REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/47650

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

In the matter between:

LE CAR AUTO TRADERS	Applicant
and	
DEGSWA 10138 CC	First Respondent
DWAYNE O'NEIL SANTOS	Second Respondent
DANIEL STASSEN	Third Respondent
WESBANK	Fourth Respondent
MOTOR FINANCE CO (PTY) LTD	Fifth Respondent
ABSA BANK LIMITED	Sixth Respondent
BARBERTON FORD	Seventh Respondent

REASONS FOR JUDGMENT ON RECUSAL

PER SUTHERLAND J:

[1] This judgment deals with an application that I recuse myself. I made an order on 29 May 2012. These are the reasons for that result.

[2] The application was made on behalf of the applicant, Le Car Auto Dealers and its representative, one Vorster, by Attorney Zehir Omar.

BACKGROUND

[3] The essential relevant events that form the platform for this application are the following:

3.1 The applicant brought an application *ex parte* against several respondents for a rule *nisi* relating to the disputed ownership of a number of motor cars. It was granted by Spilg J.

3.2 The matter came before me on the return day for adjudication as to whether the Rule should be confirmed or discharged.

3.3 The debate played out in two phases.

3.4 First, the 1st, 2nd and 3rd respondents contended that there was a misjoinder and that the Court lacked jurisdiction. Argument was heard and these contentions were upheld. The 1st, 2nd and 3rd respondents then fell out of the litigation.

3.5 Second, the remaining respondents, 5th and 6th, remained to argue and the question of the fate of the Rule was argued.

3.6 I gave a judgment in which an order was made to discharge the rule, grant interim custody of certain motor cars to the 5th and 6th respondents and to refer the dispute about the rights of ownership to oral evidence.

[4] The judgment was delivered orally on Thursday, 29 March 2012.

[5] As it transpired, the applicant was aggrieved about the outcome.

EVENTS IN RELATION TO ARRANGING A DATE FOR THE APPLICATION TO BE HEARD

[6] On Monday, 2 April 2012, following the delivery of judgment, according to an affidavit of Uys the attorney for the 6th respondent, attorney Omar sent him a notice of application for leave to appeal. That event is uncontested.

[7] At the time the Court was in recess. I received a telephone call from my Registrar, Ms Turpin, who told me that a representative of a respondent wanted to know when an application for leave to appeal which had been served could be heard. I offered 11 April 2012.

[8] On 11 April 2012, minutes before I convened Court the recusal application was presented to me together with the application for leave to appeal.

[9] In Court, Mr Omar protested that the set down of the application was not by agreement and that the respondents' attorneys had made improper personal contact with me on grounds of bias, as detailed in an affidavit in support of the application for my recusal, the contents of which affidavit are dealt with below. I stated the facts about what I knew and had done, as mentioned above. Further, I stated that I had not "set down" the matter. I had done no more than offer a date.

[10] Owing to the judgment not being available, a postponement at the instance of the applicant was ordered to allow time to procure from the transcribers a copy of the judgment. The agreed resumption of the hearing took place on 25 May 2012.

THE RECUSAL APPLICATION

[11] The application, supported by the affidavit of one Vorster, alleged that I had shown bias in several respects. The bias could be demonstrated by reference to two categories of evidence.

[12] The first category was my remarks and my findings during the hearing about the merits of the matter. The manifestations of bias during the hearing were not mentioned in Mr Omar's argument and, seemingly, no reliance was placed on those allegations. They were in any event, points that were without merit but as they were ultimately not advanced as reasons for the recusal it would be academic to address them.

[13] The second category was the alleged inappropriate contact I had with the legal representatives of the respondent over the fixing of a date for the hearing of the application for leave to appeal. It had been alleged that -

13.1 After I had delivered judgment, a decision was taken to seek leave to appeal. On 2 April 2012, the 5th and 6th respondents' attorneys were served with an application.

13.2 The next day, before the application could be served at Court, a letter from the 6th respondent's attorney was received by the applicant's attorney, Mr Omar. The letter stated:

> "We confirm that Judge Sutherland has indicated that he will hear the ... application at 9h30 on 11 April ..."

13.3 Certain oral telephone conversations also occurred between Mr Uys and a staff member of Mr Omar's Firm.

13.4 The set down of the application was not in compliance with the South Gauteng High Court (SGHC) Practice Manual (Chapter 11, p 101), which sets out a procedure for applying for leave to appeal. (More will be said of this hereafter.)

