



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2023/080436

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: YES
[3] REVISED: NO

SIGNATURE

DATE: 13.10.2023

In the matter between:

CHUNG-FUNG (PTY) LTD

First Applicant

ANCHOR PROJECTS (PROPRIETARY) LIMITED

Second Applicant

and

MAYFAIR RESIDENTS ASSOCIATION

First Respondent

IMRAAN MOHAMED

Second Respondent

SALEEN EBRAHIM

Third Respondent

EBRAHIM EBRAHIM

Fourth Respondent

FEROZE SAYED BHAMJEE

Fifth Respondent

NAZIRA EBRAHIM

Sixth Respondent

RASHID AHMED MOHAMED VORAJEE

Seventh Respondent

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Eighth Respondent

**THE CITY OF JOHANNESBURG PROPERTY
COMPANY SOC LIMITED**

Ninth Respondent

**JOHANNESBURG ROAD AGENCY (PROPRIETARY)
LIMITED**

Tenth Respondent

Summary:

***Application for recusal of an acting judge** – There is a formidable threshold to be overcome in applications for recusal. The threshold can only be overcome if both legs of the “double reasonableness” test are passed. To pass the “double reasonableness” test, more is required than previously acting for a particular litigant, especially when the litigant is an organ of state, a regular litigant and represented by a diverse panel of attorneys. A direct causal link must be established between the litigation concerned, and the practice of the acting judge as counsel.*

In the instant case, the City of Johannesburg is not a direct participant in the litigation. It has adopted a neutral stance, supporting neither the applicants’ nor the first to seventh respondents’ case.

*No direct causal link pertaining to this litigation and the acting judge was established on the papers. Judgment in **Ndimeni v Meeg Bank Ltd (Bank of Transkei)** 2011 (1) SA 560 (SCA) distinguished. Approach of Court in **Wishart and others v Blieden NO and others** 3013 (6) SA 59 (KZP) at [23] followed.*

***Application for recusal of an acting judge** – robust debate in Court, in which a proposition that goes to the heart of the issue is put to counsel, does not give rise to a reasonable apprehension of bias. Judgment in **Take and Save Trading CC and Others v The Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA) applied.*

A judge has a duty to put propositions to counsel and give them an opportunity to address the issue. This is an inextricable part of the right to a fair hearing.

In the instant case, the effect and application of the Spatial Planning and Land Use Management Act, 2013 and a re-zoning in terms thereof had not been considered by the parties and is material to the proper determination of the (main) application.

Application for recusal of an acting judge – *informal interactions between an acting judge and counsel in chambers are usually treated as confidential. The disclosure of such interactions leads to a breakdown of trust between the bench and counsel.*

In the instant case, an interaction between counsel, in the presence of all counsel in the matter, concerning the acting judge's career ambitions and an invitation to discuss them at a later time, once the matter is completed, does not give rise to a reasonable apprehension of bias.

Responsibility of legal representatives – *legal representatives, as officers of the Court, have a duty to ascertain and assess the true facts of the matter objectively before advising their clients to peruse a recusal application. Ratio in **De Lacy and Another v South African Post Office** 2011 (9) BCLR 905 (CC) at [120] considered.*

Costs – *recusal applications should not be used as a strategic tool to forum shop. Where they are, this is an abuse of process. Ratio **Bennett v The State** 2021 (2) SA 439 (GJ) at [113] – [115] applied.*

JUDGMENT

PULLINGER AJ

INTRODUCTION

[1] This matter came before me in the urgent court on 6 September 2023. Before me were two issues. The first was Part A of the applicants' notice of motion

wherein they claimed declaratory relief concerning whether, in the light of an interdict granted against them by Adams J on 19 May 2021, that was subsequently upheld by the Full Court of this Division on 22 March 2023, they may utilise Erf 56 Crown Mines North ("**Erf 56**"), for the purposes of parking. The second was a conditional counter application brought by the first to seventh respondents ("**the Residents**"), wherein they sought interim relief against the applicants, the eighth respondent ("**the City**") and the ninth respondent ("**JPC**").

