IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.16425/09

In the matter between

MBUSO ERIC NDLOVU Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR GENERAL ;
HOME AFFAIRS Second Respondent

J U D G M E N T

Del. December 2010

WALLIS J.

[1] This is a recusal application. It arises in one of 252 cases in which I heard argument on 15, 27 and 29 September 2010. The application for recusal was brought on 26 November 2010. Whilst it relates to only one of the 252 cases it has been brought by way of a test case on the basis that if it succeeds I will also recuse myself in the other cases. The circumstances giving rise to the application are the following.

[2] On 21 April 2010 I delivered the Eighth Victoria and Griffiths Mxenge lecture at the University of KwaZulu-Natal. My theme was 'Ordinary Justice for Ordinary People' and in the course of the lecture I looked at various elements of the legal system that provide obstacles to ordinary people obtaining justice from the courts, both criminal and civil.

In dealing with lawyers I proffered some criticism that they benefit from delays and suggested that the current system of remunerating legal practitioners provides a perverse incentive[1] to delay by paying them on a basis that does not encourage bringing matters to a conclusion. I drew attention to the reasons why this is so and suggested that it would be a fruitful topic for interdisciplinary research involving the law and economics faculties of our universities to see if it would be possible to align the fee charging practices of litigation lawyers with the interests of ordinary people in having cases disposed of timeously and at reasonable cost.

[3] The lecture then went on as follows:

'While on the topic of fees we should beware of following the example of those jurisdictions where contingency fees are the major source of revenue for plaintiffs' lawyers. It is no coincidence that those are the most litigious societies on the planet. And you must not believe the explanation that this affords access to justice for those who could not otherwise afford it. If it does, that is a mere by-product of what is described by lawyers in the corridors of the courts as "drumming up trade". Once again a well-meaning endeavour to assist those who cannot afford legal services provides a perverse incentive for lawyers to profit. This takes a variety of forms. It occurred in our own local courts in relation to cases on behalf of persons claiming social security grants. There was a natural sympathy for the applicants that disguised what was really happening, which was that governmental inefficiency was exploited to provide a not inconsiderable source of revenue to the legal practitioner riding the bandwagon. Let me mention briefly what happened when the court put an end to this by introducing a practice directive governing such cases. A year later I was asked to reconsider that practice directive but the evidence led before me showed unequivocally that people having grievances about social security grants were having their problems resolved quicker by following the directive than they had by pursuing legal proceedings. And of course the taxpayer was being saved vast sums in legal

1 This is a concept popularized by economists to describe an incentive that produces unintended and undesirable results that undermine the true purpose of the incentive.

fees.

This is an inevitable consequence of a system of contingency fees. Lawyers will seek out potentially vulnerable targets and then find litigants to pursue them. The litigants hope to benefit from an award and the lawyer hopes to take as much as possible by way of contingency fees. How many smokers really benefited from the enormous settlements negotiated in litigation against the tobacco industry in the United States? Every lawyer involved did, and the extent of the benefit was enormous. I, and many colleagues, listened amazed at a presentation at an International Bar Association Conference a few years ago by one of the lead firms in that litigation, which even before the payment of the settlement sum paid every employee of a large firm of attorneys a bonus from the proceeds. And yes, I do mean every employee – clerks, messengers, janitors and telephonists. And this was done before the partners took their cut. The pattern we have encountered here in regard to social security and home affairs cases is currently being repeated in the United Kingdom in cases involving claims against housing authorities where the claims are modest but the lawyers' fees are much greater. We need to cry out that there is a vast difference between providing access to justice and the enrichment of lawyers. Whilst I am not in principle opposed to some system of contingency fees it requires safeguards to prevent its exploitation by those who see in it an opportunity to enrich themselves by gaming the system.'

[4] This lecture was published in part 3 of the 2010 South African Law Journal[2] at the suggestion of a member of staff of the UKZN law faculty. Other than minor grammatical changes it was published in the form prepared for delivery at the lecture. It is this publication and particularly the passage that I have quoted *in extenso* that gives rise to the application for my recusal. In order to explain why that is so it is necessary to trace a little of the history of the present home affairs applications.

