Case No 329/95 IH

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LYNNE-ANNE MOCH Appellant

v

NEDTRAVEL(PTY) LIMITED t/a AMERICAN
EXPRESS TRAVEL SERVICE Respondent

CORAM : HEFER, E M GROSSKOPF, VIVIER,
F H GROSSKOPF JJA et VAN COLLER AJA

HEARD : 23 NOVEMBER 1995

DELIVERED : 22 FEBRUARIE 1996

J U D G M E N T

HEFER JA :

This matter came before us as an opposed application for leave to appeal which had been referred to the court for consideration upon argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959, as amended. The main issue is the appealability of an order dismissing an application to an acting judge of the Witwatersrand Local Division to recuse himself from proceedings brought by the present respondent for the sequestration of the petitioner's estate. If the ruling on this issue goes against the petitioner there is an end to the matter. If it goes in her favour, the merits of the order in the recusal application will have to be considered in the context of the prospects of success in the proposed appeal. This will enable us, in the event of leave being granted, to dispose of the appeal as well.

The petitioner opposed the sequestration proceedings at the provisional stage and presented the application for recusal after the presiding judge (Fine AJ) had called for oral evidence to resolve a factual dispute. Fine AJ

dismissed the application, heard the evidence and granted an order provisionally sequestrating the petitioner's estate. On the return day the matter came before Eloff JP. There was no appearance for the petitioner and a final order was granted. Thereafter the petitioner approached the court a quo with an application for leave to appeal against the provisional order and Fine AJ's refusal to recuse himself. Leave was refused; hence the present petition.

In view of the provisions of s 150 of the Insolvency Act 24 of 1936 as amended, which preclude an appeal against a provisional sequestration order, argument in this court on the question of appealability was limited to the order dismissing the recusal application. In order to clear the way for a consideration of the real issue viz whether such an order is appealable under the provisions of the Supreme Court Act, I will first dispose of an alternative submission made on the petitioner's behalf. It is to the effect that an appeal against an order which is not otherwise appealable may be heard in the exercise of this court's

so-called inherent jurisdiction. The short answer is that the court's "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice" (per Corbett JA in Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 754G), does not extend to the assumption of jurisdiction not conferred upon it by statute. As explained in Rex v Milne and Erleigh (6) 1951 (1) (A) SA 1 at 5 in fin,

> "[this] Court was created by the South Africa Act and its jurisdiction is to be ascertained from the provisions of that Act as amended from time to time and from any other relevant statutory enactment."

Nowadays its jurisdiction derives from the Supreme Court Act and other statutes but the position remains basically the same. (Sefatsa and Others v Attorney-General, Transvaal, and Another 1989 (1) SA 821 (A) at 833E-834F; S v Malinde and Others 1990 (1) SA 57 (A) at 67A-B.) The court's inherent power is in any event reserved for extraordinary cases where grave injustice cannot

otherwise be prevented (Enyati Colliery Ltd Another v Alleson 1922 AD 24 at 32; Krygkor Pensioenfonds v Smith 1993(3)SA 459(A) at 469G-I). This is not such a case because the petitioner elected not to seek the court a quo's leave to appeal against the final sequestration order which is appealable (with leave) in terms of s 150(1) of the Insolvency Act. In an appeal against that order she would have been entitled to rely - as will presently be seen - upon the same grounds on which she is now seeking to rely in an appeal against the order in the recusal application. Whatever prejudice she may suffer in the event of an adverse decision on the appealability of the latter order, will accordingly be entirely of her own making.

The provisions of the Supreme Court Act which regulate appeals to this court in civil matters are ss 20 and 21. In terms of s 20(1) the court may hear an appeal from a "judgment or order" of the court of a provincial or local division sitting as a court of first instance in "any civil proceedings" and, in

terms of s 21(1), it may also hear and determine an appeal from any "decision" of the court of such a division. For present purposes it matters not that s 20(1), unlike s 21(1), applies to "civil proceedings" only. The appealability of the present decision may well have to be determined in terms of s 21(1) since the application for recusal arose in the course of sequestration proceedings which are not regarded as "civil proceedings" (cf Law Society,Transvaal v Behrman 1981 (4) SA 538 (A) at 545 in fin-546C and 548A). But, although the purport of sec 21(1) is to vest in the court a jurisdiction not conferred on it in s 20(1), it has been held that the "decision" referred to therein must be of the same nature as a "judgment" or "order" in the sense in which those terms are used in s 20(1). (Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) at 584E-F and cases cited there.) In the present case the crisp question to be decided is thus whether the order in the recusal application can be categorised as a "judgment or order" as envisaged in

s 20(1); if not, it also lacks the requirements for a "decision" in terms of s21(1).

