

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COMMONWEALTH OF DOMINICA

DOMHCV 279 OF 2019

BETWEEN:

[1] LOFTUS DURAND
[2] ATHERTON MARTIN
[3] DR. IRVING PASCAL
[4] NICHOLAS GEORGE
[5] DALE LAURENT
[6] OSWALD GEORGE
[7] ATHERLEY ROBIN

Applicants

AND

[1] PRESIDENT OF THE COMMONWEALTH OF DOMINICA
CHARLES A. SAVARIN
[2] THE ELECTORAL COMMISSION
[3] CHIEF ELECTIONS OFFICER IAN ANTHONY
[4] CABINET OF THE COMMONWEALTH OF DOMINICA
[5] DOMINICA BROADCASTING CORPORATION
[6] THE ATTORNEY GENERAL OF THE COMMONWEALTH OF
DOMINICA

Respondents

Appearances:

Justin Simon QC, Cara Shillingford, Singoalla Blomqvist Williams, Elue John Charles, Julian Prevost, Ronald Charles, Joshua Francis Counsel for the applicants

Lennox Lawrence & Jodie Luke Counsel for the 1st named respondent

Tameka Hyacinth Burton Solicitor General with Jo-Anne Xavier Cuffy Counsel for the 4th and 6th Respondents

Stephen Isidore of CC Law Practitioners Counsel for the 5th named defendant

2019: November 29

ORAL RULING

[1] **Stephenson J.:** Before the court was an application for me to recuse myself from hearing the application for leave to file judicial review, for an injunction and to make several declarations. The application was filed on the 29th November 2019 with an affidavit sworn in support by the first named applicant. The Court heard arguments and received submissions for and against the application and ruled orally on same. These are the written reasons for my decision.

The application and the evidence adduced:

- [2] The grounds for the application as appear in the application filed can be stated thus:
- a. That an individual should not be a judge in his or her own cause. That I, the judge, through my own words and actions appear to identify so strongly with the respondents that I will be a judge in my own cause if I proceed with hearing the claim at bar;
 - b. That justice must not only be done but must be seen to be done; that I have an apparent bias against the applicant particularly the UWP candidate Nicholas George and in favour of the respondents;
 - c. That it would be in the best interest of justice for members of the public to have confidence in a justice system which is independent, fair and without bias.

- [3] In his affidavit sworn and filed on even date the deponent Loftus Durand, President of the Concerned Citizens Movement, stated that the facts as stated, inter alia, that he did not think that the applicant would be able to have a fair hearing before me for the following reasons: I have in parenthesis stated my response to the deponent's statements.
- a. That there has been public outcry against certain decisions given by me over the past years in matters of a political nature and that I am widely regarded as being biased in favour of the Dominica Labour Party. (The deponent failed to adduce any evidence in support of his statement)
 - b. That there has been widespread public outcry regarding delay in giving judgment, it is to be assumed in a matter of a political nature, given in favour of the Dominica Labour Party. (The deponent again failed to give any accurate or credible evidence regarding this accusation;)
 - c. That he was informed by certain persons and verily believed that I allegedly commented on a chant being made in protest outside the court house, which in his interpretation meant that I was identifying with the leader of the Dominica Labour Party, when the crowd was shouting "*Skerrit must go*" that I stated that I wished someone would run through the crowd shouting "*Bernie must go*". (The applicant in his affidavit sought to use words allegedly uttered by me which was something not said to him or in his hearing and more so something which on its face appear to be in jest, that is something that was said in amusement as a reason to ascribe apparent bias. Apart from the words being hearsay and not amounting to admissible evidence, the said words, if uttered at all, were not uttered *ad hominem* and most certainly is not evidence of a closed mind on my part as the applicant sought to imply.)
 - d. That he has noted that I sometimes show difference in the treatment of persons who are perceived supporters of the Dominica Labour Party and give them preferential treatment as against persons who are perceived as supporters of the United Workers Party: (The deponent who has one other matter pending before the court has failed to adduce any evidence in support of his statement)
 - e. That he has been informed by Mr Joshua Francis, a UWP party candidate, that he requested that the learned judge seal his divorce file which was being widely publicized and read on the radio without the Court's intervention and that Mr Francis was informed that I had no authority to seal a divorce file. (there was never an application made before the court for the sealing of this file and the oral request that the court would consider doing this was met with the response that the court would consider an application however counsel will have to make submissions on the law that

would permit the court so to do. This statement was corroborated by the affidavit of Joshua Francis himself filed on Friday, 29th November 2019 which does not corroborate the statement made by Mr Durand. It in fact, the affidavit of Mr Joshua Francis shows that Mr Durand was making a statement about that which he was not properly informed of.)