BACKGROUND

[5] These are all review applications directed at the Department of Home Affairs in relation to the issue of identity documents. Cases of this

2 At p.369.

type are commonly referred to as 'home affairs cases'. All the applicants are represented by the same attorneys, Goodway & Buck, and the same counsel. The 252 cases represented all current matters of this type involving that firm. On 25 August 2010 the Judge President directed that they be heard together on 15 September. He designated me as the judge to deal with the applications and to issue appropriate directions in regard to the hearing.

[6] The background to this direction by the Judge President is briefly as follows. A number of similar cases started to come before this court, sitting in both Durban and Pietermaritzburg from 2008 onwards. In 2009 I dealt with a group of such cases in the judgment in *Sibiya v Director General: Home Affairs and Others and 55 Related Cases.*[3] Thereafter such cases disappeared for a while but they returned towards the end of 2009. During the January recess the judges then on duty in Durban decided that there should be a consolidated hearing of such applications in order to assess whether the issues raised in *Sibiya* had been addressed. Accordingly 40 cases came before me on 19 January 2010. At that stage I was informed that only two firms of attorneys, one of them being Goodway & Buck, were currently bringing such applications. It was not possible to deal with those cases on that day and they were adjourned, by arrangement with the Judge President, to 9 March 2010.

[7] On 9 March 2010 the one firm of attorneys withdrew all of its cases. That left only those where Goodway & Buck were the attorneys. After argument had commenced the cases stood down and consent orders were taken in the remaining cases. In addition the parties agreed on a process for dealing with all pending cases of clients of the firm Goodway &

3 2009 (5) SA 145 KZP).

Buck. This involved the submission of a list of claimants to the Department for investigation; liaison between the parties in regard to the status of the applications reflected on the list and an undertaking by the respondents that if any further information, documents or applications was required from applicants officials would be made available at a time, date and neutral venue to be agreed upon between the parties for the purpose of obtaining the necessary further information and documents or for causing the further applications to be made. As the parties thought it desirable to do so I embodied these arrangements in a consent order drafted by them.

[8] My understanding of this arrangement was that whilst these endeavours were being made in good faith to resolve these cases, Goodway & Buck would not be enrolling further cases for hearing. I informed the Judge President of this in a memorandum that was circulated to the other judges in the division. The relevant portion of the memorandum reads as follows:

'In the result arrangements have been made involving the two firms of C…Attorneys and Goodway & Buck, the State Attorney and the Department for the resolution of all home affairs cases emanating from those firms. I am advised that at present they are the only two firms enrolling such matters before the High Court in the Province. In the result cases coming from these firms should no longer be on the court rolls in this Province and it would be appropriate for any judge before whom such a cases arises to query why it is on the roll in the light of the arrangements I have described. I was informed by counsel that if any other firms starts to lodge similar applications the approach of the State Attorney's office will be to request them to agree to a similar arrangement or to process their cases through either C Attorneys or Goodway & Buck.

The result of this should be that, unless the system breaks down, the courts ought not to be troubled with these applications in the future. In the case of Goodway & Buck all questions of costs have been reserved and I have advised the parties that if they are

not able to resolve these issues, which they expect to do, they should make arrangements for the cases to be enrolled at a time when I can deal with those issues.'

[9] My anticipation that the home affairs cases, at least those emanating from the offices of Goodway & Buck, would be resolved proved unduly optimistic. The suggested meetings involving applicants and officials of the Department were not convened and other endeavours to address issues proved unsuccessful. The parties met with me on 17 and 18 August 2010 at which the applicants' legal representatives indicated their firm view that the matters were not capable of resolution and should be set down for hearing. I offered to approach the Judge President with a view to having all the matters dealt with together on a single day before one judge, but the applicants' legal representatives indicated that they preferred to revert to the original system of setting down a few cases in Durban and Pietermaritzburg each day. The respondents' legal representatives, on the other hand, indicated that they would like to deal with all the matters together at a single hearing. These options were placed before the Judge President who made the decision referred to above.

[10] In the directions for the hearing that I issued on 25 August 2010 the parties were required to deal with the proper approach to costs in these applications. The terms of the relevant direction were that:

'In order properly to inform the court on this issue the applicants' attorneys are directed to provide indicative bills of costs drawn from previous cases and duly taxed indicating the quantum of costs and the items including disbursements that are included in bills in cases of this type. It should also indicate in general terms the time involved in taking instructions in cases of this type, who on behalf of the firm undertakes that task and on what basis the applications are prepared ie by whom and what time is involved.'

