IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO.10/2015

In the recusal application between:

SPECIFIED OFFICES DEFINED CONTRIBUTION PENSION FUND **APPLICANT**

And

TIMOTHY THAHANE **RESPONDENT**

CORAM: **J.T.M. MOILOA, E.M. MAKARA JJ AND S.P. SAKOANE AJ**

HEARD: **27 JUNE, 2016**

DELIVERED: **26 JULY, 2016**

SUMMARY

Judges – recusal of – party alleging bias that puisne judges have interest in the outcome of proceedings by virtue of being members of applicant – another allegation being that an acting judge expressed opinion on the challenged law while still at the Bar – whether judges should recuse themselves – applicable principles and test set out and discussed.

ANNOTATIONS

CITED CASES:
LESOTHO
Sole v. Cullinan NO and Others LAC (2000-2004) 572

CANADA
Valente v. The Queen [1985]2 SCR 693

IRELAND
McMenamin v. Ireland [1996]3 I.R 100

SOUTH AFRICA
Bernet v. ABSA Bank Ltd 2011 (4) BCLR 329 (CC)

President Of The Republic of South Africa And Others v. South African Rugby Football And Others 1997 (7) BCLR 725 (CC)

UNITED STATES OF AMERICA
In re Martinez Catala 129 F. 3d 213 (1997)

STATUTES:
High Court Rules, 1980

BOOKS:

Brazier R. (2001) *Constitutional Practice: The Foundations of British Government* 3rd Edition (OUP)

Federal Judicial Center (2002) *Recusal: Analysis of Case Law Under 28 U.S.C §§ 455 c 144*

Hogan G. And Whyte G. (eds)(2003) *J.M Kelly: The Irish Constitution* 4th Edition (Dublin: Lexis Nexis)

JUDGMENT

COURT:

I. INTRODUCTION

[**1**] This is an interlocutory application for our recusal in the main matter in which the respondents have brought a constitutional challenge to the amendment of an Act of Parliament administered by the applicant.

The Relief

[**2**] The relief sought is couched in the following terms:

> "1. That the Panel of three Judges appointed to hear the Constitutional application filed under the above case number, namely The Honourable Moiloa J, The Honourable Makara J and The Honourable Sakoane AJ, recuse themselves from the application proceedings before the hearing thereof.
>
> 2. That an alternative Panel of three Judges, who are not members of the Applicant and who have not expressed an opinion on the issues contained in the said application prior to their elevation to the Bench be appointed to hear the application accordingly.
>
> 3. That no order of costs be made in the circumstances.
>
> 4. That such further and/or alternative relief be granted to the Applicant as may be deemed appropriate."

[**3**] The grounds for the recusal application are in concise terms that:

3.1 Since the impugned provisions in the main application require the interpretation of Act which provides for

retirement benefits for the respondents and puisne judges alike, the two puisne judges on this panel have an interest and are, therefore, conflicted.

2.1 The third acting judge has a personal prejudice by virtue of the expression of an opinion about the Act while he was at the Bar.

Grounds for recusal

II. MERITS

[**4**] The founding affidavit filed on the applicant's behalf states in paragraph 4 thereof as follows:

> "This application for recusal is founded on the reasonable apprehension of the Applicant, being an informed litigant, that the Panel of Judges appointed to hear the Constitutional matter would not bring an impartial mind to bear in adjudicating the case. To put it differently, the Applicant has a reasonable suspicion of bias on the part of the said Panel. In this respect I am advised that an Applicant for recusal does not have to show a real likelihood of bias, and that the focus of such an application is on the perceptions of the Applicant himself."

[**5**] The first ground for the alleged apprehension is in relation to Moiloa and Makara JJ, and is articulated in paragraphs 6 and 9 as follows:

> "
> 6
> The first ground for the apprehension of bias lies in the fact that the Honourable Moiloa J and the Honourable Makara J are members of the Applicant by virtue of the Schedule of Specified Offices to the Specified Offices Defined Contribution (sic) Fund Act of 2011. Both have been appointed as Judges of the High Court, and in terms of

Category B of the said Schedule they are statutory position holders of the membership of the said Fund.

9

Since the said two Judges are full members of the Applicant, it follows that the outcome of the proceedings will certainly affect the position of those two Judges in the Pension Fund concerned. For instance, should the Constitutional application be successful, then the two Judges concerned will be entitled to payment of all cash available to their credit in the Fund, when they retire by virtue of reaching their retirement age. Should the Constitutional application not be successful, then they will not be entitled to the payment of all cash available to their credit in the Fund upon reaching retirement age."

