

COUR DE JUSTICE



TRIBUNAL DE JUSTIÇA



COURT OF JUSTICE

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**IN THE APPELLATE DIVISION OF THE COURT OF  
JUSTICE OF THE COMMON MARKET FOR EASTERN  
AND SOUTHERN AFRICA  
AT LUSAKA, ZAMBIA**

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**APPEAL NO. 1 OF 2016**

**GOVERNMENT OF THE  
REPUBLIC OF MALAWI.....APPELLANT**

**VERSUS**

**MALAWI MOBILE LIMITED.....RESPONDENT**

**Coram:**

Hon. Lombe P. Chibesakunda – Judge President	}	
Hon. Justice Abdalla E. El Bashir	}	
Hon. Justice Michael C. Mtambo	}	
Hon. Justice David Chan Kan Cheong	}	JJA
Hon. Justice Wael M. H. Y. Rady	}	

**Registrar: Hon. Nyambura L. Mbatia**

**Counsel for the Appellant:**

**Hon. Mr. Kalekeni Kaphale, SC – Attorney General of  
Malawi**

**Ms. Apoche Itimu – State Attorney – for the Appellant**

**Counsel for the Respondent - Mr. David Kanyenda**

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**RULING**

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*Q.*

*WR*

*Q*

*HLB MM*  
*Q.*

**I-Background**

1- This is a preliminary application by the respondent (Malawi Mobile Limited) for the recusal of Honourable Justice Dr Mtambo ("the Judge") from participating howsoever in the present appeal pending before the Appellate Division of the COMESA Court of Justice.

2- The appellant (Government of the Republic of Malawi) is opposing the application for recusal.

3- The respondent does not allege that the Judge is or will in fact be biased. Rather the respondent's contention is that there is a real danger or reasonable apprehension or suspicion that he may be biased. In other words, it is alleged that there is an appearance of bias and not actual bias. The grounds relied upon by the respondent in support of its motion for recusal are twofold.

4- Firstly, learned Counsel for the respondent contends that there may be a reasonable apprehension or perception of bias on account of the sale of the law firm of the Judge, prior to his appointment to the Bench, to the respondent's agents, among others, and an ensuing landlord and tenant relationship between them.

5- Secondly, learned Counsel contends that the Judge may be a judge in his own cause given the fact that he is a member of the Malawi Judiciary and one of the issues in the Reference is the composition and the conduct of the Supreme Court of Appeal of Malawi.

6- Learned Counsel has emphasised that the respondent does not for a moment doubt the integrity, professionalism and impartiality of the Judge or that he would allow his judgment to be clouded by his prior commercial acquaintanceship or relationship with the respondent's agents or his present

relationship with the Malawi Judiciary. Learned Counsel has, however, submitted that it is a fundamental rule of law that justice should not only be done but should be manifestly and undoubtedly seen to be done.

7- Learned Counsel has further submitted that the test is not whether the Judge can disabuse his mind of any knowledge or ties he may have had of the respondent's agents or the appellant or the Malawi Judiciary but whether a reasonable man having the required background information would reasonably suspect the possibility of bias on the part of the Judge.

## **II- Applicable law and principles**

8- One of the cornerstones of a legal system is the impartiality of the Courts by which justice is administered. The concept of a fair and an impartial judiciary is as old as the history of the courts, and rules designed to assure impartiality have been enacted since ancient times. It is obvious that bias and partiality are two characteristics anathema to the judicial robe.

9- In fact, at both the national and international level, independence and impartiality are among the core qualities most fundamental to an effective and a legitimate legal system for winning the respect of the public and adherence to the rule of law by the public. Acknowledging explicitly the importance of these concepts, the foundational instruments of most international courts provide that the judges who sit on those courts are impartial to, and independent of, their respective countries of origin.

10- There is no doubt that a judge's impartiality is one of the core principles of the Common Market for Eastern and Southern Africa (COMESA) as can be gathered from Article 6 of the COMESA Treaty as read together with Article 7 of the **African Charter on Human and Peoples' Rights (Banjul)**.

