

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2022-005166

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES

2.OF INTEREST TO OTHER JUDGES: YES

3.REVISED YES

Judge Dippenaar

In the matter between:

XOLANI NCUBE

1st APPLICANT

WARWICK LABORATORIES

2nd APPLICANT

AND

HEALTH AND HYGIENE (PTY) LTD

RESPONDENT

APPLICATION FOR RECUSAL JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 15th of December 2022.

Summary: Recusal application after judgment and at stage of application for leave to appeal – once judgment granted court functus officio – no current or prospective proceedings pending – approach to recusal incompetent – principles regarding recusal restated – spurious grounds raised – conduct of court and judge's secretary impugned without cogent basis – respondent seeking special costs order including order disentitling legal representatives from charging fees – contempt order sought in facie curiae – appropriate remedy – referral to Legal Practice Council for investigation

DIPPENAAR J:

[1] The main application between the parties was an urgent application in which the applicants sought to interdict a shareholders meeting of the second applicant. My written judgment was delivered on 13 July 2022. In terms of the order, the application was dismissed and the first applicant was directed to pay the costs on the attorney and client scale. The applicants launched an application for leave to appeal. The applicants were now represented by new attorneys, Mphambo Michelle Attorneys with email address info@mbm-attorneys.org. The application for leave to appeal was enrolled for hearing on 6 October 2022. Advocate Mkhululi Khumalo, who had represented the applicants in the urgent application, again represented them on 6 October 2022.

[2] At the commencement of the hearing of the application for leave to appeal in the virtual court on 6 October 2022, Adv Khumalo contended that there were concerns on how I had dealt with the urgent application and that the first applicant's legal

representatives had not received notice of the hearing of the application for leave to appeal. It was contended that they had formed the perception that they would not get a fair, impartial hearing from me. Adv Khumalo formally asked for time to bring a recusal application and for the matter to stand down or be postponed to do so.

[3] My secretary placed the email notifications to the parties on record, establishing that notice of the hearing date was provided to the attorneys of record of the parties on 29 September 2022 and the link for the virtual hearing was provided on 3 October 2022.

[4] The link was sent to the email addresses provided by the respective attorneys. In the case of the first applicant it was sent to the email address provided in the application for leave to appeal, being info@mbm-attorneys.org.

[5] Adv Khumalo had received the link and was present in the virtual hearing. It beggars belief that it was contended that the first applicant was not notified of the hearing, given that his legal representatives were in the meeting and had clearly received timeous notification of the link. It matters not whether Adv Khumalo received the link from only the respondent, as he alleged. The link was properly sent to his attorneys of record. The undisputed evidence was that he received the link on 3 October 2022, the same date as the respondent did.

[6] Pursuant to Adv Khumalo's request for a postponement, an order was granted postponing the application for leave to appeal to 14 October 2022 to afford the applicants an opportunity to bring a recusal application. Timelines were set for the delivery of papers in the proposed recusal application.

[7] The recusal application was launched on 10 October 2022, raising numerous grounds primarily directed at the way in which I conducted the urgent court proceedings on account of "real and perceived lack of impartiality". It was contended that I was not prepared to consider the urgent application on an *ex parte* basis but required service

before it would be entertained, thus raising an apprehension of partiality in favour of the respondent. It was further contended that I conducted the application proceedings in the urgent court in a biased manner. Further grounds were raised pertaining to the judgment granted, including a failure to correctly read and interpret legal documents, how I dealt with the respondent's challenge under r 7 to the authority of the applicants' attorney of record and that I should have referred the matter to trial rather than accept the share certificates produced by the respondent.

[8] The other ground raised was: "*Further that on account of her handling of the processes before and during the application for leave to appeal raises serious procedural and impartiality concerns that displace the presumption that she is an impartial and a fair judge*".

[9] The respondent elected to oppose the recusal application. It delivered an answering affidavit deposed to by its attorney of record, Mr Brittan. From that affidavit, it appeared that the first applicant had been removed as a director of the second applicant and the latter was deregistered after the delivery of the judgment in the urgent application on 13 July 2022. This was not mentioned in the recusal application. The first applicant thus had no *locus standi* to represent the second applicant in this application. I shall accordingly refer to the recusal application as that of the first applicant.

[10] The respondent sought dismissal of the recusal application together with a punitive costs order against the first applicant's legal representatives, jointly and severally, on a *de bonis propriis* basis. An order was further sought in terms similar to that granted by Sutherland J in *Le Car Auto Traders v Degswa 1038 CC and Others*¹ ("*Le Car*"), disentitling the first applicant's legal representatives from charging him any fees in relation to the recusal application. Lastly, the respondent further sought an order for the summary conviction of the first applicant and/or his counsel, Adv Khumalo, for contempt *in facie curiae*, and the imposition of a fine to be determined by the court.

