IN THE HIGH COURT OF ESWATINI

Held at Mbabane — Case No.: 3194/2001

In the matter between

VUSI GININDZA — **1ST Applicant**

AFRICAN ECHO (PTY) — **2ND Applicant**

ARNOT PUBLISHING COMPANY (PTY) LTD — **3rd Applicant**

AND

GIDEON MHLONGO — **Respondent**

In re:

GIDEON MHLONGO — **Plaintiff**

AND

VUSIE GININDZA — **1ST Defendant**

AFRICAN ECHO (PTY) LTD — **2ND Defendant**

ARNOT PUBLISHING COMPANY (PTY) LTD — **3rd Defendant**

Neutral Citation: *Vusi Ginindza &2Others* Vs *Gideon Mhlongo & 2 Others (3194/2019) [2019] SZHC 251 (13th December 2019)*

Coram: Hlophe J.

For the Applicant: Mr P. Flyn instructed by Musa M. Sibandze Attorneys.

For the Respondent: Mr S. Masuku

Date Heard: **25th June 2019.**

Date Judgement Delivered: 13th December 2019.

Summary

Application Proceedings – Application for the Recusal of presiding Judge – Whether in the circumstances of the matter a case has been made for the recusal sought – Position of the law with regards recusal of Judges considered and discussed – Circumstances do not justify a recusal – Application dismissed with costs.

JUDGMENT

[1] Sometime in 2018 this court was allocated the main matter herein for trial. The main matter concerned was instituted as action proceedings in 2001. The Plaintiff complained that he had been defamed by the Defendants who comprised the then Editor of a Newspaper owned by the Second Defendant whilst it was published by the Third Defendant. The newspaper concerned operated under the style, "The Times of Swaziland (Sunday)". The article

complained of was published on the 10th June 2001. The proceedings themselves were instituted on the 21st September 2001.

[2] Despite that the pleadings were actually closed in September 2004, the history of the matter shows that it was not allocated a trial date except on two occasions, when in 2007 it was allocated to Justice Mamba who could not hear it after recusing himself from doing so and in 2010 when it was allocated to Justice Agyemang before whom it could however not proceed after the Plaintiff claimed not to have been notified of the trial and was therefore not prepared for it on that date.

[3] It is not in dispute that before the matter was eventually allocated this court for trial, the Plaintiff had attempted to expedite its hearing by invoking Rule 33 bis of the Rules of this Court, which emphasizes the need for matters of commercial importance among others to be heard on an accelerated manner. When this did not work, the record shows the Plaintiff as having written letters to the Registrar for allocation of a trial date and at some point shows him as having had to go to the archives to look for the file after it was said to

have already been taken there together with other older files which had hitherto not been allocated trial dates.

[4] The matter was allocated to this Court for trial against this background. When it was placed before me for trial Mr Flyn objected to its being heard claiming that it should be dismissed allegedly because the Plaintiff had failed to prosecute it hence its finding its way to court after some fifteen or so years. This application I dismissed as it had no merit. This was moreso because every practitioner who had practised in this jurisdiction for a considerable period would know that in the past matters pending before this Court used to drag for years mainly, and in some instances without being allocated trials dates because there was a huge back log of cases resulting from the shortage of judges.

[5] I have had to go into this history because I have noted that besides there having been prepared a written ruling in this regard in April of 2018 or thereabout, the Applicants have continued instituted in their papers that the matter had taken that long before being allocated a trial date owing to the

failure by the Plaintiff to prosecute and to further suggest that there is something odd about it being proceeded with on trial. Otherwise the Judgement I handed down in April 2018 should be read together with this one for the fuller facts and circumstances in this regard.

[6] Otherwise the matter proceeded with the trial commencing after the April 2018 ruling. The Plaintiff was led in evidence but before he could be cross examined there was an instance by Mr Fyn to call the Treasury of the Town Council.

