KENNEDY GODWIN MANGENJE
versus
TBIC INVESTMENTS (PRIVATE) LIMITED
and
PAUL ESAU HUPENYU CHIDAWANYIKA

TBIC INVESTMENTS (PRIVATE) LIMITED HC 8211/14
and
PAUL ESAU HUPENYU CHIDAWANYIKA
versus
KENNEDY GODWIN MANGENJE ***Case 2***

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 24 September 2014

Chamber applications

MAFUSIRE J: Case 1 above is a chamber application for directions in terms of Rule 15(9) of the Supreme Court of Zimbabwe Rules. That rule reads:

> "The preparation of a record under the provisions of rules 22 and 34 shall be subject to the supervision of a registrar of the High Court. The parties may submit any matter in dispute arising from the preparation of such record to a judge of the High Court who shall give such directions thereon as justice may require."

Case 2 is an application for my recusal from Case 1 on the ground that I will not determine Case 1 impartially, allegedly because I have displayed bias towards the applicant, the respondent in Case 2 (hereafter referred to as "***Mangenje***").

(a) <u>Background Facts</u>

Mangenje was the successful party in the two cases under HC 601/11 and HC 9527/11 that I heard together in September 2013. To avoid confusion I shall henceforth refer to the two cases aforesaid as "***the two main cases***", or simply, the "***main cases***".

Following my judgment on 30 October 2013 in the main cases, the two respondents in Case 1, the applicants in Case 2 (hereafter referred to as "***TBIC Investments***" and "***Chidawanyika***" respectively), appealed to the Supreme Court. A dispute arose between the

parties as to whether the registrar of this court should include or exclude from the record of appeal certain two documents. The first of those documents was an interlocutory chamber application that TBIC Investments had allegedly filed in or about May 2012 (hereafter referred to as "***the interlocutory chamber application***"). That was about one year and some two or three months before I heard the main cases. The interlocutory chamber application sought an order that a certain supplementary affidavit that Mangenje had filed in one of the two main cases be expunged from the record.

The second of those documents about which the parties are at loggerheads was a supplementary affidavit by TBIC Investments (hereafter referred to as "***the supplementary affidavit by TBIC Investments***"). It was allegedly filed in June 2013, allegedly in response to a certain affidavit that had been filed by the registrar of deeds in one of the two main cases.

It is alleged that the assistant registrar of this court responsible for the preparation of the records of appeal had in his first draft included the supplementary affidavit by TBIC Investments. He had then invited the parties' legal practitioners to come and inspect the draft record in terms of subrule (8a) of r 15 aforesaid. It is alleged that Mangenje's attorney had objected to the inclusion of the supplementary affidavit by TBIC Investments. The assistant registrar had allegedly dropped it. The attorney for TBIC Investments and Chidawanyika had protested the exclusion of, not only the supplementary affidavit by TBIC Investment, but also the interlocutory chamber application. There was a deadlock. The assistant registrar referred the matter to me for directions. I called the parties for a meeting in my chambers. I wanted to understand the nature of their dispute. I saw them on 27 January 2014.

In chambers Mr *Gama*, for TBIC Investments and Chidawanyika, took the point that the referral of the matter to myself by the assistant registrar had been unprocedural and, at any rate, premature, in that firstly, an application for directions in terms of r 15(9) of the Supreme Court Rules is made by the parties, and not the registrar; and secondly, that there were discussions that were underway between the parties, which in all likelihood would settle the issues, including that relating to the disputed documents.

Without going into details about the irregularity or otherwise of the referral of the dispute to me by the assistant registrar, the parties, with my guidance, agreed on a certain course of action which, it was felt, would expedite the matter. I proceeded to endorse it on the result sheet. It was as follows:

1. That Mr *Gama* would submit certain documents to the assistant registrar by not later than close of business on Friday, 31 January 2014;

2 That thereafter the parties would meet before the assistant registrar to discuss and resolve any outstanding issues;

3. That if any issues remained unresolved then the matter would be referred to a judge for directions;

4. That the application for directions, if made, should be by the parties or one of them, via the assistant registrar.

I have gathered from the papers that the parties resolved some of the outstanding issues but remained deadlocked on the two documents aforesaid. On 17 April 2014 Mangenje filed Case 1. It had no draft order. The matter was placed before BERE J. The Honourable Judge directed that a draft order be filed. Meanwhile, Mr *Gama* had taken formal objection, both by letter, and through the opposing affidavits by his clients, that in the absence of a draft order, Case 1 was defective and should therefore not be considered. But apparently in response to the direction by BERE J, Mangenje's attorney had proceeded to file a draft order.

