CFI HOLDINGS LIMITED
versus
FIDELITY LIFE ASSURANCE ZIMBABWE LIMITED
and
LLOYD MHISHI N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 26 September & 30 December 2024

Opposed Application

T Mpofu with T Nyawo, for the applicant
T R Mafukidze with M Tshuma, for the 1st respondent

CHITAPI J: The parties to this application are CFI Holdings Limited as applicant, Fidelity Life Assurance Zimbabwe as first respondent and Lloyd Mhishi N.O as second respondent. The applicant and the first respondent are registered companies in accordance with the laws of Zimbabwe. The second respondent is the appointed arbitrator in a dispute in which the applicant sues the first respondent for an order to set aside a sale of shares agreement (the agreement) entered into between the applicant and the first respondent on 29 May 2015 at Harare, Zimbabwe.

Just to put context to the dispute without expressing any views on the merits of the dispute, the sale agreement referred to pertains to the sale by the applicant of its entire shareholding in a company called Langford Estates (Private) Limited to the first respondent. The applicant was at the time of execution of the disputed sale agreement the 100% shareholder of Langford Estates (Private) Limited whose sole asset was a piece of land called remaining extent of Langfords measuring 834.3479 hectares and held under deed of transfer No 2122/63. The purchase consideration was recorded in the agreement as the sum of USD 16 477 913.00. For reasons which are not for purposes of this application necessary to outlay or comment on, the applicant considered the agreement of the sale of shares to be invalid or wholly void, a contention hotly disputed by the first respondent.

The applicant and the first respondent on account of the applicants challenge to the validity of the agreement agreed to and referred the dispute for resolution by arbitration. The first

respondent in turn has counterclaimed for an order that the applicant should perform the formalities of registration of transfer of shares sold as per the agreement and USD 32 524 448.00 as damages for loss of business allegedly caused by the applicant and other reliefs. The arbitration process commenced before the late retired judge N Mtshiya who passed on before the arbitration proceedings had been completed. The second respondent herein Lloyd Mhishi was then appointed without objection by the applicant and first respondent. The applicant however after commencement of the proceedings, applied for the second respondent's recusal. The first respondent contested the recusal application. The second respondent dismissed the application for his recusal and rendered a ruling dated 15 April 2024. The second responded ordered that the pretrial hearing that had been stayed pending the application for his recusal should be proceeded with.

Consequent on the dismissal of the recusal application by the second respondent, the applicant filed the current application. The applicant seeks an order expressed in its draft order as follows:

"IT IS ORDERED THAT:

1. Second respondent is pursuant to provisions of Article 13 (3) of the Model Law to Arbitration Act [*Chapter 7.15*] recused from continuing to hear the arbitration matter between CFI Holding Limited and Fidelity Life Assurance of Zimbabwe Limited.
2. The parties shall in terms of the law procure the appointment of a substitute arbitrator.
3. First respondent shall bear the costs of this application."

Article 13 (3) on which the applicant seeks reliance for the relief sought herein for context must be read not in isolation but as article 13 as a whole.

Article 13 provides as follows:

"ARTICLE 13

Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days

> after having received notice of the decision rejecting the challenge, the High Court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."

So far as the outlined procedure is concerned, no issue arose between the parties. The application is therefore properly before the court.

Next is to consider the grounds for challenge as provided for in Article 12 of the Arbitration Act. They are limited and Article 12 provides as follows:

ARTICLE 12 –

> "Grounds for challenge
>
> (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
>
> (2) **An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."**

In dealing with application, it was submitted by the parties and correctly so that the court is not required to review the arbitrators ruling nor to act as a court of appeal. The court sits as a first instance court and determines the dispute on the papers placed before it which in the main comprise the grounds of recusal which were placed before the arbitrator. In the case of *EBI Zimbabwe (Private) Limited* v *Old Mutual Unit Trusts (Private) Limited* HH 55/09 at page 3 of the cyclostyled judgment, PATEL J (as he then was) stated

> "Article 13(3) enjoins the Court "to decide on the challenge" referred to it by the challenging party, without elaborating the procedure to be followed. Be that as it may, I have no doubt that the Court is confined to determining the challenge on the grounds of challenge presented to the arbitrator and cannot entertain any fresh ground of challenge. However, I am not persuaded that Article 13(3) narrows the scrutiny of the Court, when examining and ventilating the issues before it, to the same submissions that were presented to the arbitrator."

