ROSELYNE GRENNY MANGOTA
versus
DAVID MANGOTA
and
HONOURABLE JUSTICE TAGU N.O.
and
HONOURABLE JUDGE PRESIDENT JUSTICE CHIWESHE N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 1 August 2017 & 6 September 2017

CHAMBER APPLICATION FOR RECUSAL

B Mutetwa, for applicant
T Mpofu, for respondents

TAGU J: This is a two pronged chamber application for recusal. The first prong being the failure to follow normal allocation channels by the Judge President. The second prong is the proximity of the Plaintiff to the trial Judge in the main divorce trial. The relief being sought by the applicant in this chamber application is couched as follows-

"IT IS ORDERED THAT:

1. The Honourable Justice TAGU recuse himself from hearing the divorce action between the Applicant and the first Respondent.
2. The 3rd Respondent be and is hereby directed to have the file allocated for trial through the normal Family Court structures.
3. In the event of the Family Court Judges both in Harare and Bulawayo being unable to handle the trial between the Applicant and the 1st Respondent, that a retired judge be appointed to handle the trial action.
4. That costs be in the main action."

FACTUAL BACKGROUND

The plaintiff in the main divorce action is a sitting High Court Judge stationed at Harare. The trial judge is also a sitting Judge stationed at Harare. The applicant is an unemployed estranged wife to the plaintiff. The Judge President as the administrative head of the High Court in the exercise of his administrative duties allocated the divorce file to the second respondent for trial. The trial judge is attached to the Civil Court division and not currently in the Family Court division which deals with divorce actions. Upon receipt of the file with an instruction to deal with the trial, the trial judge attempted to set the matter down

for trial. The applicant through her defence counsel took issue with the manner in which the file was allocated to the trial judge by the Judge President and objected to the main divorce trial being handle by the trial judge on the basis that the allocation of the file to the trial judge had not followed what she termed normal allocation channels because it had been allocated by the Judge President instead of the Head of the Family Court Justice CHITAKUNYE. Further, she raised the issue that the plaintiff is a colleague to the trial judge in that both the plaintiff and the trial judge are stationed at Harare, and ordinarily would interact in a number of ways. She opted to have the divorce trial handle by either a retired judge and or a judge from outside Harare.

It having been intimated to the trial judge by the applicant's legal practitioner that his recusal would be sought the trial judge directed that a written application be filed. In filing the application the applicant cited the first respondent, the trial judge as the second respondent and further joined the Judge President as the 3rd respondent.

The first respondent opposed the application and took a preliminary point. The point *in limine* being that the Honourable Judge President JUSTICE CHIWESHE and the trial judge JUSTICE TAGU were improperly cited in the application for recusal. The first respondent submitted that by citing the Honourable Justice TAGU as well as the Honourable Judge President as she did her application for recusal was fatally defective and the relief sought incompetent, since it defies well established principles of procedural law and the Rules of this Honourable Court. By citing the Honourable Justice TAGU as she did, the applicant turned the trial judge into a litigant. Further, he said the Judge President has no interest at all in the application which the applicant filed with this Honourable court. He argued that applicant should have known that an application for recusal must be brought before, and heard by the judicial officer whose recusal is sought. She should have known that the application is directed to the judge who will hear the case and not to the Judge President who allocated the file to the trial judge.

The first respondent further submitted that by citing the Honourable Justice TAGU as she did the applicant disqualified him from determining the application for recusal and cannot grant the relief she is seeking. According to the first respondent Civil Procedure and the High Court Rules 1971 do not, in an application for recusal allow one judicial officer to order another judicial officer who is seized with a matter to recuse himself/herself. The judicial officer against whom the application for recusal is made is the only judicial officer who will consider the merits of the application and, at the end of the day, make up his /her mind on

whether to recuse himself/herself or not. He finally submitted that this means that this is now a suit against sitting judges. It goes without saying that a sitting judge cannot be sued without leave, hence the relief sought in paragraphs 2 and 3 of the draft order are incompetent.

The applicant having had sight of the first respondent's preliminary points, and before the hearing of the matter, rectified her application through her defence counsel by withdrawing her application against the trial judge. She however, maintained her application against the Judge President, whom she said owed her an explanation why he allocated the file to the trial judge.

