IN THE COURT OF APPEAL OF BELIZE, A.D. 2003

CIVIL APPEAL NO. 9 OF 2003

BETWEEN:

THE ATTORNEY GENERAL OF BELIZE
MINISTER OF BUDGET MANAGEMENT,
ECONOMIC DEVELOPMENT,
INVESTMENT AND TRADE **APPELLANTS**

AND

BELIZE FOOD AND TRANSPORTATION LTD. **RESPONDENT**

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BEFORE:

The Hon. Mr. Justice Rowe	**-**	**President**
The Hon. Mr. Justice Mottley	**-**	**Justice of Appeal**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**

Mr. Denys Barrow, S. C. for the Appellants.
Mr. Dean Barrow, S.C. for the Respondent.

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17 October, 2003 & 18 June, 2004.

ROWE P

1. A series of the most regrettable incidents erupted in the court below and delayed the application for leave to apply for judicial review that was commenced ex parte as long ago as March 8, 2001. I will refer

to some of these incidents in a summary manner in the course of this judgment.

2. The Cabinet made a decision on 22 February 2000 which affected the importation into Belize of bread manufactured by the respondent in the Free Zone. Thirteen months later the respondent, without seeking an extension of time, applied *ex parte* for leave to file judicial review. Leave was granted on December 3, 2002 and Notice of the Application for substantive orders on Judicial Review was served on the Government on December 16, 2002. Nine weeks elapsed, then the Attorney General, on 21 February 2003 filed a notice of motion to set aside leave on the grounds that the application for judicial review was not made promptly and in any event within three months, that the respondent had failed to exhaust alternative remedies and in the inherent jurisdiction of the Court. It was then fully three years since the Cabinet had made the decision complained of.

3. Another document was sent to the Court on 21 February, 2003. It was a letter from the respondent's attorney which requested an adjournment of its motion for the hearing of its substantive motion for judicial review which had then been scheduled for February 26, 2003. Counsel's letter of 21 February 21, 2003 was copied to the Attorney General and on February 25, 2003 the Solicitor General

wrote to the Court, copied to opposing counsel, stating that he had no objection to the adjournment requested by the respondent's attorney and in those circumstances he did not propose to attend the fixture on February 26, 2003. I pause here to say that unless counsel is excused by the Court he must attend court fixtures or be otherwise represented. The Attorney General's letter did not make a specific request for an adjournment of its motion to set aside the grant of leave. Be that as it may, on February 26, 2003 counsel for the respondent attended, but the appellant was unrepresented.

4. The Court entered an order setting the application by the respondent to vacate the order granting leave to apply for judicial review for hearing on 11 March, 2003. It was the duty of the Registrar to advise the Attorney General of this new date. There was no court record that this was done. The Attorney General stated that he was never advised of this date and accordingly did not make preparations to attend.

5. On 11 March, 2003, the respondent appeared but the respondent did not. The Court asked that the Attorney General be advised that the matter was on for hearing. Upon inquiry, the Court was informed that the Attorney General had not been advised. Although the records of the Court did not disclose any service of the order of the 26 February 2003 on the Attorney General, the Court struck out

the respondent's motion to set aside leave. There had been gross delay in these proceedings up to this stage and without a finding by the Court that the Attorney General had been informed of the court fixture, a short adjournment could meet the justice of the case. We were referred to the decision in **London Borough of Hackney v. Driscoll** [2003] EWCA Civ. 1037, where Broke LJ restated the three bases on which a party who failed to attend may seek the Court to grant an order to set aside its judgment, to wit, (a) he acted promptly when he found out that the court had exercised its power to enter judgment against him; (b) he had a good reason for not attending the trial and (c) that he had a reasonable prospect of success at the trial. I did not decide the case on a judicial consideration of these points although this was the way in which the appellant was prepared to present his argument before us.

6. There is record evidence that the Solicitor General wrote to the Chief Justice to complain about the manner in which the case was being handled by the trial judge. There is record evidence that the trial judge made reference to the correspondence from the Solicitor General to the Chief Justice, that the learned trial judge publicly stated that he had reported the conduct of the Solicitor General to the Attorney General and to the Bar for disciplinary purposes and that the trial judge had concluded that an allegation of bias had been unjustifiably made against him. In those circumstances the

learned trial judge, on his own motion, made a decision to recuse himself from the case.

