

MICHEL v DHANJEE

(2012) SLR 251

R Govinden, Attorney-General for first, second and third appellants
K Shah SC for fourth appellant
A Amesbury for the first respondent
F Chang-Sam SC (watching brief) for second, third and fourth respondents

Ruling delivered on 31 August 2012

Before Fernando, Twomey, Msoffe JJ

TWOMEY J:

The background

The applicant is also the first respondent in an appeal against a decision given by the Constitutional Court in which it found that the reappointment of a judge of the Court of Appeal, Justice Domah, was unconstitutional. A week before the hearing of the appeals, the applicant, Viral Dhanjee filed a motion supported by affidavit in accordance with rule 25 of the Court of Appeal Rules, asking for an order that Justices Fernando, Twomey and Msoffe recuse themselves from the hearing of the appeals. On 20 August we heard the application and after rising to consider our decision we unanimously found against the applicant and reserved our reasons which we now give.

The alleged bias

The affidavit contained the following averments set out unabridged below:

- (i) That in the letter addressed from the President of the Court of Appeal to the CAA which formed part of the record in the instant case, reference is made to Mr Domah in the following terms
“For the nearly four years he has worked with me and the court, he has proven to be more than a capable *team player* and with the *right team spirit*, a hard and efficient worker. [emphasis deponent’s]
Our present esteem of the Court of Appeal in the country and public opinion bears this out.” [sic, emphasis deponent’s]
- (ii) I aver that at the time that the reference was made to the “team” above, the members of the team being referred to consisted of Justice Domah, Justice Twomey, Justice Fernando and Justice MacGregor.
- (iii) Furthermore, in his application for renewal of term of office as Judge of Appeal, Judge Domah stated that, “I pledge that my commitment and contribution will be no less if not more so that we may complete that part of the unfinished business which we, at the Court of Appeal, set out to do as a solid team for the Judiciary and people of Seychelles.” [emphasis deponent’s]

- (iv) In view of the “unfinished business” which the “solid team” needs to complete, and the several references about being a team player and team spirit, I verily believe that there is real likelihood of bias by the justices who will hear my appeal.
- (v) I have been advised and believe that according to decided cases that it is not necessary to establish that a judge or other person making a decision was in fact biased, a real likelihood of bias or a reasonable suspicion of bias suffices.
- (vi) As regards Justices Fernando and Twomey, in the judgment delivered by the Court of Appeal in SCA No 16 of 2011, the judgment delivered by Justice Twomey in which Justice Fernando concurred, together with Justice Domah, clearly shows their bias towards my counsel, in what can only be described as a personal attack against her professionalism and ethical standards.
- (vii) As regards Justices Fernando and Msoffe, I aver that:
- Justice Fernando has been appointed as a Justice to the Court of Appeal pursuant to article 131 of the Constitution i.e. the same provision under which Justice Domah was re-appointed.
 - He too, has been appointed under a contract for a fixed term which is liable to be renewed at the end of that term by the powers that be.
 - Hence, Justice Fernando cannot be impartial in any decision taken as he will have a direct interest in the outcome of this case because in two years time his contract will expire and he too may find himself in the same position as Justice Domah, therefore any decision he takes may have a direct bearing on his eventual re-appointment and it is a fundamental principle of natural justice that no man may be a judge in his own case.
 - I aver that Justice Msoffe is in a similar position to both Justices Fernando and Domah in that he too is a Justice of the Appeal Court on a fixed term contract with all that it implies, therefore his impartiality is compromised as he also has a direct interest in the outcome of this case.
- I verily believe that if the Justices do not recuse themselves, my constitutional rights will be breached and I therefore pray for the Justices of Appeal to recuse themselves from this case in the interests of justice and impartiality and as guardians of the upholding of our Constitution.

At the hearing of the motion the applicant was unable to support any of these averments. His counsel admitted that the details of both Fernando and Msoffe JJ's contracts and terms of employment were not known to the applicant personally. When Msoffe J revealed his age and pointed out that at the end of his contract he would be 69 years of age and not seeking a reappointment, the applicant conceded that in that case the allegation in respect of this aspect of the application would be withdrawn. It is noteworthy that this matter occurred on the very first occasion of Msoffe J's sitting on the Court of Appeal of Seychelles.

