CIV/APN/183/02

IN THE HIGH COURT OF LESOTHO

In the matter between:-

KPMG/HARLEY & MORRIS JOINTVENTURE N.O. LIQUIDATORS OF LESOTHO BANK (in liquidation) APPLICANT

and

MAMOHALE MOPELI RESPONDENT

JUDGMENT ON RECUSAL

CORAM : HON. JUSTICE S.N. PEETE

DATE : 20TH JUNE, 2002

The counsel for applicant **Ms Makhera** has made an application that I recuse myself from hearing this application; her main ground being that because of some remarks I made in chambers in her and **Mr Phoofolo**'s presence, I will not be impartial in deciding this matter. I should also point out that this court has not approached this recusal application as in any way adversely reflecting upon the integrity of this court. Indeed, I should add,

Ms Makhera as a duty bound officer of this court was entitled to make such an application.

Background

On the 15th April 2002 my Brother **Monapathi J.** granted an interim order in favour of applicant couched as follows:-

"IT IS ORDERED THAT:

1. *Dispensing with the forms and provisions of the Rules of the High Court and dealing with the matter as one of urgency as contemplated in terms of Rules 8 (22) of the Rules of the High Court.*

2. *That a Rule Nisi do issue returnable on the 22nd April 2002, calling upon the Respondent to show cause why an order in the following terms should not be issued*

   2.1 Declaring that the Lease Agreement marked "B" annexed to the Applicants' Founding Affidavit, to be cancelled.

   2.2 The Sheriff of this Honourable Court or his deputy, be ordered to immediately attach and take into his possession the following motor vehicle at the premises of the Respondent or wherever it may be found and to retain the same in his custody pending the final determination of this Application.

To give effect to this order, the Sheriff is authorized to enter upon the premises of the Respondent at 676 Race Course, New Europa, Maseru, and if entry is resisted to engaged the assistance of the Lesotho Mounted Police.

2.3That the Sheriff or his deputy be authorized and directed to take into his possession the vehicle wherever the same may be found and hand it over to Applicant.

2.4That Rule 1,2 and 2.2 shall operate as an interim interdict with immediate effect pending the final adjudication of this application.

2.5That the Respondent pays the costs of this Applicant on the scale as between attorney and client.

2.6Granting further or alternative relief."(**My emphasis**)

The interim court order was served upon the respondent on the 19th April 2002 and a notice of intention to oppose was filed on the same day by the respondent and on the 6th May 2002 an answering affidavit was also filed the main defence of respondent being that she has long completed paying rentals in terms of the Lease Agreement and also submitting that the application is a disguised action because there is a dispute of fact over outstanding rentals. The respondent also filed notice of anticipation to the 13th May 2002, on which day the applicant also filed a replying affidavit.

I accordingly permitted both counsel to argue their case during vacation on the 17th June, 2002.

Before going into court, I invited both counsel, **Ms Makhera,** for the applicant and **Mr. Phoofolo**, for the respondent to my chambers mainly to clarify the *locus standi* of the applicant KPMG/Harley and Morris Joint Venture Liquidators of Lesotho Bank; this was consequential to the judgment of my Sister **Hlajoane J.** in CIV/APN410/01 wherein KPMG/Harley and Morris Joint Venture Liquidators had lodged a similar application. Her Ladyship **Hlajoane J.** had ruled that the Minister had acted *ultra vires* in appointing applicant as liquidators of Lesotho Bank before the coming into operation of the Lesotho Bank (liquidation) Act No.2 of 2001. Apparently on the 29th January 2001 the Minister had purported to appoint applicant as liquidators, whereas the Act no.2 came into force on the 31st January 2001 – the date of its publication in the gazette. She ruled that the appointment was a nullity, *void ab origine.* The matters in this application are different because the Minister subsequently appointed applicants as liquidators on 31st January, 2001.