[2] The gravamen of the Residents' counter application was an interim interdict against the use of Erf 56 for the purposes of parking for any commercial or residential purpose pending the outcome of a review against the City's decision to rezone Erf 56 launched on 28 February 2022 and which remains pending.

[3] The use of Erf 56 for parking was an unlawful act at the time Adams J granted the interdict against the applicants. As a result of the Amendment Scheme 20-01-2679 ("**the Amendment Scheme**") which was promulgated on 9 March 2022 and effective from that date, Erf 56 was rezoned by the City for purposes of parking. In terms of the Amendment Scheme, any use other than parking is prohibited.

[4] The matter was argued in full before me. There was robust debate between me and Mr Ben-Zeev who was acting for the Residents concerning, in

particular, the court's power to suspend the Amendment Scheme. As will become apparent, this is the *fons et origo* of the application for my recusal.

[5] After argument was heard and judgment reserved, the Residents launched this application for my recusal on 12 September 2023.

[6] The recusal application is predicated upon two grounds.

[6.1] First, it was asserted by the Residents that, as a result of having acted for the City in numerous matters over a number of years, the City "*...is a significant client*" in my practice as counsel and having been appointed as an acting judge and returning to practice "*... in all probabilities ... shall continue, or will have an interest in continuing, this relationship with the [City]*". So it was asserted, "[p]ut in other words, the commercial relationship between [me] and the [City] is not historic. In all likelihood it is a continuing relationship and therefore there is a reasonable apprehension that [I] will not be able to preside over these proceedings in an impartial manner", and further "[t]he commercial relationship between [me] and the [City] gives rise to a reasonable apprehension of bias and jeopardises the impartiality of the hearing of this matter...". The Residents went on to state "[t]he [City] is an organ of state that is frequently involved in litigation. The matters in which [I] have been involved include published decisions of the appellate courts and are highly lucrative in their nature. There

is a significant fear that the hearing could not be conducted in an impartial and fair manner.”

[6.2] Second, the Residents complained about a brief informal interaction between me and Mr Farber SC which took place in chambers before the hearing of the matter. The informal interaction was held in the presence of Mr Ben-Zeev, the Residents’ counsel, his junior, Mr Plaatjies and Ms Franck who appeared for the City. The interaction surrounded the number of acting appointments I have held, my intention to seek a permanent appointment to the bench in due course, and my attempts at being recommended for silk. Mr Farber SC invited me, once the matter before me had been completed, to further discuss my professional aspirations with him. The Residents contend, “...*this conversation in all its circumstances amounted to an interaction between [me] and Mr Farber SC, who was counsel for the applicants, that was too close and that interfered with the impartiality of the proceedings.*”

[7] The complaints may be summarised as follows.

[7.1] The first is the suggestion that avarice may entice me to grant a judgment in which the City will be afforded, in the words of the Residents, “... *a significantly advantageous position with its decisions, once promulgated, would be beyond the powers of the Court*”. This conclusion is advanced in circumstances where the

Residents complain, “[d]uring the hearing [I] exhibited a firm view that because the [City] had rezoned Erf 56 and this rezoning decision had been promulgated, the matter was beyond the scope of the Court’s power and the Court had no power to interfere with what [I] appeared to suggest was equivalent to legislation...”.

[7.2] The notion of avarice influencing a decision one way or the other, cannot be sustained on the facts. Be that as it may, the assertion assumes that a decision one way or the other will influence the briefing patterns of the attorneys on the City’s panel. If that were the case, it would be remarkable indeed. There is thus a logical flaw in the first proposition on which the Residents rely.

[7.3] The second is a suggestion that Mr Farber SC improperly influenced me in such a manner so as to affect my impartiality. Mr Farber SC is a very senior member of the Johannesburg Society of Advocates who, at one time, has served as its Chairperson.¹ The suggestion that Mr Farber SC would attempt to improperly influence a presiding officer, whether an acting judge or otherwise, is salacious.

