IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 30653/2010

In the matter between:

RAZEENA MOOLLA	Applicant
and	
DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
CAPTAIN MGCIMEMI	Second Respondent
MINISTER OF SAFETY AND SECURITY	Third Respondent
THE LEARNED SENIOR MAGISTRATE-	Fourth Respondent
CRIMINAL SECTION, JOHANNESBURG	
MAGISTRATE'S COURT	

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
23/3/12
DATE
SIGNATURE

SATCHWELL J

INTRODUCTION

1. This is an application for the recusal of myself[1] which application is solely based upon alleged "*animosity between applicant's attorney and one of the presiding judges.*"

2. Applicant ('Mrs. Moolla') is one of ten accused facing charges, in the Johannesburg Magistrate Court: firstly, of contraventions of Act 140 of 1992, the Drugs and Drug

[1] From a two Judge Court seized of a review application.

Trafficking Act, namely *"unlawfully dealing in dangerous/ and undesirable dependence-producing substance"* by reason of possession of a number of liquids *"containing methcathithone and one of the ephedra alkaloids"* alternatively possession of such substances; secondly, of contravention of Act 101 of 1965, the Medicines and Related Substances Act, by reason of alleged *"possession of ephedra alkaloids."*

3. Mrs. Moolla has brought a review application in terms of Rule 53 of the Uniform Rules of Court for an order declaring that the search and seizure carried out during a raid on her home was unlawful and that all the objects/items seized from her home during the raid carried out by members of the South African Police Services in 2006 be restored to her.

4. On the date set down for hearing of the review application, attorney Zehir Omar (appearing for Mrs. Moolla) commenced by stating that *"it would not advance the interests of justice or the perception of justice by my client if your Lordship continues presiding during this matter"* by reason of *"the apparent animosity displayed to me by your Ladyship...."*. Mr. Omar was advised that application for the recusal of a judicial officer should be made formally and in writing. Mr. Omar undertook so to do. The recusal application is now before this Court.

THE RECUSAL APPLICATION

5. This application is based on Mrs. Moolla's stated apprehension that Judge Satchwell *"will be biased in the adjudication of my matter due to the animosity that exists between the learned Judge and my attorneys"*[2], viz Mr. Zehir Omar.

6. Mrs. Moolla's grounds of apprehension appear to be three-fold:

   6.1 Attorney Omar made a submission to the Judicial Services Commission during 2009 that Judge Satchwell should not be appointed to the Constitutional Court *"because of*

[2] Paragraph 16 of the applicant's Affidavit.

her homosexual lifestyle the majority of South Africans would not be able to associate with her and she would not be representative of the public."[3]

6.2 Attorney Omar made a submission to the Judicial Services Commission, at the same time, that Judge Satchwell should not be appointed to the Constitutional Court because she was "*known to be emotional in proceedings.*"[4]

6.3 As a result of these comments made by Mr. Omar, *"he was hauled before a disciplinary hearing before the Law Society"* and Mrs. Moolla believes that *"such proceedings by the Law Society must have been instigated by the learned Judge."*[5]

7. Details of these grounds of apprehension are set out in Mrs. Moolla's affidavit, the correctness of which is confirmed on affidavit by attorney Zehir Omar *"insofar as same pertains to me"*.

THE APPROACH TO APPLICATIONS FOR RECUSAL

8. The approach to be taken to applications for recusal of judicial officers was set out by the Constitutional Court in President of the Republic of South Africa v South African Rugby Union and others 1999 (4) SA 147 (CC) at paragraph [48]:

> *"The question is whether a reasonable objective and informed person would on the correct facts reasonable 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. The reasonableness of the apprehension must be assessed in the light of the oath of Office taken by Judges to*

[3] Paragraph 11 of the Founding Affidavit.
[4] Paragraph 11 of the Founding Affidavit.
[5] Paragraph 15 of the Founding Affidavit.

administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their mind of any irrelevant personal beliefs or predispositions. They must take into the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

9. It would seem that applications for recusal have usually been based upon perceived bias or prejudice in respect of the subject matter of the litigation, the parties to the litigation or the manner in which the litigants are conducting their litigation.[6] In other words the perceived object of the judicial officer's bias is a litigant himself or the issue in dispute between litigants.

10. I have been able to find only three instances of a recusal application based upon alleged animosity between a presiding judicial officer and legal representative to a litigant.

