LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO 14/24**
CIV/APN/0367/2023

In the matter between –

MASECHABA MATEKANE	**APPELLANT**
And	
SELLOANE MOSIELLE	**1ST RESPONDENT**
TEACHING SERVICE COMMISSION	**2ND RESPONDENT**
DISTRICT EDUCATION MANAGER MASERU (DEM)	**3RD RESPONDENT**
HOOHLO ACL PRIMARY SCHOOL	**4TH RESPONDENT**
THE CHAIRPERSON OF THE SCHOOL BOARD HOOHLO ACL PRIMARY SCHOOL	**5TH RESPONDENT**
THE PRINCIPAL SECRETARY OF MINISTRY OF EDUCATION AND TRAINING	**6TH RESPONDENT**
MINISTRY OF EDUCATION AND TRAINING	**7TH RESPONDENT**
THE ATTORNEY GENERAL	**8TH RESPONDENT**

CORAM: MUSONDA, AJA
CHINHENGO, AJA
VAN DER WESTHUIZEN, AJA

HEARD: 9 OCTOBER 2024
DELIVERED: 1 NOVEMBER 2024

SUMMARY

A judge must recuse her or himself from a case, if there is bias, or a reasonable perception of bias. Concerns about bias, of an unduly sensitive or suspicious person fall short of this test and do not require recusal Judges are duty-bound to do their work.

JUDGMENT

VAN DER WESTHUIZEN, AJA:

Introduction

[1] Judges are supposed to dispense justice as objectively, fairly and impartially as humanly possible. The cliché that often appears in their prescribed oath of office is that they undertake to uphold the constitution and the law "without fear, favour or prejudice". This is easier said than done. Judges are humans who have gone through various stages of life and developed loyalty to people and institutions, as well as likes and dislikes. Yet, because of their training and legal experience, they are expected to fulfil the promise of impartiality, even when it requires a concerted effort.

[2] A legal system where the public – and litigants in particular – do not have faith in the impartiality of judges is doomed to fail. People either avoid litigation and resort to self-help or accept that bribing a judge is the only way to protect their interests. Therefore, not only a judge's actual state of mind (which might mostly be unknown to a litigant) is important, but also perceptions. In

certain cases, judges must recuse themselves, either because they are indeed conflicted or biased, or because they are perceived to be.

[3] Litigants are often emotional about their case, which they regard as overwhelmingly meritorious. Any question, remark, or ruling from the bench which does not affirm the litigant's view of their own case is thus experienced as proof that the judge is necessarily biased, because no sane person would act like the judge does. Suspicions about the judge's background and even private life could kick in, like conspiracy theories, which are rampant in today's world.

[4] It has, however, been said that every matter has a thousand sides, … or at least two. Judges have to consider all relevant sides. Therefore, not any perception of a litigant or members of the public necessitates the recusal of the judge. Should this be so, litigation may well come to a standstill. Only a reasonable perception of bias affects the position of the judge.

[5] This appeal against a judgment by Hlaele J in the High Court deals with recusal. The Court dismissed an application for recusal, with costs being costs in the cause.

Litigation history

[6] The main application dealt with internal governance issues regarding the Hoohlo ACL Primary School, specifically the position of principal. The first respondent in this appeal, Ms Selloane

Mosielle, approached the High Court for relief on the basis of urgency. The application was opposed by the appellant in this matter, Ms 'Masechaba Matekane. Both are teachers at the school. According to Ms Mosielle, Ms Matekane was unprocedurally appointed as principal, while she (Ms Mosielle) was acting as principal.

[7] On 11 December 2023 the application was heard by the High Court. As the judge on call, Hlaele J presided. Interim relief was granted; and the matter was set to be heard on its merits on 26 February 2024.

[8] Before the commencement of the proceedings, counsel for the parties appeared before the judge in open court. She informed counsel that Hoohlo was her alma mater, having attended the school from 1975 to 1981. She stated that she loved the school. Counsel were asked whether they had any concerns in that regard. Counsel for the appellant and for the Attorney General (the eighth respondent) addressed the Court and indicated they had no problem, since the judge's impartiality would not be affected.

[9] On 20 February, for days before the hearing of the matter, the appellant lodged an application, calling for the recusal of Hlaele J, that the Registrar must be ordered to allocate the case to another judge and costs in the event of opposition. The application was dismissed.

The law

[10] The law on recusal is quite clear. Several references to applicable case law appear in The High Court judgment. Only some decisions are referred to here.

[11] In *Kamoli v DPP* (CRI/T/0002/2018) (2022) LSHC 29 4/4/2022) it was stated that the test for bias was objective. The focus should be on whether a litigant would reasonably consider that he did not have a fair trial, or whether reasonably minded people who watched proceedings would believe that a trial was not fair. In *President of the Republic of South Africa v South African Rugby Football* Union (1999 (4) SA 147 (CC)) THE Constitutional Court of South Africa found the question to be 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. In assessing the reasonableness of the apprehension factors such as the oath of office, training and experience of the judge must be taken into account, as well as that judges have a duty to sit in any case in which they are not obliged to recuse themselves.

[12] The High Court also referred to jurisprudence in the United Kingdom, emphasising the "fair-minded and informed observer". This observer is not "unduly sensitive or suspicious", Lord Mance opined in *Almazeedi v Penner and Another* (2018 UKPC 3, at [20]. The test has been described as a "double reasonableness test", the High Court mentioned, with reference to academic authority.

