

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 150 of 2011

BETWEEN : **ENGINEER PROCURE CONSTRUCTION LIMITED** a limited liability company having its registered office at 5 Nagaga Street, Lautoka, Fiji.

PLAINTIFF

AND : **SIGATOKA ELECTRIC LIMITED** a limited liability company having its registered office at Valley Road, C-/P.O. Box 113, Sigatoka, Fiji.

DEFENDANT

Appearances : Ms. Gul Fatima for the Plaintiff
: Ms. Fazilat Shah & Mr. Gosai for the Defendant
Date of Hearing : 11 March 2024

EX TEMPORE RULING

1. This morning, Ms. Shah of counsel for the defendant, raised a preliminary point of objection, seeking that I recuse myself from presiding over the trial of this matter.
2. She submits that I did deliver a ruling on this matter on 17 March 2015 (“**2015 Ruling**”). At paragraph [26] of that Ruling, I had commented as follows:

The evidence all seem to indicate that what SEL and EPCFL had was a sub-contract. The onus was on SEL to adduce evidence otherwise. I agree with the Master’s analysis that SEL has failed to adduce clear and precise evidence dealing specifically with EPCFL’s claim and which raises any triable issue on the joint-venture responsibility for seeing that all electrical works on the project was installed according to specifications.

3. Ms. Shah's objection is based only on the above comments.
4. By way of background, the main issue between the parties in this case is whether the particular arrangement they had in a particular construction project was a joint-venture or whether it was a sub-contract.
5. I observe that in my 2015 Ruling, I was dealing with an application for a stay of Master Ajmeer's decision. Master Ajmeer had determined that what the parties had was a sub-contract and, on that basis, he had granted summary judgement.
6. I accept that a Judge presiding over any case has a duty to be independent and impartial (sections 1, 15(1) and (2), 16(1) (c) and 97(4) of the 2013 Constitution).
7. Society has every expectation that a Judge will carry out his or her oath of office to the fullest and that he or she will be able to clear and set straight his or her mind of irrelevant factors which might cloud his or her judgment – in any given case.
8. Hence, when a Judge takes office, he or she must take an oath of office which includes *inter alia* a promise to apply the Constitution and the law and administer justice impartially without fear, favour or prejudice.
9. This is important in the interest of a "*fair trial*", for there can be no fair trial if a Judge is partial. As Poonan JA of the Supreme Court of Appeal of South Africa said in **S v Le Grange** 2009 (2) SA 434 (SCA):

[21] As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. 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'. In common usage bias describes 'a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.'

10. That societal expectation finds expression in the provisions and in the core values of the 2013 Constitution which I mention above.
11. Flowing from that, the law presumes that a Judge who has taken the judicial oath, will be impartial in any matter placed before him or her.
12. It follows *ipso facto* that the law must place a heavy burden on a party alleging impartiality or biasness against a particular Judge.
13. That heavy burden is translated to the requirement that - a party alleging bias or impartiality - must produce cogent or convincing evidence (see **Amina Koya v State** Supreme Court of Fiji Criminal Appeal No. CAV 002/97; **Muir v CIR** [2007] NZCA 334 as cited by Mr. Singh in submissions).

14. As Lord Hope said in **Porter v Magill**:

"The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

15. I accept that a judge must recuse himself or herself in any case where he or she has an interest, or, where the judge has uttered words while presiding over a case - and where the interest or the words uttered are likely to raise an apprehension of bias in the mind of the reasonable observer.
16. However, as a point of case management, I am also mindful that a Judge who yields too easily to a recusal application for which no cogent or convincing evidence is raised, may actually be inflicting injury to the administration of justice.
17. In **Locabail (UK) Ltd v Bayfield Properties Ltd** [2022] 2 WLR 870 (cited in **Chief Registrar v Iqbal Khan** CBV 0011 (22 April 2016) (cited by Mr. Singh in his submissions), the court said inter alia at [25]:

The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more, found a sustainable objection..."

18. In this case, Ms. Shah is concerned that I had expressed a certain predisposition in paragraph 26 of my 2015 Ruling.

19. She also points out that after I had refused stay of the Master's decision in 2015, I had then transferred to Sapuvida J the subsequent application for leave to appeal on account of the very same observation I had made in paragraph 26. This is all recorded in a Ruling of Sapuvida J dated 29 August 2016.
20. Admittedly, I do not remember much of this case. However, I am also mindful that the test is whether a fair-minded and informed observed observer, having observed the facts, would conclude that there was a real possibility that I would be already set in my mind.
21. Having considered all the above, and mindful of the age of this case (2011 case), and the likelihood of an appeal should I refuse the application to recuse myself (which would only set the case back further), I have spoken to the Learned Mr. Justice Mackie who has so kindly and graciously agreed to the following:
- (i) That he, Mackie J, will take over the trial of this matter from today.
 - (ii) In exchange, I will take over the trial of his matter HBC 141/20 (**Sailosi Sovui & Ors v David Romeo**)
22. Accordingly, this matter is now transferred to Mackie J who will sit this afternoon to deal with the trial of this matter from today.



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Anare Tuilevuka
JUDGE

11 March 2024



cc: The Honourable Mr. Justice Mackie