[7] In October of 2018, with the matter having been allocated a date in January 2019, the Applicant filed a discovery comprising the report of the proceedings before the Commission of Inquiry into the affairs of the Municipality of Mbabane numbering 262 pages held in 2002. The Respondent was, at the time of instituting these proceedings, an employee of the Municipal Council of Mbabane, where he was the Chief Executive Officer. Although the facts that he was reengaged in the same position by the same entity and that is where he is presently employed. The discovery of the 262 page Commission of Inquiry Report, was followed by another

discovery of a 28 pages ruling prepared by a certain Mr Mothibi who had been established to discipline the Respondent for alleged acts of misconduct said to have arisen from matters raised before the Commission of Inquiry aforesaid.

[8] The purpose for discovering these documents by the current Applicants who were then the defendants claimed they wanted to use the said documents for purposes of cross – examining the Plaintiff, the current Respondent. It was contended that the said documents would show that the Plaintiff had no reputation to be defarmed. This had however not been pleaded as a defence in the defarrmation papers exchanged between the papers before their closure in 2004 or at any stage until the discovering concerned.

[9] It needs to be clarified that the publication complained off had been done, as stated, in June 2001. It related to rates said to have accumulated since 1998. This was before the Commission of Inquiry into the affairs of the Municipal Council concerned which only commenced on the 19th of March 2002 according to the Legal Notice filed together with the discovered documents.

[10] The article itself was under the main tittle, "How 'the club' survived the axe". The subtopic to this one placed above and below it in a rather graphic manner, read respectively as follows:-

(i) *During 1999 the club made three payments of not more than E6000-00 despite the fact that it already owed about E150,000.00."*

(ii) *While no-nonsense CEO of the Mbabane City Council Gideon Mhlongo cracked down on rates defaulters, selling their properties, he pardoned the Mbabane Club of which he was Chairman yet it was over E100000 in the red."*

[11] In a nutshell the import behind the article was that whilst he was Chairman of the Mbabane Club, Mr Mhlongo, the Respondent herein, had abused his position which he used to advance and protect the intests of the Mbabane Club in which he was Chairman by insuring it was protected from paying rates and even where they were paid, they were allowed a relaxed schedule yet other rates defaulters had their properties attached and sold for such

owed rates. In that sense he was not treating the rate payer uniformly. He was otherwise being referred to as the axe.

[12] Claiming to have been defarmed, the Plaintiff (current Respondent) denied ever being the Chairman of the club or even being involved in the collection of rates, and instituted the main proceedings herein way back in 2001, a few months after the publication of the article concerned and claimed damages for the alleged defamation.

[13] When the matter was meant to proceed on trial on the 28th January 2019, the Respondent's Counsel clarified that they had not had sight of the discovered documents and asked for more time to prepare for trial. He asked that the matter be stood down till the next day, the 29th January 2019, as they would have considered the discovered documents. When the matter commenced on that date; the Respondent's Counsel objected to the utilization of the discovered documents in the form of both the Commission of Inquiry Report, the disciplinary documents against the Respondent, the Maphandzeni dossier (relating to the Fonteyn land purchased by the

Council) and the decision of the chairperson on the disciplinary process of the Respondent.

[14] I directed, following consensus that a hearing of the objection was to proceed. Each one of the parties Counsel advanced their reasons why the objection had to upheld or dismissed as the case may be.

[15] I have erroneously left out the fact that after the very first judgement I had issued on the question whether or not the proceedings could be dismissed at that point for an alleged failure by the Plaintiff to prosecute the matter earlier, it had already proceeded on trial for sometime and the Plaintiff had commenced giving his evidence. After the Plaintiff had completed his evidence in Chief, asked for leave to call the Treasurer of the Municipal Council of Mbabane, which he said he was doing on a subpoena duces tecum. As I understand the position a witness called on such a subpoena is so called to hand into Court certain documents and not to give oral evidence let alone to be cross examined by the party, who sought leave for him to be called. Even the documents he is called to hand over or produce ought to be specified and the procedure cannot be used as a fleshing expectation on what

documents are or are not there. It is very doubtful that the manner in which the Defence Counsel proceeded with the matter observed these principles.