Both parties filed supplementary affidavits, heads of argument and supplementary heads of argument. However, BERE J did not determine the matter. He felt I was best suited to deal with it owing to my prior involvement and therefore intimate knowledge of it. It made sense. I obliged. But on perusal of the record I was distracted by the coarseness of the language in the papers filed of record. On 25 July 2014 I issued a complaint and an interim directive to the parties' attorneys in the following terms:

"4 I have looked at the matter briefly. I am disturbed by the tone of the documents placed before me. They are intemperate. They are scurrilous. They are full of buffoonery. They display a disturbing mutual lack of respect for, and courtesy to, the respective legal practitioners and the court. They distract attention from the main issue.

5 Both sets of affidavits from the applicant and the respondents are essentially hearsay. Legal practitioners have used their clients to take indecent digs at each other. Very little of the 'facts' purportedly ascribed to the clients is within their personal knowledge, information or belief. The central issue is in respect of procedural matters over which clients have little or no knowledge of.

6 I will not determine the matter in its present state. But I realize that it has been outstanding for far too long.

7 In the circumstances, I hereby direct in the interim, that the parties should file supplementary affidavits deposed to either by their legal practitioners or their counsel who appeared before me when I heard the main matter in 2013. I recall that Advocates *D. O'Chieng* (sic) and *R. Goba* appeared. The supplementary affidavits

should deal with what transpired in court on the day of the hearing concerning the production and/or admissibility of the disputed documents.

8 There are allegations and counter-allegations that the disputed documents had been or had not been part of the records that I dealt with at the time. There are allegations and counter-allegations that there was an application, on the day of the hearing, to admit one or other of the documents. There are allegations and counter-allegations that I admitted one or other of them. The supplementary affidavits should deal with all these aspects.

9 I also require an affidavit from the Registrar or his Assistant. It must deal with what documents comprised the two records when they were placed before me **at the time**. Among other things, the Consolidated Indices to those two records should be informative."

I then went on to give deadlines for the filing of the further affidavits.

The parties complied. In addition to a supplementary affidavit by himself, on 6 August 2014 Mr *Gama* wrote to proffer some form of apology for the coarse language but also directed attention to an earlier letter of his dated 18 July 2014. That letter had not been brought to my attention. I called for it. In it Mr *Gama* had sought my recusal from Case 1 on the ground that since I had determined the main matters justice demanded that another judge should handle the application. I refused to recuse myself on the ground that no cogent reason had been advanced. Mr *Gama* wrote back on 3 September 2014 to say he would now make a formal application for my recusal. He filed it two weeks later.

Naturally, I have to determine Case 2 first. If I find that I have to recuse myself then Case 1 will have to be referred to another judge. But if I refuse to recuse myself I will proceed to determine it.

(b) CASE 2: APPLICATION FOR RECUSAL

(i) Summary of the law on recusal

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 is a rule of natural justice; see *Council of Review, South African Defence Force, & Ors v Monning & Ors* 1992 (3) 482 (A), at p 491E – F, and *President of the Republic of South Africa & Ors v South African Rugby Football Union &*

Ors 1999 (4) SA 147, at p 168D - E. No man should be judge over his own cause, or *nemo judex in sua causa*.

In *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H), HLATSHWAYO J, as he then was, put it as follows[1]:

> "Where a judicial officer has such an interest, be it financial, personal or whatever else, in the outcome of a case before him, or has conducted himself in such a way, that he could be regarded as having become, directly or indirectly, a party to the proceedings, the maxim, *nemo judex in sua causa* (no one shall be judge in his own cause) requires that he should recuse himself. He is automatically barred by operation of the law. But even where the judge is not automatically disqualified, he must still recuse himself upon application by a reasonable litigant who reasonably apprehends a possibility of bias on the part of the judge."

