In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2020 No: 17

BETWEEN:

J. S.

Petitioner

and

A. S.

Respondent

RULING

Recusal; Apparent Bias; Risk of Appearance of Bias

Date of Hearing: 5 and 6 April 2021
Date Draft Circulated: 21 May 2021
Date of Ruling: 25 May 2021

Cameron Hill of Westwater Hill for the Respondent
Georgia Marshall of Marshall Diel & Myers Limited for the Petitioner

RULING of Registrar, Alexandra Wheatley

Introductory

1. The proceedings relate to both the Petitioner's and Respondent's applications for ancillary relief in divorce proceedings, comprising of both substantive and interim applications. This matter was first listed on 29 September 2020. From 29 September 2020, the various

applications were heard before me on four occasions in court, and one occasion where Counsel submitted a consent order. The orders made on these occasions are as follows:

- 19 October 2020
- 26 October 2020 (Consent Order)
- 3 November 2020
- 17 November 2020
- 1 December 2020

2. On 7 December 2020, the Respondent filed an application for my recusal ("the Recusal Application") which is the subject of this application and seeks the following relief:

> "*1. The Learned Registrar be recused from taking any further part in these proceedings in her role as Registrar, whether administrative or Judicial, or, as the case may be Assistant Justice or Acting Puisne Judge on the grounds that she expressed herself in terms that are pejorative and damming in correspondence with Cameron Angus Hill, Counsel to the Respondent, the said pejorative language continuing in her complaint to the Complaints Committee of the Bermuda Bar Association to the extent that the well informed neutral individual would have the apprehension of real risk that she was biased, and;*
>
> *2. That the time for the filing of the Affidavit of the Respondent ordered to be filed by the Registrar be extended to such time as appears appropriate in the circumstances, and;*
>
> *3. Costs, and;*
>
> *4. Such further and other relief as appears appropriate.*"

3. The Recusal Application was issued on 10 December 2020 and listed for 22 December 2021. Counsel subsequently agreed for the Recusal Application to be adjourned to 5 January 2021. On 5 January 2021, Mr Hill failed to appear and an order was made in his absence as I was satisfied he had notice of the hearing. On 5 January 2021, inter alia, I adjourned the recusal application to 12 January 2021. On 12 January 2021, Mr Hill failed to appear again and I was satisfied Mr Hill had notice of the said hearing. On this occasion the Recusal Application was adjourned *sine die* with liberty to restore.

4. Thereafter, this matter was listed before me on six additional occasions where orders were made as follows:

- 5 January 2021
- 12 January 2021
- 23 February 2021
- 9 March 2021
- 16 March 2021

- 19 March 2021

5. It was not until this matter was listed for mention for the various application relating to ancillary relief on 19 March 2021, at the instance of Counsel for the Petitioner, that Mr Hill confirmed the Respondent would be proceeding with the Recusal Application and requested the Recusal Application to be re-listed for directions. Taking into consideration the overriding objective as well as the numerous difficulties and delays experienced in these proceedings due to the Respondent's and Counsel for the Respondent's non-compliance of the orders made in paragraphs 1 and 4 above, I re-dated the Recusal Application during this hearing for this day as well. Counsel confirmed acceptance of short service in order that directions could be made specifically for the Recusal Application at that appearance.

The Evidence

6. The Respondent relies on paragraphs 113 through 126 of her first affidavit sworn on 15 January 2021 ("the Respondent's Affidavit"). Notably, the affidavit was sworn almost six weeks following the filing of the Recusal Application by the Respondent's Counsel. Counsel for the Respondent relied on written submissions filed prior to the hearing as well as various legal authorities. Supplemental, written submissions were also sent by Counsel for the Respondent during the course of the hearing.

7. Counsel for the Respondent accepted the Respondent's sole evidence to support this application is based on the correspondence I penned to Bar Council addressing Mr Hill's appearance before me as an Acting Puisne Judge in January 2020 ("the Letter to Bar Council"). The letter to Bar Council was not produced for the record or disclosed to the Petitioner.

