CHARLTON HWENDE HC 5703/20
and
PROSPER CHAPFIWA MUTSEYAMI
and
TAHABITA KHUMALO
versus
THE SPEAKER OF THE NATIONAL ASSEMBLY
and
PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
and
DOUGLAS TOGARASEI MWONZORA
and
THOKOZANI KHUPE
and
MOVEMENT FOR DEMOCRATIC CHANGE-TSVANGIRAI (MDC-T)

LILIAN TIMVOUS HC 5704/20
versus
THE SPEAKER OF THE NATIONAL ASSEMBLY
and
PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
and
DOUGLAS TOGARASEI MWONZORA
and
THOKOZANI KHUPE
and
MOVEMENT FOR DEMOCRATIC CHANGE-TSVANGIRAI (MDC-T)

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 8 October 2020

Opposed Application

HC 2351/20
T. Biti, for the applicants
A. Demo, for the 1st & 2nd respondents

S. Chatsanga, for the 3rd & 5th respondents
L. Madhuku, for the 4th respondent

HC 2352/20
A Muchadehama, for the applicant
A. Demo, for the 1st & 2nd respondents
S. Chatsanga, for the 3rd & 5th respondents
L. Madhuku, for the 4th respondent

KWENDA J: The applicants applied for my recusal from presiding in case Nos HC2351/20 and HC 2352/20. I consolidated the applications for recusal with the consent of the parties because they raise identical issues. All the applicants were expelled from Parliament on 5 May 2019 in terms of s 129 (1) (k) of the Constitution of Zimbabwe (Amendment No 20) Act 2013. Their expulsion was at the behest of the 5th respondent which issued a declaration advising Parliament that the applicants were its representatives in Parliament who had ceased to be its members. The declaration is said to have been masterminded by 3rd and 4th respondents. The applicants have challenged their expulsion in this court under case no HC 2351/20 and HC 2352/20 (herein after referred to as the main applications). In the main applications they seek orders setting aside the declaration made by the 5th respondent on 3 April 2020 and their subsequent expulsion from Parliament as aforementioned plus costs against the respondents jointly and severally.

The main applications were opposed by the respondents and set down for argument before me on 8 September 2020. On 2 September 2020 the applicants addressed similarly worded letters to the Judge President imploring him to remove me from presiding in their matters. The letters were copied to all concerned including my office. They were worded as follows: -

> "1. We refer to the above matter which has been set down for hearing before Justice Kwenda on 8 September 2020.
> 2. As you are well aware, Justice Kwenda has already pronounced an excessive judgment, in a similar matter by parties relate to our client.

> 3. He enclosed herewith a copy of the judgment in *the matter between Bacilia Majaya & Ors* v *MDC* T *& Ors and Gideon Shoko & Others* v *MDCT & Ors* HH 526/10.
> 4. A careful perusal of Justice Kwenda's judgment clearly indicates that his judgment, has already disposed of the issues raised and client's application.
> 5. We consider that it is in the best interest of justice, that another judge, other than Justice Kwenda hears our client's matter.
> 6……"

Undoubtedly the applicants had adopted a wrong procedure to remove me from their cases. Their conduct could easily be mistaken for forum shopping because the decision to recuse oneself from a case is left to the judge seized with the matter as a judicial function. The Judge President does not consult litigants before allocating a matter to a judge or a panel of judges and parties should not have any input in keeping with the spirit of the right to fair adjudication of disputes by an independent and impartial tribunal as enshrined in s 69 (2) of the Constitution of Zimbabwe (Amendment No 20) Act 2013. Once a matter is allocated, the Judge President does not get involved further in the interests of observing the independence of the individual judge unless an administrative issue arises. In this matter, the Judge President gave the necessary guidance to the applicants to address their concerns to me.