[**6**] The second ground advanced for the alleged apprehension is in relation to Sakoane AJ and is elaborated in paragraph 12 thus:

> "As far as the third member of the panel, namely Honourable Sakoane AJ, is concerned, I respectfully point out that he does not fall into the same category as the other two Judges in respect of membership of the Fund. The applicant's concern relating to possible bias on his side, lies in the fact that he has already formed a personal opinion concerning the Constitutional matter before he was elevated to the Bench. This opinion appears from a letter written by him on 23rd May 2014, and addressed to the Attorney-General. I attach a copy of that letter hereto marked annexure "**A**", and I specifically refer to paragraph 5 thereof, where he comes to the conclusion that payment of benefits should be effected to clients which the Government had accumulated for their benefit prior to **October 2011**. The Honourable Court is respectfully referred to the remainder of the views expressed in this letter, and it is respectfully submitted that the Applicant has a reasonable apprehension of bias against the said Judge in the premises."

Respondent's Answer

[**7**] The respondents answer under paragraphs 8, 13 and 15 of the answering affidavit that:

> "
> 8
>
> …when Mr. Justice Sakoane authored the letter in question he wrote it against the background of showing the obvious, namely that the Fund must pay the benefits which it did not dispute were due and payable. In the same manner he stated the obvious namely that those members

of parliament were entitled to the contributions of government which had been transferred to the Fund upon its establishment. He also stated the obvious namely that all the contributions in the Fund were intended to be "a fund credit irrespective of length of service or period of appointment". Read as a whole the letter does not suggest by any stretch of imagination that the members of parliament were entitled to the cash payments available to their credit in the Fund.

13

Consequently I have been advised that the apprehension of the Fund is not reasonable. First, it has not been established that statutory membership of the learned Judges alone makes them interested parties in the outcome of the litigation. Second, the Fund has failed to contextualize the letter authored by Justice Sakoane before his appointment. Thirdly, the Fund has always been desirous that the local judges should not preside over this matter. They have always been interested in suggesting that no single judge of the High Court should hear the matter and this matter must be heard by foreign judges. They have always rejected suggestions that acting judges could be appointed to hear this matter…

15

In the premises I aver that the application is misconceived because it fails to meet the double reasonableness test. I aver that the mere fact that the law obliges the two members of the honourable Court to become members of the Fund by virtue of their position as judges does not on its own suggest that they have an interest in the outcome of these proceedings. In the same manner the correspondence by one of the learned Judges in his time as a legal practitioner, put in proper context, does not suggest that he expressed an opinion that the Fund is liable to pay all members including those covered by section 6(2) of the Act. It follows therefore that the nature of interest which has come by force of compulsion and left the two members without a choice by virtue of their positions would not affect their impartiality and the oath of office they took to administer justice fairly and objectively. I submit therefore that a reasonable person in the circumstances of the applicant Fund would not perceive that all members of the honourable Court are likely to be biased."

III. ANALYSIS

[**8**] Mr. *Farlam*, for the applicant, advances the following two propositions in the written submissions:

8.1 Should the constitutional attack on the impugned provisions of the Act succeed, this will affect the membership and benefits of Moiloa J and Makara J. Therefore, both Judges have a direct interest of a pecuniary nature in the outcome of the constitutional application.

8.2 Sakoane AJ has expressed an opinion as to the liability of the Fund prior to his elevation to the Bench – "the Fund is therefore uncomfortable with the possibility that the Judge will proceed to determine a further claim brought against the Fund."

[**9**] Mr. *Letsika*, for the respondents, counters by contending that:

9.1 The suggestion that Moiloa J and Makara J will withdraw from the Fund in the event of the constitutional challenge succeeding is speculative. No evidence has been adduced in support thereof.

9.2 The constitutional challenge relates to the interpretation of the impugned provisions of the Act in relation to the respondents. There is no realistic

possibility that the outcome therein "would affect the membership or benefits arising from the membership of the honourable Judges."

9.3 The letter written by Sakoane AJ relates to litigation in which no constitutionality of any provisions of the Act arose. The current issues did not arise in that litigation. That correspondence should be juxtaposed with prior expression of opinion on an issue by a judge which does not disqualify a judge from subsequently adjudicating in a case in which such issue arises for determination.

