

NATIONAL SOCIAL SECURITY AUTHORITY
v
(1) HOUSING CORPORATION ZIMBABWE (PRIVATE) LIMITED
(2) PETER CARNEGIE LLYOD

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & KUDYA JA
HARARE, SEPTEMBER 28, 2023 & FEBRUARY 29, 2024**

T. Mpofo, for the appellant

D. Tivadar, for the first respondent

No appearance for the second respondent

**Judgment No. SC 21/24
Civil Appeal No. SC 334/23**

GUVAVA JA:

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[1] This is an appeal against the decision of the High Court (the ‘court *a quo*’) in which it dismissed an application made by the appellant under HC2938/19 for the setting aside of an arbitral award. It, in the same proceedings, granted an application made under HC2554/19 by the first respondent for the recognition and registration of the same arbitral award. Both applications, heard by the court *a quo*, related to the same arbitral award that had been granted by the second respondent.

BACKGROUND FACTS

[2] The appellant is a statutory body established in terms of s 4 of the National Social Security Act [*Chapter 17:04*]. The first respondent is a company, with limited liability, incorporated in accordance with the laws of Zimbabwe. The appellant and the first

respondent entered into a housing offtake agreement. The agreement was for the first respondent to construct 8000 units on behalf of the appellant at an agreed price per housing unit and in batches of 250 houses over an agreed timeframe. The appellant made a payment upfront in the sum of US\$16 million to the first respondent. This payment was in terms of the agreement. The first respondent constructed a total of 53 housing units which were completed. Several others are in various stages of completion.

[3] By the first half of 2018, a dispute had arisen between the parties and this resulted in numerous meetings being held and correspondence being exchanged between the parties. The general complaint by the first respondent concerned the appellant's lack of action in regard to a number of issues that affected the performance of the contract. Following these complaints, the first respondent proceeded to write a letter addressed to the appellant on 29 May 2018 terminating the agreement. This resulted in the parties blaming each other for breaching the contract.

[4] In an effort to resolve the dispute the parties thereafter approached the Commercial Arbitration Centre for an arbitrator. The second respondent was duly appointed as the arbitrator. During arbitration proceedings, the first respondent averred that the behaviour of the appellant constituted a repudiation of the agreement, a material breach of the agreement and a failure to remedy its breach notwithstanding the fact that it had received notice from the first respondent to do so. The first respondent maintained that it was entitled to terminate the agreement as it did and as a consequence of the termination, could claim damages in the sum of US\$2 316 000 and US\$56 842 364 together with interest thereon and costs from the appellant.

[5] The appellant denied repudiating or breaching any terms of the agreement. It also denied that there was any basis on the part of the first respondent to terminate the agreement. It averred that the first respondent was in breach of its contractual obligations and claimed its right to cancel the agreement, an award that the first respondent repay US\$16 million in terms of an Advance Payment Guarantee which was in place between the parties, damages at the rate of US\$5 000 per day from 4 February 2018 to the date of payment of the US\$16 million and costs. The arbitrator dismissed the appellant's claim and found in favour of the first respondent. He made an award to the respondent in the sum of US\$30 million together with interest thereon at the prescribed rate of 5 percent per annum.

[6] Clearly aggrieved, the appellant filed an application for the setting aside of the award under case number HC2938/19. The appellant sought the following order:

“IT IS ORDERED THAT:

1. The final award granted on the 25th of March, 2019 by the Honourable Arbitrator Peter Lloyd in favour of the first respondent is here by set aside and is of no force and effect.
2. The matter shall be referred to a different Arbitrator appointed in terms of the arbitration agreement appointed in terms of the arbitration agreement who shall determine equitable terms of the termination of the agreement between the parties.
3. The 1st respondent shall bear the costs of this application if opposed.”

The appellant averred that the award by the arbitrator was so outrageous in its defiance of logic that it amounted to a serious violation of public policy. It further averred that the award gave the first respondent a profit of US\$30 million in circumstances where it had failed to build or deliver any house to the appellant in terms of the contract. The appellant maintained that the award could not stand as it violated public policy. Apart from the ground on public policy, the appellant sought

that the award be set aside on a procedural basis as it alleged that the arbitrator did not advise the parties what the issues for determination were nor the evidence that he was going to consider in dealing with the issues. The appellant further averred that the arbitrator granted relief that had not been contemplated by the parties and without resorting to the contract *inter partes*.