The learned judge went on to state that Article 13 (3) did not fetter or define the courts powers as to procedure but noted that the procedure for referral was by way of ordinary application and that parties could file submissions. The learned judge in this regard had reflected upon the respondent's submission that as the respondent had not made submissions in the application for

recusal before the arbitrator, the respondent was therefore precluded from making submissions before the High Court and that the High Court was required to only deal with what was placed before the arbitrator without submitting further on it.

The learned judge further stated that Article 13 (3) should not be interpreted restrictively because to do so would "constrict and offend the common law right to be heard which vests in every interested party – as embodied in the *audi alteram partem* rule – as well as the constitutional right to a fair hearing guaranteed by s 18(2) of the Constitution". My understanding of the above dicta is that it was stated within the context of the respondent's submission that the applicant be precluded from making further submissions on the matters which were before the arbitrator. In that regard, the learned judge cannot have intended to hold that Article 13 (3) be not restrictively interpreted because it is worded in restrictive language as regards the grounds on which a mutually agreed or appointed arbitrator may be challenged.

Again, in considering this application, since the matter is brought as an ordinary application, the rules pertaining to the filing of affidavits and their finality as to the matters stated in them applies. In other words, the case for the applicant as well the defense of the respondent must be established on their affidavits and no new ground of challenge or defense may be introduced outside the affidavits without the leave of the court being first sought and obtained. Whilst the applicant may file an answering affidavit, it shall be an answer to the facts stated in the opposing affidavit and should not introduce new facts. This much is trite and may fairly be stated to be an elementary principle of application or motion proceedings.

Against the background facts and procedural aspects as outlined, I deal with the merits of the application. From the founding affidavit, the applicant was not comfortable with the shift or change in legal practitioners by the first respondent from Mawere Sibanda Legal Practitioners to Dube Manikai and Hwacha Legal Practitioners soon after confirmation of the appointment of the second respondent as the substitute arbitrator to replace the late MTSHIYA J. The applicant expressed its concerns as follows in para 18-19 of the founding affidavit:

> "18. The arrival of the new legal practitioners has not been without event. To begin with it is noticeable that such arrival followed hard upon the confirmation by applicant of the arbitrator's involvement in the matter. Sadly, the unholy impression given by that arrival is that first respondent was waiting for applicant to confirm its acceptance of second respondent before it could play its hand. In addition, second respondent is a former partner in the firm, Dube Manikai And Hwacha legal practitioners.

> 19. The theatrics surrounding the entry of the new legal practitioners raised on the part of the applicant at least an eyebrow. All along, applicant had no basis to be concerned."

The applicant noted that the second respondent properly made disclosure that he was once a partner at Dube Manikai and Hwacha but left the firm in 2011. The applicant averred that it considered it to be awkward that the first respondent changed legal practitioners soon after the confirmation of the appointment of the second respondent given the second respondent's prior association with the newly appointed legal practitioners. The applicant averred that it decided to carry out an investigation. The applicant expressed itself in this regard as stated in paragraph 22 of the founding affidavit as follows:

> "22. Having regard to what was in the view of the applicant an awkward reaction of first respondent to its confirmation of the arbitrator's involvement, it became important for applicants' officials to undertake further investigations in trying to understand why first respondent would seemingly believe that being represented by Dube Manikai and Hwacha, before second respondent, give it some kind of advantage in these proceedings."

The applicant noted that from its investigations, it yielded a result which it expressed in para 23 of the founding affidavit as follows:

> "23. It was at that stage that applicant became detained by a recurring theme in first respondents' papers. The papers reflect that the first respondent seems to think that the fact that the agreement, the subject matter of this dispute, was preceeded by some debts on applicant's past is a matter of moment. In paragraph 1 of its evidence headlined CFI FINANCIAL WOES, first respondent says the following:
>
> 1.1. By 2015, Claimant was in serious financial troubles as it owed Zimbabwean banks a total of UD$ 16 000 000……
>
> 1.2. …….it had no defense to the claims of the banks for example under HH320/16 FBC Bank obtained a summary judgment against claimants ….."

