



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

**NOT REPORTABLE
CASE NO.: 1955/2016**

BAREND JACOBUS VAN DEN BERG

Applicant¹

and

**THE LAND AND AGRICULTURAL
DEVELOPMENT BANK OF SOUTH AFRICA
SUIDWES LANDBOU (PTY) LIMITED
LORRAINE MARLENE VAN DEN BERG
BAREND JACOBUS VAN DEN BERG N.O.
LORRAINE MARLENE VAN DEN BERG N.O.
HENDRIK STEPHANUS LODEWICUS
DU PLESSIS N.O.
THE REGISTRAR OF DEEDS**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

Sixth Respondent
Seventh Respondent**

IN RE:

CASE NO:1240/2020

**BAREND JACOBUS VAN DEN BERG
LORRAINE MARLENE VAN DEN BERG
HENDRIK STEPHANUS LODEWICUS
DU PLESSIS N.O.**

**First Applicant
Second Applicant

Third Applicant**

¹ It is only the applicant and the first and second respondents that partook in the litigation of the application for recusal.

and

**SUIDWES LANDBOU (PTY) LIMITED
THE LAND AND AGRICULTURAL
DEVELOPMENT BANK OF SOUTH AFRICA
COREEN STEYN t/a STEYN ATTORNEYS**

First Respondent

Second Applicant

Third Respondent

ET IN RE:

CASE NO: 1955/2016

**THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA
SUIDWES LANDBOU (PTY) LIMITED**

First Plaintiff

Second Plaintiff

and

**BAREND JACOBUS VAN DEN BERG
LORRAINE MARLENE VAN DEN BERG
BAREND JACOBUS VAN DEN BERG N.O.
LORRAINE MARLENE VAN DEN BERG N.O.
HENDRIK STEPHANUS LODEWICUS
DU PLESSIS N.O.
REGISTRAR OF DEEDS, BLOEMFONTEIN**

First Defendant

Second Defendant

Third Defendant

Fourth Defendant

Fifth Defendant

Sixth Defendant

ET IN RE:

CASE NO: 765/2019

**SUIDWES LANDBOU (PTY) LIMITED
THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA**

First Plaintiff

Second Plaintiff

and

COREEN STEYN t/a STEYN ATTORNEYS
BAREND JACOBUS VAN DEN BERG N.O.
LORRAINE MARLENE VAN DEN BERG N.O.
HENDRIK STEPHANUS LODEWICUS
DU PLESSIS N.O.

First Defendant
 Second Defendant
 Third Defendant
 Fourth Defendant

Coram: M Opperman J

Heard: 9 May 2024

Order: 8 November 2024. This judgment was handed down electronically by circulation to the parties' legal representatives via email and release to SAFLII on 8 November 2024. The date and time of hand-down is deemed to be 15h00 on 8 November 2024. The reasons for judgment were delivered on 11 November 2024.

Summary: Application for recusal

ORDER

1. I accordingly recuse myself and hereby withdraw from the hearing of the matter held under case number 1955/2016 and as per the issues separated in terms of Rule 33(4) of the Uniform Rules of Court. The matter will continue before another judge.
 2. No order is made as to costs.
 3. Reasons for the judgment may be uplifted from the Registrar of the Court on Monday 11 November 2024 at 15h00.
-

JUDGMENT

Opperman J

[1] The application that lies for adjudication is one of recusal. The words of Koen J in the matter of *S v Zuma and Another*² sets the tone:

'[22] I am enjoined by my oath of office to ensure, *inter alia*, that Mr Zuma receives a constitutionally fair trial, to regulate the management of the trial, to preserve the integrity of the trial, and to ensure the proper administration of justice. The issue whether an accused receives a constitutionally fair trial as guaranteed in terms of the Constitution, is an enquiry that is paramount and something that should be ever present to a judge's mind during a trial. The integrity of any trial must be beyond any criticism or reproach. It is my task to ensure that the current trial also meets that expectation. A reasonable perception of fairness is all-pervasive.'