Respondent's argument for a negative answer is based on the judgment in Zweni v Minister of Law and Order 1993 (1) SA 523 (A) in which this court reviewed some of the general propositions commonly advanced in the decided cases in connection with the special, almost technical, meaning of "judgment or order" in s 20(1) and its forerunners in earlier legislation. In a passage appearing at 536A-C Harms AJA said :

> "In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

(See also Marsay v Dilley 1992 (3) SA 944 (A) at 962B-F.) Before I deal with

the impact of these remarks, I refer to the general proposition mentioned at 532I

to the effect that "not merely the form of the order must be considered but also, and predominantly, its effect." The first step in the present enquiry is thus to ascertain the effect of the dismissal of the application for recusal.

The application arose from an allegedly reasonable suspicion on the petitioner's part that Fine AJ might be biassed against her. The difference of opinion which had for many years been reflected in the decisions of the courts in regard to the proper test to be applied in recusal applications involving the appearance of bias was recently settled in BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another 1992 (3) SA 673 (A). In that case this court concluded (at 693I-J) that the existence of a reasonable suspicion of bias satisfies the test. It is accordingly incumbent upon every judge to recuse himself from any matter in respect of which he is reasonably suspected of bias towards or against one of the parties.

The effect of a refusal to do so is clear. Unlike the seemingly controversial status in English administrative law of the decisions of biassed officials (cf Craig : Administrative Law (3rd ed) 467-468; Wade : Unlawful Administrative Action : Void or Voidable (1968) 84 LQR 95), firm and authoritative views have been expressed in South Africa regarding the effect on judicial proceedings of a judge's refusal to withdraw from a matter from which he should have recused himself. Without spelling out its actual effect Centlivres CJ observed in Rex v Milne and Erleigh (6) supra at 6 in fin, that a biassed judge who continues to try a matter after refusing an application for his recusal thereby

> "commits ... an irregularity in the proceedings every minute he remains on the bench during the trial of the accused."

The judgment in Council of Review, South African Defence Force, and Others v Mönnig and Others 1992 (3) SA 482 (A) is more explicit. (Although the court in that case dealt with the proceedings before a court martial it is clear

from the remarks at 491C-D and in the passage to be quoted that the principles

applied were in fact those applicable to courts of law.) Dealing with the effect

of the officers constituting the court martial's refusal to recuse themselves and

with the powers of a subsequent council of review, Corbett CJ said at 495A-D :

> "What must be remembered is that in the present case we are concerned with the proceedings of what is in substance a court of law... If, as I have held, the court martial should have recused itself, it means that the trial it conducted after the application for recusal had been dismissed should never have taken place at all. What occurred was a nullity. It was not, as in many of the cases quoted to us, an irregularity or series of irregularities committed by an otherwise competent tribunal. It was a tribunal that lacked competence from the start. The irregularity committed by proceeding with the trial was fundamental and irreparable. Accordingly there was no basis upon which the council of review could validate what went before. The only way the council of review could have cured the proceedings before the court martial would have been to set them aside."

Applied to the present facts the reasoning in Mönnig's case leads

ineluctably to the conclusion that, should it be found that Fine AJ ought to have recused himself, the proceedings in his court must be regarded as a nullity.

There, moreover, the matter does not rest because the two stages of the proceedings for the sequestration of an estate are inextricably interlinked. The rule nisi which s 11 of the Insolvency Act requires to be issued simultaneously with a provisional order calls upon the debtor to appear and show cause on the return date why his estate should not be sequestrated, and in s 12 the final stage is fittingly described as "the hearing in pursuance of the aforesaid rule nisi". That hearing admittedly entails an independent reconsideration of the issues, with the added benefit to the debtor of a higher standard of persuasion than the prima facie proof required in terms of s 10 for a provisional order (Mars : The Law of Insolvence in South Africa (8th ed by De La Rey) 106), but this does not dispense with the necessity for a provisional order and a rule nisi. Since a final order can accordingly not be granted unless a provisional order and a rule have

first been obtained (Provincial Building Society of South Africa v Du Bois 1966

(3) SA 76 (W) at 81E-G), the logical implication of the nullity of the proceedings and the orders granted at the first stage is that the final order must suffer the same fate. I reject a submission by respondent's counsel that a valid provisional order and a valid rule are not required, firstly, because it seeks to ascribe some legal effect to a nullity and, secondly, because the purport of the contention is that sequestration proceedings may be validly conducted in a single stage. Any suggestion that this may be done, is refuted by the explicit and imperative terms of the Act.

