[2015] JMSC Civ. 98

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 06942

IN THE MATTER OF AN APPLICATION BY CLYNICE SPENCE FOR JUDICIAL REVIEW (AN ORDER OF CERTIORARI) TO QUASH A DECISION OF THE RESIDENT MAGISTRATE FOR THE PARISH OF ST. ELIZABETH (HER HONOUR MRS. SONYA WINT-BLAIR) TO ABORT THE TRIAL OF AN ACTION (PLAINT NO. 266 OF 2007)

AND

IN THE MATTER OF AN APPLICATION BY CLYNICE SPENCE FOR JUDICIAL REVIEW (AN ORDER OF MANDAMUS) TO COMPEL THE SAID RESIDENT MAGISTRATE FOR THE PARISH OF MANCHESTER TO PROCEED WITH THE TRIAL OF THE ACTION

BETWEEN	**CLYNICE SPENCE**	**CLAIMANT**
AND	**HER HONOUR MRS. SONYA WINT-BLAIR**	**DEFENDANT**

IN OPEN COURT

Mr. Debayo Adidepe, instructed by Maurice A. Smith, for the Claimant

Ms. Carole Barnaby, instructed by the Director of State Proceedings, for the Defendant

HEARD: May 7 & 8, 2015

JUDICIAL REVIEW – APPLICATION FOR CERTIORARI AND MANDAMUS – ISSUE OF BIAS – ACTUAL BIAS – REAL LIKELIHOOD OF BIAS – PRESUMPTIVE BIAS – WAIVER OF BIAS – WHETHER MAGISTRATE OBLIGED TO PRESIDE OVER CASE IN CIRCUMSTANCE WHERE BIAS WAIVED BY DISPUTING LITIGANTS – BASIS UPON WHICH EXERCISE OF JUDICIAL DISCRETION CAN BE SUCCESSFULLY CHALLENGED IN JUDICIAL REVIEW PROCEEDINGS

ANDERSON, K., J

[1] The underlying facts surrounding this claim are not in dispute. This claim has arisen because of a situation wherein, whilst the learned Senior Resident Magistrate for the parish of Manchester was in the course of presiding over the trial of Plaint No. 266 of 2007 – that being a civil trial which was then underway, as things turns out, the learned Senior Resident Magistrate only became aware, during the trial, that the plaintiff in that Plaint, who is also the claimant herein, then wished to call as a witness on her behalf, an individual who, as it turns out, is the second cousin of the learned Senior Resident Magistrate.

[2] That expected witness' name is: Kenrick Vassell. He is the learned Senior Resident Magistrate's father's first cousin and thus, is her second cousin. Mr. Vassell is about 25 years senior in age, to the learned Senior Resident Magistrate and she grew up very close to him as a child and has always referred to him as, 'Uncle Ken.' The learned Senior Resident Magistrate refers to Mr. Vassell as a father figure and considers him to be a close family relative of hers.

[3] It was only after the plaintiff and her first witness had completed their testimony on May 31, 2012 – this after the trial had commenced on October 15, 2009, that upon further adjournment of the trial, to September 19, 2013, it was on that last – mentioned date made known to the court and thereby brought to the learned Senior Resident Magistrate's attention, that the plaintiff then wished to call upon Mr. Vassell to testify on her behalf. Regrettably, in Magistrate's Courts in Jamaica, witness statements are neither required by any rule of court, to be filed or exchanged/served, prior to trial. It is hoped that this legal lacuna will soon be changed/filled, as for example, if such had not existed, it is distinctly probable that this claim would not be before this court today.

[4] The trial of the said Plaint had been adjourned on a number of occasions, in order to facilitate Mr. Vassell's attendance at trial, as a witness for the plaintiff. That proposed witness (Mr. Vassell), whose name was unknown to the learned Senior Resident Magistrate at any time prior to September 19, 2013, was described by the plaintiff's two senior counsel then representing her, namely: Keith Smith and Debayo Adidepe, as an, 'essential witness' who was, on prior adjournment dates, then overseas.

