first respondent made two oral applications. He applied for:

(i) my recusal from hearing the application for execution pending appeal – and

(ii) upliftment of the bar which became operative against him when the first respondent failed to file his Heads within the time which the rules of court prescribed.

I heard the first application. I delivered an *ex tempore* judgment in terms of which I dismissed it with costs. I heard the second application and reserved judgment.

I dismissed the recusal application which was based on the first respondent's feelings. His view, as gleaned from the submissions of his legal practitioners, was that, because I decided the application for review in favour of the applicant which decision he appealed I would not deal with the application for execution pending appeal in a fair manner. He submitted that the first respondent's preference was that the application for execution pending appeal be heard by another judge. He stated that, if another judge were to hear the application, the first respondent would feel that justice had not been tempered with.

I refused to entertain the application which the first respondent anchored on his feelings. I agreed with the submissions of the applicant's legal practitioners who stated, in opposition to the application, that the first respondent should have filed a written application stating his reasons for recusal clearly, cogently and concisely. He insisted, correctly so, that an application which is premised on the feelings of a litigant for a case which is before the court would create insurmountable challenges for the court and the other party.

The above-stated position is a *fortiori* where, as in *casu,* the legal practitioner of the first respondent dissociated himself from the views of his client. He submitted that he advised the first respondent that a judicial officer is a trained lawyer who appreciated the difference of matters which parties place before him. He submitted further, that his view was that I would not be biased against the first respondent who, contrary to his advice, continued to entertain the view that he would not have a fair hearing if I proceeded to hear the application for leave to execute pending appeal.

The first respondent placed his legal practitioner into an invidious position. He allowed him to be torn between his duty to the court and his duty to his client. The advice which he received from his legal practitioner should have put his mind to rest. He should have realised that if I exhibited any form of bias as his unfounded fears suggest, many options were open to him to pursue in an effort to challenge and correct the same. His unfounded apprehension did not warrant my recusal from hearing the application which the applicant and him placed before me. His apprehension can, for lack of a better phrase, be likened to that of a person who runs away from his own shadow which he sees as a monster which is ready to tear him to pieces when it is not such and, even if it is, it has no capacity to devour him at all.

I agreed with the submissions of counsel for the applicant who stated that if the approach of the first respondent to maintenance matters, one being the application which the parties placed before me, were to prevail, the magistrates' court and the children's court would not be functional. He submitted, correctly so, that maintenance matters routinely come before the same magistrates in one form or the other amongst which are such applications as are for maintenance, variation and/or discharge of the same. He insisted that for the first respondent to simply allege that the judge who reviewed the order of the magistrate in favour of the applicant would be biased against him when he hears the application for execution pending appeal is not far from setting the standard of bias far too low. He cited two branches of this court where two judges sit in Masvingo and Mutare. He submitted, in my view correctly, that the same judges would hear the parties who appeared before them over and over again. He insisted that the approach which the fist respondent took in *casu* would make justice delivery impossible at court stations which are manned by two or three judges of this court. He stated that a party would simply tell the judge that "I appeared before you before and I have a reasonable fear of bias on your part" as a result of which the court would come to a standstill position where such an eventuality occurred.

I am indebted to the applicant who furnished me the case of *Pechi Investments (Pvt) Ltd* v *Maurice Mutatsi Nyamunda*, HB 142/10. The case discuses what the applicant in an application for recusal must establish to succeed on the same. It states at p 10 of the cyclostyled judgment that:

> "A test of judicial bias was laid down in *Black* v *Pretoria Rent Board 1943* (P) 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 <u>whether a reasonable man</u> in all the circumstances <u>might suppose that there was an improper</u> interference with the course of justice" (Emphasis added)

It is pertinent to note, from a reading of decided case authorities in which recusal was /is discussed that to succeed, the applicant in a recusal application must show, on an objective test, that the judicial officer should recuse himself. He must, in short, proffer clear and cogent reasons which satisfies a reasonable litigant or any reasonable man of the level of thinking of the reasonable litigant that the judge must recuse himself. He fails to prove the requirements for recusal where, as in *casu*, his application is premised on feelings or subjective views which are, if anything, difficult, if not impossible, to prove.

The test for bias is the reasonableness of the litigant. In *Sitwana and Another* v *Mnagithate, District of Picketber and Another* 2003 (5) SA @ 603 – 604 FOXCROFT J ably stated 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* 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."

It follows from the foregoing that not only must the person apprehending bias be a reasonable person, but the apprehension itself must, in the circumstances, be reasonable. The first respondent did not directly impute any bias on my part. Nor was he able to show that I have an interest in the case of the applicant and him. All what he stated is that I reviewed their case in the past and decided for the applicant. That *per se* does not point to any bias on my part. It does not do so from an objective assessment of the first respondent's statement.

The first respondent's subjective view does not qualify to show that he established the requirements for my recusal. It is for the mentioned reason, if for no other, that I remained constrained to agree with his application for my recusal.

The record shows that the applicant served her Heads on the first respondent on 4 February, 2020. It shows, further, that the first respondent filed his Heads outside the *dies induciae*. He should have filed them on 18 February, 2020. He filed them on 3 March, 2020 when the bar which is stated in the rules of court had become operative against him.

The late filing of Heads prompted the first respondent to file his second application. He applied for upliftment of the bar. He submitted, through counsel, that when he received the applicant's Heads the applicant and him were involved in two applications. These, according to him, were the application:

(a) for execution pending appeal – and

(b) to compel the Sheriff to sell the applicant's immovable property.

Counsel for him submitted that he misfiled the applicant's Heads. He stated that, when the error which he made came to his knowledge, he filed his client's Heads well before the five (5) day period which is stipulated in the proviso to para (b) of subr (2) of r 238 of the High Court Rules, 1971.