- [7] The first respondent opposed the application for the setting aside of the award and, not to be outdone, applied for the recognition of the final award rendered by the arbitrator under case number HC2554/19. It prayed for an order couched in the following terms:

“IT IS ORDERED THAT:

1. The arbitral award made in favour of the applicant by the honourable arbitrator on 25 March 2019 is registered as an order of this court.
2. The respondent shall pay to the applicant the sum of \$30 000 000 together with interest thereon at the prescribed rate of 5% per annum from 22 February 2019 to the date of full payment.”

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The appellant opposed the application for recognition of the arbitral award made by the first respondent.

- [8] The two matters were consolidated under case number HC5556/19 and the matter was heard by MUSITHU J. The judge dismissed the application for the setting aside of the arbitral award and granted the application for registration of the award. The appellant, unhappy with this decision, noted an appeal before this Court under SC338/20. The appeal was heard on 13 September 2021 by MAVANGIRA JA, UCHENA JA and CHATUKUTA JA. At the hearing of the appeal, counsel for the appellant sought leave to amend its grounds of appeal by adding a new ground of appeal that raised a point of procedural law. The ground of appeal attacked the validity of the proceedings before MUSITHU J on the basis that the first respondent, in its application for recognition of

the arbitral award, did not attach an authenticated copy of the arbitral award. The court upheld the procedural point and made the following order:

“IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside.
3. The matter is remitted to the court *a quo* before a different judge for determination.”

[9] Under judgment number SC20/22 the Court gave its reasons for the above order and stated that the failure by the first respondent to comply with the provisions of Article 35(2) of the Arbitration Act [*Chapter 7:15*] (‘the Arbitration Act’) was fatal to the application for the registration of the arbitral award. The court further noted that the judgment of MUSITHU J did not show that a determination was made on the application for the setting aside of the arbitral award under HC2938/19 which had been made by the appellant. It thus determined that the failure, on the part of the court *a quo* to determine all the issues before it constituted a gross irregularity and as such the decision had to be set aside and the matter remitted for a hearing *de novo* before a different judge.

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[10] The parties proceeded to file supplementary heads of argument and a fresh hearing was held. The court *a quo* dismissed the application for the setting aside of the arbitral award under HC2938/19 and allowed the application for recognition of the arbitral award under HC2554/19. This is what has brought about the present appeal before this Court.

[11] A few days before the hearing of the appeal, counsel for the first respondent Mr Tivadar, by letter dated 28 September, 2023, requested the recusal of the Honourable

Justice UCHENA JA on the basis that he had been part of the bench in SC20/22. At the commencement of the proceedings, counsel made an oral application in support of the letter referred to above for the recusal of UCHENA JA from hearing the appeal. In raising this point, he argued that in the present appeal, he was going to make arguments similar to those which he had made under SC338/20.

He thus submitted that the judge, having been part of the previous bench, may already have formed an opinion on the matter and as a result, the respondent would not receive a fair hearing. Counsel thus prayed that the application for recusal be allowed and the bench reconstituted for the purpose of hearing the appeal.

[12] The application was opposed by Mr Mpofu counsel for the appellant. He submitted that the first respondent had not laid out a proper basis for the grant of such an application. He argued that an application for the recusal of a judicial officer is a procedure which ensures that the court is not unfair in deciding matters and is also in conformity with the common law. He opined that the application for recusal was a dilatory tactic by the first respondent who did not want the matter to be argued. Counsel maintained that the first respondent had no basis to make any complaint against the sitting of UCHENA JA as the test for bias had not been sufficiently met. Counsel prayed that the application for recusal be dismissed.

[13] As applications for the recusal of judicial officers have of late become rather fashionable, it was decided that a determination of this application be made before proceeding to hear the merits.

ANALYSIS OF THE FACTS AND THE LAW

[14] The principle of recusal stems from the principle of natural justice known in Latin as *nemo iudex in sua causa* which translates to ‘no one should be a judge in his or her own cause’. The principle forms the basis upon which the rule against bias or apprehension of bias was founded. At common law, an impartial judge is a fundamental prerequisite for a fair trial. PONNAN JA in *S v Le Grange* 2009 (2) SA 434 (SCA) at para 21 elaborated this point as follows:

“It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean ‘a departure from the standard of even-handed justice which the law requires from those who occupy judicial office’. In common usage bias describes ‘a leaning, inclination, or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.”

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Thus, as can be noted from the above excerpt, the cornerstone of justice is founded on the ethical duty reposed on judicial officers to be impartial and fair in adjudicating matters. Such ethical duty ensures that a judicial officer is never biased. Where a situation arises that may result in bias, a judicial officer must recuse himself from hearing such a matter.

