

SOUTH AFRICA / JUDGMENT

Timber Frame Technologies (Pty) Ltd and Others v Roelofse (2273/2023) [2023] ZAMPMBHC 42 (28 July 2023) [2023] ZAMPMBHC 42

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse

CASE / FILE NUMBER

2273/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION (MAIN SEAT)

Case Number: 2273/2023

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

DATE 28 July 2023

SIGNATURE

In the matter between:

TIMBER FRAM TECHNOLOGIES (PTY) LTD (Reg No.: 1965/006566/07 First Applicant UYS DU
PREEZ Second Applicant WDT ATTORNEYS Third Applicant

and

JOHANNES HENDRICKUS ROELOFSE First Respondent

In re the matter between:

TIMBER FRAME TECHNOLOGIES (PTY) LTD (Reg No.: 1965/006566/07 First Applicant UYS DU
PREEZ Second Applicant

MR WISEMAN KHUMALO First Respondent MBOMBELA LOCAL MUNICIPALITY Second
Respondent

These reasons will be handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be at 11h00 on 28 July 2023

REASONS

Roelofse AJ:

[1] On 3 July 2023, I dismissed an application for my recusal in the main application ("the recusal application"). I undertook to later give my reasons for dismissing the recusal application. These are the reasons for dismissing the recusal application.

[2] The main application was an unopposed application wherein the applicants sought the following relief:

'1. The First Respondent be found to be in contempt of Court of a Court Order granted in the above Honourable Court on 15 March 2022, a copy of which is attached to the founding affidavit as annexure "TF3".

2. The First Respondent be committed to a period of imprisonment for 90 (ninety) days, alternatively that this Honourable Court impose upon him such a sentence as it considers appropriate.

3. The First and Second Respondents to pay the costs of this application on a scale as between attorney and own client, jointly and severally, the one paying the other to be absolved.'

[3] I granted the order referred to in the first prayer in the main application ("the first order") in favour of the

applicants. The third respondent in the recusal application ("WDT") represented the applicants in the main application and also now. The first order (in relevant part) provided[1]:

'1. The first respondent[2] is directed to do all things necessary to execute the order granted in the Regional Court for the Regional Division of Mpumalanga held at Mbombela, under case number MRCC – 331 dated 6 March 2019, within 10 (ten) days from the date of service of this order;'

[4] The Regional Court's order was granted upon an application by the second respondent in the main application that Ms. Paulette Langa demolish a structure that was built without the second respondent's permission on an erf in Mbombela.

[5] WDT applied to join proceedings that was instituted by the Mpumalanga Society of Advocates ("MSA") in the Local Division of the Gauteng High Court against the Judicial Services Commission ("the JSC"), the President and me wherein the MSA seeks to review and set aside the decision of the JSC in October 2021 to recommend me for judicial appointment ("the review

application”).

[6] I am not opposing WDT’s joinder application in the review application. WDT’s joinder application was served upon my attorneys in the review application on 5 June 2023.

[7] The main application was set down for 12 June 2023.

[8] On 6 June 2023, WDT wrote to the Judge President and the Deputy Judge President of this Division. Although I was already seized with the main application, I was not copied in this correspondence. I reproduce the full content of WDT’s letter:

‘RE: APPLICATION FOR LEAVE TO INTERVENE AS AMICUS CURIAE - WDT ATTORNEYS INC / ADV JOHANNES HENDRICKUS ROELOFSE AND THREE OTHERS (2021/555663)

1. With reference to the abovementioned matter, We confirm that we have brought an application for leave to intervene as amicus curiae in the application brought by the Mpumalanga Society of Advocates in the High Court of South Africa Gauteng Division, Johannesburg under case number: 2021/55663

2. We attach hereto copies of:

2.1 notice of motion together with the founding affidavit in support of the application (excluding the annexures is thereto) marked annexure “A”; and

2.2 A copy of the notice of motion in the main application, marked annexure “B”.

3. It has come to our attention that the matter between Timber Frame Technologies (and Another) and Wiseman Khumalo (and Another) under case number: 2273/23 had been allocated to Acting Judge Roelofse’s roll on 12 June 2023 (number: 28).