7. It is my view that a trial judge must resist the temptation to recuse himself from a case which he is properly qualified to try. If he does not take a resolute stand against all improper attacks on his judicial integrity, the way may become clear for a litigant or counsel to choose his forum for trial by the simple strategy of a veiled or unspecified attack on the judge. **Lawrence Collins J**, gave this advice:

> "Judges have a duty to sit in any case in which they are not obliged to disqualify themselves, but they must disqualify themselves, if there are reasonable grounds on the part of a litigant for apprehending that the judge will not be impartial. It is important that judges 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**: President of the Republic of South Africa v. South African Rugby Football Union,** 1999 (4) SA 127, at 177; Re **JRL , ex. p. CJL** (1986) 161 CLR 342 at 352.
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> In **Locabail** the court said that if an objection was made, it would be the duty of the judge to consider the objection and to exercise his judgment upon it, but 'he would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance': **Bank of Credit and Commerce International (BCCI) in Liquidation v. Munwar Ali**, CH 91997) 037999, December 3, 2001.

8. After the learned trial judge had recused himself and for the reasons that he gave in the case, he conducted a hearing on the appellant's motion to vacate the order of March 11, 2003 dismissing the motion to set aside leave. I understand fully the reasons that impelled the learned trial judge to undertake this task, but in my view, the procedure was flawed. A judge who has recused himself from hearing a particular case, cannot, in my view, be perceived by the parties or the general public, as an impartial arbiter in the case from which he has just recused himself. At this resumed hearing the learned trial judge did not resile from his determination not to hear the substantive matters raised in the case, indeed he reaffirmed this determination, indicating that in his mind, the decision to recuse himself was on a basis recognized by the Courts. There was a change of counsel for the appellant when the matter was before the Court on 25 May 2003 but that change did not cause the learned trial judge to reconsider his decision to recuse himself from the case. In my view, unless, with the consent of the parties, the trial judge had completely withdrawn his decision to recuse himself from the case, he ought not to have had anything more to do with the case.

9. It was for these reasons that I concurred in the decision that the appeal should be allowed and that the case should be remanded to another judge for the continuation of the hearing of the appellant's

motion to set aside the order of 11 March, 2003 and to permit the appellant to contest the grant of leave to apply for judicial review herein.

MOTTLEY JA

10. Shortly after the commencement of the argument, the Court *ex propio motu*, invited counsel on behalf of both the appellants and respondent to address the Court on the significance of the earlier recusal by Awich J and then his subsequent hearing of the summons, the subject matter of this appeal. On April 03, the judge had, without any request from either counsel to do so, recused himself. The background leading to this appeal is set out below.

11. On 8 March 2001, an ex parte application was made by the respondent for leave to apply for judicial review of a decision of the Cabinet of Belize and/or the Minister of Budget Management Economic Development Investment and Trade ("the Minister") dated 22 February 2001, which prohibited the importation, into Belize, of bread which was produced in the Commercial Free Zone on the ground that the decision was invalid and/or ultra vires and/or void and/or a contrary to law.

12. On 3 December 2002, leave was granted to the respondent to file a notice of motion within 14 days. This leave was granted notwithstanding that more than three months had expired since the decision of the Minister had been made. Pursuant to such leave, the notice of motion was filed on 16 December 2002. Copies of the motion were served on the Attorney General and the Minister.

13. On 21 February 2003, a notice of motion was filed on behalf of the appellants seeking an order that the leave which had been granted to apply for judicial review, be set aside on the grounds, inter alia, that the application for leave was not made promptly and in any event was not made within three months of the decision being made by the Minister and that the respondent had failed to exhaust alternative remedies. On the same day, counsel for the respondent sent a letter to the Registrar informing her that an application would be made to have the hearing of the substantive applications which had been fixed for hearing 26 February 2003 adjourned until April 2003. By letter dated 25 February 2003 from counsel on behalf of the Attorney General, the Registrar was informed that there was no objection to the adjournment and that counsel would therefore not be appearing.

14. When the matter came on for hearing on 26 February, counsel for the respondent made an application for an adjournment in the

substantive matter. No counsel appeared on behalf of the appellants. It appears that no application requesting an adjournment of the application to set aside the leave to issue judicial review had been filed by the Solicitor General. On that day, the judge listed the application for leave to set aside for hearing on 11 March 2003. The substantive matter was adjourned for hearing in the month of April 2003 (p. 103).