[15] To recuse oneself means to remove oneself as a judicial officer from a particular case because of actual or potential bias, prejudice or conflict of interest. A judge or magistrate must not sit in a case where he or she may not be able to administer justice impartially, either on the grounds of hostility or interest. The Black's Law Dictionary 6

ed (1990) 1277 defines recusal as the process "by which a judge is disqualified on the objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self-interest, bias or prejudice". The reasons for recusal include actual or potential bias, prejudice, or conflict of interest.

[16] Generally, there is a presumption of impartiality which every judicial officer is believed to possess. It therefore follows that where bias is alleged, such allegation must overcome the presumption of judicial impartiality and integrity. This presumption of judicial impartiality and integrity places a heavy burden on a party seeking to rebut the presumption. In *S v Lamb and Anor* [2023] ZAWCHC 292 at para 5 the court noted that:

“The courts' impartiality and independence are fundamental principles behind the right to a fair trial. The importance of impartiality and its presumption in our judicial system cannot be overstated as they are one of the essential cornerstones that serve to protect the integrity of the court's processes. An impartial hearing generally embodies judicial independence. This in turn entails that parties would receive a just and fair decision. Thus, there is an inextricable link between judicial independence and judicial impartiality. A presiding officer is presumed to be impartial unless that presumption is rebutted. In order to render justice, a judicial officer should be truly impartial and independent.” (See also *The State v Mawadze* HH 170/23 at para 9)

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[17] A party, before a court or tribunal, which alleges impartiality or bias against a judicial officer bears the onus to prove such impartiality or bias on a balance of probabilities which is the standard of proof in all civil matters (see *Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (SC)). A litigant making an application for recusal must therefore satisfy the requirements for such application. MAKARAU JCC in *Mawere & Ors v Mupasiri & Ors* CCZ 2/22 at p. 5-6 had occasion to discuss the law on recusal. The learned judge held that:

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

(see also *Mupungu v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 7/21)

[18] Of note is that MAKARAU JCC, in dealing with the above matter, cited with approval the case of *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 hand, the vulnerability of the judiciary 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.’”

The judge also referred to the case of *President of the RSA and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725, and noted the following approach which was recommended by the Constitutional Court of South Africa 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.”

[19] The import of the above authority is to show that recusal is not for the mere asking. It is a specialized procedure that is backed by the constitutional right to a fair trial as provided for in terms of s 69 of the Constitution of Zimbabwe, 2013. Every judicial officer therefore has a mandate to act impartially and without bias. This mandate is founded in the oath of office which judicial officers swear when taking up office and which oath affords them the presumption of impartiality (see *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC)). For judges, such an oath is founded in the Constitution of Zimbabwe and as such judges have a constitutional duty to be ethical and fair in carrying out their duties. A failure to adhere to the constitutional mandate results in a violation of the rule of law. Where bias is alleged against a judge it must therefore be proved. This serves to guard against frivolous allegations of bias against judges (see *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 12H). It therefore follows that the recusal of a judge may only be granted in circumstances where a party applying for such recusal satisfies the requirements for such an application.

[20] In an application for recusal a litigant must therefore show whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judicial officer 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 evidence and submissions of counsel (see *The State v Mawadze (supra)*). In the South African jurisprudence the test is called one of "double reasonableness", not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must

also be reasonable (see the *President of the RSA and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 and *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).

[21] An allegation of bias against a judicial officer must be so clear so as to show that the failure by the judicial officer to recuse himself or herself will result in an unfair trial. There must be a real likelihood of bias and not a mere possibility. The real likelihood of bias must be easily ascertainable and where necessary the facts of the matter and events leading to a matter being placed before a judge must also be considered. A helpful description of the test to be applied can be found in *Metropolitan Properties Ltd v Lannon* [1968] 3 All ER 304 where Lord Denning, after being referred to a number of earlier cases, said at 310A-D:

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“... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. ***The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit, and if he does sit, his decision cannot stand; ... Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough ... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased’.***”(emphasis added)

[22] In *casu*, counsel for the first respondent made the application for the recusal of UCHENA JA on the basis that he was part of the bench that sat and heard the appeal noted under SC338/20. In answering the question of whether or not the judge may be

biased in these circumstances there is therefore need to look at the findings which were made by the Court under SC338/20 and the order which was granted thereof. Counsel for the appellant in the appeal before the Supreme Court under SC338/20 applied for and was granted leave to amend his grounds of appeal. The amendment saw the addition of a ground of appeal which attacked the validity of the proceedings before MUSITHU J as the first respondent had sought recognition of an arbitral award which had not been authenticated.