4. Given the nature of the relief sought in the applications referred to above, we humbly submit that it would be imprudent to have matters from our firm allocated to Acting Judge Roelofse.

5. We therefore request that this matter be allocated to another available judge for purposes of adjudication.

6. If any matter from our firm is allocated to acting judge Roelofse, we will have no choice but to ask him to recuse himself from presiding over the matter.’

[9] On 8 June 2023, the Judge President responded to WDT’s letter. I reproduce the full content of the Judge President’s

letter:

‘I refer to the above matter in particular your email letter addressed to the judge president. I hereby wish to confirm that same has been brought to his attention and have been directed by the judge president to respond to your letter as follows:

1. It is noted that your communication to the Judge President insofar as it relates to the pending matters in our Court, has not been brought to the attention of the parties' legal representatives in those

matters in particular the matters referred to in paragraph 3 of your letter. It is the view of the Judge President that it is inappropriate to have ask for the recusal of Judge Roelofse and then not copy the correspondence to your opponent.

2. The Judge President has also noted in paragraphs 4 and 5 of your letter, you want the Judge President with a stroke of a pen to recuse Judge Roelofse from presiding in the matter referred to in paragraph 3 of your letter and any other matter where your firm is involved.
3. It is the view of the Judge President that it will be inappropriate to do so taking into account the fact that amongst others, your firm is not a litigant in any matter that you had referred to in your communication and any other matter that might be allocated to him to which you are a legal representative for any of the parties.
4. In light of what is stated above, the Judge President is not inclined to recuse Judge Roelofse in any of the matters where your firm is involved and it is up to your client or the parties in any of such matters to formally raise a recusal application where judge Roelofse might be involved and it will be up to him whether the recusal application is justified.
5. Lastly, the Judge President has noted your founding affidavit in the application to intervene in the review application where the Mpumalanga Society of Advocates is the applicant. The Judge President is not sure why the founding affidavit was attached to your communication. Be that as it may, the Judge President feels that it is not relevant to your request as per your letter and that the court that will be seized with the review application in the

Gauteng Division, will appropriately deal with your application and the averments or the allegations made in your founding papers.'

[10] In the morning on 12 June 2023, I received the papers in the recusal application. After I heard WDT's counsel, I ordered

as follows:

- '1. Application for recusal shall be served on the respondent.
2. Once the order in paragraph 1 above is complied with, the applicant shall approach the registrar of this Court to obtain a date for the recusal application.
3. The application under 2273/2023 that was instituted on 22 May 2023 shall be determined once the recusal application has been decided.
4. Costs shall be reserved.'

[11] I ordered that the recusal application be served upon the respondents because, although they had not entered an appearance

to oppose the main application, they still remained parties and therefore had an interest in the outcome of the recusal application.

In addition, and in the pursuance of transparency, the respondents were also given an opportunity to air their view on my recusal as they so wished. The recusal application was served upon the respondents' attorneys on 13 June 2023. The respondents did not file any papers in the recusal application.

[12] The recusal application and the main application was before me on 3 July 2023. After dismissing the recusal application, I

heard the applicants' counsel, decided the main application and granted an order in the main application as follows:

- '1. It is hereby declared that the First Respondent is in contempt of the court order dated 15 March 2022.
2. The registrar shall issue a subpoena out of this Court for the First Respondent to appear before this Court at 09h00 on 11 August 2023 in person to give reasons why the Respondent [sic] should not be committed to prison for his contempt of the order of 15 March 2022.
3. The subpoena shall be served upon the First Respondent personally by the sheriff of this court.
4. The First and Second Respondents are ordered to pay the costs of this application on an attorney and client scale jointly and severally the one paying the other to be absolved.'

Basis upon which my recusal was sought

[13] In WDT's founding affidavit, Mr. Petrus Lodewickus Du Toit deposed to the founding affidavit. He sets out that: WDT has applied for leave to intervene in the review application; WDT is involved in legal proceedings against me and as such it would be inappropriate

for me to hear any matters in which WDT is involved "....owing to the perception that may be created thereby that he would not be able to bring an independent mind to bear in such a matter." and, that because WDT was duty bound, WDT informed the applicants in the main application that WDT had brought the

intervention application whereupon the first and second applicants instructed WDT to request me to recuse myself; that there is a history between me and WDT[3] and therefore ".... It cannot be said that [I] is likely to bring an independent mind to bear on the issues in this application."

