CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 70/10
[2011] ZACC 20

In the matter between:

ARNOLD MICHAEL STAINBANK — Applicant

and

SOUTH AFRICAN APARTHEID MUSEUM
AT FREEDOM PARK — First Respondent

TAXING MASTER FOR THE NORTH GAUTENG
HIGH COURT — Second Respondent

Heard on : 15 February 2011

Decided on : 9 June 2011

JUDGMENT

KHAMPEPE J:

Introduction

[1] The applicant seeks an order setting aside a judgment of the North Gauteng High Court, Pretoria (High Court) delivered on 28 May 2009, by Ebersohn AJ, on the basis

that it was tainted by bias or a reasonable apprehension of bias.[1] It arises from urgent proceedings the applicant brought in the High Court to stay a taxation of a bill of costs. In the course of those proceedings, the applicant sought a postponement of the application. That was refused. He also brought an application for the recusal of the judge. That, too, was refused.[2] The High Court later dismissed with costs the urgent application. It also refused an application for leave to appeal, as did the Supreme Court of Appeal.

Background

[2] The parties in this matter have a long and sticky litigation history marked by acrimonious disputes and recriminations over the conception, registration and utilisation of the trade mark "The Apartheid Museum". It is alleged that Mr Stainbank conceived the idea of establishing an apartheid museum to record the history and effect of colonialism and apartheid for educational and other purposes in 1988. To this end, he

[1] *Arnold Michael Stainbank v South African Apartheid Museum at Freedom Park and Another*, North Gauteng High Court, Pretoria, Case No 5752/09, 28 May 2009, unreported. In this Court, the applicant originally sought an order in the following terms:

> "1. THAT it is declared that the entire proceedings in the North Gauteng High Court constituted before a single judge, namely Mr Acting Justice Ebersohn ('the acting judge') in case number 5752 / 09 be and are hereby vitiated as being null, void and of no force and effect whatsoever.
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> 2. THAT it is directed that case number 5752 / 09 in the North Gauteng High Court be referred to that Court for re-hearing before a Judge other than the acting Judge.
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> 3. THAT the costs of this application be and are hereby included as part of the costs of the re-hearing referred to in paragraph 2 hereinabove.
>
> 4. THAT this Court grants such further, other and/or alternative directions and/or relief as to it seems meet."

[2] The recusal application was dismissed in an *ex tempore* (extemporaneously) judgment delivered on 6 February 2009.

registered the name "The Apartheid Museum" as a trade mark first in 1990, and then again in 1998. The first respondent, a company registered not for gain, also lays claim to the conception of a museum by the same name to record the atrocities and wrongs of apartheid. It is currently operating a museum which it opened towards the end of 2001. Shortly after the first respondent started operating the museum, the applicant applied for an interdict against the first respondent's trading style.[3] The application was based on an alleged trade mark infringement.

[3] In response, the first respondent brought a counter-application to expunge the applicant's Class 41 trade mark.[4] On 17 July 2003, the High Court granted the counter-application as well as a costs order in favour of the first respondent against the applicant (trade mark proceedings). This costs order forms the basis of the dispute before this Court.[5]

[3] The trade mark case was launched in September 2002 and registered under Case No 26295/02 in the North Gauteng High Court, Pretoria.

[4] A Class 41 trade mark is a trade mark in respect of the services of "[e]ducation; providing of training; entertainment; sporting and cultural activities" in terms of Schedule 3 to the Trade Mark Regulations published in *Government Gazette* 16373 GN R578, 21 April 1995, as amended by *Government Gazette* 23116 GN 211, 15 February 2002 and published under the Trade Marks Act 194 of 1993.

[5] In those proceedings under Case No 32237/02, Southwood J, having expunged the applicant's Class 41 registration, granted the following order:

> "(i) The second respondent [the Registrar of Trade Marks] is ordered to rectify the register of trade marks by deleting therefrom the trade mark no. B1990/03560 'THE APARTHEID MUSEUM' in the name of the first respondent.
>
> (ii) The first respondent is ordered to pay the costs of the application. These costs shall include the applicant's costs of the postponement on 14 May 2003 which are to be taxed on the scale as between attorney and own client."

[4] The first respondent did not take any steps towards pursuing the costs order until some five years later, when the applicant instituted fresh proceedings against the first respondent on the basis that it had infringed his Class 35 registered trade mark.[6] The applicant also claimed damages for over R350 million. In response, the first respondent brought an application in the South Gauteng High Court, Johannesburg to have those proceedings stayed, pending taxation and payment of costs awarded in its favour in respect of the trade mark proceedings[7] (perpetual silence proceedings).