The applicant went on to aver that the fact that the first respondent raised the issue of the alleged indebtedness of and a judgment against the applicant as deposed to in the first respondents' defense advantages it in the determination by the second respondent of the dispute in issue. The applicant averred further that because the first respondent had averred in the statement of defense that a "vacation of the agreement would prejudice or expose entities such as FBC bank that became in issue to be dealt with by the second respondent. It was averred that in 2009 when the agreement

sought to be impugned by the applicant in arbitration proceedings was executed FBC bank was represented by Dube Manikai Hwacha (hereinafter DMH) wherein the second respondent was a partner.

The applicant averred that the fact that the second respondent did not personally handle the FBC Bank transaction in question did not matter. In this regard the applicant expressed what it called it's case in para 29 of the founding affidavit as follows:

> "29. Applicant's case is that first respondent has acted in such a way as to give the impression that it is calling the arbitrators remembrance to the transaction handled during his time: to everything said about it in meetings and at tea and that it is trying to show him how that transaction impacts on this dispute and how he must use his historical knowledge to resolved the dispute now before him."

The applicant averred that it could not be coincidence that the first respondent did not change legal practitioners until after the confirmation of the appointment of the second respondent as the replacement arbitrator. The applicant reasoned that had the first respondent changed legal practitioners before the confirmation of the second respondent as arbitrator, the applicant would not have made objection to the appointment.

In the opposing affidavit, the first respondent took issue with the voluminous application which comprised 581 pages of which the founding affidavit comprised 8 pages only. The first respondent contented that the applicant did not relate specifically to the relevance of the attached annexures and documents. I must at once agree. The practice of just lumping documents as attachments to an affidavit is not permitted. Counsel have a duty to be meticulous in settling pleadings and affidavits in any matter before the court. Attachments to affidavits are intended to support a fact alleged in the affidavit. Therefore, even where a whole document(s) has been attached in support of the case, the relevance of the document and or it's excepts supportive of a particular fact or contention must be related to specifically. For example, in paragraph 8 of the founding affidavit, the applicant stated as follows:

> "8. I further attach and mark as the "**B series**" the memorials filed by the applicant and the first respondent in the arbitration. I incorporate their contents hereto to the extent that they shed light on the nature of the dispute between the parties."

If the quoted deposition is analyzed, the applicant has simply put together documents which it calls "memorials" (whatever that means) and left it to the court to sift through and decide on their relevance and the extent to which the documents "shed light" on the nature of the dispute

between the parties. It is not the duty of the court to analyze documents filed by parties for relevance or context. The deponent to the affidavit which speaks to an attached or supporting document should be specific on what in that document is relevant and factually allege the relevance. When settling the affidavits, counsel must be guided by a consideration of the issue or issues for determination as counsel perceive them to be. The depositions in an affidavit must relate to the dispute and issues which the party relying on the affidavit wants the court to determine. The applicant should have done better than to just lump documents and inviting the court to find the relevance of the documents. Depending on the circumstances of an individual case, where a party settles an affidavit with supporting documents whose relevance is not explained in the affidavit and leaves it to the court to read and discern the relevance, the errant party maybe visited with an appropriate costs order even where such party is the successful party in the litigation. In this matter the applicant must stand guided. I make no adverse costs order at this time.

In relation to the substance of the alleged grounds for the second respondent's recusal, the first respondent averred that the applicant's application had no merit as it was not backed by any factual backing but suspicion. The first respondent averred that the engagement of DMH by the first respondent to represent it had nothing to do with the prior appointment of the second respondent as arbitrator. The first respondent averred that the applicant did not relate to any facts, circumstances or other evidence from which a reasonable person would consider reasonably that the arbitrator could be biased in favor of the first respondent. The first respondent denied that its change of legal practitioners constituted theatrics nor was it awkward to appoint DMH as its legal practitioners after the appointment of the second respondent.

The first respondent averred that the second respondent ran his own private practice in competition with other law firms including DMH. The first respondent averred that no allegation was made and no any facts were alleged to suggest that the second respondent was beholden in any way to DMH or to the first respondent as would move him to favor the first respondent or be biased against the applicant.

In relation to the issue of FBC Bank having been a client of DMH at the time of the execution of the agreement in dispute between the parties in the arbitration case, the first respondent averred that the issue of the applicant having been indebted to banks which include FBC Bank was common cause. It averred that the applicant was owing other banks like AgriBank,

Infrastructure Development Bank of Zimbabwe Limited, Standard Chartered Bank Limited, and CBZ Bank Limited. The first respondent averred that it was a fact as alleged by it that if the agreement was declared a nullity, the banks would be prejudiced.

