CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 85/14

In the matter between:

YONELA MBANA Applicant

and

SHEPSTONE & WYLIE Respondent

Neutral citation: *Mbana v Shepstone & Wylie* [2015] ZACC 11

Coram: Mogoeng CJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Nkabinde J, Theron AJ and Tshiqi AJ.

Judgment: The Court

Decided on: 7 May 2015

Summary: Section 6 of the Employment Equity Act 55 of 1998 — unfair discrimination — race and social origin

Section 11(1) of the Employment Equity Act 55 of 1998 — alleged direct or indirect discrimination on race and social origin — employer justified conduct

Section 11(2) of the Employment Equity Act 55 of 1998 — alleged unfair discrimination on an arbitrary ground — complainant did not prove that conduct was not rational

Actual or perceived bias — in both instances a litigant must show a reasonable apprehension of bias — a reasonable apprehension of bias not established for both allegations of bias

Appeal against costs orders — no exceptional circumstances warranting intervention — costs orders not set aside

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ORDER

On appeal from the Labour Court:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

JUDGMENT

THE COURT

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Labour Court. It relates to a claim of direct or indirect unfair discrimination in the workplace by the applicant, Ms Yonela Mbana (Ms Mbana), against Shepstone & Wylie (the respondent), a law firm. The Labour Court dismissed the claim with costs. Ms Mbana also alleges bias against her by Gush J, who presided over the matter in the Labour Court. Furthermore, she seeks to have the order of the Supreme Court of Appeal, dismissing her application for special leave to appeal with costs, set aside.

Background

[2] The facts are largely common cause. In 2005, the respondent awarded Ms Mbana, a black woman, a bursary to study towards an LLB degree. Upon

completion of her LLB degree, Ms Mbana's bursary agreement guaranteed her employment with the respondent.

[3] In July 2008, Ms Mbana informed the respondent that she would not complete her degree at the end of 2008 as expected because she had not passed one of the modules. Instead, she told the respondent that she needed to repeat the module and would only complete her degree in June 2009. She enquired about the prospects of commencing employment with the respondent in January 2009 whilst completing her outstanding module.

[4] In response, the respondent, having had regard to its policy concerning the recruitment of candidate attorneys and the bursary agreement, informed Ms Mbana that she could only commence employment at its Durban head office in January 2010 and not January 2009.

[5] In March 2009, she again contacted the respondent, probing whether she could commence employment in July 2009 as she would have completed her degree by June 2009. She indicated a willingness to be employed at any of the other branches of the respondent, but she soon retracted that as she wanted to remain in Durban. In any event, the respondent informed Ms Mbana that in accordance with its policy, she could only commence employment in January of the following year.

[6] Accordingly, Ms Mbana commenced employment as a candidate attorney at the respondent's Durban head office in January 2010. All seemed well until January 2011, when two candidate attorneys commenced employment with the respondent. The first was Ms Janice Tooley (Ms Tooley), a white woman, and the second was Mr Trevor Mchunu (Mr Mchunu), a black man and a recipient of a bursary from Unilever.

[7] Ms Mbana soon discovered that Ms Tooley and Mr Mchunu had not completed their LLB degrees before commencing employment with the respondent and she

lodged a complaint with the respondent based on the differential treatment. Meetings were convened by the respondent to address the complaint, but these were unsuccessful.

[8] In May 2011, Ms Mbana referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation, alleging unfair discrimination based on race and social origin in terms of the Employment Equity Act[1] (EEA). Attempts to resolve the dispute through conciliation, however, proved futile and a certificate of outcome was issued to that effect.

Litigation History

[9] Ms Mbana applied to the Labour Court claiming unfair discrimination based on race and social origin or, alternatively, an arbitrary ground.

[10] She later sought to amend her statement of claim to refer to a further colleague, Ms Barbara van Rooyen (Ms van Rooyen), who had been employed as a candidate attorney by the respondent at its Richards Bay branch in 2005. Ms van Rooyen had similarly not completed her LLB degree before commencing employment as a candidate attorney.