[5] Thereafter, the first respondent set in motion the recovery of the costs by setting it down for taxation before the taxing master, the second respondent in the present proceedings. The first respondent avers that it initially elected not to pursue the costs awarded in its favour in the trade mark proceedings pursuant to advice by the applicant's former attorney that the applicant was "a man of straw".

[6] The applicant objected to the drawing and taxing of the bill of costs in respect of the trade mark proceedings by placing reliance on an impugned agreement between the parties.[8] After protracted interaction between the legal representatives of the parties, on 13 January 2009 the first respondent indicated that it intended to proceed with taxation

[6]A Class 35 trade mark is a trade mark in respect of "[a]dvertising; business management; business administration; office functions; offering for sale and the sale of goods in the retail and wholesale trade" in terms of Schedule 3 to the Trade Mark Regulations published in *Government Gazette* 16373 GN R578, 21 April 1995, as amended by *Government Gazette* 23116 GN 211, 15 February 2002 and published under the Trade Marks Act 194 of 1993.

[7] Brought under Case No 08/10152.

[8] See [12] below.

before the taxing master at or about 10h30 on 6 February 2009. The taxation had already been postponed on two previous occasions[9] because of the applicant's objection. On 5 February 2009, the applicant made an urgent application in the High Court to stay the taxation of the bill of costs.

Proceedings in the High Court

[7] The urgent application was served on the first respondent at about 12h30 on 5 February 2009 and set down for hearing at 17h00 on that day. Earlier that day, when the applicant's attorney attended court to file the application, the notice of set-down of the taxation was not amongst the papers. The acting judge sitting in the urgent motion court that week, Ebersohn AJ, directed the applicant's attorney to appear in an open court. The following interchange ensued:

> "COURT: Now why on earth, why on earth should this Court be burdened to be here at five pm today? Why should the matter not be set down for ten o'clock tomorrow morning, like all urgent applications are? If it is, unless it is a question of a murder being, about to happen, then you can deviate from the normal rules regarding set down, but now to set the matter down to five pm, that means that lady must miss her bus. Why was it set down for five o'clock?
>
> MR CARLS: M'Lord, the primary reason behind the set down for five o'clock was that there was a concern about the matter being called before the taxation has been set down at 10:30 tomorrow. That is primarily the reason. . . [intervenes].
>
> COURT: Ja, but, now you see, very conveniently the notice of set down of the taxation was deleted from the papers.
>
> MR CARLS: With respect. . . [intervenes].

[9] The taxation was initially set down on 5 May 2008 and thereafter on 22 September 2008.

> COURT: It is not in the papers.
> MR CARLS: With respect, M'Lord, not a point of convenience. It might have been an oversight.
> COURT: No, . . [intervenes].
> MR CARLS: Those papers were literally prepared within . . . [intervenes].
> COURT: The Court regards it as convenience, because then the Court would have seen that it was 10:30. Then I could have started becoming agitated.
> MR CARLS: As the Court pleases.
> COURT: I am not here to fight with you. I believe your counsel will be flying to, I do not know why you get counsel from Durban."

[8] The judge refused to hear the matter that afternoon, and ruled that it should be enrolled for hearing on the following day at 10h00. In light of the fact that the taxation of the bill of costs was set down for the following day at 10h30, the judge directed that taxation should not proceed until the urgent application was disposed of. He also requested the applicant's attorney to bring that direction to the attention of the taxing master.

[9] The application was heard on 6 February 2009, by which time the applicant's counsel was available to argue the matter. When the proceedings commenced, counsel for the applicant applied for the postponement of the application. He argued that the applicant needed to file a replying affidavit to respond to the first respondent's papers.

[10] During the presentation of argument in respect of the postponement application, the judge made several remarks that constituted the basis of the subsequent application

for his recusal. I mention a few of them. While the applicant's counsel was presenting argument, the judge interjected to remark that:

> "I take offence that attorneys behind my back elect to approach the Court and upon my clerk enquiring from your attorney why 17h00, the response was that it suited the counsel who comes from Durban."

[11] Shortly thereafter, and when the applicant's counsel informed the judge that the instructions from his attorney were that the court had on the previous day made an "order" that taxation would not proceed, the judge made this remark:

> "Your attorney is lying. . . . He is lying about what you now said. I said to him I refuse to enrol the matter. I said to my clerk, after he left my chambers, I said to my clerk he must advise the taxing master that she is not to proceed with the taxation until this application has been heard."

