STATE
versus
OBERT NHIRE
and
FLORENCE KANJERE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 15 July 2015

Criminal Review

HUNGWE J: The request for a review of the proceedings in this matter was made by the learned trial magistrate in correspondence addressed to the Reviewing Judge of this court in the following terms:

> "RE: STATE v O. NHIRE AND ANOTHER: CRB 4158-9/06
> The above matter refers.
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> The trial magistrate makes an application for the part-heard matter trial proceedings to be set aside so that another magistrate can try the case. The accused and another appeared before the trial magistrate for trial and after the trial commenced and the State had led evidence from three witnesses, the complainant made an administrative complaint to the effect that accused person is a friend or related to the trial magistrate and that the trial magistrate should therefore recuse himself. To my knowledge the accused is neither a friend nor is he related to the trial magistrate. After raising such an administrative complaint to the effect that the trial magistrate recuses himself, the trial magistrate seeks the learned Judge's guidance on the way forward.
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> In the same light, the trial magistrate is well aware of the dicta in *S* v *Motsi* HH 529 where the court quoted with approval the case of Head and *Fortuin* v *Woolaston NO & De Villiers NO* 1926 TPD where the court said:
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> > *'……..the disqualification arises whenever the judge's relation to the parties is such that or his interest in the case is such or his knowledge of the facts of the case or the antecedents of the parties is such as would tend to his mind at the trial. In short any condition of things which, reasonably regarded, is liable to destroy his impartiality should disqualify him.'*
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> In *R* v *T* 1953 (3) SA 479 the court stated as follows:-
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> > *'In the case of a trained judicial officer the mere possibility of bias not based on a previous extra-judicial opinion in relation to the case he is going to try or on hostility or relationship with one of the parties or on an interest in the case does not disqualify him in trying the case.'*
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> In *Masedza & Others* v *Magistrate, Rusape & Another* 1998 (1) ZLR 36 the court quoted with approval the case of *Metropolitan Properties* v *Lannon & Others* [1969] 1 KB 577 where the court stated:
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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…..or whoever it is 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 unbiased 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.'*
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> In the *Masedza* case, (*supra*) the court also stated that at the heart of the test for recusal lies the principle that justice should not only be done but be seen to be done.
> In the Motsi case *(supra*) the court also stated that the review court should be slow to revoke the decision made on a case where the magistrate thinks recusal is necessary and valid.
> *In casu* justice will be seen to be done by the complainant who thinks that the trial magistrate is related to the accused if the trial magistrate were not to recuse himself."

All too often judicial officers are faced with allegations of bias, some justified but in most cases such claims by parties, litigants or accused persons, are not borne out by the facts. It is important that judicial officers handle this criticism with utmost sensitivity as the perception of bias might, unfortunately, crystalize into fact. The trial magistrate correctly sets out the thrust of the test for bias as spelt out in the *Masedza* case. However, it appears to me that the present case ought to be distinguished from the *Masedza* case principally because the complaint arising from the alleged relationship between the trial magistrate and the accused appearing before him on trial was not raised by the party appearing before him, but from an interested third party. This interested third party is the complainant in the criminal matter he was trying. How he became aware of the complaint is not clear on the papers but it was sufficient for him to reconsider the propriety of his presiding over the matter. Secondly, it seems to me important that the application for recusal is made by the trial magistrate against who the complaint is raised.

In *Standard Chartered Finance Limited* v *Georgias & Another* 1998 (2) ZLR 547 (HC) Smith J succinctly put the matter in the following words;

> "In an application for recusal, the test to be applied is not easily defined since decided cases are not entirely consistent, with some judges favouring the view that the test is whether, as a matter of fact, there is a real likelihood of bias, whilst others accepted a reasonable belief that a real likelihood of bias existed as being sufficient. To my mind, however, there is no real difference between the two approaches since, unless there were a real likelihood of bias, a reasonable or right-thinking man would not believe that there was such likelihood."

This is illustrated by the remarks of Greenberg J in *City and Suburban Transport (Pty) Ltd* v *Local Board of Road Transportation, Johannesburg* 1932 WLD 100 at 106:

> 'The test appears to be whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased.'
> In *Foya & Matimba v R & Jackson* NO 1963 R&N 318 (FS) at 321E CLAYDEN CJ described the test as being:

> '..whether the impression was reasonably created in the mind of the applicant that he would not have a fair trial.'

After referring to certain cases the learned CHIEF JUSTICE proceeded at p 122F to say:

> 'The cases must, I think, be reconciled on the basis that although on facts known there might be a reasonable suspicion of bias, that will not suffice if proper enquiry would have shown that there was no real likelihood of it ... I consider therefore that what the applicants had to show was not necessarily personal animosity towards them. If they showed that the position was such that a reasonable man in their position would have thought that he would not have a fair trial in the circumstances and that there was nothing in further facts disclosed to indicate that that was not a real likelihood, that would be enough.'

Possibly the most helpful description of the test to be applied is found in *Metropolitan Properties Ltd* v *Lannon* [1968] 3 All ER 304. Lord Denning, after being referred to a number of earlier cases, said at 310A-D:

> '... 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 F 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'.'

It is emphasised that it is "a real likelihood" of bias, which satisfies the test and not "a mere possibility".

