IN THE SUPREME COURT OF ESWATINI

JUDGEMENT

Case No. 62/2020

In the matter between:

NUR & SAM (PTY) LIMITED t/a BIG TREE FILLING STATION Applicant

And

GALP ESWATINI (PTY) LIMITED Respondent

Neutral citation: *Nur & Sam (Pty) Limited t/a Big Tree Filling Station v Galp Eswatini (Pty) Limited* [62/2020] [2023] SZSC 58 (06 December 2023)

Coram: **J.M VAN DER WALT JA, J.M. CURRIE JA, S. NSIBANDE AJA, M.J. MANZINI AJA AND Z. MAGAGULA AJA**

Date Heard : 26 May 2023

Date Delivered: 06 December 2023

Summary: *Application for recusal – Basic principles restated.*

Application for recusal – Appointment of Acting Judges of the Supreme Court by Chief Justice and empanelment of Judges of the Supreme Court by the Chief Justice – Allegations that Chief Justice allegedly conflicted in the matter justifying recusal of Acting Judges appointed by the Chief Justice held to be devoid of merit – Application for recusal dismissed.

JUDGEMENT

[1] This is an application for the recusal of His Lordship Z. Magagula and I, who had been appointed as Acting Justices of the Supreme Court, sitting in a panel of five Judges of this Court constituted and empanelled to hear a review application filed by the Applicant in terms of **Section 148 (2)** of the **Constitution of the Kingdom of Eswatini Act 1 of 2005** (the Constitution).

[2] This panel is comprised of five Judges - three Judges (being two permanent Judges of the Supreme Court - Justices van der Walt and Currie, and one acting Judge of the Supreme Court - Justice Manzini), appointed by His Majesty the King in terms of **section 153(1)** and **153(3)** of **the Constitution** respectively and two Judges – Justice

Magagula and I – appointed by the Honourable Chief Justice in terms of **section 153(5)** of **the Constitution**. It is the appointments made in terms of **section 153(5)** of **the Constitution** that are in issue in this recusal application.

[3] The Applicant is Nur & Sam (Pty) Ltd t/a Big Tree filling station a company duly incorporated and registered in terms of the company laws of the Kingdom of Eswatini and having its principal place of business at the Big Tree Shopping Complex in the Matsapha Industrial Site in the district of Manzini, Kingdom of Eswatini.

[4] The Respondent is Galp Swaziland (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of Eswatini with its principal place of business along King Sobhuza II Avenue, Matsapha Industrial Site, in the district of Manzini, Kingdom of Eswatini.

[5] The brief background to this application is that the Applicant lodged an appeal to this Court against the Judgement of the High Court. The appeal was unsuccessful. The Applicant then filed an application for

review in terms of **section 148(2)** of **the Constitution** (the first review application). At the hearing of the first review application the applicant applied for the recusal of certain Honourable Judges of the Supreme Court. The application was dismissed and the applicant filed a further **section 148(2)** review application (the second review application) in respect thereof. When the second review application came before the Court as currently constituted, the Applicant's attorney informally applied, in Chambers, for Magagula AJA and I to recuse ourselves. The application was refused and a substantive application was then made and it is this application that forms the subject matter of this Judgement.

[6] The current recusal application was opposed by the Respondent and the second review application pertaining to the first recusal application was postponed *sine die* pending the finalisation of this recusal application.

THE APPLICANT'S CASE

[7] The Applicant submitted that the Honourable Chief Justice interfered in the matter between the parties in the High Court and that such

interference constituted interference with the administration of justice. As a result thereof the Applicant filed a complaint against the Honourable Chief Justice in terms of **section 158** of **the Constitution** for serious misbehavior.

