REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19/8/2020
SIGNATURE DATE

CASE NO: 22939/20

In the matter between:

ASSETLINE SOUTH AFRICA (PTY) LTD	Applicant (Respondent in application for leave to appeal)
and	
MANHATTAN DELUX PROPERTIES (PTY) LTD	First respondent (First applicant in application for leave to appeal)
MICHAEL DENENGA	Second respondent (Second applicant in application for leave to appeal)
ESDON DOKO HATIRARAMI MATIENGA	Third respondent (Third applicant in application for leave to appeal)

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. This is a judgment in an application for leave to appeal brought by Manhattan Delux Properties (Pty) Ltd, Mr Denenga, and Mr Matienga. They were the respondents in the application (the main application) brought by Assetline South Africa (Pty) Ltd. I shall continue to refer to the parties as they were cited in the main application.

2. In the main application the applicant sought a money judgment and an order declaring certain immovable property owned by the first respondent to be specially executable. The matter came before me in opposed motion court on 22 April 2020. The respondents filed an application for my recusal shortly before the hearing date. At the hearing, they also brought an application for the postponement of the main application from the Bar.

3. I made a ruling dismissing the application for my recusal with costs, and another dismissing the application for a postponement with costs. I gave ex tempore reasons for my rulings on the record before commencing to hear argument in the main application. I handed down a written judgment in the main application on 10 May 2020. I granted the orders prayed for in the main application, for the reasons set out fully in my written judgment.

PRELIMINARY ISSUE RAISED BY THE RESPONDENTS: THE ALLEGATION THAT I CONSIDERED AND DETERMINED THE CONSOLIDATION APPLICATION

4. One of the themes running through the application for leave to appeal is that I committed an appealable form of misconduct by making a determination on what is referred to as the consolidation application. This is an application that was instituted

by the respondents prior to the hearing of the main application. In the consolidation application the respondents seek to consolidate the main application with a separate matter between the respondents and one Ms Vanmali. The applicant has opposed the consolidation application. It has yet to be set down for hearing, and has never served before me. I have never been required to make, nor have I made any determination in the consolidation application.

5. The respondents raised the issue of the consolidation application in their application for my recusal at the main hearing. They also raised it in their application for a postponement of the matter. It features in many of the grounds for leave to appeal.

6. It is simply not so, as the respondents allege, that I misconducted myself in making a determination on the consolidation application.

7. I had to consider the fact that there was a pending consolidation application for purposes of both the recusal application, and the postponement. This was because the application for my recusal was based on the fact that some weeks prior to the main application, when I was sitting in the unopposed motion court, one of the matters that served before me was an application by the applicant (the heads application) to compel the respondents to file their heads of argument in the main application. The latter had been set down for a few weeks hence, and the respondents had not yet filed their heads.

8. The respondents opposed the heads application on the premise that they did not have to file heads of argument because the pending consolidation application automatically had the effect of staying all related proceedings, including the main application. I should add that the consolidation application was filed at the eleventh hour. In the heads application I rejected the respondents' defence, and directed them to file their heads of argument.

9. When, by coincidence, some weeks later the main application was allocated to me by the senior Judge on the opposed motion roll, the respondents sought my recusal because of my prior involvement in the matter. For this reason, the fact that there was a pending consolidation application (which was not, however, before me) was relevant to the recusal application.

10. The same fact was relevant to the postponement application. This is because the reason given for the postponement was that the respondents would be prejudiced if the main application was heard and determined before the consolidation application was finalised. Once again, in making a ruling on whether or not to grant the postponement application, I had to consider the fact that there was a pending consolidation application. The nature of that application was relevant to the exercise of my discretion as to whether to grant a postponement.

11. The respondents suggest that I misconducted myself because, while I stated that I would not make a determination on the consolidation application, in effect I did so. There is no merit in this submission.

12. First, as I have indicated, the nature of the respondents' case in the recusal and postponement applications put the existence of the consolidation application squarely before me as a factor in the range of factors I had to consider in reaching a decision in those applications.

13. Second, this does not mean, however, that I made any determination on whether the consolidation ultimately should succeed. That is for another court to decide through the exercise of that court's own discretion. The reasons for my decisions in all three matters are not binding on any Judge who may subsequently hear the consolidation application. They will exercise their own discretion and make their own determination on whether that application should be granted.

