

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2013-07424

|                                                                                   |                                                                        |
|-----------------------------------------------------------------------------------|------------------------------------------------------------------------|
| (1)                                                                               | REPORTABLE: YES / <input checked="" type="radio"/> NO                  |
| (2)                                                                               | OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="radio"/> NO |
| (3)                                                                               | REVIEWED: YES / <input checked="" type="radio"/> NO                    |
|  |                                                                        |
| 14 August 2025                                                                    | SIGNATURE                                                              |

In the matter between:

**MASHAYA: JABU KHANYISILE**

Applicant

And

**TRANSNET LIMITED**

Respondent

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**JUDGMENT**

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**Raubenheimer AJ:**

### **Introduction**

[1] The matter was allocated to me in civil trial court for hearing on 12 August 2025. When the legal representatives of both parties attended at my chambers before commencement of the proceedings on 12 August 2025 I disclosed to the parties that counsel for the plaintiff was my mentor during my pupillage at the Johannesburg Society of Advocates during 2005. I furthermore disclosed to the legal representatives that the instructing attorneys for the plaintiff briefed me during the early years of my practice but that I have not received any briefs from them in the last 15 years.

[2] After disclosing the mentioned facts to the parties, counsel for the defendant indicated that she needed to obtain instructions from her instructing attorney and that that she will after obtaining such instructing act accordingly.

[3] On commencement of the proceedings counsel for the defendant informed me that she holds instructions to proceed with an application for my recusal based on the mentor mentee relationship with counsel for the applicant and the erstwhile professional relationship with the instructing attorneys for the plaintiff.

[4] Counsel for both parties addressed me in court on the recusal application. I regarded it prudent to request the parties to prepare heads of argument on their respective positions. I adjourned the matter to 13 August 2025 to afford the parties to prepare heads of argument.

[5] I received the heads of argument of the parties before commencement of court proceedings on 13 August 2025. The parties proceeded with presenting their arguments on 13 August 2025.

### **The submissions by the applicant**

[6] The applicant based its application on a reasonable apprehension of bias based on the following facts:

- 6.1 The relationship that existed between counsel for the plaintiff and myself during pupillage;
- 6.2 The fact that I was briefed by the instructing attorney for the plaintiff at the commencement of my practice at the Johannesburg Society of Advocates.

[7] When the matter was argued on the 13<sup>th</sup> of August the applicant raised an additional basis namely due to the fact that counsel for the plaintiff used words unbecoming of an advocate during his address to the court and was not reprimanded by me was in and off itself sufficient to create a perception of bias.

### **Discussion**

[8] Bias has been defined as denoting "*a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.*"<sup>1</sup>

[9] Judicial bias is regarded as "*a departure from the standard of even-handed justice which the law requires from those who occupy judicial office.*"<sup>2</sup>

[10] Bias thus amounts to "*a leaning, inclination, bent or predisposition towards one side or another or a particular result'. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.*"<sup>3</sup>

[11] The criteria for an application based on a reasonable apprehension of bias

<sup>1</sup> S v Le Grange 2009 (2) SA 434 (SCA). R v S (RD) [1997] 3 SCR 484

<sup>2</sup> S v Le Grange (n 1 above). S v Roberts 1999 (4) SA 915 (SCA)

<sup>3</sup> R v S (n 1 above)

is trite and has been pronounced by courts on numerous occasions.

[12] The Supreme Court of Appeal rejected the more subjective test of “reasonable suspicion” in favour of the more objective “reasonable apprehension” test.<sup>4</sup> This test was more in alignment with developments in other Commonwealth countries<sup>5</sup> and with the purpose “*to protect the judiciary against the flimsy and unreasonable suspicions of the litigant*”

[13] The test is a constitutional matter and is rooted in the right to a fair trial. It is regarded as a “double reasonableness<sup>6</sup>” test as both the person apprehending and the apprehension must in itself be reasonable.

[14] The bedrock of the test is the presumption of impartiality<sup>7</sup> which is foundational to the nature of the judicial function and is to be assessed within the context of the oath of office judicial officers are required to take.<sup>8</sup>

[15] The presumption of impartiality is furthermore strengthened by the assumption that judicial officers through their training and experience has the ability to adhere to their oath of office and to disabuse their minds of any irrelevant personal beliefs and predispositions.<sup>9</sup>

[16] Judicial officers are required by the Constitution to apply the law impartially and without fear, favour or prejudice.<sup>10</sup> The presumption of impartiality has the effect that a judicial officer will not lightly be presumed to be biased.