¹ (2011/47650) [2012] ZAGPJHC 286 (14 June 2012)

[11] Such relief was based on the conduct of the first applicant's legal representatives in relation to the application. It was argued that the basis for the recusal application, although put up through the notional mouth of the first applicant, was demonstrably founded on alleged perceptions in respect of which a layperson would not have had insight and in respect of which he would be dependent upon advice from his attorney and counsel to have conceived, and in turn, to have made the complaints. The respondent contended that the intention to insult was manifest in the blatant lack of substance in the recusal application and the absurd grounds advanced in respect thereof which fell far short of the stringent test for recusal of a judicial officer.

[12] The respondent further argued that the language used in the application was insulting to the court, disrespectful and the procedure adopted improper. It contended that nothing was addressed in the recusal application with regard to the false submissions made on 6 October 2022 with regard to the alleged failure to notify the applicant of the proceedings, given that the address was that as appeared on the application for leave to appeal. According to the respondent the assertions were disingenuous, dishonest and an insult to the court. It argued that the persistence on the grounds in the recusal application are nothing short of an insult to the court and wholly egregious.

[13] No replying affidavit was delivered by the first applicant. Instead, two documents were uploaded onto CaseLines early on the morning of the hearing on 14 October 2022: a rule 23 notice and a document headed "notice of point *in limine*". This of itself was irregular.

[14] The latter document stated:

"(a) If the granting of an order that the applicant had to commence a formal application for the recusal of a judge before that had been a meeting in chambers involving all the parties was not irregular".

(b) Whether such decision did not prejudice the applicants in that they had to raise issues that the judge had not been appraised with, and no response, to set the record straight, came before the judge before these proceedings commenced.

(c) Further, whether the instruction that the Respondents had to respond to the allegations against the conduct of the judge was not irregular.

(d) To determine what must be done in the circumstances where a fundamental procedure had been omitted to the failure of justice”.

[15] At the hearing, Adv Khumalo sought to deal with this ‘point *in limine*’ first and to obtain judgment on the issue. I ruled that there would not be a piecemeal hearing and that the application was to be dealt with in its totality. I shall deal with this issue later in the judgment where appropriate.

[16] The r 23 notice, which seeks to strike out the respondent’s “pleadings” is not only late, having been delivered on the morning of the application, but is also fatally defective and lacks merit. That is dispositive of the r 23 notice.

[17] The test for recusal is trite. The question is whether, seen objectively, the judicial officer is either factually biased or whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the presiding officer has not or will not bring an impartial mind to bear on the adjudication of the case². How the test of apprehension of bias is to be applied was explained thus in *SARFU*³:

“An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for a recusal application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge from the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test”

[18] In applying the test for recusal our courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. A presumption in favour of judges’ impartiality must therefore be taken into account in deciding whether such a reasonable

² President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC) (“SARFU”) par [48]

³ SARFU para [45]

litigant would have a reasonable apprehension that the judicial officer was or might be biased.”⁴ The test of apprehended bias is objective and the onus is on the applicant.⁵

[19] It is against these principles that the grounds advanced in support of the recusal application must be assessed.

[20] As already stated, of the prayers in the order sought in the recusal application, only one was partially not predicated on the urgent court proceedings, but on proceedings during the application for leave to appeal.

[21] The majority of the application relied on grounds of alleged conduct on my part during the urgent court proceedings. That such grounds cannot sustain a recusal application was authoritatively determined in *Le Car*, wherein Sutherland J held that:

[36] The effect of a recusal can only be in respect of a prospective or current proceeding. Asking a judge to recuse himself after judgment is given is silly. Even if he chose to recuse himself, the judgment is not thereby nullified. A judgment once given stands until an appeal sets it aside. The judge who gave the judgment is functus officio.

[37] Moreover it does not follow that a refusal of an application for recusal leads, as the next step, to an automatic application for leave to appeal against the refusal. South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Fish Procession) 2000 (3) SA 705 CC addressed the implications of a refusal to recuse at [4] and [5]. On the rare occasions when a court would stop further proceedings to allow a challenge to the refusal to recuse, contrary to the general rule against piecemeal decisions, such consequence would be in the discretion of the court taking into account several factors, including the nature of the matter, the nature of the objection and the prospects of success in the recusal. No right exists to proceed on appeal.” .

[22] It is clear that I cannot recuse myself from proceedings that have already been completed and in respect of which I have already given a judgment. I am *functus officio* to affect the judgment in any way. Inasmuch as the motive of the first applicant was to seek to nullify the judgement granted by way of the recusal application, the application is in the words of Sutherland J “less than meritless”⁶.