Fernando J queried whether the applicant was averring that for the sake of a potential reappointment in three and a half years time he would forsake his oath of allegiance to the Constitution and the judiciary and throw his integrity out of the window, to which the applicant's counsel conceded that that indeed was not the case.

Twomey J pointed out that the reprimand issued in the Constitutional Case SCA 16/2011 referred to “counsel” and it was a general comment and that no names were mentioned. The reprimand consisted of the following words:

In the practice of law it is the tradition of the noble profession of the Bar to uphold the rule of law. It is a poor reflection of one's professional and ethical standards to slip into attitudes, tones, language and vocabulary that do not befit the Bar... This court is concerned with the constitutional and legal issues arising from the matter before it. It is neither interested in counsel's opinion of the court nor in the politics of the day..

Twomey J added that the applicant might in any case be confusing a reprimand with bias. Counsel conceded that Justices Fernando and Twomey had in the past shown no bias towards the applicant or herself. She admitted that she had indeed succeeded in cases before the two judges after the said reprimand was issued. She submitted, however that it would appear that on the occasion when she appeared as counsel for the applicant she did not succeed in her appeal.

When it was pointed out that the applicant had made serious allegations about the judges, none of which he had tried to substantiate at the hearing, Ms Amesbury abandoned substantially the assertions in the affidavit but nevertheless did not withdraw the application for recusal. We also remain in the dark about whether the application for recusal concerned an actual or an apparent bias. Despite questions being put to Mrs Amesbury on this issue no cogent answer was forthcoming. The Attorney-General and Mr Shah submitted that no actual or perceived bias had been substantiated. The Attorney-General submitted that the aim of the application was to paralyse the court as a quorum of the Court of Appeal would not be available in Seychelles to hear the case. Mr Shah relied on the cases of *Locabail (UK) Ltd v Bayfield Properties Ltd and Anor* [2000] QB 451, *Attorney-Genral of Kenya v Professor Anyang' Nyongo and Others* [2010] eKLR, and *Helow v Secretary of State for the Home Department and Anor* [2008] UKHL 62 for the proposition of the test to be allowed in such cases: whether a fair-minded and informed observer, having considered the relevant facts would concluded that there was a real possibility of bias.

The applicant's approach on this matter is singularly unimpressive. The date and composition of the panel for hearing of this appeal had been set since 26 June 2012; notice of this fact in the form of the cause list with the names of Justices Fernando and Twomey mentioned and Justice Msoffe referred to as the fourth Judge of Appeal as he had not been sworn in, was delivered to chambers of the applicant's counsel with receipt of the same signed by her secretary. If the applicant had any concerns about the appeal being heard by the three judges, that was the time to raise the issue. His failure to do so raises suspicion that this application was prompted by nothing more than a desire to postpone the appeal or to create a crisis necessitating the appointment of three foreign judges outside Seychelles to hear the case. It was a feeble attempt to emulate counsel in the *Bar Association of Seychelles and Anor v President of the Republic and Ors* (unreported) SCA 7/2004.

Further, the applicant in this case made no submission at the hearing nor did he produce any authorities, relying purely on the averments in his affidavit which averments were completely unsubstantiated. Some of these averments are tasteless and the less said about them the better.

The applicable law

An application for a recusal in civil matters is based on the constitutional right to a fair trial, specifically article 19(7) of the Constitution of Seychelles:

Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.

There are however no rules of procedure and few recusal guidelines in the laws of Seychelles. A judge is not obliged to recuse himself or herself simply because he or she is asked to. Judges are appointed to hear and decide cases; indeed they have a duty to do so. They sometimes have to make a decision whether or not to hear a case. The principles of natural justice require that a decision maker not sit when he or she has a direct interest in the case or when there might be no actual bias but that there might be perceived bias. In those cases judges recuse themselves *sua sponte*. In the case of *Charles v Charles* (unreported) SCA 1/2003, where the independence of the judiciary was challenged, Ramodibedi J felt it necessary “to rule on the point once and for all” and reminded counsel of constitutional provisions that ensure the impartiality and independence of judges. We join ourselves in this reminder to counsel. Judges do not take their constitutional oaths lightly; their tenure and salary are guaranteed despite their decisions. Any misbehaviour on their part is sanctioned by article 134 of the Constitution. An application for recusal based on bias against a litigant before them cannot be made lightly.

