PETINA GAPPAH
versus
FADZAYI MAHERE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE

Date of written judgment: 20 March 2024

Opposed application – recusal

MAFUSIRE J

[1] This is an application for recusal. By agreement the determination is on the papers. The applicant is the defendant in an action for damages for defamation under the case reference number HC 9390-18. The respondent is the plaintiff. In this application, the applicant seeks my recusal from that matter on the ostensible ground that I have demonstrated bias and prejudice against herself and in favour of the respondent in two interlocutory rulings by myself.

[2] The first of such rulings was in May 2022, under judgment no HH 334-22. In it, I dismissed the applicant's twin applications. The one was to compel further discovery. The other was for the striking out of the plaintiff's declaration.

[3] The second interlocutory ruling was in September 2022, under judgment number HH 633-22. In it, I dismissed the applicant's application for leave to appeal my judgment under HH 334-22 aforesaid. Dissatisfied, the applicant approached the Supreme Court. She lost. Her application was dismissed with costs under judgment number SC 500/22. Undeterred, she now seeks my recusal.

[4] The law on recusal is settled in all the common law and civil law jurisdictions. Little scope for originality exists. In very basic terms, and in the context of judicial proceedings, recusal is the stepping aside, or disqualification of a judicial officer from a case on the ground of personal interest in the matter, bias, prejudice, or conflict of interest. Recusal has its origins in the common law. It is now codified under s 69 of

our Constitution, the Judicial Code of Ethics and the Regulations made thereunder: see *Mawere & Ors v Mupasiri & Ors* CCZ 2-22, at p 5 – 6.

[5] Recusal is a rule of natural justice: see *Mangenje v TBIC Investments [Pvt] Ltd & Anor* 2014 [2] ZLR 401 [H] and *NSSA v Housing Corporation Zimbabwe [Pvt] Ltd & Anor* SC 21-24. No man [or woman] should be judge over his [or her] own cause, or *nemo judex in sua causa*: see *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H), 236D – F. In *Mangenje* above the court said, at p 407D – E:

> "When you are a judge or judicial officer, and your recusal from a case is sought, only you can decide that application in the first instance. If you refuse recusal and that decision is wrong, it can always be corrected on appeal; *President of RSA, supra,* at p 169 D[1]. In essence therefore, and contrary to the general rule, you become judge over your own cause. It seems an inevitable exception to the general rule."

[6] The law on recusal can be summarised as follows:

- Judges have a duty to sit and decide cases before them and in which they are not disqualified: *Associated Newspapers of Zimbabwe [Pvt] Ltd, supra*, at p 233C – E.
- It is in the general interest of the judiciary and the public for an individual judicial officer to recuse themselves where a litigant perceives a reasonable apprehension of bias. Justice is rooted in confidence. Confidence is destroyed when right-minded people go away thinking the judge was biased: *Metropolitan Properties Ltd v Lannon* [1968] 3 All ER 304, at p 310A – D.
- Judges should not too readily accede to suggestions of bias or other interest in a matter: *Re JRL: Ex parte CJL* (1986) 161 CLR 342 (HCA), at p 352E – F:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearances of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

- By reason of their training, experience, conscience and intellectual discipline, it must be assumed that judges are able to administer justice without fear or favour, and capable of judging a particular controversy fairly on the basis of its own circumstances.

[1] *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors* 1999 [4] SA 147 [CC].

