IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 957/2018

In the matter between:

VANESSA CHRISTINA TORGEMAN (BORN FLORA) Applicant

and

RONEN TORGEMAN Respondent

In re:

In the matter between

RONEN TORGEMAN Applicant/Plaintiff

And

VANESSA CHRISTINA TORGEMAN

(BORN FLORA) Respondent/Defendant

Neutral Citation	:	Vanessa Christina Torgeman (Born Flora) vs Ronen Torgeman 957/2018 [2019] SZHC 161 (31 July 2019)
Coram	**:**	**MAMBA J.**
Heard	**:**	**28 June 2019**
Delivered	**:**	**31 July 2019**

[1] Civil Law and Procedure – Custody of minor children – Custodian parent deciding to emigrate to a foreign country with children without the consent of the non-custodian parent who has a right of access to them. Non-custodian parent objecting to enrolment of children in a school in foreign country. Arbitrators appointed to decide issue unable to do so. Court as upper guardian of all minors to fully investigate issue and make a decision that is in the best interests of the children.

[2] Civil Law and Procedure – Custody of minor children – disputes of fact arising – matter referred to oral evidence for decision regarding custody.

[3] Civil Law – Disputes of facts arising and matter referred to oral evidence. Long before hearing of evidence presiding Judge in Chambers encouraging Counsel to encourage the parties to explore an amicable out of court settlement of pending issues regarding custody and educational needs of the minor children, failing which Court would require evidence on such issues. Long postponement and suggestion of an out of court settlement by Judge viewed by the applicant as an element of bias by the Judge in favour of the respondent. Legal test for bias restated. Reasonable, objective and informed person who is aware of the relevant facts of the case, would reasonably think that the Judge will not bring an impartial mind to bear on the issue, despite his oath of office to administer justice fairly. Bias not established. Application dismissed.

[1] This is an application for my recusal. After hearing submissions on 28 June 2019, I immediately dismissed the application and indicated then that my written reasons for doing so shall follow in due course. What follows herein are those reasons.

[2] The applicant is a 36 year old adult female. She is a citizen of the Republic of South Africa (herein referred to as RSA). She is a housewife and resides in this country on a temporary resident permit.

[3] The respondent describes or refers to himself as 'Ronen Torgeman, a 45 year old major male Swazi Businessman residing at Emoyeni Drive, Mountain View, Mbabane.' The applicant, however states that the respondent is Ronen Turgeman. As stated in my Judgment dated 14 December, 2018, I do not think that this is a matter that ought to be decided by the Court. Nothing turns on this issue in these proceedings.

[4] The parties were married to each other in Tel Aviv, Israel, on 5 April 2006 'by way of a formal orthodox Jewish ceremony.' Two minor children were born of the marriage.

[5] The marriage aforesaid was dissolved by an order of this Court on 27 July 2018. Following that divorce decree, the applicant was awarded custody of the two minor children. This came about as a result of a Deed of settlement that was entered into by and between the parties herein. One of the provisions or terms of the said Court Order (embodied in the Deed of Settlement) is that '---any major decisions, such as, which school and or University that [the children] will attend, will be decided upon by both parties in consultation with each other on the understanding that the interests of the minor children in question will be paramount and that any such decision, shall be in their best interests.' It was also provided that in the event the parties failed to resolve or reach an agreement on such

major decisions, two arbitrators, namely Dror Torgeman and Carla De Agrela, would have the right to decide the matter and their decision would be final and binding on both parties.

[6] It is common cause that at the time of the divorce decree, the applicant was residing in Eswatini, but later resolved to return to her country (RSA) with the children. She intended to enrol them at Waterstone College which is about 60 km from her sister's place at Vanderbijlpark, in Johannesburg,

where she intended to stay with the children. She duly informed the respondent of her decision and asked for his views thereon as provided in the Court Order aforesaid. It is again common cause that the respondent objected to the children being relocated to RSA and also that they be enrolled at the said Waterstone College. (His grounds for objection are, for purposes of this Judgment, not relevant).

