IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **13230/2011**

In the matter between:

PHILIPPE MARC ANTOINE BRAWERMAN	Applicant/Plaintiff
and	
VAN WIERINGEN & ASSOCIATES	First Respondent/Defendant
HULME & ASSOCIATES	Second Respondent/Defendant

Heard: 16 August 2019

Delivered: 13 September 2019

JUDGMENT

MYBURGH AJ:

Introduction

[1] In this application the applicant seeks my recusal in respect of four applications allocated to me.

[2] Five applications (all relating to a trial which is still to be heard) were set down for hearing on 6 August 2019. One application was to set aside two subpoenas ('the subpoena application'), three were to compel the delivery of documents and trial particulars ('the applications to compel') and the last application concerned the costs of an application launched by the defendants to postpone the trial in February 2019 ('the costs application'). After hearing argument by both counsel, I delivered an ex tempore judgment in respect of the subpoena application and made the following order:

> 'I thus find that the application for the setting aside of the subpoenas is to be dismissed with costs. These costs, however, are limited to this application and any issues relating to the evidence of Mr Buckland and Mr Nurek, as produced, are to be dealt . . ., when the trial comes to court.
>
> Perhaps I can repeat that for emphasis: The costs that I award here are strictly in respect of the application to set aside the subpoenas, which application I dismiss with costs.
>
> The costs will include the costs of two counsel where utilised'.

[3] After the judgment was delivered, the court adjourned until after the lunch hour. Before the recommencement, counsel for the applicant asked to see me in chambers and there, with the other counsel being present, he informed me that he had instructions to apply for my recusal. The matter was then postponed to 16 August 2019 so that a written application for recusal could be made. The necessary papers and heads of argument were filed and the application was heard on that date.

[4] The basis for the application, as summarised by counsel for the applicant, is as follows:

> 'The plaintiff contends that the manner in and circumstances under which the subpoena application was dismissed demonstrated that:
>
> 3.1 the judge prejudged the issues arising from the remaining four applications and made it impossible for plaintiff's counsel to present all the argument applicable to such remaining applications in such reasonable and less restricted manner that would otherwise have been available to the plaintiff;
>
> 3.2 the actions of the judge created a perception of his bias against the plaintiff in favour of the defendants'. [Emphasis added]

[5] The applicant also seeks costs against the respondents on a scale as between attorney and client.

The applicable legal principles

[6] The principles applicable to applications for recusal are well-established. One of the pre-eminent cases is *President of the Republic of South Africa and Others v South African Rugby Football Union and Others,*[1] the essence of which is distilled by Cameron AJ, for majority, in *SA Commercial Catering and Allied Workers Union and Others*:[2]

> '[11] In *Sarfu*, this Court formulated the proper approach to recusal as follows:

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[1] [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 ('*Sarfu*') paras [26]–[48]. See also *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited (Seafoods Division Fish Processing)* ZACC 10; 2000 (3) SA 705; 2000 (8) BCLR 886 paras [11]–[17] and *S v Basson* 2007 (3) SA 582 (CC) paras [23]–[36].

[2] Without footnotes.

> ". . . 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."

[12] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the *Sarfu* judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted.

[13] The second in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality — a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of

open-minded readiness to persuasion — without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication. Impartiality requires in short "a mind open to persuasion by the evidence and the submissions of counsel"; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that —

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. . . . Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."

[14] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.

[15] It is no doubt possible to compact the "double" aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

> "Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity."

[16] The "double" unreasonableness requirement 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 to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law.

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from "the evils and immorality of the old order" remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is "as wrong to yield to a tenuous or frivolous objection" as it is "to ignore an objection of substance"'.

[7] In the *Roberts* matter[3] to which Cameron AJ referred, the requirements for a reasonable apprehension of bias were expressed as follows:

'(1) There must be a suspicion that the judicial officer might, not would, be biased.

(2) The suspicion must be that of a reasonable person in the position of the accused or litigant.

(3) The suspicion must be based on reasonable grounds.

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[3] Reported as *Roberts v Additional Magistrate for the District of Johannesburg, Mr Van Den Berg and Another* [1999] 4 All SA 285 (SCA).

(4) The suspicion is one which the reasonable person referred to would, not [just] might, have'.

[8] In summary, these are the guidelines when determining whether there is a reasonable apprehension of bias:

(a) The test is objective, the question being whether a reasonable, objective and informed person would, on the basis of the facts, reasonably apprehend that the judge will not apply an impartial mind that is open to persuasion to the matter.

(b) It must be assumed that judges are able to apply their minds independently and disabuse their minds of irrelevant personal beliefs or predispositions.

(c) Judges have a duty to sit in all matters absent an obligation to recuse themselves.

(d) It is a fundamental principle that there should be no hesitation on the part of a judge to recuse himself or herself, if there are reasonable grounds for apprehending partiality on his or her part.