8. Paragraph 117 and 118 of the Respondent's Affidavit state as follows:

> "*117. This affidavit, however is primarily concerned with addressing the first issue that is of primary importance. I have been shown a complaint made by the Registrar against my Counsel in which she suggests a motive for his alleged conduct and alleges knowing dishonesty. My Counsel tells me that she has made similar allegations, in court before opposing counsel, in this matter. I have no reason to disbelieve his account. She clearly has poor opinion of Mr. Hill that she has expressed in public. She may allow that attitude to interfere with her oath of neutrality.*
>
> *118. I do not seek to apportion any blame I merely point out that Ms. Wheatley has made a complaint of criminal conduct on the part of Mr. Hill, my counsel. His conduct is described as disgraceful and motives of dishonestly are attributed to him by the Registrar, motives of which she can have no knowledge. She may be right but the tone of the letters and the complaint make it clear that the well-informed observer would be likely to apprehend a genuine danger that the Registrar's judgment may be clouded by this animus personae. It is clearly an unfortunate*

state of affairs. Therefore, this affidavit is accompanied by a summons seeking the recusal of the Registrar and an order that the matter be placed before the Judge."

9. The Respondent's Affidavit further alleges actual bias in paragraph 121:

> "*121. I fear, and those fears are being borne out that Mr Hill's reasonable requests for reasonable time to compile the evidence needed to assess my needs, means and capital requirement are being rejected out of hand. There is at least a possibility, or a risk that an informed independent individual would apprehend that there was a possibility that the refusal to allow me time to properly prepare my case was motivated by a belief that my Counsel is dishonest and that his explanation for being unable to attend were false. Her stated reason is that I am obliged to file my Rule 77 requests in advance of taking any steps to recover from other documents that the Petitioner ought to have disclosed.*"

10. For the sake of complete transparency, the Respondent requested to address the court after her Counsel made his reply submissions to Mrs Marshall's submissions. I denied this request as all the evidence had been fully argued by both Counsel (with Counsel for the Respondent making submissions in the first instance as well as in reply). It would have been entirely inappropriate for the Respondent to be given a further opportunity to present her case after all submissions had been completed, particularly without any advance knowledge of the court or opposing counsel.

11. The Petitioner relied on his affidavit sworn on 29 March 2021 with attached exhibits ("the Petitioner's Affidavit"). The vast majority of the Petitioner's Affidavit set out a detailed chronology of the court appearances referred to in paragraphs 1 and 4 above as well as other appearances before the Learned Justice Stoneham. Much of the details in the Petitioner's Affidavit set out the circumstances in which Counsel for the Respondent failed to appear before the court and both the Respondent's and Counsel for the Respondent's non-compliance with the eleven orders (the twelfth order made by consent) made by me prior to directions being given for the Recusal Application.

12. The Petitioner's evidence is that he is unaware of the Letter to Bar Council and does not accept there is any apparent risk of bias or actual bias:

> "*Re Paragraph 117*
> *I am not aware of any complaint made by the Registrar against Respondent's counsel. I am advised by my attorney however, that the Registrar took a dim view of the events which occurred on the 26th and 27th of October 2020 as described above at 4(g). Irrespective of the conclusion she may have drawn as to the veracity of Counsel's email to the Acting Registrar at 11:00 on the 27th October 2020 and any offence which the court took at Mr Hill's failure to attend before the court or his requests for adjournments by email minutes prior to the matter being listed to proceed, no suggestion is made that the Registrar has acted in any way detrimental to the Respondent and it is conceded by Respondent's attorney that there is no actual risk of Bias against the Respondent.*

Re Paragraph 118 It is stated in this paragraph that the Registrar had made a complaint of criminal conduct on the part of Mr Hill and that his conduct is described as disgraceful and that motive of dishonesty are attributed to him. I have no knowledge of any complaint of criminal conduct although I am advised that prior to the email dated 5th January 2021 sent to Ms Dismont regarding Mr Hill's lack of a practicing certificate, if he had been practicing without a certificate is stands to reason that as an Officer of the Court the Registrar would be bound to alert the relevant authority of such actions. Insofar as dishonestly is concerned it would appear that this may related to the matters set out in paragraph 4(g) above from which such an inference can clearly be drawn. Insofar as there being genuine danger that the Registrar's judgment may be clouded by what is described as an "animus personae", such an assertion will need to be considered in the context of the Respondent and her attorney allowing the summons (Recusal) to be adjourned from the hearing date set for it on the 22 December 2020 and the to further sit in abeyance for the months of January, February and most of March when there were multiple appearances before the Registrar."

13. Counsel for the Petitioner also filed written submissions and legal authorities for consideration prior the hearing.

The Law

14. Whilst Counsel for the parties accepted there was no contention regarding the law as it relates to recusal applications, it would be remiss of me not to address the legal precedents and authorities.

