IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 105/2017**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

CHANDIWIRA NYIRENDA	**1ST APPELLANT**
SIAVONGA DISTRICT COUNCIL	**2ND APPELLANT**
ATTORNEY GENERAL	**3RD APPELLANT**

AND

DEEP SIX COMPANY LIMITED	**1ST RESPONDENT**
GOMES HAULAGE	**2ND RESPONDENT**

Coram: Mchenga, DJP, Mulongoti and Sichinga JJA
On 14th August, 2017 and 15th February, 2018

For the 1st Appellant:	*Dr. H. B. Mbushi – Messrs HBM Advocates*
For the 2nd& 3rd Appellants:	*Mr. F.K Mwale and Mrs. K.A. Mundia – Attorney Generals' Chambers*
For the Respondents:	*Mr. C.M. Sianondo – Malambo and Company*

J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court.*

Cases referred to:

1. ***Mulugeta Guadle Mengiste of Tigaay and others (2013) EWCA Civ. 1003***
2. ***S. v. Dube and others [2009] 2 SACR 99 (SCA)***
3. ***The President of the Republic of South Africa and others V. South African Rugby Football Union and others (1999) ZA CC II***
4. ***Regina v. Camborne Justices (1953) 1 WLR 1046***

5. **MususuKalenga Building and Another v. Richman's Money Lenders Enterprises (1999) ZR 27**
6. ***John Kasanga, Wilmingtone Shayawa Kasempa v. Ibrahim Mumba, Goodwin Yoram Mumba and Yousuf Ahmed Patel (2006) ZR 7***
7. ***Locabail Limited v. Bayfield Properties (2000) 1 ALL ER 65, 77***
8. ***JCN Holdings Limited, Post Newspapers Limited and Mutembo Nchito v. Development Bank of Zambia (2013) 3 ZR 299***
9. **Mabenga v. Post Newspapers Limited SCZ Appeal No. 69/2012**

Legislation and other works referred to:

1. ***Halsbury's Laws of England, 5th edition, Vol.71***
2. ***Judicial (Code of Conduct) Act No. 13 of 1999***
3. ***Dr.Massos Ahmed of University of Leicester: Article on : Judicial Recusal on 4th October, 2013***

This is an appeal against the ruling of the High Court siting at Lusaka dated 6th April, 2017. In that ruling the honourable Mr. Justice Mwila Chitabo, refused to recuse himself from hearing the matter, following allegations by the 1st appellant that the Judge's previous law firm, Messrs Chitabo Chiinga and Associates, used to represent the 2nd respondent.

The dispute between the parties arose over a piece of land in Siavonga which led the respondents to sue the appellants in the High Court. Before the matter could be determined, the 1st appellant applied for an order for the Judge to recuse himself as aforestated. The affidavit in support of the application sworn by the 1st appellant shows that he was uncomfortable with the Judge presiding over the case because his firm used to represent the 2nd respondent. He also deposed that he had information that the members of the 2nd respondent had said that

they have a personal relationship with the Judge. The application was opposed on grounds that there is no evidence to warrant the Judge recusing himself.

The Judge refused to grant the application, on the premise that the allegations do not reveal any of the conditions required for a Judge to recuse himself under section 6 of the Judicial (Code of Conduct) Act. The Judge went further to state that even if it was established that his previous law firm at one point acted for the 2nd respondent, over a period of 30 years, which he could not recall, that would not be a ground for recusal under the Judicial (Code of Conduct) Act.

This prompted the appeal before us by the 1st appellant on the following grounds viz:

1. **that the allegation by the 1st appellant that the Honourable Mr. Justice Mwila Chitabo, acted for the 2nd respondent while the Judge was in private practice in Ndola where the 2nd respondent was also a resident and businessman under the Company known as Gomes Haulage Limited, was more than enough to compel the conscious of the Judge to recuse himself from the matter;**
2. **that the respondent had at one time intimated to the 1st appellant that the Honourable Mr. Justice Mwila Chitabo SC was a family friend which was sufficient ground for the Judge to recuse himself from the matter;**
3. **that the contention by the Judge (Court) that there was no written proof that the Judge was a family friend of the**

members of the 2nd respondent company is an erroneous way of establishing the friendship of people;

4. **that the insistence by the Judge on hearing of the matter has created a perception of bias in the mind of the 1st appellant and will be carried through to the final judgment of the case, a situation that could be cured at this initial stage; and**
5. **that the insistence by the Judge to handle the case would have long term mistrust of justice by the 1st appellant and the general public.**

At the hearing of the appeal, Dr.Mbushi, who appeared for the 1st appellant, informed the Court that the 2nd and 3rd appellants were not party to the appeal though the documents indicated otherwise. Consequently, the state advocates, though in attendance, did not present any arguments.

Dr Mbushi, relied on the filed heads of argument to aid the appeal. He cited a number of foreign authorities such as an article on *Judicial Recusal* by a Dr.Massos Ahmed of University of Leicester, that the test for bias is:

> ***"if a fair minded and informed observer, having considered the facts would conclude that there was a real possibility that the Judge was biased; the Judge must recuse himself."***

The case of **Mulugeta Guadle Mengiste of Tigaay and others**[1] was cited to the effect that:

"To maintain society's trust and confidence justice must not only be done but it must be seen to be done."