On 8 September 2020, the parties' counsel requested me to recuse myself on the basis of the letter they had addressed to the Judge President and copied to me and the respondents. I directed them to make their application in writing. I issued an order postponing the main matters and giving directions on the timeframes to file papers in the application for recusal. I made the following order: -

> "It is ordered by consent that:
> 1. The main matter be and is hereby postponed *sine die*.
> 2. The applicant shall file their application for recusal 11 September 2020.
> 3. The respondents shall have up to 16 September 2020 to file opposing papers.
> 4. The applicants shall file heads of argument by 18 September 2020.
> 5. The respondents shall if they oppose the application, file heads of argument by 23 September 2020.
> 6. Any party failing to meet the deadlines shall be barred.
> 7. The Registrar shall, if ordered to do so by the Judge set the matter for oral argument in liaison with the parties' legal practitioners.
> 8. The Judge, may at his discretion decide the application on the papers.
> 9. There shall be no order as to costs."

On 11 September 2020 the applicants filed separate bundles of documents headed 'Application for recusal.' The applicants did not follow any of the various mandatory procedures of written applications set out in Order 32 of the High Court Rules, 1971 as amended. The applications were neither on Form 29 nor 29B.

> **"ORDER 32**
> APPLICATION PROCEDURE
> [Order substituted by S.I. 43 of 1992]]
> A. PRELIMINARY
> ***226. Nature of applications***
> (1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—
> (*a*) as a court application, that is to say, in writing to the court on notice to all interested parties; or
> (*b*) as a chamber application, that is to say, in writing to a judge.
> (2) …………………
>
> B. GENERAL PROVISIONS FOR ALL APPLICATIONS
> ***227. Written applications, notices and affidavits***
> (1) Every written application, notice of opposition and supporting and answering affidavit shall—
> (*a*) be legibly written on A4 size paper on one side only; and
> (*b*) be divided into paragraphs numbered consecutively, each paragraph containing, wherever possible, a separate allegation; and
> (*c*) have each page, including every annexure and affidavit, numbered consecutively, the page numbers, in the case of documents filed after the first set, following consecutively from the last page number of the previous set, allowance being made for the page numbers of the proof of service filed for the previous set.
> (2) Every written application and notice of opposition shall—
> (*a*) state the title of the matter and a description of the document concerned; and
> (*b*) be signed by the applicant or respondent, as the case may be, or by his legal practitioner; and
> (*c*) give an address for service which shall be within a radius of five kilometres from the registry in which the document is filed; and
> (*d*) where it comprises more than five pages, contain an index clearly describing each document included and showing the page number or numbers at which each such document is to be found.
> (3) Every written application shall contain a draft of the order sought.
> (4) An affidavit filed with a written application—
> (*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and
> (*b*) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents.
> (5) Where by any law a certificate or other document is required to be attached to or filed with any application, it shall be sufficient to attach or file a photocopy or other facsimile of the certificate or document:
> Provided that, if required to do so by the court or a judge at the hearing, the party concerned shall produce the original certificate or document.

[Subrule inserted by s.i. 192 of 1997]

"C. COURT APPLICATIONS
230. Form of court application
A court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies.

………………."

I have underlined some of the mandatory provisions of the Court application procedure. The applicants neglected to comply in all material respects. What is before me is definitely not an oral application. Rule 226 (1) clearly states that any application, for whatever purpose, other than an oral application should comply with Order 32. The applications are not supported by affidavits. There are no draft orders The application by Tendai Biti Legal Practitioners was not signed by the legal practitioner who prepared it. Perhaps the applicants considered that it was not necessary to file the proper court application in the usual format because they had just reduced to writing what they would have submitted orally in Court. However, as can be seen from the rules quoted above, that is not permissible.

