CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 37/10
[2010] ZACC 28

In the matter between:

ENRICO BERNERT Applicant

and

ABSA BANK LTD Respondent

Heard on : 19 August 2010

Decided on : 9 December 2010

JUDGMENT

NGCOBO CJ:

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal[1] that upheld an appeal against the decision of the North Gauteng High Court, Pretoria (High Court).[2] The High Court had, in bifurcated proceedings, ruled that Absa Bank, the respondent, was liable to Mr

[1] *Absa Bank Limited v Enrico Bernert*, Case No 99/09, Supreme Court of Appeal, 29 March 2010, unreported.

[2] *Rico Bernert v Absa Bank Limited*, Case No 14302/03, Transvaal Provincial Division, 15 October 2008, unreported.

Bernert, the applicant, in damages for negligent misstatement. The issue of quantum was left over to be determined later.

[2] At the centre of the litigation was a document entitled "Verbiage of Bank Guarantee" (alleged guarantee) which was purportedly issued by Absa Bank and addressed to Emirates Bank International (Emirates Bank). It was required by a potential financial investor, Sheikh Fawaz Bin Abdullah Al-Khalifa (Sheikh), in a business enterprise to be undertaken by Mr Bernert. The alleged guarantee, which was described by the High Court as "strange and confusing" and by the Supreme Court of Appeal as "a compendium of gibberish", purported to guarantee a fixed deposit facility to a Mr Fanjek on an amount of $6 million at a specified fixed interest rate. Concerned that Emirates Bank might rely on the authenticity of this document, Absa Bank, upon becoming aware of its existence, advised Emirates Bank, by letter, that the document had been issued without its authority and in irregular circumstances. When the Sheikh learnt of this letter, he pulled out of the project.

[3] The central issue in the litigation was whether Absa Bank acted lawfully when it advised Emirates Bank that the alleged guarantee had been issued without its authority and in irregular circumstances. The High Court answered this question in favour of the applicant while, on appeal, the Supreme Court of Appeal answered it in favour of Absa Bank. Mr Bernert is attacking the

conclusion of the Supreme Court of Appeal and is alleging bias against him by some of the judges who constituted the panel that heard the appeal in the Supreme Court of Appeal.

[4] Mr Bernert contends that the Supreme Court of Appeal was biased against him on a number of grounds. First, one of the judges who constituted the panel held shares in Absa Bank; second, two of the judges had a prior relationship with Absa Bank; third, the manner in which the presiding judge conducted the proceedings created a reasonable apprehension that he was biased and fourth, the factual findings made by the Supreme Court of Appeal were so grossly unreasonable that they are inexplicable except on the basis of bias.

[5] The factual background relevant to these issues is this.

Factual background

[6] Mr Bernert is a motor mechanic. While working at his father's business of restoring motor vehicles, he came across a design for a motor vehicle. In due course, he acquired rights to this design. After making various modifications to this design, he began building vehicles which he called "El Macho". Apparently this motor vehicle attracted some interest within the armaments industry. This prompted Mr Bernert to consider building production plants for this vehicle internationally. The events that gave rise to the litigation arose

from his attempt to secure finance to build these production plants. He hoped to realise his dream through a close corporation called Rotrax Cars International CC (Rotrax), in which he was a sole member.

[7] In the course of searching for finance, he came into contact with the Sheikh and Mr Fanjek. The latter, who described himself as a businessman, purported to play the role of Mr Bernert's agent for raising the investment finance. The Sheikh agreed to invest millions of dollars to build and operate manufacturing plants in five continents. As a pre-condition for this investment, Mr Bernert had to obtain and produce an undertaking from a reputable South African bank that it would provide the Sheikh with a fixed deposit facility. In addition, the bank had to undertake to provide the Sheikh with a specified interest rate and to return the money when the term of the fixed deposit expired.

[8] The alleged guarantee was secured with the assistance of Mr Coetzee, a business manager employed by Absa Bank. The document was prepared on the letterhead of Absa Bank and was addressed to Emirates Bank. The alleged guarantee confirmed that Mr Fanjek was guaranteed a fixed deposit of an amount of $6 million for a period of 12 months at an "interest rate of libor plus 1%". It is not clear from the evidence why the alleged guarantee was in favour of Mr Fanjek instead of the Sheikh who had required Mr Bernert to produce the alleged guarantee. The evidence establishes that there were other similar

documents addressed to three other banks with different amounts of "investment".

[9] When the alleged guarantee came to the attention of Absa Bank, it set about attempting to retrieve it. Absa Bank advised Emirates Bank that the document had been issued irregularly and without its authority. It added that in the event that Emirates Bank had received the document, no reliance should be placed on it. On being informed by Emirates Bank of these developments, the Sheikh decided not to proceed with investing funds in Mr Bernert's project. And this ended Mr Bernert's hope of building his manufacturing plants.

Proceedings in the High Court

[10] Mr Bernert, as a cessionary of a claim by Rotrax, instituted a claim against Absa Bank in the High Court, claiming that, in causing the letter to be written to Emirates Bank, Absa Bank had acted unlawfully. This conduct, he alleged, alienated the Sheikh and caused him to lose millions of dollars that the Sheikh would have invested in building and operating the manufacturing plants. He further alleged that over 10 000 motor vehicles would have been manufactured and sold and that this would have earned Rotrax about R187 million, an amount he claimed as damages.

[11] The High Court, after separating the issue of liability from that of quantum, found that Absa Bank had indeed acted unlawfully. On appeal to the Supreme Court of Appeal, this finding of the High Court was set aside. It is necessary to set out the approach of the Supreme Court of Appeal to this matter as it is relevant to the question of whether the findings of that court are grossly unreasonable and whether it reversed any of the factual findings of the High Court.

Proceedings in the Supreme Court of Appeal

[12] The Supreme Court of Appeal took the view that the High Court misconceived the nature of the case. It held that the claim was not about the enforcement of a contract but about whether Absa Bank was justified in advising Emirates Bank that the alleged guarantee had been issued without its authority. Given the nature of the claim, the court held that it was irrelevant how the parties understood the document. Consequently, it found that the High Court erred in focusing more on what the witnesses said the document meant instead of focusing more on what third parties might have thought the document meant.[3]

[13] Before considering the main issues presented in this case, it is necessary to address two preliminary issues. The first is whether the late filing of the

[3] Above n 1 at para 72.

application for leave to appeal and the record should be condoned. The other is whether leave to appeal should be granted.

Applications for condonation

[14] The test for determining whether to grant condonation is the interests of justice. Factors relevant to this enquiry include, but are not limited to, the extent and the cause of delay, the prejudice to other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be decided in the intended appeal and the prospects of success.[4] None of these factors is decisive; the enquiry is one of weighing each against the others and determining what the interests of justice dictate.

[15] The application for leave to appeal was filed some three days late while the record was filed a day late. At the hearing of this matter, counsel for Absa Bank indicated that the applications for condonation were opposed only on the basis that the application for leave to appeal bore no prospects of success. In the view I take of the importance of the constitutional issues of bias raised by the application for leave to appeal, I do not consider the prospects of success to be decisive in this case.

[4] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Van Wyk v Unitas Hospital and Another (Open Democracy Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 8.

[16] Apart from this, there is a satisfactory explanation for the delay in relation to the filing of both the application for leave to appeal and the record, the delay was minimal and there was no prejudice to Absa Bank. In these circumstances, it is in the interests of justice that the applications for condonation be granted.

Should the application for leave to appeal be granted?

[17] The question whether an application for leave to appeal should be granted depends upon whether (a) it raises a constitutional matter and (b) it is in the interests of justice to grant leave.