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[6] In Coop and others v South African Broadcasting Corporation and others 2006 (2) SA 212 (WLD) the complaint was that the presiding Judge had made certain comment indicating that he had made up his mind on a point without hearing one party that expressed views about the integrity of one party; in South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Fish Processing) 2000 (3) SA 705 (CC) it was complained that the presiding judges had already heard another matter involving the same parties and the same dispute; in S v Shackell 2001 (4) SA 1 (SCA) the presiding judge, whose own son had been killed in custody by white policemen which murder had been covered up, was to preside over an alleged murder by a white policeman of a young black man.; Sager v Smith 2001 (3) SA 1004 (SCA) it was complained that the magistrate was falling asleep and had commented that this was a frivolous matter where every argument was "splitting hairs"; in President of the Republic of South Africa v South African Rugby Union and others 1999 (4) SA 147 (CC) the grounds for recusal included that certain members of the court had been members of the same political party of which two litigants were members and that there had been an advocate/client relationship between a member of the court and litigant; in R v Heilbron 1922 TPD 99 the magistrate had expressed an unfavourable view as to the management of the previous licensee.

11. The most recent involved the allegations made with regard to Justice Kriegler set out at paragraph [22] of the SARFU judgment[7] which were withdrawn and it therefore was therefore not necessary for the Constitutional Court to consider those complaints.

12. In Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996(3) SA 1, an application was brought for the recusal of an acting judge where the applicant had an apprehension that she might not get a fair and impartial hearing because of *"the strained relationship between the presiding acting judge and her attorney"*.[8] The appeal court indicated that there were two options open to the judge hearing the recusal application: one was to consider the legal sufficiency of the grounds advanced in support thereof; the other was to consider the sufficiency of the evidence and, in conjunction therewith, the respondents claim in the affidavit that the application was male fide.[9] Once the presiding judge entered into the arena in a manner where his *"aim was plainly to expose what he regarded as the petitioners utter untruthfulness and attorney A and attorney B scandalous complicity therein"* and then concluded that the applicant herself had behaved in a *"sinister"* manner and could not be believed, then said the appeal court that applicant probably had *"every reason to despair of her evidence being accepted in the main proceedings"*.[10] The appeal court took the view that the way in which the recusal application was handled *"disqualified"* the acting judge, irrespective of its merits or demerits, from proceeding with the substantive matter :the acting judge was criticized for

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[7] The specific allegation made by a litigant, Dr Luyt, was that at there had been *"a serious fallout between Justice Kriegler and the said Botha and strong animosity is displayed by Justice Kriegler towards my said attorney"*. When Dr Luyt was unsuccessful in his attempts to speak with Justice Kriegler in his capacity as Chairperson of the Independent Electoral Commission this *"created the impression in my mind that he was not prepared to speak to me"* These circumstances gave rise to the impression in the mind of Dr Luyt that *"Justice Kriegler has permitted his animosity towards my attorney to negatively impact on our own relationship and I am in the circumstances concerned that this might lead to a subsequent conscious bias towards me in the forthcoming appeal."* Furthermore, after Justice Kriegler had resigned as Chairperson of the IEC, Dr Luyt had *"on a number of occasions publicly stated that Kriegler J still owes the country the real explanation of what actually led to his resignation. This was reported in the media. He alleges further that he is concerned that his public criticism of Kriegler J might result in the Judge's bias against the fourth respondent"*.

[8] An attorney had represented a colleague in a complaint lodged with the Johannesburg Bar Council in connection with professional fees charged by the acting judge as a practicing advocate. It had also been reported by yet another attorney that the acting judge *"had it in"* for the first attorney and had stated that he *"was going to get"* that attorney one day.

[9] At page 15G

making findings on disputed facts in his own favour in motion court proceedings, for failing to have regard to his own emotional response that this recusal application was *"highly offending"* and *"an assailment of his personal integrity"* resulting in *"clouded judgment"*, the nature and regularity of the acting judge's interventions in the course of the recusal proceedings was to do little more than expose what he regarded as the applicant's *"utter untruthfulness"*.

