JEROME OKEKE
and
SIMWAL INVESTMENTS (PVT) LTD
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 19 January, 3 March 2022 and 19 July 2023

**Opposed Court Application**

Mr *E Samukange*, for the applicant
Adv *E Mubaiwa*, for the first respondent
No appearance for the second respondent

**CHINAMORA J:**

**Factual background**

The applicant in this matter approached the court seeking an order of this court for an order to compel the respondent to transfer property situate at 585 Quinnington Township of Lot 1A Quinnington Township 8422 square metres, otherwise known as No 90 Crowhill Road, Borrowdale Harare (hereinafter referred to as "the property") to himself. The applicant also sought that, should the respondent fail to comply, the Sheriff or his lawful deputy be authorized by this court to sign the necessary documents to facilitate the transfer into the applicant's name. The background of the facts are as follows: Sometime in March of 2010, the respondent through its estate agents advertised the sale of the property in the local press. The applicant responded to the advertisement, and made arrangements to view the property and expressed interest in purchasing the property. What seems not in dispute is that, the applicant made an offer of US$110 000 to the respondent, who accepted the offer and set a condition that a commitment fee in the sum of US$5 000 be paid so that an agreement of sale could be drawn by the parties.

On the 30 March 2010, the applicant paid the US$5 000 commitment fee to express his interest in purchasing the property. It is this commitment fee that the respondent states that it was not made aware of. It also seems not in dispute that the applicant made a second offer of US$100 000 which was rejected by the respondent. An agreement of sale was then drawn and signed by both parties which stated that the purchase price was $110 000 and clarified the terms and conditions. In its opposing affidavit, the respondent avers that payment of the commitment fee was done in bad faith as that payment was not disclosed to it. The respondents further submitted that it had instructed its estate agents to not communicate further with the applicant since it intended to cancel the contract. The respondent contended that the applicant signed the agreement of sale after it had instructed its agents to terminate all negotiations with the applicant. Clause 3 of the agreement of sale stipulates that the applicant should pay an initial deposit of US$5 000.

When the parties appeared before me on 3 March 2022, the plaintiff requested that the matter be removed from the roll. The reason advanced was that there was a pending application under HC 870/22 for leave to amend the pleadings, and that the application was being opposed by the first respondent. In essence, the first amendment seeks to add a paragraph to the declaration to the effect that the purported cancellation of the agreement of sale is of no force and effect. The second amendment seeks to hold the first respondent to the terms of the agreement. Finally, in respect of the prayer, the plaintiff intends to add a paragraph introducing the relief of compelling the first respondent to sign all documents necessary to effect transfer of title to the plaintiff.

The last application was that I should recuse myself from this matter. The reason was that while I was still practicing as an advocate, Adv Hashiti (who previously acted for the applicant) had discussed this matter and, to that extend, I was compromised. The contention was that the discussion between me and Adv Hashiti exposed me to confidential information relating to the matter in dispute, thus making it desirable for me not to hear or deal with this matter. Adv *Mubaiwa* for the first respondent, opposed the applications, including the one seeking my recusal from the case. Let me deal with the recusal application first, since my decision might inform how the matter would proceed from now onwards. It was submitted that the applicant ought to have given prior notice of the intention to seek recusal. The test in an application for recusal is

settled. Before I examine the test, the starting point must necessarily be s 69 (2) of the Constitution of Zimbabwe, which provides as follows:

> "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."

This constitutional provision provides the basis for a recusal application, if there is fear that a judicial officer's impartiality might be compromised. 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, as follows:

> "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 11 HH 633-20 HC 5703/20 REF CASE HC 2351/20 HC 5704/20 REF CASE 2352/20 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." **[My own emphasis]**

The reason advanced by the applicant for his apprehension is that, Adv Hashiti discussed his matter with me and came into contact with confidential information which was in his brief to Adv Hashiti. In my view, the fear entertained by the applicant is reasonable. While I hold the view that every judge is capable of dealing with a matter impartially, a critical consideration in cases of recusal is the perception of bias and not actual proof of it. Certainly, if the matter is not decided in his favour, the applicant would be forgiven for feeling that confidential information which the judge had prior knowledge of, influenced the judicial decision-making process. In *Aubrey Cummings* v *The State* HMA 17-18, MAFUSIRE J recused himself a matter despite considering the reasons nebulous. The learned judge made the following instructive remarks:

> "This was meant to be a criminal appeal. It did not proceed. The appellant asked for my recusal. I obliged. The matter was removed from the roll. My Brother, MAWADZE J and I, felt it unprofitable to get embroiled in the merits of an application for recusal. But our decision in this regard should not be taken as having set a precedent. We avoided tussling with Counsel purely so that justice might be seen to be done. The reasons for seeking my recusal were nebulous".

I propose to adopt MAFUSIRE J's approach and accede to the request for recusal. Having previously worked in the same chamber of advocates as Adv *Hashiti*, I do not wish to create an unhealthy impression that I have an ulterior reason or motive for clinging onto this matter. Any judge of this court can deal with this. Again, I will borrow the words of MAFUSIRE J in the Cummings case, where he said:

> "I did not consider myself to be conflicted, or in any way incapacitated as to warrant my recusal, but that nonetheless, I did not want to be seen as wanting to cling onto the matter as if I had cultivated a special interest in it".

I have no interest in creating an unnecessary side show, and will therefore recuse myself. The decision I have come to on the issue of my recusal makes it unnecessary for me to decide on the application for amendment sought by the applicant, or to have any further involvement in this matter. The record will be returned for allocation to a different judge.

*Samukange Hungwe Attorneys*, applicant's legal practitioners
*Matizanadzo & Warhurst*, first respondent's legal practitioners