

SAMUEL KUFANDADA

Versus

ASSISTANT COMMISSIONER WILSON MARECHA

And

CHIEF SUPERINTENDENT CHIZEMO

And

OFFICER IN CHARGE ZRP MAKOSA

And

SENIOR ASSISTANT COMMISSIONER CHENGETA

And

THE COMMISSIONER GENERAL OF POLICE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 20 JUNE 2022 & 7 JULY 2022

Application for recusal

Applicant in person
D. Jaricha for the respondent

DUBE-BANDA J:

1. This is an application brought by the applicant for my recusal from hearing this matter. Before the applicant argued his application for recusal, I placed the following facts on record: that I only knew Mr *Jaricha* counsel for the respondent only as a legal practitioner appearing before this court. I have never met him outside court and I do not socialise with him. In his brief submissions Mr *Jaricha* confirmed this position, i.e. that I have never met him outside court and that I do not socialise with him.
2. This recusal application will be better understood against the background that follows. Applicant was a member of the Zimbabwe Republic Police (ZRP). He was charged and convicted of contravening the provisions of the Police Act [Chapter 11:10]. He was

discharged from the force on the basis that he was unfit for police duties. Applicant was aggrieved by his discharge, and on the 8th June 2015 he filed a court application (HC 3298/15) for review in terms of Order 33 of the High Court Rules, 1971. He sought an order to review and set aside the decision of the 1st respondent to discharge him from the ZRP. On the 30th June 2019, he was granted a default judgment worded as follows:

It is ordered that:-

- i. The discharge of applicant from the Police Service by 5th respondent be and is hereby set aside.
- ii. A mandatory order, directing the respondents to disburse travelling and subsistence allowance towards applicant's transfer from Ross camp to ZRP Makosa within 14 days of granting of this order be and is hereby granted.
- iii. The declaration that applicant is a deserter and absent without official leave be and is hereby set aside.
- iv. The respondents shall pay costs of suit incurred by the applicant.

3. The police filed an application for rescission of judgment, seeking an order to rescind the default judgment granted to the applicant on the 30 June 2019. The rescission application was placed before me and I granted the application. See: *The Commissioner General of Police & Another v Kufandada & Ors* HB 192/21. Applicant on realising that his review application had been placed before me, addressed a letter to the Registrar of this Court. I reproduce the letter *in extensio*, it is this:

Re: Application for recusal of his Honourable Judge Justice Banda (*sic*) from hearing matter HC 3298/15

The above matter refers.

Applicant believes it is in the interest of justice that a different judge be allocated my matter on the following grounds:

The legal counsel of the respondent boasted that they control the courts and proof will be that the same judge who heard the rescission will hear the main matter. Further he boasted that in the like manner that I lost in the rescission I will also lose in the main matter.

Likewise during the hearing of cases under HC 1967/1 and HC 1968/19 the legal counsel had also boasted that the meritorious (*sic*) stay will be rendered academic and it happened exactly that the judge refused to hear the interlocutory matter first and proceeded to the main matter which I

have an apprehension that he would be biased against me. If it was not the reason of financial strain I would have appealed against the whole judgment but I was hopeful that the damage would be compensated through the main matter under HC 3298/15.

Further take notice that applicant fears that since the judge is conversant with the matter he will not depart from the mind set he adopted when he dealt with case HC 1967/19. I believe that it is in the interest of justice that the matter be heard by a different judge.

4. During his submissions in court it became apparent that applicant was aggrieved by the granting of the application for rescission of judgment. He even retorted that the judge who granted the default judgment was satisfied with his affidavit of service, which affidavit I rejected in the rescission application. It is against this background that applicant sought my recusal from hearing the review application.
5. In *President of the RSA and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725, the following approach was recommended when considering applications for recusal:

It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question 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 the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judge to administer justice without fear or favour; and their ability to carry out that oath by reason 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.

6. In *Mawere Others v Mupasiri & Others* CCZ 2/22 the court held thus:

The law of recusal is settled. It is the law against bias. Quite apart from the constitutional guarantees in favour of the right to a fair trial before an independent and impartial court provided for in s 69 of the Constitution, the common law practised in this jurisdiction has long recognised and applied the law against bias.

The constitutional provision may be viewed to have been enacted in abundance of caution so as to locate the law against bias in the supreme law of the land. It is an additional safeguard to that which the common law has long provided.

The law against bias seeks to balance two equal positions at law. These are the duty of every judge to sit and determine all matters allocated to him or her unless, in the interests of justice, recusal is necessary.

