THE STATE
versus
MUNYARADZI MAWADZE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 27 February & 2 March 2023

ASSESSORS: 1. Mr Mhandu
2. Mr Shenje

Application for recusal

T Mukuze, with *Ms C Mutimusakwa* for the State
T. Mpofu, with S Hwacha, for the accused

DUBE-BANDA J:

[1] This is an application for my recusal. The inquiry in this application is whether the accused has established facts constituting reasonable grounds for my recusal. In answering this question it is necessary to briefly sketch the background events leading to this application.

[2] The accused was initially jointly charged with two other persons. On 30 September 2022 the accused made an application for separation of trials. On 5 October 2022 the application for separation of trials was granted. See: *The State* v *Mawadze* HH 688/22. Thereafter the matter was postponed *sine die* and eventually set down for the week starting on the 6 February 2023. At the commencement of the trial State counsel applied for a postponement of the matter to 8 February to enable the prosecution to furnish the accused with an amended charge answering to the separation of trials order. In the meantime the accused was making his own application for a postponement. The postponement sought by the State was granted unopposed.

[3] On the 8 February the accused continued with his application for a postponement which he had started on 6 February. The application was anchored on the unavailability of counsel, Mr *Mpofu.* The application was refused. See: *The State* v *Mawadze* HH 101/23. Immediately after the refusal of the application, Mr *Hwacha* the intrusting attorney informed the court that he had neither the mandate nor instructions to represent the accused in the trial. He said his role in the matter going forward was reduced to a watching brief. The net effect of the position taken by Mr *Hwacha* was that the accused was left without legal representation. At that stage

the court would not countenance to proceed with the trial in the absence of legal representation for the accused.

[4] Subsequent to this turn of events, the court directed the reactivation of the appointment of *pro deo* counsel who had initially been assigned to the accused. The accused insisted that he wanted the services of Mr *Mpofu* and the court informed him that Mr *Mpofu* was not in attendance and the court will not permit this matter to remain in *limbo* waiting for Mr *Mpofu*. The *pro deo* counsel Mr *Chipupuri* appeared on 9 February and informed the court that he was conflicted in this matter and as such he was renouncing agency. He withdrew from the matter. The matter was postponed to 13 February 2023 to facilitate the appointment of yet another *pro deo* counsel for the accused. All this was done to ensure that the accused has the benefit of legal representation.

[5] On the 13 February 2023, the new *pro deo* counsel was in attendance and informed the court that the accused had expressed a desire to be represented by his legal practitioners of choice and he sought leave to withdraw from the matter. Before he was permitted to withdraw from the matter, Mr *Hwacha* confirmed that he was now back on record as the legal representative of the accused person. The *pro deo* counsel was then permitted to withdraw from the matter and he was excused from further proceedings.

[6] Mr *Mukuze* then informed the court that the prosecution and the defence had agreed that the matter be postponed to 27 February 2023 for trial. The matter was so postponed. Thus the postponement of the matter to 27 February was by consent of the parties. The matter resumed on 27 February 2023 with this application for my recusal.

[7] The jurisprudence in this jurisdiction is that that an application for recusal is in essence a conversation between the apprehensive litigant and the court and in which conversation the other party can listen in. See: *Mupungu* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 07/21; *Mawere & Ors* v *Mupasiri & Ors CC 2/22.* Mr *Mukuze* made certain points and observations and nothing turns on these points and observations.

[8] In approaching this application I bear in mind what was stated *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co. (Pvt) Ltd* 2001 (1) ZLR 266 (H), namely that a judicial officer should not be unduly sensitive and ought not regard an application for his recusal as a personal affront. It should not be regarded as a personal attack on the judicial officer, but an exercise of the litigant's constitutional right to a fair trial. The right to seek recusal of a judicial officer must be protected.

