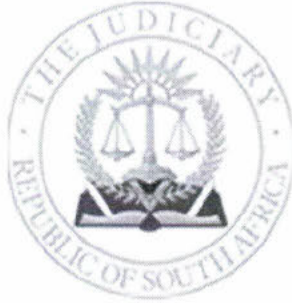


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 25558/2021

(1)	REPORTABLE:	no
(2)	OF INTEREST TO OTHER JUDGES:	no
(3)	REVISED:	yes
DATE		09/02/2026
SIGNATURE		[Redacted Signature]

In the matter between:

CHAPMAN FUND MANAGERS (PTY) LTD

Plaintiff

and

MINISTER OF PUBLIC WORKS

First Defendant

DIRECTOR-GENERAL OF PUBLIC WORKS

Second Defendant

JUDGMENT

VAN DER WESTHUIZEN, J

[1] Nugent, JA quoted in *Aktiebolaget Hässle and Astrazeneca Pharmaceuticals (Pty) Ltd v Triomed (Pty) Ltd*¹ as follows:

¹ 2003 (1) SA 155 (SCA) [1]

"In Law' – remarked Lord Steyn in R v Secretary of State for the Home Department, ex parte Daly – 'context is everything'. And so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification." (the reference to the full citation of the authority is excluded)

- [2] This statement is of immense importance and finds particular application in this matter. The context in the record of alleged shortcomings is of the utmost importance.

- [3] After the second defendant had awarded a tender to the plaintiff and a contract was concluded, the parties found themselves on opposite sides of the battle field drawn in the action instituted by the plaintiff against the defendants. As will become apparent, there were various skirmishes, the outcome of which have divergent effects upon the view of the parties thereon.

- [4] The trial of the aforesaid action had a bumpy start, and the progression thereof was not less bumpy. The special plea of alleged invalidity of the tender, and in particular the extension thereof, was separated from the other issues raised between the parties and specifically those of which the defendants raised in their plea-over. Following on a written judgment, the special plea was found in favour of the plaintiff and against the defendants. The latter applied for leave to appeal the judgment which was refused. The defendants did not take that issue further. Thereafter the trial continued. Various subsequent issues arose some of which were ruled upon, often in *ex tempore* rulings.

- [5] During the leading of evidence on behalf of the plaintiff in furtherance of its claim, objections were raised on behalf of the defendants. Of those, some were successful, when the issue was conceded on behalf of the plaintiff, others were noted by the court for final consideration at the end of the trial. It is to be recorded that the context of those objections that

were noted by the court, plays an important role when the present issue is to be considered.

- [6] The defendants have taken Umbridge to the mere noting of those objections and subsequent rulings made by the court on other issues. The defendants consequently filed an application for the recusal of the presiding judge. It is this application that is the subject of this judgment.

- [7] It is settled law that the basis of an application for the recusal of a presiding officer is a constitutional matter.² That basis is to be found in the provisions of section 167(3) of the Constitution.

- [8] The impact on judicial recusal is to be considered on the provisions of a number of sections of the Constitution, such as sections 34, 35 and Chapter 8 thereof as well as other specific sections including subsections 165(1) and (2) and section 174.

- [9] The underlying principle being the right to a fair trial or hearing before an impartial, unbiased and independent bench.

- [10] Copies of two articles published in legal journals were handed up during argument in the application for recusal.³ Those articles provide a helpful exposé on the test to be applied in adjudicating an application for the recusal of the presiding judge. Both parties indicated that they were aware of the said publications and had considered them.

- [11] It is accepted that the applicable test for recusal is set out and explained by the Constitutional Court in the *SARFU* judgment.⁴ It flows from that part of the *SARFU* judgment that the correct approach to an application

² *President of the Republic of South Africa v South African Rugby Football Union (SARFU)*, 1999(4) SA 147 (CC) par [30]

³ Okpaluba M C and Maloka T C, "The Fundamental Principles of Recusal of a Judge at Common Law: Recent Developments" 2022 *Obiter*, 89; Olivier M, "Anyone But You M'Lord: The Test For Recusal of a Judicial Officer" 2006 *Obiter*, 606

⁴ Para [35]-[48]

for recusal is objective and the *onus* of establishing it rests upon the applicant.⁵

[12] The Constitutional Court held in paragraph [48] of that judgment: “*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 counsel.*”

[13] From this reasoning the following characteristics of the test can be discerned:

- (a) A reasonable, objective and informed person (also said to be ‘thoughtful’)⁶;
- (b) would on the correct facts;
- (c) reasonably apprehend;
- (d) that the judge has not or will not bring an impartial mind to bear on the adjudication of the case;
- (e) a mind open to persuasion by evidence and the submissions of counsel.

