A The appellant's cautioned statement to PW4 reads in part as follows:

> ... tulipofika huko tulimkuta ametoka na baadaye alikuja na hapo nilimwambia shida zangu kuwa AMUUE MAMA YANGU, kwa vile yeye anafahamu vizuri kazi hiyo na hapo tulikubaliana na Lifa s/o Nkinga na nilienda mwezi
B wa Desemba 1993 tarehe sikumbuki na tulipatana kwamba mimi nitampa ng'ombe mbili na TZS.. 20 000 (siku hiyo nilitoa TZS. 10 000)

And he continued:

C
> niliyejua kuwa alimuua ni Lifa s/o Nkinga kutokana na makubaliano yangu na yeye sijui alikuwa na watu wangapi siku hiyo ya mauaji hayo.

It is our considered view that the appellant falls within the ambit of section 22(d) of the Penal Code. The appellant procured Lifa Nkinga
D to murder the deceased and was properly charged with actually committing it. For the reasons we have hopefully amply given, we find no merit in the appeal. It is accordingly dismissed.

E

REGISTERED TRUSTEES OF SOCIAL ACTION TRUST FUND AND ANOTHER *v.* HAPPY SAUSAGES LTD AND OTHERS

F

COURT OF APPEAL OF TANZANIA
AT ARUSHA

G

(Lubuva, Munuo and Nsekela, JJ.A.)

CIVIL APPEAL No. 70 OF 2002

H

(From the ruling and order of the High Court of Tanzania at Arusha, Mushi, J. dated 12 April 2002, in Miscellaneous Civil Application Number 10 of 2001)

Civil Practice and Procedure – Bias – Test to be applied where there is allegation
I *of bias.*

Civil Practice and Procedure – Disqualification of a Judge from hearing a case —Grounds for invoking such a step.

Civil Practice and Procedure – Injunction – Distinction between an injunction "ad interim" and a temporary injunction.

This is an appeal from a ruling of the High Court rejecting with costs an application filed by the appellants which sought the following order that the trial judge disqualify himself from the conduct of the suit or from the conduct of any application, petition or motion pertaining to the suit whether directly or indirectly. The central complaint of the appellants against the Judge was that he was biased against them and conducted the proceeding in a biased way.

Held: (i) The mere fact that a point made or an authority mentioned by an advocate is not specifically referred to in a ruling or judgment is not indicative of bias on the part of the learned trial judge;

(ii) It would be an abdication of judicial function and an encouragement of spurious applications for a judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on application of one of the parties on the grounds of possible appearance of bias;.

(iii) The test for apparent bias is whether the alleged circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Court was biased.

(iv) A temporary injunction may, as it very often does consist of two stages, one granted without finally disposing of the application for injunction to operate immediately till the disposal of the said application and the other granted while finally disposing of the main application to endure generally till the disposal of the suit; and while the former is generally classed as ad interim injunction, the latter is generally called temporary injunction.

Appeal dismissed

Cases referred to:

(1) *Jagjit Singh Khama v. Dr Rhakhal Das* [1988] AIR Calcutta 95

(2) *Laurean G. Rugaimukamu v. Inspector General of Police and Attorney General,* Court of Appeal, Civil Appeal Number 13 of 1999 (unreported)

(3) *Metropolitan Properties Co. (FGC) Ltd.v. Lannon* [1966] 1 QB 577

(4) *R. v. Gough* [1993] AC 646

(5) *Porter and another v. Magill* [1902] 1 All ER 465

Mr Mwandambo, for the Appellants

Mr De Souza and *Mr Merinyo,* for the Respondents

JUDGMENT

(29 July 2003)

Nsekela, J.A.: This is an appeal from a ruling of the High Court at Arusha (Mushi, J.) dated the 12 April 2002 in Miscellanoeus Civil Application Number 10 of 2001 rejecting with costs an application filed by the appellants against the respondents which sought, *inter alia*, the following order:

> That the Hon. Judge be pleased to disqualify himself from the conduct of the above suit or from the conduct of any application petition or motion pertaining to the suit whether directly or indirectly.