In my view, the preliminary points raised by the first respondent have merits. The trial judge should not have been cited as a part in the manner the applicant had done. She should also not have included the Judge President because when one makes an application for recusal the parties in the main action do not change. I agree with the first respondent's submission that by citing the trial judge in the manner she had done, she had turned the trial judge into a litigant which would have forced the trial judge to file opposing papers if he had seen it fit to do so, and the at the same time this would have disqualified this trial judge from presiding over the application for his recusal. This would have created an anomaly and the trial judge would be seen to have descended into the arena and adjudicate over a matter in which he is a respondent. An application for recusal should ordinarily be brought before, and be heard by the judicial officer whose recusal is being sought. The judicial officer against whom the application for recusal is made is the only judicial officer who should consider the merits of the application and at the end of the day make up his or her mind to recuse himself or herself.

However, this part of the preliminary point has been overtaken by events. The applicant withdrew her application against the trial judge just before the hearing of the matter. If she had not done so her application would have been fatally defective.

As regards the citation of the Judge President, my view is that since he has no interest in the matter, he should not have been joined in his or her personal capacity, but may be cited in his or her official capacity only as the head of the High Court, and as the officer responsible for allocation of files to the various judges irrespective of the divisions for trial. He should not be asked or expected to file any papers or to proffer reasons to litigants as to why he saw it fit in his wisdom to allocate files to any judge. To do so would be to usurp the administrative powers of the Judge President as the Head of the High Court. His citation may be necessary only for him to reallocate the file to another judge in the event that the trial

judge he had initially allocated a file had recused himself or herself. But I need to emphasise that his citation is not necessary because once a judge has recused himself or herself he can automatically reallocate the file to another judge. *In casu* the Judge President was cited as Honourable Judge President JUSTICE CHIWESHE N.O meaning he was cited in his official capacity only although the counsel for the applicant mischievously wanted him to proffer reasons as to why he allocated this file to the present trial judge.

ON THE MERITS

The applicant's submission on the first prong was that there was an unexplained failure to follow normal case allocation procedures by the Judge President to the trial judge. She submitted further that if the Honourable Justice TAGU was allocated the main divorce case for trial outside the normal procedures and he is not in the Family Court division of the high court which ought to have handled the trial, he had an intrinsic obligation to enquire how he had ended up with a Family Court matter involving a colleague when he is not in the Family Court. She further submitted that the duties of a judge include ensuring that set allocation Rules are followed and where they have not been followed, that duty includes explaining to the litigant why Rules have not been followed. She concluded by saying that Justice TAGU is an inexperienced judge and that procedures have not been followed because the plaintiff in the divorce trial is a colleague to those responsible for the allocation. However, she was cautious to emphasise that she has nothing against the Honourable Justice Tagu but said any reasonable litigant in her position who become aware that normal allocation procedures have not been followed and that a judge outside the normal division for the type of case has been allocated the file for trial, and that no one is willing to explain the departure from normal procedure would be alarmed and would fear that justice might not be administered in an impartial, unbiased and untainted manner.

It was her contention that she was entitled to full disclosure on the rationale for allocating the matter to a non- Family Court judge directly by the Judge President as opposed to an allocation by the Family Court Head. She further said the act of allocating a case to a trial judge is an administrative act as envisaged under the Administrative Justice Act [*Chapter 10.28*] and s 3 (1) (a) of that Act requires every administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person to "act lawfully, reasonably and in a fair manner. When she sought for reasons for such a deviation she was entitled to be given promptly and in writing the reasons for the conduct." In her view the administrative actions

of the Judge President which she complained of were clearly capricious, whimsical and influenced by the fact that plaintiff is a colleague. In support of her submissions she referred to sections 56, 68 (2) and 69 (2) of the Constitution of Zimbabwe.

On the second prong her submission was that the plaintiff in the main divorce trial is a colleague to both the trial Judge and the Honourable Judge President. They all interact on a daily basis and this gives her a reasonable apprehension that she is not likely to receive a fair trial in the main divorce action if the matter proceeds before the Honourable Justice TAGU. She therefore in her draft order prayed that she be tried by a retired Judge or by a judge from Bulawayo.