See also *S v Mutizwa* 2006 (1) ZLR 78 (H) and *Mahlangu v Dowa & Ors* 2011 (1) ZLR 47 (H).

I highlight certain aspects of the rule on recusal. 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. 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. There are a number of reasons for that. One, judges have a duty to sit and decide cases before them and in which they are not disqualified. They should not too readily accede to suggestions of bias or other interest in the matter. It was put this way by the High Court of Australia in *Re JRL: Ex parte CJL* (1986) 161 CLR 342 (HCA)[2], a case quoted with approval by the Constitutional Court of South Africa in the *President of RSA* case, *supra*[3],and by HLATSHWAYO J in *Associated Newspapers, supra*[4]:

> "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."

Two, 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

[1] At p 236D - F
[2] At p 352E - F
[3] At p 176B - C
[4] At 233C - E

of judging a particular controversy fairly on the basis of its own circumstances. It must be assumed that they are able to disabuse their minds of any irrelevant personal beliefs and predispositions; *President of RSA, supra,* at p 177D - E; also *Mahlangu, supra,* at p 50C – F, and *United States v Morgan 313 US* 409 (1941) at 421 (quoted at p 172G – H in *President of RSA, supra*). Furthermore, on being appointed, every judge 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, and that is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high; *R v S (RD)* (1997) 118 CCC (3d) 353 (quoted at p 172E – F in *President of RSA*).

Three, it is in the general interest of the judiciary and the public for an individual judicial officer to recuse himself where a litigant perceives a reasonable apprehension of bias. The judicial officer should not unduly take a recusal application as a personal affront. It is one of the fundamental human rights and freedoms enshrined in our Constitution. Section 69(2) of the Constitution says that in the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent **and impartial court**, tribunal or other forum established by law.

However, while the judicial officer considering the alleged bias must be reasonable, the perception or apprehension of bias must itself be reasonable also. So in my view, an apprehension of bias that is whimsical or morbid cannot be a ground for seeking recusal. In *S v Collier* 1995 (2) SACR 648 (C) an application for the recusal of a magistrate on the ground that he was white was refused. In *R v Mutizwa, supra,* recusal sought on the basis that the presiding magistrate had a reputation for imposing stiff sentences was refused. In *Associated Newspapers, supra,* an application for recusal by one set of shareholders in a newspaper printing and publishing company on the ground that the presiding judge had been a former temporary editor and columnist allegedly of a rival newspaper or competitor was refused on the basis that the applicant had not established any link between the judge and the other party in the main application who also happened to be a co-shareholder in the newspaper printing and publishing company. Finally, in the *President of RSA*, case, *supra,* recusal based on alleged professional and/or political and/or family ties between most of the justices of the Constitutional Court of South Africa and the appellant, who happened to be the then sitting president of the country, was refused.

Four, in all cases of automatic disqualification or of reasonable apprehension of bias, there must be a link, direct or indirect, between the judicial officer and one of the parties to the litigation; *Associated Newspapers, supra,* at p 239E – F. In *Mahlangu,* the judge's recusal was sought on the basis that she was married to a member of the police force. The alleged link was that the respondents were also members of the police force. The judge's husband had little or no day to today dealings with the respondents who were either his superiors or subordinates. Recusal was refused.

(ii) Applicants' case for recusal

The initial ground for recusal proffered by Mr *Gama* in his first letter on the point was that since I had determined the two main cases, justice demanded that another judge determine Case1, i.e. whether or not the disputed documents should be part of the record of appeal. That was hardly saying I was or would be biased. That was no ground for seeking recusal.