[8] The Applicant expanded on this point by contending that the Honourable Chief Justice allegedly interfered with the administration of Justice in the following ways:

8.1 By directing a Judge of the High Court, Justice T Dlamini, to reconsider and determine a recusal application in violation of **Section 141 (2)** of **the constitution** in circumstances where the said Judge had already recused himself;

8.2 By enrolling this matter simultaneously and on consecutive dates with another matter between Eswatini Medical Aid v Medscheme Case Number 24/2020, for the convenience of the respondent's counsel who also appears for Medscheme on the instructions of the Respondent's attorneys who also represent Medscheme. It is alleged that this is done for the convenience of Counsel to enable him to attend to both matters on

consecutive days before returning to South Africa where he is based;

8.3 On appeal, the Honourable Chief Justice was a member of the panel that heard the matter and decided against the Applicant; and

8.4 In the review proceedings the Honourable Chief Justice appointed Judges who had either decided a similar matter against the Applicant in previous litigation or were conflicted or had expressed opinions favourable to the Respondent's case.

[9] In argument before Court the Applicant's attorney were at pains to state that they were not making a case of actual bias against myself and Magagula AJA and that they were making a case of reasonable perception of bias.

[10] The gist of the Appellant's complaint as articulated in its Heads of Argument and in its submissions before this Court was that the aforesaid complaint of serious misconduct laid against the Honourable

Chief Justice creates a source of conflict on the part of the Honourable Chief Justice, and in view of this conflict, that the Honourable Chief Justice is precluded from exercising his constitutional powers to appoint and empanel judges to hear and determine this matter.

[11] It was argued that a fair minded and informed observer having regard to this conflict of interest would view the appointment and empanelling of judges to hear this matter with legitimate doubt that the judges so appointed and empanelled by the Honourable Chief Justice would be independent and impartial.

[12] What compounds this particular situation, according to the Appellant, is that the Honourable Chief Justice sat in the panel that decided the appeal from High Court in favour of the Respondent.

[13] The Appellant's case further was that in terms of **Section 21** of the **Constitution** disputes must be adjudicated upon by an independent and impartial Court and that this impartiality must exist not only in fact by also from an objective viewpoint.,

[14] It was submitted that a reasonable person, in the position of the Appellant, would reasonably apprehend that justice would not be administered impartially where the Honourable Chief Justice, in the circumstances of this matter, appoints and empanels judges to hear this matter.

[15] The Applicant cited the case of **MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS V STANLEY WILFRED SAPIRE CIVIL Appeal Case No. 49/2001** in support of its submission on the test for bias and to emphasise the importance of justice not only being done but manifestly and undoubtedly being seen to be done; it being submitted that the Court must not only be independent but must also be seen to be impartial.

[16] The Court was also referred to the matter of **YIACOUB AND ANOTHER V THE QUEEN PRIVY COUNCIL Appeal No. 0005 of 2013** for the proposition that it was not proper for the Honourable Chief Justice to appoint and empanel Z. Magagula AJA and I because he had been a member of the panel that had decided the appeal that was now a subject matter of the review.

[17] In pressing this point home, the Appellant's attorney, Mr Magagula quoted paragraph 15 of the above judgment which reads as follows:

"The difference in the present case is that the Presiding Judge found himself not simply appointing a judge to deal with a matter of general concern, but nominating a judge to hear an appeal from himself. The Board is satisfied that that carries an appearance of lack of independence and impartiality in relation to the process, viewed as a whole, which would impact on an objective informed observer. It is not difficult to imagine circumstances, under other regime in which such a process could be open to abuse of the kind not suggested here to have occurred in fact. The objective observer would, as it seems to the Board, say of such a process "That surely cannot be right."

[18] The Applicant's submission therefore, was that it cannot be right for the Honourable Chief Justice to empanel myself and Acting Justice of Appeal Magagula to hear this matter because it was a matter that the Honourable Chief Justice had decided on appeal. To do so, it was contended, would create an appearance of lack of independence and impartiality in relation to the review.

[19] The Applicant submitted finally, that it was in the interests of justice when viewed as a whole, that Justice Magagula AJA and I recuse ourselves.

[20] **THE RESPONDENT'S CASE**

The Respondent's submissions commenced with the proposition that applications of this nature must be decided on the facts before the Court and that according to **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICAN RGBY FOOTBALL UNION AND OTHERS 1999 (4) SA 147** (CC) (the SARFU case), the apprehension of bias can only arise if founded on the correct facts; that the Applicant had distorted the correct factual position regarding the Court application, the issues surrounding the recusal of Justice T. Dlamini in the High Court and the nature of the directive from the Honourable Chief Justice regarding the need for a formal recusal application as well as the allocation of the contempt application to another judge being Justice M. Mavuso.