Counsel for the applicant then apologised for the error.

[12] The application for a postponement was refused and the application to stay the taxation proceeded. The applicant argued firstly that the taxation could not proceed because the first respondent had agreed that it would not proceed to tax its bill of costs. The first respondent disputed the existence of the agreement. The applicant submitted that that very question was pending determination in the application for "perpetual

silence".[10] Secondly, he submitted that the taxing master had no jurisdiction to tax the bill of costs because, in November 2008, the taxing master had ruled that taxation would remain adjourned pending the determination of the "perpetual silence" application.

[13] The judge invited the parties to present argument after the lunch adjournment on whether the court should order costs from the applicant's attorney's own pocket (*de bonis propriis*). Thereafter, the applicant's counsel informed the court that the parties required to see him in chambers to which the judge remarked, "[d]id I get misquoted again?" The High Court adjourned once more. When it resumed, the applicant applied for the recusal of the judge.

Recusal application

[14] The application for the recusal of the judge was on the basis of actual bias or a reasonable apprehension of bias. Counsel for the applicant contended that because the judge had called his attorney, who was the sole deponent to the founding affidavit in the application to stay the taxation, a "liar" in court and had also invited submissions on costs from the attorney's own pocket in circumstances where costs had not been sought by the first respondent, he would not be able to impartially adjudicate the matter. The judge gave an *ex tempore* judgment in which he dismissed the application for recusal:

[10] The question relating to the existence or otherwise of the agreement between the parties is indeed part of the "perpetual silence" dispute.

> "The fact that the attorney gave instructions to the applicant's counsel . . . which instructions were false . . . caused the Court to remark that then he was lying. The counsel . . . then apologised and that was the end of that matter.
>
> Every reasonable person in court then realised that it was an unfortunate misunderstanding between counsel and his instructing attorney. *If the attorney is aggrieved, he only has himself to blame.* This Court has not judged the matter yet and there is no possibility of bias on the part of this Court against the applicant and/or his attorney. The application for recusal is refused."[11] (Emphasis added.)

[15] At the commencement of argument on whether costs *de bonis propriis* should be awarded against the applicant's attorney, the judge made the following remark:

> "I have got no grudge against the attorney . . . . But I have got a grudge against the non-compliance with the rules".

[16] On 28 May 2009, the High Court handed down judgment in respect of the urgent application. Its principal finding was that the applicant's attorney had failed to comply with the rules of the court, practice directions and precedent relating to the setting down of matters in the urgent court. The High Court refused to stay the taxation and made a punitive order for costs in these terms:

> "2. The applicant is ordered to pay the costs of this application and the costs of the failed application for the judge's recusal, on the scale of attorney and own client and in the event of the deputy sheriff rendering a return of nulla bona with regard to the taxed costs

[11] This *ex tempore* judgment is quoted in full in the judgment delivered in the application for leave to appeal: See *Arnold Michael Stainbank v South African Apartheid Museum at Freedom Park and Another*, North Gauteng High Court, Pretoria, Case No 5752/09, 3 March 2010, unreported at para 35.

> of the applications the attorney of the applicant, Donald Clive Carls, must pay the costs of both applications *de bonis propriis* on the scale of attorney and own client in his personal capacity.
>
> 3. Before the applicant, Arnold Michael Stainbank, proceeds with any further litigation in respect of the recovery by the Apartheid Museum of South Africa in respect of the costs order made in matter 32237/2002, he must first pay the costs of the two applications in this matter in full and append proof of such payment to the papers in the new matter."[12] (Emphasis removed.)

[17] On costs, the court reasoned as follows:

> "Regarding costs [the applicant's attorney] did not comply with the rules of the Division regarding the bringing of an urgent application, his instructions to counsel regarding the recusal application was an open attempt to bully the judge and bordered on contempt of court. He, furthermore, delayed in bringing the urgent application until such time when he knew that there would not be sufficient time for the first respondent to file answering papers. He also, unilaterally and without consulting with the judge's clerk, and seeking the judge's permission thereto, unilaterally enrolled the matter for 17h00 which is not a 'normal' time inconveniencing the court, its staff and the first respondent and their legal team. The attorney will therefore be mulcted with costs in the event of his client not paying the taxed costs of the first respondent."[13]

[18] On the merits, the court was also displeased with the conduct of the applicant's attorney in respect of how he had prepared the papers and litigated the matter. It also found that there was no basis for setting the matter down in the urgent court.[14]

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[12] Above n 1 at para 20.