Objectively, there must be compliance with a double reasonable requirement that is acknowledged. Both the objective observer that apprehends and the apprehension itself must be reasonable.

⁵ *Ibid* para [48]

⁶ *Van Rooyen v The State* 2002(5) SA 246 (CC) [34]

- [14] It is important to note that impartiality of the judicial officer is a presumption that courts have recognised.⁷ It is also acknowledged in the oath that a judicial officer is obliged to take in terms of the Constitution.⁸ Cogent or convincing evidence or reason is required to rebut the presumption of impartiality. It is not lightly rebutted.⁹
- [15] The primary factor affecting impartiality is bias, either actual or the appearance of bias on the part of the presiding officer. Judicial bias is a departure from the standard of even-handed justice, the important requisite for those who occupy judicial office.¹⁰
- [16] It is trite that a presiding judge is tasked with the management of the matter before him or her.¹¹ He or she not only adjudicates, but also manages the proceedings before him or her.
- [17] The test for bias is not concerned with a disgruntled litigant who complains of bias simply because the judicial officer has ruled against him or her. Substantial grounds for contending a reasonable apprehension of bias is required.¹²
- [18] In this application for recusal, the applicants (defendants in the main action) alleged that when regard is had to various incidents appearing from the record, a reasonable apprehension of bias on the part of the presiding judge against the applicants emerges. Sixteen instances were alleged in support of the allegation of bias. Those were set out in the founding affidavit. That document was deposed to by a Senior Legal Administrative Officer employed by the second applicant/defendant. He

⁷ *SARFU*, [40] *et seq.*

⁸ Sections 165(2), (3) and 174(8) of the Constitution

⁹ *South African Commercial Catering and Allied Workers v Irvin & Johnson Ltd* 2000(3) SA 705 (CC) para [12]

¹⁰ *S v Roberts* 1999(4) SA 915 (A) par [25]

¹¹ *Take and Save Trading CC v Standard Bank of SA Ltd* 2004(4) SA 1 (SCA) par [2] – [4]

¹² *Bernert v ABSA Bank Ltd* 2011(3) SA 92 (CC) at [34] – [35]; see also *Law Society v Steyn* 1923 SWA 59 at 60 – 61; *Schonken v Assistant Resident Magistrate, Pretoria* 1916 TPD 256 at 259

stated that the matter was allocated to him and that he attended at court during the trial.

[19] The sixteen incidents can be categorised as follows:

- (a) coaching and prejudging of material issues (grounds 1 and 2);
- (b) strange directives to assist the plaintiff and stifling the right of objection (grounds 3 and 4);
- (c) refusal to expeditiously determine admissibility of evidence contrary to binding authority (ground 5);
- (d) refusal to uphold objection to evidence not pleaded (ground 6);
- (e) mischaracterisation of the outstanding issues as "*quantum only*" (ground seven);
- (f) undue denial of procedural rights under Rule 28 and *audi alteram partem*" (ground 8);
- (g) pejorative tone (ground 9);
- (h) fishing expedition remark (ground 10);
- (i) interruption and obstruction of cross-examination due to dislike of repetition (ground 11 and 12);
- (j) evidence treated as "uncontested" without opportunity to contest (ground 13);
- (k) deferral of objections to end of the case whilst making findings on issues to which the objections relate (ground 14);

(l) avoidance of dealing with prejudged issues at exception (ground 15);

(m) pre-approvals (ground 16);

[20] During oral argument, counsel on behalf of the applicants emphasised particular issues to indicate the alleged bias against the applicants that would not result in a fair hearing.

[21] The applicants stated that reference was to be had to the period during August 2025 only when the trial was heard that would constitute sufficient bases for the request of recusal. Despite this approach, the applicants refer to and rely on adverse findings against the applicants that include: the judgment on their special plea; the judgment on the amendment of the plaintiff's particulars of claim; and the judgment on the condonation application (incorrectly attributed to a dismissal of an exception). The first judgment was delivered on 26 March 2024, the second judgment was delivered on 21 August 2025, and the third judgment was delivered on 24 October 2025. Each dealt with specific issues after both parties presented arguments thereon. The applicants applied for leave to appeal the first judgment which was refused and did not take further steps to appeal the judgment.