Such applications cannot in any case be grounded on suspicions. The fact that the applicant was not successful in a different case before this court does not give rise to an application for recusal of the judges of the Court of Appeal in every case that he may have before the court after that. As was stated in *Attorney-General of Kenya v Professor Anyang' Nyongo* (supra):

It is indisputable that different minds are capable of perceiving different images from the same set of facts. This results from diverse factors. A ‘suspicious’ mind in the literal sense will suspect even where no cause of suspicion arises. Unfortunately this is a common phenomenon among unsuccessful litigants.

The law in relation to the disqualification/recusal of judges is set out in the *Pinochet* case. In the *Pinochet I* case (*R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte* [1998] 3 WLR 1456), Lord Hoffmann was a member of the majority of the House of Lords that acceded to a request to extradite General Pinochet to Chile. In *Pinochet II* (*R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272, a differently constituted panel of the House of Lords held that the fact that Lord Hoffmann's wife had worked for Amnesty International, which organization had campaigned against General Pinochet and which had been allowed to intervene at the first hearing, meant that although Lord Hoffmann could not be accused of bias in coming to his decision, nevertheless public confidence in the administration of justice would be affected if the decision in which he had participated was allowed to stand. In *Pinochet III* (*R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte* [1999] 2 WLR 827, the House of Lords again ordered the General's extradition. In *Pinochet II*, Lord Browne-Wilkinson in summing up English and Commonwealth cases on recusal stated that it is an objective test that must be applied to determine if – "there exists a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial".

A landmark case on recusal is *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999). In that case the judges of the Constitutional Court of South Africa were asked to recuse themselves from the hearing of a case instituted against Nelson Mandela, the then President of South Africa on the grounds that there was a reasonable apprehension that every member of the court would be biased against the applicant since they had been appointed by him to be judges and that they had political and personal links with him. Even in that case, the application for recusal was refused.

The Constitutional Court of South Africa reiterated the reasonable apprehension test:

- [48] 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 impartial 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 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.

In *Council of Review, South African Defence Force, and Others v Mönnig and Others* (610/89) [1992] ZASCA 64; [1992] 4 All SA 691 Corbett CJ said:

[45] The test for apprehended bias is objective and the onus of establishing it rests upon the applicant. 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.

[48] 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 impartial 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 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.

In any case, Seychelles is a small jurisdiction. The exception of necessity in judicial disqualification cases is even more meaningful in these circumstances. In such a small community as ours, judges invariably are related to parties, friendly with one or both parties, know the parties or are perceived to have certain political and other affiliations whether these perceptions are accurate or not. The rule of necessity was recognized as early as the 15th century in English common law and has been followed in all common law countries. It is expressed as the rule “that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case” (*Atkins v United States* 214 Ct Cl 186 (1977), and reaffirmed in *Ignacio v Judges of US Court of appeals for Ninth circuit* 453F.3d 1160 (9th cir. 2006)). The rule of necessity is crucial for the administration of justice, especially in a country like Seychelles with a small bench and a small population. As expressed by Trott J in *Pilla v American Bar Association* 542F.2d 56, 59 (8th Cir 1976) “the underlying maxim for the rule of necessity is that where all are disqualified, none are disqualified”.

Decision

We have carefully considered the averments made by the applicant in his affidavit. A fair-minded and informed observer would not conclude that the judges assigned to hear

this case, even challenged as they have been by the inaccurate and unfair allegations in the affidavit, would be biased towards the applicant. Our judicial oaths and conscience would not so permit us. In any case even if we had been shown to be biased, which is not the case, the rule of necessity would dictate that we hear the appeals.

For these reasons we dismiss this application with costs.