Is there a financial interest by Puisne Judges with a realistic possibility to be affected by the outcome?

[**10**] The Act whose provisions are being attacked establishes a pension fund for public-office bearers in the legislative and judicial arms of government. The eligibility periods for qualification for pension differ – Members of Parliament have to serve minimum period of two terms of five years in aggregate. Puisne judges mandatorily retire at age 70 but may elect to leave earlier provided they have a minimum 15 years' service.

[**11**] The respondents are on retirement and are before us seeking relief which, in essence, is a constitutional declaration that their vested right to pension means they are entitled to a lump-sum cash payment and not annuity at fixed intervals. That vested right and entitlement to terminate their membership is violated by the **2014 Amendment Act**. They compare their position with that of their former colleagues who resigned before qualifying for pension and, by operation of section 32 of the 2011 Pension Fund Act, got all their contributions with net investment as a lump-sum cash payment.

[**12**] The question that arises is whether the outcome in the constitutional challenge will affect the membership and contributions in the Fund standing to the credit of Judges. Put differently, will respondents' access to 75% of their credit in the Fund affect the credits of Judges by diminishing such credits?

[**13**] In suggesting that the answer is in the affirmative, the applicant reposes heavy reliance on **Bernet v. ABSA Bank Ltd** 2011 (4) BCLR 329 (CC). The analogous principle that the applicant seeks to extract from this

authority is that a judge who makes contributions to a pension scheme is like a judge who owns shares in a litigant company. Both have direct interest of a pecuniary nature which is likely to be affected by an outcome in litigation. In both instances they are obliged to recuse themselves.

[**14**] We take the view that the proper context in which the principle is enunciated should not be lost. **Bernet** grappled with the problem of shareholding by a judge in a litigant company. Given the sensitivity of equity-markets to litigation that has the potential of being disruptive, it is understandable that the Constitutional Court was astitude to delineate the locus of the enquiry as follows:

> "[46] …Although a judicial officer may have pecuniary interest in the form of shares or other financial interest in a company that is a party to the proceedings before him or her, that does not necessarily mean that the judicial officer has a financial interest in the outcome of those proceedings. In many cases in which a company is party to the litigation, the outcome of the proceedings may have no capacity to affect the value of the shares held by the judicial officer or his or her ownership of those shares. A reasonably informed litigant, therefore, would not reasonably apprehend that, simply because a judicial officer owns shares in a litigant company, the judicial officer would not bring an impartial mind to bear in adjudicating the case. But at the same time, it cannot be assumed that proceedings in which a company is a party will not affect the shares held by the judicial officer in that company or his or her interest in those shares.
>
> ……..
>
> [50] It is, however, clear that mere interest in the litigant does not automatically disqualify a judge. As the Court of Appeal put it:
>
> > 'In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether

> the outcome of that cause could, realistically, affect the judge's interest.'
>
> ……

> [53] The approach of our law to the problem must be informed by our test for apprehended bias. What must be borne in mind is that, in deciding whether a judicial officer might be biased, it is not necessary to predict how the judicial officer will in fact approach the matter. As the High Court of Australia has observed, '[t]he apprehension of bias principle admits of the possibility of human frailty.' In addition, it must be taken into account the presumption of impartiality which can only be displaced by cogent evidence. **The allegation that a judicial officer has an interest in the proceedings or an interest in a party to the proceedings is not sufficient to give rise to a reasonable apprehension of bias**. **What is required is the articulation of the connection between the interest alleged and the feared deviation from impartial adjudication of the case**. But we must, at the same time, not lose sight of the fact that at issue is not whether there was actual bias, but whether there was a reasonable apprehension of bias.
>
> [54] It seems to me that **asking the question whether there is a realistic possibility that the outcome of the proceedings would affect the judicial officer's interest, is a useful practical method of deciding whether a judicial officer has an interest in the outcome of the case**. This approach to the problem is consistent with our test for the apprehension of bias. If the answer to this question is in the affirmative, then the judicial has an interest in the outcome of the case and a reasonably informed litigant will reasonably apprehend that the judicial officer will not bring an impartial mind to bear on the adjudication of the case. In that event, the judicial officer is disqualified from sitting in the case." [Emphasis added]

[**15**] The apprehension of bias alleged by the applicant is that the puisne judges' membership in it or their pension benefits will be affected in the following respects:

15.1 A successful outcome will entitle them to payment of all cash available to their credit in the Fund upon reaching retirement age.