After this had been clarified by both counsel, and still in chambers I made a remark about the method employed by applicant in securing repossession of leased vehicles *ex parte* before the respondents could be heard. I also made – so **Ms Makhera** argues – a comment that I would personally not grant such applications without granting audience to the other party. **Ms Makhera,** in her hurriedly prepared heads of argument in support of her application from the bar submits that-

"2. *In the premises, client's interests will not be served as His Lordship has prejudged the matter without hearing either party especially the Applicant.*

3. *My client is apprehensive that His Lordship will not hear the matter objectively and with an open mind.*

4. *There is a real likelihood of bias on the part of his Lordship and my client stands to be prejudiced.*

5. *Justice must not only be done but must also be seen to be done."*

In support of her submission she cited the case of **Lesotho Electricity Corporation v Forrester** 1979 (2) LLR 440 at 455 where **Schutz A.J.A**. at page 455 had this to say-

"*.... I would add it is in the interests of justice that recusal applications should be brought as soon as possible. Particularly this is so where an application is based on some remark that it is impossible to reconstruct with the passage of time. In reaching the conclusion that I have I do not overlook the broad principle upon which applications of this kind proceeds, which is to the effect that if a Judge does or says something which would justifiably lead a reasonable litigant to believe that he will not receive an unbiased hearing the Judge should recuse himself, whether he is in fact biased or not. Justice must be seen to be done. It goes almost without saying that in a relatively*

> *small capital like Maseru judicial officers have to be particularly careful of what they say about pending cases, that the need for their aloofness should be respected by members of the public. Also, it is inconsistent with the duty of a Judge to take the possibly convenient course of retiring from difficult litigation merely because one of the litigants asks him to do so."*

Indeed as the learned Judge of Appeal opined at page 454 "*Ordinarily matters of recusal are matters for the conscience of the judge concerned.*" In this application for my recusal, I should state that there are no aspersions – direct or indirect – upon my integrity.

In **S. v Bam**, 1972 (4) SA 41 it was held by **Kotze J.** that-

> *"..... bias which disqualifies a judicial officer from trying a case must be in connection with the litigation in question and must be of such a nature that a real likelihood exists that the judicial officer would have a bias in favour of one of the litigants from kindred or any other cause."*

I think it is worth mentioning that I do not know the respondent at all; remarks I am alleged to have made were indeed probably made because I was of view that the *audi alteram* principle demands generally that where the lessee or hire purchaser is still in a **prima facie** lawful possession, he ought not to be deprived such possession *ex parte* without giving him a hearing. Repossession by the deputy sheriff is secured *ex parte* as if it is a case of spoliation. Whilst my remarks did not reflect any bias on my part in

favour of the respondent – who- I hasten to add- would not succeed at the end of the day if she failed to prove payment of rentals, **Ms Makhera** found it necessary to apply for my recusal because she says she has a reasonable suspicion that a likelihood of bias exists – **S. v Sonday** – 1995 (1) SA 497.

In the case of **Richter v Keyser N.O. en 'n ander** – 1962 (2) SA 276 it was held that an unsolicited expression of opinion by a judicial officer on the merits of the case in chambers could entitle the other party to apply for recusal.

I should here point out that **Mr Phoofolo** in opposing the application for my recusal also dutifully pointed out that the remarks that I made in chambers were not only relevant but were based upon the respondent's main submissions that the application was a disguised action.

In my view our procedure permits that when a judge in chambers hears an *ex parte* application and with prayers as tabled, the judge may be inclined to grant with immediate effect only the prayer for the dispensation of rules and may in his discretion order that on the return date, which can be set soonest, the respondent should show cause why the other prayers should not be made final. This was the approach I would have followed if I was seized with the application for interim order as presently couched. I would have been perfectly entitled to do so under Rule 8 (22) of the High Court Rules 1980. Adoption of such an approach in no way prejudges the final determination of the respective rights of the parties. To have expressed my concern about the *modus* of the application did not mean that I had already made up my mind

to dismiss the main application at end of the day. Under our law, the onus to prove payment of indebtedness rests generally upon the debtor-of course the plaintiff/applicant having established a *prima facie* case*. It would be presumptuous of me to finally dismiss the main application despite clear proof that respondent had not discharged her indebtedness under the lease agreement.