[2] Although it appears that actual bias is alleged, I have no hesitation to reject any suggestion of this on my part from the onset. I have absolutely no gain in the future fortunes or otherwise of Mr van den Bergh (applicant) or any of the litigants. Mr Du Plessis (the attorney), representing the applicant, had at all times been courteous towards the court and there was not any instance that needed for me to extent but the same towards him. There were occasions that situations presented during the hearing and the court had to rule on issues and maintain control of the trial but I never got the impression that bias was perceived. Reading of the record as a whole and all the papers and judgments in the matter prove the opposite of real bias beyond doubt.

[3] On 8 May 2024 the Supreme Court of Appeal reiterated the legal principles when an application for recusal lies for adjudication in *Maritz v S*:³

'[6] On 29 November 2021, the appellant brought an application for the recusal of Naidoo J on the basis that she was biased and that he had a reasonable apprehension that he will not be accorded a fair trial. The appellant's recusal application was based on the following allegations and complaints against Naidoo J:

- (a) The judge irrationally and unilaterally revoked his bail;
- (b) The judge is a Gender Based Violence Activist (GBV Activist);
- (c) The judge requested a victim impact report before the revocation of the appellant's bail; and

² *S v Zuma and Another* (CCD 30/2018P) [2023] ZAKZPHC 10; 2023 (1) SACR 621 (KZP) (30 January 2023).

³ (81/2023) [2024] ZASCA 72; 2024 (2) SACR 412 (SCA).

(d) Prior to the hearing of the variation of the appellant's bail conditions, the judge spoke to her colleague, Daniso J about the case.

The high court dismissed the application for recusal. Dissatisfied with the high court order, the appellant petitioned this Court and leave to appeal was granted to this Court on 8 June 2022.

[7] A litigant who finds it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of his motive should not be lightly questioned. His or her application must be dealt with in accordance with the prevailing legal principles.

The legal principles

[8] The law relating to recusal has become settled. The right to a fair trial is entrenched in our Constitution. Section 35(3) of the Constitution deals with criminal proceedings and provides that '[e]very accused person has a right to a fair trial'. Section 34, which addresses the right of access to courts in the general sense, states as follows:

'Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[9] Section 165(2) of the Constitution, dealing with the judicial authority re-iterates the courts' independence and requires courts to apply the law 'impartially and without fear, favour and prejudice', and the oath of office prescribed by Schedule 2 of the Constitution requires each judge to swear that he or she 'will uphold and protect the Constitution. . . and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.

[10] Judicial officers are required to perform their adjudicative functions independently and impartially, without bias or prejudice in favour of any party. The concept of impartiality of the judiciary refers to the state of mind or attitude of judicial officers in relation to the issues and parties in a particular case, and to the fact that the courts must apply the law 'without fear or prejudice'. An important consequence of impartiality is that a judicial officer must recuse himself or herself if there is a reasonable apprehension that he or she is biased.

[11] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application (SARFU)*, the Constitutional Court held that the test for bias was whether 'a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judicial officer has not brought or will not bring an impartial mind to bear on the adjudication of

the case. . .'. Although it is the apprehension of bias and not actual bias which is prohibited, the test for bias is difficult to satisfy. This is because, first, the starting point is that judicial officers are presumed to be impartial, and, second, judicial officers are human. It is appropriate for judicial officers to bring their own life experiences into the judicial process. The *SARFU* judgment reaffirmed that we must assume the independence and impartiality of judicial officers based on the recognition of their legal training and experience.' (Accentuation added)⁴

[4] Remarks that I made in a previous judgment in this case against the applicant were and are of some concern to me in that it might have been of such a nature that perceived bias could have been activated. This is what I had to say:

'[2] A learned colleague quoted recently in a case akin to this matter: **"When people get desperate, they get very creative"**. In the case of *Belford v Belford* 1980 (2) SA 843 (C) at 844 that was relied upon by the Applicants, Van den Heever lamented that:

In the present, a different, context I would stress what I conceive to be the moral duty of lawyers: to dissuade their clients from indulging in petty bickering to the good of no one save the lawyers' finances. One realises of course that clients do not always heed their lawyers' advice in this regard; ...