13.5 The affidavit of Mr Vorster said:

> "The fact that the learned judge spoke about the case to 6th respondent's representatives in the absence of applicant's representatives creates the reasonable impression in me that the learned judge is biased in favour of the respondents against me. In addition the fact that the learned judge set down the application for leave to appeal, even before it was served and filed adds to the impression of untoward conduct on the part of the judge. The perception is created that the leaned judge and the respondents attorneys are working together to frustrate applicants claim to the vehicles." (Founding Affidavit para 24)

Further, it was alleged that this conduct by me,

> "... can only be explained with reference to bias" (Founding Affidavit para 27)

THE HEARING OF THE RECUSAL APPLICATION

[14] On Friday, 25 May 2012, the application was heard. It was at this time that Uys' affidavit was handed up to me, denying personal contact and alleging that he telephoned Ms Turpin who relayed his request to me and, through her, was told of the date that I said I would be available. The contents of that affidavit did not contradict what I knew of the events.

[15] Mr Omar filed heads. The stance adopted during the presentation of argument differed materially from the initial application for recusal.

[16] The thrust of the argument, now advanced by Mr Omar, accepted that there was no personal contact of any kind between the 6th respondent's attorney or counsel and me, and instead rested on the premise that the respondents' legal representatives had behaved unconscionably by making contact with my clerk, Ms Turpin. Such contact was said to be in violation of the SGHC Practice Manual.

[17] Moreover, by offering a date when I would hear the application, rather than insisting on compliance with the procedure spelt out in the practice manual, I impliedly or tacitly "condoned" non-compliance, which constituted an impropriety on my part.

[18] Mr Omar, seemingly without appreciating the anomaly of the contention, submitted that he did not contend that there was any cause to criticise me.

[19] Mr Omar went on to develop and stress the absolute sanctity of an ethical rule of practice that requires a judge to have no contact with a party or its representatives except in the presence of both parties or their representatives. According to Mr Omar this rule was breached even by a unilateral communication to the registrar of a judge about a logistical matter.

THE ETHICAL RULE ABOUT CONTACT BETWEEN COUNSEL AND A JUDGE

[20] It is appropriate to explicate the ethical rule, its rationale and its practical application.

[21] It may be generally thought to be a matter of common sense that a distance be maintained between a judge and the counsel and attorneys who are involved in any matter being conducted before that judge.

[22] The Bangalore Principles of Judicial Conduct (adopted under the auspices of the United Nations in 2002) are the generally accepted international norm-setting expression of appropriate modern judicial behaviour. The code articulates six values to govern proper judicial conduct; *ie* independence, impartiality, integrity, propriety,

equality, and competence and diligence. The code also provides by way of amplification, sub-rules on the application of the several values.

[23] Value No 4, propriety, provides that:

> "[P]ropriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge".

Sub-rule 4.2 on propriety provides:

> "A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, *avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.*" (Emphasis supplied)

In the UN Commentary on the Bangalore Principles of Judicial Conduct (September, 2007), paragraph 113 gives examples of what a judge should avoid. The paragraph remarks that the appropriate form of behaviour would include the avoidance of being transported by the police or lawyers or, when using public transport, avoiding taking a seat next to a litigant or witness.

[24] Our own South African code of Judicial conduct is at present still in draft form. (It is to be adopted in terms of s 12 of the Judicial Service Commission Act, 9 of 1994). It covers in general terms the same basic ground as the Bangalore Principles, although several issues addressed by the one instrument are absent from the other. Under the heading of "transparency", injunctions exist about the visibility of judges at

work and being accessible to the public. Adjunctive notes are provided. Note 7C provides:

> "Judges *avoid unnecessary discussion* in chambers (*ie* with the legal representatives in the absence of the parties) of matters that may be germane to the merits of the case. If what has happened in chambers has any effect on the course of the proceedings, those facts are placed on record in open court." (Emphasis supplied)

[25] The SGHC Practice Manual, p 105, Item 3, says:

> "Where counsel seek to see a judge in chambers, all counsel in the matter must be present. In view hereof it is not advisable for counsel to see a judge in chambers where one or more of the parties are not represented by counsel."

[26] The General Council of the Bar of South Africa's Uniform Rules of professional conduct provide, in Rule 4.10, that:

> "[I]t is undesirable, save in exceptionable circumstances, for counsel in a contested case, in the absence of his opponent and without the latter's consent to seek to interview the judicial officer who is hearing or is about to hear a case."

