IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 21/693 CoA/CIVA

BETWEEN: EILON MASS trading as RAW FOR BEAUTY
Appellant

AND: WESTERN PACIFIC CATTLE COMPANY LTD
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Gus Andrée Wiltens*** ***Hon. Justice Richard White*** ***Hon. Justice Viran Molisa Trief***
Counsel:	*Mr E. Mass Appearing in Person* *Mr M Hurley for the Respondent*
Date of Hearing:	*6 May 2021*
Date of Decision:	*14 May 2021*

JUDGMENT

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1. The Appellant, Eilon Mass, appeals against part of the orders made by Aru J on 26 February 2021 in which he ordered:

> 1. *I have reconsidered my decision to recuse myself and recall my ruling of 1 February 2021. I have not provided the reasons for my recusal and upon further reflection on the submissions made there is no basis for the application for disqualification to be made. Hence this Minute and I provide my reasons below.*
>
> 2. *Mr Mass has not filed any evidence that would meet the test set out above therefore the application for disqualification fails and is dismissed.*

2. In essence Mr Mass raises three points in support of the appeal.

3. First, he submitted that the Judge had no right to issue the Minute, given that he had earlier issued a ruling on 1 February 2021 (the Ruling) in which he had disqualified himself. Second, Mr Mass submitted that there had been a failure by the Judge to provide adequate reasons for his decision to not recuse himself. Third, he submitted that on any overview, the Judge should have disqualified himself for bias. He set out a number of factors that he submitted showed bias. As a fourth ground of appeal, he had also alleged errors in fact and law by the Judge in the Minute of 26 February 2021, but he did not expand on this ground.

Was the Judge able to effectively recall his earlier ruling, and reverse his conclusion on recusal?

4. In the period up to 1 February 2021, Mr Mass had applied for the Judge to recuse himself on the basis of actual or apprehended bias under s 38 of the Judicial Services and Courts Act [Cap 270]. The Judge issued a ruling on the issue on 1 February 2021. He stated:

> *4. Noting the submissions and taking into account the fact that the claimant is self-represented, I am recusing myself from the proceeding and return the file to the Registry for reallocation to another Judge.*

5. On 26 February 2021, the Judge issued a Minute. At the start of the Minute, he summarised his position:

> *1. I have reconsidered my decision to recuse myself and recall my ruling of 1 February 2021. I have not provided the reasons for my recusal and upon further reflection on the submissions made there is no basis for the application for disqualification to be made. Hence this Minute and I provide my reasons below.*

6. He referred to the test for recusal and set out the basis of Mr Mass' application for recusal, and a brief summary of the grounds. He found that Mr Mass had not filed any evidence that would meet the test for bias and stated that the application for disqualification failed and was dismissed.

7. Therefore, he reconsidered his position and decided that he would not be recused. He changed his mind.

8. Section 38 of the Judicial Services and Courts Act reads:

> *(1) If:*
> *(a) a judge has a personal interest in any proceedings; or*
>
> *(b) there is actual bias or an apprehension of bias by the judge in the proceedings;*
>
> *he or she must disqualify himself or herself from hearing the proceedings and direct that the proceedings be heard by another judge.*
>
> *(2) A party to any proceedings may apply to a judge to disqualify himself or herself from hearing the proceedings.*
>
> *(3) If a judge rejects an application for disqualification, the applicant may appeal to the Court of Appeal against the rejection. If an appeal is made, the judge must adjourn the proceedings until the appeal has been heard and determined.*
>
> *(4) A judge who rejects an application for disqualification must give written reasons for the rejection to the applicant.*

9. The Civil Procedure Rules 2002 do not set out any process for recall of a recusal, or indeed any power of recall at all. However, under s 28(1)(b) of the Judicial Services and Courts Act 2000, the Supreme Court has all jurisdiction that is necessary for the administration of justice in Vanuatu. The overriding objective of the Civil Procedure Rules 2002, rule 1.2(1) is to enable the Courts to deal with cases justly. At rule 1.2(2), this objective includes, "(a) ensuring that all parties are on

an equal footing; and (b) saving expense; and (c) dealing with a case in ways which are proportionate".

10. Mr Mass, who represented himself, relied on a statement in *Apia v Magrir* [2006] VUCA 10 for the proposition that a Judge could not recall a decision to recuse himself or herself:

> *"Once a judge has decided that he or she is disqualified from hearing or continuing to hear a matter, that is the end of that question, save in exceptional circumstances where necessity requires the judge to continue because there is no other judicial officer to take over."*

11. In that case, the challenge to the decision to recuse came from a party wishing the Judge to continue to sit. The Judge had not changed his mind and appeared to stand by his decision. However, that is quite different from the present case.

12. A decision by a Judge to recuse himself may well not be an interlocutory order in the ordinary sense of the term. However, it is not a decision which determines the rights of the parties, or a final decision on issues determined during a trial or on appeal, and it has at the least similarities to an interlocutory order. It was stated in *Apia v Magrir* (2006) VUCA 10 that a Judge may re-visit interlocutory orders if they can be shown to be mistaken in law. Such an error should be corrected so the matter proceeds to Court on the correct basis. A Judge can issue a new decision if an error has been made.