[23] This Court found that the failure by the first respondent to comply with the provisions of Article 35 of the Arbitration Act was fatal to the application for registration of the arbitral award. It further found that MUSITHU J had not made any determination on the application for the setting aside of the arbitral award which had been made by the appellant. The Court thus, found that the decision by MUSITHU J was erroneous and a gross irregularity had been occasioned, which irregularity, vitiated the decision of the court. On this basis, this Court allowed the appeal, set aside the decision of the court *a quo* and remitted the matter for a fresh hearing before a different judge.

[24] The factual basis upon which the first respondent based his application for recusal is clear in that, although the appeal was based on the same parties and subject matter, the Court did not hear or determine the merits of the matter. The Court determined a procedural irregularity which was introduced through the amended ground of appeal of the appellant. There is therefore, in my view, no basis upon which a reasonable apprehension can be had that UCHENA JA will be biased against the first respondent and arguments to be made by counsel for the first respondent as initially the appeal was disposed of on a technicality and not on the merits of the matter. The arguments to be

made on the merits of the matter by counsel for the respondent before this Court were never made under SC338/20. There can be no argument that UCHENA JA has been pre-empted on the arguments sought to be made by Adv *Tivadar* as no such arguments were made at the hearing of the appeal under SC338/20.

[25] We agree with Adv *Mpofu* that the first respondent has failed to satisfy the requirements for the recusal of UCHENA JA. There is no real likelihood of bias that will occur if UCHENA JA sits and hears the present appeal. The facts of the matter clearly show that the judge has not yet exercised his mind on the merits of the matter as what was determined under SC338/22 was a procedural point which questioned the validity of the proceedings before MUSITHU J. The disposition of the procedural issue did not take away the presumption of impartiality that the judge possesses as he has not yet said his final word on the merits of the appeal and neither has there been a dispositive order made with regard to the merits of the appeal. In coming to this conclusion, I borrow the words of MAKARAU JCC in *Mawere & Ors v Mupasiri & Ors* (*supra*) at p.7-8 wherein she held that:

“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.”

[26] The overarching principle that emanates from the Mawere judgment (*supra*) is that a judge of this Court may hear an appeal that he or she may have dealt with at an interlocutory stage leading to the hearing of the appeal such as an application for condonation and extension of time within which to note an appeal, application for reinstatement or an application for bail pending appeal. He may also hear an appeal which may have been previously set down before him but was determined on preliminary points that have no bearing on the merits or determine points *in limine* first before dealing with the merits. It must also be noted that the Supreme Court, by its composition has a limited number of judges. This means that there will always be a likelihood that a judge who has heard a chamber application or a court application will invariably hear the appeal in the main matter. It follows that judges of the Supreme Court cannot be called upon to recuse themselves willy-nilly merely because they have dealt with the same parties on procedural matters at some stage before hearing the appeal. It will be recalled, as already discussed above that the Judges by taking the oath of office and by their training will not, as a general rule, be affected by such matters to become biased. This principle was established earlier and set out succinctly in the *President of the RSA & others v South African Rugby Football Union and Others* (*supra*) where the court held:

“The reasonableness of the apprehension must be assessed in the light if 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.....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.”

[27] The exception to this principle is in instances where the decision of the judge is being appealed against. The judge cannot take part in the appeal. This is because it will be his

or her own decision that is being impugned. Indeed, this is specifically prohibited by s 5 of the Supreme Court Act [*Chapter 7:13*].

DISPOSITION

[28] It is clear from the case law cited above that the onus of proving bias on a judicial officer is on the applicant. It is also apparent that the applicant must show that there is a real likelihood of bias on the part of the judicial officer. An application for recusal is not one that is easily granted unless it is proved that the judicial officer will most likely be biased in determining the appeal. The fact that a judge determined a preliminary issue in the appeal is not on its own a basis for an application for recusal. As a result, the application for recusal must fail.

[29] Regarding costs, there is no reason why we should depart from the norm. Costs must follow the result.

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[30] Accordingly, it is ordered as follows:

“The application for recusal be and is hereby dismissed with costs.”

UCHENA JA: I agree

KUDYA JA: I agree

Zigomo & Musarira Law, appellant’s legal practitioners

Mawere Sibanda Commercial Lawyers, first respondent’s legal practitioners