The first, second and fourth respondents followed suit. They also filed bunches of documents headed 'First and second respondents' response to the application for recusal." Such responses are not provided for in the rules. Rule 227 is also clear about the format of notices of opposition. Third and fifth respondents filed a proper joint 'Notice of Opposition' supported by an opposing affidavit. They pointed out that the applications were not founded on an affidavit. They however did not raise the point as an objection based on the non-compliance with rules. Instead they opposed the applications on the merits. The indifference shown by the applicants is inexcusable and should not be repeated. I could have easily struck off the application for noncompliance with the rules but I have no such prayer before me. I was therefore left at large to *mero motu* exercise my discretion to deal with the merits of the application since this is a matter of public interest. I invoked the powers granted to this court in terms of s 4 (c) of the High Court Rules

"4***C. Departures from rules and directions as to procedure***
The court or a judge may, in relation to any particular case before it or him, as the case may be—

(*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
(*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

The applicants in case No HC 2352/20 appear not to have filed heads of argument. If they did, then they neglected to ensure that the heads of argument reached me. When parties file papers intended for a court file already in the judge's chambers, they have an obligation to hand an issued copy to the judge's assistant. Only the judge's assistant has access to the judge's chambers. Contumacy arises from non-compliance with the court's directions and may result in a party's claim or defence being struck off. See *Supiya* v *Mutare District Council & Ors* 1985(2) ZLR 53 (HC)

The grounds put forward by the applicants for my recusal are stated as follows: -

"The Judge decided the key substantive issues raised by this matter in the case of *Bacilia Magaya & Ors and Gideon Shosho & Ors* v *MDC-T & Ors* HH 526-20.
More fully the key issues in the instant mater are the following:

(a) Whether the applicants were elected into Parliament as members of the MDC Alliance or as members of the MDC-T.
(b) Whether the applicants ceased to be members of the MDC-T in or around May of 2018.
(c) Whether the applicants can be recalled from parliament in terms of section 129 (1) (k) of the Constitution by any other party other than the MDC Alliance.
(d) Whether even assuming, that without conceding the point that the applicants could be expelled by the MDC-T whether the respondents compiled with all the requirements as set out in section 129 (1) (k).
(e) Whether the Supreme Court judgment in the matter of *Movement for Democratic Change* v *Ellias Mashavire & Others* SC 56/20 resolves the instant matter.

These are the very issues that were comprehensively and decisively determined by Justice Kwenda in judgment number HH 536-20.

For that reason, Justice Kwenda is in fact *now functus officio* on the issue that are before this court. He cannot sit as a court of appeal to review his own judgment.

Further and in any event, the applicants are entitled to equal protection and benefit of the law as codified and guaranteed in section 56 (1) of the Constitution of Zimbabwe.

Equal protection and benefit of the law and due process, requires that another judge, who has not pronounced judgment on the same issues or on substantively the same issues has and determined the instant application.

Moreover, and in any event, in the special circumstances of this case, it is not in the best interest of justice, that Justice Kwenda hears and determines the instant application.

Further and in any event, in terms of section 69 (2) of the Constitution of Zimbabwe, the applicants have a right to a fair trial in the determination of their civil rights and obligations, and it would not be a fair trial if a judge who has pronounced on the same matter or substantively on the same matters were to hear and determine this matter.

Further, in terms of principles of natural justice, justice must only be done but must be seen to be done.

Proceeding before Justice Kwenda in the instant matter will breach of the *nemo iudex in sua causa* rule.

Finally, furthermore it is not fair to have to put the esteemed Justice Kwenda in this position and the matter should never have been allocated to him in the first instance."

My recusal is opposed by all respondents. The grounds of opposition are generally that

(i) the application does not meet the requirements for recusal

(ii) the fact that a judge has dealt with a similar matter before does not, on its own, warrant recusal

(iii) the application implies that if the judge had granted the *Baulia Magaya, Gideon Shoko & Ors* in HH 526/20 the applicants would have been very happy for the judge to deal with their application

(iv) it is not correct that the judge is *functus officio*

(v) by reason of training, experience conscience and intellectual discipline judges administer justice without fear and favour

(vi) the applications by *Baulia Magaya & Gideon Shoko* were decided on a *prima facie* basis

(vii) the allocation of matters is the prerogative of the courts and parties have no right to choose which judge should hear their case

(viii) a judge may only recuse himself/herself if there is apprehension on reasonable grounds of bias, malice or personal interest

(ix) no reasonable person applying his or her mind to the averments could ever contemplate recusal

The parties agreed that I could dispose of the matter on the papers without hearing oral argument if so inclined. The parties submitted very detailed heads of argument which enable me to dispose of the matter on the papers as I hereby do.

