MORDECAI PILATE MAHLANGU
versus
INVESTIGATING OFFICER
DETECTIVE ASSISTANT INSPECTOR DOWA
and
OFFICER-IN-CHARGE, LAW AND ORDER
HARARE CENTAL SUPERINTENDENT NTINI
and
COMMISSIONER GENERAL OF POLICE
and
CO-MINISTERS OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 24 February 2010 & 12 January 2011

Opposed Matter

H Zhou, for the applicant
F Chimbaru, for the 1st respondent

CHATUKUTA J: On 2 November 2009, the applicant was arrested by the 1st respondent on allegations of contravening section 184(1)(c) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The allegations were that he had obstructing the course of justice by attempted to interfere with the Attorney General of Zimbabwe in the discharge of his duties. On 3 November, 2009, the applicant filed an urgent chamber application in case No. HC 5369/09 seeking in the interim, his release from police custody. In the final relief, he sought a declarator that his arrest and detention were unlawful. The application was, on my instructions, set down for hearing on 4 November 2009 at 8.30am. The applicant however appeared before the Magistrates Court and was granted bail before the date of hearing of the urgent chamber application.

The interim relief had therefore been overtaken by events. Despite the fact that I could no longer grant the interim relief sought, I directed the conversion of the urgent chamber application into an ordinary court application and that the respondent file its opposing papers to the final relief sought in terms of the rules applicable to court applications. The applicant is now before me pursuant to that order.

The court application was set down for hearing on the opposed roll of 24 February 2010. Before the parties addressed the court on the merits of the matter, *Mr. Zhou*, the applicant's lawyer, requested my audience in chambers. It is then that he applied, on behalf of the applicant, for me to recuse myself from hearing the matter. The basis for the application is that my husband is a senior officer in the police force. The applicant expressed an apprehension that I would be biased in favour of the respondents on the basis that the application relates to my husband's subordinate and superiors respectively. The applicant assumed that because of my marriage I may have had prior knowledge of facts that would influence me in ruling in favour of the respondents.

Ms Chimbaru, for the respondents opposed the application on the basis that my husband is not a party to the proceedings directly or indirectly. Although he is the chief police spokesperson, he does not interact with the 1st respondent who is in the Criminal Investigation Department. He also did not have an interest in the outcome of the proceedings. The apprehension of bias was therefore far fetched and unreasonable.

The test to be adopted in determining whether or not a judicial officer should recuse him or herself is well settled and is set out in *Leopard Rock Hotel Co. (Pvt) Ltd & Anor v Wallenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S). The test is a two-fold objective test (double reasonableness) that the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. (see *Masedza & Ors v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (HC), *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H), *S v Mutizwa* 2006 (1) ZLR 78, *Austin & Anor V Chairman, Detainees' Review Tribunal & Anor* 1988 (1) ZLR 21 (SC), *Coop and Others v South African Broadcasting Corporation and Others* 2006 (2) SA 212 (W), *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC), *President of*

The Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC), *S v Shackell* 2001 (4) SA 1 (SCA), *Sager v Smith* 2001 (3) SA 1004 (SCA), *Government of the Republic of South Africa and Others v N and Others* 2006 (6) SA 566.)

The test is in my view aptly stated in *President of The Republic of South Africa and Others v South African Rugby Football Union and Others* (supra, at 177D-E, para 48) where it was held that:

> '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 Judges 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. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

In considering this application I have taken heed of the warning in the plethora of cases cited above that the applicant has a right to have confidence in the judiciary. Where an applicant makes an application of this nature, the court should not take it as an affront.

As stated in *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* (supra, at 239E-F) what defines the reasonableness of the applicant and the apprehension itself is the nature of the link or association between the judicial officer and the parties in the litigation. There is no direct link whatsoever between the respondents and myself. The alleged link is through my husband who is not a party to the proceedings directly. The indirect link that has been referred to between my husband and the respondents arises from an employment relationship with the respondents.

Can a marriage of a judicial officer to a police officer be elevated to an indirect link to the respondents? Put differently, it appears to me that the question is therefore

whether or not a reasonable person would have apprehension of bias arising from such a marriage and the apprehension would be reasonable under the circumstances. The link is in my view so far removed to even be considered as an indirect link between respondents and the judicial officer. Whilst my husband may be a senior officer in the police force, he does not, as rightly submitted by *Ms Chimbaru*, have any involvement in the 1st respondent's day to day discharge of his responsibilities. The fact that he is a junior to the 2nd and 3rd respondents again, in my view has no bearing on this matter.

I do not believe that any reasonable person would entertain an apprehension that a judicial officer would be biased in favour of the police simply by virtue of a marriage to a police officer. A litigate must in my view advance more information to want the apprehension. A sizeable number of matters before the court, both criminal and civil, relate to the police. I do not see any distinction between the present matter and any of those matters where the police are litigants. The apprehension expressed by the applicant would mean that the judicial officer would have to recuse him/herself from almost if not all the cases where the police and its officer are litigants. Such an apprehension would be unreasonable.

The apprehension is even more unreasonable given that the court was seized with the initial urgent chamber application. It appears to me that all the facts enquired to determine the application were already in the urgent chamber application. The court had already considered those facts when it determined the matter and converted the urgent chamber application to an ordinary court application. The nature of the facts that the court would have been privy to by the virtue of her marriage were not apparent from the applicant's submission.

A case to the point is that of *Government of the Republic of South Africa and Others v N and Others* 2006 (6) SA 566 (D). In an application for the recusal of the Presiding Judge on the ground that his daughter was in the employ of the correspondent attorneys of one of the parties, the Judge refused to recuse himself on the basis that his daughter's role was far removed from the actual litigation. (At 567E and 568B - C.)

Another case is that of *S v Collier* 1995 (2) SACR 648 (C). In dismissing an appeal against a decision in a lower court in which an accused insisted that he be tried by a black magistrate alleging that a white magistrate would be biased against him,

HLOPHE J is quoted in *President Of The Republic Of South Africa And Others V South African Rugby Football Union And Ors* (supra at 174, para 43), to have said:

> 'Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision. . . . Professor Baxter gives a commonly cited example, namely the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or Judge could ever administer justice fairly and evenhandedly in a matter involving white accused."

As stated in the cases that I have referred to above, an applicant, on raising the question of bias should take into consideration, that a judicial officer takes an oath of office to uphold the law, impartially and without fear or favour. I take the oath seriously. This should be weighed against any apprehension of bias. Whatever decision I would take in the main matter would be based on the law supported with the facts filed of record and not those that the applicant may perceive the court is aware of. It appears that the applicant has not discharged the onus placed on him of rebutting the weighty presumption of judicial impartiality.

It is my view that the ground upon which the application for recusal is premised does not give rise to a reasonable apprehension of bias by a reasonable applicant. I am satisfied that, despite my marriage to a senior police officer, I will be able to deal with the matter in an impartial and unbiased manner.

Accordingly, the application is dismissed.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Civil Division, respondents' legal practitioners