In response to that direction I was furnished with a detailed memorandum on costs, to which was attached an earlier memorandum on costs prepared by the attorneys, accompanied by indicative bills of costs in similar applications. This memorandum was not required to be oath as I regarded it as coming from an officer of the court providing information to assist the court in the proper adjudication of these cases.

[11] In the judgment in *Sibiya*[4] I had said in regard to the attorneys in that case (not Goodway & Buck) that:

'It may be that they advertise in suitable media. Certainly there are attorneys who do so in relation to this type of work. During the course of preparing this judgment one of my colleagues drew my attention to an advertisement in a regional newspaper circulating in the Durban area, involving another firm that is active in this field, although not in any of the cases before me, and reading as follows:

> "PROBLEMS GETTING YOUR IDENTITY DOCUMENT?
> (INGABE UNEZINKINGA NGOKUTHOLA UMAZISI WAKHO?)
> We will help you get your Identity Document Quickly.
> **YOU DO NOT HAVE TO PAY."**

The advertisement continues in English and Zulu and urges people to come and see the attorneys immediately, no appointment being necessary.'

On re-reading this whilst working on the reserved judgment my recollection was that the advertisement emanated from Goodway & Buck. In order to check whether my recollection was correct I asked my registrar to contact the partner at Goodway & Buck who principally dealt with these cases to make appropriate enquiries.

[12] On 29 October 2010 Goodway & Buck wrote to my registrar and said:

'We confirm that it appears to be our advertisement.'

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4 Para [56].

Then followed these submissions:

'(3) In light of the enquiry we wish to make the following submissions with regard to the advertisement, particularly in view of the fact that in the *Sibiya* Judgment the words "You do not have to pay" appear to have been highlighted by the Judge.

These words have always meant and have been understood to mean that potential clients do not have to pay to consult with Goodway & Buck (which consultation is referred to immediately under the above-quoted words) which consultation would be for the purposes of assessing the merits of a claim by the person concerned.

(4) It was never intended to mean nor been understood to mean by the many hundreds of Applicants that we have consulted, that Goodway & Buck waives its right to receive payment for services rendered in pursuance of an Applicant's claim but as is explained to potential Applicants should the application not be successful and no award for costs be made, Goodway & Buck will not hold the Applicant liable for payment of their costs.

(5) The latter reason is why the merits of any application brought by Goodway & Buck are thoroughly explored and canvassed prior to the acceptance of an instruction and the bringing of the application.'

[13] After receiving this reply and giving consideration to the memorandum on costs mentioned earlier, a letter in the following terms was addressed to the attorneys for the parties:

'In view of the statements in Goodway & Buck's memorandum on costs that:

"The bringing by such an Applicant of an application against the Respondents in the High Court is only made possible by the fact that Good & Buck are prepared, entirely at their own risk to:

17.2.1 without the expectation or requirement of payment by the indigent applicant, prepare and bring the application;

17.2.2 accept the fact that if the application is unsuccessful, not only will they

forfeit any costs, but will also forfeit any and/or all disbursements incurred by them in pursuance of the unsuccessful matter;

17.2.3 accept as their payment for the bringing of such applications, only those fees which are recovered by way of taxation or agreement which fees … bears no resemblance whatsoever to the substantially increased fees which would in normal circumstances be charged by Goodway & Buck … for the rendering of such services;"

and in its advertisements (as quoted in the judgment in *Sibiya*, para 56) that 'You do not have to pay' as explained in its letter to my registrar dated 30 October 2010 that this relates to the preliminary consultation with the client and:

"It was never understood to mean nor been understood to mean … that Goodway & Buck waives its rights to receive payment for the services rendered in pursuance of an Applicant's claim but as is explained to potential Applicants should the application not be successful and no award for costs be made, Goodway & Buck will not hold the Applicant liable for payment of their costs,"

the following questions arise:

1. Are there any circumstances in which Goodway & Buck's clients incur any personal liability for its payment of costs (including disbursements) to their attorneys? If so what are the precise circumstances in which that liability arises and what steps do Goodway & Buck take to enforce that liability?