[22] Each of the incidents raised and relied upon in the application for recusal must be considered in their particular context and circumstances. That much is conceded by the applicants in their founding papers where they concede that none of the raised issues show any apprehension, reasonable or otherwise. The applicants clearly rely on an alleged cumulative approach.

[23] The first and second grounds listed above are premised upon the allegation that the court had coached the plaintiff into amending their particulars of claim.

- [24] The alleged prejudging of the issues raised in the founding affidavit in the specific context relate to an assumed coaching of the plaintiff to amend its pleadings. The prejudging specifically related to the issue of baseline and the disputed number of buildings that fell within the contract. From the specific context it is apparent that no coaching took place, the amendment was brought on by a challenge by counsel for the applicants. The plaintiff was granted an opportunity to set out in writing the proposed amendment. Again, that was to assist the applicants in considering what the proposed amendment would entail. The matter stood down to enable the plaintiff to draft in writing the proposal for amendment and for the applicants to consider it. The matter stood down for two days in that regard. Furthermore, the granting of an amendment to a pleading does not, with due respect, amount to a prejudging of any issue raised in the amendment. The judging thereof will only and could only be determined after all the evidence led by both parties are adjudicated upon. On the granting of the amendment in a reasoned ruling, the applicants were afforded time to consider their response thereto.
- [25] The complaint that the court gave strange directives to assist the plaintiff and thus stifled the right to object is to be considered within the specific context. The applicants objected to evidence that was led that was not premised on any documentary evidence discovered. The applicants alleged that despite repeated requests for further and better discovery, nothing was forthcoming. It was mentioned on behalf of the applicants that there would be many such objections in view of the inadequate discovery. In order to regulate the proceedings, the parties were granted an opportunity to discuss that issue and find a possible shortening of the proceedings. The parties welcomed the opportunity provided. From the record it is gleaned that counsel for the applicants/defendants welcomed the opportunity. The fact that the parties could not come to terms, does not warrant a reasonable apprehension of bias of assisting the plaintiff in any manner. No reasonable apprehension of bias could be gleaned

from the granting of an opportunity to the parties to possibly avoid further interruptions.

- [26] The objection to alleged stifling of raising objections is premised upon a ruling that the court declined to adjudicate upon the issue of interpretation of the contract. The court indicated that the appropriate time, in the present matter, would be to do so after all the factual evidence was led and the issues were canvassed. The reliance of the applicants on the matter of *KPMG Chartered Accountants (SA) v Securefin Limited et al* 2009(4) SA 399 (SCA) is not appropriate in the present instance. In that matter, the Supreme Court of Appeal expressed their concern and disapproval of the leading of substantial evidence by experts and lay persons on the issue of interpretation of a contract.¹³ In the present instance, no evidence was led or to be led on the interpretation of the contract. All that was deferred, was the time for the adjudication on the interpretation of the contract.
- [27] The applicants further contended in regard of the former, that the court permitted the leading of evidence not pleaded. That contention ignores the distinction between the *facta probanda* and the *facta probantia*. The former is that which is to be alleged in a pleading to sustain a claim, whilst the latter is the evidence that would support the claim. Evidence *per se* is not pled. That is trite law.
- [28] A further issue raised in support of the application for recusal relates to the mischaracterisation of outstanding issues apart from the special plea. It is claimed that the inappropriate use of the term “quantum only” clearly reveals apprehended bias. The applicants apprehend that the court has prejudged the so-called “merits” and that only the amount is to be determined. This apprehension in its particular context does not meet

¹³ At para [38]

the standard set in *S v Basson*.¹⁴ The Constitutional Court stated in [70] of the judgment as follows:

“For a mistake on the facts to give rise to a reasonable apprehension of bias, it would need to be established that the mistake of fact is so unreasonable on the record that it must have arisen from bias or given rise to a reasonable apprehension of bias.”