It is contended that Article 18 of the Constitution of Zambia provides that Judges must be independent and impartial in discharging their functions. Furthermore, in the South African case of **S. v. Dube and others (523/07[2009] ZASCA 28[2],** the Supreme Court of Appeal found that there was a perception of bias when a state advocate appearing in a case turned out to be the judge president's spouse. Another South African case of **the President of the Republic of South Africa and others V. South African Rugby Football Union and others[3]** was cited to the effect that:

"a judicial officer should recuse herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial."

It was the further submission of counsel that the common law right to a fair trial is now constitutionally entrenched and that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reason, will not be impartial.

Counsel drew the Court's attention to the English case of **Regina v. Camborne Justices[4]** which held that:

"The reason is plain enough, justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking: the Judge was biased."

He maintained that the appellant in *casu*, has laid sufficient ground which shows that the 2nd respondent has an intimate relationship with the Judge which has raised apprehension and suspicion that there would be bias in the Judge's approach to the case, evident in the manner the Judge handled the injunctions.

Mr. Sianondo, who appeared for the respondent filed heads of argument in response, arguing all the five grounds simultaneously. To begin with, counsel argued that the issue of the injunction cannot be raised on appeal as it was never raised in the court below. The case of **Mususu Kalenga Building and Another v. Richman's Money Lenders Enterprises**[5] is cited as authority for that position of the law.

Counsel further submits that for a court to recuse itself, there has to be a basis on which the court can opt to give away a case allocated to it. It should not be, as in this case, an individual's self induced perception of bias; not based on evidence. The case of **John Kasanga, Wilmingtone Shayawa Kasempa v. Ibrahim Mumba, Goodwin Yoram Mumba and Yousuf Ahmed Patel**[6] was cited to support this assertion.

Counsel also cited an English case of **Locabail Limited v. Bayfield Properties**[7] in which the Court of Appeal held as follows:

> ***"...it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances on which an objection could be soundly based on the***

religion, ethnic or national origin, gender, age, class, means or sexual orientation of the Judge. Nor, at any rate ordinarily, could an objection be soundly based on the Judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instruction to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers.."

It is submitted that there is no evidence to substantiate the allegation, be it a document, or indeed a receipt or name of any person who said that the trial court used to act for the 2nd respondent. Counsel argued that the **Locabail** case is clear that even when the Court had received previous instructions to act for or against any party, it is not enough for the Judge to recuse himself. That the Judge in *casu* did state that he could not even remember acting for the 2nd respondent. In his oral submissions Mr. Sianondo argued that the appellant in his submissions, at pages 158 to 155 lines 17 to 22 (as the pages appear in the record of appeal), clearly admits that the allegation of bias against the Judge cannot be substantiated.

Dr.Mbushi, in response to the respondents' heads of argument, argued that bias is premised on two principles in law, that is, perception and reasonableness. There was therefore, no need for one to adduce written evidence to show that a Judge would be biased.

We have considered the submissions by counsel and the ruling appealed against. We will deal with all the grounds of appeal simultaneously as they are interrelated. The cardinal issue the appeal raises, is whether the 1st appellant demonstrated or established that circumstances had arisen in this case that there would be a real possibility or perception of bias against him should the learned Judge adjudicate upon his case. The 1st appellant alleged that the learned Judge's previous law firm of Messrs Chitabo Chiinga & Associates, used to represent the 2nd respondent and further that members of the 2nd respondent company claim to have a personal relationship with the Judge.

The conduct of Judges in Zambia is regulated by the Judicial (Code of Conduct) Act as rightly observed by the High Court. Section 6 of the Act provides that:

> ***"(1) Notwithstanding section seven a judicial officer shall not adjudicate on or take part in any consideration or discussion of any matter in which the officer's spouse has any personal, legal or pecuniary interest whether directly or indirectly.***
>
> ***(2) A judicial officer shall not adjudicate or take part in any consideration or discussion of any proceedings in which the officer's impartiality might reasonably be questioned on the grounds that –***
>
> ***(a) The officer has a personal bias or prejudice concerning a party or a party's legal practitioner or personal knowledge of the facts concerning the proceedings;***
>
> ***(b) The officer served as a legal practitioner in the matter;***
>
> ***(c) A legal practitioner with whom the officer previously practiced law or served is handling the matter;***

(d) The officer has been a material witness concerning the matter or a party to the proceedings;

(e) The officer individually or as a trustee, or the officer's spouse, parent or child or any other member of the officer's family has a pecuniary interest in the subject matter or has any other interest that could substantially affect the proceeding; or

(f) A person related to the officer or the spouse of the officer-

(i) Is a party to the proceedings or an officer, director or a trustee of a party;

(ii) Is acting as a legal practitioner in the proceedings;

(iii) Has any interest that could interfere with fair trial or hearing ; or

(iv) Is to the officer's knowledge likely to be a material witness in the proceeding."

