IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1387/18

In the matter between:

FLOYD MLOTSHWA	**1st Applicant**
WEBSTER LUKHELE	**2nd Applicant**
AND	
THE CHAIRMAN OF ELECTION AND BOUNDARIES COMMISSION	**1st Respondent**
MACFORD WELCOME NSIBANDE	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral citation: *Floyd Mlotshwa & Another and The Chairman of Election and Boundaries Commission & 2 Others* [1387/18] *[2018] SZHC 221 (9th October, 2018)*

Coram: FAKUDZE, J

Heard: 19th September, 2018

Delivered: 9th October, 2018

Summary: *Civil Procedure – Application for recusal of Judge – basis being that Judge was once a member of the Electoral Commission; was involved directly or indirectly in the drafting of the law that is the subject of the main Application - Court dismisses application for recusal based on absence of convincing evidence that there is basis or perceived apprehension of bias on the part of the Judge – Judge's role to interpret Act of Parliament bearing in mind the intention of the Legislature – Judge, like any lawyer, endowed with skills to interpret the law and does so with the assistance of lawyers for both parties – Double objective test for determining bias applies, that is the litigant alleging bias must be reasonable and secondly, the apprehension of bias itself must be reasonable – no proof that apprehension of bias is reasonable – Application dismissed with costs*

REASONS FOR EX TEMPORE JUDGMENT DELIVERED ON 19/09/2018

HISTORICAL BACKGROUND

[1] On the 30th August, 2018 the 1st and 2nd Applicants filed a Notice of Motion challenging the nomination and election of the 2nd Respondent as a candidate for the Member of Parliament for Makholweni Umphakatsi under Manzini North. The basis for the challenge was the 2nd Respondent was wrongfully registered as a voter under the Manzini North Inkhundla. The Main Application is still pending.

Recusal Application

Applicants' case

[2] On the 10th September, 2018 an informal application for recusal of Justice M.R. Fakudze was filed in the Justice's Chambers, resulting in the Judge refusing to recuse Himself from the Main Application. This culminated into an order that a fully fledged Application be filed by the Applicants. The Applicants and Respondents were put to terms for the filing of subsequent pleadings following the filing of the Application. I heard the Application on the 19th September 2018 and an ex tempore judgment was delivered on that day, dismissing the Application. I indicated that the reasons for

dismissing the Application would follow later. This is the whole purpose of this judgment.

[3] Paragraphs 12 to 20 of the Applicants Heads of Argument reflect the gist or substance of the Application. The paragraphs can be summarised as follows:-

3.1. The past relationship with the 1st Respondent makes it unlikely that he would approach the main application with an open mind.

3.2. The main application seeks the interpretation of Section 18(5) of the Voters Registration Act, 2013. Such an exercise would not be possible without a pronouncement on the reasonableness and legal soundness of the literal interpretation that 1st Respondent seeks to suscribe to the sub-section.

3.3. The Applicants are entitled to have an interpretation of Section 18(5) carried out by a Judge who would approach it with an open mind.

3.4 Paragraph 19 of 2nd Respondent's Answering Affidavit suggests that there is nothing peculiar about a Judge deciding a matter on legislation he drafted ……such Judge would be better placed to understanding the meaning and intention of the Legislator. Applicants avers that the proposition by the 2nd Respondent disqualifies the Judge because that would render Him both a Judge and witness at the same time.

3.5. The doctrine of necessity does not justify His Lordship's need to preside over election cases. Judges Mamba and Mabuza have dealt with elections cases in the past. Other Judges who joined the Bench in 2015 are not known to have had any association with the Elections and Boundaries Commission, unlike Judge Fakudze.

3.6. Justice N. Maseko was prohibited from dealing with any criminal matter at least for three years since His appointment. This was because He would find Himself conflicted since

He was at the helm of the Director of Public Prosecutions office for a long time.

2nd Respondent's case

[4] The Applicants contend that bias is apprehended on the basis that the Judge once worked with the 1st Respondent. It is further contended that His Lordship most probably had an input in the crafting of the pieces of Legislation which are pertinent in the Main Application being the Voter's Registration Act, 2013; the Elections Act, 2013, and the Parliament (Petitions) Act, 2013. Unfortunately, none of the Applicants say they are certain that the Judge took part in the drafting of these pieces of legislation.

[5] The 2nd Respondent contends that ex facie the prayers in the Main Application, the Applicants are not seeking to challenge the constitutionality of the Voter's Registration Act, 2013. They only mention this challenge in their application for the recusal of the Judge. In the Main Application, the Applicants are seeking the interpretation of the Voter's Registration Act, 2013, particularly the fact whether the 2nd Respondent qualifies to be registered at Manzini North or not.

[6] The 2nd Respondent states that it is a fact that Justice T.L. Dlamini was at some stage attached to the legal department of the Elections and Boundaries Commission. He has already dealt with a number of cases as a Judge where the First Respondent was a party. No recusal application was made against Him. The courts should be mindful of litigants who prefer certain Judges over others and bringing such application for the purpose of selecting their own Bench or on the basis that a certain Judge would most probably decide in their favour. Judges do not choose their own matters but are assigned to them hence courts should be slow to accede to applications for recusal based on assumptions because that has a bearing on the integrity of the court.

[7] Finally, there is nothing to suggest that His Lordship's past employment would influence Him not to issue an adverse order against the First Respondent, bearing in mind that He is bound by the Oath of Office. The Oath ensures that impartiality is observed in deciding cases. The Applicants have not stated whether His Lordship retains any benefit from the 1st Respondent to warrant the apprehension of bias.

