



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: 2022/2958

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: NO

15 August 2022

A handwritten signature in black ink, appearing to read "E. Molokwane", is written over a horizontal line.

In the matter between:

**INZALO ENTERPRISE MANAGEMENT
SYSTEMS (PTY) LTD**

Applicant

and

MOGALE CITY LOCAL MUNICIPALITY

First Respondent

THE MUNICIPAL MANAGER

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be August 2022.

LEAVE TO APPEAL: JUDGEMENT

Molahlehi J

[1] Application involves both the application for my recusal and leave to appeal. Should the application for the recusal be successful, the application for leave to appeal would be postponed *sine die* to arrange for another judge to be appointed to hear the application. Both applications arise from the judgment made in favour of the respondent (the applicant in the main matter). The judgment which was made on the urgent basis interdicted the applicant (the respondent in the main matter) from giving effect to a tender or appointing a company as a service provider pending finalisation of internal complaint processes and for the review of the awarding of the tender. There are other ancillary orders which were made in the judgment.

Application for recusal

[2] The controversy about the recusal is not based on the complaint about my conduct as the presiding judge but rather due to the correspondence that the respondent had addressed to the court. The complaint is that I have been compromised and would be biased due to the contents of the letter.

[3] A copy of the letter was emailed to the secretary of the court. In a sense, the letter is a complaint about the fact that the applicant has not complied with the court order and that a response to the leave to appeal launched by the applicant is a

delaying tactic on the part of the applicant. In paragraphs 3,4 and 5, the letter states the following:

- “3. Despite conceding the irregularities of the impugned decision, the Municipality has now launched an application wherein it seeks leave to appeal Your Lordship's order.
4. We are of the view that the Municipality has no prospect of success and that its application amounts to an abuse of court for the reasons set out hereunder.”
5. To date hereof, the Municipality has failed to comply with the court order as it has failed, inter alia, to provide our client with undertakings that it will abide by paragraph 2.1 and 2.2 of the court order.”

[4] The applicant contended that it was "unheard of in the South African legal system" for an attorney to address correspondence directly to the court. This, according to the applicant, has placed the "Presiding Judge in an untenable position" and thus, the only option left "to preserve the integrity" of the court is recusal of the presiding judge.

[5] The principles governing the recusal of a presiding judge are set out in *Bernert v Absa Bank Ltd*,¹ a case relied on by the applicant in support of its application for recusal. The Constitutional Court in that case, held that:

"28 It is, by now, axiomatic that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually

¹ 2011 (3) SA 92 (CC) in paragraphs [28] to [37].

biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution".

[6] The Constitutional Court further held that:

"34 The other aspect to emphasise is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable. As we pointed out in *SACCAWU*, "the two-fold emphasis . . . serve[s] to underscore the weight of the burden resting on a person alleging judicial bias or its appearance." This double-requirement of reasonableness also "highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough." The court must carefully scrutinise the apprehension to determine whether it is, in all the circumstances, a reasonable one."

[7] In my view, considering the facts and the circumstances of this case, there is, in the first instance, no basis for believing that I would be "actually biased" in considering the application for leave to appeal. As indicated earlier, the applicant does not attribute any wrongdoing on my part as far as its complaint is concerned.

[8] Secondly and again, based on the circumstances of this case, I have not been persuaded that there exists a reasonable apprehension of biased. It is common cause that the respondent had copied all correspondence that it addressed to the court to the appellant. The appellant was aware of the communication addressed to the court by the respondent at all material times. The main thrust of the letter concerning issues that are raised in the applicant's leave to appeal.

[9] In light of the above, I find that the applicant has failed to make out a case for my recusal and, according the application, stands to fail.

Application for leave to appeal.

[10] Having found that the recusal application was unsustainable, I turn to deal with the application for leave to appeal. As indicated earlier, the leave to appeal is a consequence of the judgment of this court made on 21 June 2022.

[11] The applicant has raised several grounds for leave to appeal in its leave to appeal. The grounds of appeal raised by the applicant appear on the record; therefore, I do not deem it necessary to repeat the same in this judgment.

[12] The test for leave to appeal as set out in section 17(1) (a) (i) of the Superior Courts Act 10 of 2013, is now well known in our law. It is also well established that the test as envisaged in this section is more stringent or requires a higher standard than the previous test. To succeed in an application for leave to appeal, the applicant must demonstrate that his or her appeal "would" have a reasonable prospect of success or that there are other compelling reason/s which would include other issues of public interest.

[13] The respondent in its opposition to the application, has raised a preliminary point relating to the appealability of the judgment. The applicant contends that

judgment is appealable because it is dispositive of a substantial portion of the relief claimed in the main claim or has final effect on the issues in dispute.

[14] The correct approach to adopt when dealing with whether a case is appealable is set out by the Constitutional Court in *Tshwane City v Afriforum Another*,² which is relied on by both parties in support of their conflicting propositions. The approach is summarised as follows in that case:

"Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativized the final effect of the order or the disposition of the substantial portion of what is pending before the review court in determining appealability."

[15] In my view, this matter is not appealable when regard is had to the fact that the order is interim pending the outcome of the review application. Furthermore, considering the facts and the circumstances of this case, it is not in the interest of justice to grant leave to appeal.

[16] Turning to the issue of reasonable prospects of success, I am of the view that the applicant has failed to satisfy the applicable test in that regard. The issues raised in the grounds for appeal are issues dealt with in the judgment. Having considered the grounds for appeal, the judgment of this court and the submissions made by the parties, I have not been persuaded that there are prospects of success on appeal.

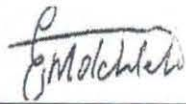
² 2016 (2) SA 279 (CC).

[17] The applicant's application for leave to appeal stands to fail.

Order

[18] In the premises, the following order is made:

- 1 The application for my recusal is dismissed with costs.
- 2 The applicant's application is dismissed with costs.



E MOLAHLEHI J

Judge of the High Court,

Gauteng Local Division, Johannesburg

APPEARANCES

Counsel for the applicants: JJ Botha

Instructed by: SMITH VAN DER WATT ATTORNEYS

Counsel for the respondents: WH POCOCK

Instructed by: DI SIENA ATTORNEYS

Hearing date: 3 August 2022

Delivered: 15 August 2022.