

SOUTH AFRICA / JUDGMENT

Fernandes v Niel N.O. and Others (8923/2021) [2022] ZAGPPHC 493 (15 July 2022)

[2022] ZAGPPHC 493

COURT

North Gauteng High Court, Pretoria

BEFORE

Phooko

CASE / FILE NUMBER

8923/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 8923/2021

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

15/07/2022

In

the matter between:

ARAUJO,

CARLOS ALBERTO FERNANDES

Applicant

and

KRIGE, NIEL

N.O.

First Respondent

KRIEGE,

NEL

Second Respondent

NDYAMARA,

AVIWE NTANDAZO N.O.

Third Respondent

MADLALA,

MANDLA PROFESSOR N.O.

Fourth Respondent
MULLER, JOHANNES
ZACHARIAS HUMAN N.O.
Fifth Respondent
SWIFAMBO
RAIL LEASING (PTY) LTD
Sixth Respondent
(in
final liquidation)
NDYAMARA,
AVIWE NTANDAZO N.O.
Seventh Respondent
TIMKOE,
NICHOLAS N.O.
Eight Respondent
RAILPRO
HOLDINGS (PTY) LTD
Ninth Respondent
PASSENGER
RAIL AGENCY OF SOUTH AFRICA
Tenth Respondent
WKH
LANDGREBE &
CO
Eleventh Respondent
BEE
ONE INVESTMENTS (PTY) LTD
Twelfth Respondent
AM
INVESTMENTS (PTY) LTD
Thirteenth Respondent
COMMISSIONER
FOR THE SOUTH AFRICAN
Fourteenth Respondent
REVENUE
SERVICE
MASTER
OF THE HIGH COURT, GAUTENG
Fifteenth Respondent
DIVISION,
PRETORIA

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] The Applicant was summoned to appear before a Commission of Enquiry (“the Enquiry”) that has been established to investigate the trade and dealings of the Sixth Respondent. During the proceedings before the Enquiry, the Applicant launched this application seeking an order declaring the First Respondent not fit and proper to act as the Commissioner of the Enquiry, in the alternative the recusal of the First Respondent as the Commissioner of the Enquiry, and the setting aside of the appointment of the First Respondent as the Commissioner of the Enquiry. In addition, the Applicant asks for a punitive cost order against the Second Respondent.

[2] The Applicant seeks the aforesaid various forms of relief in so far as they only relate to his attendance at the Enquiry.

[3] The First Respondent and Second Respondent are the only parties who oppose the relief sought in this application.

THE PARTIES

[4] The Applicant is Carlos Alberto Fernandes, a major male businessman who resides and conducts business on a farm situated in the Western Cape.

[5] At the farm, the Applicant is:

3.1 the general manager of the business activities conducted on the farm, being a grape-growing farming enterprise (and the management of a luxury lodge); and

3.2 the farm’s immovable property is owned by Okapi Farming (Pty) Ltd where the Applicant is the registered owner of 400 ordinary

shares (out of 1000 issued ordinary shares) in the capital of Okapi.

