

NOT REPORTABLE
/EVDM

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: 25095/09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

DATE: 23/7/2010

In the matter between:

SIGNATURES

REGISTRAR OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

2010 -09- 23

CHIEF JUSTICE KURUP
PRETORIA, 2010

CHIEF JUSTICE VAN DIE NOORD GAUTENG
HOGESKOLE, PRETORIA.

S. N. PITJE

1ST APPLICANT

N. PITJE

2ND APPLICANT

vs

G. T. VAN DER MERWE

1ST RESPONDENT

A. P. J. ELS

2ND RESPONDENT

JUDGMENT

Delivered on: 23 September 2010

POTTERILL J,

1. The first applicant representing himself and the second applicant represented by Advocate Tsweni brought an application for my recusal.
2. The background to this application is that on 30 October 2009 I granted an application for the eviction of the applicants in terms of the Prevention of

Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, herein after referred to as the "PIE Act." The respondents were to vacate the premises by 30 November 2009.

3. The applicants filed an application for leave to appeal against this order. This application was served on the respondents on 20 November 2009. It was arranged by my Registrar that the matter be heard on 2 December 2009. On 2 December 2009 the application for leave to appeal was postponed *sine die*, but the application in terms of rule 49(11) for the execution of the eviction order proceeded. I granted this order.
4. The respondents in the rule 49(11) application on 4 December 2009 brought an urgent application to suspend the order made in terms of rule 49(11), but the application was dismissed by Webster J.
5. On 24 December 2009 the respondents in the rule 49(11) application brought an application to vary the order granted by Webster J before Sapire AJ and the matter was removed from the roll.
6. On 1 January 2010 the variation order once again came before Makgoka J and he directed that the matter be removed from the roll.
7. On 15 January 2010 Acting Judge Tuchten entertained on an urgent basis an application to vary an interlocutory order made by Webster J on 4 December

2009. Tuchten AJ ordered inter alia that the matter is urgent but all the same postponed it *sine die*.

8. On 10 June 2010 Makgoka J made inter alia the following order:

"The execution order granted by Potterill J on 2 December 2009 is suspended, pending the determination of the rescission application launched by the first and second applicants on 3 December 2009"

9. The respondents to the leave to appeal against my eviction order then proceeded to apply for a date for the leave to appeal to be heard. My registrar informed the respondents that the date of 20 September 2010 would be suitable. This was after the respondents' attempt to arrange a date with the applicants therein was fruitless.

10. On 20 September 2010 the first applicant averred he did not know of the date for the leave to appeal, but was present because he accidentally heard of it via an advocate who told him he saw his (Pitje's) name on the roll. I found that he did in fact know of the date, but afforded him opportunity to obtain counsel and for preparation and let the matter stand down till the next day, 21 September 2010, at 9:00.

11. On 21 September 2010 he represented himself and Advocate Tsweni appeared on behalf of second applicant (his wife). They arrived at 9:50 and the matter proceeded whereby the applicants brought an application for my recusal.

12. The basis for the recusal is threefold:

17.1 *"It is further not without significance that at least two legal minds from the Bench in this division also found that what has occurred during the proceedings heard by Justice POTTERILL was controversial and amounted to an injustice being done to us from the Bench."*(Paragraph 4.4)

17.2 "I further articulated the view that her aforesaid conduct was well planned with the Respondents. This contention is further apparent from the various documents forming part of the record in the matter."(Paragraph 4.3)

17.3 Mr Pitje lodged a complaint against me at the Judicial Services Commission to which I have not responded.

13. The test to be applied in cases of applications for the recusal has recently been laid down by the Constitutional Court in the case of **President of the RSA v SA Football Union** 199(4)SA 147 CC where the Court held at 177B, par [48] as follows:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. 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 bring 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 the counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves."

In par [40] it was found that the law presumes that judges are impartial and the party applying for the judge's recusal must therefore establish the reasonable apprehension of bias. The presumption is not easily dislodged; it requires cogent or convincing evidence to establish that a judge should recuse herself from the matter. At paragraphs 46-47 it is found that given the presumption the mere fact that a party brings a recusal application is not enough to disqualify a judge. A Judge has a duty to sit.