[21] The Respondent confirmed that the matter set down for 12th October 2021 could not proceed because the Honourable Chief Justice had directed that the matter be placed before Judge T. Dlamini so as to

ensure that a formal recusal application be made before him. The Respondent stated further that Justice T. Dlamini would not proceed with the matter as he had already recused himself. The matter was then referred for the registrar for allocation to a new judge. Further that the matter was then allocated to Justice M. Mavuso but the Applicant's attorney advised the Registrar not to have the matter allocated a date as they intended to look for other alternatives outside the formal legal process.

[22] According to the Respondent the only reason that the contempt application has not been heard since October 2021 is that the Applicant has simply not prosecuted the same despite that a judge was assigned to hear the matter and it cannot therefore attribute the fact that the matter has not been heard to the alleged interference by the Honourable Chief Justice.

[23] The Respondent further submitted that the thrust of the Applicant's complaint is that Justice Magagula AJA and I are precluded from sitting in the matter because we are empanelled by the Chief Justice who has an 'interest' in the matter. It was the Respondent's submission that

interest must be of such a substantial nature as to make it likely that the judicial officer has a real bias in the matter (see **ROSE V JOHANNESBURG LOCAL ROAD TRANSPORTATION BOARD 1947**) **SA 272(W).** It was Respondent's submission that the Applicant has never identified the conflict and/or interest which the Chief Justice is said to have in this matter; that the allegation that the Chief Justice "interfered with the matter in that he ordered Mr Justice T. Dlamini to hear a recusal application in circumstances after the learned judge had already elected to recuse himself in chambers are untenable, farfetched and based on an incorrect recordal of the facts, if not a deliberate mischaracterisation of the facts, as they do not point to any conflict of interest at all; that on the facts of this matter it could not be said that the Honourable Chief Justice had displayed an interest of a substantial character as to make it likely that he has a real bias, nor could it be said, on the facts, that he is conflicted, and further that on the facts, it could not be said nor had it been seriously suggested by the Applicant, that the Honourable Chief Justice desires a particular outcome in the litigation.

[24] Further, the Respondent submitted that the Applicant's contention that simply because they had been appoint by the Chief Justice, any acting judge would be incapable of acting independently and impartially in this matter had no merit because it ignores the fact that judges are presumed to be individuals of careful conscience and intellectual discipline, capable of applying their minds to the issues before them without importing their own views; that judges will not lightly be presumed to be biased with no objective facts alleged to establish the contrary.

[25] Finally the Respondent sought to distinguish the case of **YIACOUB AND ANOTHER v THE QUEEN** (supra) which the Applicant sought to rely on for the proposition that an objective observer would apprehend the existence of bias where the presiding judge in the *court a quo* was tasked with appointing the panel to hear an appeal against his own decision. The Respondent's submission was simply that the facts of the case before us are different from those in the **Yiacoub** matter, in that this court was not concerned with a decision made by the Honourable Chief Justice or made by a panel in which he sat as an empanelled member.

[26] The matter before this court is a review of the decision of members of this Court to refuse to recuse themselves. It is common cause that the Honourable Chief Justice was not a member of the Court that refused to recuse itself on 27 May 2022. It was submitted that the Honourable Chief Justice could not be said to have a direct involvement of any kind in the present proceedings. In the circumstances, it was submitted, the Court need not follow the judgement in **Yiacoub**.

[27] **THE LAW OF RECUSAL**

The Applicant correctly recounted that the test to be applied when considering the issue of perceived bias is objective. The test was aptly set out in the case of **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND V SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS** – Judgement on recusal application **(CCT 16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999)** where at paragraph 48 the Court says the following:

"[48] ... the correct approach to this application for the recusal of members of this 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 correct facts reasonably apprehend

that the judge has not or will not bring an objective mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training or 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."