In making the application for recusal the applicant was quick to say that she did not know the Honourable Judge TAGU, and did not doubt his integrity, professionalism and good character. However, she was of the view that the trial judge upon receipt of the file should have recused himself on his own motion as did BHUNU J (as he then was) in the case of *S* v PARADZA 2004 (3) ZLR 324 where he said-

> "I strongly feel that this is a case which should perhaps be best handled by a retired judge or someone from outside our jurisdiction. I am of the view that whatever my decision is going to be in this case, justice would not be seen to be done. I therefore feel compelled to recuse myself. I feel comforted in taking that stance by the decision in the case of *South African Motor Corporation (EDMS) Bpk* v *Oberholzer* 1994 (4) SA 808 (T). In that case, it was held that :
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> > "Where two judicial officers are attached to the same bench as colleagues and one of them is a litigant or an accused, then there is a reasonable ground for the other legal officer to be recused from trying the action."

The first respondent opposed the application for recusal, he in his heads of argument submitted in the strongest of terms that the applicant assailed the High Court, its administrative structures, the Judge President, the head of the Family Law Division, the judge seized with handling this matter and the first respondent himself. He felt duty bound to oppose the application in a manner that restores the integrity of a process which has been unnecessarily assailed.

Firstly, the first respondent submitted that there has been a mischievous misjoinder in these proceedings. The judge whose recusal is sought ought not to have been joined in the first place. Whilst the applicant withdrew the application against the trial judge at the eleventh hour, he said the point must still be made that such joinder was not only mischievous but was intended to force the issue, brow beat the judge and make his lordship's position untenable. This amounted to an abuse of process.

He said by maintaining the Honourable Judge President as a litigant, the intention remains the same. She meant to abuse the process of the court. He said further that it is trite law that when an application for recusal is brought, the parties do not change. She should have advanced her position for such a relief and not to bring in new litigants. The applicant who is represented by a regarded senior legal practitioner should not have dragged the Judge President to court. In dragging the judge President to court she fundamentally altered the application before the court, and put a petition which is unknown and which must be dismissed with costs for that reason.

As regards the reliefs sought they cannot be granted against third respondent because third respondent is not properly before the court.

He further attacked the applicant's reference to the Family Court Structures and said what should purportedly happen after recusal, cannot be an issue to be dealt with by a judge recusing himself. It was his contention that there is no law which says a divorce matter must be dealt with by what applicant calls the Family Court. Any judge of the High Court can deal with it. He relied in terms of sections 2 to 4 of the Matrimonial Causes Act, [*Chapter 5.13*] and said the High Court is by statute the appropriate court for purposes of dealing with the dissolution of marriages contracted under and in terms of the Marriages Act [*Chapter 5.11*] hence her request had no legal foundation.

Turning to the applicant's request in her draft order that her matter must be handled by a retired judge the legal basis for that prayer had not been set out in the founding affidavit by which the applicant must stand or fall. The issue comes for the first time in the draft order without any appropriate motivation having been made, making the relief incompetent in terms of the authorities of *Austerlands (Private) Limited v Trade and Investment Bank Limited & Ors* SC-92-05, *Muchini* v *Adams* SC-47-13, *Muzeza* v *Muzeza & Ors* HH 213-12, *Karimatsenga* v *Tsvangirayi* HH 369-12, *Koumides* v *Koumides* HH 35-12,*Hitumen* v *Hitumen* 2008 (2) ZLR 296 (H) and *Mangwiza* v *Ziumbe* 2000 (2) ZLR 489. As held by MALABA DCJ (as he then was) in *Moyo & Ors* v *Zvoma N.O. & Anor* SC 28 -10 at p 29 para3 that-

> "My view of the case is that the application ought to have been dismissed or granted on the grounds on which the applicants made it".

The first respondent further submitted that the relief in para 3 that in the event of the Family Court judges both in Harare and Bulawayo being unable to handle the trial between the applicant and the first respondent, that a retired judge be appointed to handle the trial

action is an impermissible usurpation of the powers of the Judge President, the Chief Justice and the entire Judicial Services Commission. He said her prayer in para 4 that costs be in the cause overlooked the fact that the second and third respondents are not involved in the main divorce matter. He said the net effect of all this is that the application is simply a bad one, and one is reminded of the remarks in *Mwanyisa* v *Jumbo & 5 Ors* HH-3-2010 to wit-

> "Judges are public servants and as such they are not to complain about what lands on their plates. They must do justice always no matter the state of the case placed before them. I must however, confess that the above matter is a dog's breakfast. The parties have been to this court on at least five occasions….."

