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**(1) MUTUMWA MAWERE (2) SMM HOLDINGS LIMITED (3) AFRICA RESOURCES LIMITED (4) AFRICA CONSTRUCTION LIMITED (5) TAP BUILDING PRODUCTS LIMITED (6) FRIENDS OF SHABANIE MASHAVA MINES TRUST**
**V**
**(1) TICHAONA MUPASIRI (2) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE (3) EDWIN MANIKAI**

**CONSTITUTIONAL COURT OF ZIMBABWE**
**MAKARAU JCC**
**HARARE: 25 FEBRUARY 2022 AND 3 & 9 MARCH 2022**

**IN CHAMBERS**

First applicant in person

First respondent in person

*O. Kondongwe,* for the second and third respondents



**MAKARAU JCC:** Under case no CCZ 10/2022, the applicants applied to intervene in certain ongoing proceedings brought by the first respondent against the second and third respondents. The essence of the order sought in these ongoing proceedings is a declaration that the second respondent failed to fulfil a constitutional obligation, the precise nature of which is yet to be determined. I shall hereafter refer to these ongoing proceedings as "the main matter".

The application for intervention was placed before me for determination. Before the hearing of the application, the applicants made an application for my recusal.

After hearing submissions from the parties and counsel, I dismissed the application for recusal with no order as to costs. I indicated that reasons for the order would follow in a written judgment. This is the written judgment.

The application for recusal was filed by the first applicant who alleged that he was bringing it in his own right and on behalf of the other applicants. He deposed to the founding and only affidavit in the matter.

In purporting to act on behalf of the other applicants, the first applicant relied on the authority that he had been granted by the other five, purportedly authorising him to file the application for intervention in the main matter. Authority to bring the application for recusal on behalf of the other applicants was not furnished, an observation correctly made by the second respondent.



As a consequence, for want of authority on the part of the first applicant to represent them, the other applicants were not before me.

In addition, the applicant purported to act for two companies incorporated in the British Virgin Islands and a third incorporated in Zambia. These are the third, fourth and fifth applicants respectively. Being foreigners, the three companies ought to have furnished security for costs in accordance with the rules of court. Not having done so, the three companies were, in addition to the want of authority on the part of the first applicant, also not properly before me.

The application was however not defeated by the above non-compliance with the rules of procedure as the first applicant could bring and motivate the application in his own right.

**Background**

The first applicant is the founder member of the sixth applicant which is described in the founding affidavit as a networking association of persons who share a common interest to promote, protect and uphold unwavering respect for constitutionalism. However, the sixth applicant's constitution was not attached to the affidavit to show the ambit of its powers and in particular, that it has the power to participate in proceedings such as were before me.



There is an intricate relationship between the second applicant and the three foreign companies. For the purposes of this application, it was not necessary for me to unpack the layers of shareholding that link the four companies to each other and to the first applicant. Clearly, the first applicant has an interest in varying degrees, in the other five applicants.

As the basis for the application, the applicants relied on two decisions of the High Court that were handed down in 2005 and in 2007 respectively. I was the presiding judge in respect of both matters.

Both High Court applications were dismissed on the preliminary issues that arose before the merits of the applications could be related to. It is thus common cause that in both matters, the merits of the applications were neither argued nor pronounced on.

Notwithstanding that, the applicants are of the firm belief that it was because of the two decisions that the State was able to acquire the second applicant and other companies in which the first, third, fourth and fifth applicants held investments.

The application was opposed by the second and third respondents. They jointly submitted that recusal had been sought on an improper basis because the matters that fell for determination in the High Court were distinct from the application for intervention that was before me. It was their further contention that the applicants had failed to rebut the presumption of judicial impartiality that attaches to each judicial officer.

Although the first respondent had not filed any papers in the application, he was granted an opportunity to make submissions in respect of the issue that was before the court, which opportunity he used to solidly support the position of the applicants.



Whilst I stand by the observations made by this Court in *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 07/21 that an application for recusal is in essence a conversation between the apprehensive litigant and the court and in which conversation the other party can listen in, I was grateful for the points and observations made by the second and third respondents and their counsel. In coming to my decision, I however did not seek to rely on these. I also did not make a definitive ruling on the issue raised by the applicants that the second respondent was not properly before me, he being represented by a private law firm as opposed to being represented exclusively by the office of the Attorney-General. I left that issue open for determination in the main matter if at all that becomes necessary.

As indicated above, at the centre of the application for recusal are two matters determined in 2005 and 2007 respectively. The first matter was *THZ Holdings Limited v ZIMRE Holdings and Another* HC 542/05 whose hearing was consolidated by consent with that of ZIMRE *Holdings Limited v the Zimbabwe Stock Exchange and Another* HC632/05. The two matters concerned approval of an amendment to the rights offer by ZIMRE Holdings Limited, a company in which THZ Holdings Limited had an interest. The first applicant had interests in THZ Holdings Limited.

A preliminary point arose in both matters as to the capacity of the first applicant herein, Mutumwa Dziva Mawere, to depose to an affidavit on behalf of THZ Holdings Limited, a company incorporated in the United Kingdom. It was contended by ZIMRE Holdings Limited and correctly so in my view, that the deponent to the founding affidavit was disabled from doing so by virtue of the provisions of the Presidential Powers (Temporary Measures) (Reconstruction of State Indebted Insolvent Companies) Regulations 2004, the applicable law at the time. The order of the High Court accordingly upheld the preliminary point and dismissed the application by THZ Holdings Limited on that basis.