In fairness to him, Mr *Gama*, in his letter, requested that I grant him and Mr *Makonyere* audience in my chambers so that he could provide further information. That is the correct approach. Before an application for recusal is made, the judicial officer should be informed of the fact and the grounds of the application to avoid embarrassment and to give him the time and opportunity to give his side of the story and for facts to be verified before the formal application is made; *Associated Newspapers*, *supra*. In the *President of RSA* case, *supra,* the Constitutional Court of South Africa put it as follows[5]:

> "The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in Chambers with the Judge or Judges in the presence of her or his opponent. The grounds of recusal are put to the Judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge the applicant would, if so advised, move the application in open Court."

In casu, Mr *Gama*, having made the formal application for my recusal from Case 1, what are his grounds? Basically it is that I have already prejudged the matter. It is said it is inconceivable that in Case 1 I will find that the supplementary affidavit by TBIC Investments was part of the record when I determined the two main cases; or that it was before me; or that an application for that affidavit had been made and turned down with no reasons being

[5] At p 177H - I

proffered. And what is Mr *Gama's* evidence for saying this? Or, if it is his clients' apprehension that I will be biased, is it a reasonable apprehension?

A representative of TBIC Investments, one Killian Kapaso (hereafter referred to as "***Kapaso***") was made to sign an affidavit. Paragraphs 8 and 9 of my 25 July 2014 interim directive were duplicated *in toto*. It will be remembered that this was the directive in which I had, *inter alia*, condemned the injudicious language of the parties in the papers filed of record and had pointed out, *inter alia*, that there had been allegations and counter-allegations that an application had been made and had been refused to admit one or other of the documents. Having condemned the respective parties' affidavits as hearsay evidence I had then called for supplementary affidavits by the parties' legal practitioners or their counsel together with that of the assistant registrar to testify on what exactly had transpired in court and what the consolidated indices to those records showed in respect of the documents that comprised the records of the two main cases.

Mr *Gama* complains I should not have called for the supplementary affidavits. First, through Kapaso, he elevates Mangenje to a "***… highly educated man***" and then says Mangenje was in court on the day that I heard the two matters. It is argued that it was not hearsay what Mangenje had said in his affidavit. It is alleged that Mangenje had said in his affidavit that counsel for TBIC Investments and Chidawanyika had applied for the admission of the supplementary affidavit by TBIC Investments but that I had turned down that application. Yet, Mr *Gama* then argues, at the start of the hearing I had accepted a supplementary affidavit by the registrar of deeds. Therefore, I was being selective, because what was good for the one should have been good for the other.

It is also argued that in the meeting in my chambers on 27 January 2014 when I had enquired whether counsel had in fact made the application to admit the supplementary affidavit by TBIC Investments, both Mr *Gama* and Mr *Makonyere* had said yes. Therefore, Mr *Gama* argues, in the face of Mangenje himself and his own attorney, both saying that such an application had been made, what then was the purpose of me calling for further supplementary affidavits if not to seek support for a pre-conceived notion that would commend itself to me? What was the purpose of asking the assistant registrar to refer to the consolidated indices to the two main cases if not to suggest that the affidavit by TBIC Investments had not been part of the record? That conduct by myself, it is argued, leads a lay litigant to reasonably arrive at the conclusion that I have already taken the position that the

affidavit by TBIC Investment was not before me when I heard the two main cases on 19 September 2013.

That, in a nutshell, is Mr *Gama's* case for my recusal.

(iii) Analysis of the Applicants' case for recusal

In *President of RSA, supra*, the Constitutional Court of South Africa acknowledged that a litigant and his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and that the propriety of their motives should not lightly be questioned. In *Associated Newspapers, supra*, HLATSHWAYO J said[6];

"The learned author, E A L Lewis Legal Ethics, put the matter as follows:

> 'Though the attorney must attend to his client's reasonable belief that the Bench is not impartial, if he does not share that belief he should seek to persuade the client to his own way of thinking; but while thus again emphasising the need for the utmost extreme caution the writer would add that if duty to his client demands it he must launch the application courageously and without fear of personal consequences. If the thing must be done, it must be done without timidity. Should the attorney have a scintilla of doubt whether his application be contempt he should seek the assistance of experienced counsel, not necessarily at his client's expense."