[9] The proper test to recusal is 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. In considering an application for recusal, the court, as a starting point, presumes that judicial officers are impartial in adjudicating disputes and it is the applicant who bears the onus of rebutting the presumption of judicial impartiality. The presumption of judicial impartiality is not easily dislodged. It requires cogent and convincing evidence to be rebutted. See: *S* v *Nhire & Anor* 2015 (2) ZLR 295 (H); *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co. (Pvt) Ltd* 2001 (1) ZLR 266 (H).

[10] Section 69 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 says every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court. The right to a fair trial is constitutionally guaranteed. It has been constitutionalised. It is the hallmark of a fair and just process in the determination of guilt or innocence that accused persons enjoy.

[11] The right to a fair criminal trial lies at the heart of any just criminal law system and is widely recognized in international human rights law, as well as the Constitution of Zimbabwe. The required fairness includes that the judicial officer presiding in a trial must not be biased, or reasonably perceived to be biased. In order to satisfy the requirement of recusal, an apprehension of bias must be reasonable in the circumstances. The principle of a reasonable, objective, informed and fair-minded person enters the fray. It follows that an application for recusal will not succeed if the applicant fails to demonstrate that the judge in the circumstances might have departed or was in danger of departing from the standard of even-handed justice, or that there appeared the possibility that the judge might incline to one side or the other in the dispute.

[12] 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'. In common usage bias is described as ‘a leaning, inclination, bent or predisposition towards one side or another or a particular result'. See: *R v S (RD)* [1997] 3 SCR 484 par 104 – 105. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case." *S* v *Roberts* 1999 (4) SA 915 (SCA) 25.

[13] A judge has a duty to hear a case unless the test for recusal is met. The *onus* of proving the ground for recusal is on the applicant. According to case law a judge must give careful

consideration to any claim for his or her recusal on account of bias or reasonable apprehension of bias; and a judge is best advised to remove himself or herself if there is any air of reality to a bias claim; however judge does a disservice to the administration of justice by yielding too easily to a recusal application that is unreasonable and unsubstantiated. Litigants are not to pick their judges of choice nor are they entitled to eliminate judges randomly assigned to their case by raising partiality claims against those judges; and that to step aside in the face of an unsubstantiated bias claim is to give credence to the most objectionable tactics. See: *S* v *Nhire & Anor* 2015 (2) ZLR 295 (H); *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co. (Pvt) Ltd* 2001 (1) ZLR 266 (H); *Fako v The Director of Public Prosecution* (CRI/T/0004/18) [2020] LSHC 19; *Matapo & Ors* v *Bhila NO & Anor* 2010 (1) ZLR 321 (H); *SA Motor Acceptance Corp.* v *Oberholzer* [1974] (4) SA 808 (T).

[14] The courts approach the matter with a presumption of judicial impartiality. In other words, where judicial bias is alleged, then that allegation must overcome the presumption of judicial impartiality and integrity. This strong presumption of judicial impartiality and integrity places a heavy burden on a party seeking to rebut the presumption. Not only is the presumption not easily dislodged; but it also requires cogent or convincing evidence or reason to rebut the presumption of judicial impartiality. It does not, however, relieve the judge from the sworn duty of impartiality.

[15] It is against this backdrop that I consider the allegations raised in this recusal application.

[16] The accused advanced three grounds in support his application for recusal. It was argued that the refusal to allow a postponement in *S* v *Mawadze* HH 101/23 shows that I am biased against the accused in that I have a shown 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'. The second ground was what counsel referred to "unconscious bias" in that in an endeavour to show the world that notwithstanding the fact that the accused is a colleague's son, I will be fair and impartial and in the process prejudicing the accused. The third ground is that consequent to the granting of the application for separation of trials (*S* v *Mawadze & Ors* HH 688/22) the separated trials must be presided over by different judges.

[17] Pruned to its details, the accused is aggrieved by the refusal to postpone the trial. This application is primarily an answer to the ruling refusing the postponement. The factual basis in support of the contention that I have shown a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, is just an attack on the

ruling disguised as reasons for the recusal application. In a case of this magnitude objections and applications will be made, rulings will be made in favour of either the State or the defence, naturally some party will be aggrieved by such ruling, and such grievance cannot be permitted to be elevated to ground a recusal application.