14. The first ground for the recusal (par 12.1 above) is ill-founded and without any merit. No other Judge has pronounced over the judgment in the eviction application to which the leave to appeal pertains. Not that another Judge has the jurisdiction to sit in appeal or review over another Judge's judgment, bar very exceptional circumstances. This can thus not be a fact for recusal.

Subsequent to the eviction order the application in terms of Rule 49(11) came before Judge Tuchten in the urgent court. He made no finding of irregularity or that justice was not served. He could not because the applicants in that matter

had not put the best evidence before him; the lack thereof so fatal that he had to postpone an urgent application *sine die*. He made several *obiter* remarks and suggestions but stressing immediately after making them that he is not making any findings or expressing any opinions; Paragraphs 23 & 25.

In paragraph 9 of his judgment he states the following:

"What transpired at the hearing on 2 December 2009 is at present controversial. Suffice is to say that the application for leave to appeal did not proceed on the date but Potterill J heard and granted the Rule 49(11) application...."

In paragraphs 11 and 12 Tuchten J sets out that the applicants' (Pitsi) were not represented at this hearing. Also that it is averred that the rule 49(11) could not have been entertained because it had to be heard simultaneously with the application for the leave to appeal. I thus had no jurisdiction to entertain the rule 49(11) application because the leave to appeal did not proceed. *"All these contentions are hotly disputed by the respondents."*

He then in paragraph 24 finds that in fact there needs to be no controversy as the transcripts will determine what was said.

No reasonable, objective and informed litigant would in possession of these facts reasonably apprehend that I am partial. The controversy lies in what the applicants are averring vis a vis the respondents. He does not find that I acted controversially or that an injustice is done to the applicants and averring so under oath is an untruth.

It is also stated that the second "legal brain" that found that I acted controversially and unjustly towards the applicants is Makgoka J. Once again

his judgment has no bearing on the application for leave to appeal against the judgment granting the eviction.

For the sake of completeness the judgment of Makgoka J can also never objectively, reasonably convey to an informed litigant that I am partial.

Paragraph [37] of this judgment has the heading "CONCLUSION"

[37] *"Having regard to all the factors in this application, I am of the view that the relief sought by the applicants be granted. I have come to this conclusion mainly on the basis that Potterill J's judgment was granted in the absence of the second applicant. From a practical point of view, the order I am about to make affects invariably the first respondent. They are husband and wife."*

Makgoka J then makes an interlocutory order that the execution order is suspended pending the determination of the rescission application.

Many orders are granted in the absence of a party where notice had been given or service was affected. Be that as it may, at the most a reasonable, objective litigant in possession of all the facts can apprehend that I made a "mistake", but not that there was bias. The "mistake" is in any event against Mrs Pitje and not against Mr Pitje, the first applicant.

This "ground" for recusal is thus dismissed.

15. The second ground for the recusal is based on obviously wrong and unsubstantiated factual averments and it is also rejected.

On 24 August 2010 I received a letter from the respondents wherein they set out that I granted an eviction order. The judgment was transcribed by the respondents and served on the applicants in the application for leave to appeal on 12 August 2010. They enquired from the appeal registrar and

ascertained that I have not yet allocated a date for the hearing of this application. They then requested that I arrange a date for hearing.

My registrar on 27 August 2010 in answer to their request informed them that I have not had a request to allocate a date hence no date was allocated. He informed them to arrange a date with the applicants for any morning at 9:30. This is in accordance with normal practice in this division.

On 6 September 2010 I received a letter from the respondents wherein they requested that I provide a date as they have approached the attorneys of the applicants on three occasions to no avail.

In response thereto my Registrar provided them with the date of 20 September 2010 9:30 and requested them to serve a notice of set-down on the applicants in the application.

I also instructed my clerk to send a copy of the letter dated 6 September 2010 to the applicants' attorney by registered post. The registered slip is dated 9 September 2010. On the same date my registrar also faxed and e-mailed to the applicants attorney.