Smith J went on:

> "In deciding whether or not the above test has been satisfied, it is necessary to look, not only at facts known by the applicant, but at all relevant facts. In *R* v *Camborne Justices, ex p Pearce* [1954] 2 All ER 850 (QB) the court held at 855:
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> > '... that a real likelihood of bias must be made to appear not only from the material in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his enquiries.'

This must undoubtedly have been the attitude of the court in *R* v *Milne and Erleigh* (6) 1951 (l) SA 1 (A) where Centlivres JA said at 11H:

> '... The mere fact that a judge holds strong views on what he conceives to be an evil

> system of society does not, in my view, disqualify him from sitting in a case in which some of the evils may be brought to light. His duty is to administer the law as it exists but he may in administering it express his strong disapproval of it.'

In *Danisa* v *British and Overseas Insurance Co* Ltd 1960 (1) SA 800 (D) at 801B-C Henochsberg J suggested the following:

> "It seems to me that the test that is to be applied is whether the applicant can show a reasonable fear that the trial will not be impartial. The matter must be looked at from the point of view of a reasonable lay litigant; but the test is an objective one; the likelihood of E bias. It is almost, if not quite, as important that justice should be believed to be impartially administered, as that it should actually be so, but it must also be borne in mind that the mere possibility of bias, apparent to a layman, on the part of a judicial officer is insufficient in the absence of an extra-judicial expression of opinion in relation to the case or in the absence of one of the other recognised grounds upon which an application for recusation is granted."

The test enunciated above was quoted with approval by CONRADIE J in *Monnig & Ors* v *Council of Review & Ors* 1980 (4) SA 866 (C) at 876C. The learned judge also referred to *S* v *Herbst* 1980 (3) SA 1026 (E), saying that Eksteen J (as he then was) had restated the effect of South African judgments regarding applications for recusal in the following words:

> 'The approach of our courts to an application for recusal has been set out in a number of cases and the principle which they seek to enshrine is that no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner. He stressed, however, that the mere possibility of bias apparent to a layman would not be sufficient to warrant the recusal of a judicial officer.'

Finally, I would refer to *Moch* v *Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A). At 12H HEFER JA said:

> 'It was for the petitioner to satisfy the court that the grounds for her application were not *frivolae causae* (*South African Motor Acceptance Corporation (Edms) Bpk* v *Oberholzer* 1974 (4) SA 808 (T) at 812C ad fin), ie that they were legally sufficient to justify the recusal of the presiding judge.'

The learned JUDGE OF APPEAL went on at 13-14 to say:

> 'A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Compare *S* v *Bam* 1972 (4) SA 41 (E) at 43G-44.) If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, judge is primarily concerned with the perceptions of the applicant for his recusal for, as TROLLIP AJA said in *S v Rall* 1982 (1) SA 828 (A) at 831 in fine- 832:
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> > "(T)he judge must ensure that 'justice is done'. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that

> is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused."

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) *("Sarfu")* the Constitutional Court of South Africa formulated the proper approach to recusal as follows:

> "... 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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the *Sarfu* judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted. The second in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality (per l'HEUREX-DUBE and McLACHLIN JJ in *R* v *S (RD)* (1997) 118 CCC (3d) 353 (SCC) @ paras 35-84) — a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication. Impartiality requires in short "a mind open to persuasion by the evidence and the submissions of counsel"; and, in contrast to neutrality, this

is an absolute requirement in every judicial proceeding. As stated in *R v S* (RD) (*supra*) (per CORY J @ para 35) the reason is that:

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. . . . Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."

The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, 1996 (4) SA 915 (SCA) per HOWIE JA decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.

It is no doubt possible to compact the "double" aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

"Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity." (@ para 113). The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law.

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apprehension a legal value, and thereby decides whether it is such that it should be countenanced in law. The high threshold a litigant must pass in a trial alleged to involve the same issues or witnesses was usefully formulated in *Livesey* v *New South Wales Bar Association*, (1983) 151 CLR 288 where "the central issues" in the case had already been determined by the judges whose recusal was sought, and they had expressed a "strong view" destructive of the credibility of a witness crucial to both hearings. In finding that the judges in question should have recused themselves, the High Court of Australia stated, as far as trial proceedings are concerned, that a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment:

> ". . . if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact." (@ p 300).

The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. (See *S* v *Manamela and Another (Director-General of Justice Intervening) 2000 (5) BCLR 491 (CC)*. The importance to recusal matters of this normative aspect cannot be over-emphasised. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. 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".

In the view that I take of this matter, due regard must be given to the fact that it is the presiding magistrate who made the application for recusal in the face of an administrative complaint from, not the accused or a witness, but a complainant in the matter. Clearly, applying the above principles, notwithstanding the fact that there may be no substance in the claims, as the presiding magistrate suggests, it is important that justice is seen to be done. It may well be that there may be other circumstances which he is aware of which in his view may serve to buttress the perception of favourable bias for the accused before him which, in the learned magistrate's view, will only unnecessarily taint an otherwise fair trial. His view in that regard is praiseworthy as his actions serve to strengthen the fairness of the trial process.

In light of the above, therefore, in the exercise of this court's review powers, I make the following order:

(1) The trial proceedings before Wochiunga in the magistrate's court, Harare, be and are hereby quashed.

(2) The trial of the accused be and is ordered to be commenced *de novo* before a different magistrate.

MANGOTA J agrees ……