The appellants were aggrieved by the ruling of the High Court and lodged this appeal. A nine-point memorandum of appeal was filed. At the hearing of the appeal, the appellants were represented by Mr Mwandambo, learned advocate, and the respondents were represented by Mr De Souza assisted by Mr Merinyo, learned advocates. At the outset, Mr Mwandambo abandoned the second ground of appeal and pressed on with the remaining eight grounds. As far as we are concerned, the central issue before us is whether or not the trial judge who adjudicated upon Miscellaneous Civil Application Number 10 of 2001 should disqualify himself from the conduct of Civil Case Number 27 of 2000 as well as Miscellaneous Civil Application Number 73 of 2000 both of which are still pending in the High Court and are

between the same parties. The first ground of appeal is in the following terms: A

> Appellants having stated on oath that the Honourable High Court Judge had not recorded the proceedings of 24 November 2001, the same Honourable Judge should have had the application heard by another Judge in keeping with the principle that no person may be a Judge in his/her own cause. B

Mr Mwandambo referred us to paragraphs 7 and 8 of Mr Colman Mark Ngalo's affidavit apparently as evidence of this allegation. C

These two paragraphs read as under:

> 7. That the suit was indeed mentioned on the 24 November 2000 and my handwritten notes of the proceedings are annexed hereto and marked "CMNI." D
>
> 8. That on third January 2001 I perused the Court file and found that the record as on 24 November 2000 is completely at variance with annexure "CMNI" E

Mr De Souza responded by stating that this was the first time that the appellants have questioned the accuracy of the Court record and that on this ground, the learned trial judge should have disqualified himself. He added that there was no material difference between the Court record and "CMNI." The Court record as it now stands is the one to be looked at. If there were errors, omissions and the like, an aggrieved party should have taken appropriate measures to rectify the Court record or should have made an application before this Court to remit the proceedings to the High Court for rectification of errors, if any, before the hearing of the appeal. F G

The third ground of appeal provides as follows:

> The Honourable Trial Judge having accepted that he had already made *(sic)* an *ex-parte* order against the appellant just a day before the appellants were due to file their counter-affidavits as ordered by the same Judge, it was not open for him to defend himself or justify his decision to issue the said *ex-parte*. H I

On this ground, Mr Mwandambo submitted that there was no need for the learned trial judge to justify the decision he had made to grant the *ex-parte* interim order on the 27 June 2000. He added that Mr Ngalo had not filed a counter-affidavit and an adjournment had been refused thus depriving Mr Ngalo of the right to be heard. In the result, the appellants had lost confidence in the trial judge. On his part, Mr De Souza submitted that the appellants had been duly served with notice and entered appearance through Mr Umbulla, learned advocate, who prayed for an adjournment because of the nature and urgency of the application.

We are surprised that Mr Mwandambo, learned advocate, should fault the learned trial judge for giving reasons for the decision he had made. Order XX, rule 4 of the Civil Procedure Code 1966 provides:

> Judgments shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

It is our considered view that the learned trial judge was simply discharging his judicial duties by giving his reasons for granting the interim *ex-parte* injunction order. As a judicial officer he was bound to give reasons for his decision. The learned trial judge was not in any way defending himself as Mr Mwandambo would like us to believe. Therefore, we find no merit in this complaint.

The next set of complaint is to be found in ground five in which it is alleged that the learned trial judge had "demonstrated consistent and manifest bias" by not making any reference to the authorities cited by the appellants in support of their case and by making derogatory remarks against them. Five instances were particularly singled out in support of this "consistent and manifest bias". Responding to this submission Mr De Souza, however, was of the view that no bias could be attributed to the allegation that cases cited by the appellants were not considered, if at all that was true. As regards the alleged derogatory remarks, the learned advocate submitted that the appellants should have made an application to have those remarks expunged from the record.

