IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **58798/2021**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

....20 JUNE 2023

SIGNATURE **DATE**

In the matter between:

BABALWA BERYL McKONIE Applicant

(Identity No. 690412 0602 088)

and

THE BODY CORPORATE, LABORIE Respondent

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant applies for leave to appeal to the Supreme Court of Appeal *alternatively* to the Full Bench of this Division against the final order dated 18 October 2023 in which her estate was placed under final sequestration. The provisional order was granted on 30 August 2022.

[2] Simultaneously with the application for leave to appeal the applicant sought condonation for the late filing thereof. Prior to the commencement of the proceedings the applicant sought my recusal. The issues before Court for determination where the following:

2.1 My recusal;

2.2 Condonation for the late filing of the applicant's notice for leave to appeal; and

2.3 Leave to appeal.

[3] Before the above issues could be dealt with the applicant, who appeared in person, requested an indulgence to delay the commencement of the proceedings in order for her to obtain the assistance of an interpreter. Although the applicant is proficient in English (speaking and writing), isiXhosa is her home language. No prior arrangements for an interpreter was made. Counsel for the respondent argued that it was once again a mere delay tactic by the applicant. He argued that the applicant had not only drafted her own papers in this matter, save the supplementary reply, but argued in person in English and had previously

lodged written complaints against the respondent and vigorously defended herself. This done all in English and without an interpreter before the Adjudicator in terms of the Community Schemes Ombud Services Act 9 of 2011. The Court having regard to all the circumstances, to assist bringing the matter to finality and to aid the applicant granted the indulgence and adjourned the proceedings for a while, affording the applicant an opportunity to make the necessary arrangements.

[4] After the adjournment the applicant had a sudden change of heart indicating that an interpreter was not appear on such short notice and sought payment for services rendered. She confirmed she no longer desired the use of an interpreter and was willing to proceed without assistance provided she could take her time expressing herself. The matter commenced and proceeded on this basis.

[5] I now to turn to deal with the issues.

RECUSAL

[6] Prior to the date of the hearing the applicant informed the legal secretary of the Judge President of this Division that she had lodged a formal complaint against me with the Judicial Service Commission (JSC). Having lodged the complaint, she enquired whether the lodgement of such complaint automatically made me "*unsuitable to hear the leave to appeal*". The applicant's enquiry came to my attention prior to date of the hearing and as a consequence, this aspect required attention and resolution prior to hearing argument on the remaining issues. The applicant failed to notify the respondent of her enquiry nor of her complaint.

[7] The complaint: I was not notified by the Judicial Conduct Committee (JCC) that the applicant had indeed lodged a formal complaint as alleged nor was I provided with a copy of the sworn statement or affidavit deposed to by the applicant in this regard. I had no knowledge of the factual position let alone insight into the reasons set out to warrant the complaint to formulate any view let alone, an objective *prima facie* view or opinion of my own. For that matter, the applicant, other than stating in her papers that she had made such a complaint, referring to it as reference JSC/1042/22, had failed to provide the Court or the respondent with any documentary evidence to support the allegation. The veracity of the allegation remained untested.

[8] The applicant was informed that no such 'automatic disqualification' existed nor was a complaint apparent from the papers. The applicant was informed that I was seized with the matter and saw no reason to recuse myself unless argument was presented on a recusal application which weighed in favour of my recusal. No application was filed. The applicant was invited to consider whether she wished to pursue my recusal and if so, that she would have to do so based on substantial grounds upon which a determination could be made. The applicant sought my recusal from the bar.

[9] In argument, no objective facts upon which a reasonable suspicion of bias could be determined nor, for that matter, did the applicant state that there was a real or reasonably perceived conflict of interest. The thrust of her complaint in argument was that I had not found in her favour on 18 October 2022 (no postponement sought was granted and her reasons were insufficient to ward off

the granting of final relief). The thrust of her reason for my recusal now turned from the alleged complaint lodged to a regurgitation of her version.

[10] Bias or conflict of interest is something quite different from finding for one side caused by the evidence and the argument.