[18] The question whether a judicial officer should recuse himself or herself is a constitutional matter.[5] So too is the issue whether there was actual or a reasonable apprehension of bias.[6] And legal and factual issues that need to be decided in order to determine the question of recusal or bias are themselves issues connected with a decision on a constitutional matter.[7] The question whether the two judges of the Supreme Court of Appeal should have recused themselves as well as whether the applicant had a reasonable apprehension of bias, therefore, unquestionably raise a constitutional matter.

[5] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (*Basson I*) at paras 21-2.

[6] Id.

[7] Id at para 22.

[19] But is it in the interests of justice to grant leave to appeal?

[20] The answer to this question is a function of many factors. These include, but are not limited to, the prospects of success in the intended appeal, the importance of the constitutional issues sought to be raised in the intended appeal and the impact of the decision on the administration of justice. Among other questions, this application raises the following: The one is should the two judges of the Supreme Court of Appeal have recused themselves of their own accord? The other, which has not been answered by this Court before, is whether judicial officers who are shareholders in a litigant company before a court should recuse themselves of their own accord?

[21] Apart from this, the applicant has made serious allegations against judges of the Supreme Court of Appeal. These allegations concern the proper administration of justice. They strike at the very core of the judicial function, namely, to administer justice to all impartially and without fear, favour or prejudice. Compliance with this requirement is fundamental to the judicial process and the proper administration of justice. This is so because it engenders public confidence in the judicial process, and public confidence in the judicial process is necessary for the preservation and maintenance of the rule of law. Bias in the judiciary undermines that confidence. And a judicial

officer who sits in a case in which he or she should recuse himself or herself violates the Constitution.

[22] These are important constitutional issues that go beyond the interests of the parties to the dispute, for an independent and impartial judiciary is crucial to our constitutional democracy. It is, therefore, in the public interest that these issues be resolved. As these allegations are made against the Supreme Court of Appeal, there is no court that can investigate these issues other than this Court. This Court, as the ultimate guardian of the Constitution, has the duty to express the applicable law in order to enhance certainty among judicial officers, litigants and legal representatives and, thereby, to contribute to public confidence in the administration of justice.

[23] Prospects of success are an important consideration in deciding whether leave to appeal should be granted. However, viewed against the importance of the constitutional issues raised, I do not consider the prospects of success to be decisive in this case.

[24] In all the circumstances it is, therefore, in the interests of justice that leave to appeal be granted.

[25] And now to the merits of the appeal.

The merits

[26] The appeal raises the broad issue of judicial bias, in the following questions:

(a) Should Cachalia JA have recused himself of his own accord because of his shareholding in Absa Bank?

(b) Should Cachalia and Malan JJA have recused themselves of their own accord because of their alleged prior association with Absa Bank?

(c) Did the manner in which the hearing was conducted in the Supreme Court of Appeal give rise to a reasonable apprehension of bias?

(d) Were the factual findings made by the Supreme Court of Appeal so grossly unreasonable that they give rise to a reasonable apprehension of bias?

[27] Before considering these issues, I consider it appropriate to set out, in broad terms, the legal principles that govern allegations of bias.

Applicable legal principles

[28] It is, by now, axiomatic 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 inconsistent with the

Constitution.[8] This case concerns the apprehension of bias. 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 the interest that the judicial officer has in the outcome of the case. Or it may 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. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial.[9] And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.

[29] The test for recusal which this Court has adopted 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.[10]

[30] In *SARFU II*, this Court formulated the proper approach to an application for recusal and said:

[8] 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] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU II*) at para 30 and *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson II*) at para 27.

[9] Id.

[10] *SARFU II* above n 8 at paras 36-9.

"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 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."[11] (Footnote omitted.)

[31] What must be stressed here is that which this Court has stressed before: the presumption of impartiality and the double-requirement of reasonableness.[12] The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer.[13] This presumption 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

[11] Id at para 48.

[12] *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (*SACCAWU*) at paras 12-7.

[13] *SARFU II* above n 8 at paras 41-2.

prejudice."[14] 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."[15] And the requirement of impartiality is also implicit, if not explicit, in section 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." This presumption therefore flows directly from the Constitution.

[32] As is apparent from the Constitution, the very nature of the judicial function requires judicial officers to be impartial. Therefore, the authority of the judicial process depends upon the presumption of impartiality. As Blackstone aptly observed, "[t]he law will not suppose a possibility of bias or favour in a judge, who [has] already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[16] And as this Court observed in *SARFU II*, judicial officers, through their training and experience, have the ability to carry out their oath of office and it "must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions."[17] Hence the presumption of impartiality.

[14] Section 165(2) of the Constitution.

[15] Item 6 of Schedule 2 to the Constitution and section 9(2)(a) of the Magistrates' Courts Act 32 of 1944.

[16] Blackstone *Commentaries on the Laws of England III* 15 ed (Professional Books Ltd, Abingdon 1982) 361.

[17] *SARFU II* above n 8 at para 48.

[33] But as this Court pointed out in both *SARFU II* and *SACCAWU*, this presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias.[18] The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased.[19]

[34] The other aspect to emphasise is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable. As we pointed out in *SACCAWU*, "the two-fold emphasis . . . serve[s] to underscore the weight of the burden resting on a person alleging judicial bias or its appearance."[20] This double-requirement of reasonableness also "highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough."[21] The court must carefully scrutinise the apprehension to determine whether it is, in all the circumstances, a reasonable one.

[18] Id at para 40 and *SACCAWU* above n 12 at para 14.

[19] *SARFU II* above n 8 at para 41.

[20] *SACCAWU* above n 12 at para 15.

[21] Id.

[35] The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants 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 the case in their favour.[22] Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting.[23] This flows from their duty to exercise their judicial functions. As has been rightly observed, "[j]udges do not choose their cases; and litigants do not choose their judges."[24] An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias.

[36] But equally true, it is plain from our Constitution that "an impartial Judge is a fundamental prerequisite for a fair trial".[25] Therefore, a judicial officer should not hesitate to recuse himself or herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever

[22] *Re J.R.L.: Ex parte C.J.L.* (1986) 161 CLR 342 at 352, quoted with approval in *SARFU II* above n 8 at para 46.

[23] *SARFU II* above n 8 at para 46.

[24] *Ebner v Official Trustee* (2001) 205 CLR 337 at para 19.

[25] *SARFU II* above n 8 at para 48.

reason, was not or will not be impartial.[26] In a case of doubt, it will ordinarily be prudent for a judicial officer to recuse himself or herself in order to avoid the inconvenience that could result if, on appeal, the appeal court takes a different view on the issue of recusal.[27] But, as the High Court of Australia warns:

> "[I]f the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."[28]

[37] Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court and, on the other hand, the pre-eminent value of public confidence in the impartial adjudication of disputes.[29] As we said in *SACCAWU*, in striking the balance, a court must bear in mind that it is "'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'."[30] This balancing process must, in the

[26] *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [2000] 1 All ER 65 at para 21; *SACCAWU* above n 12 at para 17 and *SARFU II* above n 8 at para 48.

[27] *Ebner* above n 24 at para 20.

[28] Id.

[29] *SACCAWU* above n 12 at para 17.

[30] Id quoting *Locabail* above n 26 at para 21.

main, be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires.

[38] With these legal principles in mind, I now turn to consider whether (a) the two judges of the Supreme Court of Appeal should have recused themselves and (b) whether the applicant should reasonably have entertained a reasonable apprehension of bias. I will consider each of these issues in turn.

Recusal

[39] The factual background against which the question of recusal must be considered is this: Cachalia JA owned 1000 shares of Absa Bank stock, with a value of approximately R138 800. At the time, the total number of issued shares in Absa Bank stock was 718 210 000 shares, with a total value of approximately R100 billion.