The entire matter should be settled and should not be difficult to settle if both parties decide not to be **greedy and selfish**, and bear in mind that the prime aim should never be merely to hurt the opposition.

The case here is an estimated seven-year-old debt of millions of Rands that is outstanding and that the debtor **does not honour**.⁵ (Accentuation added)

[5] The outcome of the case must be in accordance with legal principles and constitutionally fair. The issue, specifically so, is thus entirely whether there is a reasonable apprehension of bias arising from findings and views essentially previously expressed by me. I have no hesitation to recuse myself from the proceedings if the interest of justice so demand. I am of the view that my recusal will indeed serve justice but for different reasons than those relied upon by the

⁴ Footnotes omitted.

⁵ Case number 1240/2020, judgment on 10 March 2021: "JUDGMENT, CONSOLIDATION APPLICATION IN TERMS OF RULE 11 OF THE UNIFORM RULES OF THE HIGH COURT OF SOUTH AFRICA", Free State Provincial Division, Bloemfontein.

applicant. It is the remarks I made above that will in the end result in me recusing myself from the proceedings.

[6] The words of Mr Maphinda in his affidavit that I refer to hereunder that stated at paragraph 81 of his statement add to the legal principles to be followed:

'The first and second respondents submit that in the circumstances Judge Opperman, with respect, has a duty to preside and should not accede to unmeritorious allegations of bias levelled against her.'

[7] This case is of such deep concern to me that I had to do brutal introspection. I had to study hundreds of pages of evidence, transcribed records and judgments. The delay in bringing this application and allegations that were made, among others, by the attorney for the applicant and one Ms Leonard of their personal experience and feelings, made it impossible to respond to. I cannot remember a Ms Leonard and I cannot account for their feelings. But as I indicated I might have been the instigator of the perceived bias.

[8] The first and second respondents gave an extensive depiction of the litigatory history of the case in the answering affidavit of one Phumelele Maphinda, Legal Advisor: Recoveries and Insolvency employed by the first respondent.⁶ I will not burden this judgment with it since it has also been extensively dealt with in other judgments of mine.

[9] From a reading of the application the applicant mainly bases his case on a complaint of differential and unfair treatment, illegal interventions during cross examination and the issue of his representation of the defendants and him possibly having to testify.

[10] It is imperative that this judgment be read with the transcribed record of all the proceedings through the many years, the numerous judgments I wrote on issues in the case and the judgments of the Supreme Court of Appeal as

⁶ Paras 21 to 67 at 152 to 168 of the bundle marked: 'Part I: pages 1 to 299'.

well as the Constitutional Court. It might even be conducive to justice if the reader of the judgment listens to the recordings. I never raised my voice to the attorney or made sarcastic remarks; this simply is not true. This shows that the allegations by the applicant as supported by his attorney is incorrect as a whole.

[11] It is not only the presiding officer in this case that is accused of questionable behaviour. An incident of extreme accusations against the legal representatives for the first and second respondents also occurred. This is depicted in the letters that form part of the application in that they were accused of having singly contacted myself without the attorney for the applicant being present. These serious accusations were devoid of the truth.⁷ Tempers flared and much frustration was experienced in this case; the tightrope to have been walked that was caused by the predicament of the attorney for the applicant complicated the case. The court had to call counsel for the first and second respondents to order and severely admonish him when he made an unbecoming remark. At paragraph 200 the first and second respondents' witness Mr Maphinda pointed out that counsel was accused by the attorney for the applicant of the following:

'senior counsel for the plaintiffs going berserk eyes bulging and red-faced, losing complete control of the management of his case in reaction to Mr Du Plessis' proposal for a date after the court recess which suited the defendant going berserk and, aggressively turned around uttering the word 'bullshit' so loudly that the presiding judge indicated that she heard it'. The description of senior counsel for the first and second respondents by the applicant is wrong and exaggerated. The court admonished counsel and he apologised.

[12] As pointed out above; from the onset the case presented with challenges. The conduct of the attorney for the applicant caused many issues and the court had to maintain order and control in unusual situations. The attorney clearly did not take kindly to the admonishments of the court to maintain control of the trial and ensure that the administration of justice is served; hence the allegations in this application.

