REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: 73/2011
Date heard: 28 February 2013
Date delivered: 14 March 2013

In the matter between

THE HONOURABLE MINISTER OF SAFETY AND SECURITY	**Applicant**
vs	
NOMPUMELELO JONGWA	**First Respondent**
MAGISTRATE V M NQUMSE	**Second Respondent**

JUDGMENT

PICKERING J:

[1] During January 2011 applicant, the Minister of Safety and Security, launched an application in this Court against one Nompumelelo Jongwa as first respondent and Magistrate V.M. Nqumse as second respondent, claiming the following relief:

> "*1. Reviewing and setting aside the trial and judgment of second respondent's of 14 April 2010, in an action in the magistrate's court for the district of Queenstown in case no 1771/2007.*
> *2. An order directing the first respondent to pay the applicant's costs of suit jointly and severally with second respondent in the event of the second respondent opposing this application.*"

[2] As will appear hereunder the review is squarely based on one issue, namely, that because of second respondent's alleged intimate relationship with plaintiff's attorney, Ms. Mtiya, second respondent should have recused himself *mero motu* from presiding over the trial and that his failure to have done so constituted an irregularity which vitiated the trial proceedings.

[3] The application is opposed by both respondents.

[4] The action referred to in paragraph 1 of the Notice of Motion was instituted by first respondent as plaintiff against the applicant as defendant in the magistrate's court, Queenstown. In that action first respondent claimed damages arising out of her alleged wrongful and unlawful detention, malicious prosecution and assault by members of the South African Police Service. When the trial commenced, presided over by second respondent, Advocate Cole appeared for plaintiff instructed by an attorney, the aforesaid Ms. Mtiya of L. Mtiya and Company, Queenstown. Applicant was represented by an attorney, Mr. de Wet of Bekker and Mostert Attorneys, Queenstown, Mr. de Wet being the local correspondent of the State Attorney, Port Elizabeth.

[5] The evidence of a number of witnesses was led over a period of three court days during October 2008. At the conclusion of the evidence the matter was postponed for judgment. Eventually, approximately eighteen months later, on 14 April 2010, second respondent delivered a lengthy, reasoned judgment, consisting of eighteen typed pages, in which he upheld all three of plaintiff's claims on the merits and awarded her the sum of R80 000,00 in total as and for damages together with costs of suit. In terms of his order those costs were to include the costs of counsel in the sum of R900,00 per hour for consultations, R9 000,00 per day for trial, as well as counsel's travelling costs between Grahamstown and Queenstown. No appeal was noted by applicant against this judgment or any of the orders contained therein and the time for the noting of such appeal duly lapsed.

[6] In this application applicant relies, in support thereof, on certain affidavits attested to by Colonel Deon van Papendorp, an advocate and legal advisor to the South African Police Services, Queenstown Cluster, as well as an affidavit attested to by the aforesaid Mr. de Wet.

[7] Colonel van Papendorp ("v*an Papendorp*") states in his founding affidavit that it fell to him in his aforesaid capacity to determine whether or not

an appeal should be noted against the judgment or whether payment should be made in accordance therewith. He states that despite the fact that the judgment was delivered on 14 April 2010 it was only sent to him on 14 May 2010. His affidavit is entirely silent as to why a month elapsed prior to the judgment being forwarded to him, apparently by the State Attorney.

[8] Be that as it may, van Papendorp states further that upon considering the judgment he noticed to his alarm that second respondent had presided at the trial. His alarm was engendered by the fact that, to his knowledge, second respondent and first respondent's attorney, Ms. Mtiya ("*Mtiya*"), had "*for some time conducted an intimate relationship from which relationship a child has been born. That relationship continues presently.*" It is clear that in this context van Papendorp is euphemistically referring to a sexual relationship.

[9] He states that he thereafter discussed the issue with the State Attorney who shared his concerns. In an effort to resolve matters he arranged to meet with second respondent and to raise with him his view that second respondent should properly have recused himself from presiding at the trial. He did so meet with second respondent in the late afternoon of 14 May 2010. He then advised second respondent that he wished to speak to him about "*a very serious matter*" and asked him whether he and Mtiya were in an intimate relationship; whether they had a child together; and whether they owned property together. According to him second respondent appeared taken aback and admitted both his ongoing relationship with Mtiya and the fact that they had a child together but stated that he knew nothing about any fixed property. Second respondent then conceded that he had committed an error of judgment in presiding over the trial and conceded that he should not have done so.