- It must be assumed that judges are able to disabuse their minds of any irrelevant personal beliefs and predispositions: *United States v Morgan 313 US* 409 (1941) at 421.
- On being appointed, every judge in Zimbabwe takes and subscribes to the judicial oath "*… to do right to all manner of people after the laws and usages of Zimbabwe, without fear or favour, affection or ill-will*": see *Associated Newspapers, supra*, at p 232D – F.
- There is a presumption that judges will carry out their oath of office. That is one of the reasons why the threshold for a successful application for recusal is high: *R v S (RD)* (1997) 118 CCC (3d) 353.
- A judge should not unduly take a recusal application as a personal affront.
- The perception or apprehension of bias by a litigant must itself be reasonable. An apprehension of bias that is whimsical or morbid fails the test: *Mangenje*, *supra*; *S v Collier* 1995 (2) SACR 648 [C] [recusal sought on the ground that the magistrate was white was dismissed]; *R v Mutizwa* 2006 [1] ZLR 226 [H] [recusal sought on the basis that the presiding magistrate had a reputation for imposing stiff sentences was dismissed].
- A judge who makes findings on preliminary issues or who has been merely exposed to the merits of the case is not disqualified to deal with the merits: *Mawere & Ors, supra*, at p 7 – 8; *President of the RSA & Ors, supra* and *NSSA*, *supra,* at p 13.

[7] In the present case, the applicant accuses me of concealing an on-going and **intimate** relationship between myself and the respondent. As proof, she refers to two random and disparate cases by myself in the last year in which the judgments went in favour of the litigants represented by the respondent, as counsel, namely, *Matukutire v Munatsi & Ors* HH 440-23 and *ASP Marketing CC v Lunar Chickens [Pvt] Ltd & Ors* HH 535-23. This is absurd. The respondent, like all counsel, ~~have~~ **has** appeared in countless other cases before the courts. Like all counsel, she has won some and lost others.

[8] The applicant has irregularly commented extensively and, in the most condescending and disparaging manner, sought to discredit both the evidence yet to be led and the witnesses yet to testify in the main case. I am accused of, among many other things, having accepted at face value the respondent's apparent falsehoods and rejected her apparent truths.

[9] The applicant further accuses me of having prejudged the main case. The evidence of all that remains my two judgments aforesaid. From them, she picks eight instances of bias or prejudice by myself. Yet the applicant and her lawyers know, or ought to know, that they are disbarred by operation of the law and the rules of procedure from bringing up the same issues as were settled by those two judgments. Her appeal to the Supreme Court was dismissed. The issues are now *res judicata* or issue estoppel. What she and her lawyers are doing, in effect forcing me to review my own judgments despite her loss in the Supreme Court, is foreign to our legal system.

[10] The applicant, aided and abetted by her lawyers, has debased the court process and subjected it to flagrant abuse. The abuse has taken many forms. Among other things, virtually in all her affidavits subsequent to the closure of pleadings in the main case, she has, at every turn, made scurrilous and condescending allegations against the respondent and others. She has been so unrestrained. In this application, her founding affidavit has over 193 very long paragraphs straddling over a staggering 43 pages. She has gone on to file an answering affidavit, continuing in the same vein and irregularly bringing up new issues.

[11] The founding affidavit is replete with slander, ironically, all in defence of a claim for defamation! The vilification peaks particularly from para 78. For example, and in relation to the respondent, she writes:

> "83. … … … I had no problem at all when I learned many years after the fact that a young woman in her mid-twenties had been so googly-eyed and mesmerised by a charming older man who is good-looking and attractive to women that she developed an unreciprocated infatuation and offered herself to him on a golden platter. Limerence is a common and consuming obsessive mental condition that affects some young women, particularly when they meet an attractive but unobtainable man who is out of their league.
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> … … … … … …
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> 94. My witnesses will testify that if anyone is to blame for her reputation as a 'woman of low morals', it is the Plaintiff herself who has earned that reputation for herself, separately from anything I have said. I will show that her reputation is in fact that of a serial mistress renowned for her affairs with married ~~woman~~ **men**."