I agree. I do not lightly question Mr *Gama*'s motive for seeking my recusal from Case 1. But by calling for supplementary affidavits I had hoped to communicate to the attorneys - and I did spell it out - that they should not have got their clients to say things that could not possibly have been within their personal knowledge or information. For example, the affidavits by the clients were referring to correspondence and communication between their respective attorneys as if they themselves had written or received them. They were referring to communication from, or invitations by, or interactions with, the assistant registrar as if they themselves had been directly involved. They were referring to an inspection of the record of appeal and to the raising of certain objections. In Mangenje's case, the record was eventually endorsed after the assistant registrar had dropped the disputed documents. In Kapaso's case, the record would not be endorsed until the documents were restored. It was as if the parties themselves, not their attorneys, had been directly involved.

The parties were referring to what oral application had, or had not, been made in court as I heard the two main cases. They were referring to what exchanges I had had with counsel over the two disputed documents as if they themselves had appeared in person. So I called for

[6] At p 232B

affidavits by the persons that had been directly involved. I would not be asked to determine a matter on the allegations of persons that had been seated at the back benches.

Adv. Ochieng, Mangenje's counsel, did file a supplementary affidavit following my interim directive. Curiously, none by *Adv. Goba* was filed. I had hoped that my enquiry to the attorneys during the meeting in my chambers in January 2014 whether such an application to admit the supplementary affidavit by TBIC Investments had indeed been made and my subsequent directive for supplementary affidavits, to include specific reference to the indices, would spur the parties to reflect closely and present accurate information.

The application for my recusal is predicated on a serious falsehood on a crucial aspect of Case 1. Whether Mr *Makonyere* and/or his client thought that *Adv. Goba* did apply to have the supplementary affidavit by TBIC Investments admitted during the hearing of the two main cases, and whether Mr *Gama* and his clients believe that to be the case, does not in the least alter the fact no such thing happened. There was no such application. I was actually surprised when it was brought to my attention that it was being said that I had refused an application for the admission of that affidavit. It was unbelievable to find the following in Mr *Gama*'s own supplementary affidavit:

> "22. With the greatest respect, I was unable to understand why **Advocate Goba** was not given a chance to prove that the affidavit had been served.
>
> 23. I was in attendance together with a director and the managing director of **TBIC**.
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> 24. To tell the truth, I did not see his Lordship making any effort to locate TBIC's affidavit in the record, neither did the court ask **Advocate Goba** to furnish it with a copy of the affidavit."

With respect, to apply for, and **to refer to**, are not the same thing. With respect to Mr *Gama, Adv. Goba* made no application to admit any document. He meant **to refer** to some affidavit. *Adv. Ochieng* sprang up and objected. He said the document that *Adv. Goba* meant to refer to had not been served on Mangenje. On my part, in spite of their volumes, I had painstakingly gone through the two records in the two main cases in preparation for the hearing, not once, but for each time that the matters had been set down. There had been two abortive sittings before, if I recall properly. None of the two disputed documents had been in either of the records. If they had been filed months in advance of the hearing as alleged, still they had not been made part of the records that I dealt with. It was only after the dispute on those documents was referred to me that I saw them for the first time.

What transpired on the date of the hearing was this. Counsel for the registrar of deeds, Mr *Chimuriwo,* applied, right at the outset, to have the supplementary affidavit by his client formally admitted. It had been part of the record. There had been filed together with that affidavit a formal written notice that such an application would be made at the hearing. There had been no objection to Mr *Chimuriwo's* application. I admitted the affidavit by consent.

Adv. Ochieng then moved for the applicant's case. When his turn came, *Adv. Goba* moved for the case of those of the respondents whom he represented. Sometime during his submissions he referred to some affidavit. *Adv. Ochieng* objected. I enquired as to where that affidavit was. *Adv. Goba* said it had been filed some time before the hearing. He was waiving some document as he spoke. I said there was no such document on file and that he could not refer to it if it was not part of the record. There was no further ado. *Adv. Goba* simply moved on to next point. None of the parties, let alone the court, referred to this afterwards.

