REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 010696/2022

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

[9 November 2022]

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SIGNATURE

In the matter between:

LYNESS MATIZIROFA **APPLICANT**

and

UNIVERSITY OF JOHANNESBURG **FIRST RESPONDENT**

PROFESSOR TSHILIDZI MARWALA **SECOND RESPONDENT**

JUDGMENT

Summary: *Judge – Recusal* – on grounds of appearance of bias – what constitutes – applicant raising shared ethnic background between Judge and second respondent and complaint lodged against judge with

JSC – applicant alleging reasonable apprehension that Judge might become vindictive after lodging complaint and not bring impartial mind to matter – test for bias reiterated – Test is: (1) whether reasonable, objective and informed person would on correct facts reasonably apprehend that Judge has not or will not bring impartial mind to bear on adjudication of case, that is, mind open to persuasion by evidence and counsel submissions; (2) reasonableness of apprehension must be assessed in light of oath of office taken by Judges to administer justice without fear or favour and ability to carry out oath by reason of training and experience – presumption of impartiality explicitly comes with judicial office – mere apprehensiveness on part of litigant that Judge will be biased, even strongly and honestly felt anxiety not enough – mere lodging of complaint with JSC without more cannot reasonably by itself warrant recusal application – no material allegation that Judge has interest in proceedings nor outcome – no rational connection between ethnic background and applicant's fear of impartiality established – application meritless.

Judge – Recusal – belated application – leave to appeal stage – interests of justice dictating litigation process be brought to finality – no reasonable apprehension of bias – court not disqualified from sitting on next stage of matter.

Order: The recusal application is dismissed with costs.

MUDAU, J

[1] This recusal application concerns the apprehension of bias pending a leave to appeal application. This flows from an order and judgment that this court granted against the applicant and two others (the legal team), interdicting and restraining them from inter alia, "*distributing, disclosing, publishing, permitting or causing to be published, and/or in any manner disseminating (whether in writing, electronically, verbally or in whatever format) any defamatory matter of and concerning the applicants, The University of Johannesburg and its Vice Rector and principal, Professor Tshilidzi Marwala*" (the current respondents). In

our law the test for bias is settled. The test for recusal is whether there is a reasonable apprehension of bias in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.

[2] It is trite that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is contrary with the relevant provisions of the Constitution[1].

[3] Usually, the apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from an interest that the judicial officer has in the outcome of the case. The apprehension of bias may also arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. It is the position of our law that courts must be independent and impartial[2].

[4] The applicant, Ms Lyness Matizirofa, a former university lecturer with the University of Johannesburg ("UJ"), alleges that this court was biased against her on several grounds, specifically that the factual findings made in the main judgment were non-existent and could only be explained on the basis of bias. She also raised ethnic association with one of the parties as another ground.

[5] The crux of the applicant's case in this belated recusal application as her counsel conceded, is contained in para 31 of her affidavit. Para 31 thereof reads as follows: "*On the 10th day of October 2022 I lodged a complaint with the JCC. Given the pending leave to appeal application due to be heard on the 13th day of October 2022, I thought it prudent to bring the current recusal application in the interests of justice. I entertain reasonable fear and*

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1 Sections 34 and 165(2) of the Constitution. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) ("*SARFU II*") at para 30 and *S v Basson* 2007 (3) SA 582 (CC) at para 27.

2 Ibid.

apprehension that the Learned Judge, since I have lodged a complaint against him will not bring an impartial mind to bear at the hearing and might become vindictive because I lodged a complaint against him".

[6] On 31 October 2022, without leave nor condonation and after judgment had been reserved; the applicant filed what is termed a supplementary complaint to the Judicial Service Commission ("JSC") that "*should also form part of the complainant's evidence in the recusal application*" against this Court and "*also furthermore as new evidence in the application for leave to appeal*". The applicant alleges in para 12 thereof that *"[o]ne cannot neglect some subjective thoughts - Mudau J and Prof Marwala are both of Venda descent. I would not be wrong to entertain subjective inference which might turn out to be the only reasonable inference that is why the Honourable Mudau J ruled against me*".

[7] On Friday, 4 November 2022, again without leave nor condonation and after judgment had been reserved, the applicant filed a supplementary complaint against this Court, which supplementary complaint has been filed with the Judicial Conduct Committee. My secretary received approximately 21 emails on Saturday 5 November 2022, with the same subject content. This an abuse of process which burdens the process unduly.