Relying on s 69 (2) of the Constitution of Zimbabwe, the applicants submitted that it would not be fair for me to preside because I have answered the main questions paused by the instant application. I disagree.

> "69 **Right to a fair hearing**
> (1………….
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
> (3) …………"

The fact that I presided in the case of *Bacilia Majaya and Gideon Shoko & Ors* v *MDC-T & Ors* HH 526/20 does not make me impartial in future disputes of a similar nature. It is inappropriate to identify a decision of the High Court with the judge who presided. The fact that the High Court has already interpreted the law does not disqualify it from dealing with other cases where the same legal issue(s) arise or where its previous interpretation of the law finds application. If anything, the system of judicial precedent is predicated on the principal of *stare decis.* The Supreme court dealt with a hotly contested issue in the matter of *Zambezi Gas Zimbabwe (Pvt) Ltd. v N. R. Barber (Pvt) Ltd. & Another* (SC 3/20) per MALABA CJ [herein after called the *Zambezi Gas c*ase] summarised the issue and its disposal in the following terms-

> "This is an appeal against the decision of the High Court ("the court *a quo*") dismissing an urgent chamber application for an order declaring that the payment made to the first respondent in terms of a court order was a full and final settlement of the liability owed by the appellant.
>
> The appeal succeeds. The Court holds that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement

> Electronic Dollars (RTGS Dollars)) ("S.I. 33/19") expressly provides that assets and liabilities, including judgment debts, denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one-to-one rate.
>
> The order in terms of which the appellant was obliged to pay the judgment debt owed to the first respondent, denominated in United Stated dollars, was made before the effective date. The judgment debt and its evaluation fell within the ambit of the provisions of s 4(1)(d) of S.I. 33/19. The payment made by the appellant in fulfilment of the judgment debt is a full and final settlement of the liability owed by the appellant."

The judgment impacted on several pending matters arising from the contentious issue. It is not up to the litigants with cases still pending to demand to appear before a differently constituted panel of judges because the interpretation of the law by the judges who presided in the *Zambezi Gas c*ase is not favourable to their clients' case. If the parties are of the firm view that my interpretation of the law, as the presiding judge, in the *Bacilia Majaya-Gideon Shoko* case is incorrect, they are at liberty to argue their own interpretation. Judges and courts approach every new case with open minds. In the event that a judge or the court is not swayed by argument, the remedy is in an appeal.

The applicant also relied on the right to equal protection of the law as enrishned in s 56 (1) of the Constitution of Zimbabwe (Amendment No. 20) Act 2013 I do not see how protection of the right entails that a litigant can elect not to appear before a judge, request that a judge be removed from his/her case or that a judge must recuse himself /herself simply because the litigant does not agree with the judge's interpretation of the law in an earlier matter. The doctrine of equality or equal protection of the law entails or means that when a judge or a court is duly seized with the matter, the parties are within their rights to expect that the judge or the particular court will deal with the matter. Put differently the obligation of a judge/court to deal with all matters that come before him/her/it and that recuse himself/herself/itself where its impartiality is objectively compromised are sides of the same coin which apply with equal force. A judge will only be excused from dealing with the case when it becomes impractical for him/her to preside or when he/she recuses himself/herself. Equal treatment simply means that all persons must be accorded some right of access to the courts and to the same just and fair procedures of access.