2. Are there any written agreements between Goodway & Buck and their clients concerning the question of costs? If so a copy of a typical agreement (assuming it is in standard form) must be furnished.

3. In the light of the basic purpose of an order for costs (*Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488; *Jonker v Schultz* 2002 (2) SA 360 (O) at 363 G-J) to what costs actually incurred by the applicants do the costs orders that are sought in these applications relate?

4. In those instances where an order for attorney and client costs (is sought?) to what additional costs actually incurred by the applicants does that order relate?

5. Insofar as applicants do not incur any personal liability to Goodway & Buck, either in respect of costs or disbursements does any legal basis exist for making an order for costs in favour of any of the applicants herein?

The parties have already been afforded a full opportunity to address the question of costs in this case. In those circumstances answers to the questions set out above and supplementary submissions by both parties must be delivered by no later than noon on Friday, 5 November 2010, so that the preparation of the judgment in these cases is not further delayed.'

[14] The response to that enquiry, on 4 November 2010, was a letter indicating that the publication of the Victoria and Griffiths Mxenge Memorial lecture had come to the attention of Goodway & Buck and they required time until 19 November 2010 to consult with their clients and senior and junior counsel in regard to its contents. On 18 November I was approached in Chambers as a matter of courtesy by senior counsel, together with Mrs Jonas from the State Attorney's office, and informed that the present application would be brought.[5]

THE BASIS OF THE APPLICATION

[15] The application is brought on the basis that the applicant contends that he entertains, and a reasonable person fully informed of the facts would reasonably entertain, an apprehension of bias on my part in addressing the question of costs in these applications. The applicant

5 In paragraphs [87] to [92] of the founding affidavit an explanation is given of leading counsel's involvement in these cases. This arose from the jocular remark made by me to senior counsel for the applicants, whom I have known well for many years, that he had been present when the lecture was delivered. In argument Mr Harpur SC entirely accepted that the comment was jocular and had no bearing on the issues in this application.

makes clear, and I entirely accept, that there is no imputation or suggestion against me and there is no contention. He also accepts that the views he attributes to me are views that 'could honestly and reasonably be arrived at by any person of integrity confronted with the particular facts as experienced by the Judge'. His concern is that I hold a fixed and settled view in regard to the question of the costs order that he seeks in his application and that the views expressed by me in my lecture are in essence are a pre-judgment of exactly the same point that I will be required to decide in the course of my deliberations in the present case.[6] It is on that basis that he submits that he entertains a reasonable apprehension of bias on my part. He adds that 'this pre-judgment occurred at a time when my case was already in existence.'[7]

[16] The applicant's stresses his constitutional right to access to justice and the fact that if Goodway & Buck were not prepared to act on his behalf on the basis set out in their memorandum in respect of costs that right would be of no assistance to him. He says that it is crucial that he should obtain a favourable order for costs in his application in order that Goodway & Buck can be remunerated for the services they have rendered. He makes the point that in the absence of such remuneration neither Goodway & Buck nor any other attorneys will be willing to act on behalf of persons situated as he is, namely indigent persons. His conclusion[8] is that he believes that his prospects of success on the question of costs before me 'and therefore meaningfully, my access to justice, are effectively nil'.

[17] Much of the founding affidavit[9] is devoted to an analysis of different

6 Founding affidavit, para [16].
7 Founding affidavit, para [17].
8 In para [35] of the founding affidavit.
9 Paras [26] to [66] thereof.

phrases and expressions used in the lecture. The applicant concludes that his 'real and lasting fear' is that his attorneys will be prevented from rendering him assistance now and in the future and that 'I will be left helpless' and at the mercy of the incompetence of the Department of Home Affairs'. He concludes his analysis in the following terms:

'[64] With utmost respect to the Judge, his views are diametrically opposed to my views, which is that I have been rendered very valuable and continuing assistance by my Attorneys and, if they were not available to assist me in this matter, I would not know to whom to turn and fear that I would be left helpless in the face of governmental might and intransigence.