15. In *Kenneth Williams* v *The Queen* [2020] SC (Bda) 37 App (28 August 2020), the second ground of appeal alleged the Magistrate should have granted the recusal application on the basis there was an appearance of bias. At paragraph 74, Subair Williams J affirmed the test to be applied:

> "*74. Beyond the rare question of actual bias, the appearance of judicial impartiality is measured by whether, on the objective viewpoint of a fair-minded and informed observer, there is a real possibility or real danger of bias on the part of the judge (See Porter v Magill [2002] 2 AC 357). Lady Justice Arden (as she then was) in Mengiste & Anor v Endowment Fund for the Rehabilitation of Tigray & Ors [2013] EWCA Civ 1003 described the appearance of impartiality in these words: "...Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially...*" [Emphasis added]

16. Further, Subair Williams J analyzed the actual subject matter of the allegation of bias and the link of that allegation to the parties in the case. Paragraph 79 states as follows:

> " *79. In this case, I find that the Appellant's asserted fear of impartially lacks objective justification. In my judgment, the subject-matter of the allegation of bias is far removed from the relevant facts of this case. Whether or not the Mother competently performed her duty to parent the Complainant's sister is wholly irrelevant to any element of the criminal charges on which the Appellant was convicted. The clear basis of the application for recusal was hinged on the magistrate's involvement in a Family Court case which proceeded 15 years ago and prior, in any event, to the birth of the Complainant. Those proceedings had not one iota to do with the Complainant herself or the allegations against the Appellant. Under these circumstances, it could not be seriously argued by a fair-minded and informed observer that there is a real danger that the magistrate's mind was in any way closed or incapable of an impartial assessment of the mother's credibility by reason of an unrelated Family Court case of 15 years prior*." [Emphasis added]

17. In the more recent case of *Athene Holding Limited* v *Siddiqui et al* [2019] SC Bda (20) Comm (15 March 2019) where the Chief Justice Narinder Hargun was required to determine an application for recusal, the legal test was further asserted as follows:

> "*43. In considering this application I remind myself of the test of apparent bias, which I take from the recent judgment of Turner J. in Charles Thomas Miley v Friends Life Limited [2017] EWHC 1583, [21-22]:*
>
> > *"21. The law relating to apparent bias is uncontroversial and is set out in the defendant's submissions:*
> >
> > *"The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude there was a "real possibility" that the judge was biased" (Porter v Magill [2002] 2 AC 357)…*
> >
> > *In Helow v Secretary of State for the Home Department [2008] 1 WLR, Lord Hope described the attributes of the 'fair-minded and informed observer' at paragraphs 1 to 3 of the speeches. These paragraphs include the following extracts:* 16
> >
> > > *"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious … Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done … may make it difficult for them to judge the case before them impartially."*

"22. At the risk of stating the obvious, any judge who is invited to recuse himself on the ground of apparent bias must be very careful not to allow any personal considerations whatsoever to contaminate his conclusions. Nevertheless, this should not preclude such a judge from acting with the same level of robustness and proportionate skepticism, where this is necessary, as he would approach any other application. To proceed otherwise would be unfairly to prejudice the other side out of an undue sensitivity to the perception that such robustness may be wrongly attributed to the personal feelings of the judge as opposed to the legitimate demands of firm management with the aim of applying the overriding objective." [Emphasis added]

44. In *Locabail (UK) Ltd, v Bayfield Properties Ltd* [2000] QB 451, the Court of Appeal found:

"force in observations of the Constitutional Court of South Africa in President of the Republic of South Africa & Others v. South African Rugby Football Union & Others 1999 (7) BCLR (CC) 725 at 753, even though these observations were directed to the reasonable suspicion test:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is 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, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."" [Emphasis added]

Analysis

18. Notably, the Respondent's Affidavit provides no explanation whatsoever as to how she came about to have sight of the Letter to Bar Council. This is of particular concern not only given its confidential nature, but moreover, as the subject matter of which it relates is an entirely different case before the courts that the Respondent is not a party. Whilst Counsel for the Respondent made submissions about how the Letter to Bar Council came about to be disclosed to the Respondent as well as provided his personal explanation in correspondence between Counsel (such correspondence exhibited to the Petitioner's Affidavit), there was nothing produced in this regard. Despite being provided no

explanation, it seems to me to be quite self-serving for Counsel to show a document to a client at a point in proceedings where numerous decisions have been made and no appeals proceeded with in relation to those decisions, to suggest the reason for the decisions made were as a result of the content of a letter sent almost one year prior that the client would ordinarily have no knowledge of.

