

JOB SIKHALA  
and  
THE STATE

HACC (A) 12/23

JOB SIKHALA  
versus  
MAREHWANAZVO GOFA N.O  
and  
NATIONAL PROSECUTING AUTHORITY  
and  
THE PROSECUTOR-GENERAL

HC 8597/22

HIGH COURT OF ZIMBABWE  
CHIKOWERO & KWENDA JJ  
HARARE, 24 October & 14 November 2023

### **Application for recusal**

*H Nkomo with J Bango & R Mutero*, for the applicant  
*T Mapfuwa*, for the respondents

### **CHIKOWERO J:**

1. This is an application for the recusal of CHIKOWERO J from sitting as a member of the court presiding over case numbers HACC (A) 12/23 and HC 8597/22. The former is an appeal against the whole judgment of the magistrates court convicting the applicant of one count of defeating or obstructing the course of justice as defined in s 184(1) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The latter is an application for review of the trial court's interlocutory decision dismissing the applicant's exception to the same charge. The applicant had excepted to the charge on the basis that it did not disclose an offence.
2. The law relating to recusal of a judicial officer is settled. See *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Wallenn Construction (Pvt) Ltd* 1994(1) ZLR 255(S); *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* 2001(1) ZLR 226(H); *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of*

*State for Information and Publicity & Ors* 2005 (1) 222(S) & *S v Nhire & Anor* 2015 (2) ZLR 295 (H). Where the reason for seeking recusal is not actual bias, the test is whether there is a reasonable belief that a real likelihood of bias exists.

3. In this regard, the Constitutional Court of South Africa in *President of the Republic of South Africa & others v South African Rugby Football Club & others* 1999(4) SA 147 (CC) said:

“The test 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 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 because 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 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 reason, was not or will not be impartial.”

In short, the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case.

4. In *S v Nhire & Anor (Supra)* it was held that in considering an application for recusal there is a presumption that judicial officers are impartial and that the onus is on the applicant for recusal to rebut that presumption by adducing cogent and convincing evidence. This is in recognition of the position that it is not easy to dislodge the presumption of judicial impartiality.
5. On a reasonable, objective and informed appreciation of the correct facts of this matter, the application for the recusal of CHIKOWERO J is frivolous.
6. The applicant, under HC 8897/22, sought review of the trial Court’s interlocutory decision dismissing his exception to the charge.
7. Following certain developments during the proceedings then pending before the trial court, the applicant, before that court, filed an application for an order interdicting the prosecution from leading further evidence. That application was dismissed. Among the reasons for that decision was that the application was misconceived in that the question of the prosecution leading further evidence did not arise as the State had not even opened its case. This decision the applicant also took on review.

8. Thereafter, the applicant then applied for the postponement of the trial pending determination of the two applications for review. The trial court dismissed the application for postponement of the trial.
9. Exhibiting a never - say- die attitude the applicant then filed an urgent chamber application for stay of the then untermiated trial proceedings pending before the trial court pending determination of the two court applications for review. I struck that application off the roll, having found that it was not properly before me. In doing so, in the matter of *Job Sikhala v Marehwanezvo Gofa N.o & two others* HH -176/23 at pp 6-7 I said:

“This urgent chamber application for stay of criminal proceedings cannot ignore the existence of a valid interlocutory decision by the magistrates court refusing the very same relief that the applicant is seeking before me..... The applicant did not challenge the decision of the magistrates court refusing to postpone the trial pending determination of the court applications for review.....this urgent chamber application for stay of criminal proceedings is not the correct procedure to express dissatisfaction with the magistrates court’s interlocutory decision to dismiss the application for postponement. This finding is in line with the views of the two- judge bench in *Mupfumira & Anor v Mutevedzi N.o & Anor* HH 200/20..... This court would not be regulating its own process by conducting a parallel hearing of the application for postponement of the criminal trial. There is an extant court decision on the issue of postponement. This application is improperly before me. In the result, the application be and is struck off the roll.”

10. What is clear is this. In rendering the decision in case number HH 176/ 23 CHIKOWERO J did not consider whether the application itself was urgent. This was so because he had found that the application was not properly before the court. He did not, for the same reason, consider whether there was a basis for interfering with the then untermiated course of proceedings pending before the trial court. Finally, again for the same reason, he was not required to, and did not consider, whether the application for review of the decision dismissing the exception had reasonable prospects of success. I mention all this because the application for recusal was predicated on these aspects. Mr *Mutero* submitted that my finding that the urgent chamber application was not urgent puts me in an invidious position if I were to remain a member of the court adjudicating the matters under case numbers HACC (A) 12/23& HC 8597/22. The correct position is that I was never required to go so far as to decide whether the application in question was urgent. Similarly, I was not required to proceed to the extent of determining whether there was justification to interfere with the course

of the then untermiated trial proceedings before the trial court. By the same token, the matter did not proceed to the stage where I was required to consider and express a view on the prospect of success of the application for review filed under case number HC 8597/22.

11. There is no objective basis for the applicant to hold a reasonable apprehension that I would not bring an impartial mind to bear in hearing and determining the appeal and the application for review. As already demonstrated, I disposed of the application filed on a procedural ground. In other words, I upheld the preliminary point raised by Mr *Kangai*, who appeared for the second and third respondents in that matter, that the application was not properly before me. Mr *Mutero* concedes that this application for recusal is not based on either actual or reasonable apprehension of bias. I therefore understand him to argue that the reasonable apprehension that I would not have an open mind arises from what he called the court's "findings" in HH 176/23. The court made no such findings. The application for recusal is not premised on the basis of the court's decision in that matter.
12. In the result, the application for the recusal of CHIKOWERO J in the matters *Job Sikhala v The State* HACC(A) 12/23 and *Job Sikhala v Marehwanazvo Gofa N.o, National Prosecuting Authority and the Prosecutor- General* HC 8597/22 be and is dismissed.

*Mhishi Nkomo Legal Practice*, applicant's legal practitioners  
*The National Prosecuting Authority*, respondent's legal practitioners