The submissions of the applicant on the issue of the bar were to the contrary. She maintained the view that the first respondent was barred and was, therefore, not before the court until he successfully dealt with the issue of the bar. She insisted that the proviso upon which the first respondent placed reliance did not suspend the ten-day period which is stipulated in the rules in terms of which the respondent should have filed its Heads. The proviso, according to her understanding, would only apply where the ten-day period during which the respondent's Heads should have been filed overlaps with the set down date.

The position which the first respondent took on this aspect of the case created an unpalatable situation for him. He was, on the one hand, asserting that he did not file his Heads within the *dies induciae* and the same were, therefore, not before me. He was, on the other hand, stating that, because he filed his Heads five – days before the date of the hearing of the application, his Heads were, in terms of the proviso, properly before me. He, in short, was approbating and reprobating.

I drew counsel's attention to the fact that he was blowing both hot and cold. I made him to understand that he was stating in one and the same breadth that the first respondent's Heads were properly and improperly filed. I invited him to make a choice between applying for upliftment of the bar and standing by the proviso. He abandoned his application for upliftment of the bar. He submitted that the Heads which he filed five-days before the date of the hearing of the application were properly before me. He insisted that the proviso in terms of which he filed them adequately covered the situation of the first respondent.

The above-stated matter prompted me to reserve judgment on the mentioned aspect of the case. I decided to write a judgment which would clear the misunderstanding which the first respondent appeared to be suffering from. The judgment, in my respectful view, would be of immense benefit not only to the first respondent but also to any respondent who may be tempted to follow his line of thinking in future especially in so far as the filing of Heads by a party, the respondent in particular, is concerned.

The proviso which is mentioned in para (ii) of subr (2a) of rule 238 of the rules of court must be placed into context. The context is that the proviso is only but an exception to the general rule. It cannot, therefore, operate as the general rule.

It stands to reason that where both the applicant and the respondent are legally represented, Heads for each party must be filed with the registrar of this court. The applicant, for instance, cannot set the application down for hearing unless and until he:

(a) files the applicant's Heads with the registrar– and
(b) delivers a copy of the applicant's Heads to the respondent – and
(c) files with the registrar proof of such delivery of the applicant's Heads to the respondent.

Subrule (2) of r 238 of the High Court Rules, 1971 places a duty on the legal practitioner of the respondent who has been served with the applicant's Heads to file with the High Court registrar the respondent's Heads of Argument. These, in terms of subr (2a) of r 238 of the rules of court, should be filed not more than ten days after the applicant's Heads were delivered to the respondent. Where the respondent fails to file his Heads within the *dies induciae* of ten days of his receipt of the applicant's Heads, the respondent shall, in terms of subr (2b) of r 238, be barred and, where the bar remains operative, the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll.

Subrule (2a) of r 238 of the High Court Rules, 1971 is the principal rule. It obligates a legally represented respondent to file his Heads within ten days of his receipt of the applicant's Heads. The principal rule and the proviso are reconciled by practice. The question which begs the answer relates to the circumstances under which the proviso – the exception to the main rule – becomes operational.

In the olden days where courts were less congested, matters could be fast-tracked. In such circumstances, the respondent would find himself without ten days in respect of which he would file his Heads. Under the stated set of circumstances, the respondent was offered a leeway to file his Heads at least five days before the date of hearing of the application.

The case of *Vera* v *Imperial Asset Management* 2006 (1) ZLR 436 (H) offers clarity to the meaning and import of the proviso. It reads, in the relevant part, as follows:

> "The operative part of the rule is not to be found in the proviso. It is in the main provision. It is to the effect that the respondent is to file his or her Heads within ten days of being served with the applicant's Heads. That is the immutable rule. However, in the event that the respondent has been served with the applicant's Heads close to the set down date, he or she shall not have the benefit of the full ten – day period within which to file and serve Heads as stipulated in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule."

The reasoning of the court in *Vera* v *Imperial Asset Management* was followed closely in *Assistant Master & Anor* v *Ellington Trading (Pvt) Ltd*, 2013 (1) ZLR 332 (H) where MUTEMA J held that:

> "the respondent is to file his Heads within ten – days of being served with the applicant's Heads. If the respondent has been served with the applicant's Heads close to the set down date, he shall not have the benefit of the full ten day period within which to file and serve his Heads but he must do so five clear days before the set down date."

The applicant and the first respondent were, and are, legally represented in the main matter. The application for leave to execute pending appeal was initially set down for hearing at 10 am of 2 June, 2020. The first respondent received the applicant's Heads on 4 February, 2020. He, therefore, had all the time in the world to file his Heads within the *dies induciae* which is stipulated in subr (2a) of r 238 of the rules of court. He, in effect, should have filed his Heads on

18 February, 2020. He did not do so and the bar which is mentioned in subr (2b) of rule 238 became operative as against him with effect from 19 February, 2020 to date. His case falls outside the proviso upon which he places reliance. He was not served with the applicant's Heads close to the set down date. He received the applicant's Heads some four months before the set down date. The proviso is, therefore, not available to him.

The first respondent's decision to abandon his application for upliftment of the bar dealt him a severe blow. His Heads are not before me and the bar remains operative against him. He, in the stated set of circumstances, made up his mind to, as it were, hand judgment to the applicant on a silver platter. He did not, in short, oppose the application to execute pending appeal.

The applicant, in the circumstances of the present case, proved her case on a balance of probabilities. The application is, in the result, granted as prayed in the draft order.

Mafume Law Chambers, applicant's legal practitioners
Mahuni, Gidiri Law Chambers, 1st respondent's legal practitioners