⁴ SARFU para [40]-[41]

⁵ SARFU para [45]

⁶ *Le Car* [39]

[23] At the commencement of the hearing, Adv Khumalo abandoned all the grounds relating to my alleged conduct in the urgent court proceedings. He however persisted with the grounds relating to “the processes before and during the application for leave to appeal”. These condensed into an issue with the virtual link for the hearing of 6 October 2022, the procedure followed in relation to the recusal application and the respondent’s participation therein and the issue of costs, aimed mainly at the *de bonis propriis* costs order sought by the respondent.

[24] The fact that Adv Khumalo abandoned the majority of his grounds for recusal does not however change the fact that there are still no current or prospective proceedings pending and the principle enunciated in *Le Car* remains applicable. The raising of alleged irregularities pertaining to a recusal application or an application for leave to appeal does not detract from the principle that there are no prospective or current proceedings pending and that the court is *functus officio*.

[25] Although that is dispositive of the recusal application, it is necessary to deal with the grounds argued by Adv Khumalo as it has a bearing on the relief sought by the respondent.

[26] The grounds persisted with by the first applicant were stated in the founding affidavit thus:

“The usual procedure in application for recusal is that counsel for the applicant seeks a meeting in chambers with the judge in the presence of his or her opponent. The grounds for recusal, I am told, are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge, the applicant would, if so advised, move the application in open court. The procedure adopted in this matter that the matter must be served to the Respondents to oppose (and argue in place of a judge) before this matter is heard in Chambers, radically departs from established practice. It also raises concerns of impartiality. The question is why must the Respondent be made to argue the judge’s case”.

[27] The “notice of point *in limine*” also has a bearing on this issue. Adv Khumalo argued that an incorrect process had been followed by me in requiring the recusal application to be in writing and in open court. It was argued that recusal had to be raised

with a judge in chambers. Reliance was placed on *SARFU* in support of that proposition. It was further argued that it was improper for the respondent to address the allegations made against the judge by the first applicant and the respondent was in no position to argue the innocence of the judge. According to Adv Khumalo, judges had to deal with the recusal in writing.

[28] He further raised the costs order sought by the respondent and the court's "insistence on a formal application". It was argued that I directed that a formal recusal application had to be brought, whereas there had to be a meeting in chambers before any formal recusal application could be launched. The inference in the argument is that it was because I required a formal application to be launched, costs were incurred. That inference is not justifiable, given that it was the first applicant and his legal representatives who elected to launch and persist with the recusal application.

[29] The glaring omission from Adv Khumalo's argument is that it was incumbent on the first applicant and his legal representatives to request such a meeting. No correspondence requesting such a meeting in chambers was sent by the applicant's legal representatives, nor did Adv Khumalo seek such a meeting at the hearing on 6 October 2022. Instead he raised the issue of my recusal in open court during the virtual hearing and expressly requested a postponement in order to do so.

[30] No meeting was held in chambers because such a meeting was simply not requested. The significant fact is that the first applicant and his legal representatives neither requested a meeting in chambers, nor addressed a letter to this court setting out his complaints. The first applicant and Adv Khumalo did thus not follow the procedure he proposed was the appropriate one. The argument that proper procedure was not followed thus lacks merit.

[31] In any event, *SARFU* must be read in context, based on its facts. There, the fourth respondent in appeal proceedings pending before the Constitutional Court, shortly before the hearing lodged an application for recusal of four of the justices of the

court. The application was served on those judges only. It was an unprecedented application for recusal implicating each of the judges of the Constitutional Court questioning their impartiality and impugning the integrity of the court as an institution⁷. Whilst sanctioning the process of approaching a judge in chambers before the launching of formal proceedings, the Constitutional Court further pointed out that a letter could have been addressed to the judge concerned in which the specific averments were set out⁸.

[32] As pointed out in *SARFU* it would further be improper to raise interrogatories without any factual basis from a Judge⁹. Adv Khumalo's argument was predicated on the notion that the court must effectively justify its actions to the first applicant by way of responding to interrogatories. As pointed out by the Constitutional Court, that approach is improper.

[33] Adv Khumalo further argued that the respondent should not have opposed the application as the recusal issue was between the first applicant and this court and that I was obliged to respond to the issues. He further argued that, in opposing application, the respondent commenced a new application which the first applicant elected not to answer. It appears that the defective r23 notice was aimed at this issue. He further criticised the respondent for not dealing with the first applicant's affidavit *ad seriatim*.