14. There is thus no substance in the preliminary issue raised by the respondents.

GROUNDS OF APPEAL: THE MAIN APPLICATION

15. The respondents note ten grounds of appeal in their Notice of Application for leave to appeal. In their written heads of argument, and in oral argument, these became twelve grounds. I will consider the matter based on the grounds of appeal outlined in the Notice.

16. The eighth ground of appeal is against the dismissal of the recusal application. I deal with this ground separately later in this judgment.

17. At the outset, I record that some of the grounds of appeal are directed at my reasoning process. Where this is so, I do not intend to deal with them as separate grounds of appeal. In most cases, they can be linked to one or another of the substantive grounds of appeal.

First ground of appeal

18. The respondents say that they wish to present new evidence to an appeal court which will show that the respondents' debt is in fact only R3,4 million. Further, that the loan agreement was nullified by the absence of insurance. The respondents say that this evidence came to light when they were studying the judgment and preparing for the application for leave to appeal. They say that the new evidence will show that I erred in dismissing the defences raised at the hearing.

19. It is trite that an appeal court will only allow new evidence in special circumstances because it is in the public interest that there be finality in proceedings:

> "It is an inevitable rule in all courts, and one founded upon the clearest principles of reason and justice, that if evidence, which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case id decided adversely to the side

> to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial."[1]

20. In order for an appeal court to consider the admission of new evidence, there should be a reasonably sufficient explanation why the evidence sought was not led at the trial or hearing. There should also be a *prima facie* likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome. Non-fulfilment of any of these requirements would normally be fatal. Each case should be considered on its particular merits. There may be rare instances where a court will be more disposed to grant the relief for some special reason.[2]

21. All I have before me is a statement made in the Notice of application for leave to appeal, and in the heads of argument, that new evidence exists. No affidavit has been placed before me to indicate what the nature of the evidence is; or who is intended to depose to the evidence.

22. Further, there is no explanation as to why the evidence could not have been secured and presented at the hearing of the matter. The respondents do not say why they were unable, until now, to gather the alleged new evidence to show that the quantum claimed is incorrect. The same holds true for the alleged evidence about the absence of insurance. The respondents did not take issue with the legality of the agreement in opposing the main application. This seems to be an attempt to open up an entirely new defence to the claim. It was not raised before, and I am not told why it could not have been raised before.

[1] *Sheddon v Patrick and Attorney-General* (1869) 22 LT 631 at 634

[2] Van Loggerenberg *et al* Erasmus Superior Court Practice Vol 1 A2-70 (Original Service 2015) ("Erasmus")

23. In the absence of these explanations, there cannot be any substance or merit in this ground of appeal.

Second ground of appeal

24. At the hearing of the application for leave to appeal, Mr Kufa, for the respondents, explained that the second ground of appeal is directed at the costs order I granted in favour of Mr Greenberg, the applicant's attorney of record. The respondents say that I ought to have found that there was collusion between Assetline and Ms Vanmali, and that this was manifest in both of them instructing Mr Greenberg as their attorney. They say I ought to have found that they were prejudiced by Mr Greenberg's conduct.

25. I dealt with this issue in my written judgment in paragraphs 25-30. As I noted in my judgment, serious allegations were made against Mr Greenberg without evidence to substantiate them. He was threatened with a *de bonis propriis* costs order against him. What is more, these allegations were made in circumstances where, on the admission of the respondent, they did not constitute a defence to the application. It was in those circumstances that I found that Mr Greenberg was entitled to have retained counsel to represent him in the proceedings, and to be awarded the costs of such representation on an attorney and client basis.

26. The question of costs lies in the discretion of the court hearing the application. It is a true discretion, meaning that while a court on appeal may interfere, it will not readily do so. In their application for leave to appeal the respondents repeat their allegations of collusion and conflict of interest. These allegations again remain unsubstantiated, and do not advance the respondents' defence.

27. In my view there is no reasonable prospect that an appeal court would find that the exercise my discretion in awarding Mr Greenberg costs was based on a misdirection, or an irregularity, or in the absence of grounds on which a court, acting reasonably, could have granted that order.[3]

Third ground of appeal: Rule 46

28. The third ground of appeal is that I erred in rejecting the defence that the applicant had failed to comply with the requirements of Rule 46.