[17] It turned out that the witness did not have the letters relating to the rates the Defendant's Counsel had sought to have him produce. The Defendant's Counsel started soliciting oral evidence from the witness including cross – examining him. He would not allow the witness to exhaust his answers if the witness was giving an answer not confirming what he was suggesting to him. When I intervened to direct proceedings including to seek clarity from the witness as I am entitled to do, he started accusing me of either placing hurdles in front of him or of preventing him from putting questions to the witness. The same thing applied when I cautioned him against cross examining the witness brought to court in that manner by him.

[18] An example of these accusations can be seen at the time Counsel, Mr Fyn, wanted the Town Treasurer, Mr Vilakati who had been brought to produce documents, even though he had started cross – examining him, to confirm that he had a certain letter dated the 9th August 1999 in his possession or within the City Council files. The witness was adamant that he had no such

letter, he knew nothing about it and that he had never seen it. As at that stage this witness had already clarified that at the City Council, documents such as rates Bills would be destroyed after the lapse of 5 or 7 years but if the rates have been paid they do not have to wait for this period in destroying them. See Page 31, 32 and 33 of the transcript.

[19] This policy he said did not apply to correspondence as that was never destroyed. This gave the input that it is possible that if such a letter could not be found by the witness after a diligent search in the files of Council, it may never have reached council even though it had been written and was in existence. When Mr Mhlongo insisted on it having been written by the President of the Golf Club and therefore that it should have been in the files of Council, I sought clarity on whether there was any evidence that it had reached the Treasurer or the Chief Executive Officer and by extension the Council because it was not enough that it had been written and a copy of it was being brandished.

[20] Mr Flyn did not like my seeking clarity in that manner. He there and then accused me of placing hurdles in front of him which was on its own

discourteous to the Court. This notwithstanding I accommodated and explained myself further, disputing I was placing hurdles in front of him. All this can be seen at pages 44 – 46 of the transcribed record of proceedings. The aspect on when what documents can be destroyed is available at pages 47 – 50 of the record or transcript. That is where Counsel accused this court of placing hurdles infront of him when it sought clarity as it should.

[21] At pages 51 to 52 of the transcript, Mr Flyn cuts shot the witness and does not allow him to exhaust his answer when he realizes the witness does not want to confirm what he is trying to suggest to him in his question. When I called him to order and reminded him about the effect of that, he accused the court of not allowing him to put questions to the witness. These pages of the record will also reveal that he tried to put words into the witness's mouth and when the court calls him to order in keeping with the normal practice and court decorum he told the court he was being prevented from putting questions to the witness.

[22] Owing to this litany of incidents of violating the usual practice rules which are by now known to him, this court found itself having to remind what was expected from Counsel of his standing and that he was not meeting those expectation by his behaviour. He obviously suffered an injured pride when being so reminded, hence his now seeking to raise these issues and twist their meanings to create a smoke screen he was not allowed to present the case.

[23] It is in line with this twisting of the facts to suit his own narrative, when in the founding affidavit it is stated that it was upon him registering his protest about being prevented from putting questions to the witness brought by the subpoena duces tecum, that this court told him counsel of his standing knew what is expected of him. He clearly misrepresents the facts to present or paint a certain picture. The record will bear it out that this was said in the context of him refusing to be guided by the court.

[24] The record bears it out that he was at no point prevented from putting questions to the witness concerned. He was, as the record shows, allowed to and did, put all questions he was legitimately entitled to put to the witness,

hence his confirming on atleast twice occasion ex facie the transcript at pages 53 and 51 that the witness was not advancing their case.

[25] This court cannot help but conclude he had expected to be left alone to do as he pleased this court which is not allowed. This ground as a basis for the recusal sought is therefore an after thought and a response to the judgement I have indeed because of his having allegedly (at least in terms of the article concerned caused the properties of the rates defaulters to be sold in execution to recover the outstanding rates, I had found it somewhat humorous for the article to be couched in the manner it was; and refer to the Defendant as an "axe". The articles tittle read; "How The Club Survived The Axe". It is very unusual to refer to a person as the "axe" and it was some sort of a nickname in the way I considered it.