- [6] The First Respondent is Niel Krige N.O. an adult male who is cited in these proceedings by virtue of his appointment, by this Court, on 28 May 2019, as the Commissioner of the Enquiry in terms of section 417 of the Companies Act 61 of 1973 as read with Item 9(1) of Schedule 5 of the Companies Act 71 of 2008 to investigate into the affairs of the Sixth Respondent in terms of the provisions of section 418(1)(a) of the Companies Act 61 of 2008.
- [7] The Second Respondent is also Niel Krige an adult male who is cited in these proceedings in his personal capacity because the Applicant seeks a punitive costs order against him for having instituted these proceedings.
- [8] The Third Respondent is Aviwe Ntandazo Ndyamara, N.O. who is an adult male professional liquidator and an administrator of insolvent estates, a director and shareholder of the Tshwane Trust Co (Pty) Ltd conducting its business in Pretoria. The Third Respondent is cited in these proceedings in his capacity as the joint final liquidator of the Sixth Respondent and because of the interest that he may have in the outcome of these proceedings. There is no relief sought against him.
- [9] The Fourth Respondent is Mandla Professor Madlala N.O, an adult male professional liquidator and administrator of insolvent estates who is also a managing member of Msunduzi Asset Management & Recoveries CC and conducts business in Pietermaritzburg, Kwa-Zulu Natal. The Fourth Respondent is cited in this application in his capacity as the joint final liquidator of the Sixth Respondent and because of the interest that he may have in the outcome of these proceedings. There is no relief sought against him.
- [10] The Fifth Respondent is Johannes Zacharias Human Muller N.O. an adult male professional liquidator and administrator of insolvent estates who is also a director and shareholder of Tshwane Trust Co (Pty) Ltd which conducts its business in Pretoria. The Fifth Respondent is cited in this application in his capacity as the joint final liquidator of the Sixth Respondent and because of the interest that he may have in the outcome of these proceedings. There is no relief sought against him.
- [11] The Sixth Respondent is Swifambo Rail Leasing (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose address is 284 Milner Street, Waterkloof, Pretoria. The Sixth Respondent was liquidated on 28 May 2019. The Sixth Respondent is cited in this application because of an interest that it may have in the outcome of these proceedings, and there is no relief sought against it.
- [12] The Seventh Respondent is Aviwe Ntandazo Ndyamara, N.O., an adult male professional liquidator and administrator of insolvent estates who is also a director and shareholder of Tshwane Trust which conducts business in Pretoria. The Seventh Respondent is cited in this application in his capacity as the joint final liquidator of the Ninth Respondent and because of an interest that he may have in the outcome of these proceedings. There is no relief sought against him.

[13] The Eighth Respondent is Nicholas Timkoe N.O., an adult male who is a managing member and professional liquidator and administrator of insolvent estates at Mike Timkoe Trustees CC which conducts business in Port Elizabeth. The Eighth Respondent is cited in this application in his capacity as the joint final liquidator of the Ninth Respondent, and because of an interest that he may have in

the outcome of these proceedings. There is no relief sought against him.

[14] The Ninth Respondent is Railpro Holdings (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose address is 284 Milner Street, Waterkloof, Pretoria. The Ninth Respondent was liquidated and is only cited in this application because of an interest that it may have in the outcome of this application. There is no relief sought against it.

[15] The Tenth Respondent is the Passenger Rail Agency of South Africa, a legal person established in terms of section 22 of the Legal Succession to the South African Transport Services Act 9 of 1989 whose main place of business is at Prasa House, 1040 Burnett Street, Hatfield, Pretoria. The Tenth Respondent has a claim against the insolvent estate of the Sixth Respondent and is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought against it.

[16] The Eleventh Respondent is W K H Landgrebe & CO, a partnership that carries on a business as chartered accountants and auditors, whose main place of business is Suite 7, Denavo House, 15 York Street, Kensington B Randburg. The Eleventh Respondent has a claim against the insolvent estate of the Sixth Respondent, and is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought against it.

[17] The Twelfth Respondent is BEE One Investments (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose registered address is Suite 7, Denavo House, 15 York Street, Kensington B, Randburg, and an owner of registered 20% ordinary shares in the capital of the Sixth Respondent. The Twelfth Respondent is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought against it.

[18] The Thirteenth Respondent is AM Investments (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose place of business is 400 16th Road, Midrand, Gauteng. The Thirteenth Respondent is one

of the creditors of the Sixth Respondent and is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought against it.

[19] The Fourteenth Respondent is the Commissioner for the South African Revenue Service a legal persona appointed in terms of section 6 of the South African Revenue Service Act 34 of 1997 whose main place of business is Lehae La Building, 299 Bronkhorst Street, New Muckleneuk, Brooklyn, Pretoria. The Fourteenth Respondent

is only cited in this application because of an interest that it may have in the outcome. There is no relief sought against it.

[20] The Fifteenth Respondent is the Master of the High Court, Gauteng Division, Pretoria and is an office having been created as such by the Minister of Justice and Correctional Services of South Africa and being an office created in terms of the provisions of section 2 of the Administration of Estates Act 66 of 1965 whose main place of business is at Salu Building, Cnr. Andries & Schoeman Streets, Pretoria. The Fifteenth Respondent is cited in these proceedings because it is the administrative office that is charged with overseeing the administration of the insolvent estate of the Ninth Respondent, and there is no relief sought against it.