Accepting then as we must that, if Fine AJ ought to have recused himself, his refusal to do so had a pervasive vitiating effect upon all the proceedings and every order granted at both stages thereof, the question is whether his refusal qualifies for appealability. In my judgment it does. We must bear in mind that what we are concerned with, is the distinction between decisions which are

"judgments" or "orders" properly so called in terms of s 20(1), and decisions (rulings) which are not. (Van Streepen & Germs supra at 580D-F, 584A-D; Zweni supra at 534A-E). A decision dismissing an application for recusal relates, as we have seen, to the competence of the presiding judge; it goes to the core of the proceedings and, if incorrectly made, vitiates them entirely. There is no parity between such a fundamental decision and rulings like those mentioned in the Van Streepen & Germs case at 580E-F, Dickinson and Another v Fisher's Executor 1914 AD 424 at 427-428 and Steytler NO v Fitzgerald 1911 AD 295 at 326. On the other hand, because it is not definitive of the rights about which the parties are contending in the main proceedings and does not dispose of any of the relief claimed in respect thereof, it does not conform to the norms in the cited passage from the judgment in Zweni's case and thus seems to lack the requirements for a "judgment or order". However, the passage in question does not purport to be exhaustive or to cast the relevant principles in

stone. It does not deal with a situation where the decision, without actually defining the parties' rights or disposing of any of the relief claimed in respect thereof, yet has a very definite bearing on these matters. That a decision dismissing an application for recusal has such a bearing stands to reason because it reflects on the competence of the presiding judge to define the parties' rights and to grant or refuse the relief claimed. For this very reason it is comparable with a decision on a plea to a court's jurisdiction which was held to be appealable in Steyler's case. In his judgment at 327 Laurence J said :

> "[The] broad question is whether the question goes to the root of the matter, and a decision as to the competency of the forum, whether affirmative or negative, I think must be regarded as radical or definitive and not merely interlocutory."

Innes J reasoned as follows at 313 :

> "Steytler ... contended that the tribunal before which he had been cited could exercise no jurisdiction over him, and he refused his consent to its doing so. And, as the Court had decided that there

> could be no proceedings without him, it followed that if his plea was good, the case could not be heard at all. The order dismissing that plea was one of the greatest consequence; it settled a definite portion of the dispute, and had a direct bearing on the ultimate issue. It is difficult to see how such a decision could properly be called a simple interlocutory one."

These remarks admittedly related to the legislation then in force and to the distinction between simple interlocutory orders and interlocutory orders having a final and definitive effect, which no longer features in the Supreme Court Act.

There was, moreover, (as appears particularly from the judgment of De Villiers JP at 337 et seq) express provision at common law for an appeal against an order on an objection to the court's jurisdiction. But the analogy is clear and the reasoning irrefutable.

I accordingly find the refusal of the recusal application an appealable order and I turn to consider the merits of the proposed appeal.

The petitioner's attorney in the sequestration proceedings was Mr Allan

Levin ("Levin"). According to Levin's affidavit in the recusal application he previously represented a colleague in a complaint which the latter had lodged with the Johannesburg Bar Council in connection with professional fees charged by Fine AJ as a practising advocate. The complaint eventually reached the General Council of the Bar who appointed a committee to enquire into it. Fine AJ testified at the enquiry and was cross-examined by Levin. Since then his relationship with Levin was "decidedly strained."

This is how matters stood when the application for the sequestration of the petitioner's estate came before Fine AJ on 11 August 1994. The application was partly argued but eventually postponed to allow the petitioner an opportunity to deal in a further affidavit with allegations in respondent's replying affidavit. On 25 August 1994, after her further affidavit had been filed, Fine AJ summoned counsel to his chambers where he informed them that he required the petitioner and the deputy-sheriff to testify at the hearing which was due to

resume on 29 August. In her founding affidavit in the recusal application the petitioner alleged that she had previously heard about the strained relationship between Fine AJ and her attorney but she was not present in court on 11 August and did not know who the presiding judge was until Levin told her on 23 August. When Levin informed her on the 25th of the new development she told him that she would not be available on the 29th since it had been arranged that she would enter hospital on the 28th where she was to undergo certain tests. (She is a diabetic and suffered from various other ailments.) Recalling what she had heard about Fine AJ's relationship with Levin, she asked Levin whether Fine AJ could perhaps be biassed against her. Levin told her that he did not believe so but would look up the law on the subject and would speak to counsel and, if necessary, raise the matter with Fine AJ in chambers. After this discussion she telephoned Mr Peter Soller ("Soller"), another Johannesburg attorney, with whom she was on friendly terms and who had acted as her

attorney in the past. Soller and Fine AJ were friends. When she mentioned to Soller her fear that Fine AJ might be prejudiced against her on account of his relationship with Levin, Soller informed her inter alia (according to para 17 of her affidavit) that:

