 ORIGINAL

COUR DE JUSTICE

COMESA

TRIBUNAL DE JUSTIÇA

COMESA

COURT OF JUSTICE

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

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

RULING

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

just because a friend, even a close friend, appears as a lawyer. However, the extent of intimacy in that case was unusual and an objective observer might reasonably doubt the judge's impartiality when he was such a close friend of the prosecutor that both their families were just about to take a joint vacation.

27- Recusal may also be appropriate if it can be proved that the judge's extrajudicial bias or prejudice towards the lawyer can be imputed to the lawyer's client.

28- It must be pointed out, in this context, that relationships between judges and lawyers at their former firms naturally dissipate over time. In **Patterson v. Mobile Oil Corp., 335 F.3d 476 (5th Cir. 2003)**, the plaintiffs moved for disqualification because the judge had previously been employed by the law firm that represented the defendants. The court concluded that disqualification was unnecessary because the judge had terminated his relationship with the firm thirty years earlier.

29- Even though the present application is grounded on an alleged close and cordial relationship as a result of the acquisition of the Judge's law firm and subsequent occupation of his office premises as tenants by the respondent's agents, it is noteworthy that the respondent has not been explicit as to what amounted to or constituted this alleged close relationship.

30- It was argued on behalf of the respondent that there was regular communication with and access to the Judge to settle the purchase price of the firm and for issues in connection with rentals, maintenance and other related matters. However, no attempt was made to explain how this alleged communication and access could render disqualification necessary.

31- As we have already noted, a judge's acquaintance with a lawyer does not ordinarily require disqualification. A relationship between judges and lawyers is not sufficient to give

rise to likelihood or apprehension of bias arising from such relationship unless it is established that there is a real danger of bias on the part of the judge, in the sense that he might unfairly regard with favour or disfavour the case of a party under consideration by him.

32- This Court finds that the respondent has not been able to establish the existence of an intimate relationship arising from the commercial relationship in the instant case. The purchase of the Judge's law firm and the landlord and tenant relationship did not necessarily engender a close relationship between the two parties as it has been alleged by the respondent.

33- It was not disputed that the frequent communication between the respondent's agents and the Judge, as stated in the written application, was necessary to settle the purchase price and the usual rent of the premises. Intimacy cannot be automatically presumed. There is no evidence on record to substantiate the respondent's allegation that the respondent's agents and the Judge were keeping such a close and cordial relationship that might lead to a reasonable apprehension that the Judge may be biased in their favour or against them.

34- It is also to be noted that the respondent has not explained whether and how the alleged close and cordial relationship continued after the end of the commercial relationship with the Judge in 2012.

35- Moreover, the allegation of learned Counsel for the respondent that it was possible that the Judge might have directly or indirectly benefited from the fees received from the respondent has remained, to say the least, vague and tenuous.

36- We, therefore, find that a reasonable person would not perceive that a judge would conduct an unfair trial in favour of or against a lawyer as a result of the acquisition of his law firm. A reasonable, fair minded and informed person would not

reasonably, in our view, perceive that a judge may be biased in favour of or against a lawyer who purchased the judge's firm without cogent evidence that demonstrates that the relationship between the judge and the lawyer at the judge's former firm remained close a long time after the acquisition.

37- In this context, we cannot help noting that even after the present application for recusal was made, and on several occasions before that, Counsel for the respondent has appeared before the Judge without raising any issue as to the impartiality of the Judge.

38- In view of the foregoing, this Court is unable to find that the prior commercial relationship between the Judge and the respondent's agents in the instant case could disqualify the Judge from sitting in this appeal. We agree with the learned Attorney General that the respondent's case is built on mere conjecture and surmise.

The second ground: being judge in his own cause by belonging to the Malawi judiciary

39- The second ground for the application for recusal is that the Judge will be a judge in his own cause. He sits on the Malawi Judiciary in the High Court Commercial Division and an important part of the Reference in the First Instance Division is an alleged wrong conduct of the Supreme Court of Appeal in Malawi relating to the issue of its composition. The respondent contends that to that extent, the Judge will be bent on insulating the Malawi judiciary by killing the Reference in the appeal by the Government of Malawi on the question whether the COMESA Court has jurisdiction to entertain the Reference.

40- As already stated above, a fundamental principle is that a man must not be a judge in his own cause: the **Pinochet** case (supra).

41- The respondent contends that under this rule, although the Judge did not take part in the decision of the Supreme Court of Appeal or other court in Malawi, he earns an automatic disqualification due to his connection with the Malawi judiciary.

42- It is conceded by the respondent that the Judge cannot be challenged merely on the basis of his country of origin as there is nothing preventing a judge of the COMESA Court from hearing a case emanating from his country of origin. This is a similar position to that in the Court of the East African Community where Kenyan judges sat in a case involving the Kenyan Government - see **Professor Anyang' Nyong'o** case (supra). However, by submitting in another breath that the Judge cannot sit in a case involving the Malawi judiciary, the applicant is, as the learned Attorney General correctly submits, circuitously asserting that the Judge cannot sit in a matter from his country of origin.

43- The appellant submits that the Court will have to use the lens of a reasonable and well informed person. This person should be taken to be aware that COMESA Court judges have legal and institutional insulation under the COMESA Treaty and the Constitution of Malawi. Articles 20(2) and 22(4) of the Treaty require the judges to be impartial and not to have a direct or indirect prejudicial interest in a case.