Article 6 (e) of the COMESA Treaty provides as follows:

*"The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the Treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June, 1991, agree to adhere to the following principles: ... (e) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;..."*

The relevant extract of article 7 of the African Charter on Human and People's Rights reads as follows:

*"1. Every individual shall have the right to have his cause heard. This comprises: (a)...(b)... (c) ... (d) the right to be tried within a reasonable time by an impartial court or tribunal..."*

11- With regard to judges of the COMESA Court of Justice, the requirement of impartiality is reflected in Article 20(2) of the COMESA Treaty which provides as follows:

*"The Judges of the Court shall be chosen from among persons of impartiality and independence who fulfil the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognised competence."*

12- In this context, it is noteworthy that the oath of office taken by the judges of the COMESA Court is to the effect that they will perform their duties impartially and conscientiously.



13- Moreover, pursuant to this requirement of impartiality on the part of the judges of the COMESA Court, Article 22(4) of the COMESA Treaty provides as follows:

*“If a Judge is directly or indirectly interested in a case before the Court, he shall immediately report the nature of his interest to the President, and, if in his opinion the President considers the Judge’s interest in the case prejudicial, he shall make a report to the Authority, and the Authority shall appoint a temporary Judge to act for that case only in place of the interested Judge.”*

14- The bedrock requirement of impartiality is that no one is to be a judge in his own cause. **In re: Pinochet [1999] 1 All ER 577**, Lord Browne-Wilkinson held as follows:

*“The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First, it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example, because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself*

*benefiting, but providing a benefit for another by failing to be impartial."*

15- The twin fundamental principle which has its origin in the requirement of impartiality is that justice must not only be done but must also be seen to be done.

16- As already stated above, the respondent is alleging an apparent bias on the part of the Judge. Quoting the case of **President of the Republic of South Africa &ors v South African Rugby Football Union 1999(4) SA 147 CC** ("S.A. Rugby Football Union case"), the learned Attorney General appearing for the appellant has correctly pointed out that there is a presumption of impartiality in favour of judicial officers and this presumption can only be rebutted by cogent evidence, so that an applicant has to satisfy a high threshold in order to successfully allege an apparent judicial bias.

17- The test of reasonable apprehension of bias is an objective one and was found to be good law in **Attorney General of the Republic of Kenya v Professor Anyang' Nyong'o [EACJ Application No.5 of 2007]**, in which the Court held as follows:

*"The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks disqualification of a judge comes to court because of his own perception that there is an appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case would be (sic)."*

18- In the **S.A. Rugby Football Union case** (supra), the Constitutional Court also held that the test was an objective one and that the onus of establishing apparent bias rested upon the party alleging it.

19- With regard to the applicable test, Lord Hope in the **Pinochet case** (supra) held as follows:

*“Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.”*

20- It goes without saying that a motion for recusal of a judicial officer must not be based on the mere figment of imagination of an applicant. In line with what was said above about the need to adduce cogent evidence in order to successfully prove apparent bias of a judicial officer, it was held in **S.A. Rugby Football Union case** (supra) as follows:

*“An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.”*

### **III- Discussions and Analysis**

21- As already stated above, the respondent raised two grounds for recusal of the Judge.

#### **The first ground: prior relationship between the Judge and the respondent's agents**

22- The first ground for the respondent's prayer is that there was a prior close and cordial commercial relationship between the Judge and the respondent's agents resulting from the sale of the Judge's law firm to the respondent's agents following his appointment to the Bench and ensuing in a landlord and tenant relationship between them.

23- It is common ground that the respondent is not alleging actual bias but apparent bias. We, therefore, need to consider whether the Judge's prior relationship with the respondent's agents could give rise to a reasonable apprehension of bias.

24- Courts rarely find that animosity or affability between a judge and a lawyer requires judicial disqualification. However, this Court cannot ignore the fact that while a judge's acquaintance with one of the lawyers does not ordinarily require disqualification, there are cases where the extent of intimacy, or other circumstances, renders disqualification necessary.

25- In **Bongani Dube and Others v The State [2009] ZASCA 28**, it was held that the principal judge, who was the husband of the prosecutor, should have recused himself due to the closeness of his relationship with the prosecutor.

26- In **United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985)**, the court noted that friendships among judges and lawyers are common and a judge needs not disqualify himself