13. Law Society v Steyn 1923 SWA 59 is an earlier judgment which could perhaps be said to reflect a more sanguine view as to the complete impartiality of a judicial officer and perhaps failed to have had sufficient regard to the reasonable apprehensions of litigants. A judge had made complaints about the conduct of an attorney to the Law Society which then instituted disciplinary proceedings against the attorney which proceedings were to be heard before the same judge. The court held that the referrals to the Law Society did not warrant recusal because when such referral was done it was done *"with an open mind"*, all the court was doing was indicating that *"there are certain circumstances which call for some explanation"*. In addition there had been a complaint by a litigant about the Judge which was also found not to justify recusal because *"a judge renders an account to no man in the world and he fears nothing but his own conscience"*.

14. The test whether or not there is a *"reasonable apprehension of bias"* is an objective one containing a *"double requirement of reasonableness- not only the person apprehending the bias must be a reasonable person but the apprehension must also be reasonable."*[11]

15. This court must therefore be satisfied that Mrs. Moolla is behaving as a reasonable person in her apprehension which must be based upon reasonable grounds.

16. Insofar as Mrs. Moolla relies upon newspaper reports in support of her apprehensions, I believe that she is entitled so to do. Newspaper articles are the most frequent sources upon which a member of the reading public could be expected to rely in acquisition of information and thereafter in the formation of her beliefs. Insofar as Mrs. Moolla relies

[11] Sager v Smith 2001 (3) SA 1004 (SCA) at para 17.

upon information furnished to her by attorney Omar, I believe that this court is entitled to consider the substantiation or otherwise and the veracity or otherwise of such information. After all, where Mrs. Moolla has formed beliefs on the strength of personal communication to her by her attorney, the court is required to consider the factual basis for such beliefs.[12]

17. Insofar as Mrs. Moolla has expressed her apprehensions, there is nothing in her affidavit to indicate that she has any appreciation that all Judges have taken an oath to administer justice "*without fear or favour*" and that there is as presumption in our law against partiality on the part of judicial officers.[13]

OMAR'S SUBMISSION TO THE JUDICIAL SERVICES COMMISSION ("the JSC")

Grounds

18. Mrs. Moolla states that her interest was captured by various articles in newspapers and television news in 2009 "*that reported about a complaint made by Mr. Omar, acting on behalf of the Society for the Protection of our Constitution against the Honourable Judge Satchwell...the article records that Mr. Omar made a submission to the Judicial Services Commission that, because of the Honourable Judge's homosexual lifestyle the majority of South Africans would not be able to associate with her and she would not be representative of the public.*"[14] Mrs. Moolla continues that "*while Mr. Omar claimed that his client believed that god-fearing people would not accept the Honourable Judge's sexuality, the learned Judge requested Mr. Omar, through the press to commit himself to constitutional values.*"[15]

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[12] "*Cogent or convincing evidence*" needs to be provided - see SA Commercial Catering and Allied Workers Union v I & J Ltd 2000(3) SA 705 CC at 714 para 12.
[13] See S v Basson 2007(3) SA 582 CC at para 30 onwards.
[14] Paragraph 11 of Founding Affidavit.
[15] Paragraph 12 of Founding Affidavit.

19. It is this *"complaint"* made by Mr. Omar to the Judicial Services Commission and this perceived *"request"* by Judge Satchwell which has created *"the perception in me that there is a dispute and animosity/hostility between the Honourable Judge and my attorney"*. [16]

20. Mrs. Moolla attaches to her affidavit photocopies of two newspapers reports, annexures MR1 and MR2. [17] It is apparent from the documentation that Mr. Omar did indeed make certain submissions to the Judicial Services Commission concerning myself.

21. Annexure MR1 is headlined *"God-fearing South Africans will not relate to gay Judge"* and records that *"Judge Satchwell has not directly addressed Omar's complaint about sexuality..."* Annexure MR2 records that Justice Minister Jeff Radebe asked Judge Satchwell, at her interview by the Judicial Services Commission, to comment and that *"Satchwell said that in the thirteen years she had been a Judge, nobody has ever asked for her recusal because of her private life, nor had it been argued in appeals on her work. The only time it had been a public matter was when she had to approach the Court personally to get her benefits extended to her partner. The Constitution included everyone, and if people saw diversity in the Constitutional Court, this was a triumph of the new society over Apartheid. So I would suggest that Mr. Omar and all South Africans look for commitment to constitutional values. If they find them in her, then all other things have no meaning in her practice as a Judge."*

22. I have already commented that Mrs. Moolla is perfectly entitled to rely upon newspaper articles which have circulated widely to both acquire information and form an apprehension. Insofar as her apprehension is concerned, one should not interrogate the truth or otherwise of the content of those newspaper reports. It suffices that this is what Mrs. Moolla, as a member of the public, has read and relied upon in her assessment of the reception she and her legal representative will receive in court.