[13] Id at para 18.

[14] Id. The Court held at para 10:

Proceedings in this Court

[19] The applicant's principal complaint is that the manner in which the judge conducted the proceedings, the remarks that the attorney was lying as well as the punitive costs order, gave rise to bias or an apprehension of bias. He asserted that this conduct violated his "fundamental right of access to justice." He therefore seeks leave to appeal against the decision and the order of the High Court.

[20] Before considering the main issues presented in this case, it is necessary to deal with three preliminary issues. The first relates to whether the application to amend the form of relief sought should be granted. The second is whether the application to lead further evidence should be considered. The third is whether leave to appeal should be granted.

Application to amend

[21] The applicant seeks leave to amend the original order so as to conform with section 167(6)(b) of the Constitution read with rule 19 of the Rules of this Court. This is because the original application was made in terms of rule 11 of this Court which made no

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> "It is clear that [the applicant's attorney], over a number of days, contemplated and was preparing the application and he deposed to his supporting affidavit on the 4th February 2009 and apparently deliberately delayed the serving of the papers on the first respondent until 12:30 on the 5th February 2009, virtually giving the first respondent no time to file answering papers. The urgent roll is also planned by the presiding judge so as to take into consideration the personal circumstances of the court staff, many of whom are dependent on bus transport. Inexperience was advanced as reason for [the applicant's attorney's] conduct but when taxed on this he disclosed that he has been practising for 22 years."

reference to an application for leave to appeal. The order sought in that application required this Court to declare the entire proceedings "vitiated as being null, void and of no force and effect whatsoever." The applicant seeks an amendment aimed at describing the order as an application for leave to appeal and to read in the relevant part "case number 5752/09 falls to be vitiated due to their being tainted by bias *alternatively* a reasonable apprehension of bias, such leave to appeal having previously been refused by the courts *a quo*, i.e. the Supreme Court of Appeal and by the acting Judge."[15]

[22] I am of the view that the aim to convert an application in the present circumstances does not require any application to amend. It would amount to putting form above substance to regard the application originally launched in terms of rule 11 of this Court as anything but an application for leave to appeal. The complaint is one of bias and the application is to set aside the order. I therefore need to consider the application to amend only insofar as it postulates that a narrower amended order will be sought.

[15] The order currently prayed for by the applicant reads:

> "Delete paragraphs 1, 2, 3 and 4 of the 'Order Prayed' *in toto* and substitute the following therefore:
>
> 1. THAT this Applicant be and is hereby granted leave to appeal to this Court on the constitutional matter raised by him, to wit that the entire proceedings including but not limited to the whole of the judgment and the orders pursuant thereto handed down on or about the 28th day of March 2009 and the 3rd day of March 2010 respectively by the North Gauteng High Court constituted before a single judge, namely Mr Acting Justice Ebersohn ('the acting judge') in case number 5752/09 falls to be vitiated due to their being tainted by bias *alternatively* a reasonable apprehension of bias, such leave to appeal having previously been refused by the court *a quo*, i.e. the Supreme Court of Appeal and by the acting Judge.
> 2. THAT the costs of this application be and are hereby included as part of the costs of the appeal.
> 3. THAT this Court grants such further, other and/or alternative directions and/or relief as to it seems meet."

[23] The test for determining whether to grant an amendment is whether the interests of justice permit. The applicant quite clearly made a mistake in crafting an order wider than was required. It cannot be in the interests of justice to penalise the applicant by refusing to amend the order sought when the first respondent has suffered no prejudice pursuant to the amendment. The essence of the application remains the same. I am mindful of the fact that the first respondent has had adequate opportunity to traverse the application in its current form. The application to amend the order must therefore be granted.

Application to lead further evidence

[24] The applicant initially applied to lead further evidence of a costs consultant. This evidence relates to events that occurred after the judge had decided the applications for postponement, recusal and to stay taxation and had refused leave to appeal. The evidence sought to be admitted is disputed by the first respondent. At the hearing of this matter, counsel for the applicant conceded that given the disputed facts, he would not persist with the application. In the circumstances, it will not be necessary to determine this application.

Should the application for leave to appeal be granted?

[25] The question whether an application for leave to appeal should be granted depends on whether: (a) it raises a constitutional matter; and (b) it is in the interests of justice to grant leave.

Does this matter raise a constitutional matter?