[17] In considering an application for recusal a judicial officer should be mindful

<sup>4</sup> BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union 1992 (3) SA 673 AD

<sup>5</sup> Porter v Magill [2002] 2 AC 357 (HL). Ebner v Official Trustee in Bankruptcy [2000] 205 CLR 337. WSSA v SYH CAMP388/2023, [2024 HKCA 735. Chretien v Canada (Attorney General), (2005 FC 925, (2005), 276 F.T.R 138 (FC)

<sup>6</sup> SACCAWU v Irvin & Johnson Ltd Seafoods Division Fish Processing 2000 (3) SA 705 (CC)

<sup>7</sup> President of the Republic of South Africa v South African Rugby Football Union 1999 4 SA 147 (CC) S v Le Grange (n 1 above). Mulaudzi v Old Mutual Insurance Co Ltd [2017] ZASCA 88; 2017 (6) SA 90 (SCA). Sizani v Mpofu [2017] ZAECGHC 127

<sup>8</sup> Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC)

<sup>9</sup> Bernert v ABSA (n 8 above)

<sup>10</sup> Sect 165(2) Constitution of the Republic of South Africa, 1996

of his duty to adjudicate matters that he has been allocated with and should not yield to easily to a recusal application that is unreasonable and unsubstantiated.<sup>11</sup> This will amount to a disservice to the administration of justice. Litigants do not get to pick their judges of choice neither are they entitled to eliminate judges randomly allocated to their case by raising spurious partiality allegations against a judge.<sup>12</sup> To step aside on the basis of spurious claims of partiality would lend credence to the most objectionable tactics.<sup>13</sup>

[18] For an allegation of judicial bias to be successful such allegation must overcome the presumption of judicial impartiality and integrity.<sup>14</sup> This shoulders the applicant with a formidable burden.<sup>15</sup> Apart for not being easy to dislodge<sup>16</sup> this burden requires the presentation of cogent and convincing evidence or reason to rebut the presumption of judicial impartiality.<sup>17</sup> In the evaluation of this evidence the totality of the circumstances should be considered.<sup>18</sup>

[19] The application of the double reasonableness test entails that not only must the apprehension be reasonable but the person holding the apprehension should also be reasonable.

[20] The starting point in the application of the test is “the reasonable, objective and informed person” having the correct facts.<sup>19</sup>

[21] This person differs from the affected litigant.<sup>20</sup> He or she is fully aware of the facts of the case, has an understanding of the role of the judge in the case and

<sup>11</sup> President of the RSA v SARFU (n 7 above)

<sup>12</sup> Benert v ABSA Bank (n 8 above)

<sup>13</sup> Beard Winter LLP v Shekdar [2016] ONCA 493 (CanLII). *Miracle v Maracle III* [2017] ONCA 195 (CanLII)

<sup>14</sup> *H v S H* (Judgment iro Recusal ; Ex tempore) (44450/2020) [2023] ZAGPJHC 1431 (27 October 2023). *Malton v Attia* [2016] ABCA 130 (CanLII) par 82; *R v GRS* [2018] ABQB 4 (CanLII) par 5.

<sup>15</sup> Benert v ABSA Bank (n 8 above). *SL v Marson* [2014] ONCA 510 (CanLII) par 24–29; *Lloyd v Bush* [2017] ONCA 252 (CanLII) par 113.

<sup>16</sup> *H v SH* (n 14 above) *Cojocaru v BC Women's Hospital and Health Centre* [2013] 2 SCR 357

<sup>17</sup> *R v S* (n 1 above) par 34 *S v SSH* [2017] 3 NR 871 (SC) *Wewaykum Indian Band v Canada* [2003] 231 DLR (4th) 1 par 59; President of the RSA v SARFU 2 (n 7 above) par 41; *S v Basson* 2007 (3) SA 582 (CC) par 30; *Christian v Metropolitan Life Namibia Retirement Annuity Fund* [2008] 2 NR 753 (SC) par 32; *S v Munuma* [2013] 4 NR 1156 (SC) par 17.

<sup>18</sup> *R v JCS* [2017] BCCA 87 (CanLII) par 44.