[5] Having become aware that Mr. Vassell would give evidence in that case, as was entirely appropriate for her to have done, the learned Senior Resident Magistrate called counsel and the clerk of court, who was then present, into her Chambers. On that day – September 19, 2013, counsel who appeared for the defendant, were Mr. Cecil July and Ms. Tamara Green. In Chambers, the learned Senior Resident Magistrate disclosed that Mr. Vassell is her 'uncle' and asked if they (counsel), would object to her continuing to preside as Resident Magistrate at the trial. All counsel who were present, then made it clear to the Magistrate that they would not so object. After counsel had left her Chambers, the learned Senior Resident Magistrate considered the matter privately and after having carefully considered same, concluded that she could no longer continue to preside over the trial of the said Plaint. Upon her return to the court room thereafter, on that same day, the learned Senior Resident Magistrate informed the parties in the matter and their counsel, that she had decided to recuse herself from continuing the trial of the Plaint, which it should be noted, was being presided over by her, as a Judge of both fact and law. Attorney Keith Smith for the plaintiff, then urged the learned Senior Resident Magistrate to reconsider her position on the grounds, as stated by him, of cost and inconvenience. In turn, Mr. Cecil July stated that he was reminding her, that there had been no objection to her continuing as Senior Resident Magistrate in the trial of the aforementioned Plaint. The learned Senior Resident Magistrate though, did not change her mind as to recusing herself and as such, set the matter down for mention on December 12, 2013, before another Magistrate – His Honour Mr. Chester Crooks.

[6] By means of this claim, the claimant seeks orders of certiorari and mandamus, arising from that which she is contending, through her counsel, was the learned Senior Resident Magistrate's legally erroneous decision to recuse herself and her insistence on not continuing to preside over the trial of the relevant Plaint, this particularly in this circumstance, wherein, the respective litigants in that Plaint, had, through their counsel, waived any objection to the learned Senior Resident Magistrate presiding over that trial, on the ground of either 'actual,' 'presumed,' or a real likelihood of bias.

[7] This court is of the considered opinion, that this case is one of those rare cases wherein, as expressed by the learned Senior Resident Magistrate, she could not, because of her relationship by consanguinity, with an important witness for the plaintiff, in the pertinent case which was then underway before her, the credibility of whose evidence would, by the claimant's counsel own frank admission to this court, have been an important plank in the plaintiff's armoury against the defendant in that case, dispassionately consider such evidence and thus no doubt, could not, as she termed it, dispassionately consider the overall case. This was undoubtedly therefore, one of those rare cases wherein, after a Judge has expressed that which is categorized in law as 'actual bias' and recused herself from further presiding over that case, the case has nonetheless, come before a higher court, upon a challenge by the claimant – who was the plaintiff in the court below and who is now aggrieved by the fact that the learned Senior Resident Magistrate has recused herself from presiding over her case.

[8] Actual bias is to be distinguished from 'presumptive bias' and a 'real likelihood of bias.' The latter – two mentioned types of bias, are typically the types relied on in appellate or judicial review court proceedings, as the grounds upon which the appellate court or judicial review court, is requested to allow an appeal either against a verdict or against the refusal of a Judge to recuse himself or herself from presiding, or continuing to preside over a particular case, or is requested to quash an order of that inferior tribunal. The law has developed those two types of bias, in an effort to limit the possibility of bias being part and parcel of judicial decision – making, on a regular basis. This is extremely necessary because, the consequences of bias for the judicial system

which we operate and have long adhered to, are insidious – not only for litigants, and not only also, the justice system, but indeed, for the nation of Jamaica, as a whole.

[9] Actual bias is nearly impossible to prove. It must be remembered that bias on the part of a judicial decision – maker or on the part of an administrative functionary exercising a quasi-judicial function will, by no means, other than in a few now well recognized circumstances, as supported by evidence, be presumed. Bias must be proven by means of evidence. Even in the circumstances now recognized by law, as giving rise to a presumption of bias, it is the party who alleges that said presumption should be applied, that has to bring before the relevant court, the evidence to justify that presumption being drawn. This is equally true, in situations wherein either 'actual bias,' or a 'real likelihood of bias' is being alleged.

[10] The four (4) cases specifically addressing the issue of bias, as are being relied on by to the claimant herein, are all cases which specifically pertain to factual circumstances which, in those cases, allegedly constituted, 'presumptive bias' or a 'real danger/likelihood of bias.' The same is true of the four (4) cases which specifically addressed the issue of bias and which are being relied on by the defendant/respondent.

[11] That this is so, should come as no surprise to anyone, since, as earlier stated, appellate court or judicial review court cases, in which 'actual bias' is being alleged, are extremely rare. Rarer yet, is this type of case and I agree with that which the claimant's counsel accepted, upon invitation made by this court, for him to do so, which is that, there exists no strikingly similar precedent anywhere to be found in caselaw. Just because the nature of a case and the legal submissions surrounding it, are novel though, does not at all mean, much less signify, that such case is without merit.