There is no doubt that relevant authorities will be considered and either followed, distinguished, rejected or simply ignored as irrelevant. The point we would like to underscore here is that the mere fact that a point made or an authority mentioned by an advocate is not specifically referred to in a ruling/judgment is not a circumstance indicative of bias on the part of the learned trial judge. Mr Mwandambo has also complained that the language used by the learned trial judge was immoderate. He used the word "derogatory", but we return to the basic issue, did the use of such language show an element of bias on the part of the learned trial judge? In our view after judiciously considering and evaluating the material before him the learned trial judge robustly expressed his viewpoint and reached certain conclusions, right or wrong. It is common knowledge that judicial officers should not be unduly constrained to express their views freely in their judgments because of the fear that we would be asked to disqualify ourselves. It would be wrong in principle if that were to be the case. Mr De Souza mooted the idea that the alleged derogatory remarks could be expunged from the record. That is an attractive idea, but if the appellants were so minded, such an application could have been made at the appropriate time and to the trial Court. It may well be that the learned trial judge made some uncalled for remarks, nonetheless in the circumstances of the case there was no basis for any trial-minded and informed person entertaining the idea that "the learned trial judge was biased". We shall revert to this general complaint of bias later on in the course of this judgment. We now turn our attention to the sixth ground of appeal which reads as under:

> The Honourable Trial judge erred in law and in fact in falling *(sic)* to appreciate that the issue of the *ex parte* order of second July 2001 was not only evidence of manifest bias but was both a travesty of justice and an abuse of judicial process.

This ground of appeal revolves around an interim *ex-parte* order that the Trial Court made on the 27 June 2000. It is important to re-trace the sequence of events that led to this Order. The respondents on the 14 June 2000 filed in the High Court Civil Case Number 27 of

2000 wherein the appointment of the appellants Colman Mark Ngalo and Michael JT Ngalo as Receiver/Managers of the first respondent (Messrs Happy Sausages) is being challenged as of no legal effect. Simultaneously, they filed a chamber summons, Miscellaneous Civil Application Number 73 of 2000 under Order XXXVII, rule 1(a) and Order XLIII, rule 2 of the Civil Procedure Code seeking certain injunctive orders. On the 20 June 2000 Mr De Souza made an application in the presence of Mr Ngalo in order to file an amended chamber summons and supplementary affidavit. The prayer was granted without objection from Mr Ngalo and the Court made the following order:

> *Order:* The applicant is granted leave to file an amended chamber summons and supplementary affidavit. The same to be filed by 22 June 2000. Counter-affidavit to be filed by 28 June 2000. Hearing on 6 July 2000.

As stated above, this Order was made on the 20 June 2000. However, on the 26 June 2000 Mr De Souza wrote a letter to the Court seeking audience to be heard in respect of Miscellaneous Civil Application Number 73 of 2000 "so as to make an application for an interim injunction order." On the same day, in the absence of both parties, the Court ordered that the Court would hear the applicant for interim orders on the 27 June 2000 and that the respondents be served with notice. On the said date, Mr Umbulla, learned advocate, entered appearance on behalf of Mr Ngalo. He made an application that hearing of the application be adjourned to the 29 June 2000 to enable Mr Ngalo to be personally present as he was then in Dar es Salaam and that he had to file a counter-affidavit on the 28 June 2000. On his part, Mr De Souza submitted that certain intervening circumstances prompted him to make the application.

The new pressing circumstances were contained in affidavits deposed to by Andrew George Mollel and Charles Hotay. It was alleged that the property, the subject matter of the contested receivership had been advertised and was up for grabs; employees were facing imminent dismissal; bank accounts had been blocked and that stocks were being

sold at 30% discount. It was under these circumstances that the learned trial judge made the interim *ex-parte* order on the 27 June 2000.

Mr Mwandambo forcefully submitted that there was no legal justification for the learned trial judge to depart from the orders made on the 20 June 2000; that Mr Ngalo was not afforded an opportunity to be heard on the interim orders and that Mr Ngalo had not filed the counter-affidavit whose deadline was the 28 June 2000. Mr De Souza countered by stating that the circumstances that were then unfolding demanded prompt remedial action from the Court.

We have given deep and anxious consideration to these complaints. From the affidavit evidence before him the learned trial judge was satisfied that there were changed circumstances that warranted the issuance of an interim order to last "until the final disposal of Arusha Civil Application Number 73 of 2000." It is our considered view that such a course of action is permitted under Order XXXVII, rules 1 and 2 of the Civil Procedure Code. To this end, we have had occasion to glance through the Indian case of *Jagjit Singh Khama v. Dr Rhakhal Das* (1) wherein the Court was construing Order XXXIX, rules 1 and 2 and section 94(c) of the Code of Civil Procedure which is identical to our Order XXXVII, rules 1 and 2 and section 68(c) of the Civil Procedure Code 1966.