[40] Prior to the hearing in the Supreme Court of Appeal, the applicant's erstwhile attorney met with Nugent JA, the presiding judge in the appeal, and with Absa Bank's legal representatives. At this conference, the presiding judge informed the applicant's attorney that one of the five judges due to sit in the appeal was a shareholder in Absa Bank and expressed the opinion that the outcome in the case would have no influence on Absa Bank's share price. The applicant's erstwhile attorney agreed. The presiding judge did not ask the

applicant's attorney to inform the applicant of the shareholding. The applicant's attorney advised the applicant of the shareholding only after the hearing, although on the same day, but several weeks before judgment was delivered. According to the applicant, there was no time to do so prior to the hearing of the appeal because the hearing was about to commence. He added that he decided to wait for the outcome of the case as judgment in his favour would have rendered it unnecessary to ask for recusal.

[41] In addition, the applicant alleges in his replying affidavit that after the filing of his application for leave to appeal in this Court, he discovered that, prior to their appointment to the bench, Cachalia and Malan JJA were both previously employed by the Institute of Banking and Finance Law at Rand Afrikaans University (now the University of Johannesburg). The Institute, founded by Malan JA, was mainly sponsored by five major South African banks, with Absa Bank being the main sponsor. As the main sponsor, Absa Bank paid the salaries of Cachalia and Malan JJA as well as for their overseas research trips whilst they were in the employ of the Institute. This prior association, the applicant contends, disqualified both judges from sitting in the appeal.

Shareholding in Absa Bank by Cachalia JA

[42] The applicant submitted that Cachalia JA should have recused himself of his own accord because he had a financial interest in Absa Bank. The "value,

nature and extent of the ownership of the shares . . . [was] irrelevant", the applicant argued. He submitted that it was reasonable to apprehend that Cachalia JA would not hand down a judgment in his favour, given the magnitude of his claim. The applicant did not refer to any specific authority in support of these submissions other than to refer broadly to Supreme Court of Appeal case law on bias.[31]

[43] To meet this argument, Absa Bank submitted that the applicant was barred from raising bias based on recusal because his attorney had knowledge of the circumstances giving rise to recusal immediately before the appeal was argued and the applicant himself had this knowledge after the hearing and some weeks prior to the delivery of judgment. This conduct, on the part of the applicant, amounts to an unequivocal election not to ask for the recusal and this was a clear and unequivocal decision to abandon the right to raise the issue of recusal, Absa Bank maintained. In support of this submission, Absa Bank referred us to the decision of the High Court of Australia in *Vakauta v Kelly*.[32] In the alternative, Absa Bank submitted that the interest that Cachalia JA held in it was "so clearly trivial in nature as to be disregarded under the *de minimis* principle". In this regard, we were referred to the Appellate Division decision

[31] *S v Shackell* 2001 (4) SA 1 (SCA); *S v Roberts* 1999 (4) SA 915 (SCA); *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) and *Council of Review, South African Defence Force, and Others v Mönnig and Others* 1992 (3) SA 482 (A).

[32] (1989) 167 CLR 568.

in *BTR*,[33] the English Court of Appeal decision in *Locabail*[34] and the High Court of Australia decision in *Ebner*.[35]

[44] On the issue of prior association between Absa Bank and Cachalia and Malan JJA, Absa Bank submitted that this attack does not meet the test for the apprehension of bias.

Applicable legal principles

[45] Ownership of shares in a litigant company is one of the possible sources of interest that a judicial officer can have in a litigant. And this interest may give rise to a suggestion that the judicial officer has an interest in the outcome of litigation. The ownership of shares in Absa Bank by one of the judges of appeal, as well as the prior association of the two judges of appeal with Absa Bank, illustrate the difference in the nature and degree of associations, and therefore, any potential interests that might exist. The association that a judicial officer has with a litigant company may or may not have the potential to raise the question of the impartiality of the judicial officer. And it may or may not give rise to a suggestion that a judicial officer has an interest in the outcome of the proceedings. The question for decision in this case is when will

[33] Above n 31.

[34] Above n 26.

[35] Above n 24.

shareholding or other financial interest in a litigant company by a judicial officer give rise to a reasonable apprehension of bias.

[46] Inevitably, a reasonable, objective and informed person would reasonably apprehend that a judicial officer who has a direct financial interest in the outcome of proceedings would not bring an impartial mind to bear on the adjudication of the case. Although a judicial officer may have a pecuniary interest in the form of shares or other financial interest in a company that is a party to the proceedings before him or her, that does not necessarily mean that the judicial officer has a financial interest in the outcome of those proceedings. In many cases in which a company is a party to the litigation, the outcome of the proceedings may have no capacity to affect the value of the shares held by the judicial officer or his or her ownership of those shares. A reasonably informed litigant, therefore, would not reasonably apprehend that, simply because a judicial officer owns shares in a litigant company, the judicial officer would not bring an impartial mind to bear in adjudicating the case. But at the same time, it cannot be assumed that proceedings in which a company is a party will not affect the shares held by the judicial officer in that company or his or her interest in those shares.

[47] When then does ownership of shares by a judicial officer in a litigant company give rise to a reasonable apprehension of bias? In Australia, the

question whether a judge, who has shares or some other financial interest in a litigant company before him or her, has an interest in the outcome of proceedings is resolved by asking whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares or interest of the judge in the litigant company.[36] If the answer is in the affirmative, the judge is disqualified, otherwise not. The High Court of Australia has emphasised that the judge is disqualified because "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case."[37]

[48] Articulating the application of the reasonable apprehension of bias test to shareholding, the High Court of Australia said:

> "[W]here a judge owns shares in a listed public company which is a party to, or is otherwise affected by, litigation, and there is no other suggested form of interest or association, the question whether there is a realistic possibility that the outcome of the litigation would affect the value of the shares will be a useful practical method of deciding whether a fair-minded observer might hold the relevant apprehension. In such a case, if the answer to the question is in the negative, the judge is not disqualified. If the answer to the question is in the affirmative, the judge is disqualified, not 'automatically', but because, in the absence of some countervailing consideration of sufficient weight, a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case."[38]

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[36] *Ebner* above n 24 at para 37.

[37] Id.

[38] Id.

[49] English courts have adopted the automatic disqualification rule.[39] This rule is invoked where a judge is shown to have a financial or proprietary interest in the outcome of a case in which he or she is to decide. In this situation "the existence of bias is effectively presumed".[40] The basic rule and its rationale were expressed as follows in *Locabail*:

> "The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice".[41]

[50] It is, however, clear that mere interest in the litigant does not automatically disqualify a judge. As the Court of Appeal put it:

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[39] This rule has its genesis in the House of Lords decision in *Dimes v. Grand Junction Canal (Proprietors of)* (1852) 3 HL Cas 759. Over the years the rule has been expressed differently. In *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (*Pinochet II*), Lord Browne-Wilkinson, at 586, expressed it as follows:

> "First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."

[40] *Locabail* above n 26 at para 4.

[41] Id at para 7.

> "In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest."[42]

[51] In this regard, the Court of Appeal cited with approval the majority judgment of the Victoria Court of Appeal in *Clenae* where Charles JA said:

> "If there is a separate rule for automatic disqualification for financial interest, unrelated to a reasonable apprehension of bias, in my view the irrebuttable presumption of bias only arises (subject to questions of waiver or necessity) where the judicial officer has a direct pecuniary interest in the outcome of the proceeding."[43]

And Winneke P, concurring, said:

> "I agree with Charles J.A. that authority which binds this court does not compel us to conclude that it is the mere shareholding by a judicial officer ('judge') in a party which, alone, constitutes the 'disqualifying pecuniary interest', but rather it is the potential interest, created by that shareholding, in the subject matter or outcome of the litigation which is the disqualifying factor."[44]

[52] These cases suggest that the basic approach to the question whether an interest in a litigant gives rise to an interest in the outcome is the same under

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[42] Id at para 8.