JURISDICTION

[21] The First Respondent was appointed by this Court as the Commissioner of the Enquiry which took place in Gauteng. In addition, the allegations leveled against the First Respondent occurred within the jurisdiction of this Court. Therefore, this Court has the competency and power to adjudicate this matter.

THE ISSUE

[22] The issues for determination before this Court are:

- (a) Whether the First Respondent is fit and proper to continue as the Commissioner of the Enquiry?
- (b) Whether there was actual bias or reasonable apprehension of bias on the part of the First Respondent that warrants his recusal as the Commissioner of Enquiry?
- (c) Whether the First Respondent's appointment as the Commissioner of Enquiry ought to be set aside?

THE FACTS

[23] This matter stems from the liquidation of the Sixth Respondent by this Court as a result of a court order issued on 28 May 2019.

[24] The said court order also made provision for the establishment of an Enquiry in terms of sections 417 and 418(1)(a) of the Companies Act 61 of 1973 to investigate the affairs of the Sixth Respondent.

[25] The First Respondent was appointed as the Commissioner of the Enquiry as per the court order.

- [26] After the proceedings had commenced, the Applicant was summoned to appear before the Enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 (as amended) read together with Item 9(1) of Schedule 5 of the Companies Act 71 of 2008.
- [27] The Applicant did not raise any objection against the summons to appear at the Enquiry and duly appeared before it using Zoom on 20 November 2020.
- [28] Post the commencement of the Enquiry, the Applicant's attorney objected to the answering of certain questions that were posed to the Applicant by the liquidator's attorney (such as the price of shares that the Applicant sold to Mamoroko Makolele Trust, and the source of the Applicant's money to buy shares from Okapi Farming (Pty) Ltd)[1] on the grounds that the questions did not pertain to the trade, dealings, affairs, or property of the Sixth Respondent. In addition, the Applicant contended that the said questions were not relevant for the Enquiry.
- [29] The First Respondent ruled that the questions asked were relevant to the affairs of the Sixth Respondent. Despite the ruling, the Applicant's attorney continued with his objection to the questions that had not been asked to the Applicant. According to the Applicant's attorney, he could anticipate the nature of the questions that were to follow if the Applicant had answered the questions that were posed.
- [30] Left dissatisfied with the First Respondent's use of the words "money laundering" or "suspicion" during the Enquiry about the funds that were used to purchase shares from Okapi Farming (Pty) Ltd, that may or may not have emanated from the Sixth Respondent, including the alleged hostility of the First Respondent against the Applicant's attorney during the Enquiry, on 22 February 2021 the Applicant instituted the current proceedings inter alia seeking the recusal of the First Respondent as the Commissioner of the Enquiry on the basis of actual bias or the reasonable perception of apprehension of bias on the part of the First Respondent.
- [31] Consequently, on 25 February 2021, the Enquiry was postponed sine die pending the outcome of these proceedings.

APPLICABLE LAW

- [32] There is adequate precedence in this area of law especially in so far as the recusal of a Chairperson/Commissioner of an administrative body and/or an enquiry. The courts are required to strike a delicate balance between various competing interests for the benefit of all interested parties. In *Absa Bank Limited v Hoberman* [2] the court stated that:

"...a court should, in deciding whether or not to remove a commissioner appointed in terms of s 418 of the Companies Act, have regard to the totality of the facts and circumstances underlying the competing interests of the parties involved. It should have a discretion not to remove a commissioner if it should not be to the general benefit of all interested parties to do so, even if it is satisfied."