The first respondent expressed its position on the issues of the mention of FBC Bank as followed in para 16.3 – 16.7 of its opposing affidavit:

> "16.3 What is before the second respondent concerns the sale and purchase of shares in Langford Estates by applicant to 1st respondent. FBC Bank Limited is not a party to these proceedings and its prior transactions had no relevance to the appointment of the second respondent as arbitrator.
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> 16.4 The first respondents' case has been simply that it assumed debts owed by the applicant to Zimbabwean banks which include FBC Bank. The vacation of the agreement without tender of repayment would affect the first respondent position. Beyond that, the fixation with FBC Bank is a creation of the applicant.
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> 16.5 For completeness the applicant did not allege that the second respondent handled the FBC Bank transaction during his time as partner at DMH and yet alleges that by virtue of being partner at DMH, the second respondent would appreciate the background to this matter. Applicant cannot approbate or reprobate; it failed to make clear and substantiate averments backed by evidence.
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> 16.6 Additionally, on the facts of this case, it was not and has not been alleged that the second respondent ever advised, litigated or did work for any of the litigants in this matter. Neither was it alleged that the second respondent had any personal financial interest in the outcome of this matter. The only allegation made is that once upon a time, the second respondent was a partner at DMH which represented FBC Bank, an entity not party to the arbitration proceedings.
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> 16.7 With respect, no fair minded and informed observer, assessing the facts objectively would conclude that there is a real possibility of bias from the second respondent. In the absence of a substantiated allegation of bias, personal or financial interest in the cause, the application for recusal was rightly refused."

The first respondent averred that the applicant had not alleged on established facts from which such a conclusion could be drawn that there was a real likelihood that the second respondent would be biased or impartial.

In the replying affidavit the applicant attached what it referred to as **Q series** correspondence involving the parties and also the arbitrator post the filing of this application. The applicant stated as follows in para 3.2 of the answering affidavit.

> "3.2 I attach thereto and mark the **Q series** correspondence exchanged between the parties as well as the arbitration post the filing of the present application. First respondent has become "pushy" in a manner which gives the objective impression that it believes itself now be in a position of some advantage."

Again, the applicant has just heaped documents which it does not singularly relate to any fact. It does not state in any specific terms what containments in the documents related to are

relevant. In any event the attachments ought to have been prefixed to a factual obligation(s) which is then supported by the attachments. The same observations are made in relation to the founding affidavit are repeated in relation to the attachment of the Q series in the answering affidavit. Whether or not the documents related to could properly be attached in the replying affidavit is doubtful because they relate to a period post the filing of this application and would contribute new evidence not placed before the second respondent as part of grounds to seek the latter's recusal.

In relation to the attachment of the whole record of proceedings before the second respondent, the applicant averred that it had to do so because the averments setting out the dispute were material to this application. They may well be material. The issue is that the applicant does not in the affidavits both the founding and answering relate specifically to those "A", "B" and "Q" series. Such failure constitutes atrocious pleading for lack of a better word. It is as bad as having the deponent stating that it has a good case as borne by the record of proceedings or by documents attached and leaving it at that. The court cannot be made to sift through an attached record and make a case for a party who has not factually related to documents which it wants the court to consider as supporting its case.

In relation to the change of legal practitioners by the first respondent, the applicant maintained that it was awkward for the change to be made almost immediately after confirmation of the second respondent as arbitrator. The first respondent averred that the first respondent reliance on the financial woes of the applicant brought in FBC Bank into the fray and FBC Bank was a client of DMH at a time that the second respondent was a partner.

The applicant also averred that the second respondent applied the wrong test for recusal and did not take into account authorities cited by the applicant. The applicant averred that the second respondent did not say anything about his being a partner or how that fact would impact on his impartiality. There was some vitriol expressed by the first respondent in paragraph 15 of the answering affidavit that the second respondent did not need enemies as the first respondent was not a good friend. It was utterly unnecessary to attack the second respondent's integrity in that regard. In relation to how second respondent was misdirected, that consideration does not fall for determination since this application is a rehearing.