⁷ See pages 101 to 116 of the bundle marked 'Part I: pages 1 to 299'.

a. The attorney for the applicant is a party to the litigation. Counsel for the first and second respondents were often frustrated and sometimes immensely so by the fact that the state of affairs caused difficulties in the case. The record shows that there were numerous objections that the attorney for the applicant testified from the bar and outside the papers filed in evidence. The attorney for the applicant admitted on record that this poses an issue and that he was concerned about it from the beginning.⁸ He stated that he is in the situation because:

'But the question is still – the issue is still beggars cannot be choosers. We-we would have loved to have a team like this, M'Lady.⁹ I would have given my front teeth for that. But-and on the other hand, M'Lady, I am also in a situation that I cannot just drop my - my trustees-co-trustees.

The attorney for the applicant conceded that the concerns of the court were valid and considered and did obtain senior council's advice on the issue that he may have a conflict of interest being a litigant and the legal representative. As by his own admission the attorney was concerned about the state of affairs. He appreciated that there might be a conflict of interest. The attorney returned to court on the issue and he intimated to the court that provided that he does not testify as to the merits of the case; no conflict of interest should exist. The court accepted the professional appropriateness and bona fides of the decision of the attorney and the trial continued.

b. Another concern raised by counsel for the first and second respondents was, that as a trustee of the Hermanusdam Trust (the trust), the attorney might be compelled to testify in the case to protect the interest of his clients. The issue was never raised by the court but by counsel for the first and second respondents and in the opening statement already.¹⁰ Concern of the court was the procedural awkwardness in that there would not be anybody to lead the evidence of the witness and the novelty of the issue. It will also cause severe detriment to the defendants if their legal representative might be ruled as a witness without credibility. There was a real apprehension that an unfair trial

⁸ On page 197 of the bundle marked 'Part I: pages 1 to 299'. But also see the whole quote from the proceedings on pages 196 to 200 of the same bundle.

⁹ Pointing to the team of legal representatives of the first and second respondents.

¹⁰ See paras 118 to 119.6 at 190 to 196 of the bundle marked 'Part 1: pages 1 to 299'.

might be declared on appeal and all the litigants and the administration of justice be prejudiced. This concern raised was labelled as sarcasm by the applicant but it was noted in a later judgment also and was real. Counsel for the first and second respondents stated the true reality in their heads of argument that:¹¹

'57. Mr van den Berg was not a party to the consolidation application that served before Judge Opperman on 10 December 2020. The applicants in the consolidation application were the trustees of the Hermanusdam Trust.

58. Accordingly, Mr van den Berg cannot possibly have formed a reasonable apprehension that Judge Opperman would be biased against him based on what had transpired at the hearing of the consolidation application on that day.

59. Judge Opperman's concerns for what Mr Du Plessis's dual role, as a party to the litigation and as attorney for the other defendants, may mean for the other defendants was justified because:

59.1 The annual financial statements of the Hermanusdam Trust for the financial year ended 28 February 2015 were discovered by the defendants, produced and handed in as evidence in terms of uniform rule 35(10). It is contained in Exhibit "C";

59.2 It is recorded in the aforesaid annual financial statements that such annual financial statements were approved by the trustees of the Hermanusdam Trust;

59.3 On face value, the annual financial statements for the financial year ended 28 February 2015 demonstrate prima facie and justify the inference that Mr Du Plessis, as trustee of the Hermanusdam Trust, authorised the registration of the mortgage bond as well as the execution of the suretyship;

59.4 The approval of the annual financial statements as aforesaid furthermore demonstrates that the defence that the suretyship and mortgage bond are invalid is prima facie spurious;

59.5 Mr Du Plessis is the only person who can testify about the issue whether he, as trustee, tacitly or by conduct, authorised Mr van den Berg to effect the registration of the mortgage bond by the trustees of the Hermanusdam Trust and to execute the suretyship, as specifically pleaded by the first and second respondents;