- [33] The above passage is testimony that a relief related to the removal of a commissioner of enquiry will not be easily granted if it is against the benefit of all the interested parties. In addition, the circumstances and context play a pivotal role in deciding on whether or not a commissioner should be removed because of his or her impartiality. The required holistic approach does not necessarily curtail a court's discretion to grant an order for recusal when the circumstances of a given case justify it to do so. Put simply, a "court is at liberty to remove a commissioner if it is satisfied that the commissioner has not acted in accordance with the precepts of natural justice, which require that the commissioner act fairly and impartially at all times".[3]
- [34] Furthermore, a court of law will be at ease to positively consider an application for the recusal of a Commissioner if such application is brought at the commencement of the enquiry because there would be minimal disruption to the proceedings.[4] However, a court will be very slow to order a recusal of a Commissioner where such an application for recusal is brought towards the end of the enquiry because such recusal has the potential to negatively affect the enquiry at great length.[5]
- [35] In *Schulte v Van der Berg & Ors NNO*[6], in a case decided before *Bernert v Absa Bank Ltd, Marais J* there cautioned that:
- "Justifiable annoyance felt by a Court-appointed investigator into the affairs of an insolvent company at the stance adopted by an examinee, even if such annoyance be plainly manifest or forcibly expressed, seems to me to be a highly questionable basis for a successful recusal application. And even if, as appears to have happened here, that annoyance may have been reflected to some extent in some of the rulings made, I remain doubtful whether that constitutes a sufficient basis for a successful recusal application. Perhaps it is, but I am not prepared in the particular circumstances of this case to devote any further consideration to the question."
- [36] The above passage entails that at certain times, there are instances where a court will excuse clear instances where the chairperson of an enquiry may have appeared to be annoyed by the conduct of a person appearing before him or her. Further, in whatever manner such annoyance may manifest itself, it may not be the basis to have the chairperson of an enquiry recused. Each situation requires to be assessed on the circumstances surrounding its facts.
- [37] The test for the determination of actual or reasonable apprehension of bias was formulated by the Constitutional Court in *President of the Republic of South Africa & others v South Africa Rugby Football Union & others*[7] where the court said:
- "... The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge [or Chairperson of an Enquiry] 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 submissions of counsel. . ." (emphasis added)*

[38] The aforementioned test is applicable in this case. I now turn to consider all the submissions of the parties to ascertain whether this court, based on the facts before it, is empowered to order the recusal of the First Respondent on the grounds advanced by the Applicant.

APPLICANT'S

SUBMISSIONS

[39] Counsel for the Applicant began by submitting that the relief sought is only limited to the recusal of the Chairperson in so far as it concerns the Applicant and not the entire Enquiry.

[40] In addition, the Applicant contended that the conduct of the Commissioner at the Enquiry when inter alia "repeatedly referring to "suspicions" and "money laundering" are evidence of actual bias and/or the reasonable perception of bias on the part of the First Respondent.

[41] According to the Applicant, the First Respondent despite withdrawing the reference to "money laundering", was not supposed to have done so. The Applicant argued that the First Respondent had referred to money laundering so that he can thereafter make reference of "suspicions" of flow of money from one company to the other such as the funds that were used to purchase

shares from Okapi Farming (Pty) Ltd that may or may not have emanated from the Sixth Respondent. The Applicant argued that this was part of the reasonable bias on the part of the First Respondent.

[42] The Applicant further submitted that even though the First Respondent might have offered a genuine explanation and withdrew his reference to money laundering, he only did so when the Applicant's attorney objected to the use of the words "money

laundering" or "suspicion of money" when referring to the movement of money from one company to the other.

Therefore, the Applicant argued that objectively viewed, this creates a reasonable perception of bias on the part of the First Respondent.

[43] Additionally the Applicant argued that the First Respondent was hostile against the Applicant's attorney. Such hostile conduct included the First Respondent's refusal to obtain the consent of the Director of Public Prosecutions before he could ask the Applicant about issues related to money laundering. According to the Applicant, there was no explanation for such refusal.

[44] Furthermore, the Applicant argued that the acts of hostility included the First Respondent's conduct where he stated that the Applicant's attorney was making a mockery of the enquiry. According to the Applicant, this "is a strong language" that the First Respondent could have avoided.[8] The Applicant submitted that these factors were not conclusive of perception of bias which warrants removal but displays the overall

conduct of the First Respondent.

[45] The Applicant further contended that the First Respondent ought to have afforded the Applicant an opportunity to be heard when the possibility of opening a criminal complaint against the Applicant was canvassed by the liquidator's attorneys.

[46] The Applicant argued that the First Respondent during the issuing of the summons and/or during the Enquiry did not advise the Applicant that there were issues/questions related to money laundering in which the Applicant was obliged to answer, even if answering such questions amounted to self-incrimination.

[47] In light of the above, the Applicant argued that all of his submissions taken together, and assessed objectively, amount to a reasonable perception of bias or actual bias.