(e) An applicant for recusal bears the onus of rebutting the presumption of judicial impartiality and this presumption is not easily dislodged.

(f) As to what is meant by impartiality, it is not an absolute neutrality, but rather an open-minded readiness to persuasion and the absence

of an unfitting adherence to either of the parties or the judge's own predilections, preconceptions and personal views.

(g) There is a two-fold emphasis on reasonableness, in that the apprehension must be that of a reasonable person, and it must be based on reasonable grounds. This underscores the weight of the burden resting on the person alleging the appearance of bias.

(h) Attention must be given to two contending factors, namely, the discouragement of ill-founded and misdirected challenges to the composition of a bench, and the importance of public confidence in impartial adjudication.

Pre-judgment of issues in the remaining applications

[9] As mentioned above, the applicant contends that the circumstances of the dismissal of the subpoena application demonstrates that I have prejudged the issues pertaining to the remaining four applications and that this will make it impossible for Mr Barnard to argue the remaining applications effectively.

[10] As stated above, the test in this regard is objective. The question is whether a reasonable, objective and informed person would reasonably apprehend that I will not bring and impartial mind to the remaining applications.

[11] This impression would presumably have been created by the manner in which I dealt with the proceedings when the subpoena application was argued, as well as the substance of my judgment. I deal first with the proceedings.

[12] The proceedings started at approximately 10h00[4] and the record reflects that there was a lot of interaction between myself and counsel in the beginning in order to orientate myself, given the voluminous nature of the papers and to ensure that I had an accurate understanding of the chronology.

[13] Once that had been done, Mr Barnard addressed me regarding what he called a war of attrition, whereby the respondents were attempting to wear down the applicant. This, he argued they were capable of doing given the disparity in financial strengths between the parties. I was certainly open to persuasion on the question of what really amounts to litigious bullying. I did not hold a position of absolute neutrality on the issue as, perhaps as a product of my own life experience and personal perspective, I had an instinctual sympathy for the applicant's position in this regard. I had to remind myself to maintain impartiality and avoid an unfitting adherence to my own predilections, preconceptions and personal views on this topic lest I exhibit bias in favour of the applicant.

[14] Mr Barnard then dealt with the question of the subpoena served on Mr Nurek. He argued at length about the context of the litigation, and in particular what he said was the obstructive conduct of the respondents. However, without disregarding his submissions in that regard, I did consider it apposite to focus his attention on the subpoenas which were the subject-matter of the subpoena application. This Mr Barnard did, whilst continually referring back to the broader context of the subpoenas. His argument, inter alia, was that while the subpoenas may, when seen in isolation, pass muster, in the broader context of the war of attrition, they amounted to an abuse.

[4] The record indicates that 09h06 was when the proceedings commenced but this is incorrect.

[15] I interacted extensively with Mr Barnard as I grappled with the idea that subpoenas, that on the face of it seemed perfectly legitimate in that they related to people and documentation, that in my view were relevant to trial, could be set aside on the basis he contended for. It was also, in my view, relevant that the two individuals subpoenaed had not raised any objection.

[16] If one peruses the record, it shows periods of lively interaction between myself and Mr Barnard, and then periods where he addressed me at length without interruption. In my view this is normal. There were issues which concerned me and I needed to have Mr Barnard clarify his stance on these issues in order to be sure that I understood the case of the applicant clearly.

[17] Mr Barnard relied heavily on a Namibian judgment, namely *Stier and Others v Venter*.[5] The case dealt with a subpoena that had been issued after a party had been unsuccessful with a rule 35(3) notice, in which she sought discovery of the same documents that subsequently formed the subject-matter of the subpoena. In that case Namandje AJ held that 'it is clear that the defendant's tactical reaction to the plaintiff's refusal to discover documents on the basis that they were irrelevant was motivated by ulterior purposes. In such a case the court is entitled to protect itself and others against an abuse of its processes'.[6] The case was dealt with both in Mr Barnard's heads of argument and in his address to me in court. I took the view, rightly or wrongly, that the case was distinguishable as the subpoenas followed on an unsuccessful attempt to use rule 35(3), whereas in this instance the subpoenas did not follow on an unsuccessful attempt to achieve the same objective in terms of another rule.

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[5] Case number (P1261A/2017) (delivered on 28 October 2008).
[6] Para 20.

[18] Argument then continued on, amongst other things, the alleged overbroad nature of the subpoenas, as well as an elaboration on the argument that the subpoenas were tainted by the context in which the respondents were conducting the litigation.