- f. That recently this court has sealed the divorce file of a lawyer whose wife filed a divorce petition against him which lawyer is the chairman of the Elections Commission and a person who was nominated to that post by the DLP and that I made an order sealing the said divorce despite the fact that I refused to seal Mr Francis' divorce. (That firstly there is no file before the court where wife of the Elections Commission has filed for divorce as averred by Mr Durand. Further that there are matrimonial proceedings before the court where an interlocutory order has been made **based on the law** and certain other submissions made to the court with liberty to the respondent to have the interlocutory orders revisited. Again, the deponent Mr Durand makes a wild and unsubstantiated and uninformed statement in his affidavit).
- g. That in DOMHCV2015/0166 I delivered a decision that the respondents in that matter who were all Government elected officials could not be charged with the election offence of treating and that I quashed the magistrate's decision to issue summons to the said officials. That I delivered the decision about three years after the application for judicial review was filed and almost two years after the matter was heard. That said decision has been appealed and that they are awaiting a ruling from the Court of Appeal on same.
- h. That following my decision aforesaid the DLP continues to engage in the said activity described as "criminal and wasteful acts of treating as they engaged in the 2014 election campaign";
- i. That there are several pending judicial review matters which I have not heard challenging the oppressive and unlawful conduct of state agents;
- j. That whilst he does not know me personally, he does not believe I am able to deal with the case at bar fairly because of my apparent political preferences which are widely discussed by members of the public.

[4] A notice in opposition to the application for my recusal was filed by the first named respondent with an affidavit in response wholly opposing the recusal application.

[5] In the affidavit sworn in support the deponent Miss Leoma Prince who is employed as a legal clerk in the chambers of Counsel representing the first named respondent stated among other things the following:

- a. That on the 26th November 2019 the applicants, through one of their Counsel, wrote to the Learned Chief Justice Dame Janice Pereira requesting that a special judge be assigned to hear the substantive application at bar on the grounds that the matter was of constitutional importance, of the recent political climate in Dominica and that there was a risk of political reprisals against any resident judge who hears and determines said claim. A copy of the letter was exhibited to the affidavit.
- b. The said letter also requested of the Learned Chief Justice that if she is not minded to send a special judge to hear the matter that the application be assigned to another judge as I delivered a judgment in a previous matter which is closely related to the case at bar which is being appealed by the lawyer writing the letter;
- c. "That there is no intention to cast aspersions on the integrity of the resident judges who continue to serve the cause of justice";
- d. That the affidavit sworn in support of the application to recuse contains a number of aspersions being made against me which is based on hearsay and suspicious political rhetoric which are both inflammatory and contemptuous of court;
- e. That as it regards the reference to my refusing to seal the divorce file of Mr Joshua Francis it is false in that it was Counsel Mr Lennox Lawrence who made that application to seal which was resisted by Mr Francis' attorneys.
- f. That there is an article published in Dominica News Online which confirmed the request made by Counsel Miss Shillingford to the Learned Chief Justice aforesaid which request was refused and the deponent stated that she took this to mean that the applicants request to assign the case to another judge or another judge other than myself was refused by the learned Chief Justice. A copy of the online article was exhibited. That the application which is now being made for me to recuse myself is a frontal challenge to the decision made by the learned Chief Justice and a veiled threat of political reprisal against any resident judge who hears and determines the substantive application.

[6] Mrs Singoalla Blomqvist Williams, one of the lawyers on record for the applicants herein, subsequently filed an Affidavit in reply sworn by Mr Joshua Francis addressing the issue of the request to seal his divorce file, of his request to meet with me and for me to seal his file and of a message allegedly relayed to him by the then Deputy Registrar of the Titles Registry that I said I did not have the jurisdiction to seal a divorce file unless he can provide authorities allowing me to do otherwise.

[7] Mr Francis further averred that the petition was subsequently withdrawn because his lawyer drew to the court's attention that the petition was defective and that a new petition was filed by his wife and before he was served with said petition it went hyper viral on social media and on the radio where it was read and discussed for two weeks.

[8] This court heard arguments on behalf of all the parties who up to the time of hearing had entered appearance in the matter.¹ After hearing the arguments I gave an oral decision refusing to grant the order as prayed and promised to provide a written decision for my reasons.

The law

[9] "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour": ***Re JRL ex parte CJL***²

[10] In **Porter-v-Magill**³ it was said that the court must first ascertain all the circumstances which have a bearing on the suggestion that a judge was biased. Or as in this case is likely to be biased.