<sup>19</sup> President of the RSA v SARFU (n 7 above)

<sup>20</sup> *R v Millar* [2017] BCSC 323 (CanLII) par 24; *Stein v BC (Human Rights Tribunal)* [2018] ABQB 399 (CanLII) par 153.

whether the judge could be seen as having an interest in the outcome of the case.<sup>21</sup> This person is a disinterested observer who considers both sides of an argument, is not unduly sensitive or suspicious, is not complacent, are aware of the weaknesses of mankind, will not evade arriving at a conclusion that can objectively be justified and takes the necessary steps to become informed of the relevant aspects.<sup>22</sup>

### **Application**

[22] The first ground advanced by the applicant for the existence of an apprehension of bias is that the counsel for the plaintiff served as the mentor for the presiding judge.

[23] In determining whether this factor would reasonably be perceived by the reasonable objective and informed observer as establishing a reasonable apprehension of bias cognizance must be taken of the following factors:

[24] The nature and level of involvement in the mentorship relationship. The relationship between a pupil advocate and his mentor is a formal relationship, professional in nature and of short duration. It is focussed on the transfer of legal skills and acumen. It differs substantially a deep personal and structured mentorship spanning many years and entailing a substantial personal investment and guidance on personal and character development. The relationship does not raise to a level of personal loyalty and affection with the possibility of an enduring power imbalance.

[25] How recent was the mentor mentee relationship and is it ongoing in nature. The particular relationship occurred twenty years ago and has not risen to the level of an enduring personal friendship. The connection between the erstwhile mentoring partners are more tenuous and sporadic.

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<sup>21</sup> Porter v Magill (n 5 above)

<sup>22</sup> Almazeedi v Penner [2018] UKPC 3

[26] Are there a logical connection between the erstwhile relationship and the current case. According to the practice note filed the matter is to proceed on quantum only as merits have been disposed of in terms of a judgment dated 25 September 2019. The evidence to be presented is primarily expert evidence dealing with the injuries and their sequelae.

[27] The second ground raised by the applicant is that the instructing attorney for the plaintiff briefed the presiding judge at the commencement of his practice.

[28] In the evaluation of this ground the nature and duration and recency of the relationship is to be considered. The judgment in *Democratic Alliance V Johannesburg City*<sup>23</sup> offers some instructive insights namely:

*“Practising advocates and attorneys make up the bulk of the acting judiciary. It is near inevitable that an acting judge will, sooner or later, preside over matters involving parties they have represented or acted against as legal practitioners. Most litigants-especially those who use the courts frequently as the DA and the City-know this. They also know that when a legal practitioner takes up an acting appointment, they leave the adversarial role behind, and are presumed to be impartial merely by virtue of their acting appointment”*

[29] The relationship between the plaintiff’s instructing attorney and the presiding judge was a professional relationship which terminated approximately fifteen years ago and has the presiding judge not been briefed in his capacity as a practising advocate since then.

[30] The existence of a current professional relationship does not warrant recusal unless there is a direct past association with the litigation.<sup>24</sup>

[31] The third ground raised by the applicant in support of the reasonable

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<sup>23</sup> 2025 (3) SA 204

<sup>24</sup> *Bernert v ABSA Bank* (n 8 above)

apprehension of bias was the fact that counsel for the plaintiff used the word "ludicrous" in his response to the application. It was submitted that the use of this word is unbecoming an advocate and the fact that the presiding judge did not reprimand him creates an apprehension of bias.

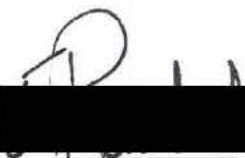
[32] Although The use of the word "ludicrous" is a strong and even dismissive word it would still fall within the boundaries of robust and adversarial argument. It amounts to a comment on the merits of the application as perceived by counsel.

[33] That counsel for the plaintiff was not reprimanded does not elevate such conduct to a reasonable apprehension of bias.

### **Conclusion**

[34] Based on the reasons mentioned above I conclude that the applicant has not presented cogent and credible evidence that would lead a reasonable, objective and informed person to conclude that the presumption of judicial impartiality has been disturbed and that a reasonable apprehension of bias is present.

[35] The application is therefore dismissed with costs.

  
  
E Raubenheimer

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION  
JOHANNESBURG

*Electronically submitted*

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **14 August 2025**

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INSTRUCTED BY:

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INSTRUCTED BY:

Edeling Van Niekerk Inc

DATE OF ARGUMENT: 13 August 2025

DATE OF JUDGMENT: 14 August 2025