29. As to the requirements of Rule 46, I rejected the respondents' defence that the applicant was not entitled to be granted an order declaring the immovable property to be specially executable without it first having executed against movable property.

30. I deal with this in my judgment in paragraph 10. At the hearing of the application for leave to appeal I was directed to the judgment in the matter of *Nkola v Argent Steel Group (Pty) Ltd*.[4] The respondents contended that this judgment was authority for its submission that Rules 46(1)(a)(i) and (ii) must be read conjunctively. But that is not what the judgment says. The SCA held as follows:

> "What the sub-rule requires, as a result of these decisions, is that in all cases were a debtor's home is in issue, a court must look at the circumstances of the debtor and exercise a discretion. … The proviso (in Rule 46(1)(a)(ii)) reflects the principle that a poor person who runs the risk of losing a home should not be placed in jeopardy with a proper consideration of his or her circumstances. … The fact that one of the houses was his (the debtor's) and his family's primary residence … is of no consequence: he had the means to avert the execution of the judgment debt and chose not to pay his admitted liability. There is no justification in this matter to read the requirements of rule 46(1)(a) conjunctively. 'Or' need not be read as 'and' save where a debtor is indigent, has insufficient assets to satisfy the debt and is at risk of losing his or her primary residence."

31. It is clear from this judgment that the two sub-rules are not, as a matter of course, to be read conjunctively. It may be necessary, in the proper exercise of a court's

[3] Erasmus, and the cases cited in n4, A2-86
[4] 2019 (2) SA 216 (SCA) at paras 15 & 17

discretion to grant foreclosure in respect of a primary residence of a debtor, to read the two conjunctively. However, this applies where it is necessary to do so to ensure that any foreclosure order will not unjustifiably undermine the debtor's right to housing.

32. In the present case, as I indicated in my judgment, there was no evidence to establishing that it was necessary to read the two sub-rules conjunctively. The third respondent is not indigent. Further, as I discuss further below, there is no evidence that he will be rendered homeless by the foreclosure against the first respondent's property.

33. For these reasons, I find that there is reasonable no prospect that another court would find differently on this issue.

Third, fourth, fifth, sixth and ninth grounds of appeal: Rule 46A

34. I have grouped the above grounds of appeal together because they are all in some way or another directed at my concluding that the applicant was entitled to an order declaring the immovable property specially executable. In essence, the submission is that I erred in concluding that the applicant had complied with the requirements of Rule 46A, and in my finding that an order of executability was appropriate under that Rule.

35. I dealt with this issue in paragraphs 11 to 18 of my written judgment. I first dealt with the issue of whether Rule 46A was even applicable, given that the registered owner of the immovable property was the first respondent, a corporate entity. I questioned whether it was applicable, and I questioned whether there was evidence before the court to show that the immovable property was the third respondent's primary residence. Nonetheless, I went on to consider whether the requirements of

Rule 46A had been met on the assumption that the rule applied. I pointed out that this was the approach that had been adopted by the applicant in its application. It was on this basis that I ultimately decided that the applicant was entitled to an order of executability, taking into the consideration the requirements of Rule 46A.

36. At the hearing of the application for leave to the applicant referred me to the cases of *Absa Bank v Mokebe and related cases*[5], and *Standard Bank of South Africa Ltd v Hendricks and another and related cases*[6] as authority for the principle that Rule 46A only "concerns and applies to those properties which are primary homes of debtors who are individual consumers and natural persons".

37. Quite apart from this authority, even if Rule 46A was applicable in this matter, as I have indicated, this was fully dealt with in my written judgment. Even if one were to overlook the basic principle of corporate personality, and treat the property as if it were that of the third respondent, there remain questions around whether it is indeed his primary residence. The applicant provided evidence to the effect that the third respondent has provided a residential address in London, and that he has extensive ties to the United Kingdom and Zimbabwe. No evidence was provided by the second respondent himself to refute this. In any event, my judgment covered the possibility that the property might be his primary residence. Regardless of who the property belongs to, and whether or not it is the second respondent's primary residence, all bases were covered by the applicant in its application, and by me in my judgment.