Adv. Ochieng's description of the incident in his supplementary affidavit portrays the position more accurately. He wrote:

> "8. I recall that during the course of the hearing, my friend GOBA advanced a submission in support of which he referred to the contents of an affidavit. I cannot remember what the submission was, only that I found it difficult to follow because I could not remember reading the averments that he mentioned. I then quickly looked through the record and could not find the affidavit. Thinking that I might have overlooked it somehow, and believing that he likely had a better knowledge of the record than I, I turned to my instructing attorney, Mr Makonyere, to confirm the position.
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> 9. Mr Makonyere was sitting behind me in the very first row of the gallery. I do not expect that I actually spoke to him, but would have simply shrugged quizzically. He would likely have shrugged back or shaken his head to indicate that he knew no more than I. I then rose to object, saying that my learned friend was referring to material that I could not locate in the record and should not be permitted to do so.
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> 10. His Lordship seem to share my own recollection of the record, as he said words to the effect "Yes, I was about to query that too. Mr Goba, where in the record is this affidavit?" I[n] reply, Mr Goba only described it by reference to its date and the name of the deponent and was unable to direct his Lordship to the relevant page in the record. His Lordship then invited me to develop my objection, and I said that I could take it little further than to repeat that the affidavit to which my friend referred formed no part of the record with which I was briefed and not unless it was in his Lordship's record should he be permitted to proceed.
>
> 11. Unable to find the affidavit in the record, his Lordship upheld the objection. My learned friend did not persist in or even complete the submission that he

> had begun, and he then continued with his address without further reference to the affidavit."

The test for apprehension of bias is an objective one. The onus of establishing it rests on the applicant. In the present case, the apprehension or perception of bias is predicated on false facts. The apprehension of the reasonable person has to be assessed in the light of the true facts[7]. Incorrect facts which an applicant takes into account have to be ignored. In determining the possibility of bias, there is no difference between whether one does so from the point of view of the court seized of the challenge or from the point of view of the reasonable litigant. It was said by LORD GOFF in *Appel v Leo* 1947 (4) SA 766 (W)[8], a passage quoted with approval in *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S)[9] that:

> "Since, however, the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed and the impression derived by the court, here personifying the reasonable man."

No link, direct, or indirect, has been shown between Mangenje and myself. The nearest that has been inferred or insinuated is that I have been selective in my treatment of the litigants. As I have shown, this apprehension is based on untrue facts. Therefore it is unreasonable. In the circumstances, there is no basis for seeking my recusal in Case 1. The application in HC 8211/14, Case 2 above, is hereby dismissed with costs.

(c) CASE 1: APPLICATION FOR DIRECTIONS

(i) The Interlocutory Chamber Application

Not a single case has been made out for the inclusion, into the record of appeal, the interlocutory chamber application that allegedly had been filed in May 2012, allegedly seeking an order to exclude from the record a certain supplementary affidavit by Mangenje. The two main cases had been filed under references HC 601/11 and HC 9527/11. It appears the interlocutory chamber application was filed under a different case number altogether.

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[7] *President of the Republic of South Africa v South African Rugby Union* 1999 (4) SA 147
[8] At p 735
[9] At p 277A - B

May 2012 was a good one year and some five months before I heard the two main cases. There is no indication whatsoever what was done after the interlocutory chamber application had allegedly been filed. Thus, unless, someone made the effort to physically marry the court record for which the interlocutory chamber application had been opened with those of the two main cases, the matters would, in all probabilities, have remained separated.

A chamber application commences by way of an entry in the chamber book in terms of r 241(1) of the rules of this court. It has to be served on interested parties, unless it is one in respect of which the exceptions in paragraphs (a) to (e) of r 241(1) apply. Rule 243 provides that a chamber application ***may*** be accompanied by heads of argument. But this is merely directory or permissive, and not peremptory. It seems that once the chamber application has been entered into the chamber book the onus shifts to the registrar. In terms of r 245 the registrar is required to submit it to a judge in the normal course of events, but without undue delay. The use of the word "***shall***" means it is peremptory that the registrar acts with expedition.

Once the registrar has submitted the papers to him, the judge must consider the papers without undue delay. In terms of r 3 "***judge***" means a judge sitting otherwise than in an open court. The repeated reference to "***without undue delay***" in r 245 in relation to what the registrar and the judge are required to do means that chamber applications, even though not urgent, must be dealt with expeditiously.