- [29] The context in the record does not lean to a reasonable apprehension of bias in that regard. Had it been so, the issues relating to the “merits” would not have been alive and the debates thereon would not have been allowed.
- [30] Further in this regard, the issue of “*one iota*”, and “*fishing expedition*”, in their respective contexts in the record does not evidence a reasonable apprehension of bias. The respective contexts show that the evidence that had been led at that stage, and the submissions on behalf of the applicants warranted some censure from the court in respect of the approach adopted by the applicants.
- [31] The applicants bemoan the alleged repeated ignoring of objections on behalf of the applicants. Considering the objections raised in the relevant period relied upon, the context indicates that some of the objections were conceded by counsel on behalf of the plaintiff and the questions retracted or re-phrased, effectively in favour of the applicants, not adverse to them and thus upheld. The objections noted by the court in the respective contexts were deferred for consideration at the appropriate time and in so doing to consider all evidence and that to be presented by the applicants. The applicants were accordingly not denied to rebut any issue. The issues were not judged and remained open. The proverbial doors were not closed.

¹⁴ 2007(3) SA 582 (CC)

- [32] The ground relating to the amendment of plaintiff's particulars of claim ignores the fact that the court ruled upon the application for amendment and in so doing considered all the provisions of Rule 28 of the Uniform Rules of Court, including the thrust of sub-rule (10) thereof. Furthermore, the applicants were granted an opportunity to respond to the amended pleading. The amendment was granted as evidenced by the ruling that both parties had been afforded the opportunity to address the court before a ruling was made. In that regard, the applicants were granted a period of at least two days to consider the intended amendment. Their objections were fully considered in the ruling granting the amendment. Their lamentation seems to be that they were not afforded an extended time to consider and to react thereto. The amendment did not pre-judge any issue against the applicants. They were entitled and remain so entitled to lead evidence to gainsay the allegations. There can be no reasonable apprehension of bias. The context in the record clearly disproves any such apprehension.
- [33] The complaint that the court pre-judged the exception is not supported in the specific context of the record that relates thereto. This complaint is without merit. At that stage the court was considering an application for condonation. The fact that a notice in terms of R23(1) was attached to the heads of argument on the condonation application, did not and could not be considered as an exception before the court. Counsel for the applicants conceded that. The procedural issues relating an exception had not been completed by then. The exception *per se* was not argued. It was not before the court. There could be no reasonable apprehension of bias. It is trite law that an exception can be taken at any stage. Taking it late in the proceedings could have an impact upon costs.
- [34] In view of the applicants' concession that individually the grounds raised relating to an apprehension of bias do not meet the stringent test for recusal, they nevertheless submit that when considered cumulatively, there is reasonable apprehension of bias. Where the context in respect

of each of the grounds disproves the alleged apprehension of bias, it would be a constrained and contorted exercise to find any reasonable apprehension of bias on a cumulative basis. The disappointment of having rulings made against a litigant, i.e. a disgruntled litigant, does not lean to a reasonable apprehension of bias where in the respective contexts, that ruling was appropriate.¹⁵ A number of white lights superimposed could not make a red light. A number of amber lights superimposed may have a hint of red. It would not be reasonable to say there is a red light.

[35] Following from all of the foregoing, the applicants have not met the test for recusal. Objectively, the requirement of double reasonableness has not been shown in the context of the record. The application for recusal stands therefore to be refused.

[36] There remains the issue of costs. The applicants sought an order as to costs should the application succeed. On the other hand, the respondent/plaintiff sought a punitive cost order against the defendants/applicants in their personal capacities, on the scale of attorney and own client. The rational being that the launch of the recusal application was misguided and ill founded. I do not intend to grant such a costs order. A party is entitled to approach a court for recusal when it apprehends bias towards it. However, the principle that costs follow the event should be adhered to.

I grant the following order:

1. The application for recusal is refused.
2. The applicants are to pay the costs, jointly and severally, the one paying, the other to be absolved, such costs to include the costs consequent upon the employ of two counsel, and to be taxed on scale C.

¹⁵¹⁵ *Bernert, supra*, at para [35]

3. The trial is to continue forthwith.



C J VAN DER WESTHUIZEN J
JUDGE OF THE HIGH COURT
PRETORIA

On behalf of Applicants:	M Mojapelo SC V Mabuza
Instructed by:	The State Attorney
On behalf of Respondents:	P Ellis SC A P Ellis
Instructed by:	Weavind & Weavind Inc.
Date of hearing:	26 January to 3 February 2026
Date of Judgment:	9 February 2026