[7] After the disagreement above could not be settled by the parties, it was referred to the above mentioned arbitrators, who regretfully could not make a decision thereon. The applicant was insistent on her intended move with the children to RSA and this prompted the respondent to file an application to interdict the applicant from relocating the children to RSA or enrolling them to any school or educational institution without

his prior consent or approval. The application was filed ex parte and on an urgent basis on 19 November 2018. I granted a rule nisi as prayed.

[8] The urgent application was opposed by the applicant herein and was argued before me on 30 November 2018. Judgement was landed down in open court by me on 14 December 2018, which happened to be the last day of the last session on 2018. I note here that there was no appearance for or on behalf of the applicant when judgement was handed down. It is therefore not surprising that the applicant states in her founding affidavit herein that the said judgement was rendered on 7 December 2018. (See paragraph 20 of the said affidavit).

[9] In that judgement, I referred the matter to oral evidence and the matter was set down for hearing on 10 April 2019. Again, this date was settled in open court in the absence of the applicant or her representative. The rule nisi was extended until that date, i.e 10 April 2019. The obvious and logical effect of this extension of the rule nisi meant that the applicant could not enrol the children in any school, bar their present school, without the prior consent of the respondent. She could not relocate them from Eswatini either, without his prior consent or agreement.

[10] In arriving at the said order, I pointed out as follows:

‘[29] In view of the impasse between the parties, this court is therefore enjoined to exercise its role and decide what is in the best interests of the children in this case. In exercising this delicate function or role, the court has to have all the necessary facts and material before it. Generally or often, the matter

is referred to trial to hear evidence on the pertinent contentious issues. There are legion of such issues in this application.

[30] It has to be emphasised herein that whilst the respondent as the custodian parent has the right to choose for herself where she wants to live or stay, such right is by necessary implication and logic, subject to or restricted or restrained by a consideration, amongst others, of what is in the best interests of the children and the rights of access to such children by the applicant. In a word, her rights of residence are not without limit. They are not unbridled.

[31] It is unfortunate for both the children and their parents that this dispute has occurred at this time of the year, when decisive or concrete decisions have to be made for the new year regarding the welfare of the children. I have no doubt though that both parents have been motivated and have acted and are acting in pursuit of or by what they consider to be in the best interests of their children. They have acted and are acting out of parental love and affection. They are, however, unable to agree on these crucial issues of residence and schooling for the children in this case.

> [32] I do not think that any useful purpose would be served in rushing a decision on such a sensitive and delicate matter. Evidence is required. The matter is referred to trial for the court to investigate amongst others, the issue of the suitability of the respective intended residence arrangements for the children, the travel or transport arrangements that the respondent would put in place for the children in Johannesburg and the schooling at Waterstone College.'

[11] I pointed out in open court, that the 10th day of April 2019 was the earliest day that was open to me and that in any event, the parties had the duty to garner or assemble all the necessary evidence on both sides and in both RSA and Eswatini on the proposed or intended living conditions and school or educational environment of the minor children. Additionally, as one would expect in such cases, a report by the Social Welfare Office might become necessary or required.

[12] Again, in arriving at the above decision, I was acutely aware of the timing of the whole dispute and the resultant decision I made and its effect on the rights of all the protagonists herein. This is reflected in paragraph 31 in the excerpt in paragraph 10 above.

[13] On 22 January, 2019 I had a roll call of all the cases allocated to me and which had no trial dates. I then took the liberty to also invite both Counsel in this case to meet me in my Chambers on the same date. They both obliged and I am thankful or grateful to them for their response. During the brief discussion with Counsel, I pointed out to them from the outset that I had called them to suggest to them or encourage them to get their respective clients to explore a possible out-of-Court settlement of the matter on the issues that were the subject of the proceedings set down for 10 April 2019. I indicated to them that the matter was by its very nature sensitive and at times the parties were likely to be emotive and that this was bound to affect their relationship going forward. This would, ultimately adversely affect the minor children.