[10] Second respondent also enquired from him as to whether or not in his view he had erred in the judgment which he had delivered on 14 April 2010. According to van Papendorp he advised second respondent that he was not suggesting that the judgment was necessarily biased or wrong, but was of the

view that the quantum awarded was unduly high and that the award of costs was inappropriate. He further expressed the view that second respondent was *functus officio* and that in those circumstances he intended to approach Mtiya with a request that she advise first respondent to abandon the judgment in the latter's favour.

[11] He states that he did meet Mtiya and advised her that in his view the judgment should be set aside inasmuch as second respondent should not have presided at the trial. Mtiya's response was that at the time that the trial was conducted the relationship between herself and second respondent had come to an end, having terminated during June 2007. Van Papendorp then endeavoured to persuade her that she should advise first respondent to abandon the judgment in which case a settlement of the matter could be discussed. Mtiya enquired as to what would then be done about counsel's fees to which van Papendorp responded that the fee of R9 000,00 per day was indeed a problem and that there was no possibility of that issue being settled.

[12] Van Papendorp states further in his founding affidavit that applicant has, in all the circumstances, a reasonable apprehension that second respondent may have been biased in his judgment, such suspicion being "*founded on the objective fact that he was, at the time, involved in an intimate relationship with first respondent's attorney of record*", and especially as "*he was required to make various findings of credibility which do not find favour with applicant's legal representatives and his witnesses*".

[13] Van Papendorp accordingly addressed a letter to Mtiya inviting first respondent to abandon the judgment, alternatively, consenting to a rescission thereof, failing which an application for the review of the judgment would be brought. In due course, by letter dated 8 June 2010, he was advised that first respondent refused either to abandon or consent to the rescission of the judgment. He states that he accordingly sought the consent and authorisation of his superior officers in order to initiate the present application. On 26 July 2010 he was advised by his superior officer that the matter should be taken

on review. He accordingly approached the State Attorney. He states that the institution of the application was delayed because of the intervention of the World Soccer Cup in consequence whereof he was deployed to Port Elizabeth and various of his superiors were also redeployed. He states further that after receiving authorisation to instruct the State Attorney to launch these proceedings he called on second respondent to advise him of the fact that he had obtained such authorisation and that he had received no co-operation from Mtiya. He states that in an attempt to avoid this application, and to avoid what he told second respondent would be an unpleasant matter for everyone concerned, he enquired from second respondent as to whether there was not something that he could do. Second respondent's response was that his relationship with Mtiya had recently turned sour and there was nothing more that he could do.

[14] In a supporting affidavit Mr. de Wet ("*de Wet*"), who represented applicant at the trial of the matter, states that he had no direct knowledge of the relationship between second respondent and first respondent's attorney, although he had in the past heard rumours of the existence of such a relationship. He states that had the existence of a personal and intimate relationship been known to him he would have applied for the recusal of second respondent from the trial.

[15] In her affidavit first respondent states that she instituted the action against the applicant in good faith and that prior to the hearing of the trial she had never met the second respondent. She states that despite judgment having been entered in her favour on 14 April 2010 she has not yet been paid the damages awarded to her. She points to the fact that no application for leave to appeal has ever been filed and she avers that the correctness of the findings of second respondent in the judgment as a whole are, in fact, unassailable.

[16] First respondent's attorney, Mtiya, states in her affidavit that during May 2010 she was advised by second respondent that van Papendorp had visited him and had asked him to contact her. She eventually met van Papendorp

who advised her that he had spoken to second respondent and had told second respondent that he was not happy with either the quantum of damages awarded by him or the order of costs. He suggested to her that she should consider entering into an out of court settlement after abandoning the judgment in first respondent's favour. She advised him that she did not think that this was a proper way of dealing with the matter and that it would be more appropriate for the Minister of Safety and Security to take the matter on appeal if he believed that there were in fact grounds for an appeal. Van Papendorp replied that he was not prepared to take the matter on appeal.