Van der Walt v *Met Cash Trading Limited* 2002 (4) SA 317. Judicial Officers are duty bound by their judicial oath to hear the cases that come before them, subject to their duty to recuse themselves…Their duty to sit has been held to be equally as strong as their duty not to sit when disqualified…". See B D Crozier *Legal Ethics: A handbook for Zimbabwean Lawyers Legal Resources Foundation* at p 56 and the cases cited thereat. See also *ANZ (Pvt) Ltd & Anor* v *Diamond Insurance Co (Pvt) Ltd* 2001(1) ZLR 226 (H).

The first and second respondents provided some instances where judges have recused themselves.

They are;

- the judge is biased
- the judge is related to a party attorney or spouse of either party
- the judge is a party
- the judge is a material witness
- the judge acted in this case in question as an attorney for at least one of the parties or participated in some other capacity
- the judge prepared any legal instrument where validity or construction is in issue
- as appellate judge the judge previously dealt with the matter at a lower level
- The judge has a personal or financial interests in the outcome of the matter

It is however clear that the list cannot be exhaustive. Those are just examples in case law where it was considered desirable for the presiding judge to recuse himself or herself so that the litigants' right to a fair trial before an independent and impartial court is seen to be protected. In my view the judge must preside over all matters brought before him unless there is a sound basis recognisable at law to recuse himself/herself. The law is set out succinctly in the case of *President of the RSA* v *SA Rugby Football Union* 1999 (4) SA 147 (CC) at 177 B-E

> "The question is whether a reasonable, objective and informed person would on correct facts reasonably apprehend that the Judge has 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. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by Judges to administer justice without fear or favour, and their ability to carry out that 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 predispositions. They must take into account the fact that they have a duty to sit in every case where they are not obliged to recuse themselves. At the same time, it must never be forgotten that an in impartial judge a is a pre requisite for a fair trial and a judicial officer should not hesitate to recuse himself or herself 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."

A court/judge becomes *functus officio* when he/she has decided a dispute on the merits. See Herbstein & van Winsen *The Practice of the High Courts of South Africa* 5 ed, Vol 1 at pp 909 and 917 and the cases cited thereat.

At p 909

> "The Court has refused to allow a witness to be recalled where the issue of liability had already been decided, rendering the court *functus officio."*

and p 917

> "Once a court has made an order disposing of the matters in issue, the court becomes *functus officio* and may not make further orders not sought in the papers set out and defining the *lis* before the court, unless the parties agree otherwise."

The court only becomes *functus officio* with respect to a particular dispute. Similarly, the fact that the court was aware of pending matters does not disqualify or mean that the court will not be impartial if those pending matters come before it in future. Each case is treated on its own merits.

Actually as correctly pointed out by the first and second respondents the fact that I dealt with the urgent application in *Bacilia Majaya and Gideon Shoko* v *MDC-T and Ors* does not mean that I would be disqualified from dealing with the substantive dispute on the return day. See *Cummings* v *The State* HMA 17/18 *per* MAFUSIRE J.

I do not see the application or the relevance of the *nemo iudex in sua causa* rule to this matter. The applicants concede I have no interest in the cause or outcome.

In the result I am not persuaded that the applicants have shown that there is a sound basis for my recusal from this case.

The application is dismissed and costs will be in the cause.

HC 2351/20
Tendai Biti Law, applicants’ legal practitioners
Chihambakwe, Mutizwa & Partners, 1st & 2nd respondents’ legal practitioners
Mwonzora & Associates c/o *Chatsanga & Partners*, 3rd & 4th respondents’ legal practitioners
Madhuku & Associates, 4th respondent’s legal practitioners
HC2352/20

Mafume Law Chambers, applicant’s legal practitioners
Chihambakwe, Mutizwa & Partners, 1st & 2nd respondents’ legal practitioners
Mwonzora & Associates c/o *Chatsanga & Partners*, 3rd & 5th respondents’ legal practitioners
Madhuku & Associates, 4th respondents’ legal practitioners