"17.3 he (Soller) had had a number of disagreements with Levin from time to time both in respect of personal and professional matters and that these differences had been the subject matter of discussions between him (Soller) and Fine AJ;

17.4 Fine AJ had made it plain to Soller that he had it in for Levin and he (Fine AJ) was going to get Levin one day;

17.5 the fact that Levin had cross-examined Fine AJ before the General Council of the Bar was common knowledge in Johannesburg legal circles."

She did not act on this information immediately but on 29 August 1994 she telephoned Levin from hospital and conveyed to him what Soller had told her. As a result Levin instructed counsel to raise the matter of his recusal with Fine AJ in chambers. But Fine AJ declined to be approached in that manner.

Accordingly, when the sequestration proceedings were resumed on 31 August 1994, petitioner's counsel informed him in open court that a substantive application for his recusal would be brought. This led to another postponement. The application (which, apart from the petitioner's founding affidavit, was supported by affidavits deposed to by Levin and Soller) was filed on 13 September 1994. Respondent filed an opposing affidavit alleging, without denying the basic facts averred in the founding and supporting affidavits, that the application was mala fide. The application was heard and dismissed on 26 September 1994. Fine AJ then proceeded with the sequestration application by hearing the oral evidence he had called for and counsel's final argument. In a judgment delivered the following day in that application he furnished the reasons for the dismissal of the recusal application.

In her founding affidavit the petitioner alleged that :

"consequent upon the aforementioned advices to me by Soller, I became far more concerned about the impartiality towards me of

> Fine AJ than I was previously, notwithstanding Levin's assurances to me that he did not believe that Fine AJ might be biased against me. I genuinely believed that, by virtue of what Fine AJ had said about Levin and the relationship between Fine AJ and Levin as explained to me by Soller, I might be prejudiced if Fine AJ continued hearing the matter and I feared that justice might not be administered in a fair and impartial manner."

It wil be noticed that her apprehension that she might not get a fair and impartial hearing allegedly arose from the strained relationship between the presiding judge and her attorney as well as from Fine AJ's alleged threat to "get" Levin. She obviously had to show that such a relationship in fact existed and that the alleged threat had indeed been uttered. Apart from these factual requirements, it was for the petitioner to satisfy the court that the grounds for her application were not frivolae causae (South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T) at 812C ad fin), ie that they were legally sufficient to justify the recusal of the presiding judge. In

his judgment Fine AJ dealt with the sufficiency of the first ground by indicating that a bad relationship between a judge and the attorney acting for one of the contending parties does not constitute a justa causa for the former's recusal. With his alleged threat and the sufficiency thereof as a ground for recusal he did not deal. His failure to do so is, however, of no consequence in view of the ratio of his judgment which appears from the following passage :

> "I do not believe that there was any honest belief in the contention put forward by the respondent and her legal advisors. The applicant has contended in the affidavit resisting the application for recusal that the application is scandalous and mala fide. I agree. I find that the application is mala fide, and brought with an ulterior motive. The conduct of those responsible for this application is reprehensible and improper."

In coming to this conclusion Fine AJ summarily rejected every material part of the founding and supporting affidavits. Such a drastic step is uncommon in motion proceedings where the basic facts are disputed (cf Trust Bank van Afrika

Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 2181 (A) at 294C-295, 299E-F, 299H-300) and the more so where they are not. Presumably by way of explanation Fine AJ stated elsewhere in the judgment :

> "A close analysis of the facts, compared with the affidavits which are replete with omissions and half-truths, points ineluctably to the fact that the application for my recusal was contrived and frivolous, and not based on a bona fide and honest belief of a probability of bias on my part."