In submissions to the court, the applicants counsel noted that there was anger expressed in the first respondents opposing affidavit and heads of argument. It was argued that this in itself was telling. Counsel submitted that there was a pushy attitude and approach by the first respondent perhaps aided by the second respondent to have the arbitral proceeding carried out. As I understand the submission, the suggestion was that the anger and push factors suggested some collusion between the first and second respondents. Counsel submitted that before the second respondent was appointed the replacement arbitrator, the first respondent had made numerous interlocutory applications to stall the proceedings before MTSHIYA J but that its attitude had changed. It was submitted that the first respondents' attitude had changed because the appointment of the second respondent was to its advantage.

In response, the first respondents counsel submitted that the anger expressed in the affidavits was not unusual in adversarial systems of procedure. Counsel submitted that it was important for the court to concern itself with the pleaded case. I do agree. Nevertheless, the rules of court provide that an affidavit should deal with the facts and may have supporting documents attached thereto to support the facts alleged in the affidavit. Emotions and vitriol as well as the use of uncouth language and expressions should be avoided. Since it is the legal practitioners who normally draft an affidavit for his client it is not expected that a seasoned, experienced and professional legal practitioners would fail to appreciate that cases are decided on evidence constituted by facts and therefore showing off by use of intemperate or uncouth language as commentary does not add value to the claim or defence as the case may be. Grandstanding by words or conduct does not win cases.

Applicants counsel submitted that the issue for consideration was not whether or not the second respondent dealt with the transaction involving FBC Bank. The issue was that the second respondent was a partner in DMH at the time that the transaction involving FBC Bank was consummated. Counsel submitted on the authority of *Pertisilis* v *Calcatern and Another* 1999(1) ZLR 70 (HC) that in a partnership a conflict affects all parties.

The first respondents counsel however submitted that the case for conflict on the part of DMH was not pleaded. Counsel submitted that the alleged transaction involving FBC Bank was not explained and neither was it alleged nor was it shown that the second respondent knew about it. Counsel submitted that the transaction remained so named without detail. The submission is

correct. The first respondent did not admit that there was a transaction involving FBC Bank. It was accepted that FBC Bank was a client of DMH but the transaction was not given any flesh. The statement of claim and defence did not allude to it. The issue of conflict arose because of the disclosure by the second respondent of his prior association with the first respondent's legal practitioners. The disclosure ended at that. Even after the applicant had carried out its investigations, the result of the investigation was not disclosed. The applicant instead quoted an allegation by the first respondent to the effect that the applicant was in serious financial problems in 2015 and owed banks USD $16 000 000.00 and that the applicant had summary judgment entered against it in 2016 by judgment reference HH320/16. The second respondent had left DMH in 2011. The agreement in issue in the arbitral proceedings was concluded in 2009. A reading of the agreement does not show any reference to FBC Bank Limited nor to DMH. It is difficult if not impossible to make out the connection between FBC Bank limited being a client of DMH in 2009and the issue of the applicant's alleged financial woes and a court judgment both events having accused in 2015 and 2016 respectively. The second respondent was no longer with DMH.

The first respondents counsel took the court through the applicant's annexures showing cash advance facilities made by FBC Bank to the applicant. Counsel submitted that there was nothing in those annexures to show that DMH were involved in the relationships between FBC Bank and the applicant. Counsel submitted that on the applicants own papers, the applicant borrowed heavily from FBC Bank from 2009 through to 2015. It was submitted that the fact that the applicant had financial woes was evident from the 2015 case and the summary judgment entered against the applicant. Counsel submitted that the applicant did not establish that there was a transaction involving the arbitrator or DMH during the second respondents time at DMH as would impact upon the second respondent's determination.

Counsel were polarized on the issue of whether or not arbitration was subject to constitutional provisions on the right of access to court. The applicants counsel submitted that the constitutional right of access to courts was not applicable to arbitration because the parties choose a forum for their dispute resolution. The first respondent counsel disagreed and argued that the arbitration process was subject to constitutional imperatives. Counsel placed reliance on the case of *Lufuno Mphaphale* v *Andrews* 2009 (4) SA 529 (CC). Having read the case, I noted that the Constitutional Court of South Africa had to consider whether arbitration infringed the s 34

constitutional right of access to court. Arbitration appeared to limit the right. The position taken was that s 34 did not limit the right of access to the court since parties would voluntarily have chosen that their dispute be resolved by a lawful process of arbitration.

On the other hand, the applicants counsel position that the constitutional provisions do not apply may not be entirely correct if unqualified because the arbitration process itself must be constitutionally carried out. Unconstitutional decisions or proceedings may be declared to be so. In the final analysis on arguments on this point, nothing of note arises therefrom because the issue of constitutionality or otherwise of the arbitration was not a point that arose for determination.

