NGAATENDWE TAKAWIRA
versus
UNIVERSITY OF ZIMBABWE

HIGH COURT HARARE
TAGU J
HARARE 25 November and 16 December 2015

Urgent Chamber Application

A T Muza, for the applicant
T L Mapuranga with *J PMutizwa*, for the respondent

TAGU J: The applicant who has been the University of Zimbabwe's Deputy Registrar, academic was suspended by the Vice Chancellor on 17 October 2015 and later brought before a disciplinary committee on 26 October 2015 to answer to the allegations that on 2 October 2015 she had failed to provide an appropriate cap for the Chancellor's (President of Zimbabwe) graduation academic attire on the graduation ceremony. It was alleged that as a result the graduation ceremony was delayed by about 45 minutes. At the hearing of the disciplinary committee the applicant made an application for the recusal of the disciplinary committee on the basis that the said committee was made up of people who are all except for the Council Member, subordinates of the University's Vice Chancellor. According to the applicant the committee had been hand – picked by the Vice Chancellor. The applicant fears that she would not receive a fair hearing, hence harbours an apprehension of bias more particularly in that the allegations of misconduct were raised by the Vice Chancellor. The Vice Chancellor is the one who caused the investigation into the matter and formally charged the applicant. The Vice Chancellor is the one who instructed that the cap in question be searched for and when it could not be found he instructed that a new cap be procured. Hence the perception created in the eyes of the ordinary or reasonable man is that the disciplinary committee chosen by the Vice Chancellor who is very much involved in the case will not discharge its duties fairly.

The disciplinary committee refused to recuse itself and the applicant made an application for review of the disciplinary committee's decision to continue with the hearing at the labour court in case number LC/H/REV/116/15 and the said application is still pending. Pending the determination of the review application the applicant filed an urgent chamber application staying the hearing at the Labour Court. The Labour Court dismissed the application on the basis that the Labour Court lacked jurisdiction to grant stay of hearing in case number LC/H/APP/1284/15. This prompted the applicant to file this application seeking the following relief:-

"TERMS OF THE ORDER SOUGHT

That you show cause to the Honourable Court, why a final order should not be made in the following terms-

1. That the disciplinary proceedings against the Applicant be and are hereby stayed pending the determination of the application for review filed by the Applicant under case number LC/H/ REV/116/15.
2. That the Respondent shall pay costs of this application on the higher scale of attorney and client.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is granted the following relief:

1. That the Respondent be and is hereby ordered not to set down for hearing the disciplinary hearing proceedings for the Applicant pending the determination of this matter on the return date.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the Respondents by the Applicant's legal practitioners or by the Sheriff."

The application was opposed by the respondent.

This court was referred to a number of cases where an application of this nature was dealt with. In the case of *Albert Matapo and Others* v *Magistrate Bhilla and The Attorney-General* HH 84/10 Uchena J (as he then was) reiterated the fact that generally this court does not encourage the bringing of unterminated proceedings for review. He observed, however, that there are circumstances which may justify the reviewing of unterminated proceedings. He said this court will not lightly stay proceedings pending review and such applications can only succeed if the application for review has prospects of success. Reliance was made to the case of *Masedza & Ors* v *Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (HC) where DEVITTIE J at p 47 said:

> "If an allegation of bias has been proved the proceedings, are a nullity. Therefore it would be unjust to require that the accused go through the motions, if he is convicted, (sic) of the sentencing process, followed by an appeal or review in respect of proceedings proved to be abortive at the stage of the application for recusal. Thus, in *S* v *Herbst* 1980 (3) SA 1026 (C), where the facts showed that the magistrate's conduct of proceedings might have created the impression 'in the mind of the right – minded layman that he was unfavourably disposed towards the applicant', the court intervened in unterminated proceedings by setting aside the proceedings and referring the matter for hearing de novo before another magistrate. It was not necessary, the court stated, to show that the magistrate was in fact biased."

In my view, the issue to be decided is whether there is an appearance of bias from the dismissal of the applicant's application for recusal.

Mr *Muza* for the applicant submitted that the perception of bias comes from the fact that the said committee is hand–picked by the Vice-Chancellor of the University. The Vice–Chancellor who picked the individuals to preside over the hearing is the complainant in the case and was involved from the start up to the time the matter got to the disciplinary committee. Prior to the graduation ceremony the Vice-Chancellor advised the applicant to search for the cap in question. After the graduation he caused investigations to be conducted into the issue of the cap. He went on to suspend and charge the applicant and hand-picked the disciplinary committee in terms of s 22 of the University of Zimbabwe Act [*Chapter 25:16*]. The defence of the applicant puts liability of the cap on the Vice- Chancellor himself. In the eyes of the reasonable man it is difficulty for the committee to come to the conclusion that the applicant is not guilty of misconduct, and say the blame lies on the Vice-Chancellor. The applicant fears that the committee is likely to say she is guilty. Further, the eagerness of the disciplinary committee to proceed with the matter shows perceptions of bias.

Mr *Mapuranga* for the respondent however, disputed the fact that the disciplinary committee was biased. He cited several authorities to the effect that there was nothing untoward in the manner the disciplinary committee was appointed since it was appointed in terms of the University of Zimbabwe Act. He referred the court to the case of *Dully Holding*s v *Chanaiwa* 2007 (2) ZLR 1 where the Supreme Court held that there was no bias where the managing director who had preferred charges went on to chair the disciplinary hearing in work related cases. Relying on the *Matapo* case (*supra*) and other authorities Mr *Mapuranga* submitted that there are no prospects of success in the application for review.

However, I have been persuaded by what was said in the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 where the test for bias and its application was made. At p 238 Hlatshwayo J said:

> "In our jurisdiction, the test for bias was stated in *Leopard Rock Hotel Co. (Pvt) Ltd & Anor* v *Wallenn Construction (Pvt) Ltd* (supra) (1994 (1) ZLR 255) at 278A as an objective one, i.e. whether' there exist circumstances which may engender a belief in the mind of a reasonable litigant that in the arbitral proceedings he would be at a disadvantage."

He went further at p 239 in applying the test to say-

> "In deciding whether the apprehension of bias is reasonable or not, the existence and nature of a link or association between the judicial officer and the parties in litigation is crucial. It is the link or association which then defines the interest of the judicial officer in the subject if such interest is not already evident ex facie, as would be the case where financial or personal interests are involved."

In *casu*, while the Vice-Chancellor is not a member of the disciplinary committee in terms of s 22 of the University of Zimbabwe Act, the link between the disciplinary committee and the Vice – Chancellor makes a reasonable man believe that the disciplinary committee may not be fair in the manner it is to conduct its hearing given the degree of involvement of the Vice Chancellor in the investigations, suspension and charging of the applicant. In my view there are prospects of success on the review application. Even where the application for review is going to be dismissed, there is no prejudice to be suffered by the respondent because it can still proceed to set the matter and deliberate on the matter. But where the application for review is granted in favour of the applicant there would be some irreparable harm. It is therefore better to wait until the review proceedings are concluded before proceeding with the hearing.

In the result the application is granted.

Mawere Sibanda, applicant's legal practitioners
Chihambakwe Mutizwa & Partners, respondent's legal practitioners.