[43] Id quoting *Clenae Pty. Ltd. and Others v. Australia & New Zealand Banking Group Ltd*. [1999] 2 V.R. 573 at para 59.

[44] Id at para 9, quoting *Clenae* at para 3. It must be noted that when this case came on appeal to the High Court of Australia, as *Ebner* above n 24, it noted, at para 54 that:

> "Having regard to the current state of the common law in Australia on the subject of disqualification for apprehended bias, we do not accept the submission that there is a separate and free-standing rule of automatic disqualification which applies where a judge has a direct pecuniary interest, however small, in the outcome of the case over which the judge is presiding."

English law and Australian law. The question to ask is whether there is a realistic possibility that the outcome of the litigation would affect the interest that the judge has. In English law, an affirmative answer leads to "automatic disqualification". In Australia, it leads to disqualification, not, as the High Court of Australia emphasised, because of an automatic disqualification rule, but because a reasonably informed litigant might reasonably apprehend bias.[45] This rider reflects the differences in the way the common law of recusal in these countries has developed.

[53] The approach of our law to the problem must be informed by our test for apprehended bias. What must be borne in mind is that, in deciding whether a judicial officer might be biased, it is not necessary to predict how the judicial officer will in fact approach the matter. As the High Court of Australia has observed, "[t]he apprehension of bias principle admits of the possibility of human frailty."[46] In addition, it must take into account the presumption of impartiality which can only be displaced by cogent evidence. The allegation that a judicial officer has an interest in the proceedings or an interest in a party to the proceedings is not sufficient to give rise to a reasonable apprehension of bias. What is required is the articulation of the connection between the interest alleged and the feared deviation from impartial adjudication of the case. But

[45] *Ebner* above n 24 at para 37.

[46] Id at para 8.

we must, at the same time, not lose sight of the fact that at issue is not whether there was actual bias, but whether there was a reasonable apprehension of bias.

[54] It seems to me that asking the question whether there is a realistic possibility that the outcome of the proceedings would affect the judicial officer's interest, is a useful practical method of deciding whether a judicial officer has an interest in the outcome of the case. This approach to the problem is consistent with our test for the apprehension of bias. If the answer to this question is in the affirmative, then the judicial officer has an interest in the outcome of the case and a reasonably informed litigant will reasonably apprehend that the judicial officer will not bring an impartial mind to bear on the adjudication of the case. In that event, the judicial officer is disqualified from sitting in the case.

[55] By contrast, where there is no realistic possibility that the outcome of the proceedings could affect a judicial officer's interest, a reasonably informed person will not reasonably apprehend that the judicial officer might be biased. Then no reasonable apprehension of bias can arise and the judicial officer is not disqualified from sitting. This will generally be the case where the judicial officer holds a relatively small number of shares in a large company and the amount involved in the litigation is not such that it could realistically affect the

value of the judicial officer's shares or dividends. It may also be the case where the judicial officer has a savings, fixed deposit or current account.

[56] However, even in those situations where there is no realistic possibility that the outcome of a case would affect a judicial officer's interest or shareholding, it is nevertheless desirable that the judicial officer should disclose the nature, extent and value of his or her interest to the parties. Disclosure should be made no matter how small the interest may be. Litigants should not be left with the impression that the judicial officer is hiding his or her interest in the case from them. This is likely to be the case where there was no prior disclosure and the parties subsequently discover that the judicial officer had an interest. This may raise questions about the impartiality of the judicial officer in circumstances where this would not have been the case if there had been prior disclosure. And this may well undermine public confidence in the judiciary.

[57] It is apparent from the above that the nature and extent of the interest in the shares or the value of the shares are relevant considerations in this enquiry. These constitute "the correct facts" which an "informed person" must possess before he or she can "reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case".[47] I am, therefore, unable to uphold the submission by the applicant that how many

[47] *SARFU II* above n 8 at para 48.

shares in Absa Bank Cachalia JA held, what they were worth and what proportion of the bank's issued share capital they constituted, are irrelevant. These facts are necessary in order to assess the reasonableness of the apprehension of bias and they may well demonstrate whether there is any logical connection between the interest held and the feared deviation from impartial adjudication.

[58] What remains to be considered is the decision of the Appellate Division in *BTR*.[48] This decision, at first glance, appears to suggest that the *de minimis* rule is an exception to the requirement that a judicial officer, who has an interest in the outcome of the case, must recuse himself or herself. That case did not involve ownership of shares in a litigant company. The question in that case was whether the presiding member, who was one of three Industrial Court members hearing a labour dispute between BTR and a labour union, had, by attending a labour seminar organised by a firm of labour consultants that had been advising BTR in the dispute before the Industrial Court, associated himself with the "camp of the enemy" and thus created a reasonable apprehension of bias in the minds of the union officials. The presiding member attended the seminar at the invitation of the firm concerned and prior to the completion of the proceedings in which he was presiding. At the seminar, the

[48] *BTR* above n 31.

legal representatives of BTR, as well as the Industrial Court member concerned, presented papers.

[59] Both the court of first instance and the appeal court held that the presiding member displayed too great an association with the firm and this would have created a reasonable apprehension of bias in the reasonable minds of union officials. In the course of discussing the applicable legal principles, the appeal court said:

> "It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the *de minimis* principle) he is disqualified, no matter how small the interest may be. See in this regard the remarks of Lush J in *Sergeant and Others v Dale* (1877) 2 QBD 558 at 567. The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."[49]

[49] Id at 694H-695A. In *Serjeant and Others v Dale* (1877) 2 QBD 558, cited by the court in *BTR*, the English court held at 567:

> "The law does not measure the amount of interest which a judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

[60] It is not apparent from this passage whether the court intended to lay down the rule that a judicial officer who has any interest in the outcome of a case must recuse himself or herself from the case no matter how small the interest may be. The statement that the law does not seek to measure the amount of interest may very well be construed as laying down such a rule. But the qualification introduced in parenthesis, namely, "save an interest so clearly trivial in nature as to be disregarded under the *de minimis* principle", seems to suggest that not all interests in the outcome of a case should lead to disqualification.

[61] This passage must be understood in the context of the apprehension of bias test which the court adopted, and in particular, the statement that "the matter stands no differently with regard to the apprehension of bias by a lay litigant."[50] What the court had in mind, it seems to me, was that the interest held by a judicial officer must be such that it gives rise to a "suspicion of partiality . . . which might reasonably be entertained by a lay litigant".[51] The court must be understood as holding that where the interest of a judicial officer in proceedings is so clearly trivial in nature, it will not give rise to a suspicion of partiality which might reasonably be entertained by a lay litigant. But where the interest is not trivial in nature, it may give rise to a suspicion of partiality. And "[i]f

[50] *BTR* above n 31 at 694I-J.

[51] Id.

suspicion is reasonably apprehended, then that is an end to the matter."[52] Thus understood, this is consistent with the test for a reasonable apprehension of bias.

[62] It follows that the contention that the mere ownership of shares by Cachalia JA was, without more, sufficient to disqualify him from sitting in the case cannot be upheld.

[63] The question which a judicial officer should subjectively ask himself or herself, therefore, is whether, having regard to his or her share ownership or other interest in one of the litigants in proceedings, he or she can bring the necessary judicial dispassion to the issues in the case. If the answer to this question is in the negative, the judicial officer must, of his or her own accord, recuse himself or herself. If, on the other hand, the answer to this question is in the affirmative, the second question to ask is whether there is any basis for a reasonable apprehension of bias on the part of the parties, whether on the basis of an interest in the outcome of the case, interest in one of the litigants (by shareholding, family relations or otherwise) or attachment to the case. If the answer to this question is in the affirmative, the judicial officer must disclose his or her interest in the case, no matter how small or trivial that interest may

[52] Id at 695A.

be. And in the event of any doubt, a judicial officer should err in favour of disclosure.