[65] What is also of great concern, I wish to emphasise, is that the Judge has not only clearly demonstrated that he holds these views very firmly, but also that his prescribed solution would result in a quicker resolution of the problem than if lawyers had been consulted and legal proceedings had been pursued. With respect, I dispute this, and hold the opposite view.

[66] Further, as already pointed out, the Judge seeks to propagate his views and convince others to think the same.'

[18] In the balance of the founding affidavit the applicant links his views to the contents of the letter of enquiry quoted in paragraph [13] *supra*. In addition, under the general heading 'Other conduct' the applicant suggests that I have conducted myself on other occasions in a manner consistent with the views expressed in his speech. He catalogues these as follows;

(a) He says, on information furnished by his attorney, that during argument on the merits I asked Ms Sridutt whether the costs that were the subject of her argument were the applicants' costs or those of the applicants' attorneys;

(b) He suggests that I have held the applicants to strict time limits but have adopted an understanding and indulgent attitude towards non-compliance by the respondents;

c) He says (and this was strongly stressed in argument on his behalf by Mr Harpur SC) that the issue of costs has been raised by me *mero motu* and in this regard refers to the letter of 1 November 2010;

d) On another occasion when I was presiding in the motion court, similar matters came before me and I there queried the basis upon which the representative of the State Attorney consented to pay costs.

The applicant emphasises that none of these factors on their own would have given rise to the present application but submits that they fortify the apprehension of bias derived from my lecture. His conclusion is that he reasonably fears that I 'will simply find against me on the question of costs on the basis of what I reasonably fear is a fixed and settled view arrived at in advance'.

[19] It is on that basis that the application for recusal must be considered and determined.

THE LAW

[20] The law in regard to applications for recusal is now well settled as a result of a trilogy of cases in the Constitutional Court.[10] What follows is a distillation of the law as laid down in those judgments. It is largely expressed in the language used by the Constitutional Court.

[21] The correct approach to an application for a recusal is objective and

10 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) paras [35] to [48] (SARFU II); *South African Commercial and Catering and Allied Workers' Union and Others v Irvin & Johnson Limited (Seafoods Division Fish Processing)* 2000 (3) SA 605 (CC), paras [11] to [17] and *Bernert v Absa Bank Limited* [2010] ZACC 28 paras [28] to [37].

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 brought 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. Two factors are of fundamental importance in this regard. The first is the presumption of impartiality arising from the judge's oath of office requiring him or her to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law and their ability, by virtue of their training and experience, to put on one side any irrelevant matter or predisposition that they may have in regard to a case. The second is the double-requirement of reasonableness in that both the person who apprehends bias and the apprehension itself must be reasonable.

[22] A judge confronted with an application for his or her recusal must bear in mind that he or she has a duty to sit in all cases in which they are not disqualified from sitting. Litigants must not be encouraged to believe that by seeking the disqualification of a judicial officer they will have their case heard by another judicial officer who is likely to decide it in their favour. Judges do not choose their cases and litigants do not choose their judges. Accordingly an application for recusal must be based on substantial grounds for contending that a reasonable apprehension of bias would be entertained by the reasonable person in possession of all the correct facts.

[23] The particular source of the apprehension of bias in the present case arises from my prior utterances in delivering the Victoria and Griffiths Mxenge Memorial lecture. There is nothing untoward about judges

delivering lectures on legal topics and it is generally thought desirable that they should do so. The reason that they are asked to deliver such lectures[11] is that it is believed that their experiences and views will be of interest to others and, particularly in an academic or legal environment, will contribute to debate on issues of public legal importance. The desirability of judges making available to the broader legal community the benefit of their experience and views was stressed by a strong Court of Appeal[12] in *Locabail (UK) Limited v Bayfield Properties Limited and Another.*[13] The mere public articulation of strong views on general legal questions, even those that may subsequently come before the judge in court, does not ordinarily serve to disqualify the judge.[14] As Centlivres JA said in *R v Milne and Erleigh*[15]:

'The mere fact that a Judge holds strong views on what he conceives to be an evil system of society does not, in my view, disqualify him from sitting in a case in which some of those evils may be brought to light. His duty is to administer the law as it exists but he may, in administering it express his strong disapproval of it.'