See also *Morris* v *Morris* HH -71-11 and *Taruona* v *Zvarevadza* HH-87-12. He said this too, is a dog's breakfast and the court must refuse to partake in it.

It is the first respondent's view that this is an abuse of process, and the applicant brought this application which effectively says no one must hear the divorce trial. He said she does so because she simply does not want to be divorced and does not want to see this matter finalised. For this he said the remarks of HUNGWE J in *Mcmillan & Ors* 2004 (1) ZLR 17 (H) are apposite as they show the kind of the litigant that the applicant is. His Lordship HUNGWE J said-

> " On the other hand, some litigants see conspiracy by the whole system against them. They smell a rat in every corner, they cannot accept that their cases would be fairly handled. They hold this belief without any basis. This category of suspects or litigants is an unreasonable lot."

See also *S* v *Roberts* 1999 (4) SA 915 (SCA) at 922, *Leopard Rock Hotel (Pvt) Ltd* v *Wallen Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) and *Foya & Matimba* v *R & Jackson NO* 1963 R&N 318 (F) at 322.

According to the first respondent the words of HUNGWE J resonate materially with the facts of this matter. For example according to the applicant the Judge President is biased against her. The head of the Family Court who dealt with the application for a gag order is also biased. TAGU J is biased. The whole sitting High Court judges are biased and she needs a retired judge. What she overlooked is the fact that all the retired judges have had a working relationship with the first respondent when he was the Permanent Secretary in the then Ministry of Justice, Legal and Parliamentary Affairs and he directly and indirectly handled their conditions of service. That means therefore that the entire judicial system cannot assure her of a proper hearing. This with the greatest of respect is the height of unreasonableness. It has not been stated for instance why the Judge President is biased against her. It is not stated

why the head of the family court is biased. These are the stories that have not been told, and one wonders on what basis does the applicant infer bias against TAGU J other than her fantasized and unsubstantiated allegations?

The first respondent however identified five grounds upon which the applicant seemed to infer bias.

The first ground is that the first respondent and the trial judge are known to each other. The papers show that the applicant and the first respondent have been married to each other for some decades now. If there was a worrisome relationship between TAGU J and the first respondent, the applicant would have been the first to know about such. She is "mum" on that critical issue. In fact she conceded that she does not know TAGU J, which point has the effect of not excluding TAGU J from hearing the matter. The view that they are friends is vexatious. In *THE SELECTIVE VOET BEING THE COMMENTARY ON THE PANDECTS, BOOK 2* at p 65 under s 52 voet says the following:

> "Friendship should not sway a judge – It follows from what has been said above, namely that judging should be in accord with the law, that no "case for friendship", as they commonly call it, should be suffered in judicial proceedings. The term implies that a judge has power in quite uncertain and unambiguous cases to give judgment in the suit for that one of the co-litigants who is linked to the judge by the tie of friendship".

The second ground is that the applicant contents that TAGU J is not in family court and is not "experienced". What experience does she know when she is being divorced for the first time? Only one who has been divorced before can claim to have that experience. The first respondent respectfully submitted that such an attack on a judicial officer is both unfortunate and regrettable. Regard being had to the fact that TAGU J as a judicial officer served this country at all levels up to the High Court and divorce matters had been part of his daily meal. This contention is contradictory to what applicant said else -where in her submissions that she does not doubt the integrity and professionalism of TAGU J.

The third ground relied on by the applicant is the "gag" order against the press granted by CHITAKUNYE J who is the head of the family court, which was rescinded by consent since the applicant was in default when it was granted. The applicant also expresses some disquiet with his lordship CHITAKUNYE J who handled that matter. It is therefore difficult to appreciate what the applicant really wants. This duplicitous conduct by the applicant and her legal practitioner is worrisome and shows an abuse of process. See *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (S).

The fourth ground is that the directive by the trial judge for her to bring a written application shows bias. That attack is uncouth and with respect indubitably vexatious. The judge merely wanted the applicant to put it on record the reasons why she wanted the trial judge to recuse himself since there appeared nothing untoward to warrant the trial judge to recuse himself *mero motu*.