[18] That this application is a direct attack on the ruling refusing to postpone the matter is clear from the applicant's affidavit and submissions by counsel. For example the applicant says "Quite honestly, with respect, I was shocked yet again when despite all of the above, the court ruled that the matter must proceed the very next day on 9 February 2023 at 10 a.m. Witnesses were duly warned." In his submissions in support of the application, Mr *Mpofu* mounted an elaborate attack on the ruling, e.g. Counsel attacked the notice of set down and the manner of service was also attacked. In essence it was argued that the ruling showed that I am not impartially in this matter. This application is a subtle invitation to this court to come to the defence of its ruling refusing a postponement. The invitation is declined.

[19] The Constitutional Court of South in case of *Bernert* v *ABSA* 2001 (3) SA 92 (CC) para [35] had this to say:

> "The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."

[20] The accused is simply a disgruntled litigant who is complaining about the dismissal of his application for postponement. This disgruntlement cannot be permitted to be elevated to a basis for a recusal application. The contention that I am biased in the sense of 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office' has no merit.

[21] Turning to the argument that the separated trials must be presided over by different judges, it is trite that under the common law a court that has granted a separation of trials has no power to determine the sequence in which the trials ought to take place. See: *Matsiya* 1945 AD 802. Generally, though the case proceeds against the remaining accused, however it still

remains with the State to decide the sequence of the trials. The court may, at most, suggest that a particular sequence would best serve the interests of justice. But it remains the prerogative of the State to determine the sequence of the trials.

[22] The net effect of a separation is that the court has two trials to deal with, i.e. the original trial and the separated trial. In terms of s 190 of the Criminal Procedure & Evidence Act [*Chapter 09:07*] the court may abstain in giving a verdict in respect of whichever trial it started with, until both trials are concluded. Therefore whichever trial starts first, its verdict has to wait until the verdict of the other trial is ready. Therefore, the contention that consequent to the granting of the application for separation of trials (*S* v *Mawadze & Ors* HH 688/22) the trial of the other two accused must be dealt with first has no merit. Again at common law it is permissible that same judicial officer hear the separated trials. See: *R* v *T* 1953 (2) SA 479 (A). The argument that the separated trials must be presided over by different judges has no basis at law.

[23] I underscore the point that it is not for the court to determine the sequence of the separated trials. Neither is it the law that such separated trials must be presided over by different judges.

[24] Mr *Mpofu* put the factual premise of the third ground of recusal as the following: that the accused's father is a judge of the High Court of Zimbabwe stationed at the Masvingo High Court. He previous was at the High Court in Harare. That I as a judge of the High Court, *albeit* stationed at the Bulawayo High Court, I am a colleague to the accused's father. Counsel argued that it matters not that I have not shared tea, nor shared a corridor with the accused's father, we remain colleagues as High Court Judges. And that there is a sub-conscious inclination to show the world that notwithstanding the fact that the accused is a colleague's son, I will be fair and impartial and in the process prejudicing the accused. This court was informed further that the judges stationed at the Harare High Court declined to deal with this matter, and that this explains the reason it was allocated to me, a judge stationed at the Bulawayo High Court.

[25] Counsel argued at length on what he termed "unconscious bias." Generally unconscious biases are stereotypes about certain issues that are made without conscious awareness. Judges are human and they bring their life experiences to the Bench. They do not operate in Mars or some celestial planet. If litigants were to expect a judge who is totally divorced from their individual perspectives of the world and life experiences then they might have to wait for a very long time indeed to find such a judge. Notwithstanding their "being human" judges are required to be impartial, that is, to approach a matter with a mind open to persuasion by the

evidence and the submissions of counsel. Their training and experience caters for this aspect of the matter. The contention that I will unconsciously endeavour to show the world that notwithstanding the fact that the accused is a colleague's son, I will be fair and impartial and in the process prejudicing the accused has no merit.