[27] It is evident that the same simple point is made in all of these injunctions; *ie* there should be no personal communication with a judicial officer except *when necessary*. Necessary, of course, does not mean convenient or useful. Necessary contact does not mean that there should be no contact at all. Self evidently,

communications about logistics differ materially from communications about the substance or merits of a matter. It can never be appropriate to engage a judicial officer about the merits of a matter except in the presence of your opponent, and sometimes not even then. Unilateral contact with the judge's clerk about matters relating to logistics is wholly unobjectionable. Daily, counsel are in contact with a judge's clerk, *eg*, to find out when a matter in the opposed motion court might he heard, or to seek an indulgence about when a matter might be heard, to file amended pages to pleadings, to update a court file, to deliver bundles of documents or to file heads of argument; and, not least, to enquire about when a judge might be able to make time to hear an application for leave to appeal.

[28] It can be readily inferred that the ethical rule aims not to prohibit contact, but to regulate the form of contact appropriate to the circumstances. Unilateral contact is not proscribed *per se*; it is the subject-matter of the enquiry by the practitioner that determines whether bilateral contact only is permitted or unilateral contact is permitted. Unilateral contact with a judge's clerk about logistical matters is not a breach of counsels' ethical duties, nor that of the judge.

THE STATUS OF THE SGHC PRACTICE MANUAL

[29] Mr Omar invoked SGHC Practice Manual and brandished its provisions with vigour, stressing the sanctity of its contents and alleging that it must be strictly adhered to. In doing so, he was mistaken. The SGHC Practice Manual, introduced in

2009, serves a practical purpose. Its purpose and status are not matters which need to be guessed. Chapter one expressly states that its aim is to promote uniformity in the functioning of the Court. It also states in paragraph 2 that -

> "[I]t must be emphasised that no judge is bound by practice directives."

[30] It is not appropriate to invoke the guidelines of the Practice Manual as if they were rules of law or rules of court. A deviation from these guidelines does not require 'condonation'.

[31] Chapter 11 of the Practice Manual sets out a procedure for applying for leave to appeal in a civil matter. The procedure includes procedure fixing a date for a hearing. This process involves wring to the clerk of appeals and a channel of communication from the appellant's attorney to the clerk of appeals to the judge's clerk and then to the judge and then back down this list of persons to the appellant's attorney.

[32] In setting out this procedure, the Practice Manual sets out the recommended route for arranging a date. It is not the exclusive route. In circumstances where a judge may be conveniently reached informally, such an approach is not to be condemned.

[33] At its highest, practitioners must accept that if a judge insists on the prescribed procedure being followed, there can be no complaint. Where a pragmatic indulgence is permitted, it is no more than that. Ultimately, the aim is swift and efficient administration of affairs.

RECUSAL FROM WHAT?

[34] As is apparent, the application for my recusal took place after I had given a judgment and before I heard an application for leave to appeal against it. I posed the question to Mr Omar: 'From what was I to recuse myself? His answer was: 'From the "proceedings". I further asked if he meant that I was being asked to recuse myself from the hearing of the application for leave to appeal. Mr Omar answered: 'No; from the whole proceedings'. I then asked what effect would my recusal, at this stage, have on the judgment I had already given. Mr Omar answered that the judgment would become a nullity, and the rule *nisi* which I had discharged would be revived. I then asked what would be the effect of a refusal to recuse myself. Mr Omar said that he would cause an application for leave to appeal against that refusal to be noted.

[35] I record the exchange as close to verbatim as I am able to do from my contemporaneous note and my memory.

[36] These propositions have only to be stated to be revealed as nonsense. The effect of a recusal can only be in respect of a prospective or current proceeding. Asking a judge to recuse himself after judgment is given is silly. Even if he chose to recuse himself, the judgment is not thereby nullified. A judgment once given stands until an appeal sets it aside. The judge who gave the judgment is *functus officio*.

[37] Moreover, it does not follow that a refusal of an application for recusal leads, as the next step, to an automatic application for leave to appeal against the refusal.

South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Fish Processing) 2000 (3) SA 705 CC addressed the implications of a refusal to recuse at [4] and [5]. On the rare occasions when a court would stop further proceedings to allow a challenge to the refusal to recuse, contrary to the general rule against piecemeal decisions, such consequence would be in the discretion of the court taking into account several factors, including the nature of the matter, the nature of the objection and the prospects of success in the recusal. No right exists to proceed on appeal.