[12] As to why, proof of 'actual bias' is so difficult and is not usually even alleged, see paragraphs 1-3 of single judgment of Lord Bingham (then C.J.) and Lord Woolf, M.R. and Sir Richard Scott, issued in the **Locabail case** – [1999] EWCA Civ. 3004.

[13] In this court's considered view though, the outcome of this case, does not turn or rest on whether or not this court is correct in its view that this is a case of 'actual bias,' that being, it should be noted, also the view of the defence, as set out both in their written and oral submissions.

[14] This court holds that considered view because the caselaw cited to this court by both counsel, that being the **Locabail case**, has laid down – that even in cases of 'automatic disqualification' of an adjudicator due to either presumptive, or actual or a real likelihood of bias, it is still open to any party with an irresistible right to object to that judge, hearing that case, to waive that 'bias' and thereby, properly permit the adjudicator or judicial officer, to continue to preside over that particular 'case.' See dicta to this effect, in para. 15 of **Locabail case** and also, at p. 593 H and I of **Pinochet case**.

[15] So important is the issue of waiver, to this area of the law, that it ought to be recognized by all, that waiver will be implied if, full or at least, adequate disclosure having been made by the relevant adjudicator or judicial decision-maker, to the parties most directly to be affected by the decisions made, or to be made in that case, those parties, or neither of those parties, make any objection to that person continuing to preside over same. In such a circumstance, waiver will be presumed and it will not be open to the party most aggrieved by a decision of the person who presided, to succeed if a challenge to that decision, whether by means of judicial review, or on appeal, is thereafter mounted in a higher court. See: **R v Sussex Justices**, **ex parte McCarthy** – [1924] L.J.R. 129; and the **Locabail case**, at para. 26.

[16] In this case though, it is the accepted evidence of both sides, that the respective attorneys for both sides, had, after adequate disclosure by the learned Senior Resident Magistrate to them, of the grounds underlying her conclusion that she would have been unable to dispassionately adjudicate on the case which was then being presided over by her, expressly urged the learned Senior Resident Magistrate to continue presiding over that case. As such, the parties to that case had expressly waived any objection to

her presiding over same, on the ground of alleged 'actual,' 'presumed,' or 'real likelihood' of bias.

[17] It is the contention of the claimant herein, as made through her counsel, that in the circumstances, the learned Senior Resident Magistrate was obliged to continue presiding over the case and erred in law, in having decided that she would no longer do so and thus, in having recused herself.

[18] It has been urged upon this court, also by the claimant's counsel, that the recusal of the learned Senior Resident Magistrate, if not set aside by this court, will undoubtedly cause, not only great inconvenience to the parties disputing that case, but also, will come at a significant additional and, as is contended, legally unnecessary, financial cost to them. As such, it is the claimant's contention that the learned Senior Resident Magistrate was obliged to continue presiding over the said case.

[19] This court holds the considered view that when considered in the aforementioned factual and legal context, the following are the issues which now must be determined by this court, for the purpose of its adjudication of this case, by means of which, ultimately, the claimant is seeking an order quashing the decision of the learned Senior Resident Magistrate to abort the trial of Plaint No. 266 of 2007 – **Clynice Spence v Philmore Nephew** and an order of mandamus to compel the learned Senior Resident to proceed with the trial of that Plaint/Action.

[20] Those issues are:

(i) Does a Judge/or adjudicator have a discretion to continue to preside over a case, or *quasi* – judicial proceeding, in circumstances wherein there exists, at the very least, a real likelihood of bias on that Judge or adjudicator's part, but notwithstanding, that that Judge/adjudicator has disclosed same, the parties to that proceeding, waive any objection to that Judge or adjudicator, continuing to preside over same?

(ii) Does it make any difference to the court's expected exercise of that discretion (if such discretion exists at all), that the circumstances which give rise to any form of bias on the part of the Judge or adjudicator,

became known to that Judge or adjudicator during the course of that trial, or *quasi-judicial* proceeding and thus, is disclosed to the parties at that stage, rather than before the commencement of that trial, or *quasi-judicial* proceeding?

(iii) If it does make a difference, what is the nature and precise extent of said difference?

(iv) In what circumstances should a reviewing court, on a judicial review application, quash a judicial exercise of discretion, by a judicial functionary?

(v) Can a reviewing court, on a judicial review application, issue an order of mandamus requiring a judicial functionary to decide on any issue which it is within that functionary's discretion to decide, in the way in which that judicial review court believes that that issue, ought to be decided?