The notice of set-down is served on the applicants' and filed at the registrar on 9 September 2010.

The applicants submitted that I gave the respondents a date already in July 2010 and I confirmed this in a remark I made when Mr Pitje argued that he did not have notice of this date of the 20th of September 2010.

This is devoid of all truth; all the correspondence bears this out. I, in court, informed Mr Pitje that I had given the respondents the date prior to the notice of set-down and not in July 2010. He jumps to this conclusion because the notice of set-down is dated 12 July 2010 although served and filed on 9

September 2010. The judgment had not been transcribed by 12 July 2010 and was only revised on 5 August 2010. The facts speak for themselves.

On these objective facts no reasonable litigant can reasonably apprehend bias. I took all steps to timeously inform the applicants' when their application is to be heard.

The statement under oath "*I further articulated the view that her aforesaid conduct was well planned with the Respondents*" is, having regard to the true facts, highly irresponsible, reprehensible and unethical.

This ground is rejected.

I on 20 September 2010 found on a preponderance of probabilities that the applicants' knew of the date of 20 September 2010. The notice of set-down was served and filed and my registrar had successfully transmitted a fax, sent e-mail and registered post. The fact that Mr Pitje was at court on 20 September 2010 confirms this. The fact that he was in court because on the morning of the 20th an advocate informed him that his name was on the roll is so improbable as to be unbelievable. This is borne out by the fact that he refused to enlighten the Court as to who this advocate was. The affidavit presented on the 21st of September 2010 that the secretary of his attorneys did receive "LP1"(notice of set-down) and "LP2"(letter emanating from my registrar) but did not bring it to the attention of the professional staff is filed after my ruling and my ruling stands. She does not state whether she filed the letter received by registered post or the one sent by e-mail or the one sent by fax. I stand by my ruling that on a preponderance of probabilities Mr Pitje knew that the application was to be heard on 20 September 2010.

16. The last ground for the recusal is that Mr Pitje laid a complaint at the Judicial Services Commission. He avers that the basis of his grievance is that "*Justice POTTERILL has acted in a manner that is openly bias against us and has made only adverse orders against us as a result of her such conduct.*"

Paragraph 4.5 stating that I have not responded to the complaint is a blatant untruth. It can just again be described as reprehensible conduct on the part of Mr Pitje and deserves no further comment.

The matter is still pending and will be finalized on the 4th of October 2010. Accordingly the merits of the complaint will not be dealt with, suffice to say that the nature of the complaint as set out in the complaint, or the lodging of the complaint itself, can never impact on my ability to be free of unfitting adherence to either party.

Applying the test as set out above I am mindful that a litigant knowing that a pending complaint was laid by Mr Pitje and I have to adjudicate in a matter that he is involved may apprehend whether I would be able to distance myself from this complaint.

On this ground I accordingly recuse myself.

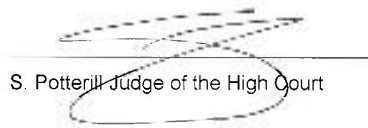
17. I accordingly make the following order:

17.1 I recuse myself from the application for leave to appeal.

17.2 The costs of this application is costs in the cause.

17.3 The wasted costs of 20 September 2010 is to be argued at the hearing of the application.

17.4 Either party may forthwith approach Judge W van der Merwe, the Deputy Judge President in writing for two judges of this division to hear the leave to appeal application.



S. Potterill Judge of the High Court

Matter heard on: 20 & 21 September 2010

Delivered on: 23 September 2010

Counsel for the 1st Applicant:

In Person

Counsel for the 1st & 2nd Respondents:

Advocate van der Merwe

Counsel for the 2nd Applicant:

Advocate Tsweni

Attorney for the 1st & 2nd Applicants:

Mkhabela Attorneys.

Pretoria.

(Ref: MK/LP/40/2010)

Attorney for the 1st & 2nd Respondents:

Van der Merwe & Associates

Pretoria

(Ref: P VD MERWE/II/PV0054)