[8] Discussions that take place between a Judge and counsel in Chambers are generally treated as confidential. When the contents of discussions held in

¹ Mr Farber SC was chairperson of the Johannesburg Society of Advocates (“the JSA”) (as it is now known) in 1998 and his involvement with the Bar Council ended at about the same time as his tenure as chairperson. He served, from time to time, thereafter, as a member of the Professional Sub-Committee. Mr Farber SC stood down as leader of his group in about 2019. He has no involvement in the process of recommending members of the JSA, beyond the right to participate at the Meeting of Silks in his group that annually considers the merits of candidates who have made application to the JSA for Silk.

chambers are repeated this has an indelible effect on the bench's ability to trust counsel and leads to an inevitable breakdown of the relationship between the bench and counsel.

[9] Mr Willis, who argued the recusal application on behalf of the Residents, correctly, did not pursue this line with much vigour.

[10] The applicants oppose the recusal application. The applicants take the view that this application is “...*frivolous and disingenuous. It has been brought with the sole design of delaying the finalisation of the matter.*”

[11] The City abides the decision and did not file papers but advanced certain submissions at the hearing of this application.

[12] Before addressing the legal principles that find application in a recusal application, it is necessary to examine the role played by the City in the litigation before me.

THE ROLE OF THE CITY IN THE LITIGATION BETWEEN THE APPLICANTS AND THE RESIDENTS

[13] As will become apparent, the City had little to no participation in the proceedings. Their contribution amounted to little more than an exposition of what they contended the legal position to be, pursuant to the promulgation of the Amendment Scheme.

[14] The City was cited in the (main) application as the eighth respondent. No relief was sought against the City by the applicants. It was cited together with the JPC and the Johannesburg Road Agency (Pty) Ltd (“**the JRA**”) as the tenth respondent. No relief was sought against either the JPC or the JRA. In the Residents’ counter application, relief is sought against the applicants, the City and the JPC. Neither the JPC nor the JRA participated in the proceedings.

[15] In the (main) application the City filed an affidavit in which it stated that the

“[City] does not oppose the Applicants’ application, nor does it oppose the [Residents] conditional counter-application”.

[16] In its affidavit the City set out its position vis-à-vis the competing applications. It placed reliance on the Amendment Scheme constituting administrative action which, in its opinion, continues to have effect until set aside by a Court. Express reliance was placed on the provisions of the Promotion of Administrative Justice Act, 2000 and the Supreme Court of Appeal’s judgment in **Oudekraal**.²

² **Oudekraal Estates (Pty) Limited v City of Cape Town and Others** 2004 (6) SA 222 (SCA)

[17] It adopted the position that pursuant to Erf 56 being rezoned for parking, it should continue to be used for such purposes pending the outcome of the Residents' review. The City advanced other submissions regarding the other portions of the order granted by Adams J, but these are irrelevant for present purposes and pertain to Part B of the (main) application, which was not before me.

[18] Thus, while the City has an interest in the outcome of the competing applications because it concerns its Land Use Scheme, its stated position was neutral and its affidavit contributed very little to the matter other than to state its views on the matter.

[19] This is consistent with the approach the City took in the matter before Adams J. In the Residents' answering affidavit, it is said:

"The [City] failed to participate in the interdict proceedings at all, despite the severe allegations made against it. This included allegations that some of its officials were clearly in an improper relationship with the applicants. It also did not participate in the appeals brought by the applicants."

[20] The position of the City in the (main) proceedings was stated in the Residents' heads of argument in the main application as having:

"...only joined these proceedings after the [Residents] filed an answering affidavit, and ostensibly on the basis that the respondents had addressed its complicity in the unlawful conduct of the applicants."