[64] What has been described in the preceding paragraph is more than a matter of prudence of professional practice which should guide judicial officers when they have an interest or association which has the potential to disqualify them. The rule of practice described above has become established. It has been followed by judicial officers for a long time. Indeed, this is the practice Cachalia JA followed when he made the disclosure. Similarly, at the hearing of this case, some members of this Court disclosed their interest in Absa Bank arising from banking accounts they held in it. The advantage of this requirement is that it gives the parties the opportunity to object to the judicial officer sitting or bring to the attention of the judicial officer some aspect of the case that has a bearing on the shareholding or interest that the judicial officer might have overlooked.[53] Failure to disclose an interest, in itself, does not lead to a reasonable apprehension of bias. However it may be relevant, if at all, "only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias."[54]

[53] *Ebner* above n 24 at para 69.

[54] Id at para 70. (Footnote omitted.)

[65] As I have stated above, the test for bias in our law is by now settled. That test is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias. Ownership of shares in a litigant company is a form of association with, and an interest in, a litigant in a case. It may or may not give rise to a suggestion that a judicial officer has an interest in the outcome of the proceedings. And this may or may not give rise to a reasonable apprehension of bias. If it does, the judicial officer concerned is disqualified from sitting in the case. Our test of reasonable apprehension of bias is, therefore, wide enough to address the situation where a judicial officer owns shares in a litigant company.

[66] I would therefore hold that the question that falls to be determined on this aspect of the case is whether, the apprehension that Cachalia JA might, on the facts and circumstances of this case, not bring an impartial mind to bear on the adjudication of the case, was reasonably held. Relevant to this determination is the value, nature and extent of Cachalia JA's shareholding in Absa Bank, the disclosure of his shareholding and the applicant's failure to object to Cachalia JA sitting, immediately before the commencement of the hearing and before delivery of the judgment. This question must, as pointed out earlier, be considered in the light of the presumption of impartiality and the double-requirement of reasonableness.

Application of principles to this case

[67] The share capital of Absa at the time amounted to approximately R100 billion. If successful in all he claimed, the applicant would have been awarded at most R187 million. This represents 0.187% of R100 billion. This outcome of the case, in my view, could not realistically impact in any significant way on the share price of Absa Bank. There was, therefore, no realistic possibility that the outcome of the proceedings could affect the value of shares held by Cachalia JA in Absa Bank; nor was there a realistic possibility that his shareholding in Absa Bank could influence his decision either way.

[68] Even if it could be said that there was some basis for a reasonable apprehension of bias, Cachalia JA disclosed his shareholding in Absa Bank. Shortly after the hearing the applicant was told of the shareholding and yet did not object. Nor has the applicant pointed to any conduct on the part of Cachalia JA before, during or after the hearing that could possibly have inspired a reasonable apprehension of bias. And the applicant has not pointed to any aspect of the judgment that has any bearing on the shareholding.

[69] There is a further hurdle besetting the applicant's pathway to success on this issue: the delay in raising the issue of recusal. The applicant's erstwhile attorney was advised of the shareholding in Absa Bank prior to the hearing of the appeal. There was no objection to Cachalia JA sitting in the appeal until

after the delivery of judgment which went against the applicant. The applicant sought to explain failure to object prior to the hearing on the basis that there was little or no time for his attorney to inform him of the shareholding prior to the commencement of the hearing. He sought to explain the failure to raise the issue of recusal prior to delivery of the judgment on the basis that, had judgment been in his favour, there would have been no need to ask for recusal. Absa Bank contended that the applicant, by his conduct in not seeking recusal earlier on, had abandoned his right to do so.

[70] The applicant had about 39 days from the date of becoming aware of the shareholding to the date of delivery of the judgment. He could have asked for time to consider his position. He could have asked Cachalia JA to recuse himself and, if his application had merit, he could have had the proceedings started afresh before another panel. Instead he did nothing. Judgment was reserved and delivered nearly six weeks later. He sprang into action and began complaining about bias only after the judgment had gone against him.

[71] It was not open to the applicant to wait for the outcome of the appeal before pursuing his complaint of bias. It is highly desirable, if extra costs, delay and inconvenience are to be avoided, that complaints of this nature be raised at the earliest possible stage. A litigant should not wait for the outcome of the appeal before raising a complaint based on recusal where all the facts giving rise to the

recusal complaint were known to the litigant. The conduct of the applicant is simply inconsistent with a reasonable apprehension of bias. If he had any apprehension, it must have been of the kind that he thought could be cured by a judgment in his favour. But that can hardly be said to be a reasonable apprehension of bias that is reasonably entertained. The applicant wanted to have the best of both worlds.

[72] In *Locabail*, the Court of Appeal held that if, after disclosure of interest in one of the parties to proceedings, a party does not raise any objection to the judge hearing the case or continuing to hear the case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias.[55] To allow a party to complain of bias in these circumstances "would be unjust to the other party and undermine both the reality and the appearance of justice".[56] Similarly, in Australia it has been held that:

> "It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her."[57]

[55] *Locabail* above n 26 at para 26.

[56] Id.

[57] *Vakauta* above n 32 at 572.

[73] In England and Australia, the rationale for this bar is grounded in waiver.[58] Although counsel for Absa Bank did not expressly say so, it is apparent that he was inviting us to find that the applicant had waived his right to raise recusal. The issue is not one of waiver. For waiver to occur, it must be established that the litigant "has acted freely and in full knowledge of the facts."[59] It is difficult to see how the concept of waiver could be imposed on the facts of this case. As counsel for Absa Bank properly conceded, there is a great likelihood that the applicant was simply hoping that, despite the adverse tone of the Supreme Court of Appeal hearing, the court would still rule in his favour. It is therefore unlikely, as a matter of fact, that subjectively he waived his right to seek the recusal of Cachalia JA.

[74] In my view, whether a litigant should be allowed to raise the issue of recusal at a later stage, despite an earlier opportunity to do so, implicates the interests of justice and not waiver. The question is whether it is in the interests of justice to permit a litigant, having knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Here five appellate judges pondered the judgment for 39 days before deciding the matter and expended public resources in doing so. Cachalia JA

[58] *Locabail* above n 26 at para 26 and *Vakauta* above n 32 at 573 and 577.

[59] *Pinochet II* above n 39 at 590. As Innes CJ put it in *Laws v. Rutherfurd* 1924 AD 261 at 263, a party seeking to establish waiver "must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it." See also *Meintjes NO v Coetzer and Others* 2010 (5) SA 186 (SCA) at para 11.

was never afforded the opportunity to withdraw from the matter before judgment was delivered. In addition, the interests of justice demand that the interests of other litigants be considered. Absa Bank invested both time and money in seeking a final outcome to the dispute, and it is entitled to one.

[75] It thus seems to me that, in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that after the outcome of the case is known, there is a possibility that litigation may be commenced afresh because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice.

[76] In the event, it is not in the interests of justice, at this late stage, to permit the applicant to raise a complaint of bias based on shareholding by Cachalia JA.

[77] For all these reasons, the applicant has not made out a case that Cachalia JA should have recused himself by reason of his shareholding in Absa Bank.

Prior association with Absa Bank

[78] Prior association with an institution cannot form the basis of a reasonable apprehension of bias "unless the subject-matter of the litigation in question arises from such associations or activities."[60] Most judicial officers would have been engaged in a number of activities in pursuit of their professional lives before their appointment. These activities contribute to the expertise that judicial officers bring to the bench. What is required is that judicial officers should decide cases that come before them without fear, favour or prejudice according to the facts and the law and not according to their subjective personal views.[61] Of course, where a judicial officer, in his or her former capacity, either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for that judicial officer to sit in that case.