[21] It will readily be recognized from the foregoing, that if no question of there being any discretion on the part of the judicial or *quasi-judicial* functionary properly arises, then, issues numbers (ii), (iii) and (iv) above, do not need to be decided on by this court, at this time, since, if in this case, the learned Senior Resident Magistrate had no discretion to refuse to continue presiding over the trial of the Plaint which had begun before her, then, undoubtedly, she would have erred in law, both in having exercised her discretion and moreover, in having exercised same, in the way in which she did.

[22] This court though, has found itself wholly unable, despite the initially attractive legal submissions put forward by the claimant's counsel in support of the claimant's contention that no such discretion existed, in view of the parties' waiver of bias, to accept that contention.

[23] This court has been unable to accept those initially attractive legal submissions because this court recognizes that as a judicial officer, a Magistrate or a Senior Resident Magistrate – as is the defendant herein, has taken an oath of office to decide on all matters which come before him or her for adjudication, fairly and impartially, or in other words, 'without fear or favour.' It is not to be expected that any judicial officer will

violate that important oath, even if the said judicial officer can make a determination on issues in that case which he or she is presiding over, in a manner which appears to be fair, bearing in mind that full disclosure of the actual, or real likelihood of bias was made by the judicial officer as soon as was realistically and reasonably possible, but the parties nonetheless, wished for the judicial officer to continue to hear and preside over that case.

[24] In such a circumstance, there would be the appearance of fairness and justice being done, if the relevant scenario was considered by a fair minded and informed observer of same, but in fact, justice would not have been done. Both the actual doing of justice and the appearance of doing justice, are undoubtedly, of equal importance. See in that regard, the case – **R v Sussex Justice, ex parte McCarthy** – [1924] Law Journal Reports 129.

[25] It can perhaps be properly stated that in such a circumstance, justice would have been done, insofar as the parties most directly affected by the decisions made by the judicial officer in that case, are concerned. It is though, important to recognize that doing justice in a particular case is not only for the benefit of the parties to that case, but indeed, is of the utmost importance to the nation's justice system as a whole and indeed, to this nation's very democracy. The doing of justice in each case before any court, is of immeasurable value in ensuring that persons can and do have confidence that the justice system can and should properly be used as the means of resolving intractable disputes. Whilst it is true that justice is not and will not be carried out in circumstances wherein, each and every adjudication by a court is made, this does not mean that every effort should not be made by each and every judicial officer to not only ensure that justice appears to be done, but also, to at least as far as it is reasonably and humanly possible for that judicial officer to do so, ensure that justice is actually done.

[26] In the case at hand, it is clear to this court, that had the learned Senior Resident Magistrate continued presiding over the relevant case, she would not only have thereby violated her oath of office, but, also, would have caused an injustice. As such,

regardless of waiver by the parties, in a circumstance such as this, the judicial or *quasi-judicial* officer, has a discretion to exercise, as to whether or not to continue presiding over the case/matter. There can be no hard and fast rule laid down, as to how that discretion is to be exercised in each and every case. It all depends on the particular circumstances of each particular case.

[27] Issues nos. (ii) and (iii) as set out earlier on, can conveniently be disposed of together. Suffice it to state that the stage of the proceedings reached, at the time when the disclosure is made and thus, at the time when the parties waived any challenge to the judicial or *quasi-judicial* officer continuing to preside, can and should make a difference as to how the presiding judge or *quasi-judicial* officer's exercise of his or her discretion as to whether or not at that stage, to recuse himself or herself, ought to be exercised.

[28] In the final analysis, it is the overall interests of justice, considered holistically, which is of the utmost significance in determining how that discretion ought to be exercised in any particular case, this as distinct from merely considering the interest of expediency, or the interests of the parties. The latter two-mentioned factors, are factors to be considered, when one is considering the overall interests of justice, but they are by no means the only, nor even, the most important factors. See dicta to this effect, at paras. 21 ad 26h of the **Locabail case** and paras. 34 and 35 (v) of the case – **Jones v DAS Legal Expenses Insurance Company Ltd. and ors.** – [2003] EWCA Civ. 1071; and paras. 6 and 29 of the case – **AWG Group Ltd. and anor. v Morrison and anor.** – [2006] 1 ALL ER 967.

[29] **The AWG Group case**, it should be noted, bears some similarity to the present case and in that case, it was held by England's Court of Appeal, that disqualification of a judge for apparent bias, or in other words, on the grounds that there existed either presumptive bias or a real likelihood of bias, is not a discretionary matter. Once therefore, there exists a real possibility/likelihood of bias, the judge would be automatically disqualified, regardless of inconvenience, cost or delay.