[17] She then advised van Papendorp that she would raise the matter with first respondent. In the course of the discussion van Papendorp told her that counsel's fees should never have been awarded and that taxpayers' money was being wasted. He asked her if she was involved in a relationship with second respondent which question, Mtiya states, she "*merely brushed aside*". Van Papendorp then proposed that the matter be settled out of court for an amount of R30 000,00 with no counsel's fees to be paid "*before your relationship with the magistrate causes you embarrassment.*"

[18] Mtiya states that in the circumstances this was a thinly disguised threat that unless she coerced first respondent to abandon the judgment and costs and to enter into some other settlement he would take steps that would embarrass her in future. Mtiya did thereafter take instructions from first respondent who was not prepared to abandon the judgment. She then wrote a letter dated 31 May 2010 (Annexure LM1) in which she stated *inter alia* as follows:

> "*It is important to place on record that the so-called* 'intimate relationship' *between the writer and the presiding officer that you maliciously rely on had long ended at the inception of the matter*."

Mtiya states that at the time of the trial she was in fact involved in an intimate relationship with another attorney, Mr. Sondlo. This fact is confirmed by Mr. Sondlo in an affidavit.

[19] Second respondent in his affidavit reiterates that the erstwhile relationship between himself and Mtiya had terminated during June 2007. He states that since then, apart from their interaction relating to the child born of their relationship, he had no relationship with Mtiya other than a professional one. He denies that at the time of the trial such relationship was ongoing and states that the allegations by van Papendorp are nothing more than a personal attack on his integrity as a judicial officer.

[20] He states that applicant's attorney, de Wet, and Mtiya are in fact, besides being colleagues, personal friends and that de Wet was aware of his past relationship with Mtiya and yet did not consider it necessary to apply for his recusal on that basis.

[21] With regard to the meeting between himself and van Papendorp he states that the concerns raised by the latter regarding his judgment were based on the quantum awarded and the costs of counsel. Van Papendorp advised him that the judgment on the merits was "*good*" and that he would not appeal it. Second respondent indicated to van Papendorp that he was *functus officio* and that, if he was not satisfied, he should take such necessary legal steps as were available to applicant. He specifically denies that he had conceded having made an error of judgment of proceeding at the trial.

[22] The averments made on behalf of the respondents brought forth a replying affidavit by van Papendorp in which he reiterated that at the time of the trial the intimate relationship between Mtiya and second respondent had not in fact terminated and stated that "*all indications*" are that the relationship was ongoing.

[23] In dealing with the denials by second respondent and Mtiya that their relationship was ongoing he states, for the first time, that "*in any event whatever the status of their relationship was the fact remains that they were engaged in a long term intimate relationship and had a child together. This alone is fertile ground for a perception of bias.*" He avers later in his affidavit

that "*a reasonable person in the position of applicant would harbour a suspicion of the possibility of bias even upon the facts admitted by the second respondent.*"

[24] In support of his averment that the relationship was ongoing van Papendorp refers to an "*affidavit*" (Annexure RA1) purportedly made by second respondent with relation to a burglary which had occurred at Mtiya's residence. At the commencement of the hearing of this matter reference was made to an application filed by second respondent for an order striking out "*paragraphs 5 and 6 of the replying affidavit of applicant*" in which paragraphs van Papendorp makes reference to the address of Mtiya and to the statement (Annexure RA1) purportedly attested to by second respondent on 31 January 2011 and, further, striking out the annexure itself. It appears, however, that in relying on this "*affidavit*' van Papendorp overlooked the fact that it had never been signed by second respondent.

[25] It is not necessary to deal therewith in any greater detail because Mr. de la Harpe, who appeared for applicant, correctly conceded that the application had to be granted. Accordingly those paragraphs and the so-called affidavit (Annexure RA1) were struck out. Strangely enough, costs of the application were only sought in the event of it being opposed. As it was not opposed no order of costs can be made.

[26] Mr. de la Harpe conceded further that there was an irreconcilable dispute of fact as to whether or not the relationship between second respondent and Mtiya was ongoing at the time of the trial. He disavowed any intention of having this dispute referred for the hearing of oral evidence. We wish to record our appreciation to him for thereby averting what could only have been an unseemly and unsavoury *viva voce* hearing which would of necessity have involved attacks upon the credibility of the second respondent, Mtiya and van Papendorp.

[27] In the light thereof, on an application of the principles set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd 1984 (3) SA 623 (AD) at

634 H-I the application falls to be determined on the basis of those facts averred in applicant's affidavits which have been admitted by the respondents, together with the facts alleged by the respondents.