[79] There is no suggestion in this case that the subject-matter of the litigation arises from the association which Cachalia and Malan JJA had with Absa Bank prior to their appointment to the bench. Nor is there any suggestion that in the course of their association with Absa Bank, the two judges of appeal acquired personal information that was relevant to the appeal before them. Nor do I consider that there was any obligation on the two judges of appeal to disclose their prior association with Absa Bank. In *SARFU II*, this Court said that "[j]udicial officers are obliged to disclose only such facts as might reasonably

[60] *SARFU II* above n 8 at para 76.

[61] Id at para 70.

be relevant to a recusal application."[62] Non-disclosure of irrelevant facts cannot, therefore, be a basis for a reasonable apprehension of bias.

[80] No case, therefore, has been made that Cachalia and Malan JJA should have recused themselves because of prior association with Absa Bank.

[81] It now remains to consider whether the applicant has established a reasonable apprehension of bias on the basis of conduct during the appeal hearing and the findings in the judgment.

Has the applicant otherwise established a reasonable apprehension of bias?

[82] The facts and allegations upon which the applicant relies in support of bias can broadly be divided into two categories, namely, (a) remarks and interventions made by the presiding judge during argument and (b) incorrect factual findings made in the judgment. In relation to (a), the argument is that the remarks, conduct and interventions by the presiding judge give rise to a reasonable apprehension of bias. The argument in relation to (b) is that the factual findings made against the applicant are not only incorrect, but are also so unreasonable as to give rise to a reasonable apprehension of bias. The applicant did not contend that these factual findings, viewed individually, give

[62] Id at para 89.

rise to a reasonable apprehension of bias but relied upon their cumulative effect.

[83] It would be convenient to deal first with the alleged remarks and interventions made by the presiding judge during argument, which for convenience's sake I shall refer to as "conduct during argument".

Conduct during argument

[84] The applicant's complaint under this head falls into at least three categories: first, he complains that his attorney, who represented him as the respondent in the Supreme Court of Appeal, was called upon to argue first instead of the legal representative of Absa Bank, the appellant in the Supreme Court of Appeal; second, in the course of oral argument, the presiding judge displayed a hostile attitude and biased demeanour towards him and his attorney; and third, the presiding judge made disrespectful and humiliating remarks, often concerning the applicant's attorney and the trial judge.

[85] Let me first recap the applicable legal principles as developed in our jurisprudence.

[86] A litigant who bases a reasonable apprehension of bias on remarks and interventions made by a judicial officer in the course of a trial or argument has

a formidable hurdle to overcome: the presumption of impartiality. The complainant must show that the remarks complained of "were of such a number or quality as to go beyond any suggestion of mere irritation . . . and establish a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with a reasonable perception of bias."[63] As we explained in *Basson II*, in the context of allegations of bias arising from remarks and interventions made by a trial judge:

> "As far as the first category is concerned, this Court should bear in mind that in long criminal trials a Judge may at times make remarks that are inappropriate, or display irritation towards counsel. At times such interventions may arise from attempts at humour. In considering the question of whether such remarks give rise to a reasonable apprehension of bias, a court should not hold a Judge to an ideal standard which would be difficult to achieve. Moreover, a court considering a claim of bias must take into account the presumption of impartiality, mentioned by this Court in *SARFU*."[64] (Footnote omitted.)

[87] While these remarks were made in the context of a trial court, they apply with equal force to an appellate court. Appellate judges are no less irritable than their trial counterparts. This is not to say that this kind of behaviour is acceptable; it is not. Judicial officers should be courteous to both litigants and their legal representatives. One of the hallmarks of the judicial process is listening to all sides. This listening ability is hampered by interventions which

[63] *Basson II* above n 8 at para 42.

[64] Id.

are not conducive to an understanding of the litigants' viewpoint. Constant interruption of counsel and inappropriate remarks may, in an appropriate case, give rise to a reasonable apprehension of bias.

[88] As we pointed out in *Basson II*—

> "it is important to emphasise that Judges should at all times seek to be measured and courteous to those who appear before them. Even where litigants or lawyers conduct themselves inappropriately and judicial censure is required, that should be done in a manner befitting the judicial office. Nothing said in this judgment should be understood as condoning discourteous or inappropriate remarks by judicial officers. Inappropriate behaviour by a Judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities, but it will not ordinarily give rise to a reasonable apprehension of bias. It will only do so where it is of such a quality that it becomes clear that it arises not from irritation or impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias."[65]

[89] With these legal principles in mind, I now turn to consider each of the incidents relied upon by the applicant.

(a) Calling upon the applicant's attorney to argue first

[90] An appellate court normally evaluates a written record. The issues of both fact and law have usually long been crystallised and the appellate court has the benefit of advanced written argument in which the contentions of the parties on those issues are fully set out. In these circumstances it is unavoidable that

[65] Id at para 36.

appellate judges will form a view, albeit a provisional one, on the issues in the case. Regrettably, this provisional view is sometimes expressed in fairly strong terms and is given an outward manifestation. This provisional view will become apparent in the issues raised by the court in the course of the argument. This may lead the presiding judge in the appeal to call upon a party to argue out of order. This, however, does not establish a reasonable apprehension of bias.

[91] As the court observed in *R v Silber*:[66]

> "It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias."[67]

[92] While these remarks were made in the context of a trial court, they apply with equal force, if not more, to an appellate court. The fact that Mr Bernert's attorney was called upon to argue first does not establish a reasonable apprehension of bias. It is no more than an outward manifestation of a provisional view held by the court.

[66] 1952 (2) SA 475 (A).

[67] Id at 481F-H.

(b) Hostile attitude and demeanour

[93] The applicant also relied upon certain remarks and conduct on the part of the presiding judge as showing hostility towards the applicant's case, his attorney and the trial judge. These include what the applicant described as attacks, criticism and humiliation of the applicant's erstwhile attorney. The one remark that was drawn to our attention is the following which was said to have been made by the presiding judge: "Well Mr Nel, you have a choice, you can either keep on sweating, like you are doing now, or we can switch on the air conditioners but then I can't hear you any way . . .". He also complained of "various occasions" in which the presiding judge interrupted his attorney when the attorney was trying to answer questions posed by the court. He complained that the presiding judge would interrupt the attorney "in a rude manner" and often did not allow the attorney to finish answering questions. The disrespectful remark made by the presiding judge concerning the trial judge is the allegation that the presiding judge said "he was sick and tired of ill considered judgments that landed up in his Court."

[94] It must be kept in mind that the judge concerned has not had the opportunity to deal with any of the allegations made concerning him. It is not practice for judicial officers to respond to allegations of bias made against them. Absa Bank did not dispute the applicant's account of the hearing before the Supreme Court of Appeal. Instead, it avers merely that the demeanour of

the presiding judge and the other judges "was nothing unexpected or untoward".

[95] If these remarks concerning the trial court judgment were indeed made, they were regrettable. Judicial officers must be presumed to take their work seriously and that they will not give "ill considered judgments". An appellate court may disagree with the reasoning of the lower court, but that does not mean that the judgment of the lower court is ill-considered. It simply means that it took a different view of the matter. Even in those rare instances where the conduct of the lower court is inappropriate and censure by the appellate court is required, this should be done in a manner befitting the judicial office. The appellate court, it must be added, has an educational role to play towards the lower court. Its role is to guide the lower court by pointing out where it made an error and how this error should be corrected. And this too, must be done in a manner befitting the judicial office.