[14] It was during this discussion with Counsel that Mr Henwood, Counsel for the applicant, pointed out that the respondent was not being truthful in saying that his right of access to the children would be adversely affected if the applicant were allowed or permitted to take them with her to RSA. Counsel pointed out that the respondent was a regular visitor to RSA and thus he could exercise his rights of access to the children without any undue hardship or restraint. In response to this, I informed Counsel that the Court would need evidence or information where such meeting between the respondent and the minor children would take place and

under what climate or condition, be it in a hotel, restaurant, car park or house. A meeting in a hotel, restaurant or car park was not ideal, I pointed out.

[15] During the month of February 2019, I was not available for any court process in this court. I returned on 04 March 2019 and on or about 08 March 2019, Counsel, for the applicant informed me that he was applying for my recusal from the matter, based on the following grounds or reasons; namely:

'5.1 When the matter originally came before your Lordship on the 19 November 2018 it was heard on an urgent and ex parte basis. Prayer 1 of the Order made it absolutely clear that the matter was enrolled urgently and ex parte.

5.2 Without hearing any evidence from our client, the Respondent, an order was issued against her in the most unusual manner in that our client was entitled to travel with the minor children Talia and Sofia out of the country, but was not allowed to enrol them in any other school.

5.3 Your Lordship found, in making the Order that South Africa, the country of their birth, was a foreign country and that they were interdicted from returning there.

5.4 Our client and her legal representatives were put to unreasonable terms to file the answering affidavits, which they did and the matter was heard by your Lordship on the 30 November 2018.

5.5 A judgment was handed down in December 2018 in terms of which the application was postponed to 10 April despite the fact that the application had been held urgent. Your Lordship postponed the matter to a date some four months later for the hearing of oral evidence on the basis that your Lordship did not have any sooner date. We and our client find it extremely difficult to understand

this lengthy postponement when the matter was enrolled by your Lordship on an urgent basis in the first place and argued in November 2018.

5.6 The postponement to April 2019 is effectively a ruling that the children must continue schooling in Swaziland in 2019. The applicant has therefore already been granted the relief he sought at least for 2019. It also serves to expedite and fortify his contention that the children should remain in Swaziland.

5.7 On the 22nd January 2019, at approximately 7.05 am, the writer and Attorney of the Respondent, received a telephone call from your Lordship's Clerk to the effect that your Lordship would like to see the parties in his Chambers at 9 am on that day. We subsequently learnt that the same message was given to the Applicant's Counsel.

5.8 Both myself and the Advocate van de Walt appeared at your Lordship's Chambers at 8.45 am on that day. Your Lordship indicated his wish that the parties resolve the matter prior to 10 April 2019 and expressed the view that it would be quite inconvenient and not conducive for a father to see his children in a hotel room in the event that they return to South Africa.

5.9 The observation which relates to a contentious issue in the application and which is still to be determined after hearing evidence has raised a serious concern on the part of our client and on our part as legal representatives. Our client has a reasonable fear that she cannot be assured of a fair and impartial hearing in circumstances in which your Lordship has already formed a view on a contentious issue which would fundamentally affect the outcome. In essence our client's reasonable apprehension is that your Lordship suggests that the matter be resolved on applicant's terms.

5.10 Our client is also most concerned that the meeting with your Lordship took place on 22 January 2019 which was the first day of school year of the Montessori School which Sofia attends. The meeting took place at a time when our client had little option but to accept that the children would have to remain in Swaziland in 2019.'

[16] After considering Counsel's representations before me, I declined to recuse myself from the matter – based on the stated grounds. To do so would, I pointed out, not be in keeping with my oath of office to hear all matters between litigants without fear, favour or prejudice. To recuse myself under such circumstances would be an abdication of my responsibilities as a Judge, I said. The upshot of that refusal to recuse myself was this application.