[34] Those arguments are misconceived for various reasons. I have already dealt with the impropriety of an interrogatory approach. It was for the first applicant to raise its concerns in a proper, motivated fashion. Adv Khumalo's argument further disregards that in the recusal application, reliance was placed on my alleged real or perceived lack of impartiality, referring to alleged conduct in the proceedings in the urgent court, forming the subject matter of my judgment. The respondent thus clearly had an interest in those averments and the right to be heard. It elected to do so and to oppose the application.

⁷ Para [3]

⁸ Para [50]-[51]

⁹ Para [51]

[35] The argument that the respondent was barred from raising any facts and only had to respond to the first applicant's allegations illustrates a grave misunderstanding of the relevant principles, including that of *audi alteram partem*. Its response to the recusal application was clearly not a new application.

[36] It was open to the respondent to raise whatever issues it deemed appropriate in response to the recusal application. Its opposition was aimed at protecting its own interests in what the respondent termed "a wasteful and meritless" application. As party to the proceedings, and in adherence to the principles of *audi alteram partem*, the respondent was afforded an opportunity to deliver answering papers, if it chose to do so.

[37] During argument on 14 October Adv Khumalo denied that he had requested an opportunity to bring the recusal application. He argued that this court ordered the first applicant to launch the recusal application. At the commencement of the hearing on 6 October 2022, the following exchange occurred:

"MR KHUMALO: Yes. Thank you very much. Your Ladyship, with respect, there, there are concerns that I would like to raise with you, they relate with the very same application in the appeal or the very same matter that is under appeal right now.

Your Ladyship, can I take you through what happened? This application was first launched as an ex parte unopposed application and then Your Ladyship directed that it should be opposed. You did not give us the reasons why it should be opposed and then during the hearing I was thinking, Your Ladyship, were going to tell us the reasons why it had to be opposed but the nonetheless, the respondents raised the issue that there were a number of applications on CaseLines to an extent that they were kind of confused as to which application they were supposed to listen to, they were supposed to respond to and it did not come out of this Court to support the fact that there was an initial application which application the, the learned judge had directed that it should be opposed.

COURT: Sorry, let me just understand; when you mean opposed, do you mean served? You wanted to bring it as an ex parte application ...[intervenes]

MR KHUMALO: Ex parte unopposed, unserved, yes.

COURT: Ex parte and I was not prepared to entertain the application on an ex parte basis ... [intervenes]

MR KHUMALO: Yes.

COURT: ...I told you that you must serve the application. Is that what you mean with opposed? I just want to make sure I understand ...[intervenes]

MR KHUMALO: Yes, yes ...[intervenes]

COURT: Okay.

MR KHUMALO: You said [indistinct – 05:05] served. Yes, that is what I am ...[intervenes] ... [speaking simultaneously]

COURT: Okay. Thank you.

MR KHUMALO: Alright. Thank you very much, Your Ladyship, and then those reasons did not come out of the Court. Alright. And then when we were here, during the application, during applicant, it came out that our respondents were allowed, the respondents were allowed an opportunity to start as if it was their matter and then when I raised that, Your Ladyship assured us that you will take cognisance of that when you deal with the issues and then it immediately turned out in the judgment that, to a certain extent, Your Ladyship was entertaining the apprehension that there was something that we were supposed to prove and you went with that kind of thinking throughout, and then it resulted in a judgment that is subject to an appeal, as we speak right now.

And then thirdly, whereas this matter is our matter, the secretary of the judge did not inform us that we are appearing today. We received that kind of communication from the respondents, yet this our matter, and we did not get the, how can I put this one, we did not get the communication from the, ja, Jacqueline Blake, she in fact communicated with the respondent and the respondent only told us recently that, by the way, if you did not receive any communication from Her Ladyship, here is communication that you are supposed to appear on the 6th and when we look closely at the date the, the 6th, it is a date that was selected by the respondents.

We had requested not to appear today and we had made it clear that we have several matters that we are attending to and then the decision was made again that we should appear today when we had requested tomorrow.

We had requested the 7th, the 14th, and the 21st because we had looked at our itinerary and nonetheless a decision was made that we should appear today and then when we look at the aggregate of all these issues that I have just put before you, Your Ladyship, one gets the perception that we are not going to get a fair trial. We will never get a fair hearing, an impartial hearing from Your Ladyship.

With respect, I am addressing you on that matter and I do not know whether Her Ladyship will make a decision that the matter stands down or it is postponed and then we submit an application for your recusal from the matter but I simply wanted to tell you that the aggregate of the things that have happened up to this point in time, they point towards one fact, that we may not get a fair trial when you sit on this matter.

Thank you very much, Your..., Your Ladyship.