[12] The torrent of abuse decluttered, the following allegations or insinuations must rank as the nadir of dishonour:

- That the respondent has instituted a million dollar claim for damages in the knowledge and confidence that there are corrupt judges that will fight in her corner [*para 187*].
- That I have dismissed the applicant's interlocutory applications aforesaid because my eyes are squarely on the plaintiff's million- dollar claim [*para 114 and the applicant's letter of complaint to the Judicial Service Commission*];
- That the respondent may as well have been the one who penned the two interlocutory judgments aforesaid [*para 24*].
- That I failed to disclose a long-standing **intimate** relationship with the respondent the evidence of which is the success the respondent has scored in matters argued by her before me [*para 3, 32 and 34 – 37*].
- That I have doctored the record of proceedings in the main matter by amending the joint pre-trial conference minute in such a way as to reverse the onus of proof resting upon the respondent to prove defamation, and proceeding further to conceal that document from the applicant and her lawyers [*para 32, 46, 121, 135, 145, 154 and 188*].
- That the applicant's interlocutory applications fortuitously foiled a well-orchestrated plan by myself and the respondent to ambush the applicant at trial [*para 188*].

[13] Sometimes the courts are driven to question abnormal conduct by litigants. In *Masamba v Secretary, Judicial Service Commission* 2019 [2] ZLR 54 [H] CHATUKUTA J, as she then was, in relation to the applicant in that matter, said, at p 57F:

> "It is apparent that the court is not faced with a bitter litigant who is aggressively and unreasonably seeking redress. The court appears to be faced with a litigant who requires psychological intervention."

[14] This application does not meet the requirements for recusal in any respect. It is an unmitigated absurdity. It is an affront. No judicial officer can relate to it without impairing the dignity of the court. It is unbelievable that two legal practitioners who are supposed to be officers of the court have presided over and directed the drafting of the founding affidavit. It is equally incredible that they have purported to file heads of argument over what is patently an aberration.

[15] The applicant has unjustifiably gone personal. She has purported to superimpose her own misguided issues into the respondent's cause. This is wrong. What is more, it is done in the most derogatory manner. Facts are deliberately twisted. An example is the

refrain that I called her 'wicked'. Yet that expression, in the leave to appeal judgment, was in reference to the self-serving philosophy that says justice is only justice when decisions are given in one's favour.

[16] Unbelievably, both the applicant and her lawyers fail to grasp the simple point that by operation of the law, the nature of her defence to the respondent's claim for defamation, quite apart from what may, or may not have been agreed upon at the pre-trial conference, is such that the onus of proof automatically shifts to her. This is quite elementary. But all these issues are now *res judicata* and should not continue to be recycled.

[17] It is important that the dignity and integrity of the courts and their processes are restored and maintained. Litigants that stray from the norm deserve censure. This application has to be dismissed with costs at the highest scale available. The applicant's legal practitioners are equally culpable. They have been complicit in the demonization of the entire judiciary. In *Phulu & Ors v Rukanda & Ors* HH 516-21 the court said, at p 6, para 15:

> "But this sort of thing happens when legal practitioners abdicate their responsibilities as officers of the court and opt to act like hired guns. A legal practitioner's first duty is to the court. He or she should have the courage and responsibility to advise their client when their cause is dead."

[18] The applicant's legal practitioners herein deserve to be censured by an order of costs *de bonis propriis* on the same high scale. The regulatory authority may need to peek into their behaviour. However, since these issues have not come up before, an opportunity is given them to show cause why they should not be reported and mulcted in costs.

[19] In the premises, the following orders are hereby made:

i/ The application for recusal in the matter under the case reference number HC 9390-18 is hereby dismissed with costs on the legal practitioner and client scale.

ii/ Within seven [7] days of the date of this order, the applicant's legal practitioners, Jessie Majome & Co and Advocate Tinomudaishe Chinyoka, shall show cause why they should not bear the costs of this application on the

legal practitioner and client scale, *de bonis propriis* and jointly and severally with the applicant, and why this judgment should not be copied to the Law Society of Zimbabwe.

iii/ The trial of the matter under HC 9390-18 shall commence on the date and time to be advised by the Registrar.

20 March 2024

Jessie Majome & Co, applicant's legal practitioners
Coghlan, Welsh & Guest, respondent's legal practitioners