[48] I will now turn to costs. The Applicant argued that he viewed the conduct of the Second Respondent as serious in nature and deserves to be punished with punitive costs. In addition, the Applicant argued that the Respondent regarded the Applicant's application as being an abuse of the court processes and that the First Respondent sought the dismissal of the entire Applicant's application. According to the Applicant, the First Respondent ought to have filed a report and not oppose the merits of the application.

FIRST AND SECOND RESPONDENT'S SUBMISSIONS

[49] Counsel for the First Respondent inter alia argued that the Applicant has no reasons to substantiate his claim that the First Respondent is not fit and proper to proceed with the Enquiry or why his appointment should be set aside or have him recused.

[50] According to the First Respondent, the Applicant's application is "not bona fide and a clear abuse of process".[9]

[51] The First Respondent argued that the Applicant failed to make a case for the alleged unlawfulness or hostility on the part of the Commissioner of the Enquiry.

[52] The First Respondent further submitted that the Applicant's reference to various portions of the transcript which refers to inter alia "suspicions, bear the consequences of your action in another forum, and your behaviour is making a mockery of this enquiry" do not support the Applicant's contentions of alleged bias or unfair conduct on the part of the First Respondent.

- [53] Regarding the costs, counsel for the Second Respondent contended that the Applicant did not advance any grounds justifying a punitive costs order against the Second respondent in his personal capacity. Furthermore, counsel for the Second Respondent argued that there is no unreasonable or dishonest conduct that was identified against the First Respondent.
- [54] The Second Respondent argued that the Applicant raised new grounds during oral submission that did not form part of the pleadings in so far as it relates to the First Respondent's filing of a report instead of opposing the application.
- [55] Ultimately, the Second Respondent argued that the Applicant's application is unfounded and ought to be dismissed with costs on the scale as between attorney and client, such costs to include the costs of two counsels.

EVALUATION OF SUBMISSIONS

- [56] The starting point is to emphasize that the Applicant made it clear that the relief sought is only in so far as it relates to him and will therefore not disrupt the entire proceedings.
- [57] With regards to the summons, the Applicant argued that the positive consideration of the liquidators' attorneys' request for issuing of summons by the First Respondent against the Applicant to testify at the Enquiry was based on bold statements that

were not supported by any records. Counsel for the Applicant referred this court to the paragraphs below:

“... ”

2. Mr. Araujo sold his shares in Okapi Farming (Pty) Ltd to the Mamoroko Makolele Trust in terms of an agreement, provided to us by WKH Landgrebe & Co Auditors.
 3. It is clear that the origin of the purchase price for the said shares emanated from Swifambo Rail Leasing (Pty) Ltd. and/or Railpro Holdings (Pty) Ltd. Mr. Araujo needs to testify regarding the sale of shares which purchase price was in the amount of R24 000 000.00.”
- [58] I need to indicate that the Applicant was represented by his attorney before the Enquiry. Both the Applicant and his legal representative did not at any stage (upon receipt of the summons, before testifying, or during testimony) have an issue and/or raise any objection to the invitation. In my view, this is where the Applicant, through his attorney, missed an opportunity to challenge any aspects of the summons. On the contrary, the Applicant availed himself to testify before the Enquiry. It was only after being asked about the Applicant's knowledge of one Mr. Mashaba[10] and the source of funding to purchase shares in Okapi Farming (Pty) Ltd that the Applicant further objected to the questioning.[11]
- [59] The Applicant only raised the issue of recusal for the first time after the First Respondent had warned the Applicant about inter alia his “... conversation that lasts an inordinate amount of time”.[12]

[60] I fail to understand why the Applicant contends that the summons was issued with bold statements that are not backed up by any documentation. I say so because a careful reading of the transcript of the Enquiry shows that there are documents that reveal that certain amounts may have come from the Sixth Respondent.[13] The Applicant could have also asked and/or objected to this if he so desired when he was allowed to ask about any issues related to the summons.[14] Again, the Applicant did nothing.