COURT: Thank you. Mr Khumalo, you had the opportunity to bring a written application for my recusal, you knew about the date. Why is there no, I cannot entertain such an application from the bar.

MR KHUMALO: As, as I said to you, we were only informed by the respondents three days ago. We did not get that kind of communication from Jacqueline Blake. If I would have received such communication from Your Ladyship, then we would have made arrangements to make that application but because it seems we would get all the information through the respondents and we had to bring that you today.

COURT: Thank you. Let me hear Ms Blumenthal on the issue. Let me just clarify before Ms Blumenthal. So, so what are you asking for today effectively? I just want to understand what you are asking for so I have clarity.

MR KHUMALO: **We are asking that Your Ladyship gives us time to bring a written application for Your Ladyship's recusal from the matter. "**

[Emphasis provided]

[38] Adv Khumalo, having been the party making the submissions, was thus fully aware that his contention that the court ordered him to bring a recusal application (raised in an attempt to avoid the costs order sought by the respondent) was patently false. Such conduct does not become an officer of the court and is worthy of censure.

[39] Adv Khumalo during argument further submitted that the procedure adopted by requiring a formal application to be dealt with in open court was substantively and procedurally unfair.

[40] There is no merit in such argument. S 34 of the Constitution, 1996 provides, in relevant part:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court..."

[41] Dealing with the recusal application formally and in open court, adheres to this principle.

[42] It follows that these grounds lack merit and do not sustain the recusal application.

[43] In the recusal application, reliance was also placed on certain alleged conduct on my part in regard to the leave to appeal application. The founding affidavit is replete with incorrect factual and legal submissions. The relevant portion stated¹⁰:

"COMMUNICATION IN REGARD TO THE LEAVE TO APPEAL

"We launched a leave to appeal application. However, the Judge, through her secretary, has chosen to communicate with the respondent, without directly establishing contact with us. Ordinarily, leave to appeal is decided by a Judge upon having regard to the submissions of the applicant. Thereafter, in terms of rules and applicable statutes, Respondents may be served. Before her Ladyship, things have unfolded disturbingly differently.

The respondents received communication on dates where we had to select our dates on which we could be available and was tasked with informing us. Correct procedure would be for the Judge and or her office to establish contact with us (as owners of the notice), which details she and or her office had on the notice. For some reason, the Respondents entrusted with the duty to relay the Judge's preferred dates. It suggests that the Judge had and still has closer contact with the respondents than she has with us. 24 Through the office of the Judge we sent our dates. The Judge selected to 6th of October a date that was requested by the Respondent. Clearly, this is bias towards Respondents."

¹⁰ At paragraphs 22 to 24 of the founding affidavit

REQUEST FOR HEADS OF ARGUMENT FROM BOTH PARTIES

I understand that in terms of directive, the Judge who hears an application for leave to appeal may direct how it would unfold. However, requesting the Respondents to challenge a leave to appeal, which would issue a decision, which in terms of rules, would still be communicated them extraordinary (sic). At the end of the day, the decision is for the Judge, upon considering the Applicants submission (notice) to decide if there appears to be grounds, upon which a different judge would come to a different judgment.

FAILURE TO COMMUNICATE LINK TO THE APPELLANTS

In an extra-ordinary and bizarre move, through her secretary, the Judge only invited the Respondents appear (sic) in a notice of leave to appeal and left out the Appellants. The respondents had to relay such information, a day or so before the date. The move is inexplicable. The Judge wants to rely on communication that was sent to an email that is not working...But what surprises is that the Judge, through her secretary had used an alternative working to contact the Appellants attorneys. Failure to do the same with such crucial information (which was sent to the Respondent's by the way)is proof that the Judge is in fact not impartial.

It is our submission that the Judge has not been impartial and or independent in in her conduct and rulings. The facts speak for themselves.”.

[44] The first applicant did not raise any of the well identified grounds for recusal. The grounds raised were artificial technicalities without merit and without any conduct on the part of the court to recuse itself, especially not at this stage of the proceedings. The first applicant's attorney of record provided no contribution to the debate and remained silent, not providing any confirmatory affidavit or affidavit dealing with the merits of the application.

[45] In adherence to the principle of *audi alteram partem*, it is standard practice to afford all parties to an application the opportunity to make submissions at an application for leave to appeal. It is up to those parties to decide whether to oppose such application or not. Providing a deadline for the submission of heads of argument, is in no way improper.

[46] Communication pertaining to the hearing of an application for leave to appeal is a logistic issue, dealt with by a judge's secretary, who will ascertain a judge's availability

to hear such application. As held by Sutherland J in *Le Car*¹¹, after dealing extensively with the ethical rules about contact between counsel and a judge:

“Self-evidently communications about logistics differ materially from communications about the substance or merits of a matter. ... Unilateral contact with the judge’s clerk about matters relating to logistics is wholly unobjectionable ... including to enquire about when a judge might be able to make time to hear an application for leave to appeal.