It is not my intention to deal with the points made in the judgment in support of this conclusion. Some of the omissions and so-called half-truths relied on are not, in my view, nearly as significant as Fine AJ would have it and his inferential reasoning is questionable in several respects. But I will say no more in this regard because I am of the view that the way in which he handled the recusal application disqualified him, irrespective of its merits or demerits, from proceeding with the sequestration application. On this view it is unnecessary to consider either the factual proof or the legal sufficiency of the

grounds for the recusal application.

Reading the record of the proceedings leaves one in no doubt that Fine AJ found the application for his recusal highly offending and regarded it as an assailment of his personal integrity. In one of his many exchanges with Mr Bratt who appeared for the petitioner, the following was said :

> "COURT : ... You have got to be honest in these applications and open. I am placed in a very awkward position. There are attacks on my integrity and one would expect from senior experienced attorneys that the utmost good faith is observed in these matters... MR BRETT : M'lord, with respect, your lordship's integrity is not put in issue here at all m'lord. COURT : Oh it is. It is very much."

His reaction to a passage quoted to him from an article in the South Africa Law Journal to the effect that "it is better to avoid even a semblance of suspicion," is equally revealing. It reads as follows :

> "...you cannot create grounds for recusal by making scandalous allegations and then hope to hoist yourself by your own petard

> because you made a scandalous allegation and then a more scandalous allegation and then hope that that is going to be the farceur."

A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Cf S v Bam 1972 (4) SA 41 (E) at 43G - 44.) If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a judge is primarily concerned with the perceptions of the applicant for his recusal for, as Trollip AJA said in S v Rall 1982 (1) SA 828 (A) at 831 in fin-832:

> "the Judge must ensure that 'justice is done.' It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his

open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused."

(See also S v Malindi and Others 1990 (1) SA 962 (A) at 969G-I and cf Solomon and Another NNO v De Waal 1972 (1) SA 575 (A) at 580H; S v Meyer 1972 (3) SA 480 (A) at 484C-F.) A judge whose recusal is sought, should accordingly bear in mind that what is required, particularly in dealing with the application for recusal itself, is "conspicuous impartiality" (BTR Industries supra at 694G-H).

Unfortunately this is precisely what is lacking in the present case. Mr Brett had hardly commenced his argument when Fine AJ interrupted him and the following exchange occurred :

"COURT : I have looked at the law, there has got to be a reasonable apprehension that there is going to be a distortion of justice. Your case is basically this - because I allegedly do not like Mr Levin, I am going to traverse the course of justice today...

MR BRETT : No m'lord, not that - no. M'lord, the applicant's case for recusal in this matter is that she has a - as a lay litigant, she has a reasonable perception.

COURT : It has got to be a reasonable and honest perception.

MR BRETT : It has got to be a reasonable and honest perception, as your lordship pleases.

COURT : What case do you have there, please Mr Brett?"

This was the first indication that Fine AJ intended to concentrate on the honesty of the petitioner and her witnesses and served as a prelude to what was still to come. Thereafter, amidst countless interventions openly aimed at exposing what Fine AJ regarded as patent lies on the petitioner's part and Levin and Soller's complicity therein, Mr Brett valiantly tried to state his client's case. Respondent's counsel's argument was similarly interspersed with interventions. But there was a noticable difference in their nature : all that respondent's counsel in effect had to do, was to confirm facts and propositions adverse to the petitioner's case suggested to him from the bench. In Greenfield Manufacturers

(Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd 1976 (2) SA 565

(A) at 570E-F it was said that :

> "Whilst the true role of a trial Judge in civil proceedings is not necessarily that of a 'silent umpire', he must studiously avoid any form of intervention which is calculated to create the impression that he is descending into the arena which is ordinarily reserved for the litigants. A failure to do so, might have unfortunate consequences, eg an impression (albeit mistaken) might be created that his intervention evidences bias or that he is prejudging the matters which are to be considered only at the end of the trial."

This admonition went unheeded in the present case. What is disturbing is not the regularity of the court's interventions, but the nature thereof : as mentioned earlier Fine AJ's aim was plainly to expose what he regarded as the petitioner's utter untruthfulness and Levin and Seller's scandalous complicity therein. This occurred in the very application for recusal in which the petitioner had declared her suspicion of possible bias. It could only serve to confirm her impression.