13. It was stated in *Apia v Magrir* [2006] VUCA 10:

> *"As the orders made by the Supreme Court on the application dated 4 August 2004 were interlocutory orders, the res judicata principle has no application. That is a principle which applies to final decisions on issues raised and determined after a trial (or on an appeal therefrom). That is not to say, however, that where there has been a hearing on a factual issue in the course of deciding an interlocutory application that there may not arise an "issue estoppel" relating to an essential factual issue that has been clearly raised and decided. That occurred here on the question of whether an appeal had been instituted by Mr Taur and whether there was an agreement between the parties pursuant to which Mr Taur sent the notice to the Chief Registrar withdrawing his appeal."*

14. We should say in this regard that a recusal decision by a Judge is not to be taken lightly. Judges have a duty to the public and to their fellow Judges to deal with the work allocated to them. If a Judge is unable to continue to hear a case that has been allocated to that Judge, particularly where there have already been attendances on the matter by the Judge and the Judge is familiar with the file, there must be a good reason for the recusal. It cannot be just because a party seeks it. There must be reasons so a party can understand the Judge changing his mind on the point. As we say later in this judgment, there was in our view no good reason for the Judge to recuse himself in this case.

15. Although there are obvious limitations on Judges changing their minds, in this case, given the very personal nature of a decision to recuse, the unreasoned original decision that was in fact given, and as we will say below, the lack of any apparent reason for a recusal, lead us to a decision that

the Judge did have the power to effectively change his mind on the point. Indeed, it was proper that he did so. On further reflection, the primary Judge considered he was not disqualified for bias.

16. Thus, the first ground of appeal that there was no power for the Judge to change his mind and change the ruling on recusal, is rejected.

The lack of reasons

17. This submission must fail because, as a matter of fact, the Judge did indeed give reasons for his decision not to disqualify himself. In contrast, he had not given reasons in his initial ruling.

18. In his Minute of 26 February 2021 the Judge had, as we have set out, noted that he had not given reasons for his original recusal and that upon reflection there was no basis for his disqualification.

19. Later in the Minute, the Judge elaborates on his reasons. Mr Mass' submission sets out that he has waited seven years for the case to reach final judgment and sees no justice. The Judge notes that Mr Mass' submissions are very general, and he raises issues yet to be determined. Other matters that he raised were for the trial proper. He noted the many amended pleadings that had been filed. In general, it is plain that the Judge had not had any matters put to him that would warrant recusal.

20. The Judge in the Minute sets out the relevant principle, quoting from the relevant case of *Mass v Minister of Internal Affairs* [2019] VUCA 27. He explains why in the light of that test he is not going to recuse himself. Plainly, he does not consider that the test has been met.

21. The fact that Mr Mass might not like, or agree with some of the reasons given, is not the point. Therefore, this second submission fails.

Was the Judge biased?

22. In a lengthy submission, Mr Mass refers to numerous actions and statements by the Judge that he says shows actual or reasonably apprehended bias. He says for instance that the wrongful approach of the Judge included:

- Change his decision 180 degrees in the matter of parties to the case.
- Refuse to consider admissible evidence.
- Consider evidence which is inadmissible.
- Giving misleading statements in his judgment in relation to evidence and facts related to said evidence.

23. He submits that the Judge made contradicting decisions, "in a suspicious and concerning manner". He says the Judge showed incompetency in his actions and acted in a way that was dangerous to the fairness of the proceedings. He says that the Judge failed to read documents and evidence and omitted admissible evidence. Mr Mass blames delays of seven years on the Judge. He is critical of various statements by the Judge which he says were not correct.

24. All these detailed criticisms focus on the performance of the Judge when he was dealing with matters in Court or in relation to Court matters or his actual decisions. They were all in the category of matters commonly raised on appeal. Indeed, some were appealed. They were actions and decisions that Mr Mass plainly disagreed with, but that is no reason at all for a finding of actual or apprehended bias. We have examined the numerous complaints of Mr Mass and can see no action that warrants recusal.

25. Section 38 of the Judicial Services and Courts Act, set out at paragraph [8] of this judgment, sets out a test for the disqualification of a Judge. Disqualification arises where a Judge has a personal interest in any proceedings or there is actual bias or an apprehension of bias by the Judge in the proceedings. There can be no suggestion that the Judge in this case had any personal interest in the proceedings. Nor do we see in any of the examples given any evidence of actual bias, or anything that could lead to an apprehension of bias by the Judge.

26. The test for apprehended bias has various formulations in overseas jurisdictions. They can be summarised as requiring a determination of whether a fully informed fair minded observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the Court is required to decide.

27. The Judge has made decisions, as Judges must. Some of them, perhaps most of them, have displeased Mr Mass. However, that is not a reason for the recusal. Mr Mass has failed to point to any action or words from the Judge indicating bias. Everything he points to indicates a Judge making a decision or giving reasons or making rulings and observations as a case proceeds. None of them contain inflammatory language or anything to show a personal interest or partiality.

28. Accordingly, this third submission is also not accepted.

Conclusion

29. None of the grounds in support of the appeal are accepted, and accordingly the appeal is dismissed.

30. The respondent is entitled to standard costs to be paid by the appellant. Those costs, if not agreed, are to be assessed by the Master; and once set are to be paid within 21 days.

DATED at Port Vila, Vanuatu this 14th day of May, 2021

BY THE COURT

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Chief Justice V. Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU