

SOUTH AFRICA / JUDGMENT

H v S.H - Ex tempore (44450/2020) [2023] ZAGPJHC 1385 (23 November 2023)

[2023] ZAGPJHC 1385

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ingrid Opperman

CASE / FILE NUMBER

44450/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44450.2020

DATE: 27-10-2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date: 23/11/2023

In the matter between H Applicant And SH Respondent

J U D G M E N T IRO RECUSAL

(EX TEMPORE)

INGRID OPPERMAN, J: The application for leave to appeal, the reasons for which were filed on the 11th of September 2023, was set down for hearing this morning on the 27th of October 2023 for hearing at 08:30. At 21:15 last night I received a letter from the attorney (Mr Dylan Jagga) of the applicant in this recusal application, the respondent in the application for leave to appeal whom I will refer to as Mr H, in which reasons were advanced for my recusal as the case manager in this matter and any other interlocutory applications in future.[1]

From my reading of the letter, I assumed that the application for leave to appeal was proceeding as scheduled and was taken by surprise when Adv Nick Jagga, representing Mr H, communicated to this court that he held instructions to move an application for my recusal in respect of the application for leave to appeal. He immediately placed on record that he was not relying on any

of the facts set out in the letter I received last night from Mr Dylan Jagga, but that he was confining his application for recusal to two grounds only. I will deal with these grounds shortly however something needs to be said about the procedure that was followed.

In President of the Republic of the Republic of South Africa vs South African Rugby Football Union (SARFU)

[1999] ZACC 9; 1999 (4) SA 147 CC, the Constitutional Court held that the usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge in the presence of his or her opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them.”[2]

In this case the procedure adopted departs radically from the accepted practice. No approach was made to me prior to the launching of the application for my recusal either in writing or in chambers. Mr Dolly emphasised his surprise at the launching of the application. Mr Jagga representing Mr H readily conceded that this would have been the correct approach and would have been followed had this hearing been physical and at court. He explained that under such circumstances he would have accompanied Mr Dolly to my chambers and the procedure as set out in SARFU would have been followed. That may be so, however, there was no request for the recording device to be turned off and for us to speak as though we were in chambers and off the record. I was not afforded an opportunity to consider the grounds, I was not afforded an opportunity to place any facts on record. As it turns out I do not think much turns on it, as the facts relied upon or the inferences sought to be relied upon are drawn from the content of the judgment.

As was stated in SARFU at paragraph 10 counsel should do what they are required to do and I can do no better than to quote the Constitutional Court where the following appears.

"a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should 'not be unduly sensitive and ought not to regard an application for his [or her] recusal as person affront'."

In what follows I will set out why I think the fear held by Mr H, insofar as he does hold it, is not reasonable. In my view Mr Hewlett is intent on disqualifying me for hearing the application for leave to appeal because having regard to what I have already found against him in the judgment he is concerned that the application would be decided adversely to him. In this regard I am reminded of what was held in SARFU as follows:

"We are in full agreement with the following observation made by Mason J, in a judgment given by him in the High Court of Australia:

‘Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and to do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour’.

We also agree with the further observation made by Mason J in the same case that: ‘It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party’.”

Now the application was launched orally and this court attempted as best it could to distil the grounds for such recusal. The first is to be found in paragraph 71 of the judgment. In such paragraph this court referred to matters pending before me in which the production of documents are sought. I refer to matters which were set down for hearing the day before the argument of the matter in question. Because I took cognisance of such matters and the subject matter thereof, a perception of bias was created because I said: “one would have thought that Mr H would make available all his personal bank statements in an attempt to move the matter forward.”

The second ground is that in considering the prejudice requirement I accepted Ms SH say-so of impecuniosity and placed an “onus” on Mr H to substantiate his financial position. I accordingly, so the argument goes, in my assessment of the two parties dealt with them in an unequal fashion. I will refer to the first ground as ground 1 and the second as ground 2 in this judgment.

The principles applicable to a “reasonable apprehension of bias” as a ground for calling for the recusal of a judge were stated by the Constitutional Court in SARFU.

“...the correct approach to the 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 himself or herself if there are any reasonable grounds on the part of the litigants for apprehending that the judicial officer for whatever reasons, was not or will not be impartial.”

In *Bernert vs ABSA Bank Limited* 2011(3) SA 92CC referring to the principles in *SARFU* the Constitutional Court further held:

"33. ...this presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be biased ...

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'. The 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.
35. ...Judicial Officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed 'judges to not choose their cases; and litigants do not choose their judges.'
36. But equally true, it is plain from our Constitution that an 'impartial judge is a fundamental prerequisite for a fair trial...' In a case of doubt, it would ordinarily be prudent for a judicial officer to recuse himself or herself in order to avoid the inconvenience that could result if, on appeal, the appeal court takes a different view on the issue of recusal. But, as the High Court of Australia warns '(if) the mere making of an unsubstantiated objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a state where, for practical purposes, individual parties could influence the composition of the bench. This would be intolerable.'
37. Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court and, on the other hand, the pre-eminent value of public confidence in the impartial adjudication of disputes."

So, having regard to these principles the first enquiry which must be undertaken is to establish the facts. The apprehension of a reasonable person must be assessed in light of the facts as they emerge at the hearing of the recusal application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test. I should immediately place on record that there is no affidavit by Mr H setting out which facts he relies upon. The application is based exclusively on legal submissions which is not wrong, as the test is objective, if the facts are common cause they are common cause, so there is in principle no reason why it should not be

moved in this manner. However, there is no evidence before me about disputed facts, I therefore have the judgment and the four corners of the judgment which Mr H has confined himself to for purposes of this application to embark on this inquiry.

I deal with ground 1 first. Paragraph 57 under the heading discretion provides as follows:

"Mr H approached this court on the basis that if the 530 000 is not released, he will face insolvency. I explained why I do not accept this."

I reference paragraphs 25 to 28 of the judgment for purposes of this finding of fact. Paragraph 25 reads:

"25. Mr H says that all his personal banking accounts were frozen on 23 May 2023 and that he has been prevented from accessing the funds held therein. He contends that he only became aware of the writ on 10 June 2023. He explains that the frozen funds include his income that he requires to pay his monthly expenses, the funds that he uses to pay for the monthly expenses of the minor children and rental of the property that he resides in, debit orders and loans. He also says he needs to pay for the curator ad litem appointed on behalf of the minor children and the experts appointed. He emphasises that while his banking accounts are frozen, he is unable to comply with court orders that have placed financial obligations on him which relate primarily to the minor children. Mr H states further that should Ms SH's conduct continue unabated, he will be placed in a state of insolvency.

26. Mrs SH challenged these allegations. In her answering affidavit to the supplementary affidavit served on 19 June 2023 (the second answering affidavit) she invited Mr H to produce all his bank statements, including all the ABSA Bank statements reflecting the credit of R530 000. One searches the papers in this application in vain for a response to this invitation. It begs the question: What would have been easier than to attach the bank statements to evidence the transactions which would have been on this account? How easy would it have been to analyse the monthly transactions in support of Mr H's averments? The most plausible inference to draw from this failure, which inference I draw, is that the content of the bank statements will not support Mr H's version, that, without this R530 000, he will not be able to pay for the minor children's expenses.' and I might add, be placed in a state of insolvency.

In paragraph 27 of the judgment the following is recorded:

"Mr H was also directly challenged by Mrs SH to explain how he was able to accumulate R530 000 in his ABSA bank account when he is in such financial difficulties. Mr H, very glibly stated that "it has been no secret that I earn commission from time to time as well as bonuses. It is this, my monthly salary, and the bonuses which permits the entities I am associated with to provide me with financial assistance..."

Paragraph 28 then analyses this and this courts finds:

"This response raises more questions than answers: When was the commission paid? When was/ were the bonus/es paid? How is this credit possible if he allegedly has a monthly shortfall of about R77 000 as averred in the rule 43 application? Again, the bank statement/s would cast light on these allegations, but Mr H chose to not take this court into his confidence leading to the probable inference being draw, that the transactions reflected in the bank statement will not corroborate his version."

So that is what is referenced, in fact paragraph 29 is also included in my footnote in paragraph 57, but I am not going to belabour this judgment by quoting that as well, but it is there.

This court then continued in paragraph 57 and stated that in all the affidavits which served before this court I was unable to find a single shred of evidence to support this proposition. I then record that I issued invitations to the parties to show me where it was, after the hearing. This exchange is recorded in paragraphs 57, 58, 59, 60, 61. Mr Dolly's response in paragraph 60 addressed the substance of the request correctly as follows:

"The current suspension application does not contain any of the Applicants bank statements since January 2022 except the one bank statement which was furnished to us by Standard Bank pursuant to the subpoena we delivered."

And then in paragraph 62 I record:

"It is under these circumstances and with these facts that Mr H approached this court. I have drawn attention to the lack of evidence resented to this court to support an application based on the interests of justice."

This court recorded in paragraph 64:

"That the interests of justice require that rule 43 orders be complied with."

This court emphasised Justice Nicholl's views in the S v S Constitutional Court judgment.

It is with this background and with this criticism of the absence of bank statements that this court just added an additional fact in paragraph 71. It was not because I was case managing the matters that I knew, it was because the matters had been allocated to me, I mean, I had 'allocated' them. I was charged with hearing the matters, the parties knew I was hearing the matters and what happened on that day was that the matters were postponed. Yes, it is correct that they were postponed due to Mrs SH wanting to file answers, but the point is they were not dealt with and they were not dealt with because the papers were incomplete, so the object of the application is to afford the 35 affinity companies an opportunity to object to the production of certain documents, it is an entirely correct recordal of the facts. That is what happened. The matters were postponed. They were not heard. They were not heard because the papers were incomplete and that is a summary of the factual position. This court had already found as a fact that Mr H approached this court, cap in hand, explaining that he would be facing insolvency and under those circumstances this court found that he should substantiate his position and that he did not take this

court into his confidence. Those are the correct facts. The correct facts found by this court. It is in this context that paragraph 71 should be read and it is in this context that I found, that I concluded, Mr H has not discharged the onus resting upon him to show that his apprehension of bias is reasonable. And I certainly conclude that in respect of this ground the double requirement of reasonableness that the application of the recusal test imports is not discharged.

I turn then to ground 2 which is that I did not require Mrs SH to prove her financial position, that I had accepted without more her claims of impecuniosity. Viewed objectively, and as I should be doing, Mrs SH was a respondent armed with a rule 43 order. Armed with an order which the Constitutional Court has held should be complied with. Armed with an order which is not appealable, which was accepted and was the reason for this invalidity application. It was for the applicant, Mr H, to persuade this court that this court should come to his aid, it was for the applicant Mr H to place facts before this court to show that the order should not be implemented. There was no obligation on Mrs SH to persuade this court that she was not impecunious, she has an order. The order should be complied with, unless circumstances dictate differently and it is this unless which places a burden on the applicant and that is a matter of law, it is not a matter of bias, if this court had the law wrong then no inference of bias can follow, then it follows that I got the law wrong. I thus also find in respect of ground 2 that the two-pronged test fails.

In applying the test for recusal courts have recognised a presumption that Judicial Officers are impartial in adjudicating disputes.[3] In deciding whether a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased, this presumption in favour of a judge's impartiality must therefore be taken into account. Both the person apprehending the bias as well as the bias itself, must be reasonable. My oath of office requires me to administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law.

This I believe I have done in respect of both Mr H and Mrs SH.

I accordingly make the following order. Before doing so, I have been urged to grant a *de bonis propriis* costs order against the instructing attorney of Mr H, Mr Dylan Jagga, for persisting with this, or for giving an instruction that this application be launched or persisted with. In my view this application was ill advised, it was sprung upon this court and Mr Dolly, this despite the fact that the notice of application for leave to appeal was filed weeks ago and was left until the eleventh hour to launch without the grounds being clearly articulated or distilled.

I have a discretion in awarding costs and as I intend proceeding with the application for leave to appeal on conclusion of this judgement, the wasted costs for entertaining this matter will be part of the entire day's costs. In exercising my discretion, I am neither going to order *de bonus propriis* costs or a punitive costs and I accordingly make the following order:

ORDER

The application for the recusal of this court from the application for leave to appeal is dismissed with costs.

OPPERMAN, J

JUDGE OF THE HIGH COURT

DATE: ...23/11/2023.....

[1] The letter seems to have been received by my Registrar Ms Twaku at 14:45 yesterday afternoon, however it was only forwarded to me last night.

[2] . At para 50 of SARFU

[3] SARFU at Paragraph 40

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