[28] Further to this the Courts in **CARL ROBERTS V ADDITIONAL MAGISTRATE FOR THE DISTRICT OF JOHANNESBURG, MR VAN DEN BERG AND THE ATTORNEY GENERAL OF THE WITWATERSRAND 1999 ZASCA 53** stated as follows:

"(3) Thus far, therefore, the requirements of the test thus finalised are as follows as applied to judicial proceedings:

(1) There must be a suspicion that the judicial officer might, not would, be biased.

(2) *The suspicion must be that of a reasonable person in the position of the accused or litigant.*

(3) *The suspicion must be based on reasonable grounds."*

[29] The Courts go on to state that when faced with an application for recusal *"the Court, as a starting point presumes that judicial officers are impartial in adjudicating disputes."* In the matter of **SOUTH AFRICAN COMMECIAL CATERING AND ALLIED WORKERS UNION, PATRICK NKATU AND OTHERS V IRVIN AND JOHNSON LIMITED SEAFOODS DIVISION FISH PROCESSING CONSTITUTIONAL COURT OF SOUTH AFRICA Case CCT 2/00**, the Court went on to say that this presumption is in-built and entails two further consequences. *"On the one hand, it is the Applicant for the recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted."*

[30] **APPLICATION OF THE LAW TO THE FACTS**

Firstly, and with regard to the submission that the Honourable Chief Justice has an interest in the matter before us or is conflicted because

he has empanelled Magagula AJA and I to hear an appeal from a judgement on which he was empanelled and that that carries *"an appearance of lack of independence and impartiality in relation to the process…which would impact on an objective observer…"* , I say the following – the factual position is that before us is a review application brought in terms of **section 148 (2)** of **the Constitution** to review the refusal of the panel that sat on 27 May 2022 to recuse themselves from hearing a previous application in terms of **section 148(2)** of **the Constitution** brought by the Applicant. The Honourable Chief Justice was not a member of that panel. This matter cannot therefore be equated to the **Yiacoub** matter (supra) and is clearly distinguishable from it. There is therefore no basis on which an objective observer would apprehend the existence of bias resulting from the Honourable Chief Justice empanelling Magagula AJA and I onto the Appeal Court bench to hear this matter as it is not his decision we are empanelled to review.

[31] I now turn to the complaint in terms of **section 158** of the **Constitution.** Although the applicant did not take the Court into its confidence by sharing a copy of the written complaint, I accept that there is such a

complaint and that it should not be taken lightly as it speaks to allegations of a breach of not just any law but the constitution of the country. The applicant did not share with us the forum before which this complaint is and what the status thereof was at the time of the hearing of this application. In any event it is not for this court to determine the merits of the complaint and we will not address same save to say that the factual matrix regarding the events that gave rise to the complaint as set out by the applicant has been denied vigorously in the respondent's answering affidavit.

[32] As previously set out, the Applicant bases its current recusal application on the fact that Magagula AJA and I were appointed by the Honourable Chief Justice at a time when it had lodged a complaint against him relating to an alleged interference with the matter before the High Court between the same parties which are ancillary proceedings to the matter before this Court. The applicant alleges that while the complaint is still pending, the Honourable Chief Justice is tainted by his alleged conflict and interest in the matter and is therefore precluded from appointing and empanelling us to hear the matter. It is alleged that it is this complaint that is a source of the Honourable Chief

Justice's conflict and that this complaint bars the Honourable Chief Justice from exercising his constitutional and administrative powers in respect of this matter.

[33] It is common cause that the panel of five judges sitting to hear this matter were empanelled by the Honourable Chief Justice. It is also common cause that the Applicant raises issue only with the empanelling of Magagula AJA and I by virtue of the fact that unlike Justice Manzini AJA we had been appointed by the Honourable Chief Justice.

[34] Similarly, it was argued by the Applicant that the empanelling of Magagula AJA and I was objectionable because we were empanelled by a *'conflicted'* Chief Justice whereas the empanelling of the rest of the bench (3 justices) by the very same Chief Justice, was not objectionable.