59.6 Mr Du Plessis is first and foremost an officer of the court and as such under the paramount duty to serve the interests of justice; to avoid the introduction of incorrect or misleading evidence; and to disclose to the court all the facts known to him which

¹¹ Footnotes from the heads of argument omitted.

may be relevant to the issue, even if such facts are not in favour of his clients, in the event that his clients' testimony is inconsistent with such facts;

59.7 The defendants, despite the aforesaid approval of the 2015 annual financial statements and the consequential confirmation of the execution of the suretyship and the registration of the mortgage bond, denied the validity of the suretyship and the mortgage bond and persisted with such denial; and

59.8 There was, in the light of the aforesaid facts and in view of the duties of officers of the court, a real prospect that a conflict of interest might arise, and that Mr Du Plessis would have to testify at the trial of the 2016 action despite Mr Du Plessis' stated reluctance to testify.

60. Moreover, the aforesaid facts objectively demonstrate prima facie that Mr van den Berg, as a reasonable and informed person, could not upon the correct facts (the authorisation of the execution of the suretyship by the trustees and the authorisation to register the mortgage bond by the trustees) reasonably apprehend that Judge Opperman will not bring an impartial mind to bear on the adjudication of the case.

61. The aforesaid contention is fortified by the fact that Mr van den Berg does not deny that he signed the 2015 annual financial statements and does not even attempt to explain notes 1.1 and 6 reflected therein.

62. The allegation that the first and second respondents' attempt to create a scenario that Mr Du Plessis is required to testify about an undated document which is on the face of it signed by an unidentified person, at a strange place on the document, is in the light of the aforesaid facts and legal principles unfounded.

63. The date upon which the 2015 annual financial statements were approved (signed) by the trustees are irrelevant.

64. The allegations, by Mr van den Berg and confirmed by Mr Du Plessis, that the 2015 annual financial statements were signed by an unidentified person are disingenuous.

64.1 The 2015 annual financial statements were discovered by the defendants;

64.2 The 2015 annual financial statements were in terms of uniform rule 35(10) produced by the defendants and were handed in as Exhibit "C" on 29 November 2019 during the trial of the 2016 action;

64.3 The resolution in terms whereof the trustees approved the 2015 annual financial statements was also signed by an "unidentified person" and produced and received as evidence as part of Exhibit "C"; and

64.4 The inference is unavoidable that the "unidentified person" who signed both the resolution and the 2015 annual financial statements on the very same page where provision for signature by the trustees is made, is Mr Du Plessis.

65. In the premise, the inference is justified that:

65.1 The defendants and specifically Mr van den Berg's attack upon the integrity of Judge Opperman is unfounded and unjustified;

65.2 The contentions in the replying affidavit that the first and second respondents are attempting to force Mr Du Plessis to testify are unfounded;

65.3 Prima facie, there were no reasonable factual foundation to support the denial of the authority of Mr van den Berg to execute the suretyship and to authorise the registration of the mortgage bond; and

65.4 Prima facie, the defendants' persistence with the denials that the suretyship and the mortgage bond are valid is unjustified.

66. It follows that Mr Du Plessis will, in the event that his clients persist with their denial that the execution of the suretyship and the registration of the mortgage bond were not authorised by the trustees, have to testify about the approval of the 2015 annual financial statements by the trustees and the consequent notes 1.1 and 6 at the trial of the 2016 action. Stated differently, Mr Du Plessis as an officer of the court will have to disclose the relevant facts to the court which are prima facie inconsistent with the denial of authority in respect of the execution of the suretyship and the registration of the mortgage bond.

The judgments in the consolidation application and the application to compel

67. The correctness of the findings made by Judge Opperman were unsuccessfully challenged in terms of the applications for leave to appeal in the High Court; the subsequent applications for leave to appeal in the Supreme Court of Appeal; and the applications for leave to appeal in the Constitutional Court.

68. These judgments stand. Mr van den Berg is not entitled to a re-hearing of the issues in either the application to compel or the consolidation application.