[17] In her founding affidavit, the applicant states that she complains about the matter being heard by me ex parte and what transpired after the rule nisi was granted. First, she says the order or rule nisi is final in effect, secondly she was given very little or short time within which to file her opposing affidavit. Thirdly, 'that although [she] was entitled to travel with the minor children out of the country, [she] was not allowed to enrol them in any school.'

[18] Her fourth complaint is that in making the order, the court found or ruled in effect that 'South Africa, the country of their birth was a foreign country and that the minor children were interdicted from returning there.' (See paragraph 19 of the founding affidavit). Her sixth ground of complaint is that the long postponement; for about four months to hear oral evidence, is contrary to or not synchronous with the earlier finding of

the court that the matter is urgent. (It is of course not inconceivable that once the injunction was granted, the matter, though still urgent, may have not been of the same urgency as when initiated). Her seventh ground of complaint is that:

'[22] The second issue of concern relates to what transpired on the 22nd January 2019. On that date, at approximately 7.05 am, my Attorney Earl John Henwood received a telephone call from Clerk to his Lordship to the effect that the parties were to appear before the Lordship in his Chambers at 9:00 am on that day.

[23] My Attorney duly obliged and appeared at his Lordship's Chambers together with Advocate Magriet van der Walt at 8:45 am on that day. At that meeting, his Lordship indicated that he wished that the parties resolve the matter prior to 10 April 2019 and expressed the view that it would be quite inconvenient and not conducive for a father to see his children in a hotel room in the event that they return to South Africa.

[24] This observation, although probably made in good faith relates to a contentious issue in the application and which is still to be determined after the hearing of evidence has raised a serious concern on my part. This is fortified by the fact that the Respondent travels out of Eswatini almost every weekend and currently, when the children are with me on holiday in South

Africa, me makes arrangements to collect them and has access to them in that manner. This is an issues that has a bearing on the Respondent's ability to see the children and how he has chosen to exercise his right of access to them in the past.

[25] The observation made by his Lordship has raised a fear on my part that I cannot be ensured of a fair and impartial hearing in circumstances in which his Lordship has already formed a view on a contentious issue which could fundamentally affect the outcome. In effect, my reasonable apprehension is that his Lordship has suggested, although not in open oral terms, that the matter be resolved on the Respondent's terms.

[26] The other thing that is concerning to me is the fact that that meeting took place on the very first day of the school year of the Montessori School of which Sofia attends. The meeting took place at the time when I had little option but to accept that the children would remain in Eswatini in 2019.

[27] It was indeed most unfortunate that possibly by coincidence, my legal representative was called to his Lordship on the very first day of the school year. This, coupled with the fact that the matter had

been enrolled urgently when relief was being granted to the Respondent, but not deal with the same urgency when I was called upon to show cause, leaves me with the unsettling feeling that I am not being given a fair hearing.'

[19] In hearing the matter on an urgent and ex parte basis, it is common cause and legally relevant, that the court took into account the fact that schools in Eswatini were about to close for the final year (2018) and the respondent stated that '--- the [applicant] intends to leave Eswatini and to relocate with the children to Vanderbijlpark in the Republic of South Africa after their schools had closed on the 5th of December 2018, which is in approximately 2 (two) weeks time; '--- [and] the [applicant] is insistent on relocating with or without my consent and has applied for admission of the children at a school in South Africa for 2019 on the 1st November 2018.' These assertions by the respondent must perforce, be read and understood together with the further allegations by the respondent that it was not in the best interests of the minor children that they be caused to relocate to RSA and be enrolled at the said school. Amongst other things, the Court Order stated that any decision regarding their schooling or educational rights must be decided by the parents jointly. The parents had, regrettably, not agreed on this issue. Furthermore, the respondent stated that since he was resident in Eswatini,

relocating the children to RSA would adversely affect his rights of access to them. All these, in my judgement, were factors, taken individually and cumulatively, that justified the matter being heard urgently and an injunction be put in place to prevent the applicant from relocating the children to South Africa. The fact that the children held citizenship of that country was, frankly, inconsequential at that stage of the proceedings. The door was, however, still wide open to the applicant to state her defence, if so advised or minded. She did so.