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[16] Paragraph 12 of Founding Affidavit.

Apprehension of animosity or hostility by attorney Omar towards Judge Satchwell

23. Appointments to all levels of the judiciary are, in terms of the Constitution, facilitated through the Judicial Services Commission which calls for nominations, invites comment on the candidates, interviews candidates and makes recommendations to the President.

24. Neither attorney Omar (personally or on behalf of any organisation), nor any member of the legal profession or the public can be criticized for exercising their rights to express views to the Judicial Service Commission on any candidate for judicial office. Since the advent of the new Constitutional dispensation, many organizations and individuals have so done and these comments and expressions of views may or may not have played a part in the JSC deliberations, decisions and recommendations.

25. On the one hand, Mrs. Moolla should not assume that exercise of Constitutional rights of free speech and participation in the public processes of the JSC by attorney Omar are necessarily to be viewed as indications of *"hostility/animosity"* towards the individual(s) about whom he expresses such views. Nor are such comments necessarily received as such. Public processes, such as the consideration of the candidacy of persons for judicial appointment, requires airing of all relevant considerations and may sometimes result in robust debate. But this is part of the democratic exercise – it is not to be viewed, as Mrs. Moolla apparently does, as an automatic indicator of personal animosity or hostility. Nor is it to be viewed as improper or unprofessional behavior which is deserving of censure.

26. On the other hand, should attorney Omar be of the view that he holds personal feelings of animosity and has expressed such animosity towards any judge, such feelings and behaviour would not be relevant to an application for recusal of that judge.

27. The reasoning is simple: litigants are not entitled to pick and choose the judicial officer who presides over their disputes. Legal representatives and their clients cannot be encouraged to develop or harbor or express any animus towards a judicial officer thereby enabling the legal representative to claim that such expression of animus should require the judicial officer to recuse herself. Should such a practice be allowed to develop, this

could result in selection by legal representatives and their clients of their own panel of judicial officers acceptable to them. Such manipulation of the composition of the court would had a most serious impact upon the administration of justice [18] - firstly, as to the management of the court and secondly and most importantly, the encouragement of understandings of bias and prejudice both to and from a judicial officer.

28. The issue is any application for recusal can never be the personal views or opinions or predilections of a legal representative towards judicial officers. The application must be confined to whether or not the judicial officer has conducted herself in such a way that there is a reasonable apprehension of bias towards a litigant or her cause.

Apprehension of animosity or hostility by Judge Satchwell to attorney Omar

29. Mrs. Moolla deposes that she has read and understood the newspaper articles to report that *"the learned Judge requested Mr. Omar, through the press to commit himself to constitutional values"*[19] which *"request"* has, inter alia, led to Mrs. Moolla's perception of *"animosity/hostility"* on the part of myself towards her attorney.

30. However, neither newspaper report supports Mrs. Moolla's reading or interpretation thereof. Neither report indicates any *"request"* by myself to attorney Omar that he *"commit himself to constitutional values"*.

31. Instead in annexure MR2 it is reported that I responded to questioning on attorney Omar's submission by, inter alia, suggesting that "*Mr Omar and all South Africans look for commitment to constitutional values. If they find them in her, then all other things have no meaning in her practice as a Judge.*" I am not reported to have called upon attorney Omar to look within himself or question his own values. My response was

[18] In Heilbron *supra*, the court had regard that "*it would be perfectly impossible to conduct the administration of justice in the proper way*" if recusals followed every event complained of.
[19] Paragraph 12.of Founding Affidavit

reported to be that South Africans should look for adherence to Constitutional values within her.