15. On 11 March 2003, the application by the appellants to set aside leave was struck out for non-appearance. It is not necessary to detail all that occurred. It is sufficient to say that, on 25 April 2003, when the matter was again before him, the judge made reference to a letter dated 24 April 2003 which has been written by the Solicitor General to the Chief Justice concerning the ruling which the judge had made on 11 March 2003.

16. For the purposes of my judgment, I need only refer to what was said by the trial judge. He said:

> *"Per 7th paragraph. The seventh paragraph of the Kaseke's letter to the Chief Judge says his case has been prejudged by what is said in Court about a point of law". He continued: "I protest in the strongest possible terms, I would have thought what a judge says in Court is subject to submission and therefore persuasion of counsel.*

Even this late for me, there are many things to learn about what is proper and what is not, that was not one of the things to learn. I have also never known a judge to continue to sit on trial of a case where aspersion of bias has been cast on him/her, even in less permanent form than in a letter and the aspersion is addressed to the Chief Justice and during the trial."

17. The judge then invited counsel to address him on whether he should recuse himself having regard to the letter from Mr. Kaseke. It should be noted that no application had been made by either party for the judge to recuse himself. Nonetheless, the judge, having regard to the letter, concluded that he should recuse himself. Before doing so, he invited Mr. Kaseke, who was now in Court to address him on the matter of recusal. Mr. Kaseke informed the judge that he stood by what he had said and, as the application to set aside leave and the substantive matters were on the same ground, his client was going to appeal. The Solicitor General indicated to the judge that he considered that the judge's comments had prejudiced his client's case.

18. The judge ruled that he, most regrettably, had to recuse himself in view of what he had heard and the contents of the letter to the Chief Justice. The judge was obviously upset by the letter sent by the Solicitor General to the Chief Justice. In deciding to recuse

himself, the judge must have concluded that an allegation of bias was being made against him.

19. On 14 May 2003, an application was made by the appellants to set aside the order of the judge whereby he had struck out the appellant's application to set aside the ex parte leave that had been granted on 3 December 2002. The hearing of this summons took place on 23 May 2003. At the commencement of the hearing after Mr. Denys Barrow SC had entered an appearance on behalf of the appellants, who had previously been presented by the Solicitor General, the judge remarked how impressed he was about the change that had taken place at the Bar. It is not necessary to speculate as to the meaning of this statement.

20. The judge proceeded to explain what had taken place at the earlier hearing when he had recused himself. He stated:

> *"Yes, I have to inform you about what is happening. I think it was the 25th. Before you say something I have to inform you about what is happening. On the 25th April, 2003, I recuse myself from this case because of a letter dated, I think, 24th April, 2003, written by Learned Solicitor General Mr. Kaseke, to the Chief Justice and this application today has been listed before me and is only going to be this*

application to recuse our still (sic) status in the event your application does not succeed.

The other matter I need to inform your parties that I consider the letter of Mr. Kaseke improper and intended to inference (sic) the Court. I have reported and forwarded the letter to the Attorney General and I have reported to the Bar Association and I leave it with them."

21. Despite stating that at the hearing he would not take into account what has taken place, the judge in his ruling dated 26 May 2003 stated:

"On April 24, 2003 I recused myself from hearing the review case in which today's application by summons, dated 14.5.2003, is being made. I understand that the business listed in this Court today is only the hearing of the application. If leave to bring the review matter survives today's application and subsequent application to set it aside, the review hearing has been listed, I understand for 24.6.2003 and before another judge".

22. In passing, I note that in his ruling, the judge made reference to:

"the manner in which the learned Solicitor General concluded his case invites escalation of costs to the respondent incessantly and that is an oppressive way of conducting a case. First, the Solicitor General assumed that his application dated February 24, 2003 would be adjourned without an application for its adjournment. Secondly when he did not attend Court on March 11, 2003 and I have now decided, he had justification, and his application was struck out, he applied, he said, out of abundance of caution, for leave to appeal to the order made exparte, instead of applying to have the order set aside or for restoration of the application for hearing. His application was unnecessary and irregular. Thirdly, when he lost the application for leave to appeal he announced intention to appeal. I have to assume that the Solicitor General knows the rules about appeal. The way he conducted the case showed that he intended protracting the whole review proceedings. That would have consequences in costs for both parties and inconvenience to the Court. The number of days the Solicitor General would unnecessarily spend coming to Court could be better used on other duties. The respondents of course have to pay for the extra days Court time for other case would unnecessarily be delayed."