[61] With regard to the conduct of the First Respondent at the Enquiry, the Applicant relied on several parts of the transcript of the Enquiry regarding the First Respondent's use of the word "suspensions". The context under which the use of this word (suspensions) is important. The First Respondent used the word "suspensions" to ascertain the truth regarding suspicious funds that may have been transferred to the Sixth Respondent such as "there's a suspicion that the funds That were used to purchase those shares emanated from Swifano Rail Leasing".[15] In my view, this does not suggest any foregone conclusion of the Enquiry and/or bias on the part of the First Respondent. I find myself persuaded by the First Respondent's paragraph below regarding the nature of enquiry proceedings:

5 Now you must remember too, you must remember too, where we talk about suspicions and so forth, but you must remember that the liquidators come into estates like this without any prior knowledge and as you will ... obviously, and maybe concede, that the directors don't give them any cooperation; documents are often destroyed and they have to have enquiries like this in order to piece together the information so that they can get the best dividend for creditors.

...

10 Now, I am told ... I am told that ... and just ... and you are probably aware of the authors, Jooste Blackman ... Everingham & Jooste, and they say directly that enquiries of this nature are fishing expeditions. So you go fishing, you 10haven't got...so you've got to follow up everything lead which can give you ... which can lead possibly, possibly to information which can lead to the benefit of the enquiry. So if I am told, or if I am led to believe that there ... that there's a suspicion, then I am ... the liquidators are led to believe there's 15asuspicion, they can act on it."[16]

[62] The above explanation and the reading of the transcript of the Enquiry indicate the nature of the proceedings and a fact-finding mission. The First Respondent used the word suspicions in the context of interrogation.[17] This does not suggest that there is any conclusion that has been reached by the First Respondent. The First Respondent was simply searching for answers about the funds that were used to purchase shares from Okapi Farming (Pty) Ltd and that such funds may or may or may not have emanated from the Sixth Respondent. This remains a suspicion and can only be confirmed through investigation, questions, answers, and evidence.

[63] Concerning the Applicant's argument that the First Respondent was hostile towards the Applicant's attorney during the Enquiry, I find this argument difficult to comprehend. The evidence before this Court dictates otherwise. As evident from the record of proceedings in

the Enquiry, the Applicant had leeway and spoke at length most of the time. As a result, the First Respondent cautioned the Applicant's attorney to inter alia not to make a "mockery" of the proceedings of the Enquiry. I do concede that the First Respondent might not have exercised proper judgment when it came to his choice of words. However, at some stage, the First Respondent had to take control of the proceedings including cautioning the parties who spoke at length without any justification. For example, at some stage, the Applicant's attorney persistently objected to a question that was not yet even asked. Despite various warnings from the First Respondent that the Applicant's attorney was objecting before a question was asked, the Applicant's attorney continued at length with his objection.[18]

[64] The Applicant objected to the First Respondent's reference to money laundering. The First Respondent explained the context of the use of the word including mentioning that he had used it as an example. In addition, the First Respondent apologized and withdrew the use of the word. Accordingly, I do not understand the basis for the Applicant in persisting with this contention on this subject.

[65] Concerning the Applicant providing self-incriminating testimony at the Enquiry, I need not say more except that this matter was long resolved in *Ferreira v Levin NO and Others' Vryenhoek and Others v Powell NO and Others*[19] where Ackermann J, as he was then, said:

"... no incriminating answer given pursuant to the provisions of section 417(2)(b) of the Companies Act on or after 27 April 1994 shall be used against the person who gave such answer, in criminal proceedings against such person..."

[66] The Applicant's attorney combined with his wealth of experience as a legal practitioner also knows that no self-incriminating

information obtained at an Enquiry can be later used against the Applicant elsewhere. It is not clear how the Applicant's

argument about self-incrimination is relevant in this instance because there was no incriminating question asked to the Applicant.[20] Instead, the Applicant's attorney was merely speculating about what might be asked in the future.[21] I align myself with the First Respondent's assertion that there is no possibility of an incriminating answer. Accordingly, the Applicant's argument has no merit.

[67] Concerning the opening of a criminal complaint against the Applicant and the right to be heard, there is no criminal case opened against the Applicant. Consequently, this is no longer an issue.

[68] Having carefully considered the transcript of the Enquiry, Applicant's, First and Second Respondent's written and oral submissions, I am of the view that an objective assessment of the facts surrounding this case does not in any way show actual bias or a reasonable perception of apprehension of bias on the part of the First Respondent.