[11] On 27 November 2012, the Labour Court concluded that the respondent's insistence that Ms Mbana commence employment in January 2010, as well as the continued employment of Ms Tooley, Mr Mchunu and the circumstances around the employment of Ms van Rooyen did not evidence direct or indirect unfair discrimination against Ms Mbana on the grounds of race and social origin or an arbitrary ground. Even if the respondent's deviation from its policy in relation to Ms Tooley, Mr Mchunu and Ms van Rooyen constituted discrimination, the Court noted that the discrimination was both fair and justified.

[1] 55 of 1998.

[12] As a result, it dismissed her application with costs[2] and later dismissed her application for leave to appeal to the Labour Appeal Court.

[13] Thereafter, Ms Mbana amended her grounds for leave to appeal. She added that the Judge was actuated by bias or that a reasonable apprehension of bias existed. The Labour Appeal Court dismissed her petition for leave to appeal and the Supreme Court of Appeal dismissed her application for special leave to appeal with costs.

In this Court

[14] Ms Mbana approaches this Court seeking leave to appeal against the judgment and order of the Labour Court. She raises two issues. First, she seeks leave to appeal on the merits of her discrimination claim and on the costs orders granted by the Labour Court and the Supreme Court of Appeal. Second, she alleges that there was actual bias or a reasonable apprehension of bias on the part of the presiding Judge in the Labour Court.

[15] She claims that the Judge adjudicated her claim without informing her of his past association with the respondent and that this association gives rise to a reasonable apprehension of bias. Additionally, based on certain utterances and conduct displayed by the Judge during the trial, she avers that there was indeed actual bias. As a result, Ms Mbana urges that the Labour Court judgment and order should be set aside.

[16] This Court invited the Judge to respond to the allegation that he did not inform Ms Mbana of his past association with the respondent. In response, he stated that the respondent and Shepstone & Wylie Tomlinsons Inc, a Pietermaritzburg firm, formed an association in about 1988. At the time, he was a director of Shepstone & Wylie Tomlinsons Inc. The association, which entailed the remittance to the respondent of a

[2] The Labour Court order, at para 52, states:

> "The applicant's application is dismissed and the applicant is ordered to pay [the] respondent's costs incurred after the conclusion of the pre-trial minute."

percentage of the earnings of Shepstone & Wylie Tomlinsons Inc, was dissolved in March 2004. The Judge was appointed as a member of the bench of the Labour Court in May 2010.

[17] When Ms Mbana's matter was allocated to his trial roll in November 2012, he avers that he requested his secretary to advise the parties of his past association with the respondent. In support of this, he adduced affidavits from his secretary and an attorney from the respondent. Furthermore, the Judge avers that during the pre-trial conference he personally informed Ms Mbana of his past association.

[18] Ms Mbana vehemently denies that she was ever informed. This creates a dispute of fact between her and the Judge, which cannot be resolved on the papers. As the Judge is not a respondent in this matter, the *Plascon-Evans* rule does not apply.[3]

[19] On 3 December 2014, this Court issued directions inviting the parties to make submissions on how the dispute of fact should be addressed. Ms Mbana submits that an oral hearing, where evidence would be led and the relevant parties subjected to cross-examination, is the appropriate solution. As the facts relating to the unfair discrimination claim have been established and are largely common cause, the respondent submits that the claim of unfair discrimination can be decided through a rehearing on the same factual issues without addressing the credibility of the Judge.

[20] This Court decided to dispose of the matter on the basis of these submissions, and on the strength of the parties' pleadings, without oral argument.

[3] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C, discussed and approved in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 53, where this Court held:

> "Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where, however, a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant."

[21] It is worth noting that Ms Mbana lodged a complaint against the Judge with the Judicial Conduct Committee for allegedly failing to disclose that he had previously practised as an attorney and a partner at the respondent prior to presiding over the trial. That complaint has since been dismissed.