[28] That being so, it must be accepted for purposes of this application that, as averred by second respondent and Mtiya, their intimate relationship had in fact terminated during June 2007. It will immediately be apparent that this was not the basis upon which the application was brought. In his founding affidavit van Papendorp relies exclusively on the alleged ongoing relationship as a basis for applicant's apprehension of bias on the part of second respondent. It is only in reply, after second respondent and Mtiya denied these allegations, that van Papendorp states, almost in passing and as an afterthought, that in any event, even on the facts admitted by second respondent and Mtiya, a reasonable person in the position of applicant would harbour a suspicion of the possibility of bias.

[29] It is trite that an applicant must make out his case in his founding papers. In the present matter the application for review of the trial proceedings was premised solely on the alleged existence of an ongoing relationship. The possibility of the existence of an alternative scenario was not entertained. The respondents were called upon to answer only the specific allegations put forward by applicant and none other. (Compare Administrator Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (AD)). In consequence of this the affidavits of second respondent and Mtiya understandably did not deal in any detail with the precise nature of their present relationship and of their interaction over their minor child, beyond stating that their relationship was "*professional*". The court is accordingly in the dark as to the exact nature of that interaction.

[30] Much argument was addressed to us as to whether in the circumstances applicant could rely on what, so counsel for the respondents submitted, was essentially a different cause of action.

[31] Mr. de la Harpe submitted, however, that the present application involved important issues relating to the impartiality of the court and the credibility of the administration of justice and that accordingly it would be wrong to take too narrow and technical a view of the matter. He submitted that if the averments put up by the respondents themselves created a reasonable apprehension of bias then the fact that this was not the basis originally relied upon should be no impediment to the relief sought by applicant.

[32] It seems to me that in the peculiar circumstances of this case there is merit in his submission. The issue to be determined therefore is whether, having regard to the factual matrix contained in respondents' affidavits, second respondent was disqualified from hearing the case by reason of a reasonable apprehension by applicant of bias on his part.

[33] I should mention at this juncture that both Mr. Cole, who appeared for first respondent, and Mr. Mnyatheli, who appeared for second respondent, submitted that there had been a grossly unreasonable delay of 9 months on the part of applicant in the launching of this application, which delay had not been satisfactorily explained by van Papendorp. This submission has considerable merit. Firstly, no explanation is proferred as to why van Papendorp only received the judgment of 14 April a month later on 14 May. Secondly, as submitted by Mr. Cole, van Papendorp appears to have spent three months trying to convince the first respondent, via the second respondent and Mtiya, to abandon the judgment and to enter into settlement negotiations for a considerably lower amount of damages. Furthermore, the Soccer World Cup ended during July 2010 and the review application was only launched some 6 months later. In the circumstances the explanation for the delay is, in my view, woefully inadequate. Unsatisfactory as the explanation for the delay may be I am persuaded, however, that, given the nature of the issues at stake, it would be preferable to deal with the application on its merits.

[34] Before turning to do so there is one further matter which, regrettably, calls for comment. This relates to the conduct of van Papendorp in approaching second respondent in the manner he did. Van Papendorp is an advocate and legal advisor. He should have known that it was entirely improper and unprofessional for him to have approached second respondent, who was in any event *functus officio;* to have questioned him about his relationship with Mtiya; and to, in effect, have threatened him with an embarrassing review application unless he took steps to assist in persuading first respondent to abandon the judgment in her favour. His conduct in so doing is worthy of censure. Similar considerations apply to his interaction with Mtiya. She was, in my view, fully justified in believing in the circumstances that van Papendorp was attempting to coerce an abandonment of the first respondent's judgment on pain of causing embarrassment to second respondent and herself.

[35] I then turn to consider the merits of the application.

[36] As was submitted by Mr. de la Harpe, this application must be considered in the context of section 34 of the Constitution which provides:

> "*Everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial Tribunal or Forum.*"

S 34 has the effect of entrenching, as a constitutional value, the right to a fair trial. See The President of the Republic of South African Rugby Football Union 1999 (4) SA 137 (CC) at 168, para 28.

[37] In S v Roberts 1999 (4) SA 915 (SCA) the following was stated at para 28:

> "*In S v Malindi 1990 (1) SA 962 (A) at 969G–I it was said:*

> *'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of S v Radebe 1973 (1) SA 796 (A) and South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important*."