...Unilateral contact with a judge’s clerk about logistical matters is not a breach of counsels’ ethical duties nor that of the judge.

[47] Other than selecting the 6th of October 2022 as the option which best suited me from the prospective dates supplied by the parties, I was not involved in the logistics of arranging a hearing date.

[48] For these reasons, the contention that I had closer contact with the respondent than with the first applicant, lacks merit.

[49] The contention that my secretary did not send the link to the applicant, is incorrect as evidenced by the facts and the contents of the emails placed on record by my secretary at the hearing on 6 October 2022. The fact that the first applicant’s attorney had another email address cannot constitute any irregularity if that email address is not provided by the attorney as a contact address. That was not done. The first time that the attorney of record for the first applicant’s second email address appeared on the application papers was on the recusal application, delivered on 10 October 2022. That email address is mmphambo@gmail.com.

[50] In argument, Adv Khumalo sought to impute the conduct of my secretary, whose conduct was beyond reproach, to me without any factual or rational basis. The argument was simply that as the notification comes from the judges’ office it comes from the judge. He argued that the alleged omission to send the link on the part of my secretary, affected this court’s office and created the impression that it was done

¹¹ Paras [27]-[28]

deliberately. There is no cogent factual basis to attribute logistical issues dealt with by my secretary, in which I was not involved, to conduct on my part. Considering that one of the main functions judges' secretaries perform is to deal with logistic arrangements, this argument entirely lacks merit. The facts in any event established that there was no such omission and the link was properly sent to the email addresses provided by the respective attorneys of record.

[51] Even more egregious is that Adv Khumalo sought to ascribe an intention to my secretary to deliberately not inform the first applicant of the hearing date, despite knowing that the email address of the attorney was not working. No factual basis was laid for this scurrilous and unwarranted attack on her integrity. It was argued that if not deliberate, my secretary was negligent and that it was the obligation of the judge's secretary to check with the applicant's attorney whether the link was received. It was contended that as the court did not jointly inform the parties, there was no even handed treatment. These accusations are devoid of merit and are scurrilous and unwarranted. It is not my secretary's duty to check up with parties whether emails she sent them were received.

[52] That as a matter of logic, the duty rested with the attorney to provide a functioning email address, was entirely disregarded. If there are difficulties with any particular email address, it is the obligation of the attorney to notify the other parties and to provide another functioning address. That never happened. No such communication was received from the applicant's legal representatives. It was further not explained why the first applicant's attorneys of record did not provide a functioning email address or why they only formally came on record by way of a notice of appointment on 10 October 2022, given that the notice of application of appeal was dated 3 August 2022.

[53] Adv Khumalo in argument initially conceded that there was no prejudice regarding the link issue and there was only a perception of bias. Later he sought to argue that there was indeed prejudice. It was argued that it was potential prejudice given what transpired in other proceedings between the parties dealt with by another

judge in which an order was granted in the absence of the first applicant. It was contended that the judge's secretary there too had failed to send the link to both parties. That argument does not avail the first applicant, given that factually both his attorney and counsel received the link to the virtual hearing on the same day it was sent and that they appeared at the proceedings.

[54] At the hearing, it was argued that as the email address was faulty, the email would have bounced back from that address and that the secretary would be aware of this. As alleged proof of this, an email dated 6 October 2022 was provided, reflecting that the email address could not be found. At best this indicated that the particular email address was not working on that date. The first applicant did not provide any proof that the email address was not working on 3 October 2022 when the link was sent to the parties. No affidavit was provided by the first applicant's attorney explaining any issues with the email address or verifying what was contended in argument.

[55] Adv Khumalo had received the link and was in the meeting and it is unclear where any prejudice may lie. In these circumstances, there is no cogent factual basis for the alleged "perceived prejudice". It was undisputed that the parties had all received the notification of the hearing date of 6 October 2022, already on 29 September 2022. The irresistible inference in the circumstances is that the parties had all received proper notification.

[56] There is no objective factual basis on which the alleged "issues with the link" could found a recusal application. Not only did my secretary act properly in all respects, it is an administrative function which a judge's secretary performs and which is not dealt with by a judge.

[57] It cannot objectively be concluded, applying the relevant test, that the first applicant's alleged apprehension that he would suffer prejudice if the matter proceeded before me was justified or reasonable, based as it was on incorrect facts and the drawing of unreasonable conclusions.