[26] Two issues arise in this application. The first relates to whether the proceedings in the High Court were tainted by bias or a reasonable apprehension of bias, thereby depriving the applicant of the right to a fair hearing. The second relates to whether or not the costs order was competent.

[27] It is now axiomatic that the question whether a judicial officer should recuse himself or herself is a constitutional matter, as is the question whether there was actual or reasonable apprehension of bias.[16] In this case, the question whether a court made a competent costs order in respect of the matters it decided is also an issue connected with the decision on a constitutional matter in terms of section 167(3)(b) of the Constitution.[17] This is so for three fundamental reasons. Firstly, if the issue of bias is before us, a costs order arising therefrom would be connected with that issue and we would therefore have the requisite jurisdiction to address it under section 167(3)(b) of the Constitution. Secondly, the costs order in this matter is intricately interwoven with the challenge of

[16] *Brian Patrick De Lacy and Another v South African Post Office* [2011] ZACC 17; Case No CCT 24/10, 24 May 2011, as yet unreported (*De Lacy*) at paras 47-9; *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) (*Bernert*) at para 18; *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (*Basson I*) at paras 21-2; and *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson II)* at paras 24-5. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) (*SARFU II*).

[17] Section 167(3)(b) of the Constitution states:

> "(3) The Constitutional Court—
>
> . . .
>
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters".

bias in that its peculiar form may have arisen from the judge's irritation with the conduct of the applicant's attorney and may be indicative that the judge was influenced by bias. Thirdly, there may be misdirections in the reasoning of the High Court leading to the costs award, which are closely connected to bias. The costs order in this case is therefore an issue connected with a decision on constitutional matters in terms of section 167(3)(b) of the Constitution.

[28] The question whether the judge should have recused himself and whether the applicant had a reasonable apprehension of bias, therefore, intrepidly raises a constitutional matter. So too does the question whether the High Court in this case was competent to make the impugned costs order.

Is it in the interests of justice for this Court to hear the matter?

[29] The question whether it is in the interests of justice to hear the matter depends on many factors. These include, but are not limited to, the prospects of success, the importance of the issues raised in the intended appeal, and whether the case will either benefit the larger public or achieve legal certainty.[18]

[18] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29; *Fourie and Another v Minister of Home Affairs and Another* [2003] ZACC 11; 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC) at paras 10-2; *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 14; and *Fraser v Naude and Another* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

[30] The applicant is alleging bias or its apprehension against a judge. Whilst this is generally a serious allegation as it impinges upon the proper administration of justice, its mere assertion will not, without more, warrant a hearing by this Court. What is required from an applicant who seeks leave to appeal is an arguable assertion demonstrating that a complaint about the judge's alleged bias has reasonable prospects of success. In this case, the allegation of bias, is in all the circumstances, sufficiently plausible to warrant further investigation in the appeal. It is, therefore, in the interests of justice that leave to appeal should be granted. I now turn to the merits of the appeal.

Issues

[31] Two issues arise for consideration. The first is whether the applicant has made out a case for actual bias or the reasonable apprehension of bias. The second is whether the costs order awarded by the High Court is competent, and if not, whether it should be set aside.[19]

[19] The Chief Justice issued Directions on 6 September 2010 in order to help clarify the issues before the Court:

> "Written argument must also deal with the merits of both the application for direct access and the application for leave to appeal so that the merits could be determined by this Court in the event of either application being granted and must deal with the following issues—
>
> (a) whether this case raises a constitutional matter;
>
> (b) whether it is in the interests of justice for this Court to grant leave to appeal;
>
> (c) whether the applicant has made out a case for the reasonable apprehension of bias;
>
> (d) the competency of the costs order awarded by the High Court; and
>
> (e) costs in this Court."

Applicant's submissions

[32] The applicant relied upon two interrelated grounds as giving rise to bias or a reasonable apprehension of bias. The first ground relates to the remarks the judge made during the hearing of the application to postpone the main application, and his conduct during the proceedings. The second ground relates to his invitation for submissions on whether costs should be ordered from the applicant's attorney's own pocket. To this end, the applicant submits that the punitive costs order awarded on 28 May 2009 was evidence of the fact that the judge was biased and that the costs order was improperly awarded. The applicant contends that all these factors taken together give rise to bias, or a reasonable apprehension thereof.