[69] The Applicant has also failed to demonstrate before this Court that the First Respondent is not fit and proper to continue as a Commissioner of the Enquiry and/or that his appointment should be set aside in so far as it relates to his attendance at the Enquiry.

[70] I, therefore, conclude that the Applicant has failed to meet the test for reasonable perception of apprehension of bias.

[71] Accordingly, the application falls to be dismissed in its entirety.

COSTS

[72] Punitive costs are awarded in rare circumstances where the conduct of a party to a litigation is found to be objectionable.[22] In *Mribatsi v Minister of Police and Others*[23] Molahlehi J correctly indicated that:

“the consideration behind punitive costs is to punish a litigant who is in the wrong due to the manner in which he or she approached litigation or to deter would-be inflexible and unreasonable litigants from engaging in such inappropriate conduct in the future”. I need to stop and ask myself whether the conduct of the Second Respondent, in this case, was objectionable and warrants punitive costs?”

[73] The Applicant argued that he viewed the conduct of the Second Respondent as serious and deserving of punitive costs. For the first time during oral submissions, counsel for the Applicant argued that the Second Respondent, as the Commissioner of the Enquiry, ought to have only filed a report and not oppose the merits of the case. I view the latter submission persuasive and could have

possibly saved everyone’s time. However, I agree with the First Respondent in that this should not be considered by this Court as it did not form part of the pleadings.

[74] I need to be mindful that the Applicant is the one who sought personal costs against the Second Respondent even though the Second Respondent was acting in an official capacity at the Enquiry. It would be unfair to expect a litigant not to defend a punitive costs order sought against him or her, especially in the context of this case. I do not think that the Second Respondent’s conduct was objectionable in defending these proceedings.

[75] I am therefore of the view that the circumstances of this case do not justify the awarding of punitive costs as prayed for by the Applicant.

[76] Ultimately, the First and Second Respondents have been successful parties in this matter. The costs should therefore follow the result.[24]

ORDER

[77] I, therefore, make the following order:

(a) The appeal is dismissed:

- (b) The Applicant is ordered to pay the costs of this application on the scale as between attorney and client, such costs to include the costs of two counsels.

M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to 15 July 2022.

APPEARANCES:

Counsel for the Appellant: Adv L. Hollander

Instructed by:

John Joseph Finlay Cameron

Counsel for the First and Adv J. Booyse

Second Respondents:

Instructed by:

Tintingers Incorporated

Counsel for the Third to Sixth Adv F.H. Terblance SC

Respondents:

Adv H. Strung

Instructed by:

Schabort Potgieter Incorporated

Date of Hearing:

17 March 2022

Date of Judgment:

15 July 2022

[1] Enquiry Proceedings Volume 10: 001-82, 001-83, 001-132.

[2] [1997] 2 All SA 88 at 106.

[3] Ibid at 106.

[4] Ibid at 110.

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- [5] Ibid.
 - [6] 1991
 - (3) SA 717 (C) at para 41.
 - [7]
 - [1999] ZACC 9; 1999 (4) SA 147 (CC) at para 48.
 - [8] Record of proceedings before this court at 21.
 - [9] First and Second Respondents' head of arguments para 11.
 - [10] Enquiry Proceedings Volume 10: 001-92.
 - [11] Enquiry Proceedings Volume 10: 001-83.
 - [12] Enquiry Proceedings Volume 10: 001-112-113.
 - [13] Enquiry Proceedings Volume 10: 001-155-116.
 - [14] Enquiry Proceedings Volume 10: 001-50.
 - [15] Enquiry Proceedings Volume 10: 001-83.
 - [16] Enquiry Proceedings Volume 10:001-87.
 - [17] Klerk and Others NNO 20 v Jeeva and Others 1996 (2) SA page 573.
 - [18] Enquiry Proceedings Volume 10: 001-111 to 123.
 - [19] 1996
 - (1) BCLR 1 at para 157.
 - [20] Enquiry Proceedings Volume 10:001:109.
 - [21] Ibid.
 - [22] Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and Others 2013
 - (4) All SA 346 (GPN) paras 34 and 35.
 - [23] Case No: 34907/2019 at para 14.
 - [24] President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another 2002
 - (2) SA 64 (CC) at para 15.

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