[24] The only cases to which I have been referred, or that I have discovered in the course of my research, in which a judge has been held to be disqualified from sitting in consequence of the expression of prior views are the decisions in *Locabail, supra,* and the Australian decision of *Livesey v The New South Wales Bar Association.*[16] It will be helpful to examine them.

[25] In *Locabail* the judicial officer was sitting as a recorder[17] in a

11 Amongst my predecessors in delivering that particular lecture were Chief Justice Langa and Justices Kriegler and Skweyiya.
12 Consisting of Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C, later Lord Scott of Foscote.
13 [200] 1 All ER 65 (CA) at para …
14 SARFU II, para [44].
15 1951 (1) SA 1 (A) at 12 A.
16 1983 (151 CLR 288).
17 A part-time judge.

personal injuries claim involving a seriously injured claimant. In his practice at the Bar he specialised in this field of work and overwhelmingly represented plaintiffs. Not only was he the editor of a leading textbook on the subject of the quantum of damages but he was a prolific contributor to legal and other journals on the topic of personal injuries claims and the payment of damages therefor. In his capacity as author he had frequently and in pungent language expressed the view that insurance companies failed to recognise their obligation to pay proper compensation to victims of accidents, particularly those who had suffered substantial and even horrific injuries, with consequent disablement. When Lord Woolf's reforms to civil procedure in England and Wales came into effect he expressed doubts whether they would operate to compel insurance companies to recognise and comply with this obligation. He had publicly and strongly criticised the tactics adopted by insurers' lawyers, which he regarded as dilatory and unfair and directed solely at putting pressure on disadvantaged plaintiffs to accept less compensation than was properly their due. In the case where his impartiality was challenged he had in robust terms rejected all criticisms of the claimant's evidence and rejected all the evidence on the part of the insurer inconsistent with that of the plaintiff as well as all the arguments on behalf of the insurer. Although the Court of Appeal regarded it as a borderline case it held, with expressed reluctance, that his judgment should be set aside.

[26] There is a difference between that case and the present case in that the application was brought after judgment and the Court of Appeal could consider not only the publicly expressed views of the judicial officer as embodied in his writing, but also his particular approach in the trial before him. It was accordingly possible for the appellant insurance

company to demonstrate a close correlation between his publicly expressed views and the judgment in that particular case. That is not the position here.

[27] In *Livesey*, the appellant was a barrister. The New South Wales Bar Association sought an order striking his name off the roll of barristers. One of the grounds was that his conduct in relation to the provision of bail to a client by a law student, a Ms Bacon, was improper. The application for Mr Livesey's striking-off came before a court, two of the members of which had sat on Ms Bacon's application for admission as a barrister and dismissed that application *inter alia* on the basis of the part she had played in providing bail to Mr Livesey's client. In doing so both judges were strongly of the view that Ms Bacon lacked both credit and credibility as a witness. When she was called on behalf of Mr Livesey she was again disbelieved. In those circumstances the High Court of Australia held that a fair-minded observer might have entertained a reasonable apprehension of bias by reason of pre-judgment.

[28] That was a case where the members of the court had already adjudicated on the credibility of a witness and made adverse findings in that regard in circumstances where she would be giving evidence on the same topic and her credibility on that same issue would once more be crucial to the outcome of the case. That is wholly different from the present situation and it is no surprise therefore that Mr Harpur neither referred to nor sought to rely on this decision.

DISCUSSION

[29] The authorities show that in considering recusal the person whose

views are relevant is a reasonable person who is fully informed and in possession of the correct facts. Those have largely been set out above. They reveal that at the time the lecture was delivered the applicant's case and the other 251 cases, were not before the court and the lawyers for the parties were engaged in a process that was anticipated would bring about their resolution as well as providing a means for resolving disputes of this character that would not require recourse to the courts. The only potentially live issue related to costs and the parties had expressed confidence that this could be resolved.