[14] In paragraph 26, Mr. Du Toit sets out as follows:

'His Lordship Justice Roelofse, AJ cannot be said to be objective and impartial as far as hearing and adjudicating upon any matters in which our firm is involved is concerned because there is a reasonable perception of bias.'

[15] It is clear that WDT relies upon a perception of bias against WDT (as attorneys) because of WDT's intervention application

and the basis upon which WDT seeks to intervene in the review application. There is no allegation of actual bias or any conflict of interest. The reliance upon a perception of bias is confirmed in paragraphs 30 and 31 of the founding affidavit where Mr. Du Toit says:

'30. Given the facts as set out hereinabove, a reasonable, objective and informed person would reasonably perceive that His Lordship Justice Roelofse, AJ is biased.

31. A judge is expected to recuse himself from a case if there is a real or reasonably perceived suspicion of bias.'

Discussion

[16] The principles to be applied in the decision of a judge to recuse himself or herself is trite. In *South African Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*[4], the principles laid down in *Sarfu*[5] was reaffirmed as follows:

'[12] In *Sarfu*, this Court formulated the proper approach to recusal as follows:

'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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.' [Footnotes omitted].

[17] A judge is required to and must be able to bring an impartial mind to bear on the adjudication of a case and always be open to persuasion. This is from the perspective of the litigant that is involved in the dispute before the court. An apprehension otherwise by a litigant must be measured against the oath of office a judge is required to take together with the assumption that a judge is able to disassociate himself or herself from irrelevant personal beliefs or predispositions. All of these requirements are necessary to ensure a fair trial.

[18] In this matter, as set out in WDT's letter of 6 June 2023, WDT not only wanted the Judge President not to allocate the main application to other judges, but also all the matters WDT is involved in. WDT's request is founded upon the joinder application and the evidence in support of the joinder application. What Mr. Du Toit is in effect saying is that because WDT has brought the joinder application and is now litigating with me, I must recuse myself from all of WDT's cases. Mr Du Toit therefore assumes

that because WDT is litigating against me, I will not be open minded in WDT's client's cases and that I will not be able to disassociate myself from the fact that WDT is litigating against me. This is what Mr. Du Toit alleges to be the foundation of WDT's apprehension of bias.

[19] Mr. Du Toit alleges that he obtained instructions from the applicants in the main application to request me to recuse myself when they were informed by WDT that WDT is litigating against me. The origin of the alleged perception of bias is therefore not the applicants in the main application, but that of WDT. It is for no other reason that WDT requested the Judge President to allocate all matters in which WDT was involved in to other judges.

[20] Conflicts between a judicial officer and a legal practitioner does not mandate the recusal of the judicial officer. In this regard

see, *Lesibana Obed Boshomane v NG Petorius N.O. and The Director of Public Prosecutions* (Limpopo): Limpopo High Court; Case Number: REV 25/21 where the Regional Court Magistrate was the first respondent, the applicant was the accused that was being tried before the Magistrate and the attorney representing the applicant/accused was Mr. Thabethe. The following was said by Makgoba JP in the review application in the High Court after considering the case law on applications for recusal:

[20] As a ground for recusal of the First Respondent. the applicant stated the following in paragraph 31 of his founding affidavit:

"31. From the foregoing factual background, it is clear that the 1st Respondent is highly conflicted towards Mr Thabethe. The 1st Respondent is on record having stated amongst others that he does not like Mr Thabethe and that he laid a complaint against Mr Thabethe wherein Mr Thabethe is apparently an accused person."

It is clear from the above statement by the Applicant that this case has more to do with the conflict or hatred between the first respondent and attorney Thabethe than with the applicant having a well-grounded apprehension of bias which calls for the recusal of the First Respondent. The test in the SARFU judgement above does not relate to counsel, but to the litigant, that is the accused in the present case.

[21] The fact that the First Respondent might dislike Mr. Thabethe is, in my view, of no consequence. The test as set out in the case law referred to herein above has to be satisfied before one can even remotely come to a conclusion that justice will not be done should the First Respondent continue to preside in the trial in which Mr Thabethe appears for the Applicant.”