Leave to Appeal

[22] In determining whether an application for leave to appeal should be granted, we must be satisfied that the application raises a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court.[4] We must also be satisfied that it is in the interests of justice to grant leave. Ultimately, the decision to grant leave is a matter for the discretion of this Court. And although there are other factors to consider, prospects of success remain an important consideration in the interests of justice enquiry.[5]

Unfair discrimination

[23] The claim of direct or indirect unfair discrimination implicates the right to equality in our Constitution.[6] This is a fundamental right entrenched in our Bill of Rights, and therefore this claim intrepidly raises a constitutional issue.[7]

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[4] Section 167(3) of the Constitution. See also *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5.

[5] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12, where this Court held that—

> "[i]n considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry. An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal".

See also *Fraser v Naude and Another* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7 and *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 44.

[6] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[24] The essence of Ms Mbana's contention is that she has been unfairly discriminated against, directly or indirectly, based on her race and social origin or an arbitrary ground. The gravamen of her complaint is that the respondent's conduct constitutes unfair discrimination because it denied her an opportunity to commence employment in January 2009 as she had not completed her LLB degree while allowing other candidates, one black person and two white persons, to commence employment without LLB degrees.

[25] The EEA proscribes unfair discrimination in a manner akin to section 9 of the Constitution.[8] Apart from permitting differentiation on the basis of the internal requirements of a job in section 6(2)(b),[9] the test for unfair discrimination in the context of labour law is comparable to that laid down by this Court in *Harksen.*[10]

> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[7] *Sali v National Commissioner of the South African Police Service and Others* [2014] ZACC 19; 2014 (9) BCLR 997 (CC) (*Sali*) at paras 38 and 97.

[8] See section 6(1) of the EEA, which provides:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

See also section 9 of the Constitution above n 6.

[9] Section 6(2) of the EEA provides:

> "It is not unfair discrimination to—
>
> (a) take affirmative action measures consistent with the purpose of this Act; or
>
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

[10] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*) at para 54. See also *Sali* above n 7 at paras 9-10.

[26] The first step is to establish whether the respondent's policy differentiates between people.[11] The second step entails establishing whether that differentiation amounts to discrimination.[12] The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair.[13]

[27] It must be noted, however, that once an allegation of unfair discrimination based on any of the listed grounds in section 6 of the EEA is made, section 11 of the EEA places the burden of proof on the employer to prove that such discrimination did not take place or that it is justified.[14] Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.[15]

[28] The respondent has a graduate recruitment programme. Applications are received and interviews for potential candidate attorneys are conducted at the beginning of each year. Successful applicants are offered employment as candidate attorneys with effect from January the following year. Both Ms Tooley and Mr Mchunu fell under this programme.

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[11] *Harksen* id at para 48, where this Court stated:

> "The question whether there has been differentiation on a specified or an unspecified ground must be answered objectively."

[12] Id at para 54.

[13] Id.

[14] Section 11(1) of the EEA provides:

> "If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—
>
> (a) did not take place as alleged; or
>
> (b) is rational and not unfair, or is otherwise justifiable."

[15] Section 11(2) of the EEA provides:

> "If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that—
>
> (a) the conduct complained of is not rational;
>
> (b) the conduct complained of amounts to discrimination; and
>
> (c) the discrimination is unfair."

[29] The respondent also has a bursary programme offering to pay for university tuition fees towards an LLB degree. Unlike the graduate recruitment programme, the recipient of a bursary is guaranteed employment as a candidate attorney on attaining the degree. Ms Mbana fell under this programme.

[30] Both of these programmes entailed the candidate attorneys' employment policy that, barring any exceptional circumstances, only candidates who had completed their LLB degrees would commence employment as candidate attorneys in January after their year of completion. This policy was in line with the respondent's practice of candidate attorneys participating in its Graduate Programme commencing in January each year. The exceptional circumstances related solely to the respondent's business and operational needs rather than the individual circumstances of the candidates.

[31] The respondent was made aware of Ms Mbana's inability to complete her studies six months in advance, and therefore it was in a position to recruit another candidate in her place. In regard to Ms Tooley and Mr Mchunu, the respondent discovered that they had not completed their LLB degrees only after they had commenced employment.