[38] In President of the Republic of South Africa v South African Rugby Football Union *supra* the test applicable to a matter such as the present was set out at para 48 as follows:

> "*The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by evidence and the submissions of Counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a Judicial Officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that*

the Judicial Officer, for whatever reasons, was not or will not be impartial."

[39] In S v Dube and Others; 2009 (2) SACR 99 (SCA); [2009] All SA 223 (SCA) the following was stated at paras 13 and 14:

"*[13] The rule is clear: generally speaking a judicial officer must not sit in a case where he or she is aware of the existence of a factor which might reasonably give rise to an apprehension of bias. The rationale for the rule is that one cannot be a judge in one's own cause. Any doubt must be resolved in favour of recusal. It is imperative that judicial officers be sensitive at all times. They must of their own accord consider if there is anything that could influence them in executing their duties or that could be perceived as bias on their part. It is not possible to define or list factors that may give rise to apprehension of bias – the question of what is proper will depend on the circumstances of each case.*

[14] In situations where the judge has a relationship with a party or a legal representative appearing before him or her, it is always appropriate for the judge to consider the degree of intimacy between him or herself and the person concerned. The more intimate the relationship, the greater the need for recusal. In the case such as the present, where there is a close relationship between the presiding officer and one of the legal representatives, it appears to be undesirable if not improper for such judicial officer to sit in the matter. No general rule as to the kinds of relationship that should require recusal need be laid down, however, given the clarity of the test in SARFU (supra)."

[40] At paragraph 10 the Court referred further with approval to the following extract from the Bangalore Principles of Judicial Conduct:

"*Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. It must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived,*

that perception is likely to leave a sense of unease, grievance and of injustice having been done, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest; by the judge's behaviour on the bench, or by the judge's out-of-court associations and activities. A judge must therefore avoid all activity that suggests that the judge's decision may be influenced by external factors such as the judge's personal relationship with a party or interest in the outcome."

[41] What was said in Bernert v Absa Bank Ltd 2011 (3) SA (CC) at 102 D-E (para 35) is also apposite:

"*[35] The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should a litigant be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '*(j)udges do not choose their cases; and litigants do not choose their judges'*. As application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias.*"

[42] As is often the case, the legal principles may be clear but the application of those principles to the facts may occasion some difficulty.

Mr. de la Harpe submitted, however, that no such difficulty existed in the present matter. He submitted that respondents' own papers disclosed a

personal relationship between second respondent and Mtiya of such a close nature as to give rise to a reasonably established suspicion of partiality and a perception of an injustice having been done.

[43] In Dube's case *supra* it was held that the failure of the presiding Judge (Mogoeng J as he then was) to recuse himself from a matter in which his wife, a State counsel, presented argument on appeal, constituted an irregularity which vitiated the proceedings.

This finding is, with great respect, readily understandable. There is no doubt, to my mind, having regard to what was stated in Dube's case, *supra*, that had second respondent and Mtiya been involved in an intimate relationship at the time of the trial, even had they not been living together, second respondent would have been disqualified from presiding over the trial. The issue is, however, rather more difficult to resolve in circumstances where the impugned relationship is not as obviously and closely intimate as that which was in issue in Dube's case. As was stated therein, however, no general rule as to the kinds of relationship that should require recusal needs to be laid down. What is required is "*a normative evaluation of the facts to determine whether a reasonable person faced with the same facts would entertain the apprehension. The enquiry involves a value judgment of the Court applying prevailing morality and common sense.*" (para 7)

[44] In S v Basson 2004 (1) SACR 85 (CC) reference was made at para 53 to the application in an enquiry of this nature of "*common morality and common* sense".