15.2 An unsuccessful outcome will disentitle them to such payment.

[**16**] The factual basis of the alleged apprehension of bias fails to make a distinction between compulsory membership and benefits which accrue by operation of law on the one hand, and voluntary membership and value of shares which are based on voluntary participation. Pension benefits, like salaries of judges, constitute financial security which is one of the essential conditions of judicial independence. They are a constitutional imperative. The issue of judges' entitlement does not even arise under the Constitution: see **Valente v. The Queen** [1985]2 S.C.R. 693

[**17**] In **Valente**, the Supreme Court of Canada held as follows:

> "40 The second essential condition of judicial independence for purposes of s.11 (d) of the Charter is, in my opinion, what may be referred to as financial security. That means security of salary or other remunerations, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the

> case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace and favour of the Executive."

[**18**] The same principle is propounded in the judgment of Irish courts in **District Judge McMenamin v. Ireland** [1996]3 I.R. 100 @ pp 111 and 140-141 thus:

> "I think that it is implicit in the Constitution that judges must receive salaries and pension benefits, quite apart from any recruitment consideration. Otherwise, the essential independence of the judges would be undermined. It seems obvious that that constitutional obligation could not be discharged by conferring on judges salaries or pension arrangements which were irrational or wholly inadequate. If, for instance, a salary for a District Court Judge, as fixed by statute, became so eroded in real terms by reason of inflation that, having regard to salary movements in the community generally, it was totally out of line and so low as to undermine the secure independence of the judiciary, there would be a breach of the constitutional obligation. As pension is nothing more than deferred remuneration, the same principle would apply to pension rights."

[**19**] Another important contextual consideration is that the respondents are politicians and have the liberty to come out of retirement and re-enter politics as Prime Minister Pakalitha Mosisili has done. Not so for puisne judges. The international convention is that judges cannot go back to the practice of law and are, thus, prevented from supplementing their pension annuity: see Hogan G and Whyte G. (eds) **J.M. Kelly: The Irish Constitution** 3rd Edition (Dublin) pp 1003-1004; Brazier R. **Constitutional Practice: The Foundations of British Government** 3rd Edition (OUP) pp. 283-284

[**20**] The aforegoing provides a context different from that of corporate share-holding by a judge. This makes it difficult to accept that puisne judges have any direct, let alone substantive interest of a pecuniary nature, in the outcome of the main application. The respondents are not seeking termination of membership or lump-sum payment of benefits inclusive of those of puisne judges. They simply want to test the constitutional validity of the impact on their alleged vested rights by the amendments to the principal Act.

[**21**] There is nothing in the affidavits to suggest the identified puisne judges are on the verge of retiring or have reached either the mandatory age of 75 or the optional minimum 15 years' service. Neither is it suggested that the pension arrangements are irrational or wholly inadequate as to impact on judicial independence.

[**22**] Absent any of the factors above, we do not see any realistic possibility that the membership or benefits of the two puisne judges will be affected by the outcome of the constitutional challenge. This necessarily means that there is a disconnect between the interest alleged and the feared deviation from impartial adjudication by Moiloa J and Makara J. Their recusal is, therefore, not warranted.

Does prior expression of an opinion by a judge disqualify him/her from adjudicating?

[**23**] The applicant's alleged apprehension of bias on the part of Sakoane AJ is grounded on some correspondence through which he engaged with the Attorney General concerning a case in which he represented some former Members of Parliament in 2014. The complaint is that he expressed strong opinion as to the liability of the applicant to pay his former clients. The applicant is constrained is to accept that the context of the correspondence is a communication between Counsel in respect of the implementation of an order of court in a case which unlike the one before us, was not of a constitutional nature.