[33] Counsel for the applicant argued that the applicant was very concerned with the word "lying". This concern was based on the fact that the applicant's attorney was the only deponent to the founding affidavit in the urgent application and if he was labelled a liar, this accusation would bear on the veracity of his affidavit and it suggested that the judge had already pre-judged the matter. In the founding affidavit to the application in this Court, the applicant used the tag "liar", as opposed to "lying". Counsel for the applicant conceded that there is a difference between being labelled a liar and being accused of lying, and that being labelled a "liar" was more egregious than being accused of "lying". The former is more egregious because it goes to the character of a person whilst the other may be confined to a single occasion. Eventually counsel accepted that the matter must be approached on the footing that the judge accused his attorney of lying.

First respondent's submissions

[34] Counsel for the first respondent submitted that none of the grounds relied upon by the applicant raised bias or a reasonable apprehension of bias, and that the costs order was justified.

Applicable legal principles: apprehension of bias

[35] Our jurisprudence in this regard is now well developed. The test for recusal is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that a judge has not or will not bring an impartial mind to the adjudication of the dispute, that is, a mind open to persuasion by the evidence and the submissions of counsel.[20]

[36] In *SACCAWU,* this Court emphasised that not only is there a presumption in favour of the impartiality of the court but it is a presumption that is not easily dislodged.[21] Cogent and convincing evidence, that demonstrates the judicial officer's conduct gives rise to a reasonable apprehension of bias, is necessary in order to do so.[22] A court considering the issue of bias should be circumspect not to permit a disgruntled litigant to complain of bias merely because the judge had given a ruling against her or him, or

[20] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd* (*Seafoods Division Fish Processing*) (*SACCAWU*) [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at paras 13-4.

[21] Id at para 12.

[22] Id. See also *Bernert* above n 16 at para 33.

because the judge had been irritated by the manner in which the case was conducted. Nevertheless, judges should at all times seek to be measured and courteous to both litigants and their lawyers who appear before them.[23]

[37] In *Basson II*, this Court held that in considering whether the remarks give rise to a reasonable apprehension of bias, a judge should not be held to an ideal standard that would be difficult to attain.[24] Mindful of these legal principles, I now turn to consider the conduct of the judge.

The allegation of apprehended bias

[38] The applicant levelled several accusations against the judge. The first was the judge's charge that the applicant's attorney was lying. Second, that the judge displayed a set mind by calling for submissions on punitive costs, and thereafter ordering punitive costs. Third, his remarks about getting counsel from Durban. Lastly, the judge's anger at the attorney's conduct in setting the matter down after hours and disregarding the rules of court. Added to these was the judge's displeasure at the application for recusal, which he considered to be *mala fide* and an "open attempt to bully" him.

[39] However, the applicant's principal contention is that the cumulative effect of the judge's conduct engendered an apprehension of bias. In considering the question

[23] *Bernert* above n 16 at para 87 and *Basson II* above n 16 at para 36.

[24] *Basson II* above n 16 at para 42.

whether the applicant reasonably entertained an apprehension of bias, regard must be had to the judge's overall conduct of the proceedings in light of the entire record.

[40] It must be accepted that, even though the judge was testy from the beginning of the proceedings, by the end of the proceedings in the main application, it appears that a bantering tone seems to have prevailed. In the circumstances, it is conceivable that the judge's earlier comments about counsel coming from Durban, and his remarks "hell I am so busy, I do not have time to become bias[ed]" and "[d]id I get misquoted again?", were perhaps a heavy-handed attempt at humour.

[41] The applicant's complaint that the judge displayed a set mind by inviting submissions on punitive costs, when these were not sought by the first respondent and thereafter ordering costs, is understandable, given the judge's obvious irritation with the applicant's attorney.[25] However, it is quite evident as the record shows, that the first respondent initially sought punitive costs but later withdrew the request. In the judgment in respect of the application for leave to appeal, the judge explained that he had invited argument from the parties because he had "understood" that these costs had been sought by the first respondent. Even if the judge was incorrect to suggest that the first respondent had made the request for punitive costs against the applicant, it is generally within the court's discretion to call upon parties to make submissions on costs.

[25] See [45] below.

[42] It is plain that the applicant's attorney was not without blemish, having breached practice directions regarding the setting down of matters in the urgent court,[26] attempting to enrol the matter outside of normal court hours and failing to index and paginate the founding papers that were seemingly prolix. When attending to cases in short time frames, one of the purposes of the rules is to ensure efficient and effective administration of justice. A failure to comply with court rules acts as a great hindrance to the efficacy with which the court is able to adjudicate matters and interferes with the orderly flow of matters in the urgent court. In assessing the conduct of the judge, the environment of the urgent court must inevitably be taken into account.