[58] However, even after the true facts were clarified by my secretary on record at the hearing on 6 October 2022, the recusal application was brought and persisted in, despite it being devoid of merit. That has a bearing on costs, an issue to which I later return.

[59] The right of any litigant to ask a judicial officer to recuse herself is a very important right which must be given full protection, as long as it is being honestly exercised. If the right however is abused and if, under the cloak of an application for recusal, a party is in truth insulting a court willfully, summary committal may be appropriate. The present application is of an exceptional kind as it was made only at the application for leave stage, when the judgment was already delivered. The grounds which were raised were spurious and without merit. The grounds for alleging bias were not facts outside the course of the proceedings, but grounds which related purely to what has happened during the course of the leave to appeal proceedings. The grounds advanced were entirely devoid of substance considering the facts.

[60] Seen objectively it cannot be concluded that any reasonable person would conceive how the first applicant or his attorney could advance them seriously, nor how a practicing legal practitioner could regard such grounds as having any logical or sustainable foundation for an accusation of bias. As pointed out by Spilg J in *Bennet v S; In re S v Porrit*¹²:

*"More and more recusal applications are being initiated as a strategic tool or simply because the litigant does not like the outcome of an interim order made during the course of a trial. The recusal of a presiding officer should not become standard equipment in a litigant's arsenal, but should be exercised for its true intended objective which is to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of people they serve. Judges are expected to be stoic and thick skinned. ... Where a judge's character is seriously impugned and clearly defamatory statements are made at a personal level, the legal representatives should bring a more analytical appraisal to bear particularly where the judge's recusal was not pursued expeditiously."*¹³

[61] Spilg J warned:

¹² 2021 11 BCUR

¹³ [2021] 1 All SA 165 (GJ); 2021 (2) SA 429 (GJ)

“[i]t may also be necessary to consider whether a stage has been reached to impose sanctions in cases where the right to request a recusal has been abused for an ulterior purpose or objective.” Ongoing unfounded aspersions cast on judges could bring about a loss of faith in the judiciary and bring it into disrepute.¹⁴

[62] These comments are apposite to the present case. The application was not made on the spur of the moment but after a process of contemplation and deliberately. The primary focus of the grounds raised were aimed at the urgent court proceedings, despite none of those grounds having been raised in the application for leave to appeal. The grounds raised were spurious and without merit, the majority of which were abandoned at the last moment, when authority was produced by the respondent that the judgment in the urgent court application could not be nullified by the recusal application.

[63] In *Bernert v Absa Bank*¹⁵ the Constitutional Court emphasised that: *“the resumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden which rests 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.”*

[64] In *SARFU*, it cautioned against impugning the integrity of judges by parties who are dissatisfied with the judgments rendered by such judges¹⁶. *Adv Khumalo*, having relied on *SARFU*, would have been aware of this caution.

[65] On the facts there was no impropriety on my part and no inference of bias can reasonably be inferred from the facts. No fundamental right of the first applicant as litigant has been adversely affected. Considering the grounds raised, the first applicant must have obtained advice from his legal representatives in relation to the recusal application. Although the role and involvement of the first applicant’s attorney of record remains unclear and she did not deliver any affidavit in the application, it appears that

¹⁴ *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at 713H-714A; *Bernert supra* at 101B-102A; *Ndlovu v Minister of Home Affairs* 2011 (2) SA 621 (KZD) at 631G-H; *Ex Parte Goosen* 2020 (1) SA 569(GJ) para [13]

¹⁵ 2011 (3) SA 92 (CC)

¹⁶ Para [68]

the attorney acquiesced in the approach adopted and she would have had to instruct Adv Khumalo as he is not practicing as an advocate with a trust fund¹⁷.

[66] The conduct of counsel during the hearing was gratuitous and disrespectful and disregarded the decorum required in a virtual court hearing. The challenge to the court's objectivity was misconceived and as appears from the founding affidavit, aimed at a challenge to the judgment in the urgent application. It can be reasonably inferred that upon being confronted with the relevant authorities which put pay to that approach, Adv Khumalo resorted to personal attacks on spurious grounds and grabbing at straws to try and support his submissions. None of the allegations raised had any substance. In doing so, he transgressed beyond the boundaries of acceptable conduct expected of an officer of the court.

[67] The application and the argument which was presented by Adv Khumalo was gratuitously insulting not only to me and to my secretary, but also to the respondent's legal representatives. In reply, Adv Khumalo went as far as to seek a *de bonis propriis* costs order against Ms Blumenthal, who represented the respondent throughout the proceedings. There was no cogent or proper basis to do so.

[68] The respondent sought an order summarily convicting the first respondent and/or Adv Khumalo of contempt of court committed in *facie curiae* and sought a fine to be imposed as sentence.