In the case of **JCN Holdings Limited, Post Newspapers Limited and Mutembo Nchito v. Development Bank of Zambia**[8], which dealt with the issue of recusal by a Judge, the Supreme Court held that:

> ***"the law relating to recusal by a High Court Judge is found in sections 6 and 7 of the Judicial (Code of Conduct) Act..... Section 6 of the Act deals specifically with disqualifications from adjudication. It outlines circumstances under which a judicial officer should not adjudicate on a given matter..."***

In the case of **Mabenga v. Post Newspapers Limited**[9], the appellant's counsel, (Mr. C.L. Mundia, SC) had represented a client at a disciplinary hearing against a legal practitioner. The Legal Practitioner's Disciplinary Committee of the Law Association of Zambia (LAZ) absolved the legal practitioner of any wrongdoing. Mr. Mundia's client, Ms Mukinga, appealed the decision of the Disciplinary Committee.

Before the outcome of the appeal, the legal practitioner subject of the LAZ disciplinary hearing, was appointed Judge of the High Court for Zambia. Later on, in a matter unrelated to the disciplinary hearing against the Judge as a legal practitioner, counsel from Mr. Mundia's firm appeared before the Judge in the High Court. Counsel made an application on behalf of Mr. Mundia SC, for the matter to be transferred to another Judge, on the basis that he was representing Ms.Mukinga in the pending appeal against the Judge.

The Judge dismissed the application, with costs, on the grounds that the application was an attempt at forum shopping. The Court stated that a party is not entitled to choose which forum his or her action will be heard before. She further held that, even if it was an application asking her to recuse herself in the matter, it could not succeed because the appellant had not asked her to recuse herself but had instead asked for the reallocation of the matter to another Judge. The appellant appealed the Judge's decision to the Supreme Court.

The Supreme Court considered the matter as one concerning the perception of possibility of bias against the appellant. In a unanimous opinion, the Supreme Court held that the Judge in the court below should have recused herself because there was a likelihood that she would be biased against the appellant. The Court stated: ***"The learned Judge should not have handled a matter in which the lawyer appearing before her was prosecuting the Judge in a different matter."*** The Supreme Court ordered that the matter be sent back to the High Court for hearing before a different Judge.

In **Locabail Limited v. Bayfield properties**[7] also cited by Mr. Sianondo, the Court of Appeal went further to state that:

> ***"...by contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case..."***

According to Halsbury's Laws of England: ***"the test applicable in all cases of apparent bias, whether concerned with justices, members of inferior tribunals, jurors or with arbitrators, is whether, having regard to all the relevant circumstances, there is a real possibility of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour, or disfavour, the case of a party to the issue under consideration by him. In considering this question, all the circumstances which have a bearing on the suggestion that the judge or justice is biased must be considered. The question is whether a fair minded and informed observer, having considered the fact, would conclude that there was a real possibility that the tribunal was biased... It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be seen to be done but be seen to be done is applied, and the court gives effect to the maxim by examining all the material available and considering whether there is a real possibility of bias..."***

In *casu*, we note, as submitted by Mr. Sianondo, that the 1st appellant failed to demonstrate let alone establish a *prima facie* case of a real possibility of bias or perception thereof by the learned Judge. In comparison with the **Mabenga v. Post Newspapers Limited**[9] case, we note that in that case a history of a case or a complaint at LAZ against

the Judge by the appellant's counsel was established. The said case was actually pending hearing of the appeal when the firm of Mr. Mundia SC, asked the Judge to transfer the Mabenga case to another Judge. There was, therefore a basis upon which the Judge was ordered to recuse herself and the matter allocated to another Judge. The appellant's advocate was able to demonstrate the likelihood or perception of bias against him or his client had the Judge adjudicated upon the matter.

In the present case, there is no basis at all upon which the allegations were made. The Judge stated that he cannot even remember having represented the 2nd respondent due to the ancient of time. This notwithstanding, as aforementioned the appellant failed to establish or demonstrate any basis upon which the Judge could have recused himself as outlined in section 6 of the Act. Even the foreign cases cited by Dr. Mbushi are not helpful to his case. It is clear from these cases that there was a basis for recusal like the state advocate being a spouse of the Judge President.

Baseless suspicion that the Judge could have acted for the 2nd respondent previously, is not sufficient to warrant a recusal. We opine that this is an attempt by the appellant, and we dare add his counsel, at forum shopping which the courts frown upon. We find counsel's argument that dismissing this appeal would erode the public's confidence in the Judiciary; meritless. To the contrary, it is the conduct such as exhibited by the 1st appellant and his counsel which would tend to erode the public's confidence in the judicial system. The

conduct by the appellant's counsel and his client of accusing the Judge of bias without basis, actually borders on contempt.

We wish to warn, especially counsel, that in future, he risks being cited for contempt. The courts will not condone such baseless accusations by the bar through their clients, against the bench especially from senior counsel like Dr.Mbushi, who should know better and advise clients accordingly.

In the net result the appeal is dismissed with costs, to be taxed, failing agreement. For avoidance of doubt, the matter to proceed to trial before the same Judge.

Delivered at Lusaka the 15th day of February, 2018

C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.Y. SICHINGA,SC
COURT OF APPEAL JUDGE