[43] I am mindful of the extreme pressures under which High Court judges have to perform their judicial functions, especially in busy urgent courts. These pressures cannot be underestimated and this Court acknowledges and appreciates the considerable pressure under which High Court judges sitting in urgent motion courts work. These pressures were aptly described by the judge in this matter as "horrible". I am also aware that the North Gauteng High Court is one of the busiest divisions in South Africa, a factor that in itself gives rise to extreme pressures on the part of the judges sitting in an urgent motion court to ensure efficient case management.

[26] See "North Gauteng: Practice Directions" in Erasmus et al (eds) *Superior Court Practice* (Juta, Cape Town 2009) at D5-25 — D5-28.

[44] However, even allowing for: (a) the pressures of a busy urgent court like the North Gauteng High Court, (b) the absurdity of the set down, and (c) the inept manner in which the applicant's attorney prepared the application given his 22 years' experience, the judge's conduct during the proceedings is unacceptable. The remark made by the judge that the applicant's attorney was "lying" is most unfortunate. It displays a lack of courtesy that is required from a judge in the execution of his judicial duties, no matter how trying the circumstances are.

[45] There can be no question that the judge was irritated by the conduct of the applicant's attorney. Rightly so, given his disregard of the rules. Bearing in mind that there is no suggestion that the applicant himself was responsible for this, it is understandable that he may have formed a subjective impression that the judge was biased against him. In the end, although this case comes close to satisfying the reasonable apprehension of bias test, considering all the factors, it falls short of dislodging the presumption of impartiality. In the circumstances, the appeal founded on bias cannot succeed.

[46] In any event, the application to stay the taxation has become moot since the bill of costs has already been taxed. The taxation took place on or about 22 September 2010. Counsel for the applicant confirmed in oral argument that the execution of the taxed bill has not yet taken place. In the circumstances, the applicant will still have other avenues to pursue in this regard. In the event that the taxed bill of costs should be executed, it

would be within his right to launch an application in the High Court, in order to stay the execution of the bill of costs.

Competency of the costs order

[47] The only remaining issue relates to the unusual costs order the High Court awarded in this case. As the appropriateness of the costs order has been put before this Court by the applicant, it is apposite to consider whether or not the costs order was properly granted.

[48] This Court will be at large to determine the issue of costs if there are misdirections in the reasoning leading to the costs award. In my view there are two misdirections. The first is connected to bias. As I have already indicated, the judge in the High Court took the view that the application for his recusal was an attempt at bullying the judge. Nothing in the record justifies this conclusion; a conclusion which could well be detrimental to the achievement of justice because it could have the chilling effect of precluding applicants from bringing applications for recusal even where an application of this kind would be wholly justified.

[49] The second misdirection is that, in determining the costs order, the judge took into account the fact that the attorney for the applicant provided legal representation to his client in circumstances where previous costs orders made against the applicant had not been paid. There is simply no warrant for this approach and, as I understand the ethics of

the legal profession, attorneys are ordinarily obliged to provide legal representation to any client who is prepared to remunerate them regardless of the status of the client concerned or the nature of the case to be presented. It is not acceptable to take into account against an attorney something which he or she has done that is wholly in accord with the oath of practice.

[50] In these circumstances, this Court is entitled to interfere with the costs order.

[51] The basic rule on costs is that all costs, unless otherwise enacted, are within the discretion of the judge, and the discretion must be judicially exercised.[27] Factors that would have a bearing on whether a successful litigant would be entitled to costs include the following: the conduct of the parties, the conduct of the legal representatives, whether a party has had only technical success and the nature of the proceedings.[28]

Costs from the attorney's own pocket (de bonis propriis)

[52] Although the courts have the power to award costs from a legal practitioner's own pocket, costs will only be awarded on this basis where a practioner has acted

[27] *Kruger Bros. & Wasserman v. Ruskin* 1918 AD 63 at 69—

> "the rule of our law is that all costs — unless expressly otherwise enacted — are in the discretion of the Judge. His discretion must be judicially exercised; but it cannot be challenged, taken alone and apart from the main order, without his permission."

I should note that at present our understanding of judicious behaviour revolves around whether a judge brought an unbiased mind to the proceedings. I am not prepared to stray from the arguments of the parties to consider whether there may be other forms of injudicious behaviour within the wording conceived by *Kruger*. It may be, in future, something that will be considered by this Court.

