REPUBLIC OF SOUTH AFRICA

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

Case Number: 2022-009834

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

4/08/2023
DATE

[redacted]
SIGNATURE

In the matter between:

JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE First Applicant

RAYMOND MNYAMEZELI MLUNGISI ZONDO N.O Second Applicant

and

SALIM AZIZ ESSA First Respondent

IN RE:

SALIM AZIZ ESSA First Applicant

and

JUDICIAL COMMISION OF INQUIRY INTO STATE CAPTURE First Respondent

RAYMOND MNYAMEZELI MLUNGISI ZONDO N.O Second Respondent

JUDGMENT

STRYDOM, J

Introduction

[1] This is an application for the recusal of me as the presiding judge in this matter, brought by Mr Seleka, appearing with Ms Modise, counsel for the first and second applicants in this application (hereinafter referred to as counsel for the JCE). On behalf of the respondent (hereinafter referred to as Mr Essa) Ms Van Aswegen appeared.

[2] For purposes of dealing with this recusal application, a short synopsis of the background to the postponement application should be provided: Mr Essa brought a review application to set aside parts of the report delivered by Raymond Mnyamezeli Mlungisi Zondo N.O, the second respondent in the review application (herein after referred to as the main application). The JCE opposed the main application by notice filed on 22 August 2022. The JCE is still to file an answering affidavit in the main application.

[3] The next relevant event, was when the JCE, on or about 1 February 2023 served an application, supported by a founding affidavit, in which the following relief was sought:

1. The Applicant's review application under the above case number is dismissed with costs.

2. Alternatively, to 1 above, the Applicant's review application, under the above case number, is stayed pending the Applicant's compliance with the order in 3 below.

3. The Applicant is directed to provide security for the Respondents' costs in the review application under the above case number, in the amount of R5 000 000.00 (five million rands) to the Registrar of this Court within ten (10) days from the date of this order.

4. That failing compliance by the Applicant with the order in 3 above, leave is hereby granted to the Respondents to supplement the papers in this application and apply for an order for dismissal of the Applicant's review application.

5. That the Applicant is ordered to pay the costs of this application in the event of opposition.

6. That the Respondents be granted such further and/or alternate relief.

[4] A notice of intention to oppose this application was filed on 8 February 2023. When Mr Essa failed to file an answering affidavit, the JCE caused the matter, through the registrar of this court, to be set down on the unopposed motion court roll to be heard on 2 May 2023. On or about 1 May 2023 – a public holiday – Mr Essa filed his purported answering affidavit in this further application. I refer to this affidavit as "purported" as the JCE disputes that the document was lawfully commissioned and as such not an affidavit. (hereinafter referred to as the "answering affidavit")

[5] After the filing of the answering affidavit, the matter was postponed *sine die* by the unopposed court. The matter now became an opposed application. It was filed on Case Lines under the section titled "Interlocutory application for security of costs". Whether it is in fact an interlocutory application or not, is not a relevant for purposes of deciding the recusal application, suffice to state that it became an opposed application and may be interpreted to be interlocutory to the main application (in this judgment this application would be referred to as the "interlocutory application). Final relief is sought by the JCE in this interlocutory application, as indicated in prayer 1 of the notice of motion quoted hereinabove.

[6] After the interlocutory application became opposed and an answering affidavit was filed, the JCE on 30 May 2023 filed a replying affidavit. The JCE applied for the set down of the interlocutory application and the registrar then set the matter down. On 6 July 2023 Mr Essa was notified that the matter was set down in the opposed motion court on 31 July 2023. I allocated the matter to be heard at 14h00 on the 3rd of August 2023, but after a request was made on behalf of Mr Seleka, citing his unavailability at 14h00, as he was travelling to Limpopo Province, I changed the time for hearing to 10h00 on the same day.

[7] In the interim, Mr Essa filed an application for the postponement of this interlocutory application. This was filed on 27 July 2023, after correspondence was exchanged between the parties. This application became opposed on 28 July 2023 and an opposing affidavit was filed in unsigned form. On Monday 31 July 2023, a signed opposing affidavit was uploaded onto Case Lines. This was followed by a replying affidavit filed on behalf of Mr Essa. When the matter was called, I informed the parties that I am of the view that the Court should deal with the postponement application upfront. Ms Van Aswegen then proceeded to argue her case, submitting that the matter was set down as an opposed application in contravention of Practice Directive 2 of 2022.