[21] Thus, even the Residents accept that the City's role in the matter before me was, at best, belated and prompted not by any desire to advance or defend the rezoning of Erf 56, but to defend allegations of alleged impropriety by its officials. Again, any alleged impropriety of the City's officials may be an issue in the Residents' review, but did not feature in the (main) application before me.

[22] In the applicants' answering affidavit in this application their attorney points out:

"It must be remembered that the City was not a direct or immediate party to the litigation be [me] and sought no relief in the matter.

The directly competing parties were the applicants and the residents."

[23] This was met with the retort in the replying affidavit that:

"It is not correct that the [the City] was not a "direct or immediate party" to the litigation. It was cited as a respondent and it filed an answering affidavit and heads of argument. It is the owner of Erf 56. Through its municipal manager, the [City] made the ultimate decision to dismiss the internal appeal of the respondents against the rezoning of Erf 56. The [City] is also the author of a letter in which it took the view that the zoning decision rendered the judgment of this Court inapplicable. The applicants relied on this letter."

[24] This is at odds with what the Residents submitted in their heads of argument in the (main) application filed before the recusal application was conceived and does not address the point made by the applicants' attorney. It is flawed thinking and not causally connected to the dispute that came before me.

[25] The decision made by the City to rezone Erf 56 is the subject of the Residents' review. It is here that the City is a direct and immediate party. On any version, it is not directly involved in the application brought by the applicants or directly affected by the relief sought in the Residents' counter application.

[26] It is in this context that I discuss the applicable legal principals and their application to the facts of this matter.

APPLICABLE LEGAL PRINCIPALS

[27] In **Take and Save Trading**³ the Supreme Court of Appeal was confronted with an appeal against the refusal of the trial Judge.

[28] The context of this judgment is apposite given the *fons et origo* of the Residents' complaint herein, being the debate that took place at the hearing of this matter.

[29] The debate was informed by a review of the papers filed of record and upon consideration of the relevant statutes and case law, most particularly, the impact of the Spatial Planning and Land Use Management Act, 2013 ("**SPLUMA**") on the application.

³ **Take and Save Trading CC and Others v The Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA)

[30] SPLUMA is the relevant legislation that empowers a local authority, such as the City, to promulgate a Land Use Scheme and to effect amendments thereto. The effect of SPLUMA was not addressed in the comprehensive heads of argument filed by either the applicants or the Residents. This is central to both the applicants' and Residents' cases.

[31] There are two important principles that emerge from **Take & Save Trading**. The first is a proper understanding of a Judge's role in civil proceedings. Harms JA writing for a unanimous Bench said:

"A Judge is not simply a 'silent umpire'. A Judge 'is not a mere umpire to answer the question "How's that?" Lord Denning once said. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources ..."

[32] I believe, with respect to the imminent Judge of appeal, the role of a Judge goes further than that. A Judge is obliged to put his/her difficulties with a litigant's case to its representatives so that they may be afforded an opportunity to address it, lest a decision is made against a party without them having had the benefit of addressing that issue. This, to my mind, is an inextricable part of the right to a fair hearing as guaranteed in section 34 of the Constitution.

[33] But, when a Judge puts a proposition to counsel does this found a reasonable apprehension bias? The question was answered in the negative in **Take and Save Trading** where Justice Harms said:

"... as Mr *Shaw* rightly accepted, a deadly legal point forcefully made by the court during argument cannot give rise to an apprehension of bias in the eye of the 'reasonable, objective and informed' litigant in possession of 'the correct facts'."