¹Appearances were entered for the first, third, fifth and sixth respondents

²(1986) 161 CLR 342 at 352, per Mason J, High Court of Australia recited in *Locabail*[2000] QB 451 at paragraph 22.

³ [2001] UKHL 67, [2002] 1 All E R 465

[11] The legal test for apparent bias is well settled by authority and was stated by Lord Hope in **Porter –v- Magil** to be *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."...⁴*

[12] Each case turns on its own facts and merits.

[13] Do circumstances asserted by the applicant lead a fair minded and informed observer to conclude that there is a real possibility or a real danger, the two being the same, that this court as currently constituted would be biased?

[14] What is in the present case that gives rise to apparent bias?

- a. By reason of the fact that I have been involved as judge in decisions adverse to the applicants' interest in previous judicial review and constitutional proceedings. My comments follow:
 - i. Firstly, regarding the evidence adduced by the applicant who must prove his case in this regard. The applicant failed to show that across the board I , over the years that I, having served the Commonwealth of Dominica as one of their resident judges in both the criminal and civil jurisdictions, that I have ruled solely in favour of the DLP as he would seem to want to suggest. The applicant failed to aver that there have been over the years decisions that have been handed down by myself for and against the DLP and the Government of Dominica some of these decision have never been appealed and some of which have been appealed even as recently as the last sitting of the Court of Appeal in Dominica where the decision (the Treating Case) referred to by him was reserved. The deponent also failed to take note or refer to the fact that in the said sitting there was a decision in favour of the UWP which was successfully appealed by the DLP where my decision was overturned;
 - ii. Secondly, the applicant failed to be advised, appreciate or mention that due to the passage of Hurricane Maria the Civil High Court was destroyed along with all the files that were then due for decision and that to date the civil court still has no permanent court room or chamber save for a few months and that a significant amount of files were never fully recovered. The deponent failed to aver that the

⁴ibid, Helow –v- Secretary of State [2008] UKHL 62

decision along with other decisions that were rendered were all written out of Dominica based on my personal notes and efforts to recoup and recover all the necessary information allowing the decisions to be prepared.

iii. That in my respectful view when Mr Durand sought to make a criticism of this court on the grounds of the time that it took me to deliver a judgment he failed to acknowledge or be advised or be aware of the fact that the court has since the passage of Hurricane Maria and in all the circumstances existent in Dominica at this time has not heard matters which has been for the most part due to the unavailability of files or court room for the court to adequately function.

iv. In **Locabail-v- Bayfield Properties Ltd.**⁵it was held that

*“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 something more found a sustainable objection”*⁶. Therefore the applicants submission regarding this court having made a ruling against parties with similar interests as the applicants involving some of the same defendants in the case at bar is not a sufficient ground for this court to recuse itself. The application in this regard therefore fails.

[15] The applicant contends that this court as currently constituted should, based on a comment which was allegedly made by the court which was not heard by the deponent himself, not be a judge in its own case and therefore should recuse itself. This is in my considered view a misconceived notion on the part of the applicant. In **R –v- Bow Street Metropolitan Stipendary Magistrate Ex Parte Pinochet Ugarte (no 2)**⁷it was held that “the fundamental principle that a man may not be a judge in his own case was not limited to the automatic disqualification of a judge who has a pecuniary interest in the outcome of the case but was equally applicable if the judge’s decision would lead to the promotion of a cause in which he was involved together with one of the parties; ...”

⁵ [2000] QB 451

⁶ *Ibid* at paragraph 25

⁷ [2002]1 A.C. 119

[16] There has been no evidence adduced before this court creditable or otherwise that would suggest that this court as currently constituted has either a personal or pecuniary interest in the outcome or even an interest in the substantive case at bar.

[17] It is accepted by this court that where an applicant is seeking to have a judge recuse him or herself from hearing a matter that applicant need only rely on a perception or possibility of actual bias without there being actual bias; however, the evidence adduced by this applicant in this regard falls woefully short of establishing such a perception.

[18] In **Locabail-v- Bayfield Properties Ltd**⁸ the court in examining what can be considered apparent bias opined that ordinarily an objection can be soundly based on, among other things, extracurricular utterances. In the case at bar the utterances which the applicants seek to rely on was a statement made in “iocas” or in jest and were most certainly not “*ad hominem*” or directed to anyone and were not words that could possibly show a closed mind as alleged.