The fifth and final ground relied upon by the applicant is that TAGU J shares the same corridors as the first respondent. That they take tea together, they sit in appeals together, they do this and that together. The first respondent conceded that it is true for all the judges in this country. The judges in Bulawayo and Masvingo have themselves sat at the Harare High Court. Not only that at the end of every term all judges in the country meet/ and or interact during symposiums. At the end of the day, it simply means that her matter must not be heard. When all this is considered, it is clear to the first respondent that this is not a genuine application for recusal. It is instead an application designed to aid applicant in delaying the inevitable and or in judge shopping. She referred for instance to her comfort with judges from Bulawayo. That is all with respect is the purpose of the present petition, and that cannot be allowed. The first respondent therefore prayed that this application be dismissed with costs.

In her application the applicant referred to s 56 of the Constitution of Zimbabwe Amendment (no) 20 of 2013. The section deals with or provides for equality and non- discrimination between men and women when it comes to the application of the law. It provides among other things that all persons are equal before the law and have the right to equal protection and benefit of the law. This included equality of men and women in various spheres such as political, economic, cultural and social spheres. In my view, I do not seem to see that the applicant was discriminated in any manner. I do not see the relevance of this section in this application for recusal. None of her rights have been violated by the referral of her trial file to the current judge. She still enjoys equal treatment with men, and equality before the law and has equal protection and benefit of the law. Hence she is free to make this application before this court and is legally represented by a lawyer of her choice.

She further referred to s 68 (2) of the Constitution of Zimbabwe. This section deals with and provides for the right to administrative justice. It provides as follows-

"68 Right to administrative justice

(1) Every person has a right to administrative conduct that is lawful, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct".

In casu, the applicant's contention is that she requested for reasons from the Judge President why the file for her divorce trial was allocated to the current trial judge but was not favoured with satisfactory reasons, other than a brief response couched in the following terms

> "We refer to your letter Mrs Mtetwa /tz dated 11 April 2017 which you copied to the Honourable Justice Tagu among others.
> The Honourable judge has been allocated the matter. He is expected to preside over the trial. Your concerns *vis a vis* the set down date shall be addressed by the trial judge."

In my view, the Judge President did not violate the applicant's rights and legitimate expectations as provided for under s 68 (2) of the Constitution. Having received the applicant's request the Judge President directed the applicant's counsel to the trial judge, who, if he had been asked to explain, either in writing or in chambers, since he had been appraised of the reasons why the divorce file had been referred to him, a fact the applicant was not aware of could have explained. Instead the applicant, out of over zealousness or lack of proper legal advice, decided to lodge the present application for recusal. What she failed to appreciate is that the trial judge did not allocate himself the file. Having been fully briefed of the reasons why the file was being referred to him for set down directly from the Judge President, and not from the family law court head and having been satisfied with the explanation from the Judge President, a fact not known by the applicant, the trial judge was duty bound to accept to deal with the trial despite the fact that he is not in the family court division. Having been directed as to whom she should liase with regarding the set down of the trial, counsel for the applicant in her wisdom or lack of it, directed her guns at the wrong target.

Finally, the applicant also contended that the provisions of s 69 (2) of the Constitution were violated. The section reads as follows-

"69 Right to a fair hearing

(1) ……..

(2) In determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law."

In casu, the trial judge received the file for trial during the vacation. The trial judge fortunately was on vacation duty at the time. The trial judge in fulfilling the requirements of s

69 of the Constitution, decided to speedily advise the counsels for the parties in the divorce file for the need to agree on a suitable date for the divorce trial in the event the date the trial judge had in mind was not suitable to any of the parties where the trial was to be conducted in public and within a reasonable time. However, the counsel for the applicant had her on interpretations and refused to have her client's civil rights and obligations to be determined as soon as possible hence the present application. The counsel for the applicant having indicated to the trial judge that she was not available on the suggested date for trial, the trial judge instead did not insist on proceeding with the trial to accommodate the applicant's counsel's requests. She in my view cannot raise the issue that her civil rights and obligations and right to a fair hearing before an independent and impartial court established by law have been violated.

In a nutshell, the trial judge was not so biased as to want to proceed with the trial when the applicant's lawyer was not ready.

I will now turn to deal with the test for recusal.

The test for recusal has been the subject of analysis in many judicial pronouncements both within and without Zimbabwe. I will quote a few examples cited by both the applicant and the first respondent.

In *Pechi Investments (Private) Limited* v *Nyamuda* 2010 (1) ZLR 516 (H) and the cases cited therein it was stated at p 525 that-

> "Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is likelihood of bias on the part of judicial officer: that is that he will not adjudicate impartially. The matter must be regarded from the point of view of a reasonable litigant and the test is an objective one. 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."