32. There is no factual basis for Mrs. Moolla's apprehension that the newspaper reports to which she refers indicate or reveal any hostility or animosity on the part of myself towards attorney Omar. There is no suggestion that I have ever expressed an opinion of and about Attorney Omar.[20]

JUDGE IS EMOTIONAL

Grounds

33. Mrs. Moolla further deposes that, at the time that Judge I was under consideration for appointment to the Constitutional Court, *"Mr. Omar also claimed in the articles that the Honorable Judge was known to be emotional in proceedings and therefore should not be allocated to the position of Judge of the Constitutional Court..."*[21] Mrs. Moolla continues that Mr. Omar sent a letter to Judge my Registrar *"that expressly conveys apparent conduct of the Honourable Judge in proceedings where my attorney was involved, that culminated in the learned Judge expressing great fury, slamming her hands on the desk and storming out of court."* It is, says Mrs. Moolla, *"noteworthy that even this incident is a bone of contention between my attorney and the learned Judge, with the learned Judge denying that such an incident ever occurred."*[22]

34. Mrs. Moolla claims that she is *"anxious that the same fate will be dealt in her matter"*.

35. Mrs. Moolla refers to a newspaper report, annexure MR1 [23] which has a subheading *"Nominee for top court too emotional, say opponent"* and reports that *"Omar claims Judge Satchwell 'is known to become very emotional in court proceedings and had on*

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[20] See the approach in Heilbron *supra*.
[21] Paragraph 11 of the Founding Affidavit.
[22] Paragraph 14 of Founding Affidavit.

one occasion, began shouting at a counsel and eventually slammed her hands on her desk in fury and stormed out of court.' " That same article reports myself as saying that *"Omar's claims were not true"* in that *"I have never shouted at counsel, slammed my hands on the desk or stormed out of court. Fortunately all proceedings in court are mechanically recorded. Any discourtesy by any Judge to any legal representative is on the record. This record and a typed copy thereof is available to anyone to peruse. What did or did not take place in court is recorded for posterity"*.

36. Furthermore, Mrs. Moolla refers to a letter from attorney Zehir Omar dated 31 August 2009 addressed to the *"clerk to learned Judge Satchwell"*, Annexure MR3 to the founding affidavit. This letter advises that, in motion court proceedings in 2003, *"the respondent's counsel addressed the court and stated that the proceedings should start with the words "Bismillah Irahman Irahim" (In the name of God, the most beneficent, the most merciful). At this, your Judge became annoyed and slammed on the court's desk and stormed out of court ... the matter [was] transferred to Judge Labe*." Mr. Omar's letter goes on to call upon me to *"to disclose to the Judicial Services Commission the true facts as they eventuated in court"* and also *"to explain her failure to disclose these facts to the Judicial Services Commission"* and that Mr. Omar's *"instructions are that such withholding of information from the Judicial Services Commission is a serious blight on the character of a Judge aspiring to hold the position of a Judge in the Constitutional Court"*. Mr. Omar expresses the view that *"your Judge may do well to consider withdrawing her acceptance of the nomination as Judge in the Constitutional Court"*.

Hearsay

37. Neither the letter from attorney Omar nor Mrs. Moolla's affidavit go so far as to state that attorney Omar was himself present in court on the occasion of this alleged incident and personally witnessed same.

38. Attorney Omar's letter dated 31 August 2009 does not claim that he was present or an observer or the recipient of the events of which he complains. At most he refers to

"respondent's counsel" who had addressed the court and who apparently *"annoyed"* me. The founding affidavit of Mrs. Moolla states no more than that these were proceedings *"where my attorney was involved"*[24] but does not claim that attorney Omar was the *"counsel"* whom she says appeared in court. This could obviously not be stated because Mr. Omar is an attorney and not an advocate and is therefore not referred to as *"counsel"*.

39. Not only is there a failure to disclose the identity of the Advocate who apparently observed these events and reported on them to attorney Omar but there is also a failure to obtain a confirmatory affidavit from such "counsel".

40. It is of importance to note that Mrs. Moolla does not claim that a transcript of the recording of these proceedings has ever been procured. As I am reported to have said in Annexure MR1 *"Fortunately all proceedings in court are mechanically recorded. Any discourtesy by any Judge to any legal representative is on the record. This record and a typed copy thereof is available to anyone to peruse. What did or did not take place in court is recorded for posterity"*.

41. It is also noted that no complaint of inappropriate or improper behaviour has been made concerning myself to the Judicial Services Commission for disciplinary investigation. The JSC is the body to whom such referrals are made[25]. The gravamen of the complaint is set out. If the complaint concerns proceedings in court then it is a simple enough matter to procure a transcript of the recording of those proceedings. In casu, no such complaint has been lodged, investigated or adjudicated upon.

42. Assessment of Mrs. Moolla's apprehension indicates that it apparently relies on double hearsay – information relayed to her from attorney Omar to whom information was initially relayed by an anonymous "counsel". Mrs. Moolla's apprehension is not based upon any substantiated facts.