[35] These assertions by the Applicant seem to suggest that the Honourable Chief Justice was "*compromised*" and had an interest in the matter only when he was appointing Magagula AJA and I as well as when he was

empanelling us. When he recommended the appointment of Judge Manzini AJA and when he empanelled Judges Van de Walt, Currie JJA and Judge Manzini AJA to hear this matter then he was neither conflicted nor did he have an interest in the matter since that appointment and the empanelling are not objectionable. In other words the process was tainted only when he appointed and empanelled Judge Magagula AJA and myself and it was not when he recommended the appointment of Judge Manzini AJA and empanelled him and the two other members of the bench.

[36] These cannot be the founding basis of a reasonable apprehension of bias by an objective and informed person in the position of the applicant and who is in possession of all the correct facts in this matter. It is absurd, in my view, that a reasonable person in the position of the Applicant would reasonably apprehend that the Honourable Chief Justice may interfere with the matter when empanelling two Justices in a bench of five. There simply cannot be any basis for the Court to conclude that a reasonable person in the shoes of the Applicant would reasonably apprehend bias from some of the bench empanelled by the

Honourable Chief Justice and not from the others empanelled by the same Chief Justice.

[37] Add to this the fact that a reasonable person so described by the Courts in the tests for recusal would be aware that Magagula AJA and I are permanent members of the Judiciary of Eswatini. Judge Magagula AJA is positioned in the High Court and I am the Judge President of the Industrial Court of Appeal. Such a reasonable person would, in my view apprehend that we would execute our judicial functions in terms of the oath that we took on appointment without improper influence from anyone, including the Honourable Chief Justice. This must also be read with due regard being had for the presumption of judicial impartiality.

[38] Further the Applicant's contention was that the apprehension of bias was also reasonable because this matter is always set down a day before or after another matter that involves the Respondent's counsel (Case 24/2020 mentioned in paragraph 8.2 above). This act allegedly further showed that the Chief Justice had an interest in the matter and should therefore not be empanelling Judges to hear this matter.

[39] It is common cause that counsel for the Respondent also appears in Case 24/2020. It is common cause that counsel is not local but travels from outside the country.

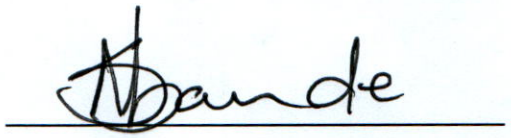
[40] It is in my view proper that international considerations of comity, reciprocity and convenience which permits right of appearance by foreign counsel should accommodate Counsel's travel arrangements where it is not prejudicial to any other party to the litigation. I take note of the fact that our Courts do this as a matter of practice – for example the Courts will start later than normal or adjourn earlier than usual to allow counsel time to travel to catch his/her flight out of the country. In this matter nothing has been put forward by the applicant as giving the respondent an advantage through the accommodation of the Respondent's Counsel travel arrangements. The applicant has not set out how it is prejudiced in the litigation of this matter by this arrangement. I am unable to fathom how the applicant can possibly be prejudiced in the litigation to the point of it being seen as an interference or interest in the litigation by the Honourable Chief Justice.

[41] Further and as articulated by the respondent, no facts have been alleged to show that the Chief Justice somehow has an interest in the outcome of this matter. The allocation of consecutive dates of hearing two matters in which counsel for the respondent appears does not in my view constitute an interest of such a substantial nature as to make it likely that he has a real bias in the matter (see **Slade v Pretoria Rent Board (1943 TPD 127**).

Further the test requires that the presiding judge is the one that should have an interest of a substantial character in the litigation in order to found a reasonable apprehension of bias. *In casu*, it appears that Judge Magagula AJA and I are no more than anonymous pieces on a board in a game of chess that has nothing to do with us and/or our judicial independence and integrity.

[42] It is my conclusion that the Applicant has failed to satisfy the Court that its apprehension of bias is reasonable and is that of a reasonable informed observer who is in possession of all the facts of this matter. The Applicant has failed to discharge the onus borne by it.

[43] For the above reasons the application for recusal is hereby dismissed with costs.



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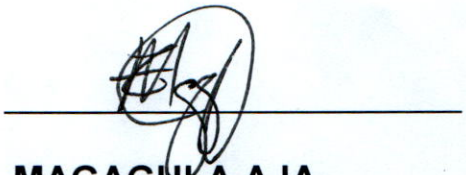

MAGAGULA AJA

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