[32] The respondent states that its litigation department would have suffered had it terminated the employment of Ms Tooley and Mr Mchunu. Because it recruits candidates a year in advance, when it learned of Ms Tooley's and Mr Mchunu's situation in February 2011, it was not in a position to recruit further candidates to replace them. Of the five candidate attorneys that the respondent had recruited for 2011, one of them did not commence employment as expected. Had the respondent immediately dismissed Ms Tooley and Mr Mchunu, it would have been left with only two out of the five candidates it had sought to employ for 2011. Instead, the respondent, who was not prepared for this occurrence, entered into an agreement with Ms Tooley and Mr Mchunu that they would have to complete their degrees by June 2011 or they would no longer be employed as candidate attorneys. Indeed in June

2011, Ms Tooley obtained her degree in time and continued her employment. Mr Mchunu, on the other hand, left the respondent's employ because he did not complete his degree in time. The business needs of the respondent dictated that these candidate attorneys be retained under these circumstances. The Labour Court found that these reasons constituted exceptional circumstances justifying the respondent's deviation from its policy of employing candidate attorneys and was not discriminatory. We are not in a position to gainsay that finding.

[33] In regard to Ms van Rooyen, the unrefuted evidence shows that she had been in the employ of the respondent for five years as a secretary before being employed as a candidate attorney. She began studying part-time towards her LLB degree prior to entering into an agreement with the respondent that she would move to a branch office in Richards Bay and that she would also perform administrative tasks whilst at that office.

[34] The respondent distinguishes this from Ms Mbana's situation. It submits that there was a vacancy in the Richards Bay office at the time that also required the performance of administrative tasks. Ms van Rooyen was experienced and had agreed to move from the Durban head office to the Richards Bay office. In addition, she was not part of the respondent's graduate programme. The Labour Court concluded that, not only were these circumstances fundamentally different from those of Ms Mbana, they occurred in 2005. There is no evidence of any vacancy which Ms Mbana could have filled in any of the respondent's branch offices between 2008 and 2011. And even though she had enquired about the possibility of being employed in a branch office, Ms Mbana had swiftly retracted that enquiry. The respondent was therefore not afforded an opportunity to consider Ms Mbana's request to be placed in a branch office similar to Ms van Rooyen, making her situation markedly different from that of Ms van Rooyen. In addition, Ms Mbana was guaranteed employment as a candidate attorney because of her bursary, while Ms van Rooyen had been part of the respondent's personnel.

[35] What is startling is that Mr Mchunu's case demonstrates how the differential treatment was unlikely attributable to race or social origin. Like Ms Mbana, he is also a black person. In the circumstances, Ms Mbana's claim that she was discriminated against on the basis of race loses traction. Although Ms Mbana alleges that Mr Mchunu was employed by the respondent because he had a bursary from Unilever, a large client of the respondent, she proffers no evidence to sustain this allegation.

[36] She has similarly failed to demonstrate how the alleged unfair discrimination was based on an arbitrary ground. Ms Mbana has not shown that the respondent's recruitment policy was irrational, that it amounted to discrimination or that it was unfair. Instead, the respondent has reasonably justified its policy and its application of the policy to her circumstances. Moreover, the respondent has sufficiently justified its deviation from the recruitment policy in the instances of Ms Tooley, Mr Mchunu and Ms van Rooyen.

[37] Put simply, there were no exceptional circumstances that required the respondent to deviate from its recruitment policy for Ms Mbana. Therefore, the claim of direct or indirect unfair discrimination based on race, social origin or an arbitrary ground has no prospects of success and it is not in the interests of justice that we grant leave to appeal.

[38] Despite this conclusion, it must be stressed that an employer's business and operational needs will not simply be accepted on the employer's own say-so. It must be shown, objectively, that there are genuine and legitimate business and operational needs that justify the differential treatment of employees. We believe that, in this case, the respondent has adequately done so. Hence we conclude that Ms Mbana's prospects of success on her substantive complaints against the respondent are poor.