[19] Eventually, Mr Barnard concluded his argument on the subpoenas and asked if he could move on to the costs application. My interaction with Mr Barnard in this regard was as follows:

> 'M'Lord, I will then move to the application to postpone the trial.
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> COURT: I think we must deal with this aspect, the subpoena aspect first. It is going - I know you want to deal with all three and then get a reply but I would prefer to hear Mr Steenkamp on the question of the subpoena first.
>
> MR BARNARD: As the court pleases, M'Lord'.

[20] I understand that it is a judge's prerogative to manage his or her court and, at this juncture, after hearing Mr Barnard on the question of the subpoenas, I decided that it was best to deal with the subpoena application first and then move to the other applications. I did not cut short Mr Barnard's submissions on the subpoena application and while I did initially allow him to argue more broadly, my decision to deal with the one application first does not give rise to an apprehension of bias.

[21] Mr Steenkamp then addressed me briefly. This is not unusual. By that point many of the issues had been crystallised by way of my interaction with Mr Barnard who addressed me comprehensively and at length. In doing so many

ideas were crystallised and consequently I was able to address the pertinent issues with Mr Steenkamp in a more expedited manner.

[22] The first issue I asked Mr Steenkamp to address was the argument of Mr Barnard that the subpoena was part of a pattern of abuse, a war of attrition of sorts conducted by his clients against the applicant. It was an important consideration and required Mr Steenkamp to set out the respondents' position in that regard.

[23] After Mr Steenkamp had finished with his address, I gave Mr Barnard an opportunity to reply, and thereafter delivered an ex tempore judgment.

[24] Early on in my judgment, I made a point of acknowledging the applicant's position by stating the following:

> 'I understand the case of the applicant in this application to be that, if one looks at the subpoenas in the context of this case and, in particular, the long and drawn-out history of the matter, which commences really on 30 November 2008[7] when the plaintiff started with the building project and carries on to the present date, that, when seen in that context, the issuing of the subpoenas on the two individuals concerned constitute an abuse'.

[25] I then went on to deal with the substance of the subpoenas, as well as the argument that they were overbroad. Towards end of my judgment, I stated the following:

> 'I have considered carefully the contention of the applicant in this application, that these two subpoenas are no more than another attempt by the defendants to delay this matter coming to trial, and that I have considered in the context of the many steps that

[7] The record is incorrect where it refers to 2018.

> have already preceded this matter, this hearing today, in preparation for a trial that has not yet eventuated. However, these subpoenas have substance. There is every reason to expect that the information that would be provided by these two gentlemen would go to the core of the issue to be decided by the Court and thus I cannot find that the subpoenas are an abuse, as explained by the applicant'.

[26] In hearing the matter, I was at pains to provide both counsel with an opportunity to address me fully on the question of the subpoena application and I am confident and that an objective and informed person observing proceedings would not reasonably apprehend that I did not apply an impartial mind in the hearing of the subpoena application, nor that I would fail to do so in the applications that follow.

[27] I made it clear in my judgment that costs to be paid by the applicant, regarding the subpoena application, were to be limited to the application itself. Thus, and that any issues relating to the evidence produced by Mr Buckland and Mr Nurek remain alive. For example, if such evidence is unnecessarily voluminous and irrelevant it can be dealt with when the matter came to trial, by the trial judge. As mentioned above, I was aware when hearing the matter that I should temper by instinctual sympathy for the financial underdog and keep my mind open to persuasion by both counsel.

[28] Counsel for the applicant submitted that the notional observer would have formed the impression that I had not read the papers. The deponent of the answering affidavit countered that this was not the impression of the respondents who thought me well-versed in the papers. Counsel for the respondents argued that even if this were the case it did not give rise to an apprehension of bias. The applicant's contention in respect of my lack of preparation for the hearing is devoid of truth and, in my view the notional

reasonable observer would not have formed an impression that I had not read the papers.

[29] Finally, it does not follow from the finding I have made regarding the subpoenas not being an abuse, that I will be biased when hearing the four remaining applications. Each application will be determined on its own merits. It is possible to make a decision that the applications to compel are part of a pattern of abuse, despite the subpoenas not being so. As matter of law I am not precluded from making such a decision and neither is there a reasonable apprehension that my mind is already made up in this regard.

[30] This applies to the costs application as well. If the postponement was no more than a ploy to keep the matter out of court then it will be open to me to make an appropriate costs order.

Conclusion

[31] It is trite, as mentioned above, that an applicant for recusal bears the onus of rebutting the presumption of judicial impartiality and that this presumption is not easily dislodged. I find that the applicant has failed to dislodge the presumption and hence make the following order:

(a) The application for recusal is dismissed with costs, which costs are to include the costs of two counsel.

P A MYBURGH

Acting Judge of the High Court

Appearances:

For the applicant:	Advocate T A Barnard
	Instructed by John Smith and Association
For the respondents:	Advocate M Steenkamp
	Advocate N Brand
	Instructed by Clyde and Co and Mellows & De Swart Inc