JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONSTITUTION CASE NO. 1 OF 2008

BETWEEN:

JAMES PHIRI.....……PLAINTIFF

- AND -

ATTORNEY GENERAL..…….INTERESTED PARTY
DR. BAKILI MULUZI…...……..DEFENDANT

CORAM: THE HONOURABLE MR JUSTICE E B TWEA
THE HONOURABLE MR JUSTICE H S B POTANI
THE HONOURABLE MR JUSTICE J S MANYUNGWA
Mr Chiphwanya, of Counsel for the plaintiff
Absent, 1st Respondent
Absent, 2nd Respondent
Manda – Official Interpreter

O R D E R

Manyungwa, J

This is an ex – parte application by Mr Chiphwanya, of counsel for the plaintiff. The plaintiff's application sought an order from this court that the Honourable Judge Twea, who is one of the judges on this Panel, hearing the Constitutional case of ***James Phiri V Dr Bakili Muluzi*** herein, do rescuse himself from the further recourse of this case on the ground that following an article in the week – end Nation of 10 – 20 July, 2008 in which there was published an article to the effect that the learned judge Twea, had refused to accept the sum of MK15,000.00 which had been given by the defendant

when the judge was admitted at hospital namely CURE in Blantyre. It was counsel's argument that whilst he personally had no qualms with the conduct of the judge, it was his view that the public may perceive whatever ruling the court delivers in this case, otherwise. Counsel Chiphwanya argued that if the decision in this case were to go against the defendant, the members of the public would conclude that we knew it, after all he rejected a gift from the defendant, and that if it were to go in favour of the defendant, then they would say we knew the judge is friends with the defendant. It was a case of public perception, Counsel submitted.

We have had occasion to consider the application, and we think that the position at law is perhaps at variance with what the plaintiff conceives as regards to public perception. We take the liberty to quote, with approval the dicta of Lord Esher M R in the case of ***Eckersley V Mersey Dock's and Harbour Building***[1], in which the learned Master of Rolls said:

> "When the proposition sought to be established on behalf of the plaintiff's is examined, it comes down to this, that the disputes ought not be referred to the engineer because he might be suspected to being biased, although in truth he would not be biased. It is an attempt to apply the doctrine which is applied to judges, not merely of the Superior Courts, but all judges that, not only must they be not biased, but that, even though it be demonstrated that they would not be biased, they ought not to act as judges in a matter where the circumstances are such that people, not necessarily reasonable people but many people, would suspect them of being biased".

However, as has been reported in the case of ***Simuka Enterprises V African Businessmen Association***[2], this passage from Lord Esher has been heavily criticised and the modern law on the topic, has sharply departed from the above passage. Lord Obrien in the case of ***R V County Cork J.J***[3]. stated:

> "That in my opinion, goes too far. It makes mere suspicions of unreasonable persons, a test of bias. I think that the judgement of [Lord Esher] was not a considered one, and that Lord Esher made use of some loose expressions. We decline, on a consideration of these cases, to go so far as that very eminent judge. These must, in the

[1] ***Eckersley V Mersey Dock's and Harbour Building*** (1894) 2 QB, 670
[2] ***Simuka Enterprises V Africa Businessman Association*** 10 MLR 264 at 268
[3] ***R V County Cork JJ*** [1910] 2IR at 275

> words of Blackburn J, be a real likelihood of bias. In ***Rex (De Vesci) V Justices of Queen's Co***[1] at follows: 'By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be different if the suspicion rested on reasonable grounds, was reasonably generated but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision".

Although, some support for Lord Esher, view especially the judgement of Lord Hewitt CJ in ***R V Sussex JJ ex – party Mc Carthy***[2] [1924] IKB at 259, the Simuka Enterprises case [supra] makes it clear that the case of ***R V Sussex*** (supra) is no longer good law. The test to be applied is one of whether or not there is a reasonable likelihood of bias or reasonable suspicion thereof. Moreover Bucknill J in ***Cottle V Cottle***[3] [1939] 2 AllER at 541 stated the principle as follows:-

> "The test which we have to apply is whether or not a reasonable man in all the circumstances might suppose that there was improper interference with the course of justice".

This is the test that the Supreme Court of Appeal followed the ***Simuka case*** (supra), and they allowed an appeal to the effect that the judge in the lower court was not biased.

In the instant application we think that the application is not made out and should be dismissed on the following grounds. To begin with, we wish to observe that this is a Constitutional Court panel in which there are three of us judges. Certainly, and it is obvious, that the court goes by a majority but that each judge is at liberty to render their judge own judgment. In this case, we do not think that the learned Judge Twea, even if he was biased, which we have not found, would be that influential to influence the rest of us with whatever position he takes on the substantive case before us. Secondly, the facts show that the judge refused the gift, the position in our view, would have been different if the judge had received the gift. We wish to express our, that gladly the judge did not. We therefore do not see how this would

[1] ***Rex (De Vesci V Justices of Queen's Co*** [1908] 2IR 285 at 294
[2] ***R V Sussex JJ wx – parte Mc Carthy*** [1924] IKB at 259
[3] ***Cottle V Cottle*** [1939] 2AllER

influence the judge, or in any case, to be influenced. Thirdly, it would appear that the events reported in the paper happened sometime last year, and since then the learned judge, we are adequately informed, has handled a number of cases involving the defendant. We therefore do not see how these events, which have only come out in the paper now, would influence the learned judge one way or another in this case.

In these circumstances, and by virtue of the foregoing, it is our firm view that the issue about public perception does not really arise bearing in mind that a reasonable man would, in the circumstances of this case, and the nature of the application clearly see that the decision whichever way it will go, that it was the work of the Constitutional Court comprising of three judges and not Honourable Judge Twea alone. In any case, if there was such an apprehension, as the plaintiff wishes us to see, the defendant would perhaps have been the first one to raise it, but even then, it is clear in our view that the position at law does not support the view taken by the plaintiff. Accordingly, we dismiss the plaintiff application.

Pronounced in Chambers this 25th day of July 2008 at Blantyre.

E B Twea J…….

H S B Potani……..

J S Manyungwa……