[34] Therefore when a court that puts a proposition to a party with which that party does not agree and a robust debate ensues, that on its own, cannot give rise to a reasonable apprehension of bias. If that were the case, every legal practitioner who appeared before a court, and was confronted with a difficult question, would be well motivated and notionally entitled to advise their client to seek the recusal of the judge in question. This would amount to forum shopping and an abuse of process which cannot be countenanced. In **Beinash**,⁴ the Constitutional Court upheld the argument that:

"Indeed, as the respondents argued, the Court is under a constitutional duty to protect bona fide litigants, the processes of the Courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that '(n)o person or organ of State may interfere with the functioning of the courts'. The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed."⁵

[35] A similar sentiment was expressed by the Constitutional Court in **Bernert**⁶ where it said:

⁴ **Beinash and Another v Erst & Young and others** 1999 (2) SA 116 (CC)

⁵ At 123 E-F

⁶ **Bernert v Absa Bank Ltd** 2011 (3) SA 92 (CC)

"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 litigants 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."** An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias."⁷ (emphasis added)

[36] The double reasonableness requirement referred to in **Bernert** was explained as follows by the Constitutional Court in **SACCAWAU**⁸ as follows:

"[14] The second in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality - a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. **Impartiality requires in short "a mind open to persuasion by the evidence and the submissions of counsel"**; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that -

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals... Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'

⁷ At 102D - F

⁸ **South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited (Seafoods Division Fish Processing)** 2000 (3) SA 705 (CC) at [14] and [16]

[15] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu*, where **the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.**

[16] **It is no doubt possible to compact the “double” aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions.** But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

‘Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.’” (emphasis added)

[37] Now, the question is whether the Residents made out a case that surpassed the formidable threshold of the double reasonableness test referred to in **Bernert?**

[38] On the facts of this case, I do not think that that threshold has been surpassed.

[39] I have not been able to find many judgments dealing with the recusal of acting judges on the grounds raised by the Residents. The leading case appears to be that of **Ndimeni**.⁹

⁹ **Ndimeni v Meeg Bank Ltd (Bank of Transkei)** 2011 (1) SA 560 (SCA) at 568D - 570F

[40] This stands on a very different footing to that considered by the Supreme Court of Appeal in **Ndemeni**.

[41] In **Ndimeni**, an acting judge, practicing attorney and a partner in the firm in which he practiced, presided over a trial that concerned the appellant's dismissal by the respondent. Mpati P, as he then was, said:

[23] It must be remembered that the case before Zilwa AJ concerned the fairness or otherwise of the appellant's dismissal by the respondent. Two of the witnesses who testified at the trial on behalf of the respondent, namely Marais and Kalternbrünn, were senior members of the respondent's management stationed at head office. The appellant was their subordinate. Their evidence, particularly Marais', was to be weighed against his because he was placing the blame for the respondent's financial loss on Marais, while Marais was placing it on him. Moreover, the instructions given to the firm of which Zilwa AJ was a partner by the respondent for the preparation and execution of bonds were not a once-off occurrence — and I express no view as to whether a once-off occurrence would have made any difference. The firm is said to be on the respondent's list of attorneys to whom such instructions are given. (It has not been disputed that the firm is on the respondent's list, but merely that it 'was appointed to the panel of attorneys for TNBS Mutual Bank', which, we know, merged with the respondent.) In my view, the appellant would be entitled to believe, reasonably so, that Zilwa AJ would have expected to receive more instructions in the future from the respondent to prepare and execute bonds on its behalf. In these circumstances, I agree with the submission of counsel for the appellant that Zilwa AJ was obliged to disclose his relationship with the respondent, so that the appellant could decide whether to request him to recuse himself, or to waive his right to do so. In my view, the facts satisfy the requirements of the 'reasonable apprehension of bias' test."

[42] The distinction lies in the direct relationship between the firm for which the learned acting judge worked and the respondent. There is ordinarily no direct relationship between a client and counsel. The firm for which the acting judge

worked was on the panel of the respondent's attorneys. There was thus an expectation that of more instructions from the respondent. None of those considerations arise *instanter*. Importantly, as further distinguishing feature, the (main) application does not call upon me to hear evidence or make credibility findings concerning any of the protagonists.