[30] In those circumstances the one reference in the lecture to home affairs cases would not have been understood by a reasonable, properly informed person as referring to these 252 applications. The phrase used was 'social security and home affairs cases'. The former had been dealt with in some detail in the previous paragraph, where it was made clear that it referred to the judgment in *Cele v South African Social Security Agency and 22 Related Cases.*[18] A person in possession of the facts would have taken that reference and the reference to the related, but unreported judgment when the practice directive flowing from *Cele's* case was revisited[19] and linked them to the judgment in *Sibiya*. That case did not involve these applicants or this firm of attorneys. A reasonable person would also have recognised that the references in the lecture were to cases that had come before me in public hearings and which had been the subject of reported judgments in which the evidence and applicable law had been analysed. While the issue of costs had been dealt with in *Cele's* case and it was briefly discussed in *Sibiya*[20] the questions raised in the letter of 1 November 2010 were not considered anymore than were the

18 2009 (5) SA 105 (DCLD), which appears in the law reports immediately before the report of the judgment in *Sibiya*.
19 *Cele v South African Social Security Agency* [2009] ZAKZNDC 16.
20 Paras [35] to [37].

fee arrangements between the attorneys in those cases and their clients.

[31] For the sake of completeness and accuracy it is appropriate for me to deal briefly with an affidavit delivered by Mr Michael Buck of the firm Goodway & Buck in which he describes the history of these applications. The following points are relevant as being matters that would have been known to a properly informed person.

(a) Between October 2009 and December 2009 I had nothing to do with Home Affairs cases emanating from any firm as I was acting in the Supreme Court of Appeal at the time;[21]

(b) In January 2010 the adjournment of all Home Affairs cases, including those of Goodway & Buck, to 19 January 2010 arose from a discussion between all the judges then on duty in Durban and was approved by the senior judge. It was not my decision alone;

(c) The adjournment of cases on 19 January 2010 to 9 March 2010 was with the approval of the Judge President and I was allocated to hear the cases by the senior civil judge on duty in Durban at that time;[22]

(d) No direction was issued requiring Goodway & Buck to remove matters from the roll that had already been set down.[23] It was indicated that this was desirable and the parties agreed to it.

(e) The circumstances in which cases were not set down after the hearing on 19 March 2010 arose from my understanding (shared by the State Attorney as emerges from correspondence) that the parties had put in place a mechanism to resolve these cases and accordingly to set them down for hearing would undermine that arrangement. That view was conveyed to the parties at a meeting requested by Goodway & Buck and was not challenged by them.[24] There was accordingly no 'ban' on setting

21 Buck, para 6
22 Buck, para 8.4.
23 Buck, para 8.7.
24 Buck, para 10.6 suggests that they were 'not permitted' to set matters down and in para 13.1

down such cases. They were not set down because of the endeavours to resolve them and then (after 25 August) pending the outcome of the hearing of all 252 cases.

[32] As the applicant's fears arise from the publication of the speech rather than its public delivery the reasonable, objective and informed person would have regard to the text of the address as published. They would read the entire address and place the two paragraphs relied on by the applicant in the context of the address as a whole. They would have the advantage of footnotes that would guide them to the judgment in *Cele* as well as the English cases to which reference is made in conjunction with the reference to social security and home affairs cases.

[33] A reasonable, objective and informed reading of the address would lead the reader to understand that I had concerns about the workings of the legal system in respect of both criminal and civil cases. I tried briefly within the constraints of a public lecture to identify some of the problems and to say why they did not lead to ordinary justice for ordinary people. Amongst the problems I identified were delays on the part of legal practitioners and the incentives to lawyers to delay matters. Amongst these I mentioned the system of charging fees and the absence of any incentives to expedition.

[34] In that context I sounded a warning against viewing contingency fees as a panacea for these evils. No specific type of contingency fee was identified, so that it must have been obvious that the type of contingency fee that was charged in the tobacco litigation in the United States of America stood on a different footing to any contingency fees charged in

describes this as a 'bar' but that is not an accurate reflection of matters. The agreement Goodway & Buck entered into would have been stultified by their continued setting down of cases.

the social security and home affairs cases in South Africa or the public housing cases in the United Kingdom. The general point was made that such fees could lead to abuse and the generation of litigation directed more at benefitting the lawyers concerned than their clients. Lastly, the reasonable reader would see that I said specifically that I had no objection in principle to contingency fees, provided appropriate safeguards were in place to prevent them from being exploited purely for the enrichment of lawyers.