19. A great deal of Counsel for the Respondent's submissions addressed decisions I made in my exercising my judicial capacity given to me as the Registrar under the Matrimonial Causes Rules 1974. So much so, that these submissions teetered on alleging actual bias and attempting to re-litigate issues which are *res judicata*. It appears to have been a difficult task for Mr Hill to separate instances where I was exercising my judicial authority and what he asserts are examples of "*the appearance of bias*".

20. The chronology of these proceedings must also be given substantial consideration. Counsel appeared before me on elven occasions prior to Counsel for the Respondent moving forward with the Recusal Application. Five of those occasions were prior to the Recusal Application being filed, and a further six appearances after Counsel for the Respondent failed to appear for the first return date of the Recusal Application at which time it was adjourned *sine die*. It cannot be right for a party to make an application for recusal after many decisions have already been made by a Registrar or a Judge. Any allegation of bias should be raised at the first opportunity and prior to the hearing of any applications; not following numerous appearances before the Court.

21. Counsel for the Respondent has also appeared before me on a number of other cases. Mr Hill submitted the facts of the Recusal Application would not apply to all of the cases where he is Counsel as the test is case specific. Based on this submission alone, it appears the Respondent is attempting to rely on actual bias rather than appearance of bias. If the Respondent's Recusal Application is based on the complaint made by me in my judicial capacity, the proposition of there being an appearance of bias as it relates specifically to the Respondent in this matter falls apart entirely.

22. The reliance Counsel for the Respondent places on the specific content and wording in the Letter to Bar Council in my view is irrelevant. Whilst Counsel for the Respondent may dislike the content of the Letter to Bar Council, I do not accept this has any bearing on this application. Not only is there a duty of any judicial officer to report serious infractions committed whilst appearing in the courts, the scrutiny of the wording of any such complaint for fear of an application such as this would be unprecedented.

23. No doubt, Counsel can appreciate the requirement to comply with Practice Directions as well as the Bermuda Bar Act 1974 and the Barristers' Code of Professional Conduct 1981. Any failure of Counsel to comply with such cannot be ignored by a judge, the Registrar or any member of the judiciary for that matter. Indeed, the late, former Chief Justice Sir Richard Ground, evidently contemplated the necessity to voice the judiciary's ability to refer matters to Bar Council for such infractions committed by Counsel. Counsels' appearances before the courts are specifically addressed in the Practice Direction No. 7 of 2007 at paragraphs 1 and 2:

"***Punctuality***

1. *Counsel are reminded that it is their duty to be before the Court at the time fixed for the start of any hearing, robed (where appropriate) and ready to start on time. They should understand that the Court will start whether they are present or not, and will not wait for them.*

2. *Counsel who do appear late should normally apologise to the court and offer an explanation. In the absence of a satisfactory explanation the Court may refer the matter to the Bar Council or proceed summarily against the Counsel concerned for contempt in the face of the Court.*" [Emphasis added]

24. If Counsel do not appear in court on dates and times required to do so without explanation, there is absolutely no restriction on the judge in making enquiries to ascertain the veracity of the explanation. The gathering of all facts necessary to determine an application and/or the next steps in case management cannot be criticized.

Conclusion

25. The Respondent has provided no evidence to support the notion there would be any appearance of bias I would have as it relates to the Respondent/Applicant. All of the case law is clear in providing precedent for instances where the judge has an actual or apparent bias against the applicant rather than against actual or apparent bias against Counsel. Rather, it appears Counsel for the Respondent is attempting to use this application due to the dislike of the findings and orders made in this matter. There is a procedure clearly set out in Rule 131 of the Matrimonial Causes Rules 1974 for the appeal of an order made by the Registrar.

26. Therefore, having considered all of the affidavit evidence which was before me at the hearing and submissions made by Counsel. I am of the view that a fair-minded and informed observer, having knowledge of all the relevant facts, would not conclude that there was a real possibility of the appearance of bias or actual bias. Accordingly, I dismiss the Respondent's Recusal Application.

27. The costs of the Recusal Application should follow the event, unless Counsel for the Respondent makes and application within the next seven days to be heard on costs.

25 May 2021

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ALEXANDRA WHEATLEY
REGISTRAR OF THE SUPREME COURT