[30] Thus, it needs to be made clear at this juncture, that in the case at hand, the learned Senior Resident Magistrate had a discretion to exercise as to whether to recuse herself or not, only because, having made full or, at least, adequate disclosure, at the earlier possible opportunity and the parties having waived their right to complain of bias, it was then open to her to continue presiding over that case. This is so because, parties can waive 'automatic disqualification.' She did exercise that discretion by deciding to recuse herself. She was, it seems to me, entirely correct in having so done and acted, entirely ethically and fully in obedience to the judicial oath which she has taken. She clearly exercised that discretion of hers, taking into account as fully as possible, the overall interests of justice and as she ought to have done, where there existed any doubt in her mind, as to whether she could dispassionately have adjudicated on the pertinent case, she clearly would have resolved that doubt, in favour of recusing herself. That was an entirely correct approach to such a situation. See dicta to this effect at para. 25c in the **Locabail case**; and at para. 34 of the **Jones and DAS case**, wherein the court stated – '*If the thought crosses the judge's mind that the conflict of interest could actually affect his mind, then he should recuse himself.'*

[31] Suffice it, at this stage, to only state as follows, in response to issues nos. (iv) and (v) as set out above, which also, for the sake of convenience, will be addressed together in this judgment. A court will not lightly interfere with the exercise by a judicial officer, of his or her discretion. It will only interfere in circumstances wherein said discretion had been exercised either demonstratively in bad faith, or demonstratively contrary to law, or in such a manner that no reasonable tribunal could properly have exercised same. See: **Associated Provincial Picture Houses Ltd v Wednesbury Corpn.** – [1948] 1 K.B. 223; **and re King's Application** – [1988] 40 W.I.R.15.

[32] In the case at hand, not only has the claimant not, at all, brought before this court, any evidence capable of satisfying this court, that it ought to interfere, in any way, with the learned Senior Resident Magistrate's exercise of her discretion to recuse herself, she has not even put before this court, as a ground of her application for judicial review, the contention that the learned Senior Resident Magistrate, having exercised

her discretion to recuse herself from the pertinent case, exercised said discretion in a manner such that same could and should now be quashed by this court.

[33] Indeed though, it is not at all surprising that no such ground was alleged, or evidence brought to bear on these proceedings, since throughout, it has been the claimant's contention that the learned Senior Resident Magistrate had no discretion to recuse herself, once the parties had expressly and with knowledge of the pertinent background information, waived challenge to her continuing to preside over the case. For reasons already given, this court considers said legal viewpoint, to be an erroneous one.

[34] As far as the remedy of mandamus which is being sought also, is concerned, this court will not order same, as it is not now open to this court, to direct the learned Senior Resident Magistrate as to how it is that she is to exercise her discretion. That discretion is one which is at all times, hers to exercise. This court, in any event, is entirely precluded from granting mandamus, in circumstances wherein, no quashing order will be made.

[35] Only one more important legal point needs to be made, before concluding this judgment and it should be noted that this legal point would, in and of itself, have been entirely dispositive of this claim. This court though, did not refer to this legal point, earlier on in this judgment, because this court thought that it would be useful to expound on the applicable legal principles as regards bias and to apply those principles to the particular facts of this particular case, prior to referring to that legal point. Said legal point can simply be stated as follows: The ruling of a Resident Magistrate is amenable via certiorari, only if the Magistrate had either acted in excess of jurisdiction, or without jurisdiction. As such, if the Magistrate has allegedly erred in law and a challenged to that Magistrate's decision, is mounted on the basis of that alleged error of law, that challenge can only properly be mounted by means of an appeal. A judicial review court and a judicial review process, are not the appropriate forum and means respectively, for the pursuit of such a challenge. In that regard, see: **Brown and Others v Resident**

Magistrate, Spanish Town Resident Magistrate's Court, St. Catherine – [1995] 48 W.I.R. 232.

[36] The claimant herein, having mounted her judicial review challenge on the ground that the learned Senior Resident Magistrate erred in law, ought to have mounted her challenge by way of an appeal, if statute so permitted. Even if statute does not so permit though, this would not entitle the claimant to challenge the learned Senior Resident Magistrate's decision, by means of judicial review.

[37] In the circumstances therefore, judgment is entered for the defendant. In accordance with **rule 56.15 (5) of the Civil Procedure Rules (CPR)**, since this court is not of the view that the claimant acted unreasonably in the filing of her application for judicial review, this court makes no order as to the costs of this claim. The defendant shall file and serve the judgment order.

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Hon. K. Anderson, J.