[35] The reasonable, objective and informed person reading the address would have understood from these passages that my view is that contingency fees are not in themselves the solution to the problem of access to justice and can give rise to abuses by lawyers whose purpose is personal financial benefit rather then protecting their clients' rights. However there is no basis for thinking that the reasonable reader would take the view that in a case where the legal practitioner was acting on a contingency basis I would deliberately deny their clients an order for costs to which they were in law entitled because of the concerns I expressed in the lecture about contingency fees. Nor could such a reader have connected those remarks to the 252 cases that I am now hearing or thought that anything I said in the speech had anything to do with the proper adjudication of these cases. The link that the applicant perceives between the speech and these cases is not in my view a link that a reasonable, objective and properly informed person would perceive.

[36] I have considered whether there is anything in the letter addressed to the applicant's attorneys on 1 November 2010 that could lead the reasonable reader to view the article any differently. In my view there would not. An examination of the questions on which I sought

information and submissions would reveal that they had nothing to do with contingency fees, but were concerned with the impact of the indemnity principle that underpins costs orders on the relationship between Goodway and Buck and their clients. That principle was expressed by Innes CJ in *Texas Co (SA) Limited v Cape Town Municipality*[25] and has consistently been followed in subsequent decisions by our courts. As I had been told by Goodway & Buck that they would not charge their clients for their services but depended solely on costs orders being made in favour of the clients in order to secure any remuneration, the application of the indemnity principle was clearly relevant to the question of costs. It had not been addressed in the course of argument and it would have been unfair to the parties to take a decision based on that principle without affording them the opportunity to deal with it. That is what the letter did.

[37] Mr Harpur made much in argument of the fact that I raised these issues *mero motu*. With a measure of hyperbole he described this as being akin to the Star Chamber and that it was impossible to answer the questions without being aware of the 'agenda' that lay behind them. That contention cannot be accepted. The Constitutional Court has said:

'Where a point of law is apparent on the papers, that the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu* to raise the point of law and require the parties to deal therewith. Otherwise the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'[26]

The issue to which the questions in the letter of 1 November 2010 were addressed was an issue of law arising from factual material placed before me by the applicant's(?) attorneys. Not to have asked the parties for their

25 1926 AD 467 at 488.
26 *Cusa v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) para [68].

submissions on those questions would have been unfair even though they had been afforded ample prior opportunity to address the question of costs. In those circumstances these contentions on behalf of the applicant cannot be accepted.

[38] As the article would not be construed by the reasonable, objective and fully informed reader in the manner in which the applicant construes it the application fails at the first hurdle. However, even if it could be construed as indicating that I was implacably opposed to contingency fees (notwithstanding the express recognition in the article that I was not opposed to them in principle) the application would fail on the second reasonableness requirement. It is one thing to say that a judge has strong views opposing a particular form of legal practice. It is an entirely different matter to extrapolate from those views to a reasonable belief that if confronted with a case where that form of practice emerges the judge would disregard existing authority and make a finding on the issue in question adverse to the particular litigant. The only issue in regard to which it is suggested that the applicant entertains a reasonable apprehension of bias is the issue of costs. In regard to the remaining issues in his and the other cases there is no suggestion that anyone could think that I would deal with them other than impartially in accordance with my judicial oath. The area of cost is one in which there is an enormous body of well-established authority setting out the principles that bind a judge in reaching a decision on costs. Whilst ultimately the decision is a matter of discretion it is a discretion that is circumscribed by well-established principles. No reasonable, objective reader would conclude after reading this article that in any case involving contingency fees that came before me I would disregard these principles and make a finding on the costs adverse to the party whose lawyers were employed

on a contingency fee basis. In effect that is what the applicant is contending but it is not a reasonable contention.

RESULT

[39] In the result the application for recusal is dismissed. Whilst the respondents were represented and opposed the application they did not ask for any order in respect of costs and none is made.

I

DATE OF HEARING	6 DECEMBER 2010
DATE OF JUDGMENT	21. DECEMBER 2010
PLAINTIFF'S COUNSEL	MR G D HARPUR SC, with him MS D SRIDUTT
PLAINTIFF'S ATTORNEYS	GOODWAY & BUCK
DEFENDANT'S ATTORNEYS	MR K GOVENDER (the State Attorney) and with him MS M JONAS