[38] Mr Omar recalled the instance of Dr Basson who was the accused in a marathon trial for alleged complicity in poisoning cadres engaged in the struggle against Apartheid, as an example of such an event. Mr Omar is mistaken. The case is reported as *State v Basson* 2007 (3) SA 582 CC at [3] to [5]; also *State v Basson* 2005 (1) SA 171 CC at [18] to [22]. The court dealt with the State's attempt to challenge the judge's refusal to recuse himself. An application in terms of Section 319 of the Criminal Procedure Act 51 of 1977 was made to reserve question of law for the Court of Appeal regarding the refusal to recuse. The judge allowed it and the matter went off to the SCA. It was subsequently dismissed on the basis that the propriety of a refusal to recuse was not a question of law but rather a question of fact. There is, accordingly, no judicial support for the notion nursed by Mr Omar.

[39] Self evidently, if nullifying the order given were the real motive that inspired the application, the application is less than meritless.

SUMMARY

[40] In my view there is no merit in any of the contentions advanced in support of the recusal application:

40.1 I cannot recuse myself from proceedings that have already been completed and in respect of which I have already given a judgment.

40.2 Apart from the sheer illogicality of the proposition, the obvious fact remains that I am *functus officio* to effect the judgment in any way.

40.3 The rule about avoiding unnecessary contact is not a rule that forbids any contact at all. The absolutist doctrine advanced by Mr Omar is incorrect.

40.4 The SGHC Practice Manual is not a set of laws. It is merely a guide. No sanction is enforceable for non-compliance at the instance of a litigant.

40.5 On the facts, no impropriety occurred.

40.6 No inference of bias can be reasonably inferred from these facts.

40.7 No fundamental right of the applicant *qua* litigant has been adversely affected.

THE COSTS OF THIS APPLICATION FOR RECUSAL

[41] The 6th respondent filed an affidavit. The question arises whether such participation was necessary. Owing to the allegation by Mr Vorster that there was personal contact, despite the fact that the letter by Mr Uys to Mr Omar does not support such an occurrence, it was appropriate for Mr Uys to set the record straight from his point of view. This was exacerbated by the virulent criticism by Mr Omar, alleging mendacity, unprofessionalism and demanding that he be referred to the law Society and that he should apologise to the Court for lying. The costs incurred were provoked by the personal attack launched on him by Mr Omar. As is manifest from the facts traversed above, there is no basis to infer Uys lied at all.

[42] The basis for the application, although put up through the notional mouth of Mr Vorster, is demonstrably founded on alleged perceptions in respect of which a lay person would not have had insight and in respect of which he would be dependent upon advice from his attorney to have conceived, and in turn, to have made the complaints. A similar situation occurred in an application before Satchwell J to recuse herself involving Mr Omar (*Moola v Director of Public Prosecutions & Others* SGHCJ Case No: 2010/30653; 23 March 2012 - as yet unreported). In that matter Satchwell J, having held that the application was without merit, concluded that the

source of the false allegations giving rise to the complaints notionally made by the litigant was her attorney. It was held that she should not have to bear the costs of such an application nor should she be obliged to pay a fee to Mr Omar for such application. I agree with that approach.

[43] The application was gratuitously insulting to a fellow practitioner and, in large measure, was an insult to the intelligence of everyone involved. It was not conceived with circumspection but with bluster, invective and without regard to the running up of costs in so doing. Costs on the attorney and client scale are appropriate.

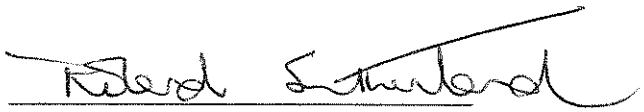
RESULT

[44] It was for these reasons that I made the order on 29 May 2012 as follows:

44.1 The application for recusal is dismissed.

44.2 The costs occasioned by the participation in the application by the 6th respondent shall be borne by the applicant's attorney of record on the attorney and client scale *de bonis propriis.*

44.3 The applicant's attorney of record is ordered not to present a bill, nor to recover any fees or disbursements from the applicant in respect of any work performed in respect of the recusal application.



ROLAND SUTHERLAND
Judge of the South Gauteng high Court, Johannesburg
11 June 2012

Hearings:	: 11 April, 25 and 29 May 2012.
Reasons delivered:	: 14 June 2012
For Applicant	: Attorney Z Omar
For 5th respondent	: Adv Van der Berg SC
Instructed by	: Van Heerden Inc
Reference	: W Van Heerden
For 6th Respondent	: Adv I Posthumus
Instructed by	: Strauss Daly Inc
Reference	: B Uys