It seems that a party that sleeps on his application in a court application, as opposed to a chamber application, may not have it set down. There is an elaborate procedure set out in the rules as to what a party seeking set down of a court application should do. However, in a chamber application, it seems that where a party has filed it the application must automatically proceed to determination.

However, even though the rules cast the duty on the registrar and the judge to ensure that a chamber application once filed, is determined without undue delay, this does not mean that the applicant can just file the application and go to sleep. Human systems are not infallible. Documents can go missing or become misplaced. It remains the applicant's duty to be vigilant. He must follow up on his application. The law helps the vigilant, not the sluggard. In the present case, there is no indication whatsoever what follow-up action was taken after the interlocutory chamber application had allegedly been filed. No one is saying anything about this. And, as I have pointed out in Case 2 above, that document was not part

of the record when I determined the two main cases. Therefore it cannot be made part of the record of appeal.

(ii) The Supplementary Affidavit by TBIC Investments

It is said that this affidavit was filed some three months before I heard the two main cases. But again, as I have demonstrated in Case 2 above, it was also not part of the record when I determined those cases. Therefore, it also cannot be made part of the appeal record.

However, I direct a different course in respect of this affidavit. Evidence has been placed before me that that affidavit had been lodged with, and date-stamped by, the registrar on 17 June 2013. It was filed in the court record bearing the reference number HC 601/11, i.e. one of the two main cases. There is some evidence that the affidavit had been served on the Civil Division of the Attorney-General's Office and Mangenje's attorneys on 17 June 2013 and 19 June 2013 respectively. Thus, even though no one has told me what became of the affidavit, in the normal course of events it ought to have been part of the record when I heard the two main cases on 19 September 2013.

Rule 15(5) 0f the Supreme Court Rules reads:

> "The record shall contain an index of the names of witnesses whose evidence is included in the record and all proceedings and documents which are included in the record. **In addition** there shall be a list of evidence, proceedings **and documents omitted from the record**. Such index and such list shall appear at the beginning of the record." (my emphasis)

In the final analysis therefore, I direct that the supplementary affidavit by TBIC Investments in HC 601/11, more accurately described as "**1st Respondent's Affidavit In Response to 4th Respondent's Affidavit**", and which was attached to a document titled "**Notice of Filing 1st Respondent's Affidavit in Response to Chief Registrar of Deeds' Affidavit**", be omitted from the record of appeal proper, but that it be included on the list of the evidence, proceedings and documents omitted from the record, which list must appear at the beginning of the record.

(d) Disposition

Cases 1 and 2 above, namely HC 3244/2014 and HC 8211/2014 respectively, are hereby disposed of as follows

(i) Case 1: HC 3244/2014

1. The registrar of this court, or his assistant responsible for the preparation of the records of appeal, shall:-

1.1 exclude from the record of appeal altogether, a certain chamber application which is Annexure "OA7" to the Respondents' opposing papers in HC 3244/14, which was prepared and signed by Madzivanzira, Gama & Associates on 30 April 2012 and issued with this court on or about 2 May 2012, referring to case number HC 9527/11, but which does not appear to have been allocated a case number,

1.2 omit from the record of appeal proper, the supplementary affidavit by TBIC Investments in HC 601/11, more accurately described as "**1st Respondent's Affidavit In Response to 4th Respondent's Affidavit**", and which was attached to a document titled "**Notice of Filing 1st Respondent's Affidavit in Response to Chief Registrar of Deeds' Affidavit**", but shall include it on the list of the evidence, proceedings and documents omitted from the appeal record, and which list must appear at the beginning of that record.

2. There shall be no order as to costs.

(ii) Case 2: HC 8211/2014

The application for my recusal from Case1 (HC 3244/2014) is hereby dismissed with costs.

24 September 2014

Gama & Partners, applicant's legal practitioners in Case1, respondent's legal practitioners in Case 2

Robinson & Makonyere, respondents' legal practitioners in Case 1, applicants' legal practitioners in Case 2