[45] In my respectful view the issue of what constitutes "*prevailing*" or "*common*" morality may, depending on the circumstances, not necessarily be clear-cut, especially when regard is had to what was stated in the President of the Republic of South Africa case *supra,* at para 43:

> "*In a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that judicial officers should*

> *share all the views and even the prejudices of those persons who appear before them.*"

[46] In that matter the elder son of Chaskalson P was added to the legal team representing the appellants in the appeal before the court. An allegation of an inappropriate personal relationship between Chaskalson P and his son was given short shrift, the Court stating at para 84 as follows:

> "*We would also mention that it has been accepted practice in our Courts for many decades that close family members appear before each other and it has never before been suggested that it was inappropriate.*"

In a footnote (86) the following is stated:

> "*In this Court, apart from the case of Mr. Chaskalson, Trengove AJ sat in cases in which his son, Mr. W. Trengove S.C. appeared and Kentridge AJ sat in cases in which his daughter-in-law, Mrs. J Kentridge appeared.*"

[47] In an instructive article, The Family Business Curtailed: Advocate: December 2010 at pages 70-74, Wallis J, as he then was, with reference to the President of the Republic of South Africa case, states that the examples set out in footnote 86 were not isolated instances and that "*the Constitutional Court was undoubtedly correct in its view of the practice in South Africa*". He refers in this regard to "*countless examples*" of members of the Bar who had appeared before close relatives.

He refers further, however, to remarks by the Lord Chief Justice in a foreword to the Guide to Judicial Conduct issued by the Judges' Council in respect of judges in England and Wales, namely:

> "*However, the responsibilities and the public's perception of the standards to which judges should adhere are continuously evolving.*

> *To take but one example, when I came to the Bar it was considered in order for a son to appear before his father. This would be unacceptable today.*"

Wallis J states further that "*the view that the Constitutional Court said had been settled for decades, whilst factually correct for South Africa, is no longer acceptable in much of the world.*"

[48] Be that as it may, the ongoing relationships between relatives such as those to which the Constitutional Court has given its *imprimatur*, are in my view much closer and more intimate than is the relationship with which this matter is concerned, a relationship which, apart from interaction over the child born thereof, is no longer extant, other than on a professional level.

[49] I do not believe that a reasonable person in the position of applicant would apprehend in the circumstances that the second respondent could not bring an impartial mind to bear on his adjudication of the case because of his previous intimate relationship with Mtiya. There is no suggestion that Mtiya and second respondent continued to have any social interaction with each other at the time of the trial. The mere fact that they "*interacted*" over their child is, in my view, in the absence of any greater detail as to the nature of this interaction, not such as to engender any suspicion of bias of the part of a reasonable observer.

[50] Moreover, their so-called intimate relationship had ended a year prior to the commencement of the trial and, since their break up, Mtiya had become involved with another man.

[51] No purpose would, in my view, be served in attempting to answer the rhetorical question posed by Mr. de la Harpe as to where the line should be drawn in a case such as the present concerning the time which had to elapse between the termination of an intimate relationship and the commencement of a trial without a reasonable suspicion of bias being engendered.

It is, after all, a question of degree in any particular case. Having due regard to the presumption of impartiality on the part of the judicial officer and the "*formidable burden*" borne by the applicant I am satisfied that, however intimate their relationship may have been in the past, the degree of intimacy existing between Mtiya and second respondent at the time of the trial was not such as to require the recusal of the latter.

[52] I am satisfied therefore that the application should be dismissed with costs. There is, however, one aspect relating to the costs of a previous postponement on 17 May 2012 which must be dealt with. On that day when the matter was called before Sangoni JP and Majeke AJ it transpired that the papers were not in order. The matter was accordingly postponed and the issue of the wasted costs occasioned thereby was reserved.

[53] It appears from an affidavit filed by applicant's attorney, Mr. Wolmarans, that when last he checked the file, on 20 March 2012, the papers were complete and in order. He accordingly did not consider it necessary to check it again before the hearing on 17 May 2012. He is at a loss to explain what happened to the papers in the interim. It appears that at some stage some-one described as a "*messenger*" uplifted the papers from the court file. Who this person was, nobody knows. Be that as it may, it is clear that the duty to ensure that the papers were in order for the hearing on 17 May 2012 rested on applicant as *dominus litis.* That being the case applicant must bear the costs occasioned by the postponement.

The following order will accordingly issue:

> The application is dismissed with costs, such costs to include the wasted costs occasioned by the postponement of the matter on 17 May 2012.

_____

J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

_____
M. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. D. De la Harpe
Instructed by: Dullabh & Co: Mr. Wolmarans

Appearing on behalf of 1st Respondent: Adv. S. Cole
Instructed by: Wheeldon Rushmere and Cole : Mr. van der Veen

Appearing on behalf of 2nd Respondent: Adv. Mnyatheli
Instructed by: Whitesides Attorneys: Mr. Basson