38. I gave due consideration to the issues required to be considered before an order of executability is granted. There was no substantiated evidence the third respondent

[5] 2018 (6) SA 492 (GJ) at para 59
[6] 2019 SA 620 (WCC)

is indigent and that he will be rendered homeless by the order. The third respondent provided no information to the court to indicate that this was the case. As stated in my judgment:

> "On the contrary, what the court does know from the papers is that the loan was advanced to Manhattan for purposes of a business venture: it was not to provide funding to purchase the property. From the text messages exchanged between Mr Matienga and Mr Katz, Mr Matienga holds himself out to be an international businessman involved in various ventures across international jurisdictions. At one stage, he claimed that he had access to funding in Dubai (although it has to be said that this did not result in Manhattan actually meeting its obligations under the loan agreement). He also appears (from the text messages) to be a co-owner of another property in Johannesburg valued by him at the time to be worth R9 million. Mr Matienga was also willing to sell the property to a private buyer before getting cold feet and refusing to sign the transfer documents. This fact also appears from the text messages exchanged between the parties. In short, these facts do not describe the profile of a debtor who would be rendered homeless by an order of execution."

39. The respondents do not say how I erred in reaching this conclusion. I can see no reasonable prospect of another court finding differently.

40. As far as I can make out, the sixth ground of appeal seeks to imply that I erred in failing to protect the private law interests of the first respondent by granting the foreclosure order. While the first respondent has an interest as owner in the property, so too does the applicant. It is the registered holder of a mortgage bond over the property. As such, and as is trite in our law, it has a real right in that property. Our law permits a bondholder to have the property declared specially executable. Under our constitutional dispensation, this right is tempered to some extent in order to protect indigent homeowners from being rendered homeless as a result of the foreclosure process. Through this, the private interests of the homeowner, and of the mortgage bond holder are balanced. I am unpersuaded that there is any reasonable prospect that another court would find that the balance was incorrectly struck by me in this case.

41. The fifth ground of appeal appears to relate to the exercise of my discretion to not place a reserve price on the execution of the property. It is said that I should have found that Ms Vanmali intended to buy the property "for a song". It is for the execution creditor to determine who the property should be sold in execution. The normal course is to instruct the Sheriff to conduct a public auction. The effect of the order of executability does not mean that the property will be sold to Ms Vanmali for R3,4 million. The respondents assume that this will be the case, but this is an incorrect assumption. There is no merit in this ground of appeal.

Eighth ground of appeal

42. The respondents call this a constitutional ground of appeal. They say that:

> "The procedure employed by the Learned Judge to refuse the fact that a consolidation application was pending and place the matter before her into hiatus, it is respectfully submitted does not pass constitutional muster."

And further:

> "whether the hearing of a matter takes precedence despite a consolidation application having been filed, has not been the subject for judicial consideration by the South African Courts with the result that there are compelling reasons why the appeal should be heard as understood in the meaning of section 17 (1)(a)(ii) of the Superior Courts Act 10 of 2013".

43. The respondents contend that this is an issue of national importance and that for this reason, it is imperative that a court of appeal should consider the issue.

44. As I have already discussed, the issue of the pending consolidation application was raised by the respondents at the hearing in support of their postponement application, and in relation to the recusal application. It also tangentially featured in the *lis alibi pendens* defence raised by them. For reasons given *ex tempore*, I declined to postpone the main application pending the finalisation of the

consolidation application. This would have caused a considerable delay in the finalisation of the matter, and would not have served the interests of justice.

45. As to the *lis alibi pendens* defence, the respondents' case was that Ms Vanmali's application was a replication of the main application, and that I should therefore pend the main application until after the two applications could be consolidated and heard together. I considered the requirements for the defence of *lis alibi pendens*, and found that they had not been met. The main application was not a replication of Ms Vanmali's application. The two applications did not share the same cause of action. In the circumstances, I was not called upon to exercise my discretion under that defence, to suspend the hearing of the main application.

46. The respondents sought to argue that there ought in law to be a basic principle that once an application for consolidation of two cases is filed, no further separate proceedings should be permitted to take place until the consolidation is finalised and both matters are disposed of together. Rule 11 permits the consolidation of different matters if this is convenient. However, it does not provide that the effect of a consolidation application is to stay all proceedings in the matters pending consolidation. The respondents suggest that this is a lacuna in our law, and that it is a matter of national and constitutional importance that the issue should be brought to the attention of an appeal court by granting leave to appeal in this matter.