Bias

[39] The Judiciary is an essential component of our constitutional democracy and judicial authority is vested in the courts by the Constitution.[16] Therefore, allegations of actual bias or a reasonable apprehension of bias certainly raise a constitutional issue.[17]

[40] In *Basson II* we emphasised that courts must treat differently allegations of actual or perceived bias, based on the conduct of a judge during the trial, and actual or perceived bias owing to a judge's associations.[18] When considering the issue of bias in a trial court, there is a difference between grounding a complaint of bias on the conduct of the judge in hearing the case, and grounding such a complaint on the relationship between the judge and one of the parties or witnesses.[19] The test, however, in claims of actual or perceived bias arising from both trial court conduct and judicial association is the same: a litigant must show that "a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias".[20] In other words, a litigant must show a reasonable apprehension of bias to succeed.

[41] There is a presumption in our law that judicial officers are impartial when adjudicating disputes[21] and, as it was noted by this Court in *Irvin & Johnson*, the

[16] Section 165(1) of the Constitution.

[17] *Stainbank v South African Apartheid Museum at Freedom Park and Another* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) at paras 27 and 30; *De Lacy and Another v South African Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC) at para 47; *Bernert v ABSA Bank* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) (*Bernert*) at para 18; *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson II*) at paras 24-5; and *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (*Basson I*) at paras 21-2.

[18] *Basson II* id at para 33.

[19] Id.

[20] *Bernert* above n 17 at para 65. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU II*) at para 48.

[21] *Bernert* above n 17 at para 86; *Basson II* above n 17 at para 42; *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (*Irvin & Johnson*) at para 12; and *SARFU II* id at para 41.

threshold a litigant would have to meet to establish a reasonable apprehension of bias is high.[22]

Actual bias

[42] In support of the allegation of actual bias, Ms Mbana claims that the Judge, during the pre-trial conference, did not display fairness and appeared to favour the respondent's counsel. It is clear from her founding affidavit that she was aware of this alleged bias during the pre-trial conference. On this, she affirms that "[d]uring the pre-trial conference . . . it became clear to me that the Judge was biased in favour of the respondent". There is nothing indicating why Ms Mbana did not seek the recusal of the Judge during the pre-trial conference or at any point during the trial.

[43] Ms Mbana raised the allegations of actual bias for the first time when she brought an application for condonation and an amendment to her grounds for leave to appeal in the Labour Court. However, the application to amend was brought after her application for leave to appeal was dismissed and thus, the allegations were only properly raised in her petition to the Labour Appeal Court.

[44] Had Ms Mbana apprehended bias in the Labour Court, as she asserts she did, she would ordinarily have raised these allegations at the trial stage or in her initial application for leave to appeal. This Court in *Bernert* noted that a litigant who did not raise an allegation of bias timeously does not display conduct consistent with a reasonable apprehension of bias.[23] It is not in the interests of justice to permit a litigant who had full knowledge upon which the claim of actual bias is made to wait until an adverse judgment is pronounced before raising these allegations. To do so would undermine the administration of justice.

[22] *Irvin & Johnson* id at para 49.

[23] In *Bernert* above n 17 at para 71, this Court said:

> "The conduct of the applicant is simply inconsistent with a reasonable apprehension of bias. If he had any apprehension, it must have been of the kind that he thought could be cured by a judgment in his favour. But that can hardly be said to be a reasonable apprehension of bias that is reasonably entertained. The applicant wanted to have the best of both worlds."

[45] In *Bernert* we emphasised that "litigation must be brought to finality as speedily as possible".[24] That applies with equal force in this case. It is not desirable for a litigant, after a trial has been completed and she has already sought leave to appeal on other grounds, to amend her grounds for leave to appeal by including new facts alleging actual bias.

[46] For these reasons, we find that it is not in the interests of justice, at this late stage, to permit Ms Mbana to raise a complaint of actual bias.