[26] What has indeed exercised my mind is the fact that the accused's father I are sitting judges of the High Court of Zimbabwe. The following facts are pertinent in this inquiry, the accused is a son of a sitting judge of the High Court. I first met the accused's father when I was appointed to the Bench. However, I have no personal relationship with him. I have no close relationship with him. I have not worked with him in close proximity. His work station is at Masvingo High Court, while my work station is at Bulawayo High Court. I neither knew him nor did l appear before him when I was in private practice.

[27] Counsel cited *S* v *Paradza* HH 182/04 as authority supporting my recusal. This case is distinguishable from the *Paradza* case, in that in the *Paradza* case the accused was a sitting judge, he was in the liberation struggle with the presiding judge, he had worked with the presiding judge as magistrates, and as a legal practitioner he appeared before the presiding judge. In the *Paradza* case there was too much that supported a recusal. See: *SA Motor Acceptance Corp.* v *Oberholzer* [1974] (4) SA 808 (T). Such is not the case *in casu.*

[28] In The *State* v *Mawadze* HH 273/20 this accused before court applied for bail pending this trial. The State made an application for the recusal of the presiding judge on the grounds that: the accused's father and the presiding judge were sitting judges of the High Court of Zimbabwe. And that the presiding judge would be unable to deal with the matter impartially and was likely to deliver a judgment favorable to the accused. *Per* contra the accused argued that the judges of this court have heard matters of relatives of sitting judges without much ado. In dismissing the recusal application the court said:

> "Firstly, all the judges took a judicial oath well appreciating that situations may arise which present them with difficult, albeit, not insurmountable choices. Secondly, it has to be borne in mind that the person before the court as an accused person is not Justice Mawadze but his son. …….
> The position advocated for by the State does not pass the test as it would mean that a High Court judge would have to recuse him/herself from any case where a relative of a fellow judge is a litigant. To uphold such a reasoning would set a dangerous precedent and bring chaos to the proper administration of justice in our judicial system."

[29] I, with respect, fully associate myself with the above sentiments which accord with requirements of the law.

[30] Accepted that this is a trial and in The *State* v *Mawadze* HH 273/20 the court was dealing with a bail application, I take the view that the principles are the same. What was said applies with equal force in this case. The accused is not a sitting judge of the High Court. He is a son of a sitting judge. Again I have neither close proximity nor personal relationship with his father. I do not work at the same station with his father. The work relationship I have with the accused's father is too remote to ground a recusal.

[31] The right to an impartial court is a fundamental principle of our law and a prerequisite for a fair trial. I do accept the need to keep the streets of justice pure and undefiled. However on the facts of this case my relationship with the accused's father is too general and remote to ground a recusal. In all this I factor in the principle that a judicial officer is presumed to be impartial in adjudicating disputes and that presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption.

[32] In conclusion, the fact that a judicial officer makes a ruling against a litigant does not amount to a ground giving rise to a reasonable apprehension of bias. Further, it is not for the court to determine the sequence of the separated trials. Neither is it the law that such trials separated trials must be presided over different judges. Again, the contention anchored on unconscious bias negates the fact that judges are trained and required to be impartial, that is, to approach a matter with a mind open to persuasion by the evidence and the submissions of counsel. Further the law presumes a judicial officer to be impartial in the adjudication of disputes, and that such presumption is not easily dislodged. Further, I neither have a close and personal relationship with the accused's father to ground a recusal. Again, the allocating authority neither informed me of the fact that the judges stationed at the Harare High Court declined to deal with the accused's matter, nor do I know the reasons given for such a decision. In the circumstances, the accused has failed to establish proper grounds for recusal, and it is for the above reasons that this application must fail.

In the result, it is ordered as follows:

The application for recusal be and is hereby dismissed.

National Prosecuting Authority, State's legal practitioners
Dube, Manikai & Hwacha, first accused's legal practitioners