IGNATIOUS MASAMBA
versus
JOHN VAMBE

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 12 January 2016 and 26 May 2016

Civil Appeal

Appellant in person
R S Ratisai, for the respondent

MWAYERA J: The magistrate's court dismissed the appellant's claim for damages against the respondent. The appellant was aggrieved by the dismissal of his claim and thus mounted the present appeal.

The appellant's grounds of appeal filed of record were clouded with evidence and lacked clarity. Given the appellant is a self-actor we condoned the improper filing of grounds of appeal and picked from the many words filed as notice of appeal the 'grounds' to be that the trial court erred in not awarding $5 000-00 for breach of contract for mental suffering occasioned on the appellant by the respondent. Secondly that the trial court erred in not finding that the respondent breached contract by paying two weeks later. Further that the respondent breached the contract by paying rentals short by $5-00 thus making two payments in breach of contract. Finally that the court *a quo* erred in not finding that the respondent vacated the property before making final water bill payment. The appellant argued that he endured mental stress as a result of the respondent's breaches and thus sought his claim for damages of negligence to be upheld.

At the hearing the appellant prefixed his appeal with an oral application for recusal of both judges constituting the appeal panel. He advanced in respect of both judges they had in other different matters presided over matters involving him and had issued judgments which were not in his favour. In respect of Mwayera J he argued she concurred with Uchena J in an

appeal matter that the appellant lost. In respect of Munangati-Manongwa J he argued that she presided over a civil matter in which she issued a judgment which was not in his favour. No further details for recusal were given. The approach of our courts to an application for recusal has been discussed in several cases. What comes out from the cases is the principle that no reasonable man should by reason of situation or the action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner. It has been held that the mere possibility of bias apparent to a layman would not be sufficient to warrant recusal of a judicial officer. See *Standard Chartered Finance Zimbabwe Limited* v *Georgias and Anor* 1998 92) ZLR 547.

The applicant must show a reasonable fear, based on objective grounds, that the trial will not be impartial. The mere possibility of bias apparent to a layman is not itself sufficient to warrant recusal. See also *Devine Homes Private Limited* v *The Sheriff and 2 Others* HH 120–04. The appellant seemed to have made the application without any reason for imputing bias. He just entertained in his mind a vague suspicion that the judges would not be impartial. The test of bias goes beyond suspicion there has to be a real likelihood of an operative prejudice for bias to be imputed. Sight should not be lost that judges as a judicial officers are trained professionals who would know under what circumstances to recuse themselves even for a repeat litigant. The applicant seemed to have raised the application simply on vague and remote suspicion. The submissions fell short of disclose as bias based on objective grounds.

Having considered both oral and written submissions by the appellant we dismissed the application for recusal as it was baseless and based on irrelevant non related allusions. We did not see any reason to recuse ourselves as professionals given there was no allegations of bias, no grounds for recusal were substantiated or even given to warrant granting of the recusal. We thus dismissed the application for recusal and proceeded to hear the appeal.

The appeal as evidenced by the jumbled up grounds was equally shrouded in a web net. During oral submission and upon considering the heads of arguments presented the following observations were made.

The appellant was disgruntled by the court *a quo's* decision to dismiss his claim for damages against the respondent. The appellant sought damages on the basis that the respondent breached their lease agreement in that the respondent failed to pay monthly rentals and water

bills timeously thereby causing mental anguish to the appellant. The appellant also sought, unsuccessfully damages for compensation since the appellant alleged the respondent removed fixtures in the building. The appellant argued that in breach of the terms of contract the respondent removed the cabinet in the kitchen thereby removing an antique of value to convert the kitchen into an office in breach of the contractual agreement. The appellant argued that the delay in payment of rentals by a day, that is paying on 8 January instead of the latest date being the 7th occasioned mental or emotional stress on him.

The court *a quo* in its judgment made a finding that the mental distress claim was not substantiated and as such the quantum of damages claimed was not established. Further that the claim for $5 000-00 damages given the kitchen cupboard was not damaged but just stored away and placed back in the kitchen was again not justified and thus dismissal of the claim in its entirety. As regards the water bill, going by the appellant's evidence the respondent paid although he delayed. No other evidence was adduced to show the extent of mental anguish and quantum of damages occasioned by the delay in paying.

The appeal court is only enjoined to interfere with the court *a quo's* decision if there is a misdirection warranting such interference for the obvious reason that the court *a quo* will have had occasion to test the veracity of evidence. In the case *Barrows and Another* v *Chimponda* 1999 (1) ZR 58 Gubbay CJ (as he then was) made pertinent remarks on the general test for interference with the lower court decision when he stated:

> "These grounds are firmly entrenched. It is not enough that the appellant court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court act upon a wrong principle, if it allows extraneous or irrelevant matter to guide or affect it, if it mistakes facts, if it does not take into account relevant consideration then, its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has material for doing so. In short, this court is not imbued with the same brand discretion as was enjoyed by the trial court."

See also *BHP Minerals Zimbabwe (Pvt) Ltd* v *Cranny Takawira* SC 81/99. What clearly comes out in these cases is that the appellate court should not be quick to interfere with the decision of the court *a quo* unless there is a misdirection.

In *casu* the appellant based his claim on contractual breach as well as delictual claim for mental anguish. In respect of the damages under contractual breach the underlining principle would be to place the aggrieved party in the position they would have been in if breach of

contract had not occurred. The value of damage suffered should be ascertainable through evidence. In other words assessment of damages suffered should be ascertainable from evidence. Evidence in support of the claim should be availed in order to come up with quantum. In this case the appellant alleged breach by delay in payment but acknowledged the respondent paid what he owed. This then leaves some speculative claim for damages. The appellant sought to argue under the delictual claim for mental anguish occasioned by the stress induced because of the delay. The evidence as regards how he mentally suffered when the respondent made payment a delayed payment with a shortfall of $5-00 was not adduced before the court *a quo*. The claim that he suffered mental anguish due to delay on non-payment of water bills because of disconnection is difficult to comprehend given the appellant was not staying at the premises. If there was water disconnection then the respondent would suffer in not having the service but not the appellant. It remained for the appellant to show the court *a quo* on a balance of probabilities how he suffered the mental anguish so as to be entitled to a quantum of damages for solace and wounded feelings.

In the face of no evidence showing material breach of contract and mental anguish there was no basis for the trial court to award any quantum of damages for the appellant. There was no proof of breach of contract or damages as alleged and there was no basis for mental anguish warranting redress in the form of damages. We find no fault in the decision of the court *a quo*.

The appeal has no merit and must fail.

In the result the appeal is dismissed with costs.

Ratisai Law Practice, respondent's legal practitioners