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[24] Paragraph 14.

[25] See the Judicial Service Commission Act 9 of 1994 and the amendments thereto of October 2008.

COMPLAINT TO THE LAW SOCIETY

Grounds

43. Mrs. Moolla continues in her affidavit to state that *"my attorney informed me that as a result of the aforegoing comments he made on behalf of his client regarding the learned Judge he was hauled before disciplinary hearing of the Law Society. I like any reasonably minded person believe that such proceedings by the Law Society must have been instigated by the learned Judge."*[26]

44. Mrs. Moolla states on oath that attorney Omar is the source of this information that he was called to attend a disciplinary hearing of the Law Society as a result of his submissions made to the JSC concerning myself. Attorney Omar has himself deposed to an affidavit that he confirms the contents of Mrs. Moolla's affidavit *"insofar as same pertains to me"*. Attorney Omar has therefore confirmed on oath the entire content of paragraph 15 of Mrs. Moolla's affidavit – namely that he was called to attend disciplinary proceedings and that one would believe that I must have instigated such proceedings against attorney Omar.

The Version of the Law Society

45. One would normally expect that any attorney, against whom a complaint was made and in respect of whom disciplinary proceedings were convened by the Law Society, would know the identity of the complainant and the substance of the complaint against him. The Law Society does not conduct a "star chamber". Any attorney about whom a complaint is made is always advised of the details of the complaint and the identity of the complainant. In such circumstances, it is surprising that attorney Omar did not provide his client, Mrs. Moolla, with a copy of the complaint made against him.

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[26] Paragraph 15 of the Founding Affidavit.

46. It is even more surprising that it is left to Mrs. Moolla to speculate in her affidavit that she *"like any reasonably minded person, believes that such proceedings by the Law Society must have been instigated by the learned Judge."* On the assumption that attorney Omar was indeed the target of a complaint made to the Law Society and participated in a disciplinary hearing, then he would be expected to know the identity of his accuser, the complainant. Since attorney Omar is the source of all Mrs. Moolla's knowledge in respect of this complaint and these proceedings, he would be in a position to have informed Mrs. Moolla of the correct identity of the source of the complaint against him. His client, Mrs. Moolla, should not have to rely upon unverified supposition. It is inconceivable that Mrs. Moolla has been left to speculate and that her attorney was unable to advise her of the full particulars which must have been known to him.

47. On receipt of this application for recusal and on reading the contents of paragraph 15 of the founding affidavit, I telephoned the Law Society of the Northern Provinces. I did so because I knew that I had never instigated any proceedings against attorney Zehir Omar nor made any complaint against him to the Law Society of the Northern Provinces.

48. A letter dated 7 March 2012 was received from Mrs. M M Malatji - Head: Disciplinary Department of the Law Society of the Northern Provinces. That letter states:,

> *"We confirm that a disciplinary enquiry was held by the Law Society of the Northern Provinces into the conduct of attorney Zehir Omar as a result of three complaints received from Professor Leslie London, Hoosein Mahomed and Mr. P Steyn based on what was reported in the press*
>
> *The complaints were investigated. Mr. Omar was requested to appear before an investigating committee and the committee in the absence of attorney Omar recommended that the charge be formulated against attorney Omar.*

A disciplinary committee was held on 18 October 2010. Mr. Omar was not requested to plead to the charge of conduct unbecoming of an attorney and the matter was discussed with him by the committee.

After the discussion the committee recommended that no charges should be formulated against the attorney and the file was closed.

49. Copy of a letter on the letterhead of the Law Society of the Northern Provinces dated 21 September 2009 from J Herholdt, Legal Official – Disciplinary Department was received. The letter is addressed to Mr. Z Omar, Zehir Omar Attorneys at P O Box 2545 Springs. The letter states:

"Dear Sir

COMPLAINTS BY MR HOOSEIN MAHOMED; MR PIETER STEYN & MR LESLIE LONDON

We refer to the above.

Kindly find enclosed herewith 3 complaints against in respect of remarks you made in respect of Judge Kathy Satchwell.

We urgently await your comments thereto within 14 days of date of this letter.

Yours faithfully"

50. At the hearing of the recusal application, the letter of 7 March 2012 had been received and was made available to all counsel appearing in this matter. The letter of the 21st September 2009 was only received the day after the hearing of the recusal application and has been forwarded to all counsel appearing in this matter for comment.