[8] Also filed is a Rule 7(1) Notice delivered by the applicant and two others in the main application; and a purported "AMENDED NOTICE OF MOTION", delivered on behalf of the applicant. On 8 November 2022, the parties were requested to indicate how they wished to deal with the supplementary papers filed in this matter, which was required by no later than 12h00 today, 9 November 2022 for purposes of the recusal application brought by Ms Matizirofa.

[9] The respondents submitted that none of the supplementary papers have any operative effect on the recusal application, and that the court was at liberty to proceed to deliver judgment therein, without regard to the supplementary papers. The applicant took the view that the matter be ventilated further on 10 November 2022, a date previously reserved for the leave to appeal application.

The applicant further, "reserved (her) right to furnish the Court with Supplementary Heads of Argument". This was not followed up.

[10] Rule 7 (1) relied upon in relevant part provides that: *"Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application".*

[11] In the amended notice of motion, the applicant repeats the relief sought and argued in relation to my recusal from hearing the leave to appeal application. The applicant also seeks that this court condones the late filing of the Rule 7 (1) which challenges Eversheds Sutherland Inc. to act on behalf of the current respondents already heard on 16 August 2022, and judgment handed on 26 August 2022. The applicant requests that this recusal judgment, which was heard and fully argued on 13 October 2022, be stayed pending the furnishing of the requisite authority to act. But, this court is *functus officio* in relation to the judgment already handed down.

[12] In *SARFU II*[3] at para 48, the Constitutional Court formulated the proper approach to an application for recusal and said:

> *"It follows from the foregoing that 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*

[3] Footnote 1 above.

> *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*".

[13] There is presumption of impartiality which is implicit, if not explicit, that comes with judicial office. This presumption, as Ngcobo CJ put it in *Bernert v ABSA Bank Ltd*[4]

> "*must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice' Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.' And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.*" Footnotes omitted.

[14] From a host of decided cases, it is clear 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. It is often stated: judges do not choose their cases; and litigants do not choose their judges.

[15] The mere lodging of a complaint with the JSC without more, cannot reasonably by itself warrant a recusal application on issues that should ordinarily be dealt with on appeal. The allegation that I might become vindictive because of the applicant's complaint laid with the JSC is without merit. There exists no material allegation that I have an interest in the proceedings nor the outcome. A faint allegation in the supplementary affidavit being that, because of a common ethnic background with the Vice Chancellor and Principal, Prof Marwala, I could

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[4] 2011 (3) SA 92 (CC) para 31.

rule against the applicant, whom I have never met. The cause of complaint, my ethic background, was not raised when the merits of the application were dealt with. The conduct of the applicant in this regard, is simply inconsistent with a reasonable apprehension of bias.

[16] The applicant failed to articulate a rational connection between the ethnic background as alleged and her fear of my deviation from an impartial adjudication of the application for leave to appeal. If the argument is allowed, the consequence would be that Judges should not sit in cases in instances where one of the parties is of the same ethnic background as the presiding Judge. This is not only absurd and trivial in nature, but would grind the justice system to a halt. The complaint in this regard is insufficient to give rise to a reasonable apprehension of bias.

[17] It is in the interest of all the parties that the litigation process regarding this matter be brought to finality as speedily as possible. Under the circumstances, the applicant as well as the alleged nature of apprehension is unreasonable. The application is not only unfounded but misdirected. This Court is not disqualified from sitting, there being no reasonable apprehension that the Court will not continue impartially with the next stage of the matter. To rule otherwise would be to permit a disgruntled litigant, in the position of the applicant, to successfully complain of bias simply because I ruled against her.

[18] I hold, accordingly, that a reasonably informed litigant in the position of the applicant would not reasonably apprehend that I will not bring an impartial mind to bear in adjudicating the leave to appeal application simply because of the unmeritorious complaint to the JSC and my ethnic background. For these reasons the application stands to be dismissed with a necessary costs order to follow.

Order

[19] The recusal application is dismissed with costs.

T. P MUDAU
JUDGE OF THE HIGH COURT

APPEARANCES:

For Applicant:	Adv. Macgregor Kufa
Instructed by:	Machaba Attorneys
For Respondents:	Adv. Paul McNally SC
Instructed by:	Eversheds Sutherland (SA) Inc.
Heard on:	13 October 2022
Delivered on:	9 November 2022