[69] In arguing that Adv Khumalo should be held in contempt, reliance was placed on *R v Silber*¹⁸ wherein the Appellate Division dismissed an appeal pertaining to a conviction and sentence summarily imposed by a magistrate for contempt of court committed *in facie curiae* following an application made by the appellant attorney on behalf of his client to the magistrate to recuse himself on the ground of an impression of

¹⁷ As placed on record during the urgent court proceedings.

¹⁸ 1952 (2) SA 475 (A)

bias. The magistrate had sentenced the appellant to a fine or imprisonment in the alternative.

[70] Schreiner JA held that what the appellant, an attorney, had said, constituted a wilful insult to the magistrate and he had correctly been convicted. Schreiner JA further held that the wilful insults of the magistrates¹⁹ and the allegation of bias is grave as it is not only an insult but a wilful insult, which may render summary committal appropriate if the insults are directed under the cloak of an application for recusal.²⁰

[71] It was further held that the power to commit summarily for contempt *in facie curiae* is essential to the proper administration of justice. This power is to be used with caution, for although in exercising it, a judicial officer is protecting his office rather than himself, the fact that he is personally involved and the party affected is given less than usual opportunity of defending himself, makes it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it.

[72] Considering the facts of this matter, I am not persuaded that the due administration of justice clearly requires that a contempt order be granted or that the first applicant be sanctioned.

[73] On the other hand, the conduct of the first applicant's legal representatives, including Adv Khumalo cannot be ignored or countenanced by a court as it would undermine the judiciary which is ever increasingly faced with a barrage of unwarranted attacks.

[74] In my view, considering the present circumstances, it would be appropriate to refer the conduct of Adv Khumalo and the first applicant's attorney and Adv Khumalo to the Legal Practice Council ("LPC"), as oversight body over legal practitioners under the

¹⁹ 480D-F

²⁰ At 481A

Legal Practice Act²¹, for investigation and whatever further action it deems appropriate. The format of any proceedings are best left to be determined by the LPC.

[75] It should not be left for the court to be drawn into the fray and effectively become a party to the disputes between the parties, in what is clearly acrimonious litigation.

[76] The respondent sought costs on an attorney and client scale. There is merit in the respondent's argument that the recusal application was academic and wasteful and justifies the granting of a punitive costs order. As in *Le Car*, the recusal application is an insult to the intelligence of everyone involved. In the words of Sutherland J: "*It was not conceived with circumspection but with bluster, invective and without regard to the running up of costs in so doing. These too are circumstances where costs on the scale as between attorney and client is appropriate*".

[77] I agree with the respondent that the basis for the recusal application, although put up through the notional mouth of the first applicant, is demonstrably founded on alleged perceptions in respect of which a layperson would not have had insight and in respect of which he would be dependent upon advice from his attorney and counsel to have conceived, and in turn, to have made the complaints²².

[78] In those circumstances, it would not be appropriate to mulct the first respondent in costs but that such costs should rather be borne by the first applicant's counsel and attorney of record *de bonis propriis*. I am further persuaded on the facts that it would be appropriate to grant a costs order in similar terms as was granted in *Le Car*²³. No cogent basis was advanced for the granting of a joint and several costs order deviating from the common law principle of joint liability.

[79] I grant the following order:

²¹ 28 of 2014, as amended

²² *Le Car* para [42]

²³ *Le Car* para [43]

[1] The recusal application is dismissed;

[2] The costs occasioned by the respondent's participation in the application shall be borne by the first applicant's attorney of record, Mphambo Michelle and counsel, Adv Mkhululi Khumalo, jointly *de bonis propriis* on the scale as between attorney and client;

[3] The first applicant's attorney of record and counsel are ordered not to present a bill, nor to recover any fees or disbursements from the first applicant in respect of any work performed in respect of the recusal application;

[4] The matter is referred to the Legal Practice Council for investigation into the conduct of Advocate Mkhululi Khumalo and the first applicant's attorney of record Mphambo Michelle;

[5] A copy of this judgment, all documents in the proceedings and the records of the proceedings are to be provided to the Legal Practice Council by the parties.

[6] A copy of this judgment is to be provided to the first applicant by his legal representatives forthwith.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 06 October 2022

DATE OF JUDGMENT : 15 December 2022

FIRST APPLICANT'S COUNSEL : Adv Mkhululi Khumalo

FIRST APPLICANT'S ATTORNEYS : Mphambo Michelle Attorneys

RESPONDENT'S COUNSEL : Adv R. Blumenthal

RESPONDENT'S ATTORNEYS : Brittan Law Attorneys