23. The judge again returned to the issue of his recusal and stated he is making:

> *"….no order withdrawing my recusal announced on 25.4.2003. I have since had time to read Mr. Kaseke's letter to the Chief Justice more carefully. I decided to have reported it to the Attorney General and to the Bar Association. In view of these developments, I think it is not advisable that I hear and decide the review case."*

24. Later the judge expressed the view that the conduct of the Solicitor General had led to time being wasted and unnecessary costs being incurred.

25. After making these comments, the learned trial judge declined to exercise his discretion. Even though the judge had heard the application to set aside leave, he nonetheless stated that, in view of what had taken place in the matter, he did not consider that it would be advisable for him "to hear and decide" the substantive matter.

26. Whatever operated on the mind of the judge to lead him to the original conclusion that he should not hear the substantive application, apparently was still affecting him even though he had heard the application to set aside the leave. It is not necessary to speculate as to what was in fact operating on his mind but it is safe to say it appears to have had its origins in the letter written to the

Chief Justice by the Solicitor General. It would appear that he concluded that bias was being alleged against him and that his ability to conduct this matter in a fair and impartial way was being called into question. By deciding to recuse himself, he was in fact saying that his ability to render a fair judgment between the parties had been compromised. Having reached the conclusion to recuse himself from hearing the substantive motion, the judge, in my view, ought not to have heard the application to set aside the Order.

27. His comments made in the course of his judgment would tend to show that, whatever had caused him concern and which led him to voluntarily recuse himself, was still operating on his mind. Indeed having heard the application, he concluded his judgment by saying that he did not think it advisable that he should “hear and decide the review”. In so doing, the judge was again voluntarily recusing himself from “hearing and deciding the substantive matter”. He obviously considered that it would not have been appropriate. It is difficult to appreciate how the judge, having voluntarily recused himself, could have concluded that it would have been appropriate to hear and determine this application and yet inappropriate to hear and decide “the substantive matter”. Since his ruling on 25 April, the judge stated in his ruling of 26 May that he had time to read more carefully the letter which the Solicitor General had written to the Chief Justice.

28. For my part, I would have thought that, having recused himself, he ought not to have taken any further part in the trial. He must have concluded that he had been compromised by the imagined allegation of bias. It was, in my view, inappropriate for him to take any further part in this action.

29. The conclusion by the judge that an allegation of bias had been made against him by the Solicitor General led him to recuse himself. It is a fundamental requirement that a judge should be impartial and should under no circumstances be biased. Lord Phillips M.R. in **Director General of Fair Trading** in appeal v. **Proprietary Association of Great Britain and Proprietary Articles Trade Association** in appeal [2000] EWCA civil 350 stated:

> *"Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may*

consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."

30. The conduct of the judge, in recusing himself on his own motion from hearing the substantive application, and then hearing the application to set aside the order, and subsequently continuing to insist that he would not "hear and determine" the substantive application, could affect the confidence of the public in the administration of justice.

31. It was for these reasons that I concurred, in allowing this appeal and ordered that the matter be remitted to the hearing of the application. Because of the manner in which the appeal was dealt with, costs were ordered to be costs in the cause.

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MOTTLEY JA

SOSA JA

31. On 23 May 2003, in the court below, Awich J heard an application by the appellants for the setting aside of an order which he had made on 11 March 2003. He dismissed this application ('**the setting aside application of May**') two days later and, with leave granted by him on 12 June 2003, the appellants filed a notice of appeal. On 17 October 2003, when this appeal came on for hearing, the learned late President, of his own motion, raised the question whether it was proper for Awich J to have heard and determined **the setting aside application of May** in view of his earlier recusal of himself from hearing the substantive application of the respondent for judicial review ('**the substantive application**'). My learned brethren arrived at the conclusion that the question so raised ought to be answered in the negative and, accordingly, although no argument was heard on the grounds of appeal filed by the appellants, the appeal was allowed.

32. Much to my misfortune, I found it necessary to dissent from the majority judgment of this Court. In my respectful, but firm, opinion, the question above adverted to should have been answered in the affirmative, and this Court ought to have proceeded to hear the appeal before deciding how to dispose of it.