[96] That said, however, while some of the remarks may have been unfortunate, particularly those directed at the applicant's attorney and the trial judge or the manner in which the trial judge approached the case, they amount to no more than irritation or impatience. As pointed out earlier, an appellate court's benefit of the full record, issues as crystallised and written argument on those issues, will inevitably lead the court to form a provisional impression favourable to

one side. Judicial officers will put questions to counsel or their legal representatives based on those impressions and thereby provide litigants with the opportunity to rebut any incorrect impression formed. This does not give rise to a reasonable apprehension of bias.

[97] Indeed, robust debate may facilitate open-mindedness and bring clarity to the difficult issues that appellate courts often have to decide. What must be emphasised here is that the presumption of impartiality and the double-requirement of reasonableness must both be taken into account in deciding whether a reasonable litigant would entertain a reasonable apprehension of bias. The requirement postulates a well-informed litigant. And a well-informed litigant will know that appellate courts, having the benefit of the record, crystallised issues and written argument will engage counsel in a way that is often robust and may at times be overly so.

[98] In my view, it is fundamental to our judicial system that judicial officers are not only independent and impartial, but that they are also seen to be independent and impartial. Civility and courtesy should always prevail in our courts. Litigants should leave our courts with a sense that they were given a fair opportunity to present their case. This is crucial if public confidence in the judicial system is to be maintained. And public confidence in the judicial system is essential to the preservation of the rule of law which is so vital to our

constitutional democracy. Therefore, legal representatives should not stand by as spectators over what may convey an impression of bias. They should raise any objection as soon as reasonably practicable. This will allow the judicial officer to explain his or her behaviour and, if necessary, correct that behaviour. Judicial officers, it must be remembered, are only human. This will make our courts vigilant of their behaviour and ensure that they prevent behaviour that may create an apprehension of bias.

[99] For all these reasons, I conclude that the remarks and interventions of the presiding judge, cumulatively and individually, do not establish a reasonable apprehension of bias.

Incorrect factual findings

[100] The applicant's contention relating to bias based on incorrect factual findings rests on three propositions. The first is that the Supreme Court Appeal breached the rule that requires an appellate court to defer to the factual findings of the trial court; second, factual findings made by the Supreme Court of Appeal are not borne out by the record and third, the factual findings made by the Supreme Court of Appeal are grossly unreasonable. There is no merit in any of these propositions. The applicant has not even attempted to direct our attention to any part of the record which supports his contentions. On the contrary, our review of the record shows that (a) the Supreme Court of Appeal

took a different view of the issues that had to be decided; (b) the factual findings made by the Supreme Court of Appeal are borne out by the record and (c) these findings are plainly reasonable on the record.

[101] Apart from this, a careful analysis of the applicant's complaints in this regard reveals that the applicant does not in fact contest the accuracy of a number of the factual findings of the Supreme Court of Appeal complained of. What the applicant largely seeks to do is to show that there are other aspects of the evidence that the Supreme Court of Appeal did not have regard to; in some instances he offers an explanation for the evidence criticised by the Supreme Court of Appeal, in others he says those findings are irrelevant. Most of these aspects are not entirely relevant to the issues that the Supreme Court of Appeal considered it had to decide. But perhaps more importantly, these aspects neither show that the findings are wrong nor that they are unreasonable. In substance, therefore, the applicant is challenging the factual findings of the Supreme Court of Appeal though in form he is complaining about bias. This challenge reduces itself to an appeal on facts masquerading as a complaint based on bias. This Court should not countenance this approach to litigation.

[102] As we held in *Basson II*, "a mistake on the facts, even if correct, is not ordinarily sufficient on its own to give rise to a reasonable apprehension of

bias."[68] Judicial officers are not super-human beings who do not make mistakes. That is why there is an appellate process to correct mistaken findings on law or facts. A mistake on the facts will only give rise to a reasonable apprehension of bias if it is so unreasonable on the record that it is inexplicable except on the basis of bias.[69] A litigant who relies on bias based on incorrect factual findings bears the onus of establishing this fact. This is a formidable onus to discharge.

[103] What this implies is that the applicant must first establish that the factual findings are erroneous on the record. The question whether the mistake on the facts is so unreasonable as to be explicable only on the ground of bias, only arises once it has been established that the factual findings are erroneous. Where a litigant fails to establish a factual error, the question of unreasonableness will not arise, and the litigant fails at the first hurdle. To overcome the second hurdle, namely, that the mistake of fact is so unreasonable as to be explicable only on the ground of bias, the litigant must establish that the mistake of fact is more than a normal factual misdirection. The fact that another court would have had a different appreciation of the facts cannot found a complaint of bias.[70] For a mistake of fact to give rise to a reasonable

[68] *Basson II* above n 8 at para 70.

[69] Id.

[70] Id at para 101.

apprehension of bias, it must be "so out of kilter with the evidence led that [it is] explicable only on the grounds of bias."[71]

[104] As part of establishing the case of bias, it is therefore incumbent upon a litigant to refer the court to the parts of the record that support the contention that the passages under attack are not borne out by the record. Failure to do so will, in an appropriate case, lead to the dismissal of the application on this ground alone. A claim that a judicial officer was biased because he or she ignored the evidence is a very serious accusation against a judicial officer. In effect, it amounts to an accusation of dishonesty on the part of the judicial officer. Litigants should not make bald and sweeping accusations of bias and fail to back them up with evidence. Unsubstantiated accusations of bias undermine public confidence in the judicial system and imperil the rule of law. Litigants should therefore take care not to make unsubstantiated allegations of bias. It is for this reason that courts should insist on the litigant demonstrating, by reference to the record, that the findings are in fact incorrect.

[105] The applicant made much of the fact that the Supreme Court of Appeal overruled factual findings of the High Court. Much store was placed by the applicant in the decision of the Appellate Division in *R v Dhlumayo and*

[71] Id.

Another,[72] which dealt with the deference to be paid by the appellate court to the factual findings of the trial court. In *SARFU III*,[73] this Court addressed the appropriate level of deference to be afforded to a trial court's credibility finding and said the following:

> "The advantages which the trial court enjoys should not, therefore, be over-emphasised 'lest the appellant's right of appeal becomes illusory'. The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities. . . . [A] finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. The passage from *S v Kelly* above correctly highlights the dangers attendant on such interpretation. A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact."[74] (Footnotes omitted.)

[106] What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word."[75] The main advantage being the opportunity to

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[72] 1948 (2) SA 677 (A).

[73] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU III*).

[74] Id at para 79.

[75] *R v Dhlumayo* above n 72 at 696.

observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of appellate courts".[76] It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record.[77] Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.[78]

[107] The applicant has not been able to draw our attention to any specific factual findings of the Supreme Court of Appeal which he alleges overruled the factual findings of the High Court. The only instances that I have been able to identify are those relating to the criticism of witnesses such as the Sheikh and Mr Fanjek.[79] Those aspects of the Supreme Court of Appeal judgment are supported by the record.[80] The applicant does not, therefore, even begin to

[76] Id at 695.

[77] See *R v Dhlumayo* above n 72 at 706 and *SARFU III* above n 73 at paras 78-80.

[78] *R v Dhlumayo* above n 72 at 706.

[79] The Supreme Court of Appeal, above n 1, said the following at para 12:

> "The court below described Sheikh Fawaz as an impressive witness but the record of his evidence does not bear that out. . . . I have found the evidence of the Sheik to be almost as unimpressive as that of Mr Fanjek. Most of his answers to questions about the transactions . . . were incoherent and attempts to probe them in more detail were brushed aside on the basis that those were matters that he left to his advisers."

[80] The applicant's complaint is that the court found that the Sheikh and Mr Fanjek were unimpressive witnesses. This finding has ample support in the record. As for the Sheikh, he testified that when he entered into the joint venture agreement he reviewed all the documents, he knew that the company had registered designs and patents and he knew what intellectual property means, namely, trademarks and patents. When he was confronted with the

overcome the first hurdle, namely, that the findings of the Supreme Court of Appeal are erroneous.

