JUDICIAL SERVICE COMMISSION

VERSUS

HLEZIPHI NDLOVU

AND

NONKULULEKO MKHONTO

AND

THE MINISTER OF JUSTICE, LEGAL

AND PARLIAMENTARY AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO5 & 19 DECEMBER 2013

P. Madzivire, for the applicant
M. Nyathi, for the 1st respondent

Judgment

MOYO J: This is an application for referral to the Constitutional Court, of an application by 1st Respondent for my recusal in terms of Section 175 (4). The background of the matter is that 1st Respondent made an application that I recuse myself from hearing the application for rescission of judgment made by the Judicial Service Commission the applicant (herein).

The grounds for the application for recusal were that:
1stly a serving judge is likely to be sympathetic with the applicant as it is the employer of judicial officials in Zimbabwe. The reason for a serving judge to be so sympathetic is given as that the Judicial Service Commission being the employer was ordered in the judgment sought to be rescinded, to pay damages to 1st Respondent in the sum of $100 000-00 and therefore such an amount would make me sympathetic to the financial concerns of the applicant.

2ndly that abuse of office by a former employee of the Judicial Service Commission resulting in the suit by 1st Respondent against the Judicial Service Commission would render a serving judge sympathetic with their employer as such a scenario is likely to paint the Judicial Service Commission in a bad light in regard to the training of its officers.

3rdly that the Judicial Service Commission being composed of the Judge President, the

Chief Justice and the Deputy Chief Justice having sat and decided that the judgment in HC 3033/12 should be rescinded, a serving judge is likely to be persuaded by such a decision having been taken by her superiors. 4thly that the speed with which the matter was set down raised fears on the part of the 1st Respondent that there is a peculiar interest in the matter by all the parties concerned including the judicial officials.

I dismissed the application for recusal as I found it to be baseless and to be devoid of merit. All the grounds raised by the 1st Respondent do not pass the test of a reasonable apprehension of bias in the mind of a litigant as enunciated in numerous decided cases. The principles are dealt with in depth in the case of *Matapo and others* vs *Bhila No* and another 2010 (1) ZLR 32, there is an emphasis that the apprehension itself must be reasonable.

In this case it was held at page 322 paragraph F-H ''that an application for recusal must be based on a reasonable litigant's apprehension of bias and the apprehension must itself be reasonable. Mere apprehensiveness on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety – is not enough. The court must scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.''

To suggest that a serving judge, who took an oath of office, would worry or be concerned about what the Judicial Service Commission becomes liable or not liable to pay to an individual defies logic and is farfetched. Again to say that a serving judge would worry about what image the numerous officers employed by the Judicial Service Commission portray so as to paint their employer in bad light to the extent that the judge becomes partial is in fact so grossly unreasonable and desecrates the independence of the Judiciary. Why would a serving judge, a constitutional appointee be worried about the misdeeds if any, of the employees of the Judicial Service Commission as an organisation to the extent that she lacks objectivity on issues brought before her for determination? This again is farfetched and unreasonable an assertion.

The 3rd reason that the Judge President and the Deputy Chief Justice as well as the Chief Justice who are part of the Judicial Service Commission sat and deliberated that the matter be brought for rescission and that therefore a serving judge would then be persuaded by their decision lacks merit. A judge sitting in court applies the law to the facts before her and makes a decision in accordance with the legal principles enunciated in our law, to say that a judge would sit in court and make a decision on the basis that the afore mentioned judges of the superior courts are part of the Judicial Service Commission and therefore that would mean their mere decision to challenge the judgment would entail that a serving judge would then be persuaded to blindly find in favour of the Judicial Service Commission, is unfounded and totally baseless. Mr *Nyathi* for the 1st Respondent withdrew the 4th ground on the expeditious setting down of the matter and I would not address it herein although it is equally unfounded and illogical.

Judges are expected to decide cases that are brought before them impartially without fear or favour according to facts and law, and not according to subjective personal views. It is thus farfetched that a judge would disregard legal principles and the facts before her so that she finds in favour of her purported ''employer.''