The second matter was *SMM Holdings Limited v The Minister of Justice Legal and Parliamentary Affairs* HC 12064/05. This was a review application in which the second applicant sought to have reviewed the decision of the respondent in that matter to issue a reconstruction order against it. The application was filed outside the time limited by the rules of court for a review application. As a consequence, the review was not properly before the court and was accordingly dismissed on that basis. This made it unnecessary to determine the merits of the application.

The issue that then fell for determination in the application for recusal was whether or not the High Court orders detailed above disabled this court from determining the application for intervention by the applicants in the main matter.

**The law**

The law of recusal is settled. It is the law against bias.

Quite apart from the constitutional guarantees in favour of the right to a fair trial before an independent and impartial court provided for in s 69 of the Constitution, the common law practised in this jurisdiction has long recognised and applied the law against bias. The constitutional provision may be viewed to have been enacted in abundance of caution so as to locate the law against bias in the supreme law of the land. It is an additional safeguard to that which the common law has long provided.



The law against bias seeks to balance two equal positions at law. These are the duty of every judge to sit and determine all matters allocated to him or her unless, in the interests of justice, recusal is necessary.

Expressing himself on the two competing positions, in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886* Cameron AJ had this to say:

> "On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is 'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance."

Recusal is therefore not to be had for the mere asking. It has to be validly taken.

In *President of the RSA and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725, the following approach was recommended when considering applications for recusal:

> "It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. 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. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judge to administer justice without fear or favour; and their ability to carry out 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 any case in which they are not obliged to recuse themselves."

This is the approach that guided me in this matter.



**Analysis**

The two matters that came before the High Court in 2005 and 2007 respectively were both disposed of on preliminary points. This is common cause.

The law against bias prohibits a judicial officer who has already expressed himself or herself on the merits of the matter at hand, in or out of court, from sitting in determination of such merits. It prohibits a judicial officer who will not bring an open mind to bear on the matter to be determined to sit in adjudication of such a matter. Mere exposure, without comment, to the merits of the matter is not an adequate and valid basis for seeking recusal.

*Per contra*, the prohibition does not extend to judicial officers who make findings on preliminary issues only. This is so because, borrowing the language of Ngcobo CJ in *President of the RSA and Others v South African Rugby Football Union and Others (supra)*, a judicial officer who limits himself or herself to disposing of a matter on procedural issues remains of a mind open to persuasion by the evidence and the submissions of counsel on the merits.

The above position at law applies where the court that disposed of the matter previously on preliminary issues is called upon to determine the matter on the merits. Such a court is not disabled from proceeding to pronounce itself on the merits of the matter at a future date.

In addition to the above position and in any event, I was not called upon to determine the merits of the two applications that were determined in the High Court in 2005 and 2007 respectively. I would have no jurisdiction to do so as this Court can only determine constitutional issues.



It appears, with respect, that the first applicant conflated the causes of actions that were before the High Court in 2005 and 2007 respectively and the cause of action that he seeks to intervene in. The two applications in the High Court were all brought on common law causes of action. The application that he and the other applicants seek to intervene in can only raise constitutional issues. The two are as similar as chalk is to cheese. They call for different jurisdictions which jurisdictions are triggered differently. Different legal considerations are brought to bear in the determination of each.

It also occurred to me that the merits of the conduct of the second respondent, the purported cause of action in which the applicants sought to intervene, did not and could not have arisen in the two applications that were before the High Court in 2005 and 2007 respectively. This is so because the law creating the special jurisdiction of this Court under which the conduct of the President can be reviewed was not in place then, it being a creature of the Constitution adopted in 2013. Any remarks by the High Court in 2005 or 2007 regarding the constitutional validity of any action that the President may have taken in relation to the interests of the applicants, if any were made by that court, would have been grossly irregular as the High Court then did not have the special jurisdiction that this Court has now been endowed with. It still does not have such jurisdiction.

Notwithstanding the above, I anxiously perused the two judgments to establish whether, in an unguarded moment, the High Court may have adverted to the merits of the matter that fall to be determined in the application for intervention or in the application against the second and third respondents in the main matter. I was satisfied that it did not. Indeed, the first applicant, who has been most uncomplimentary and openly contemptuous of my reasoning capacity and legal acumen, agreed with me on this single score that the High Court did not go beyond the preliminary issues. He gratuitously went on to suggest that my conduct in the High Court should be investigated for failing to deal with the merits of his grievances as both applications were on matters of immense importance to him and others who had invested in the second applicant.



**Disposition**

Regarding costs, I saw no reason for departing from the general position not to award costs in a constitutional matter. This was so notwithstanding the invective language

that the first applicant employed in both his written application and oral submissions which provoked the second and third respondents into entreating the court to make a punitive award of costs. The language did not distract the court from the issue at hand.

The above therefore constitute the reasons for the order made on 9 March 2022 dismissing the application with no order as to costs.

*Dube, Manikai & Hwacha*, 2nd and 3rd respondents' legal practitioners.