47. As I have indicated, the consolidation application was not before me, and I was not required to apply Rule 11. Whether or not there is a lacuna in Rule 11 which is unconstitutional was not an issue I was asked to determine. In my view, it is therefore not an issue that arises for consideration by a court of appeal in this case.

48. The issues that a court of appeal would have to consider in this case is whether or not I erred in my rejection of the *lis alibi pendens* defence, which defence involved

argument on the fact that there was a pending consolidation application; and whether or not I misdirected myself in refusing the postponement application. In the latter regard, the refusal of a postponement application is not normally appealable, being as it is interlocutory in nature. However, even assuming that it was, the consolidation issue is one of the factors that was brought to my attention and to which I applied my mind in exercising my discretion. It was not the only consideration, but it was one of the many that I considered.

49. In my view, it is only in these respects that the effect of a consolidation application is at all relevant to an appeal in this case. In fact, the manner in which the consolidation was raised before me, tends to show that there is not, in fact, a lacuna in the law. Where there is a pending application for consolidation a party has many avenues of recourse available to them under our existing law as it stands. She may apply for a postponement (as the respondents did in this case); she may apply for a stay; or she may raise the *lis alibi pendens* defence (again as the applicant did in this case) in an appropriate case.

50. In all of these remedies, the court has a discretion to grant an order that has the effect of holding matters in abeyance until consolidation has taken place and the matters are heard together. Such orders are made by courts under our existing law as it stands when it is appropriate to do so. The fact that the respondents did not succeed in obtaining such an order before me is not indicative of a pressing lacuna in our law of a constitutional nature. They did not succeed on the application of existing principles of law. If they were to succeed on appeal, it would be because another court found that I erred in applying the existing law. A court on appeal would not have to consider any lacuna in our law in order to make that determination, as

suggested by the respondents. Any appeal would simply be on the basis of the application of existing rules and principles to the facts of the case.

51. For all of these reasons, I find that there is no reasonable prospect that another court would find that I erred or misdirected myself in failing to give proper consideration to the fact that there was a pending consolidation application in rejecting the *lis alibi pendens* defence, and in refusing the application for a postponement. Nor am I persuaded that an appeal should be granted on the basis that this would be in the interests of justice.

GROUNDS OF APPEAL: THE RECUSAL APPLICATION

52. The tenth ground of appeal is directed at the refusal of the recusal application. The respondents say in this regard that:

> "The tenth ground of appeal is the Learned Judge ought to have recused herself as she had heard the application to compel the submission of heads of argument by the Respondents:
> 1.10.1.The Learned Judge acted in a grossly biased manner and thus denied the Respondents the attainment of justice by refusing to recuse herself;
> 1.10.2.The Learned Judge ought to not have deferred to the opinion of the counsel of ASSETLINE to proceed with the matter;
> 1.10.3.The Learned Judge had initially adopted a consonant approach of vacating the hearing of the matter but was persuaded by the counsel for ASSETLINE to hear the matter;
> 1.10.4.The Learned Judges failure to decide effectively on her own renders her impartiality circumspect and thus reasonable apprehension of bias remained alive;
> 1.10.5.The Learned Judge failed to percolate that she had intimated that at the hearing of the application to compel heads that she had given an ex tempore judgement wherein she indicated that consolidation application will always be considered in due course;
> 1.10.6.The Learned Judge's sentiments were of such a nature to contaminate the expectation of fair and unbiased decision given the fact that she went against the grain of her own expressions on the 17th day of March 2020…"

53. And further, with reference to s165 and the Preamble to the Constitution, they say that:

> "…it is inherently inappropriate for a court of law, as the court a quo, the constitutionally designated primary protector of personal rights and freedoms, to pursue such a course of conduct of punishing the Respondents for raising their hands in unison that the conduct of Mr Greenberg be probed and deserved judicial

censure and for trying to persuade the Court to hear the consolidation application first…"

54. The recusal application was premised on the fact that I had heard the application against the respondents to compel their filing of heads of argument in unopposed motion court. The respondents' complaint was that the consolidation application was a pertinent issue raised at that hearing. It was also going to be a pertinent issue raised at the hearing in the main application. They said that I had refused to consider the consolidation application as a factor in the unopposed motion court, and had instead granted an order compelling them to file their heads of argument and to pay costs on an attorney and client scale. The respondents submitted that given what had transpired in unopposed motion court, their expectation was that once again I would not be willing to consider the consolidation application as a factor, thus rendering me biased for purposes of the main application.