[**24**] The controlling principle on the issue of recusal on the basis of prior professional association or expression of opinion is articulated in **President of The Republic of South Africa And Others v. South African Rugby Football And Others** 1997(7) BCLR 725 (CC) at para [79]:

> "Then there are the allegations of a 'longstanding relationship of advocate and client'. We have never heard of a recusal application founded upon such a relationship prior to a judge's appointment to the bench in South Africa. There have been countless cases in our history where judges have adjudicated disputes in which a party had been client prior to their appointment. This is not surprising having regard to the nature of the relationship between advocate and client in our dual bar system which prohibits a client from having direct access to an advocate without intervention of an attorney. In the normal course the client does not select the advocate but leaves it to the attorney to do

> so. Of course, where judges, in their former capacity as advocates either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for them to sit in such matter…"

[**25**] In the United States of America, the courts take the view that because judges often cannot avoid some acquaintance with parties or events that give rise to litigation, such acquaintance, by itself will generally not require recusal. As put by the First Circuit Court **In re Martinez Catala** 129 F. 3d 213 @ 221 (1997):

> "… But many judges also sit, usually after a self-imposed cooling off period, on cases involving former clients (assuming always no current financial ties and that the judge did not work on the same or a related matter while in practice). Former affiliations with a party may persuade a judge not to sit; but they are rarely a basis for compelled recusal.": see Federal Judicial Center **Recusal: Analysis of Case Law** Under 28 U.S.C. §§ 455 144 @ pp. 26 and 32

[**26**] Similar views are shared by the Court of Appeal in **Sole v. Cullinan NO and Others** LAC (2000-2004) 572 @ 588 B-E in regard to expression of opinion by a judge in prior rulings on the same issue but in a different case. The Court has held that:

> "The fact that certain factual matters may overlap between two (or more) matters in contention adds little. As was said in an analogous situation:
>
> > '…there is no rule in South Africa which lays down that a judge in cases other than appeals from his judgments is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case. There would be as little justification for such a rule as to a rule which laid down that a judge who in a judgment expressed an opinion as to the correct interpretation of an Act of Parliament could not sit in a subsequent case between the different parties where the same question of interpretation was involved.'"

[**27**] Succinctly put, the test is whether a sitting judge gave advice or acquired personal knowledge relevant to the case between the same parties while still in private practice or has expressed an opinion on the same issue in another case. If the parties are not the same and the issue revolves around the correct interpretation of the law, then there would be no warrant for recusal. It is, perhaps, in recognition of this principle that the applicant does not ground the recusal application on this test in moving against Makara J. who, in the **Tšehlana** case, gave an interpretation of section 6(2) of the principal Act which received the imprimatur of the Court of Appeal.

[**28**] *In casu*, the applicant's apprehension of bias has nothing to do with any advice Sakoane AJ gave to his former clients. It is based simply on his communication of the clients' position to the Attorney-General as to the execution of an order of court issued in their favour. If anything, his expression of opinion was on the correct interpretation of the court order and not the interpretation of the principal Act. It, therefore, was not an expression of opinion as to the correct interpretation of the principal Act. Interpretation of the law belongs to the province of the judge. Advice on the law belongs to the advocate.

[**29**] We, accordingly, find that on the aforegoing correct facts, no well-informed reasonable person would apprehend that Sakoane AJ would not bring an impartial mind to bear on the adjudication of the matter.

[**30**] Before concluding, there is a developing practice among legal practitioners which we deem fit to comment on. There is a worrying trend among some legal practitioners to go behind the backs of judges who are allocated

matters and who seek to obtain removal of those matters from the roll of the judge concerned. The habit is abhorrent, illegal and dishonest. It amounts to forum shopping. This habit must stop immediately. We remind all legal practitioners that any contemplated removal of a matter before the judge who is seized of it must be made by a way of recusal application to the judge concerned and not informally behind such judge's back in some obscure corner. Legal practitioners are reminded that recusal applications are in the nature of an interlocutory applications and subject to the prescripts of Rule 8(21) of the **High Court Rules** and are guided by our common law practice and the ethics of our honourable profession. Practitioners must at all times remember that they are officers of the court and that they must at all times act honestly and honourable to the court and to their colleagues on the opposite side.

IV. DISPOSITION

[**31**] In summation, the application, for our recusal falls to be dismissed in relation to all the grounds on which it is based. The parties were in agreement that whatever the result, there should be no order as to costs.

[**32**] ORDER

The following order is made:

1. The application is dismissed.
2. There will be no order as to costs.

_____

J.T.M. MOILOA
JUDGE

_____

E.M. MAKARA
JUDGE

_____

S.P. SAKOANE
ACTING JUDGE

For the applicant: P.B.J. Farlam SC and P.J. Loubser instructed by Webber Newdigate, Maseru

For the respondent: Q. Letsika for Mei & Mei Attorneys Inc., Maseru