[11] Against this backdrop, it bears repeating that everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator. This common law right is now Constitutionally entrenched. If a reasonable apprehension of bias is present, the judicial officer is duty-bound to recuse him or herself. The law in this regard is clear.[1] The Constitutional Court in the **President of South Africa and Others v South African Football Union and Others** stated at paragraph 48 that:

> "*The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not being an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.*"

[12] At the time of the application for my recusal, no proof of a compliant was evident, the final sequestration application had been heard, the evidence and submissions considered and final judgment pronounced. In other words, the case had already been adjudicated.

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[1] **President of the Republic of South Africa and Others v South African Football Union and Others** [1999] ZACC 9; 1999 (4) SA 147 (CC).

[13] Counsel for the respondent then referred the Court to the matter of **Le Car Auto Traders v Degswa 10138 CC and Six Others**[2] in which Southwood J stated:

> "*[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. (See* ***South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Fish Processing)****.*[3]

[14] Southwood in the **Le Car Auto Traders,** *supra*, reaffirmed that the proprietary of recusal is not a question of law, but rather a question of fact. No facts were provided by the applicant to rebut the presumption of judicial impartiality let alone grounds in support of reasonable suspicion of bias nor, for that matter, that there was a real or reasonably perceived conflict of interest. For this reason, the application was dismissed.

CONDONATION - DELAY

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[2] Unreported (2011/47650) [2012] ZAGPGHC 286 (14 June 2012) at par [36] and [37].

[3] 2000 (3) SA 705 CC at par [4] and [5].

[14] On the 24th of March 2023 the applicant simultaneously filed an application for the condonation of the late filing of her application for leave together with her application itself.

[15] The provisional sequestration order was made final on the 18th of October 2022, the decision handed down *ex tempore*, the applicant appeared in person and was present in Court at all times.

[16] According to Rule 49(1)(a) when leave to appeal is required, it may on the statement of grounds be requested at the time of the judgment or order, which was not the case in this matter, or in terms of Rule 49(1)(b) within 15 (fifteen) days from the date of order appealed against.

[17] Applying Rule 49(1)(b), the applicant should have delivered her leave to appeal setting out her grounds on or before 8 November 2022. She did not elect to do that. The word ‘elect’ is used intentionally as will become apparent.

[18] According to the applicant’s version under oath, she on 18 October 2022, directly after the final order was granted, sought advice (no particularity from whom is set out) to “*pursue appeal/review*”. Acting on that advice she sought the assistance from the offices on the fifth floor of the High Court Building. She states that the assistance failed (no particularity as to what is meant nor what transpired is set out). However, what was clear was her intention to pursue an appeal/review and the knowledge of the procedure/s to pursue.

[19] 2 (two) days later and on 20 October 2022, the applicant filed papers electing to pursue the review of the judgment of 18 October 2022. The notice was

served on the respondent's attorneys. She confirms being informed that this was an incorrect procedure (no particularity of when this occurred nor who informed her is set out). According to the initial advice given to her the alternate relief, an appeal, was the only other remaining possible procedure to pursue. She did not action it at that time.

[20] Instead, the applicant waited a further 2 (two) months and at the beginning of December 2022, sought legal advice from an attorney (no particularity of the attorney is set out nor corroborated on the papers). Advice was sought to apply for the rescission of the judgment granted as far back as 10 August 2021 in the respondent's favour for outstanding levies and administration fees. This is the same judgment the applicant, in her supplementary answering affidavit dated the 9 March 2022, stated she was in the process of initiating recission procedures. The applicant too, sought advice from the attorney to launch an appeal. The applicant, unhappy with the advice from the attorney delayed even further and did not pursue the appeal herself at this time, nor as became apparent the recission application.

[21] A month later and on 18 January 2023, the applicant, instead of pursuing the appeal without delay, rather elected to lodge a complaint against the decision maker, this is the complaint with the JSC (reference: JSC/1042/22). The applicant states that she was again informed by 'someone' at the JSC (no further particularity of the person is set out) the investigation into the complaint would not alter the order and that it was only the courts who could deal with it and she is to seek legal advice.