[43] I respectfully follow the approach taken by Gorven J, as he then was, in **Wishart**.¹⁰ The learned judge said:

“[23] As was submitted by the respondents, my dealings with the second respondent were at a purely professional level. No personal beliefs or predispositions developed which are in any way relevant to the present application. **I am required to deal with issues argued on the papers. I am therefore not called upon to make any credibility findings or deal with the cross-examination of witnesses, including that of the second respondent. I am confident that I can fulfil my oath to administer justice to all persons in this application without fear, favour or prejudice in accordance with the Constitution and the law. I was, and am, of the view that, on the facts, a reasonable, objective and informed person would not reasonably apprehend that I would not bring an impartial mind to bear on the adjudication of the application.**” (emphasis added)

[44] The rationale is apposite. I am required to make a determination on the papers of the case made out by each of the applicants and Residents. The City's opinion on the law is no more than that; its opinion.

THE FACTUAL MATRIX

[45] Turning now to the facts:

¹⁰ **Wishart and others v Blieden NO and others** 3013 (6) SA 59 (KZP)

[45.1] First, the contention that a view expressed by a Judge, in the course of argument on any aspect that goes to the heart of the matter cannot not give rise to a reasonable apprehension of bias.¹¹ As already stated, the Residents failed to have regard to SPLUMA, its application or effect on the merits of the (main) application.

[45.2] Second, the only question before me was a question of law to be answered upon proper application of SPLUMA and the applicable authorities. As to how this may advantage the City in the pending review or otherwise was not explained by the Residents. It is apposite to remark that the Residents' statement to this effect is little more than an expression of opinion which carries no probative value.¹²

[45.3] Third, the City is a large amorphous statutory creature. It is divided into some seven regions, each region having its own officials responsible for building control, by-law enforcement, housing and the like and has a large panel of attorneys, each of whom are at liberty to instruct whichever counsel they see fit. These attorneys change on a regular basis, appointed pursuant to tenders for the provision of legal services; a process which the City is obliged to follow.¹³ These tenders for legal services are for different

¹¹ **Take and Save** (*supra*)

¹² **Die Dros (Pty) Limited and Another v Telefon Beverages CC and Others** 2003 (4) SA 207 (C) at [28]

¹³ Section 217 of the Constitution read with the Local Government: Municipal Finance Management Act, 2003 and the City's Supply Chain Management Policy

departments, including building control, by-law enforcement, housing and so on.

[45.4] Fourth, it must be remembered that it is the attorneys that appoint counsel and not the client.

[46] These are all facts that the Residents' legal representatives know or ought to have known and have properly considered.¹⁴

[47] There is no suggestion that I have any particular relationship with any official in any of the City's departments in any area, nor that I have any prior knowledge of the dispute. The relationship, if such a word may be used in this context, exists between me and the attorneys firms who are on the City's legal panel.

[48] The Residents referred to a number of matters in which I appeared for the City in the past.¹⁵

[49] The deponent in the Residents' replying affidavit points out that I had appeared in a matter just weeks before hearing this matter.¹⁶ The fact that I argued a matter for the City recently, does not show, as is suggested by the Residents, an on-going commercial relationship of some great proportion, but

¹⁴ **De Lacy and Another v South African Post Office** 2011 (9) BCLR 905 (CC) at [120]

¹⁵ The matters cited by the Residents date from 2011 to 2018. The matter that I recently appeared in has been on-going since 2016 and relates to an earlier opposed application that resulted in a judgment granted in 2011.

¹⁶ **City of Johannesburg v Changing Tides 74 (Pty) Ltd** [2023] ZAGPJHC (16 August 2023)

simply that I acted in my capacity as counsel for one firm of attorneys on the City's panel.

[50] It is deeply troubling to my mind that this misrepresentation of the facts to support a narrative is how the Residents have been advised to pursue this course of action. It seems to me to be a breach of the legal duty owed by the Residents' legal practitioners as officers of the Court.¹⁷

[51] A proper due diligence by the Residents' attorneys, as required by the decision in **De Lacy**, would have revealed that I am regularly instructed by Webber Wentzel in large commercial matters. If the suggestion is that an acting judge may be motivated by considerations of his or her financial position, then in the present case, I would surely be motivated to curry favour with the Residents' attorneys.