The Court had this to say at page 97:

> A temporary injunction may, as it very often does consist of two stages, one granted without finally disposing of the application for injunction to operate immediately till the disposal of the said application and the other granted while finally disposing of the main application to enure generally till the disposal of the suit and while the former is generally classed as *ad interim* injunction, the latter is generally called temporary injunction. *Neither on principle nor on authority we find any bar to the Courts granting ad interim injunction* if *subsequent developments or altered* circumstances warrant such grant [emphasis supplied]. We respectfully wish to associate ourselves with these views.

A The learned trial judge was of the opinion that there existed altered circumstances which warranted granting the injunction order on the 27 June 2000. Contrary to Mr Mwandambo's assertions, there was neither a travesty of justice nor an abuse of the legal process. The
B eighth ground of appeal seems to us to be based on an apparent distortion of the import of the following passage in the ruling of the learned trial judge. It reads as under:

> Out of the four acts of the presiding judge which are alleged to be biased
> C against the applicants only two of such acts are established. These are the issuing of the ex parte injunction order on 27 June 2000 and serving the ex parte interim order to Mr Ngalo's agents stationed at the respondents company by their names: As it has already been stated, such acts of the
> D presiding judge were done within the ambit of the law. The applicants may challenge the legality of the orders on appeal which opportunity they still have. For the applicants to say that the acts were purposely done with a bias intention that would be reading beyond what human eyes can
> E read in the record.

Mr Mwandambo submitted on this point that since the learned trial judge held that two acts of bias had been established, that was enough to disqualify himself. Mr De Souza, however responded by submitting
F that the learned trial judge accepted that he had made the impugned orders but without any bias. There is no shadow of doubt in our minds that the learned trial judge was not in any way admitting that he was indeed biased in making the said Orders. We have already explained
G elsewhere in this judgment that the learned trial judge properly exercised his discretion in granting the *ex-parte* injunction order.

This takes us to grounds four, seven and nine which will be considered together. It is the general complaint that the appellants' affidavits
H disclosed and established elements of bias in the manner the learned trial judge handled the matter and that the appellants' had discharged the *onus* required to establish the existence of bias. Mr Mwandambo complained that the learned trial judge had departed from orders
I previously made without good cause. The learned advocate was of

the opinion that the appellants had established that there was a real likelihood of bias. He added that the mere fact that some portions of what was stated by counsel in the address to the Court were not recorded in the proceedings had created a suspicion that the learned trial judge was biased and that there was a total breakdown of confidence. Mr De Souza countered by submitting that the affidavits of Mr Ngalo and Mr Rweyemamu showed that the appellants had full confidence in the learned trial judge. He added that the mere fact that there is a complaint against a judge, that should not amount to automatic disqualification of such a judge from adjudicating upon a case.

We have carefully examined the allegations of bias advanced by the appellants in the memorandum of appeal and the erudite submissions by the learned advocates for the parties. It is our considered view that it would be an abdication of judicial function and an encouragement of spurious applications for a judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on application of one of the parties on the grounds of possible appearance of bias. A judicial officer should not automatically stand aside whenever requested to do so. (See: *Laurean G. Rugaimukamu v.* (1) *Inspector General of Police* (2) The *Attorney General* (2). Mr Mwandambo referred us to the case of *Metropolitan Properties Co. (FGC) Ltd. v. Lannon* (3) wherein Denning M.R. formulated the prevailing test for "bias". Even at that time, some cases preferred the "reasonable suspicion or apprehension of bias" test. Other cases had found favour with the test in terms of a "real danger or likelihood of bias". *Lannon's* case (3), is an example of the reasonable suspicion test though Denning MR also spoke of a real likelihood of bias. He stated thus at page 599:

> In considering whether there was a real likelihood of bias the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial

A as could be, nevertheless if right -minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.