[22] The next day, on 19 January 2023, and not following the advice given to her to date, the applicant met with the Adjudicator General of the Community Scheme Ombud Services ("*CSOS*") who "*informed me that the matter is at a higher court and they cannot take any steps to investigate the levies owed, orders not followed and all other problems that I have in my community scheme.*"

[23] Hearing the same advice over and over from as far back as 18 October 2022, the applicant waits yet again for a further month and, on 20 February 2023 yet again does not elect to pursue the appeal, but rather approaches the offices of the Director-General, Department of Justice with the intention to present her disgruntlement of the order, not at Court as advised, but with the Honourable Minister Lamola. She was however informed by the executive assistant, Mr R. Manzini, that they do not have the budget to assist her and that she should go to Legal Aid. From the facts the applicant had exhausted the assistance provided to her by Legal Aid as confirmed in argument Legal Aid had withdrawn twice, the withdrawal on 18 October 2022 being the second withdrawal.

[24] Still not accepting the advice from Mr R. Manzini, the applicant waited 2 (two) weeks and on 6 March 2023 elected to approached the Constitutional Court. Registrar Maphasa, informed her that there was nothing that they could do and referred her back to the Chief Registrar of this Division.

[25] The applicant on 22 March 2023, waiting for more than 2 (two) weeks returned to the Court where she was advised to return to months earlier. Mr Thomas 'Shirilele' at the registrar's office, whom she stated in argument was not

allowed to give her legal assistance or to a member of the public, did and advised her to pursue the leave to appeal and to apply for condonation.

[26] The applicant delivered her papers on 24 March 2023.

[27] Having regard to the applicant's explanation of the delay the following enquires arise:

27.1 Did the applicant unreasonably/unduly delay to file her application for leave to appeal?

27.2 If the delay is unreasonable, did the applicant provide a satisfactory explanation for her delay? If not, should this delay be condoned?

[28] In the assessment of the reasonableness of the delay and the necessity for condonation regard is had to the requirements set out in Rule 49(1)(b) which provide that the clock starts ticking from the expiration of 15 (fifteen) days after the date of the order appealed against. The applicant was in Court on the date when the final order was given (18 October 2022), and under oath stated that she wished to "*pursue an appeal/review*" on that same day. The applicant's contention in her application for leave to appeal that she was only aware of the order on 1 December 2022 when it was uploaded onto Caselines, is rejected.

[29] In the absence of opposition filed by the respondent in respect of the condonation relief, the assessment of the applicant's delay must be dealt with applying the time prescripts of Rule 49(1)(b) together with her filed version.

[30] On the applicant's version she fell woefully short of the time limits prescribed in Rule 49(1)(b) and in consequence delayed in filing her leave to appeal timeously. Notwithstanding her intention to pursue an appeal and all the advice given to her, the applicant appeared to labour at her own peril.

[31] However, was the delay unreasonable? In **Uitenhage Transitional Local Council v South African Revenue Services**[4] the Supreme Court of Appeal held that condonation is not to be had merely for the asking and that a full, detailed, and accurate account of the cause of the delay (own emphasis) and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the reasonableness. It stated further that it is obvious that if the non-compliance is time related, as in this matter, that the date, duration, and extent of any obstacle on which reliance is placed must be spelt out.[5]

[32] Applying the applicant's version, it was clear from the onset that she wished to challenge the decision and the decision maker. In so doing, she without delay sought advice on 18 October 2022. She filed a notice to review without delay but failed to serve the application for leave to appeal without delay. Instead, she sought and failed to accept or action advice from attorneys, someone at the office the JSC, the Adjudicator General of the CSOC, a member at the office of the Minister of Justice and the Registrar of the Constitutional Court. In consequence, the applicant received advice, did not follow it and was or caused her own obstacle and was the reason for her own delay. The delay must therefore be unreasonable.

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4 2004 (1) SA 292 (SCA).

5 *supra*, par 6. See also **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited and Others** [2013] ZASCA 5; [2013] 2 All SA 251 (SCA), par [11].