[28] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3.

inappropriately in a reasonably egregious manner.[29] However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion.[30] Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*.[31]

[53] Punitive costs have been granted when a practioner instituted proceedings in a haphazard manner;[32] wilfully ignored court procedure or rules;[33] presented a case in a misleading manner;[34] and forwarded an application that was plainly misconceived and frivolous.[35]

[54] The basic rule relating to the court's discretion is as relevant to the award of costs *de bonis propriis* as it is in other costs awards. Extending from this discretion, it appears the assessment of the gravity of the attorney's conduct is an objective assessment that lies within the discretion of a court making the award.

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[29] *De Lacy* above n 16 at paras 115-8; *Baphalane Ba Ramokoka Community v Mphela Family and Others, In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others* [2011] ZACC 15; Case No CCT 75/10, 21 April 2011, as yet unreported at para 42; *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at paras 47-9; and *Thunder Cats Investments 49 (Pty) Ltd and Others v Fenton and Others* 2009 (4) SA 138 (C) at paras 25 and 34.

[30] Above n 27.

[31] See *Vermaak's Executor v. Vermaak's Heirs.* 1909 TS 679 at 691.

[32] *Khan v Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47 (Tk) at 48G-I.

[33] *Makuwa v Poslson* 2007 (3) SA 84 (TPD) at para 14 and *Darries v Sheriff, Magistrates' Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 44D-45B.

[34] *Washaya v Washaya* 1990 (4) SA 41 (ZH) at 45G-46B.

[35] *Road Accident Fund v Le Roux* 2002 (1) SA 751 (WLD) at 754H-755A.

[55] A costs order *de bonis propriis* as surety for costs ordered on an attorney and own client scale is undoubtedly a particularly unusual order. Counsel for either party was unable to refer us to any reported authority where these orders have been granted. Nor have I been able to find such authority.

[56] The conduct of the applicant's attorney justifies an award of costs from his own pocket. This includes: the failure to launch the urgent application expeditiously; the delay in the service of the application papers on the first respondent; the failure to comply with court procedures and rules for moving an urgent application, including failing to index and paginate court papers; and the attempt to enrol the application outside normal court hours without complying with the rules.

[57] However, my difficulty with the costs order the High Court awarded relates to the paucity of improper conduct ascribed to the applicant – as opposed to his attorney – in the judgment, in order to justify the award of punitive costs on an attorney and own client scale. The applicant, although unsuccessful, was entitled to bring an application to the court, and litigants should not fear punitive costs orders when attempting to vindicate their rights.

[58] It seems it would not be unreasonable that a judge would consider that the aforestated conduct constitutes egregious misconduct on the part of the practitioner. As

already alluded to when discussing the reasons advanced by the judge, it is apparent that the judge held an objective view that there were grounds to order the applicant's attorney to pay costs out of his pocket, which ignited the basic rule and, according to that discretion, it was an appropriate order to grant.

[59] The judge did not attribute to the applicant any unbecoming conduct apart from the numerous cases the applicant had instituted in the past against the first respondent. In these circumstances, there appears to be no basis upon which the court's displeasure with the applicant's attorney would warrant a punitive costs order against the applicant.

[60] In all the circumstances, it would be appropriate to correct the costs order granted on 28 May 2009. Given the court's displeasure with the remissness on the part of the applicant's attorney, I would set aside the costs order, and substitute it with one that grants costs from the applicant's attorney's own pocket on a party and party scale.

[61] It follows that the portion of the order of the High Court[36] directing that the applicant may not proceed with any further litigation against the first respondent before paying the costs of the two applications that had been considered by the High Court must fall away.

[36] See [16] above.

Costs in this Court

[62] The applicant has enjoyed partial success. He has succeeded in setting aside the costs order against him in the High Court. Although he was entitled to approach this Court, his appeal founded on bias has not succeeded. In the circumstances, it is equitable to require the parties to pay their own costs in this Court.

Order

[63] The following order is made:

a) The application to amend the form of relief sought is granted.

b) Leave to appeal is granted.

c) The appeal succeeds to the extent that the order of the North Gauteng High Court, dated 28 May 2009, is set aside and replaced with the following:

> "1. The application to stay the taxation of the costs order in matter 32237/2002 is dismissed.
> 2. The applicant's attorney is to pay from his own pocket the costs of this application and the costs of the application for the judge's recusal, on the party and party scale."

d) There is no order as to costs in this Court.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Mogoeng J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Khampepe J.

For the Applicant:	Adv I Moosa, instructed by Carls Attorneys.
For the First Respondent:	Adv O Salmon, instructed by Edward Nathan Sonnenbergs.