The persistent interference with Mr Brett's argument is open to an even more alarming perception. Fine AJ insisted from the outset to know why the petitioner had not revealed in her founding affidavit the source of her information about his relationship with Levin, and repeatedly suggested that there is an ineluctable inference to be drawn from this lacuna. What the inference was, he did not disclose at that stage, but the following passage in the judgment is most informative of what he had in mind :

> "What is however more sinister is that the respondent attempts to create the impression that she had previously (obviously from other sources) heard of the relationship between me and Mr Levin. She is deliberately silent as to when, where, and from whom she had heard about the dissension which existed. The silence and omission are not casual, but deliberate and contrived. The respondent is a businesswoman; she is not in any way attached to the legal profession; it is inconceivable that she would have heard of the dissension which existed between Mr Levin and me from any source other than Mr Levin ... The inference, in my view, is therefore inescapable that it was Mr Levin who made this

disclosure to the respondent with, of course, the necessary embellishments, and I am of the view that this was done on 25th August, 1994, when I called for viva voce evidence."

Factual grounds for some of these observations (eg that the omission was deliberate, that Levin could have been the only source of her information and that he embellished whatever information he supposedly conveyed to her) do not exist and the conclusions are patently speculative. In short, the passage reveals a number of misdirections. That, however, is not the point. What is more important is the pains which Fine AJ took to discredit Levin and to expose him as a schemer, a conniver and a perjurer. This could easily and reasonably have been perceived by the petitioner as confirmation of what Soller had told her -that Fine AJ had threatened to "get" Levin.

This brings me to the fundamental problem which I have with the dismissal of the recusal application. When the application was brought before him Fine AJ had two options. One was to consider the legal sufficiency of the

grounds advanced in support thereof; the other was to consider the sufficiency of the evidence and, in conjunction therewith, the respondent's claim in the affidavit that the application was mala fide. He preferred the second option. But, once he elected to follow that course, his position became an intolerable one bearing in mind that the petitioner was a potential witness in the sequestration proceedings. The outcome of those proceedings depended largely upon her evidence and her credibility would obviously be at stake. When, during argument in the recusal application Fine AJ forcefully brought it home to her counsel that she could not be believed, did she not at that stage already have every reason to despair of her evidence being accepted in the main proceedings? We also know that in his judgment Fine AJ rejected the most material part of her founding affidavit in even more forceful terms and in effect found her to be a perjurer who had deliberately attempted to deceive him. What confidence can she have that her evidence in the main proceedings was

considered with an open mind?

The answers to these questions are obvious and lead irresistibly to the conclusion that Fine AJ ought to have withdrawn from the proceedings.

It remains to consider what relief the petitioner should now be granted. Since Fine AJ ought to have recused himself, it is clear that leave to appeal must be granted and that the appeal itself must succeed to the extent that his refusal to do so must be set aside and replaced with an order allowing the recusal application. As indicated earlier in this judgment the effect of such an order will be that all the proceedings and orders granted in the sequestration application are to be regarded as nullities. But is the petitioner entitled to an order giving positive and practical effect to their nullity? In particular, is she entitled to an order setting aside the final sequestration order in the absence of an appeal against that order? When these questions were posed in argument petitioner's counsel responded by referring us to the judgment in S v Ebrahim

1991 (2) SA 553 (A) in which this court set aside the appellant's conviction and sentence in an appeal directed at an order granted in a preliminary application to the trial court. But he also drew our attention to the remarks at 584 I-585C of the judgment from which it appears that the order setting aside the conviction and sentence was granted by consent. In the absence of the respondent's consent in the present case I do not think that we have jurisdiction to set aside the final sequestration order. Leave to appeal is one of the jurisdictional requirements of ss 20 and 21 of the Supreme Court Act (Zweni's case supra at 531B-C) and the petitioner did not seek leave from the court a quo to appeal against the final order, nor did she request an adjournment of the proceedings in this court in order to allow her to approach the court a quo even at this stage (cf S v Langa en Andere 1981 (3) SA 186 (A) at 189 in fin). That being the case this court is not competent either to grant leave or to entertain an appeal against the final order without leave.

The following order is accordingly made :

17.6 The application for leave to appeal is granted.

17.7 The appeal is upheld and the order of Fine AJ dismissing the application for his recusal is set aside and replaced with an order granting the application with costs.

17.8 The respondent is directed to pay the costs of the appeal including the costs of the application for leave to appeal and the costs pertaining to the employment of two counsel, as well as the costs of the application for leave to appeal in the court a quo.

17.9 The respondent will be entitled to enrol the application for the sequestration of the petitioner's estate for hearing afresh before another judge without reference to the viva voce evidence given before Fine AJ.

J J F HEFER

AGREED: E M GROSSKOPF JA
VIVIER JA FH
GROSSKOPF JA VAN
COLLER AJA