7. Bias in the sense of judicial bias has been said to mean a departure from the standard of even-handed justice which the law requires from those who occupy judicial office. It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further “proceedings” a nullity.
8. Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he or she will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.
9. It is on the basis of these legal principles that this recusal application must be viewed and considered.
10. In considering this recusal application I make the point that there is absolutely no evidence supporting the allegations made against Mr *Jaricha* counsel for the respondents. I reject as false applicant’s contention that counsel of the respondent boasted that they control the courts and proof will be that the same judge who heard the rescission will hear the main matter. Further I reject as false that counsel boasted that applicant will lose the review application in the same manner he lost in the rescission application. Mr *Jaricha* denied having made such scandalous statements. All in all I reject applicant’s gratuitously allegations made against counsel and my person.

11. What has really exercised my mind is that I dealt with the rescission application involving the same parties as in this review application. In *Guardforce Investments (Private) Limited v Ndlovu & Ors* SC 24/16 the court observed thus:

It must also be noted that the default judgment in this matter was handled by the same judge who subsequently attended to the initial granting of the chamber application which was later set aside by consent and the final order appealed against herein. This to me is very unsatisfactory. It is highly undesirable that the same judge should preside over several applications between the same parties. (My emphasis).

12. If I were to hear this application, I would have heard two applications involving these parties. My view is that two applications would not amount to “several” in the reading of the *Guardforce Investments (Private) Limited* case. I also note that the position at law is that where a court that disposed of the matter on preliminary issues is not disabled from determining the matter on the merits at a future date. See: *Mawere & Others v Mupasiri & Others (supra)*. Therefore the fact that I heard the application for rescission, standing alone is no bar in hearing this review application.

13. Further the application for rescission was filed in terms of Order 49 rule 449 of the High Court Rules, 1971. Because it was brought in terms of rule 449 I did not consider the merits of the application for review. I found that the review application was not served and hence the default judgment was erroneously sought and granted.

14. What has further exercised my mind are the observations I made about and concerning the applicant in the rescission judgment. In *The Commissioner General of Police & Another v Kufandada & Ors (supra)* @ page 6-7 of the cyclostyled judgment I made the following observation:

In passing I mention that first respondent’s conduct in the prosecution of his application for review is not beyond reproach. He files an application for review in HC 3298/15, he attempts on three occasions to get an order on the unopposed

roll. On two occasions the matter is struck off the roll, and one occasion it is removed from the roll, the reason being the non-service of the application on the respondents, particularly the Commissioner General of Police. Instead of serving the application on the respondents, makes a turn and files a chamber application for default judgment in respect of the same review application. In the chamber application he does not disclose to the court that HC 3298/15 has been struck off the roll for non-service of the application. He attaches an affidavit of service, which says he served the court application HC 3298/15 on the 11 December 2015, which cannot be the truth. Had he served the court application on the 11 December 2015, the application would not have been struck off the roll on the 26 October 2017, on the basis of non-service. Such underhand tactics undermine the integrity of the processes of this court and serve no useful purpose in litigation.

15. Cut to the bone the question is whether on the correct facts a reasonable, objective and informed person can be apprehensive that the judge will not bring an impartial mind to bear on the adjudication of the review application, i.e. a mind open to persuasion by the evidence and the submissions. In answering this question I factor into the equation that the cornerstone of any fair and just legal system is the impartial adjudication of disputes which comes before the courts. Nothing is more likely to impair confidence in proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the officials who have the power to adjudicate on disputes. An impartial judge is a fundamental prerequisite for a fair hearing 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 reasons may not or will not be impartial. See: *The President of the Republic of South Africa and Others* 1992(2) BCLR 725 (CC).
16. My view is that the observations I made in the rescission judgment that applicant was not truthful and had deployed underhand tactics to obtain the default judgment might unsettle a reasonable, objective and informed person to be apprehensive that I will not bring an impartial mind to bear on the adjudication of the review application. This is particularly so in that HC 1961/19 sought to rescind a default judgement granted in this review application, and the application succeeded.

17. It must never be forgotten that it is not only actual bias that can justify a recusal, even a reasonable perception or appearance of bias is enough for a judicial officer to recuse himself or herself. Justice is so important a value, and it has to be protected. Justice must not only be done but must also be seen to be done. However all this does not mean litigants can judge-shop, not at all. All it means is that the right to a fair hearing must be protected.

18. This is a boarder-line case, and in such a case I will go for recusal. The application stands to be granted not on the basis of the reasons given by the applicant, but on the basis of the observations I have made above.

19. It is for these reasons that I felt inclined to recuse myself from this matter.

In the result:

- i. I recuse myself from hearing the case of *Samuel Kufandada v Assistant Commissioner Wilson Marecha and Ors* HC 3298/15.

A-G's Office Civil Division applicant's legal practitioners