[19] The applicants have not adduced any factual evidence that would lead a fair-minded observer, even the average person travelling on the minibus in Dominica to any destination, to conclude that this court as currently constituted would be biased in the case at bar. Neither has there been any acceptable evidence adduced to this court that would create any logical connection between the substantive application before the court and the imagined or feared departure from the accepted course of dealing with the case on its merits. There has been no facts or evidence laid before the court that properly identifies any issue that could possibly lead this court to decide the substantive issue other than on its factual or legal merits.

[20] It is important to consider and note what the attributes of the objective bystander are. The objective bystander is an informed person, a person who knows the relevant facts and is fair minded. (**re: Gillies –v- Secretary of State for Work & Pensions**⁹).

⁸ supra

⁹ [2006] UKHL 2, [2006] 1 ALL E R 731 at paragraph 39

[21] A fair-minded observer is not unduly sensitive or suspicious. (**Re: Johnson –v- Johnson**¹⁰ Kirby J had this to say in describing the objective bystander

“Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded the bystander, before making a decision important to the parties and to the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that the adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also be taken to have, at least in a very general way, some knowledge of the fact that the adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to parties or their representatives, which has been taken out of context.”¹¹

[22] When the context and the entire circumstances as stated in the affidavit in support of the application to recuse are taken into account, a fictitious bystander, observing what was said and done, would not, in my respected view, come to a reasonable apprehension or conclusion that there would be apparent bias on the part of this court or that this court will bring an partial and prejudiced mind to the resolution of the issues before me.

[23] Considering the issue of real bias, more particularly the concerns raised by Mr Durand in his affidavit in support of the application to recuse about the decision made in a previous case similar to the case at bar, the Privy Council in the **Berry (Linton) –v- DPP**¹² in examining the issue of bias against the background that two of the judges on the court sat in a previous case in which strong views were expressed as to the guilt of the appellant it was held *inter alia* “that it does not mean that the court’s capacity to exercise independent and impartial judgment when performing the necessary balancing operation is in anyway impaired.”¹³ The court said

¹⁰(2000) 201 CLR 488

¹¹ Ibid At paragraph 53

¹²50 WIR 381

¹³ Ibid at page 385

“The test to be applied is whether there was, in the circumstances, a real danger of bias: see *R v Gough* [1993] AC 646. Their lordships have no doubt that the courts below were right to conclude that there was no such danger. The fact that two members of the court were previously party to a judgment in which strong views were expressed as to the guilt of the appellant in the light of the evidence then before them does not suggest that there was any danger of bias on their part when they came to perform the balancing operation involved in deciding whether or not to order a new trial”.

[24] In **Okirite International Investment Management Limited –v- Urumov**¹⁴ it was held that the fact that a judge has made adverse findings against a party does not preclude him or her sitting in judgment in subsequent proceedings.

[25] In the case cited by the applicants **Walsh –v- Ward and others and other appeals**¹⁵ the Caribbean Court of Justice in applying **Porter –v- Magil**¹⁶ held *inter alia* that

“In determining whether a judge was disqualified from hearing a case, the reviewing court had to place itself in the position of an objective and fair-minded lay observer fully informed of the facts. The pertinent question was whether such an observer would conclude that there was a real possibility of bias. What mattered was not so much the reality of bias or prejudice on the part of the judge, but its appearance. The test was aimed at preserving confidence in the administration of justice and not at censure of the judge. The presumption of impartiality of a judge was not an impenetrable barrier to the making of a successful application that a judge should be disqualified on account of apparent bias. Like other presumptions, it was rebuttable. The professional status of a judge was only one factor that the informed lay-observer would consider. In the instant case, there was evidence that the judges concerned had recently demonstrated that they had carried with them, out of court, some animus against counsel and had been moved to the point of contemplating legal redress against him. It was inconceivable that a lay-observer would not think there was a possibility of bias on the part of a judge who had recently engaged a lawyer to determine whether to institute legal proceedings for defamation against counsel appearing before the judge. It followed that the judges in question should have recused themselves”

¹⁴ [2014] EWCA1315

¹⁵ 87 WIR 101

¹⁶ Op cit

[26] In the case at bar it is clear to this court that the deponent was not fully informed of the facts that he sought to rely on in his pursuit of having this judge disqualified from the hearing of the substantive application at bar.

[27] In the circumstances of this case the applicants have failed satisfy the test for the recusal sought and in the circumstances, I am unable to accede to their application and I so rule. The application therefore stands dismissed.

M. E. Birnie Stephenson
High Court Judge

(SEAL)

BY THE COURT

REGISTRAR