The Applicable Law

[8] In **Lieberneberg v Brakpan Liquor Licencing 1944 W.L.D. 52**, Solomon J brought out the principle that no person should be a Judge in his own cause when His Lordship said at pages 54 to 55 that:-

> *"…….. Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others is disqualified if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial."*

[9] Likewise in **SV Roberts 1999 (2) SACR 243(SCA)** it was held that:-

> *"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 complete that continuing to preside after recusal should have occurred renders to further "proceedings" a nullity……"*

[10] Not only must the bias be actual, there must also be a reasonable apprehension of bias. In **Alan Alexander McGregor v Robert Crabtree and three Others Case No. 748/2017**, Her Ladyship Dlamini M. J captured the test of bias when she said at page 12 that:-

"[22] The principle of law on bias reflects that it is a twofold objective test. Firstly, the litigant alleging bias must be reasonable and secondly, the apprehension of bias itself must also be reasonable."

[11] An objective standard is often employed in matters of recusal. Hlophe J in the case of **African Echo (Pty) Ltd and Others v Inkhosatana Gelane Simelane High Court Case No.1138/99** demonstrated this point when he said:-

> *"Otherwise it is settled law that the test applicable in matters of this nature is based on an objective standard, as was stated in the **SARFU case** as well as the **Stanley Sapire case**. The position was put in the following words in the **SARFU CASE** at page 177*
>
> *It follows from the foregoing that the correct approach to this Application for the recusal of the 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 <u>correct facts</u> 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 submission by Counsel. The reasonableness of the apprehensions 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 reasons of their training and experience. It must be assumed that they disabuse their minds of any irrelevant personal believes and predispositions. They must take into account the fact that they have a duty to sit in a case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a Judicial Officer should not hesitate to recuse himself or herself if there are reasonable grounds on the part of litigants for apprehending for whatsoever reason was not or will not be impartial."

[12] His Lordship went on to further observe that:-

"It has been said that the above stated test has two inbuilt considerations. These are considerations that a court faced with a recusal application starts from the presumption that Judicial Officers are impartial in adjudicating disputes, while the other consideration is to the effect that absolute neutrality is a chimera and therefore emphasis should be placed on impartiality. The first inbuilt consideration viz, the presumption that judges are impartial in adjudicating disputes has attached to it two further considerations

namely that the presumed impartiality of the court is not easily dislodged and that for it to be dislodged cogent and convincing evidence should be provided. Otherwise the second inbuilt consideration in the recusal test calls for distinguishing between absolute neutrality and impartiality which are clearly not the same thing. Impartiality which is a requirement of this inbuilt consideration, has been defined as an open mind readiness to be persuaded without unfitting adherence to either party or to the Judge's own predilections, preconception and personal views."

Court's analysis and conclusion

[13] The basis upon which the Applicants want Justice Fakudze to recuse Himself is that He once worked with the 1st Respondent. He could and not that He did influence or contribute towards the crafting of the legislation that is the subject of the Main Application. It is this court's view that the facts alleged by the Applicant as the basis for the recusal application are not only speculative. Not only are they speculative, but they are also remote as rightly pointed out by the 2nd Respondents. The Applicants are seeking the interpretation of Section 18 of the Voter's Registration Act, 2013 and are not

seeking the striking down of that Section. It is therefore not an issue of Constitutional interpretation. There must be convincing evidence or correct facts to substantiate the Application for the recusal of the Judge and it is this court's view that the ones advanced by the Applicants run short of any convincing evidence or correct facts. In the English case of **R v Smith and Whiteway Fisheries Ltd (1994) (33 N.S. B. (2d) 50 (CA)** at page 361, the court stated that *"…… Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a Judge, in the absence of convincing evidence to that effect."*

[14] In the **African Echo Case (Supra)**, Hlophe J did indicate that 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 submission by counsel.

[15] It is this court's view that the Applicants' case ought to fail based on the second leg of the objective test that "the apprehension of bias itself must also be reasonable" as enunciated in the **Alan Alexander McGregor Case (Supra)**. There is nothing to suggest that at the end of the case the Judge

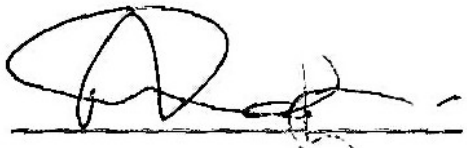
will not make an adverse finding against the 1st Respondent. Even if he does, the Applicants can exercise their right to appeal against it.

[16] Further, case law has stated that one of the inbuilt considerations in the recusal test calls for distinguishing between absolute neutrality and impartiality. Impartiality has been defined as an open mind readiness to be persuaded without unfitting adherence to either party or to the Judge's own predictions, preconceptions and personal views. Thus, the presumed impartiality of court is not easily dislodged and that for it to be dislodged, cogent and convincing evidence should be provided. See **Echo Case (Supra).** Cogent and convincing evidence has not been provided by the Applicants in the case before court.

[17] Finally, courts have clearly stated that the reasonableness of the apprehension of bias must be assessed in the light of the oath of office taken by the Judge to administer Justice without fear or favour; and his or her ability to carry out that oath by reason of his or her training and experience. The judge, as a trained lawyer, is assisted by counsel for both parties in the determination of a dispute before Him or Her. Statutory interpretation is

part and parcel of legal training for any lawyer. This consideration applies to the present application.

[18] For the above stated reasons, the Application for recusal of Justice M. Fakudze is hereby dismissed. Each party shall bear its own costs.



FAKUDZE J.

JUDGE OF THE HIGH COURT

For Applicant: M.L.M. Maziya

Instructed by Kunene-Dlamini Attorneys

For 1st & 3rd Respondents: Attorney General's Office

For 2nd Respondent: Mr. Piliso