[26] Before comments referred to had during argument of the objection been referred to the Judgement in **Klisser V Associated Newspaper LTD 1964 (3) SA 308** in which it had been stated that whilst a party would be entitled to bring before court material that showed that the Plaintiff had no reputation to be defamed, the opposite to that was the possibility of an aggravation of

the damages against it in the event the Court were to find that the Plaintiff was defamed which was to say he had reputation to be defamed.

[27] When the Defendant's Counsel disclosed as the way forward in the matter was being discussed that they were going to file a discovery of certain documents to prove or show that Plaintiff had no reputation, I recalling what I read about the unintended consequence of that, continued that they should consider their action thoroughly in that regard so as to ensure that they do not find themselves to have aggravated the situation should the court find that the Plaintiff had been defarmed. In other words I had said that standing up to a person who claims to have been defarmed and claim that although the statement complained of would have amounted to defamation, he could not claim it in his case because he had no reputation to be injured was too strong a position which would only be taken by a person who was very sure of what he was saying. I said it was a very sensitive, meaning a delicate position. In fact the parties had understood me in that context and indeed the record at page 17 reveals Mr Flyn saying he was flattered by the Court's caution.

[28] That this was the case can be seen from the fact that they had not taken that matter up as a ground for recusal at the time but had understood it in the context in which it was made. It does come as a shocker when it is now being used as a ground for recusal after the court had delivered a ruling upholding the objection to using the bundle of documents, after it found they were irrelevant. It means that had the court ruled in the Defendant favour on the objection, the recusal application would never have been made.

[29] The other ground relief upon for the recusal sought is that I had been involved in the Commission of Inquiry into the affairs of thhe Mbabane Municipal Council that had been established by the Minister of Housing and Urban Development way back in 2002. The strange thing about this ground is that it is raised by the Defendants and not the Plaintiff against whom the Firm Millin & Currie I was working for was acting.

[30] Being that as it may, the article in question was not influenced by the events arising from the Commission of Inquiry. It had long been published when the Commission of Inquiry was established and these proceedings had also long been instituted. Furtherstill whatever allegations were made at the

Commission of Inquiry were not conclusive or did not reach concrete findings in that they had not amounted to a trial where the person being accused was to allow to challenge all the evidence lined up against him. What this would have meant would be that I would, in the cause of a defamation case, have had to firstly ascertained the truthfulness or correctness of the allegations concerned before determining whether they proved that indeed the Plaintiff had no reputation. For this reason I concluded that the contents of both the Commission of Inquiry Report and those of the Ruling in the disciplinary process were, because of the inconclusive nature of the allegations concerned, which would have required this court to decide on collateral issues before applying them in this matter were irrelevant. These it seems to me, are not issues that would ground a recusal than they would an appeal. It would be immaterial in such a case whether or not I know anything about the matter.

[31] On the contention that I know prior about the Commission of Inquiry, it is firstly not true I knew all the allegations there as I only alternated with Mr Sibandze in attending the said commission where whatever allegations made were not conclusive.

[32] Mr Sibandze who knew about the Commission of Inquiry had not objected to my hearing the matter. I had not read the documents prior to the hearing and only did so after the argument. There had been more than one Commission of Inquiry at the City Council. I discovered that I had participated in the Commission of Inquiry relating to Mr Mhlongo when I read the report in preparation for Judgement. Believing that both Counsel were aware of my involvement and wanting to ensure that it did not have to remain hidden I disclosed my involvement in that Commission but because a view I took of the matter it had no bearing on the defamation matter before me.

[33] The Plaintiff contended in his papers that this application should be seen as part of the defendant's stratagem to delay the matter as much as possible. He cites for this contention the several applications the Defendants have moved to try and have the proceedings either dismissed or delayed. It was telling, the contention went, that up to this point, a year and some months after the matter commenced, that the Plaintiff was still the only one to have given evidence on behalf of the Plaintiff and that he has still not been cross

examined. This conclusion was also based on the fact that instead of moving the application for recusal immediately after the filing of the discovery, the applicants awaited a ruling by this court on the objection made and only moved application after that ruling did not favour.