The background to **the setting aside application of May**

33. In the court below it was alleged by the respondent that the government, by a purported decision of the Cabinet made on 22 February 2000, sought to prohibit 'the importation into Belize's customs territory of bread produced in the Commercial Free Zone'. In March 2001 the respondent, by its attorneys-at-law, Lois Young Barrow & Co ('LYB'), took out an ex parte summons for leave to apply for judicial review of the purported decision. The date fixed for the hearing of this application was 8 June 2001, but it was not in fact heard on that date or at any time soon after. It was heard on 3 December 2002, almost 21 months after the taking out of the summons, when leave was granted by Awich J. The appellants were subsequently served with notice of **the substantive application**. Following a lapse of some nine weeks, they filed a notice of motion dated 21 February 2003 for an order setting aside the earlier order whereby the respondent had been granted leave to apply for judicial review ('**the order granting leave**'). The date fixed for the hearing of this motion was 26 February 2003. This was also the date appointed, together with 27 February 2003, for the hearing of **the substantive application**.

34. It appears from a ruling of Awich J dated 25 April 2003 that Ms Lois Young SC of LYB wrote a letter dated 21 February 2003 to the

Registrar intimating that she would be applying on 26 February for an adjournment of the hearing of **the substantive application**. It further appears from the same ruling that, on 25 February, Mr Elson Kaseke, the Solicitor-General, wrote a letter to the Registrar informing her that he would not be objecting to the respondent's intended application for an adjournment. The appeal record contains no copy of either letter nor any indication that either was copied to the attorney-at-law on the other side.

35. On 26 February 2003, Ms Young appeared in chambers for the respondent but no one appeared for the appellants. Awich J adjourned the appellants' application for the setting aside of **the order granting leave** to 11 March 2003. In addition, noting that the survival of **the substantive application** would depend on the outcome of the appellants' application, he ordered that, in the event that it survived, **the substantive application** would be heard in April 2003.

36. On 11 March 2003 the respondent was again the only party represented in chambers. After causing a marshal of the court to make contact by telephone with Mr Kaseke, Awich J made an order striking out the appellants' application for the setting aside of **the order granting leave**. For convenience, I shall hereinafter refer to the former order as '**the striking out order**'.

37. **The substantive application** had thus survived the appellants' application. A date for the hearing of **the substantive application** was subsequently fixed and communicated to the parties. On that date, 26 April 2003, all parties were represented in court. Ms Hafiz, who appeared for the appellants, applied for an adjournment on the grounds that the office of the Solicitor-General had received no notice that **the substantive application** was to be heard on that day and that she had consequently gone to court under the erroneous impression that what was to be heard was the appellants' motion for the setting aside of **the order granting leave**. Mr Dean Barrow SC, appearing for the respondent on 24 April 2003, did not oppose the application for an adjournment and Awich J adjourned the matter to the following day.

38. On the following day, 25 April, the proceedings were marred by a chain of most unhappy occurrences which, in my view, ought not to be dignified with further attention in this judgment. The upshot of the day's very unfortunate proceedings was that Awich J (1) was effectively prevented from hearing **the substantive application** (2) ended up hearing, instead, a purely oral application by the appellants, represented by Mr Kaseke, for leave to appeal from **the striking out order**, an application which Awich J dismissed, and (3) recused himself from hearing **the substantive application**.

The setting aside application of May

39. There was less material before us than there might have been of the circumstances which led Awich J to hear and determine **the setting aside application of May**. Naturally enough, counsel for the respondent appeared to have been surprised by the learned President's raising of the issue of recusal when this appeal came on for hearing. With no affidavit evidence to fall back on at this stage, counsel did the next best thing, so to speak. He related a material development which followed the decision of Awich J to recuse himself, stating as follows:

> 'Subsequent to that, My Lord, there was a meeting of the parties with the Chief Justice in order for a date to be set for the review hearing. It was at that stage that the Chief Justice indicated both to me and to the Solicitor-General that with respect to the application that had then been filed, the subsequent application to restore the struck out motion, that it was his view that the judge certainly ought to hear that, that it was advisable that since he was the one that struck out the motion any application to restore the motion ought to be heard by the same judge and that since the judge had only recused himself with respect to the substantive review application he would instruct the judge to hear the

application to restore the motion that had been struck out. And that was what happened.'

To this, counsel for the respondent later added:

'All I know is what the Chief Justice said to us, (sic) Mr Kaseke and I, I suppose (sic) agreed that the substantive review application apart (sic) was fine for the judge to hear the set aside application.'