B The essence of the argument for the appellants was that once a reasonable man would suspect bias from outward appearance that would be enough to vitiate the proceedings. Mr Mwandambo seemed to use the words "real likelihood of bias" and "reasonable apprehension/suspicion of bias" interchangeably, but the thrust of his argument was really to C invoke the "reasonable suspicion of bias" test. We should perhaps point out at this juncture that there is no complaint against the learned trial judge that he had a direct interest in the subject-matter of the proceedings as may lead to an appearance or likelihood of bias. Nor D is it alleged that he had any pecuniary interest in the matter. The complaints of bias against him revolve around the manner in which the judicial proceedings were conducted. In the case of *Republic v. Gough* (4), the House of Lords held, *inter alia*, that in all cases of E apparent bias concerning justices, members of inferior tribunals, jurors or arbitrators, the same test was applicable, namely that on ascertainment of facts pointing towards bias, whether there was a "real danger" of bias concerning the relevant member of the tribunal. F So there was only one test, and that is "real danger" of bias and it was for the Court in possession of all the relevant facts to apply the test and not from the point of view of the reasonable man. Underscoring this point, the House of Lords speaking through Lord Goff of Chievely G stated as follows at page 670 D:

> Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the Court should look at the matter through the eyes of a reasonable man, because the Court in cases such as these personifies the H reasonable man; and in any event the Court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in Court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood to ensure that the Court is thinking I in terms of possibility rather than probability of bias.

However, in the case of *Porter and another v. Magill* (5) 1 All ER 465, the House of Lords modified the formulation of the test of bias as enunciated in *Gough's* case, (4). In so doing the House took into consideration recent developments in the law in some Commonwealth countries, notably Australia and Canada and adopted the following formulation of the test in paragraphs 103 and 104:

> The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead *a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased* [emphasis added].

On our part, we would with the greatest respect, adopt the current formulation of the test for apparent bias as stated by the House of Lords in *Magill's* case, (5). Our country is a member of the Commonwealth with a common law tradition. A decision of the House of Lords under appropriate circumstances would be of persuasive value in moulding our decisions. In the instant case, the alleged bias pertains to the learned trial judge who conducted Miscellaneous Civil Application Number 10 of 2001 in the High Court, Arusha. We have already examined at length the circumstances which led the appellants to suggest that the learned trial judge was biased against them. The next question to ask then is whether or not those circumstances would lead a fair-minded and informed person/observer to conclude that there was a real possibility that the learned trial judge was biased. It is important to bear in mind that this observer has to be fair-minded and informed. In our context such an observer should be aware of our Court procedures; the role and function of a trial judge in adjudicating cases. He should be aware of interlocutory proceedings during a trial and that an aggrieved party can always appeal to the higher echelons in the Court hierarchy. Moreover, such an informed observer would be aware that there is no proforma ruling or judgment. They differ in substance and linguistic style. In this case, it is our settled view that looking at the complaints of bias from the standpoint of the fair minded and informed observer, such an observer will not find anything tending to show bias in the

A manner the learned trial judge conducted the proceedings in the application.

In the event and for the foregoing reasons, we find no merit in the appeal which is dismissed with costs. However in the interests
B of justice, even though we have found no bias established against the learned trial judge conducting the proceedings, it is ordered that hearing of the main suit and other pending applications be proceeded with before another judge.

C

D

M/S LAW ASSOCIATES, ADVOCATES *v.* M/S INDEPENDENT POWER (T) LIMITED

IN THE MATTER OF TAXATION OF THE BILL OF
E COSTS

HIGH COURT OF TANZANIA
AT DAR ES SALAAM

F (Massati, J.)

TAXATION CASE IN CIVIL CASE No. 336 OF 2002

G *Civil Practice and Procedure – Jurisdiction – Jurisdiction of the High Court – Notice of Appeal to the Court of Appeal – Effect of the notice of appeal on the jurisdiction of the High Court.*

Upon an application to enforce an agreement for instruction fees between M/s Law
H Associates, applicants, and M/s Independent Power (T) Limited, respondents, leave was given to the respondent to file a third party notice against one Lugemalira. When a ruling that the third party had nothing to answer, the respondent was dissatisfied and filed a notice of appeal against such ruling to the Court of Appeal and also filed a chamber summons for leave to appeal. After delivery of ruling on third party notice a
I question arose as to whether the Court could still proceed with the hearing of the matter.