[34] I cannot help but agree with Applicant's Counsel on this conclusion. It is the only reasonable one to draw from the set of facts. The inter contrary applications by the applicant have not been placed or founded on cogent grounds. For instance the application to dismiss the proceedings on the alleged failure to prosecute could not be viewed in any different light from the defendant's contention. It had always been a known fact that proceedings in this jurisdiction usually took forever in court as a result of the shortage of Judges. It was different in a case like the present where of both parties in the proceedings the Plaintiff is the only one shown to have made several attempts to have it heard.

[35] As records the calling of a witness during the unfinished testimony of another was part of the logjam strategy as it is very unusual for that to be done in matters. This refers to the calling of the Town Treasurer, who was himself subjected to cross – examination contrary to establish procedure.

[36] Also filing of a Commission of Inquiry Report comprising 262 pages plus a Ruling by the Chairman of a disciplinary hearing in unrelated matters, supposedly for cross examination only is proof of this stratagem. The same thing applies in laying a trap and not disclosing at the hearing of the objection or prior thereto that the presiding Judicial Officer had acted together Defendant's instructing counsel and there and then raising an objection that the court should name itself is again part of the delaying tactic. It is with this observation that I refuse to accept the reason given that Mr Sibandze suffered a memory lapse which had to be jogged, as he puts it.

[37] Even the use of incidents that had not been issues at the time of their occurrence to found or ground an application for recusal is part of the stratagem and to litigate recklessly without a desire to get the main matters finalized. No sound reason has been given why what are now relied upon grounds for recusal could not ground such applications immediately after their occurrence.

[38] The position of our law is that Judges took an oath of office essentially to do good to all manner of people without the will, fear or favour. This oath of office is provided for by the Constitution of this Kingdom. This means therefore that before a Judge recuses himself, it must be shown that it is such a matter where objectively, there is a need for him to recuse himself. In **President of The Republic of South Africa Vs South African Rugby Football Union (The SARFU Case) 1999(4) SA 147 (CC)** the position was put in the following words:-

> *"The question in 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 favour and their ability to carry out that oath by reason of their training and experience. It must be assured 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."

The emphasis in this matter is, taking into account placed on me by the Constitution to preside in all matters where I am not oblige to recuse myself, is whether in this matter it has been shown on the applicable law that I should recuse myself.

[39] The test on whether or not a case has been made for a Judge to recuse himself was put as follows in **South African Commercial Catering and Allied Workers Union Vs I & J LTD 2000(3) SA 705 (SACCAWU judgement at para 12.**:-

"*In formulating the test… the court observed that two considerations are built into the test itself. The first is that in considering the application for recusal the court as a starting point presumes that Judicial Officers are impartial in adjudicating disputes. As it later emerged in the SARFU judgement, this in – built aspect entails two further considerations. On the one hand the presumption*

is not easily disclosed. It requires cogent or convincing evidence to be rebutted.

The second in built aspect of the test is that absolute neutrality is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences and the perspective that is derived inevitably and distinctively in forms each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality – a distinction the SARFU decision itself vividly illustrates. Impartiality is that quality of open minded readiness to persuasion without unfitting adherence to either party or to the Judge's own predilections, perceptions and personal views – that is a key stone of a civilized system of adjudication. Impartiality requires, in short, a mind open to persuasion by the evidence and submission of counsel, and in contrast to neutrality, this is an absolute requirement in every judicial proceedings."

[40] This excerpt emphasizes the fact that the presumption that judges are impartial in their adjudication of disputes is not easy to dislodge. In other words a very strong case to found the recusal is required before a Judge can be expected to recuse himself. I have already stated that from the many fronts of it, if not in all its aspects, this application has already been shown to be weak. The grounds relied upon occurred months earlier and after significant other further steps or interventions had occurred which is not consistant with a strange case.