[33] Whether the unreasonable delay should be condoned requires the consideration of the prospect of the applicant's leave to appeal as against the provisions of Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. Reason dictates that if the appeal would not have a reasonable prospect of success there would be no point in granting condonation. The enquiry requires an objective conspectus of the grounds of appeal and should my opinion weigh in favour of applicant, after applying the test applied in Section 17(1)(a)(i), it may tend to compensate for an unreasonable delay.

LEAVE TO APPEAL

[34] Section 17(1)(a)(i) of the Superior Courts Act provides that leave to appeal may only be given where the judge is of the opinion that the appeal "*would have reasonable prospects of success*". This is in (apparent) contrast to the test under the previous Supreme Court Act, of 1959 that leave to appeal is to be granted where a reasonable prospect was that another court "might" come to a different conclusion.

[35] Appreciating the contours of the more stringent test (in contrast to the previous test), I now turn to ascertain whether there would be a measure of certainty that another Court would differ from my decision.

[36] The respondent's counsel submitted that the leave to appeal fell woefully short of setting out clear grounds upon which the judgment or order was sought to be appealed as prescribed in Rule 49(1). His argument was that it consisted of argument instead of grounds, did not indicate misdirections of fact or law and at

times an incorrect reference to the evidence. Although this is correct, I was mindful that the applicant was a lay person appearing in person, the decision was handed down *ex tempore* and it was not evident whether either of the parties obtained a transcript of the proceedings. In the light of difficulties, I held the view that the point, although well taken, would not assist in bringing the matter to finality nor assist the interest of justice if applied. I proceeded to assist the applicant.

[37] The application for leave to appeal consisted of nine points containing argument, a regurgitation of a defence to the claim against her brought by the respondent in the Magistrate's Court, reservation of rights and certain incorrect references to purported evidence presented in the final sequestration application. No misdirections of law or facts were alleged. Notwithstanding, the thrust of the aggrievance appeared to be twofold, namely:

37.1 The Court errored in not granting a postponement (seemingly points 1-3, 6);

37.2 The Court errored in accepting the applicant's version and did not take cognisance of historical events (seemingly points 4, 5 and 7).

[38] **Refusal to grant postponement**

38.1 On the 6th of December 2021, the applicant, acting in person filed a notice of intention to defend the sequestration application.

38.2 On the 3rd of January 2022, the respondent in person filed an opposing affidavit.

38.3 Subsequent to the applicant filing her opposing papers and after the respondent's reply dated 7 February 2022, the applicant was in a position to procure services with Legal Aid SA. By agreement between the parties, the applicant's legal representatives were provided with an opportunity to file a supplementary answering affidavit to assist the applicant. A supplementary affidavit was indeed served on 9 March 2022, the respondent filing their reply on 20 April 2022.

38.4 On the 12 October 2022 the applicant duly represented by Legal Aid filed an affidavit dated 12 October 2022 pursuant to the provisional order. However, on the date of the hearing Advocate Jacobs who represented the applicant on behalf of Legal Aid, addressed the Court confirming that Legal Aid was to withdraw from the matter. The nub of the reason proffered was his inability to argue the case as instructed. The applicant insisting on handing up yet a further affidavit drafted by herself dated 14 October 2022. It was abundantly clear that the applicant wished further facts to be placed before the Court.

38.5 The respondent was amenable to afford the applicant an opportunity to hand up the further affidavit and the further affidavit of 14 October 2022 was tendered into evidence by agreement.

38.6 But for the agreement, in observing the *audi alteram partem* rule and in conducting fair proceedings, I was inclined to accept the

further affidavit anyway. In addition, I had noted that the affidavit filed on 12 October 2022 was not commissioned, the non-practising advocate who had signed the affidavit on 12 October 2022 had signed certifying the document as a true copy of the original instead of commissioning the affidavit as prescribed in terms of the Justice of the Peace and Commissioner of Oaths Act 16 of 1963. The further affidavit stood as the only evidence filed subsequent to the provisional order. The applicant to be heard.