In *S* v *de Vries* 1962 (2) SA 110 E it was held that disqualification arises whenever the judge's or magistrate's relationship to the parties is such, or his knowledge of the fact of the case or of the antecedents of the parties is such that it would tend to bias his mind at the trial. It is the possibility of bias and not actual bias that one needs to prove and this must be proved from facts which the possibility of bias can be inferred.

In *Leopard Rock Hotel (Pvt) Ltd* v *Wallem Construction (Pvt) Ltd supra*, the Supreme Court reemphasised the test as follows:-

> "Thus the character, professionalism, experience or ability as to make it unlikely despite the existence of circumstances suggesting a possibility of bias arising out of

> some conflict would yield to infamy, do not fall for consideration. The test is an objective one, the possibility in fact of bias, and not actual bias."

In *S* v *Roberts supra*, it was held that-

> "Bias in the sense of judicial bias has been said to mean "a departure from the standard of even handed justice which the law requires from those who occupy judicial office"….what the law requires is not only that a judicial officer must conduct the trial open- mindedly, impartially and fairly but that such conduct must be "manifest to all those who are concerned in the trial and its outcome, especially the accused….."

Lastly, in *Metropolitan properties Co. (FGC) Ltd* v *Lannon & Ors* (1968) 3 ALL ER 304 at 310A, LORD DENNING had this to say,

> "It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a a judicial capacity ….The Court looks at the impression which would be given to the other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit his decision cannot stand."

See also *Foya & Matimba* v *R & Jackson* NO1963 R&N 318 at 322.

The common thread that runs through the authorities cited above is that what disqualifies a judicial officer is the impression formed in the mind of reasonable people. An unreasonable impression does not found a basis upon which a judicial officer could recuse themselves.

In casu, the applicant submitted that likelihood of bias can be inferred on the basis that the trial judge and the plaintiff are colleagues who are based at the same station. That the normal allocation procedures were not followed in that the trial judge is not in the family court division which handles divorce actions and that the interlocutory application for a "gag" against the press was fast tracked.

On the other hand the first respondent submitted that a reasonable person believes that judicial officers are able to judge all in accordance with the law. In the present case, a reasonable person does not and cannot claim that no judge at the High Court can deal with a simple divorce trial. That a reasonable person cannot claim that they want their matter dealt with by an "experienced" judge. A reasonable person cannot adopt a scatter gun approach to the question of recusal. A reasonable person does not impugn the integrity of the entire judicial system over a divorce issue in which only the issue of the division of one asset and maintenance remains to be decided.

In asking the court to dismiss the application with costs on a higher scale the first respondent summed up his submissions by citing voet at 55 who said-

> "Otherwise, however, no favour should be shown to trial and foolish reasons for suspicion, such as are now and then found to be set up either in malice or thoughtlessness. It seems that we should rather believe that those who are bound by a sworn and tested loyalty, and have been raised to the function of judging for their eminent industry and dignity, will not so readily and for such slender causes depart from the straight path of justice and give judgment in defiance of their own inner sense of duty."

All having been said and done in this case, my view is that the mere fact that a case has been allocated to a trial judge by the Judge President, who is the head of all High Court divisions cannot be a basis for the judge who has been allocated a trial to refuse to deal with the matter merely because the judge is at that time not attached to a particular division.

The second basis alleged by the applicant that the plaintiff shares the same corridors with the trial judge, in my view is equally not a good reason for the trial judge to recuse himself. The rational being that once one is appointed a judge one is able to discharge his or her duties fairly and without bias. This application has no merit and has been brought for the sole reasons of avoiding the trial, delaying the trial, judge shopping, assailing the judicial officers as well as the entire judicial system. On this basis I refuse to recuse myself. In doing so I am fortified by the decision in the case of *President of the Republic of South Africa & Others* v *South African Rugby Football Union & Others* 1999 (4) SA 147 where an application for recusal was dismissed despite the fact that certain members of the court had been members of the political party which the first and second appellants were members and that the President of the Court had had a long standing relationship of advocate and client with first appellant.

In the result it is ordered that -

1. The application is dismissed.
2. The applicant to pay costs on a higher scale.

Mtetwa & Nyambirayi, applicant's legal practitioner
Chihambakwe, Mutizwa & Partners, 1st and 3rd respondents' legal practitioners