[21] It is not in the interest of the proper administration of justice that issues that may arise between a judicial officer and a legal practitioner require the judicial officer to recuse himself from all cases that legal practitioner brings to court. Judicial officers and legal practitioners are all officers of court who are expected to conduct themselves in such a manner that the functioning of the courts are not hamstrung in any manner whatsoever. In this instance, WDT brings many cases to this court and in our Division

there is a shortage of judges. To exclude me from the pool of judges in all matters WDT brings to court would inevitably cause delays in the finalization of WDT’s matters but also possibly delays for other litigants.

[22] Sarfu is clear, it is a reasonable perception of bias that must exist with the litigant. Lesibana reaffirms the principle that the apprehension of bias must lie with the litigant and not the legal practitioner. In this matter, besides Mr Du Toit’s say so, no confirmatory affidavit was furnished by either of the applicants in the main application, who are the actual litigants, confirming their alleged apprehension of bias.

[23] The stringent requirements for the recusal of a judicial officer have not been met by WDT and the applicants. In addition, no injustice has resulted from my decision not to recuse myself.

[24] I dismissed the application for my recusal and resolved to give these reasons later in order not to delay the finalization of the main application wherein I, in any event, granted substantial relief to the applicants.

[25] The last issue I am of the view that needs to be addressed is WDT’s resolve to cite me in my personal capacity as respondent

in the recusal application. I questioned Ms. Van Niekerk who appeared for WDT in the recusal and main application as to the reason for my citation in the recusal application in circumstances where WDT sought my recusal from a matter that was presently before me for consideration. Ms. Van Niekerk informed me that she has a lead senior counsel and that they relied on case law for my citation in my personal capacity in the recusal application. I requested Ms. Van Niekerk to furnish me with the authorities they relied upon.

[26] Ms. Van Niekerk complied with my request per email and referred me to *Basson v Hugo and Others* 2018 (3) SA 46 SCA and *M.M.V v Khan and Others* (M 183/2021) [2021] ZANWHC 84 (3 December 2021). Ms. Van Niekerk further stated in the email as follows:

‘I understood from these authorities that the presiding judge or Magistrate is considered as a respondent in the application and that it may therefore be necessary, out of abundance of caution, to cite His Lordship as a respondent in the application.’

[27] Unfortunately, with respect, Ms. Van Niekerk (and possibly also her leader)’s understanding was wrong. In both the cases referred to, the recusal of the presiding officer was challenged in the High Court and to be decided upon by the High Court and not the tribunal or court that was seized with the initial decision. There was no basis in law to have cited me in my personal capacity in the recusal application.

[28] In this Division, the daily court rolls are distributed widely to the legal fraternity. The resolve to cite me in my personal capacity resulted in the daily court roll being published whereupon it appeared that the applicants in the main application is litigating

against me in my personal capacity. Due to the daily roll indicating that I am a respondent, the Judge President contacted me and asked me whether I have seen the daily roll. I had to explain that the matter where I was cited was the recusal application. The same perception that I am a respondent in litigation with the applications might have also been held by persons who had seen the particular daily roll. I therefore deem it necessary to request the Registrar to distribute this judgment to all the recipients of the daily rolls. I will request the Registrar to do so.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 3 July 2023 DATE OF JUDGMENT: 28 July 2023

APPEARANCES

FOR THE APPLICANTS IN THE MAIN AND RECUSAL APPLICATIONS:

Ms M van Niekerk on instructions of WDT Attorneys INC.

[1] The remaining part of the order was an ancillary order to authorise the Sheriff to execute the Regional Court’s order and for costs to be paid by the first and second respondents.

[2] The first respondent referred to in the first order is also the first respondent in the main application.

[3] This judgment is not the place to deal with the alleged history between me and WDT. The review application will be the best place to respond.

[4]

[2000] JOL 7073, (8) BCLR 886, ZACC 10, (3) SA 705 (CC).

[5] President of the Republic of South Africa & others v South African Rugby Football Union & others [1999] JOL 4949, (7) BCLR 725, ZACC 9, (4) SA 147 (CC).

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