44- Under the Constitution of Malawi, section 103(1) provides that all courts and all persons presiding in those courts shall exercise their functions, powers and duties independent of any other person or authority. Section 9 provides that the judiciary shall have the responsibility of interpreting, protecting and enforcing the constitution in an independent and impartial manner with regard only to relevant facts and the law. Section 119(6) provides that High Court judges shall have fixed tenure up to the age of 65 years and cannot be removed unless for incompetence or misconduct. Such removal can only be by impeachment in the National Assembly (section 119(3)). The

remuneration of judges is protected in that it is determined by the National Assembly, not the executive, it cannot be reduced without the judge's consent and it is mandatory that its value be maintained. In the light of these provisions, the learned Attorney General submits that a reasonable man well informed of this would not have apprehension that the judge would be biased.

45- In reply in open Court during oral submissions, learned Counsel for the respondent has submitted that these safeguards are not peculiar to Malawi and that despite their universal existence, judges have been recused including in England such as in the **Pinochet case** (supra) where it was held that Lord Hoffmann should have recused himself for his connections with Amnesty International, an interested party in the extradition of General Pinochet, a former Chilean dictator, wanted in Spain for human right abuses, and in the COMESA Court of Justice in **Eastern and Southern African Trade and Development Bank (PTA) and Dr. Michael Gondwe v Martin Ogang Reference Number 1B/2000**, where it was held that Justice Ogoola, who had close ties with the respondent, should have recused himself or disclosed his acquaintanceship with the respondent to the Court.

46- In its summation, the appellant argues that the respondent has not adduced evidence as to what the Supreme Court of Appeal in Malawi or the Judge will gain or lose if the Reference at hand is determined one way or the other for him to be partial.

47- Having considered the submissions from both sides, we are inclined to agree with the appellant that there is no evidence adduced by the respondent why the Judge would throw away his judicial oath and become partial. While being aware of the dictum in the criminal case of **Bongani Dube** (supra) at para 13 where it is stated that any doubt must be resolved in favour of recusal, we must emphasize that judges enjoy the presumption of impartiality- See the **S.A.Rugby Football Union case**

(supra). The one asserting otherwise must prove such allegations.

48- In addition, we may hasten to quote the judgment of the East African Court of Justice in **Professor Anyang' Nyong'o** case *(supra)* at page 25 that-

> ***"...A reasonable and informed person, knowing that the judge sits in a panel of five judges, trained and sworn to administer justice impartially, would not in our view, perceive that the judge would skim to single handedly deny the applicant a fair hearing or justice. We think that a reasonable, informed and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the judge with sufficient intelligence and not indulge in futile animosity"***

49- We agree with the dictum of Cardmore J. in **Drexel Burnham Lamber Inc, 861 F. 2d 1307 p1309 (2nd Cir, 1998)** that it does not mean that every time a litigant claims to see smoke then the court is bound to find that there is a fire. To this end, we further agree with the statement in the **S.A.Rugby Football Union case** (supra) para.104 that-

> ***"...While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them a right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the cases in their favour..."***

50- It must be observed that judges of the same jurisdiction hear appeals from their brother judges but it would not occur to any reasonable person to contend that the appellate judge will be a judge in his own cause because the judiciary of which he is a member is being taken to task. In fact, appellate judges often

disagree or overrule their brother judges to the extent of sometimes holding that the first instance judges have been misguided or erred in law. We, therefore, see no reason why the Judge cannot disagree with the conduct of the Supreme Court of Appeal of Malawi at the COMESA Court if that were called for.

51- In fact, judges of the COMESA Court serve in their personal capacity and not on behalf of any particular government. It is worth noting that in the **Norwegian Fisheries case (Norway v. UK, 1951 I.C.J. 116, 134, Dec. 18)** before the International Court of Justice, Judge Helge Klaestad (Norway) continued to sit even though he had been a member of the Supreme Court of Norway that had given a decision invoked in the ICJ proceedings and relevant to them.

52- We, therefore, see no merit in the point raised by the respondent that the Judge may be awed by the fact that the decision of the Supreme Court of Appeal in Malawi to be considered in the main Reference in the First Instance Division involved the current Chief Justice of Malawi. As stated earlier on in this ruling, due to constitutional and institutional safeguards, judges in Malawi and elsewhere exercise their minds independent of any person.

53- On a final note, we wish to echo the words of the Constitutional Court in the **S.A. Rugby Football Union case** (supra), where the judges refused to recuse themselves, at para. 45 that-

> ***"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for [a recusal] application."***

IV - Conclusion

54- For the above reasons, we find no merit in the present application which is dismissed. We shall make a decision as to costs in the final determination of this appeal.

Done at Lusaka, Zambia this 22nd day of June, 2016.

Delivered this 23rd day of June, 2016.

Hon. Lady Lombe P. Chibesakunda - Judge President

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Hon. Mr. Justice Abdalla E. El Bashir - Lord Justice

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Hon. Dr. Michael C. Mtambo - Lord Justice

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Hon. Mr. David Chan Kan Cheong - Lord Justice

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Hon. Dr. Justice Wael M. H. Y. Rady - Lord Justice

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