[13] Authority referred to in the written heads of argument of both the appellant and respondent's counsel also emphasise the aspect of reasonableness. In short, for recusal either actual bias, or a reasonable apprehension of bias, is required.

The appellant's concerns analysed

[14] At the core of the appellant's complaint is the fact that the judge openly informed all the legal representatives present on 11 December 2023 that she was a student of the school and loved the school, the third respondent before her. In the High Court judgment, it is explained that it occurred to her to make the disclosure "*for purposes of transparency*".

[15] Logically it is difficult to understand how her attendance of a primary school and especially her love for the school could result in bias against the appellant as a litigant. Does the appellant see the school, of which she refers to herself as the principal, as her opponent? Is – in her view – what is good for the school bad for her case?

[16] The case is supposed to be about the best possible governance of the school. In so far as an emotion such as "love" is relevant, love for the school should rather be viewed as a positive attitude on the part of the judge, than as bias. If, for example, the judge said to counsel that she hated the school where she was a student, a fear of some reprisal and desire to harm the school might have been understandable. Love for the school, however, is unlikely to do any harm. The judge did not express her love for any of the

individuals involved, but for the institution. The dispute is not with another entity, but within the school.

[17] Hlaele J is to be commended for the openness and honesty she displayed, as a judicial officer.

[18] As stated above, counsel for the appellant raised no objection when Hlaele J disclosed her relationship with the school. In her founding affidavit supporting the recusal application the appellant states that her counsel did inform her of the events on 11 December. According to her, she expressed her discomfort pertaining to the impartiality of the judge, *"based on information (she) had received"*, as well as her *"dissatisfaction that he consented to the … Justice presiding over the matter before consulting with me".*

[19] When counsel for the appellant was asked during oral argument before this Court why he had not objected on 11 December and why he had changed his mind, his response did not refer to instructions from his client. His rather unconvincing explanation was that he had no objection to the judge on call hearing the urgent application up to the granting of interim relief, but that he held the opposite view regarding the rest of the proceedings. Counsel failed to explain the difference between the stages of the proceedings, as far as the impartiality of the judge was concerned.

[20] The appellant's affidavit contains several robust statements, some with potentially serious implications. For example, it is stated that after the 11 December proceedings, the judge *"went on to instruct Judge's clerk to ask the Registrar to allocate the case to her"*. Whether judges can ask for specific cases to be allocated to them, I do not interrogate. In the High Court judgment Hlaele J states that when the date of 26 February was discussed on 11 December, she mentioned to counsel that the date might not be suitable to the judge to whom the case was allocated and indicated her availability. In order to expedite matters, it is *indeed "normal practice … for a judge on call to be allocated a matter"*. The final decision remains with the Registrar.

[21] This is understandable, given the fact that she was already familiar with the case, whereas another judge would have to read the papers from scratch, early in the first term of the new year. Her conduct seems to be collegial, rather than sinister. The case was then allocated by the Registrar to Hlaele J.

[22] In her affidavit, the appellant goes even further though: *"As if this is not enough, I have been told and believe same to be true that the … Chief of Ha Hoohlo, was advised and engineered that the initial file … be withdrawn and replaced by the present file which was strategically filed on the week that the said Hlaele J would be on call so that she could hear and grant the urgent application."*

[23] The appellant's affidavit relies heavily on hearsay allegations. These include that *"Her Ladyship still maintains not only cordial*

relations but cosy relationship with the existing board which has been behind applicant's case in this matter …". The choice of the word *"still"* seems to refer to the judge's involvement as a learner in the school more than 40 years ago, when different people probably served on the board.

[23] The appellant furthermore states that the applicant before then High Court *"has been boasting openly to her friends that I cannot win the case because she has good relations … with Her Ladyship …it is for this reason that they did not even bother to go to court because they had communicated with Her Ladyship and were sure to get the court order."*

[24] To these and similar allegations Hlaele J responded in some detail in the High Court judgment. For example, according to her, she informed the parties during the proceedings of 11 December that she did *"did not even know one member of the board".*

[25] There is no evidence before this Court that Hlaele J lied in her judgment. During oral argument counsel for the appellant indicated that he abandoned the allegations based on hearsay. Indeed, these concerns of the appellant amount to rumours and gossip.

Conclusion

[26] The nature of the appellant's concerns, as well as the tone in which they are raised in her affidavit, may well remind one of the *"unduly sensitive or suspicious*" person Lord Mance had in mind in

Almazeedi, referred to above in [12]. The appellant's complaints neither indicate actual bias on the part of the judge, nor justify a reasonable perception or apprehension of bias, as stated in the decisions referred to here, as well as numerous others. The appeal must be dismissed.

Costs

[27] Costs must follow the result. On behalf of the first respondent counsel requested punitive costs, but not to be paid by the appellant's legal representative. Costs are in the discretion of the Court. The appellant approached this Court with a weak case, but her conduct did not reach a level that would justify a punitive costs order.

Order

[28] In view of the above, the appeal is dismissed with costs.

J VAN DER WESTHUIZEN
ACTING JUDGE OF APPEAL

I agree:

P MUSONDA
ACTING JUDGE OF APPEAL

I agree:

M CHINHENGO
ACTING JUDGE OF APPEAL

FOR THE APPELLANT:	ADV B SEKONYELA
FOR THE 1ST RESPONDENT:	Ms M LEPHATSA
FOR THE 2ND TO 8TH RESPONDENTS:	ADV M MOQHALI