The test for recusal of an arbitrator is as counsel agreed, the same as for judicial officers. In the case of *National Social Security Authority* v *Housing Corporation of Zimbabwe (Private) Limited and Peter Carnegie Llyod* SC 21/23 GUVAVA JA extensively dealt with the issue and cited several cases that deal with the recusal. Notably the learned judge stated at paragraph 20 and 21 as follows

> " [20] In an application for recusal a litigant must therefore show whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judicial officer 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 evidence and submissions of counsel (see The State v Mawadze (supra)). In the South African jurisprudence the test is called one of "double reasonableness", not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable (see the President of the RSA and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 and South Afrcan Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886).
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> [21] An allegation of bias against a judicial officer must be so clear so as to show that the failure by the judicial officer to recuse himself or herself will result in an unfair trial. There must be a real likelihood of bias and not a mere possibility. The real likelihood of bias must be easily ascertainable and where necessary the facts of the matter and events leading to a matter being placed before a judge must also be considered. A helpful description of the test to be applied can be found in Metropolitan Properties Ltd v Lannon [1968] 3 All ER 304 where 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 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'." (**emphasis added)

In the disposition para 28 the learned judge stated

[28] It is clear from the case law cited above that the onus of proving bias on a judicial officer is on the applicant. It is also apparent that the applicant must show that there is a real likelihood of bias on the part of the judicial officer. An application for recusal is not one that is easily granted unless it is proved that the judicial officer will most likely be biased in determining the appeal. The fact that a judge determined a preliminary issue in the appeal is not on its own a basis for an application for recusal. As a result, the application for recusal must fail.

I do acknowledge that counsel for both the applicant and the first respondent lined up several authorities on recusal in their heads of argument and in the application for recusal which was placed before the second respondent. The authorities do not detract from the quoted dicta of GUVAVA J (supra).

In the case of Associated newspapers of *Zimbabwe Private Limited* v *Diamond Insurance Co Private Limited* 2001 (1) ZLR 726 H a case quoted by the respondent's counsel in the heads of argument the court quoted with approval the dicta in the case of *R (Donoghue)* v *County Cork JJ* [1910] 2 IR 271 at 275 271 at 275 thus

> "……...that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds- was reasonably generated-but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of recusal."

In the case of *Umgeni Water* v *Hills N.O and Anor* 2012 (3) SA 475, the court inter alia considered that in an application for removal of an arbitrator, the person and background of the arbitrator was a relevant consideration. It was stated therein as follows

> "Whilst the position of Judges and arbitrators differ in some respects there are also areas of great similarity in their respective positions. And all the more so here where the applicant limits the attack upon the position of the first respondent to the perception of bias, as opposed to actual bias. The first respondent is a practising advocate and a senior counsel to boot. Like judges, advocates also, upon their admission as advocates, take an oath to behave honestly and faithfully in the course of their professional careers. Also advocates, as referral practitioners and by virtue of their training,

> have greater scope for impartiality when sitting as an arbitrator than say a lay person. In the present……"

It was submitted in the papers that by 2009 when the agreement subject of arbitration was executed, the second respondent was already a partner in DMH law firm and left that firm in 2011 to set up the firm Mhishi Nkomo Legal Practice as principal to date. The fact that the second respondent is a senior legal practitioner is beyond doubt. It would be proper to assume that the second respondent appreciates the concepts of impartiality and its centrality to dispute resolution. In the case of the second respondent therefore, it is safe to assume that a reasonable person who considers the circumstances present herein which include the fact that the second respondent inter alia did not deal with FBC Bank portfolio at DMH and did not have knowledge of the agreement in dispute and had divorced from DMH over ten (10) years ago, the reasonable person would not perceive that the second respondent would be biased against the applicant.