51. It appears an inescapable conclusion that there were three complaints made to the Law Society of the Northern Provinces against attorney Omar, that these three complaints emanated from Mr. Hoosein Mahomed, Mr. Pieter Steyn and Mr. Leslie London, these complaints concerned the submissions made by attorney Omar to the JSC, that attorney

Omar received the complaints against himself and that attorney Omar participated in a meeting with an investigative committee of the Law Society.

52. Since receiving notification of the complaints from the Law Society (sometime in 2009) attorney Omar must have known the identity of the authors of the complaints against him and the details of their complaints. He could never have operated under the mistaken belief that I, myself, initiated any complaint against him. He can never have even speculated that I was the author of the complaints.

53. It is inconceivable that an attorney of the High Court would so mislead a client either by omission or commission. Perhaps attorney Omar failed to fully inform Mrs. Moolla of the facts of the situation - viz that there were three complaints lodged by Messrs Mahomed, Steyn and London. Perhaps attorney Omar wrongly informed Mrs. Moolla of the facts of the situation – viz that I had made a complaint to the Law Society. Perhaps there is another scenario of which I have not thought?

54. Whichever is the case, it would seem that attorney Omar either provided a client with incorrect information knowing it to be incorrect or only partially furnished information to his client allowing her to speculate as to the rest. It would be greatly to be regretted if he furnished that incorrect or incomplete information to his client in the full knowledge that his client would rely on same as grounds for this recusal application.

55. As instructing attorney in this matter, attorney Omar prepared the affidavit in support of this recusal application – he was therefore required to and obviously did advise his client of the necessary requirements to be alleged in support of such application. He allowed his client to depose on oath to an affidavit where it would appear he knew the contents to be untrue. He permitted this to be done in circumstances where he knew his client to be person of religious conviction. It seems, on the documents before me, that he advised his client to enter into litigation and bring an application for the recusal of a judge where he had failed to disclose correct facts to his client and allowed her to speculate as to inferences which were known by him to be incorrect.

56. This judgment, together with all pleadings in this recusal application, will be forwarded to the Law Society of the Northern Provinces.

57. Accordingly, where Mrs. Moolla has stated that she *"I like any reasonably minded person believe that such proceedings by the Law Society must have been instigated by the learned Judge"*, the facts indicate that I instigated no such disciplinary proceedings.

COSTS

58. This application for recusal must be dismissed. In the ordinary course, costs would follow the result. In the present case, the respondents were in court but did not oppose the application and, correctly, did not engage in the merits of the matter.

59. However, Mrs. Moolla has incurred costs in bringing this application. There are the costs of her attorney in consultation and preparation of the pleadings, there are the costs of briefing Advocate Springveldt to appear at the application and there are miscellaneous disbursements.

60. It seems a great injustice that Mrs. Moolla should be required to meet these costs. She was acting on the legal advice of the attorney Omar who also furnished her with the information upon which she grounded her apprehensions of bias on the part of myself. Mrs. Moolla has not been well served in such advice.

61. This is not a case where an award of costs de boniis propriis is appropriate. As I have indicated there are no costs incurred by the opposing side.

62. However, this is a case where attorney Omar should not be entitled to recover from his client, Mrs. Moolla, any fees for himself or his firm or disbursements incurred by his including the fees of counsel who appeared to argue this matter.

ORDER

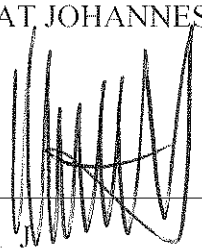
63. It is ordered:

63.1 The application for the recusal of Judge Satchwell is dismissed.

63.2 The attorney of record, Zehir Omar, may not recover from the Applicant, Mrs. Moolla, any fees or disbursements incurred by his firm including fees charged by counsel, correspondent attorneys or any other costs for the days of Thursday 9th February and Monday 12th March 2012.

63.3 This judgment, together with all pleadings in this recusal application, is to be forwarded to the Law Society of the Northern Provinces.

DATED AT JOHANNESBURG ON 23RD MARCH 2012



Satchwell J

Date of Hearing: 9th February and 12 March 2012

For Applicant: Attorney Z Omar

Advocate Springveldt

In Attendance for Respondent - Advocate D Barnard and Advocate D Joubert.