[20] It has to be noted further that the respondent stated that he feared that the applicant would '--- remove [the children] from Eswatini and beyond the jurisdiction of the above Honourable Court, --- at any given time, more so should she learn of this application.' (See paragraph 52 of his founding affidavit).

[21] As to the return date of the rule nisi and the time for filing further papers in the matter, this took into account the averred urgency and the need to hear and finalise that application within 2018 so as to have clarity on the parties' respective rights and in particular the educational welfare of the minor children. That the applicant was served with the rule nisi just a day before she was required to file her opposing papers, is a matter for the Deputy Sheriff, who was entrusted with the duty or responsibility to serve

the Court Order. In any event, the applicant applied for and was granted an indulgence to file her papers on a later date. She suffered no prejudice in her defence in this regard. But again, accepting for the moment that the Court was in error in hearing the matter in the manner aforesaid and granting the rule nisi referred to above, is this a ground or cause for the presiding Judge to recuse himself? I answer this question in the negative. Indeed, the applicant did not think so too, because had she thought otherwise, she would have immediately filed the necessary application for recusal.

[22] As already stated above, when the court made its ruling referring the matter to oral evidence and extending the rule nisi pending finalisation of the matter, there was no appearance for and on behalf of the applicant. In settling the date for hearing of oral evidence, the court had to take into account that which I have already stated above; namely, the nature of the evidence required, its location and possible witnesses, plus, the availability of the Judge hearing the matter. I also cautioned against rushing into making a decision into the matter without having the relevant material before the Court. (See paragraph 32 of the Judgment). This ruling was handed down in open court on 14 December 2018. Again, the applicant did not complain about this apparent long postponement of the

matter. She waited and bid her time until on 08 March 2019, when she caused her attorney to write the letter requesting for my recusal.

[23] I accept, as the applicant states that her application for recusal was triggered by the remarks I made to Counsel in my Chambers on 22 January 2019. She states that that was the straw that broke the camel's back. Her complaint in this regard is totally unreasonable and most illogical. First, in requesting both Counsel to encourage the parties to reach an out-of-court settlement on the matter, I specifically advised Counsel that because of the very nature of the matter, its sensitivity and inherent long term effect on the parties and the minor children in particular, an agreed settlement would be the best outcome (in the matter). I wanted the parties, if possible, to reach an amicable result or ending. Had I been biased against the applicant I would not have taken this route. Instead I would have simply gone through the motions of hearing oral evidence and ultimately ruled in favour of the respondent.

[24] It is hereby recorded that during the discussion with Counsel, it was pointed out by Mr Henwood, Counsel for the applicant, that the respondent was not being truthful in asserting that relocating the children to RSA would adversely interfere with his rights of access to them, inasmuch as the respondent was a regular visitor to that country. It was

in response to this assertion that I informed Counsel that the Court would want to have the necessary evidence regarding and under what conditions would the respondent exercise his rights of access to the children during these visits to that country. That, in my Judgement, was a relevant and legitimate remark. It did not in any way suggest or intimate to the parties that the applicant must give in to whatever terms were dictated to her by the respondent. To suggest and allege that that is what I intimated, conveyed and or indicated to Counsel, is absurd in the extreme. No reasonable and informed person, in the position of the applicant would find this as even remotely suggestive of the meaning ascribed or attributed to it by the applicant.