[8] The Court engaged with Ms Van Aswegen and remarked that the unavailability of the counsel in this matter, would not be a reason in and of itself for the postponement of the opposed interlocutory application but instead, the non-compliance with the Courts' Directive might be a ground for postponement. It was stated by me, that the Court would also have to first hear from Mr Saleka on this issue.

[9] When writing this judgment, the Court did not have a typed record available of the proceedings, but has a recollection of what, in broad terms, transpired. When Mr Seleka proceeded with his address, he referred to Mr Essa as a fugitive from justice, and I pointed out that this issue was the subject matter of the interlocutory application.

[10] A debate ensued between Mr Seleka and I on whether the matter stands to be postponed based on the unavailability of counsel. It was argued that a deponent to the founding affidavit in the postponement application stated that Adv Hollander indicated that he would not be available on 31 July 2023 as he would be involved in an arbitration, which is proceeding on the same date. It was submitted by Mr Seleka that when the matter was allocated to be heard on a different date, to wit 3 August 2023, this would mean that he should be available to argue this matter on the latter date.

[11] It was argued that in the Replying affidavit it was stated that Mr Hollander is still not available on 3 August 2023 as he would be involved in arbitrations (in plural).

[12] It was argued that the credibility of the deponent of the affidavit was questionable. The court then made a remark that an arbitration, when set down for hearing on a particular date, may run for a longer. Mr Seleka then said that I was giving evidence from the bench. He put a question to me, and I responded by informing him that he should not put questions to the Court. I then said that the Court does not regard the unavailability of counsel as a ground for postponement but would rather hear submissions on the issues pertaining to whether the JCE complied with the directives of this court pertaining to the requirements of setting down of this opposed matter. Mr Seleka pointed out that the matter was set down by the registrar. I posed the question that "I wonder how the matter found its way onto my opposed roll considering that the terms of the directive were not followed". Issues as to when and how a postponement application can be brought was discussed.

[13] During the debate Mr Seleka stated at some stage that the court appears to be unwilling, or perhaps even unable to see the inconsistencies between the affidavits filed on behalf of Mr Essa. I posed the question whether it is suggested that Mr Hollander was untruthful about his unavailability. Shortly thereafter, Mr Seleka briefly spoke to his junior and asked for my recusal.

[14] The Court adjourned to consider how this application should be dealt with procedurally. On my return to Court, I asked Mr Seleka to proceed with his application for my recusal. He stated that through my engagement during argument, I created the perception of bias against his client, and argued that I gave evidence from the bench in assistance of the case for postponement on behalf of Mr Essa. This relates to my statement that arbitrations are not set down for one day and may proceed for longer. This statement indicates, as it was argued, that the Court has made a pre-determination on the postponement application. This impression, so the argument went, is intricately bound to the unavailability of the counsel issue.

[15] It was argued that the court was unable, perhaps even unwilling to see the inconsistencies in the unavailability of counsel issue, which is an indicating of pre-judgment. Further, it was argued that my statement that I "wondered" how the matter found its way to my opposed roll created the impression, or implied,

suspicion or some form of underhandedness in the setting down of the matter. It was also argued that the Court's demeanour or tone during engagement with Mr Seleka were indicators of pre-judgement.

[16] Finally, it was argued that as I showed a willingness to hear the postponement application, I acted against the authority of a case referred to as *Imperial Logistics Advance*, an SCA decision. Mr Seleka did not elaborate on the facts or findings of this case.

[17] Counsel for the respondent opposed this application, stating that the Court's inquiry as to how the matter was set down cannot be interpreted to suggest or imply some form of underhandedness. Rather, the inquiry was about the non-compliance with the Directives of this Court. This, she argued, could not have created a perception of bias.

[18] Ms Van Aswegen pointed out that the Court indicated to her that it was the Courts' view that the unavailability of counsel, standing on its own, could not provide sufficient ground for postponement of the matter, but rather, the issue of non-compliances was to be addressed. Ms Van Aswegen argued that the Court can express a *prima facie* view in this regard. She further pointed out that I said that I still need to hear Mr Seleka on these issues.

[19] My recusal is sought on the basis that I created a perception of bias against the JCE. To consider this, I find it necessary to make mention of, and consider the legal prescripts on recusal applications.

The legal position on recusal applications

[20] The approach to be taken to applications for recusal of judicial officers is authoritatively laid down by the Constitutional Court in two cases[1], namely, *President of the RSA and others v South African Rugby Football Union and others*[2], where the full court formulated the approach to recusal as follows:

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[1] It has also been considered by the Supreme Court of Appeal in *S v Roberts* 1999 (4) SA 915 (SCA), 1999 (2) SACR 243 (SCA); *Sager v Smith* 2001 (3) SA 1004 (SCA) and *S v Shackell* 2001 (4) SA 1 (SCA).