The judgment in the rule 27 application

69. Mr van den Berg makes no allegation of bias in the application for leave to appeal in the High Court, nor in the application for leave to appeal to the Supreme Court of Appeal in respect of the judgment in the rule 27 application.’

c. The attorney for the applicant did indeed endeavour to do his due diligence but the case remained strained, unorthodox and complicated from the very beginning. The case became mammoth in issues and record. There was an instance where the documents relied upon by the attorney was illegible and the attorney for the applicant suggested that a magnifying glass be used. He did have one available in court. Neither the witness nor the defence nor the court could read the numbers on the papers.¹² He also wanted for a witness to do calculations in court on the illegible documents. The witness did not draft the documents and could not testify to the correctness thereof. She, Ms Bester, was not a competent witness to testify on the issue. When the court asked the attorney for the applicant in a certain instance what he based a statement to a witness on, he answered: ‘From my experience’. He just would not seize to be a witness in the case. He would also not take kindly to the court questioning the manner in which he cross-examined and wanted to present evidence.¹³

[13] The fact that the court quoted the words of the attorney for the applicant in quotation marks in a judgment was interpreted as sarcasm by the court whilst it was a mere quote. The use of the word ‘bizarre’ was attacked. This made the handling of the case challenging. The court had to be extremely careful because much was twisted to another meaning of what the court said as this application and example shows.

[14] A reading of the record shows that the court rarely intervened during cross-examination. Most of the issues followed after objections by counsel for the first and second respondents.¹⁴

¹² Bundle marked ‘Part I: pages 1 to 299’ proceedings on 10 November 2023: paras 261 to 308 at 253 to 270.

¹³ Bundle marked ‘Part I: pages 1 to 299’ proceedings on 10 November 2023: para 323 at 276.

¹⁴ Bundle marked ‘Part I: pages 1 to 299’ paras 125 to 145 at 203 to 206.

[15] Counsel for the first and second respondent was also called to order on some occasions as the record will show. On the first day that the matter served before me the file was not properly prepared, the papers drafted in Afrikaans and some other complications were caused by the first and second respondent and they were indeed admonished. Mr van den Berg indicated that he, from the first day, had 'misgivings about the independence of the trial judge'. He is however very vague about the cause therefor. I chided both parties for the state of the files and papers.

[16] There just is not any evidence that real bias existed in this case. It is not the only test; real perceived bias is enough.

[17] Notwithstanding the conduct of the attorney for the applicant and although I managed and control the trial in accordance with the law; the remarks I made above make me conclude that I must recuse myself from the trial. As stated in *S v Zuma and Another* supra,

'[83] ...it is what the sound administration of justice, the requirements of the Constitution, and my conscience dictate. No reasonable negative inferences as to whether the trial is constitutionally fair, should be allowed to arise. ... 'It is not enough for a judge to be just in his judgment; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds. The integrity of the judicial process must be protected against any reasonable taint of suspicion so that the public and litigants may have the highest confidence in the integrity and fairness of the courts.'

[18] The applicant requested a costs order against the first and second respondents should the application be opposed. The opposition of the application by the first and second respondents was just and fair and will I not make any order as to costs.

[19] **Order**

1. I accordingly recuse myself and hereby withdraw from the hearing of the matter held under case number 1955/2016 and as per the issues

separated in terms of Rule 33(4) of the Uniform Rules of Court. The matter will continue before another judge.

2. No order is made as to costs.
3. Reasons for the judgment may be uplifted from the Registrar of the Court on Monday 11 November 2024 at 15h00.


M OPPERMAN J

APPEARANCES

Counsel for the Applicant

Mr. HSL Du Plessis
HSL Attorneys
Kroonstad
Email: ontvangs@hslprokureurs

C/O Lovius Block Attorneys
First Avenue 31
Westdene, Bloemfontein
Email: lorinda@loviusblock.co.za
Ref: OJ van Schalkwyk
Ref: E09101*OVKS/lv/S188/16

Counsel for Respondents

Advocate D.J. van der Walt SC
Advocate W.A. van Aswegen
Chambers
BLOEMFONTEIN

L. Strating
Symington & De Kok Attorneys
169B Nelson Mandela Drive
BLOEMFONTEIN
REF: L STRATINGKH0637
Email: strating@symok.co.za