[52] In truth and in reality, the dispute between the parties is much like numerous applications that have come before this Court where neighbours complain of the City's failure to have enforced its Land Use Scheme or By-Laws.¹⁸ Indeed, I have appeared in many such cases and in matters directly against the City and continue to hold such instructions. Thus the Residents' alleged apprehension is not reasonable.

[53] The fact that I have previously acted for the City does little to support the Residents' case. They themselves have made the point that the City is

¹⁷ **De Lacy** (*supra*)

¹⁸ See, for instance, **Pick 'n Pay Stores Ltd v Teazers Comedy and Revue CC and Others** 2000 (3) SA 645 (W)

regular litigant in this Court. When this fact is properly considered in light of the panel of attorneys and the multitudes of counsel briefed by these attorneys on behalf of the City, the argument withers. Any apprehension of bias, when viewed, objectively, in the context of the correct facts, cannot be sustained.

CONCLUSION

[54] The threshold set for a recusal application is high and the reason is manifest, hence the need for the double reasonableness test.

[55] In **Bennett**¹⁹, this Court sounded a warning against recusal applications being used for tactical purposes. Spilg J said:

"[113] More and more recusal applications are brought as a tactical device or simply because the litigant does not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners bring or threaten to bring recusal applications is cause for concern. The recusal of a presiding officer, whether it be a magistrate or a judge, 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 the people whom they serve.

[114] Judges are expected to be stoic and thick-skinned. That comes with the territory. What is expected of a judge in presiding over a matter is clear, as is the right of a litigant to raise the impropriety of a judge's conduct and, without fear, seek his or her recusal. There can also be no doubt that the right to seek a recusal is embedded in the right to a fair trial and should not be stifled, even indirectly.

¹⁹ **Bennett v The State** 2021 (2) SA 439 (GJ)

[115] A question that does not seem to have occupied the attention of the courts is the responsibility, if any, of litigants or their legal representatives in pursuing a recusal application. The concern, as expressed earlier, is that more and more recusal applications are being initiated as a strategic tool. So too raising issues where the court may have to make credibility findings."

[56] This is not an application that ought to have been perused. The facts alleged by the Residents do not support the conclusions for which they contend.

[57] The applicants ask that this matter be dismissed on a punitive scale. I think that such a costs order is warranted in the circumstances. In **De Sousa II**,²⁰ this Court said

"[353] It is proper to award costs on an attorney and client scale where a party has deliberately failed to limit or curtail proceedings, **or has abused the court's process**. In this regard I am mindful of the following dictum of Innes CJ in *Scheepers and Nolte v Pate* 1909 TS 353 at 356, where he said the following:

'I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense. If there is a legal defence which can be effectively raised, by way of exception or otherwise, at an early stage, he ought at that stage to raise it. If he only takes it later on it may still be effective, but the fact that it came late, and that considerable expense was unnecessarily incurred in consequence, seems to me an element which may well affect the mind of the court in apportioning the costs.'

[354] The object of the award of attorney and client costs has been explained by Tindall J in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607:

'The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the

²⁰ **De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others** 2017 (5) SA 557 (GJ)

conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

Nel's case was approved by the Constitutional Court in *Swartbooi and Others v Brink and Others* 2006 (1) SA 203 (CC) (2003 (5) BCLR 497; [2003] ZACC 5) para 27."

[58] Even if this application had been brought *bona fide*, it has had the effect of being vexatious and warrants the imposition of a punitive costs order.²¹

[59] In the result the following order is made:

1. The application is dismissed;
2. The first to seventh respondents, jointly and severally, the one paying the other to be absolved, are directed to pay the applicants' costs on the scale as between attorney and client including the costs consequent upon two counsel."

A W PULLINGER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

²¹ *In re: Alluvial Creek* 1929 CPD 523 at 535

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