[2] *President of the RSA and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (*SARFU*).

"...the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably 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 the judges to 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 minds of any irrelevant personal beliefs or predispositions. They must take into account 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 a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."[3]

[21] This was confirmed in the later judgment of *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd* (Seafoods Division Fish Processing)[4], where Cameron AJ, as he then was, citing the judgment of the Court of Appeal in *Locobail (UK) Ltd v Bayfield Properties Ltd and another*[5], pointed that a court considering a recusal application asserting a reasonable apprehension of bias must give consideration to two contending factors:

"On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is 'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'"[6]

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[3] Id at para 48.
[4] *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (*SACCAWU*) at para 2.
[5] *Locobail (UK) Ltd v Bayfield Properties Ltd and another* [2000] 1 All ER 65 (CA) at para 21.
[6] *SACCAWU above n4* at para 7.

[22] It follows then, that where the claimed disqualification is based on a reasonable apprehension, the test is, therefore, an objective one, having regard to whether the reasonable, objective, and informed person would on the correct facts reasonably apprehend that the judge would not be impartial.

[23] Applying this test, I am of the view that my engagement with counsel during argument was not as such that a reasonable, objective, and informed person would, on the correct facts, have reasonably apprehend that I would not have brought an impartial mind to hear and decide this postponement application. I did express views as I read the papers in the application before the hearing. My strongest view expressed during engagement with Ms Van Aswegen was that the unavailability of counsel, standing on its own would not ordinarily be a sufficient a ground for postponement of a matter. She argued the non-compliances with the Directive 2 of 2022 and what is required before a matter can be set down on the opposed roll. I indicate to her that this may be a ground for the postponement of the matter as the convenience of the Court, also became a consideration. I made it clear that I still wanted to hear what Mr Seleka had to argue on this alleged issue of non-compliance with the Directive. When Mr Seleka then started his argument, he never fully addressed the Court on this issue, as he, during the course of his argument, applied for my recusal.

[24] In my view, what I said, would not have been conceived by a reasonable person as a pre-determination of the matter, but rather, be seen as active participation by a presiding Judge with counsel during argument. I have expressed views but have not pre-determined the application. My *prima facie* views expressed were still subject to persuasion to be incorrect. This could not have created a perception of bias.

[25] As far as the allegation on giving evidence from the bench is concerned, the statement of the Court in itself cannot be objectively interpreted to mean that I was favouring a version on behalf of Mr Essa's application for postponement.

[26] As I indicated to counsel, my view was that his arguments to prevent a postponement should rather focus on the non-compliance issues raised. A

reasonable person would not have perceived that I pre-determined the application.

[27] I never raised my voice, or changed my demeanour, which can be interpreted as being biased in favour of Mr Essa. In my view, there could not have been a reasonable apprehension of partiality in favour of Mr Essa, when I required argument on the issue whether the Directive, as far as setting down a matter is concerned, was complied with.

[28] When the documents and dates of filing are considered, as was pointed out by Ms Van Aswegen, various documents were not filed, alternatively, not timeously, as required in paragraph 136.1 of practice Directive 2 of 2022. The Court was still awaiting Mr Seleka's submissions in this regard as this might have been explained by him. He could still have convinced the Court that should there have been non-compliances, this could be overseen or condoned by the Court. A reasonable, objective, and informed person would have concluded as such.

[29] The onus was on the applicant in this recusal application to indicate, on a balance of probabilities, that I should recuse myself based on perceived bias. In my view, the JCE has failed to meet the test for reasonable apprehension of bias. Accordingly, I conclude that the application for my recusal should be dismissed.

[30] The parties have not addressed me on costs, and I will invite them to address me on this issue, whereafter I will make an order pertaining to costs.

Order

[31] I make the following order:

1. The application for my recusal is dismissed, and

2. The applicants' are, jointly and severally, the one paying the other to be absolved, to pay the wasted costs occasioned by of this recusal application.

[32] As to the postponement application—

1. By agreement between the parties, the matter is postponed *sine die*; and

2. I order no costs in the postponement application.

R STRYDOM

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:	Ms. S. Van Aswegen instructed by Swartz Weil Van Der Merwe Greenberg Inc
For the Respondents:	Mr P Seleka SC, with Ms T Modise instructed by BR Rangata Attorneys
Date of hearing:	03 August 2023
Date of judgment:	04 August 2023