38.7 However the further affidavit did not take the applicant's case further and in fact reaffirmed her indebtedness to the respondent, tendering payment of her debt in instalments on certain conditions. She had failed to rescind the judgment against her or provide any proof that she indeed initiated proceedings as she had alluded to in her papers. The judgment stood. In argument she confirmed that subsequent to judgment being granted against her she had not paid any levies due and owing to the respondent (a period of approximately 2 (two) years).

38.8 The *nulla bona* return stood. No action had been taken against the Sheriff, no complaint had been laid against the Sheriff by the applicant, no further evidence to substantiate the applicant's claim that the Sheriff purposively filed a *nulla bona* return and why was forthcoming. The Sheriff was not joined. The balance favoured the respondent on the documentary evidence before Court.

38.9 When the applicant, becoming acutely aware that her further affidavit was not assisting her and the shoe began to pinch, she sought a postponement on the basis that she was unrepresented in this way trying to force the Court to grant a postponement. No tender for costs was forthcoming.

38.10 Counsel for the respondent argued it was merely a delay tactic and brought *mala fide*. All the evidence was before Court for a final determination.

38.11 The mere withdrawal by a practitioner or the mere termination of a mandate "*does not, contrary to popular belief, entitle a party to a postponement as of right*". This is clearly stated in **Take & Save Trading CC**.[6]

38.12 In exercising my discretion, I considered the prejudice which could be caused by such a postponement in respect of the respondent who was ready to proceed and the further cost implication for both parties. The inconvenience of a postponement for the respondent could not be cured by a cost order. The applicant did not tender costs and in all likelihood could not pay even if tendered. She confirmed that she was unemployed under oath and argued that she was poor.

38.13 The balance of convenience favoured the respondent, the judgment against the respondent was granted in 2021 and no

[6] *supra*, footnote 1, par 3.

evidence was before Court that she had initiated recission proceedings. She was represented by Legal Aid during this time. What was patently clear is that the applicant had delayed for 2 (two) years to do so notwithstanding a provisional order to wind up her estate. None of this moved her to take action or to explain her delay with any particularity in the further affidavit which she herself had drafted and desperately wanted to tendered as evidence. The further affidavit was littered with her aggrievances with the respondent, an issue not before this Court.

38.14 As a result of the aforementioned, I accepted the respondent's argument that the applicant sought a postponement to delay the finality of the application. The applicant had been granted an opportunity to tender her reasons and all the papers were before Court.

38.15 A further reasoning for the refusal of the postponement was the fact that the applicant's reason for the request was that she was unrepresented and feared not being able to express herself. This is notwithstanding the fact that all the factual issues were before Court. Her case was expressed in her papers and penned by her own hand.

38.16 I exercised my discretion and refused the postponement.

38.17 I pause to mention that the applicant, in her leave to appeal against the refusal, does not state that I did not judicially exercise my discretion, just that I did not grant it in her favour.

CONSIDERATION OF ALL THE HISTORICAL FACTS

[39] All the material facts were considered, including the applicant's further affidavit. All the historical facts were considered . Such facts considered against the backdrop that, at the material time, the applicant had failed to do anything to eliminate her perceived historical obstacles and the consequences thereof remained as at the provisional stage.

[40] The respondent's counsel too addressed the in *limine* point of authority again, although this too had been ventilated at the provisional stage. I was satisfied that the evidence on a balance of probabilities warranted a final order and granted it.

[41] In consequence, applying the test of Section 17(1)(a)(i), that the appeal would not have a reasonable prospect of success. The result of the outcome of the enquiry in respect of granting condonation is that the outcome of the enquiry into the prospects of success on appeal do not compensation for an unreasonable delay and as such condonation should be refused, as too the leave to appeal on its own merit.

[42] Having regard to the above, the following order is made:

1. Leave to appeal is dismissed;

2. Costs shall be costs in the sequestration.

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L.A. RETIEF
Judge of the High Court
Gauteng Division

Appearances:

For the Applicant:	Babalwa Beryl McKonie
For the Respondent:	Adv. L. Van Gass Email: leon@clubadvocates.co.za Cell: 074 601 4758
Date of hearing:	10 May 2023
Date of judgment:	20 June 2023