[25] In paragraph 26 of her founding affidavit, quoted above, the applicant complains that the meeting between Counsel and I took place on 22 January 2019 and that was the very first day of the school year of the Montessori School of which Sofia attends. 'The meeting took place at the time when I had little option but to accept that the children would remain in Eswatini in 2019.' But the ruling was made on 14 December 2018. The applicant ought to have accepted that the children will, in 2019, be schooling in Eswatini, then. That the date in question was the first day of school was purely coincidental and of no moment for the Court. In any event, this was no hearing. The children were not involved

in the meeting and neither was the applicant. Counsel were only invited and attended. If any information on the matter needed to be kept away from Sofia, this was the responsibility of the applicant and her legal team.

[26] The test for bias was stated by the South African Constitutional Court in *S v Wouter Basson (CCT 30/03) [2004] ZACC 13, 2005 (1) SA 171 (CC)* as follows:

'[25] *In President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)* this Court held that a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with Section 34 of the Constitution and in breach of the requirements of Section 165 (2) and the prescribed oath of office. It went on to lay down the following test for recusal:

"The question is whether a reasonable objective and informed person would on the correct facts reasonable 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 submissions of counsel. The reasonableness of the apprehension must be assed in the light of the oath of office taken by the Judges 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. 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 herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." (footnotes omitted).

…

[29] In *SARFU*, the Court identified two different approaches for determining "the appearance of bias." The focus of the one is "real likelihood of bias" and of the other "a reasonable suspicion of apprehension of bias." The Court accepted, relying on earlier authority of the Appellate Division (as the SCA then was) that it was not necessary for the litigant who complained of bias to establish that there was a real likelihood of bias. The Court then went on to consider the distinction between the "suspicion" and "apprehension" and, to avoid the potentially inappropriate connotations that the word "suspicion" might engender, preferred the phrase "reasonable apprehension of bias" to "reasonable suspicion of bias."

[30] The Court held that there was a presumption in our law against partiality of the judicial officer. In reaching this conclusion it reasoned as follows:

> "This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence."

The effect of this presumption is that an applicant who alleges that a Judge is biased or reasonable apprehended to be biased must establish that. The Court also acknowledges that all Judges as human beings bring to their work their life experience which means that they are not neutral in an absolute sense. The Court held that it is not improper for Judges to have individual perspectives and for these to be brought to bear on the adjudication of cases.

[31] *In South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Proceedings) (SACCAWU)* this Court emphasised that not only is there a presumption in favour of the impartiality of the court, but it is a presumption which is not easily dislodged. Cogent and convincing evidence is necessary in order to do so. The Court, repeating what had already been held in SARFU, referred to the

two contexts in which reasonableness fits into the enquiry. It emphasised that not only must the evaluation be made from the perspective of a reasonable person, but the perception of bias must itself also be reasonable. In this regard, Cameron AJ writing for the majority stated:

> "It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:
>
> 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it call into question an element of judicial integrity."

[33] When considering the issue of bias in a trial Court, the following must be borne in mind. There is a difference between grounding a complaint of bias on the conduct of the Judge in hearing the case and grounding such a complaint on the relationship between the Judge and one of the parties or witnesses. It is generally far harder

to establish a reasonable apprehension of bias in the former case. As Harms JA noted in a recent decision of the SCA:

> "… a Judge is not simply a 'silent umpire.' A Judge 'is mere umpire to answer the question "How's that?" Lord Dennis once said. Fairness of Court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources."

In that case, the litigant had complained of the judge's questioning in a case which it argued had suggested that the Judge had disclosed a predisposition to an issue in the case.

I, with respect adopt these remarks herein. (See also the ruling of this Court in *R v Sipho Shongwe CRI. Case 42/2018, dated 05 June 2019).*

[27] From the above analysis of the facts and relevant or applicable law, I ruled that there was no merit in the application for recusal and it was accordingly declined.

MAMBA J

For the Applicant: Advocate P. Flynn

For the Respondent: Advocate Van der Walt