55. The test for recusal, as set out in *Coop and others v South African Broadcasting Corporation and Others*[7], is comprised of the following components:

> "First, the test is whether the reasonable objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial."[8]
>
> "Secondly, the test is an objective one. The requirement is described... as one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial."[9]
>
> "Thirdly, there is a built-in presumption that, particularly since Judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence the applicant bears the onus of rebutting the weighty presumption of judicial impartiality.... (T)he purpose of formulating the test as one of 'double reasonableness' is to emphasise the weight of the burden resting on the applicant for recusal."[10]

[7] 2006 (2) SA 212 (W) at 213C
[8] Para 19. See also President of the *Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) at 177B-E
[9] Para 20
[10] Para 21

> "Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel."[11]

56. It is not a ground for recusal that a Judge expressed an opinion at a previous stage in the same case which was based on the hearing of the case itself, or in another case between the same parties.[12] Further:

> "When in any case a judge finds upon the law or evidence he is discharging a duty and there can never be a suggestion that merely because such a finding is adverse to one of the parties the Court is biased or hostile to that party. The fact that findings are made in judicial proceedings, published ex cathedra, in the discharge of a duty rebuts any presumption of malice or ill-feeling."[13]

57. As I indicated in the *ex tempore* reasons for my dismissal of the recusal application, in unopposed motion court, the respondents argued that they should not be ordered to file their heads of argument in the main application because the effect of the recently filed consolidation application was to put an automatic halt on the main application. I rejected this argument, and ordered that they file their heads. I suggested to the respondents that if they felt it was relevant, they could deal with the issue in their heads of argument.

58. This decision was based on a simple application of the rules set out in the Practice Directives of this Division. They permit a party to apply to compel the filing of heads of argument by the other party if they have not been filed timeously. The main application had been enrolled for hearing on the opposed motion court roll some weeks hence, and the respondents had not filed their heads. That was the situation before me. I took the view that the consolidation application (which had been filed

[11] Para 22
[12] *Berman v Wigoder* 1949 (2) SA 252 (C)
[13] *Law Society v Steyn* 1923 SWA 59 at 60-1

only the day before the unopposed motion court hearing) did not alter the applicant's entitlement to an order compelling the respondents to file their heads of argument.

59. I made a procedural legal decision based on the facts and rules applicable. The fact that I found against the respondents does not amount to bias. The test is not a subjective one, but an objective one.

60. At the commencement of the hearing in the main application, the respondents' counsel reminded me of what had transpired in the unopposed motion court some weeks before. He indicated that this formed the basis for the recusal application. I suggested to the parties that it may be pragmatic for the matter to be heard by one of the other Judges assigned to the opposed motion court roll. I recalled that I had made an attorney and client costs order against the respondents and that the interchange with counsel for the respondents had been robust. I thought it might obviate the need for a recusal application if a Judge without any history in the matter could hear the main application.

61. However, after taking an instruction from his attorney, counsel for the applicant indicated that they were not agreeable to this suggestion, and that the recusal application should be heard and a ruling made. Once this was communicated to me, I proceeded to hear the recusal application. Counsel for both the respondent and the applicant addressed me, and I was referred to the relevant authorities. Ultimately, I ruled in favour of the applicant and refused the recusal application for reasons stated *ex tempore*. This does not, contrary to the respondents' suggestion, amount to deferring to the opinion of counsel for the applicant. It is a normal function of our adversarial system that invariably a Judge will have to decide to accept the submissions made by counsel representing the one party over those of counsel representing the other party. It is not evidence of bias.

62. I am unpersuaded that on an application of the principles governing recusal there is a reasonable prospect that another court would find that I erred in not recusing myself from the main application.

CONCLUSION AND ORDER

63. In summary, I find that none of the grounds of appeal advanced have merit.

64. I make the following order:

"The application for leave to appeal is dismissed with costs."

R M KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date Heard (by videolink)	: 08 JULY 2020 (with further written submissions being presented subsequently)
Date of Judgment	: 19 AUGUST 2020
Counsel for the applicant	: JM Hoffman
Instructed by	: Swartz Weil Van der Merwe Greenberg Inc
Counsel for respondent	: M Kufa; M Moropene
Instructed by	: Machaba Attorneys