In terms of Section 180 (2) of the constitution, the Judicial Service Commission does the administrative work leading to the appointment of judges. In terms of the same section subsection (3), the authority to appoint the nominees selected by the Judicial Service Commission (in terms of section 180 (2)) vests in the President of the Republic of Zimbabwe and the president has the final say in such appointments as he can decline to appoint any of the nominees submitted by the Judicial Service Commission. The ultimate authority to appoint judges therefore rests in the President of the Republic of Zimbabwe.

Judges are constitutional appointees whose Tenure of office is protected in terms of Section 187 of the Constitution as it stipulates the grounds upon which judges can be removed from their office.

The Section states thus:-

1) A judge may be removed from office only for
a) Inability to perform the functions of his or her office, due to mental or physical incapacity,
b) gross incompetence,
c) gross misconduct and it further states that a judge cannot be removed from office except in accordance with this section.

In terms of section 187 (3) judges are removed from office by the President after a due enquiry by a tribunal appointed by the President. Section 186 (2) provides that judges are appointed from the date of assumption of office until when they reach the age of 70 years.

In terms of Section 188 (3) of the constitution the salaries, allowances and other benefits of members of the Judiciary are a charge to the Consolidated Revenue Fund.

The afore mentioned sections of the constitution clearly show that the constitution in its present form does go a long way in ensuring that judges as constitutional appointees are protected in this regard to ensure an independent judiciary. To suggest that judges would be influenced to be partial in favour of the Judicial Service Commission is not only farfetched but it is devoid of merit.

On the application that the issue of my recusal be referred to the constitutional court in terms of Section 175(4) I have alluded to the case of the President of the *Republic of South Africa and others* v *South African Rugby football Union and others* 1999(4) South African Law

Reports 147. In this case the application for recusal was being sought against certain judges who were believed to have been members of a political party that 1st and 2nd appellants also belonged to and that the President of the court had a long standing advocate-client relationship with the 1st Appellant. It is important at this juncture to distinguish the South African case from the one before me as there is nothing that has been shown on the reasonable apprehension of bias against myself sitting in this matter as a judicial officer. The application in this matter has a blanket apprehension of bias as against all the serving judges in this jurisdiction. The court in that case had to decide whether the matter was a constitutional matter or one connected with a decision on a constitutional matter.

The court held in that regard that a judge who sat in a case in which she or he was disqualified from sitting because, seen objectively, there existed a reasonable apprehension that such a judge might have been biased, acted in a manner that was inconsistent with the constitution.

It is important to note that the gist of the finding in the South African case, is that for the constitutionality or other wise of the matter to arise, there first must be a reasonable apprehension of bias, and therefore such a judge would already have been found, at the recusal stage, to be disqualified to hear the matter but nevertheless proceeds to do so. Where the court has found as in the case before me that there is no reasonable apprehension of bias as the application for recusal would be baseless and devoid of merit, then the constitutionality or other wise of the matter never arises. It is also important to note that the application for recusal in that case was dismissed. In conclusion the court in the South African Rugby Football Union case (*supra),* stated thus at page 193-194.

> ''Under our new constitutional order, judicial offices are now drawn from all sections of the legal profession, having regard to the constitutional request that the Judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have a right to apply for the recusal of Judicial officers where there is a reasonable apprehension that they will decide the case impartially, this does not give them the right to object to their cases being heard by particular judicial offices simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial offices are nonetheless requested to ''administer justice to all person alike without fear, favour or prejudice, in accordance with the constitution and the law. To this end they must resist all manner of pressure regardless of where it comes from. This is the constitutional duty common to all judicial offices. If they deviate, the independence of the judiciary would be undermined and in turn the constitution itself.''

In Zimbabwe our current judicial officers are also drawn from all sections of the legal profession. Consequently I find that the application before me that I refer this matter to the constitutional

court is frivolous and vexations for the aforementioned reasons. I accordingly dismiss the application.

Mabhikwa, Hikwa & Nyathi, 1st respondent's legal practitioners
Kantor & Immerman, applicant's legal practitioners c/o *Joel Pincus, Konson and Wolhuter*