In the case of **S. v Sonday** – 1995 (1) SA 497 it was held per **Thring J.** that despite an expression of opinion before the hearing of a case,

> *"When during the subsequent course of argument in court, such prima facie views are put to counsel, two things, and not infrequently, do result therefrom. First, the essential issues in the case are addressed and properly ventilated and debated between the court and counsel. Secondly, quite often the* ***prima facie*** *views of the court are changed by argument and final views emerge which are quite different from what the court's prima facie views were. I might add that this in an advantage which is enjoyed by our system by virtue of our practice of allowing free-ranging oral argument, based, as it is, on British procedure."*

* Christie – The Law of Contract in South Africa – 3rd Ed. – 1996, page 481; **Abraham v Cassiem** 1920 CPD 568; **Standard Bank of SA Ltd v Sacks** – 1928 TPD 352; **Italtile Products (Pty) Ltd v. Touch of Class** 1982 (1) SA 288 at 290 (H).

What may be a "*perception*" may not be graced with reasonableness, and before a decision maker is disqualified, the suspicion of bias on his part must be one which might be entertained by a reasonable litigant. **R. v Sonday** *(supra)*, at page 504 (E-F). My comments merely related to the manner in which the repossession was being gained *ex parte* and whether this did not tarnish the *audi* principle. **Ms Makhera** could indeed have convinced me otherwise when arguing her case in open court. She has however acquired "*a perception*" that I had already prejudged the final determination of the case. A preliminary observation in chambers by a judge and during the course of judicial duty about the way an application is brought does not necessarily lead to a conclusion that the court will not discharge its duty impartially and that the applicant would be disadvantaged.

I am however of the view that although the likelihood of bias may be no greater as it is non-existent, yet to a reasonable mind, remarks – though not ill- intended, could have created a ground for a perception that I had already prejudged the whole case. As **Schutz AJA** said in **Forrester**'s case, (supra) at p.455 the test is objective (a reasonable litigant) and it is not relevant whether the judge "*is in fact biased or not.*"

Mr Phoofolo cited the case of **R. v. T.** 1953 (2) SA 479 where **Centlivres C.J.** held that there is no rule of practice to the effect that where a judge has expressed an opinion in the course of judicial duties about the case, such judge ought to recuse himself. I am however inclined to err on the side of caution and follow the more recent and authoritative remarks by **Schutz AJA** in **Forrester**'s case (supra).

In **BTR Industries South Africa (Pty) Ltd v. Mental and Allied Workers' Union & Another** 1992 (3) SA 673 a full Bench of the Appellate Division held that the test to be adopted in recusal applications involving the appearance of bias is whether there exists a reasonable suspicion of bias on the part of the decision maker and that an apprehension of a real likelihood that the decision-maker will be biased is not a prerequisite for disqualifying bias. The very objects which the "reasonable suspicion" test are calculated to achieve would be frustrated by grafting onto it the further requirement that that the probability of bias must be foreseen ... If suspicion is reasonably apprehended, then that is the end of the matter.

It seems to be the modern practice therefore that the "*reasonable suspicion*" rather than "*real likelihood*" test should apply: a judge should recuse himself if there is reason to fear partiality on his part – whether such bias exist or does not. See also **S. v Malindi and Others** – 1990 (1) SA 962; **S. v Radebe** 1973 (1) SA 796. In the **Malindi's** case (*supra*) it was held that "*The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important*".

Bearing in mind the comments of ***Krause JP*** in **R. v Chondi and Another** 1930 OPD 267 at 271 that-

> *"It is a matter of the gravest public policy that impartiality of the Courts of Justice should not be doubted or that the fairness of a trial should not be questioned; otherwise the only bulwark of the liberty of the subject ... would be undermined",*

and having duly considered the submissions of counsel in this matter and without reflection upon the wont impartiality and integrity of this court, I come to the conclusion that I recuse myself as I hereby do*.

S.N. PEETE
JUDGE

For Applicant : **Ms Makhera**
For Respondent : **Mr Phoofolo**

*I should however add a word of caution. Paucity or rarity of recusal cases in Lesotho shows that recusal applications should not be lightly resorted to.