[108] What presents an insurmountable hurdle for the applicant on this aspect of the case is how the Supreme Court of Appeal approached the matter. The Supreme Court of Appeal found that this was not a case about the enforcement of the terms of a contract where "the understanding of the parties to the document might have been relevant."[81] The issue to be decided "was whether Absa Bank was obliged to allow Emirates Bank, and indeed others to whom [the alleged guarantee] might have been presented, to rely upon its authenticity."[82] The answer to this question lay not in what the witnesses said the document meant, but in "what third parties might have thought it meant",[83] the court held.

[109] The approach of the Supreme Court of Appeal to the case appears from the following passages in its judgment:

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concession by the applicant that in 1999 there was not a single trademark or patent or any form of intellectual property registered in the name of Rotrax Cars International, his response was "because I love cars, even if not I will help him." When asked what then did he review, his response was that his business managers and advisors checked all the documents because they knew what he wanted. Later on he said it was Ghassan Dinawe.

As for Mr Fanjek, he admitted that he told a white lie. Both the High Court, above n 2 at paras 31-2, and the Supreme Court of Appeal, above n 1 at para 9, found him to be a liar. And both courts were prepared to accept his evidence, when corroborated. The question is one of the weight to be attached to his evidence in the light of his admitted lies. The finding that Mr Fanjek was an unimpressive witness is fully supported by the record.

[81] *Absa* above n 1 at para 71.

[82] Id.

[83] Id at para 72.

"This was not a claim to enforce the terms of a contract, in which event the understanding of the parties to the document might have been relevant. The claim was that Absa Bank was not justified in advising Emirates Bank that the document had been issued without authority and in irregular circumstances. In those circumstances the question was not how the Sheikh or Mr Fanjek or even Mr Bernert understood the document. The question was whether Absa Bank was obliged to allow Emirates Bank, and indeed others to whom it might have been presented, to rely upon its authenticity. Clearly it was not obliged to do so if the document was capable of misleading third parties. Both Mr Merritt and Mr Van Tonder believed that the document was indeed capable of misleading third parties and they were perfectly correct.

It needs to be borne in mind that the meaning that was given to the document by the witnesses, and by the court, was teased out from selected passages from the document, while ignoring other passages altogether. And if one meaning can be teased out of selected passages, when read in isolation, then a different meaning is capable of being teased out from contradicting passages, when they are also read in isolation. In my view the court below ought to have directed itself less to what the witnesses told it that the document meant, and more to what third parties might have thought it meant, particularly if they were told that it had a different meaning."[84]

[110] On the Supreme Court of Appeal's approach to the problem, therefore, the question was whether, having regard to the contents of the alleged guarantee, it was capable of misleading third parties, in particular, "if it [was] presented in the context of documentation indicating that it [was] part of a larger transaction", so as to justify Absa Bank in warning Emirates Bank that the

[84] Id at paras 71-2.

document had been issued without its authority and in irregular circumstances.[85] The court answered this question in favour of Absa Bank.

[111] This appears in the following passage in the judgment of the court:

> "I do not intend going through the document in detail. It is sufficient to say that at the commencement of argument Mr Bernert's attorney was asked to suggest a coherent meaning of the document when all its terms are read as a whole. He was not able to do so and the reason for that is plain. When all the terms are read together the document is a compendium of gibberish. I have no doubt that a document containing gibberish on the letterhead of a major financial institution is capable of misleading third parties as to its meaning, perhaps even more so if it is presented in the context of documentation indicating that it is part of a larger transaction, and that Absa Bank was entitled to ensure that that did not occur. The fact that the document might not have been intended to be used in that way is immaterial. Absa Bank was not to know where the document might have ended up. I think it goes without saying that whatever authority Mr Coetzee might have had he had no authority to issue gibberish that had the potential to mislead, and that the issuing of gibberish that might mislead does not fall within the regular business of a bank."[86]

[112] The only aspect of this paragraph that the applicant attacked was the finding that "whatever authority Mr Coetzee might have had he had no authority to issue gibberish that had the potential to mislead, and that the issuing of gibberish that might mislead does not fall within the regular business of a bank."[87] He argued that the alleged guarantee "is clearly not gibberish and

[85] Id at para 73.

[86] Id.

[87] Id.

the justification for finding that Mr. Coetzee did not have the authority to issue the letter falls away." He argued that this finding is so patently wrong that it leads to an inference of bias.

[113] I am unable to agree with this criticism of the finding of the Supreme Court of Appeal. One need only read the alleged guarantee to conclude that it is unintelligible. Indeed, the High Court too described the alleged guarantee as "strange and confusing." The finding by the Supreme Court of Appeal is amply supported by the record. The applicant, therefore, has not shown that the finding complained of is erroneous. He therefore fails at the first hurdle and the question whether a reasonably informed litigant could have apprehended bias does not arise.

[114] The applicant complains that, in deciding the appeal, the Supreme Court of Appeal made a host of unreasonable findings of fact which are not borne out by the record. In pursuing this line of attack, he sacrifices quality for quantity. The founding affidavit alone identifies 13 paragraphs in the Supreme Court of Appeal judgment which, in the applicant's view, are not reasonably justifiable on the facts and amount to gross unreasonableness. Other like claims are sprinkled throughout the applicant's submissions. At the hearing, counsel for the applicant identified 17 paragraphs, some old and some new, which purportedly suffer from similar defect. As I have pointed out above, what the

applicant has not done in giving us the long list of paragraphs is to point to the portions of the record which support his various assertions. Nevertheless, an exhaustive review of the record in the light of the Supreme Court of Appeal's factual findings reveals that the applicant's complaints are not borne out by the record. It is not necessary in this judgment to rehearse each paragraph.

Conclusion on incorrect factual findings

[115] I have carefully considered the paragraphs in the judgment of the Supreme Court of Appeal complained of by the applicant in the light of the legal principles set out above. I am unable to conclude on the record that any specific factual finding is so out of kilter that it is inexplicable except on the basis of bias. On the contrary, I have found that the applicant's complaints with the Supreme Court of Appeal judgment are not borne out by the record. Nor does he contest the accuracy of a number of the factual findings. Where he contested factual findings, I have found those findings to be borne out by the record. In any event, given the approach the Supreme Court of Appeal took to the central issue in the case, none of the other passages complained of are material to that court's finding on the crucial issue of the authority and regularity of the alleged guarantee. I am, therefore, unable to uphold the argument that the Supreme Court of Appeal was biased because of incorrect and unreasonable factual findings.

[116] For all these reasons, all the challenges based on bias must be dismissed.

Challenge based on natural justice

[117] In this Court, the applicant contended for the first time that before sending a letter to Emirates Bank advising it of irregularity and lack of authority in the issuing of the alleged guarantee, Absa Bank was bound by the rules of natural justice to give him a hearing. This contention neither formed part of the pleadings nor was it advanced in either of the courts below. It cannot be entertained by this Court at this stage. This challenge therefore falls to be dismissed.

[118] In the result, the appeal must fail.

Costs

[119] There is no reason to depart from the general rule relating to costs, namely, that costs should follow the result. The applicant is pursuing a private interest against a private bank. He must, therefore, bear the costs of this litigation in all courts.

Order

[120] In the event, the following order is made:

(a) The late filing of the application for leave to appeal as well as the late filing of the record is condoned.

(b) The applicant is granted leave to appeal.

(c) The appeal is dismissed with costs, including the costs of two counsel.

Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Ngcobo CJ.

For the Applicant: Advocate LJ Lowies instructed by Hauptfleisch.

For the Respondent: Advocate PG Robinson SC and Advocate SW Burger instructed by Eversheds.