Counsel for the appellants did not dispute before us the accuracy of the narration of facts contained in the penultimate quotation or the soundness of the supposition contained in the last.

40. Even, however, in the absence of strict evidence of the matters found in the two immediately preceding quotations from the address of counsel for the respondent in this Court, there are the statements of Awich J made in court prior to hearing **the setting aside application of May**. He quite properly said to counsel for the appellants, viz Mr Denys Barrow SC and Ms Coleen Lewis, who were making their first appearance in the case:

'I have to inform you about what is happening. I think it was the 25th. Before you say something, I have to inform you about what is happening. On the 25th of April, 2003, I recuse (sic) myself from the this case because of a letter dated, I

think, 24th of April, 2003, written by Learned Solicitor General Mr Kaseke to the Chief Justice and this application today has been listed before me and is (sic) only going to be this application to recuse our still status (sic) in the event your application does not succeed… Any hearing today will not take account of what has happened so far.'

41. The record reveals that Mr Denys Barrow replied, 'As your Lordship pleases' and started, without further ado, to introduce **the setting aside application of May**.

The legal considerations

42. Two points arise from the foregoing. First, **the setting aside application of May** was a matter allocated to Awich J from above. The duty, however invidious, of Awich J in those circumstances was all too clear. In *Locabail (UK) Limited v Bayfield Properties Ltd* [2000] 2 WLR 870, the English Court of Appeal (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C) quoted with approval from the judgment of Callaway JA in *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* [1994] VSCA 35.

The court said, at para 24:

'In the *Clenae* case … Callaway JA observed, at paragraph 89 (e):

> "As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."'

There was, in the instant case, no disqualification application at all with respect to the hearing and determination by Awich J of **the setting aside application of May**. This could hardly have been the result of an oversight. The appellants' leading counsel was highly experienced Senior Counsel. Furthermore, the application was being made pursuant to a notice of motion filed as long before as 14 May 2003 and addressed to him, amongst others. It seems to me to be clear that the two judges concerned and well-seasoned Senior Counsel on both sides (numbering three, as Ms Young also appeared for the respondent), not to mention junior counsel for the appellants, were unanimously of the view that no impropriety was involved.

43. Secondly, the issue of waiver inevitably arose and loomed very large in the circumstances. In the *Locabail* case, the court said, at para 15:

> '… a party with an irresistible right to object to a judge hearing or continuing to hear a case may, as in other cases to which we refer below, waive his right to object. It is however clear that any waiver must be clear and unequivocal and made with full knowledge of all the facts relevant to the decision whether to waive or not.'

As has been seen above, Awich J commendably disclosed to incoming counsel for the appellants on 25 May the essential details of his earlier recusal and counsel replied in the most unambiguous of terms that the appellants had no difficulty whatsoever with the intended hearing and determination of **the setting aside application of May** by Awich J. This was not a case of litigants appearing before a court of law without the benefit of legal representation. In truth, it would be an understatement to say that the appellants had the benefit of adequate legal representation. In my view, this Court ought to have allowed itself to be guided by what was said by the English court in *Locabail*, at para 59, viz :

> 'They [the parties] are the principals. If they are content that the trial should proceed the judge should, in our view, except where he doubts his ability to be impartial, be very slow to abort the trial.'

This, plainly, was a case where not only were the parties so content but both judges of the court below who had anything to do with the relevant stage of the proceedings were satisfied as to the existence of the necessary judicial impartiality. As in *Locabail*, the judge was, on 25 May 2003, not asked on behalf of the appellants for additional time in which to consider the situation that had presented itself, the question of recusal was not raised at all and the judicial disclosure made was treated as a matter of no consequence whatsoever. Moreover, when the appellants subsequently sought to appeal, their application for leave was made before, and granted, by the selfsame Awich J.

44. In *Locabail*, the court observed, at para 26:

> 'If the appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so.'

Unquestionably, the same undesirable result is produced if the complaint emanates from an appellate court subsequently seised of

the case rather than from the party who chose not to object in the lower court.

45. These were the reasons which compelled me to disagree with the majority and to see no scope for the adoption, on the unusual and, as I hope, unique facts of this case, of the sound general observation that a judge who has recused himself from hearing a particular case cannot be perceived by the parties or the public as an impartial arbiter in that case.

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SOSA JA