Reasonable apprehension of bias

[47] Ms Mbana alleges a reasonable apprehension of bias on the basis that the Judge did not disclose his previous association with the respondent. She avers that on 29 January 2013, she stumbled upon a 1998 Labour Court judgment where the Judge was reflected as a legal representative of Shepstone & Wylie Tomlinsons Inc.[25] While this might explain why the allegation of the reasonable apprehension of bias was not raised during the trial, the fact that a judge may have had a previous association with the respondent does not, in and of itself, meet the high bar that a complainant of perceived bias is required to meet.[26]

[48] A complainant must be able to show that a judge's past association may reasonably be apprehended to obstruct the discharge of a judge's judicial duty. Hence, merely alleging that a judge may have been associated with other people in the

[24] *Bernert* id at para 75. See also *De Lacy* above n 17 at para 61.

[25] The Labour Court judgment dismissing Ms Mbana's claim of unfair discrimination was delivered on 27 November 2012 and the Labour Court judgment dismissing her application for leave to appeal was delivered on 6 February 2013. The allegations of bias were only properly raised in the Labour Appeal Court in October 2013.

[26] In *SARFU II* above n 20 at para 76 this Court stated:

> "In our opinion it follows that a reasonable apprehension of bias cannot be based upon political associations or activities of Judges prior to their appointment to the Bench unless the subject matter of the litigation in question arises from such associations or activities."

past, without more, does not meet the test.[27] More to the point, the claim that a judge hearing a case had a pecuniary association with a litigant that ended a whopping six years before his appointment does not give rise to any reasonable apprehension that the judge may be biased in favour of that litigant.

[49] It is, however, desirable as a practical matter that a judge should disclose, in writing, his association with the litigants as this diminishes the risk of disputes. This is important to maintain the confidence that the public repose in the Judiciary.

[50] In this case, it is disputed whether the Judge disclosed his past association. This dispute of fact can only be resolved by remitting the matter for oral evidence. However, this question of disclosure is not relevant to the determination of the matter and therefore it would not be in the interests of justice to order the remittal.[28]

[51] For all these reasons we find that it is not in the interests of justice to grant leave.

Labour Court and Supreme Court of Appeal costs

[52] When granting costs against Ms Mbana, the Labour Court took into consideration the provisions of section 162 of the Labour Relations Act.[29] In so

[27] In *Bernert* above n 17 at para 78, this Court noted that—

> "[m]ost judicial officers would have been engaged in a number of activities in pursuit of their professional lives before their appointment. These activities contribute to the expertise that judicial officers bring to the bench. What is required is that judicial officers should decide cases that come before them without fear, favour or prejudice, according to the facts and the law, and not according to their subjective personal views. Of course, where a judicial officer, in his or her former capacity, either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for that judicial officer to sit in that case." (Footnote omitted.)

[28] See *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 26 and 92-6 where this Court held that where a dispute of fact is not material to the determination of the issue, it would not be in the interests of justice to grant leave or to remit the matter for oral evidence. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at paras 234-9.

[29] 66 of 1995. Section 162 provides:

> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

doing, it was cognisant of the requirements of the law and fairness. It considered the conduct of the parties during and after the preparation of the pre-trial minute and concluded that costs would be borne by Ms Mbana, but limited them only to costs incurred after the conclusion of the pre-trial minute. The determination of costs is a matter that lies in that court's discretion.[30] Ms Mbana has not made a compelling argument that in exercising that discretion, the Labour Court acted capriciously or applied the law incorrectly.

[53] Similarly, Ms Mbana has proffered no cogent argument that the Supreme Court of Appeal exercised its discretion capriciously or incorrectly when granting the costs order, nor has she identified exceptional circumstances warranting this Court's intervention in this regard.[31]

[54] All be told, it is not in the interests of justice to grant leave in respect of the costs orders of the Labour Court and the Supreme Court of Appeal.

Costs in this Court

[55] The best course to follow in this matter is to make no order as to costs.

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(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of *this Act* and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties—

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the *dispute* or against any person who represented that party in those proceedings before the Court." (Emphasis in original.)

[30] See *Giddey NO v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at paras 19-21.

[31] See *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* [2015] ZACC 4 at para 12 and *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 11.

Order

[56] In the result, the following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

For the Applicant:	In person.
For the Respondent:	M Pillemer SC instructed by Shepstone & Wylie.