The applicants counsel in the heads of argument referred to the case of *Pertsilis* v *Calcateria & Anor* 1999 (1) ZLR 70 (HC). In that case a law firm acted at different times for the applicant and respondent involved in the dispute. The partner declined to act for either of the parties in the court proceeding. Another legal practitioner from the same firm was assigned to appear for the respondent, the partner having recused himself. SMITH J found that it was improper for another legal practitioner from the same firm to appear for any of the parties who had been past clients of the firm. The learned judge stated

> "In this case, the position adopted by Mr Ventuars is entirely proper and ethical. As he rightly pointed out, he could not act for ant of the parties in litigation inter se. Furthermore, I consider that the position he adopted must extend to any partners or employee of his. Justice must not only be done; it must manifestly and undoubtedly be seen to be done. It would be no consolation, in my opinion, for a litigant to be told that the legal practitioner who is appearing for his opponent is not the legal practitioner who formerly acted for him, it is only his partner or his employee. If one member or employee of a legal firm has appeared for a litigant, the litigant would be fully justified, I feel, in fearing that his interest would be prejudiced if another member or employee of the same firm acted for an opponent of his in any litigation."

In seeking to apply the above dicta, counsel for the applicant submitted as follows in paragraph 5 of the heads of argument

> "50. It follows that just as a partner at DMH who was directly involved with FBC and a transaction that has impact on the arbitration cannot act as an arbitrator in a case where DMH is representing one of the parties, a person who was a partner at the natural time of the transaction cannot also sit as an arbitrator in this matter."

There is no doubt that the facts of the *Pertsilis* judgment are different from the facts of this application. DMH did not at any time represent the applicant. If such happened it was not alleged nor so submitted. There is no issue of conflict of interest arising in this application. It is not necessary to comment further on the dicta which I have no qualms with. The *Pertsilis* judgment being markedly distinguishable on the facts does not conduce to resolving the current application.

In my view, the mere fact that the second respondent was a partner in DMH at the time that the agreement in dispute was executed should not without further ado be held to unsuit him to sit in an arbitration wherein DMH law firm was not involved in the making of the agreement. The agreement itself does not specifically make any reference to FBC Bank nor DMH. It is quite a stretch for the applicant to impute perceptions of a reasonable person reasonably suspecting that there might be bias or impartiality perceived or acted on the part of the second respondent.

I am not persuaded that the applicant established a case for recusal of the second respondent. At best the applicants case hinged on a mere possibility of the second respondents bias based upon the fact that FBC Bank was and / or is still a client of DMH. However, the brief which brings that firm to the fore in this application was not given by or at the instance of the FBC Bank which is not a player in the arbitration. The fact that the first respondent mentioned in its affidavit that banks like FBC Bank would stand to be prejudiced if the transaction or agreement was severed is surely a point of fact which may or may not be contradicted. The case before the second respondent concerns the validity of the sale agreement in issue. The issue of the indebtedness of the applicant to FBC Bank or ant creator is not an issue for determination. The parties themselves who want their dispute resolved are the natural focus in the arbitration. A reasonably minded person is one who will only perceive bias in the light of understanding the relevant facts.

In my judgment therefore, there is no merit in the application and it stands to be dismissed. That leaves the question of costs. The first respondents counsel strenuously argued for costs on the higher scale of the legal practitioner and client. Emphasis was placed on the allegation that the applicant had brought a frivolous application compounded by the ineptitude of the applicants and / or its legal practitioners to settle the papers. I have already commented that the applicant just heaped documents as annexures without relating to such documents. It is correct as submitted by the first respondents counsel in para 41 of the heads of argument that

> " 41……in motion proceedings, the affidavits constitute both the pleadings and the evidence. See Hudson v Hudson and Anor 1927AS 259 at 268 and the issues and averments in support of

> parties' cases should appear clearly therefrom. A party cannot be expected to travel through lengthy annexures to the opponent's affidavit and speculate on the possible relevance of facts contained therein. Trial by ambush cannot be permitted."

The first respondent submitted that such conduct should be visited with a punitive costs award. I have agonized over this submission which needs serious thought. I already indicated in the judgment that I was not inclined to punish the applicant and or his counsel for the poor settlement of the application in this case. Unfortunately, the practice of dumping annexures before the court without explicit reference to them and explaining them has become common place. I will therefore use this judgment to send a message to errant legal practitioners that the time has now come for the court to punish this prolixity in settling applications pleadings generally by issuing punitive orders which may include but are not limited to striking out the offensive affidavit and its annexures, making an adverse costs order against the errant legal practitioner in person or ordering payment of costs on the higher scale as requested in this application.

In the result the following order disposes of this application

IT BE AND IS ORDERED THAT;

1. The application is dismissed with costs.

Nyawo Ruzwe Attorneys, applicant's legal practitioners
Dube Manikai Hwacha, first respondent's legal practitioners