[41] Whereas it needs to be shown that the Judge will not bring that the judge will not bring a mind not open to persuasion, not even an attempt was made in this regard which means that this requirement was not satisfied at all. In fact in so far as this recusal is a reaction to upheld objection not to use certain documents in cross – examination, which would normally be a ground for appeal than recusal, there is no strong reason to respect that the court will not bring about a mind open persuasion.

[42] Our courts have enunciated the principle that there must be double reasonableness for a recusal application. In other words both the person

fearing the alleged bias must be reasonable just like the fear itself. When the fear is not entertained by a reasonable person, recusal would not be appropriate. This principle was put in the following words in the same SACCAWU judgement. An excerpt capturing this principle was set as follows:-

> "*Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. The two – fold emphasis does serve to underscore the weight of the burden resting on a person alleging Judicial bias or its appearance."*

[43] The apprehension that this court would not be impartial raised merely because the court has found against the applicants can hardly be seen to be reasonable. In fact it was said in the same SACCAWU case that not even a strongly and honestly felt anxiety would be enough to establish the bias required to face a Judge to recuse himself. The court is required to scrutinize the application to determine whether it is to be regarded as reasonable.

I have already said that in my scrutiny of this application, there is no reasonable basis for the recusal sought.

[44] The applicants case herein is spoilt by the fact that the applicants in all the grounds relied upon as founding the recusal application, failed to move the application as soon as he became aware of the grounds relied upon. In the ground involving the alleged interventions when the witness brought by the subpoena ducess tecum, the application was moved after months of the observation concerned and after the court had to issue a judgement which did not favour the applicant. On the consideration of the court having allegedly advised the Applicants to consider the issue of proving that the Respondent herein had no reputation to be impaired. The Applicants moved the application for recusal months and after several other interventions or further slips had been taken. The same thing applied with regards the Commission of Inquiry Report together with the Ruling on the Respondent's disciplinary hearing. They had always known about it and that I had, 15 or so years ago, played part in the Commission which was irrelevant to the matter. Besides that it made no conclusive proof of the Plaintiff's wrong doing, the objection was not raised in time. I have rejected their reason that Mr Sibandze had forgotten about that Commission. If he remembered Plaintiff's involvement there is no reason he would not have remembered

with who he had from time acted from his firm in handling the matter. I have found they just wanted to use it as a trap hence it had to take the court to disclose before they owned up and still accused this court of impropriety which was self made.

[45] Our law makes it a prerequisite that an application seeking the recusal should be moved as soon as possible after becoming aware of the ground disqualifying the Judge from presiding therein. Where such an application is not made but a further step is taken in their watch, they are in law taken to have waived their right in that regard. The High Court had the following to say in the matter of **Amos Mbulaleni Mbhedzi Vs The King Criminal Appeal Case No.236/2009,** which is apposite to these principles, whilst citing an excerpt from **Wade and Forsyth's book, Administrative Law, 7th Edition at page 481**:-

> *"The right to object to a disqualified adjudicator may be waived and this may be so, even where the disqualification is statutory. The court normally insists that the objection shall be taken as soon as the party prejudised knows the facts which entitle him to object. If*

after her or his advisors know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged."

[46] This principle was underscored in the following words in **Sole V Cullinan and Others (2004) 1 LRC 559 at 560**, where the principle in the case of **Locabuil (UK) LTD Vs Bayfield Properties LTD (2000) 3 LRC 482 at 508** was recited:-

"It is not open to a litigant to wait and see how claims…turned out before pursuing her claim of bias…she wanted to have the best of two worlds. The law will not allow her to do so."

[47] The court went on to say the following at page 559 of the Judgement:-

"Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced to the proceedings by

failing to take objection at the earliest possible opportunity."

[48] It is by now a fundamental principle of our law that it is not advisable for litigants to choose certain Judges whilst refusing to have their matters by others. The position is that just as Judges cannot choose cases, litigants cannot choose Judges.

[49] For the foregoing reasons the Applicants application cannot succeed. It is dismissed with costs.