CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 24/10
[2011] ZACC 17

In the matter between:

BRIAN PATRICK DE LACY First Applicant

BARRY JACK BEADON Second Applicant

and

SOUTH AFRICAN POST OFFICE Respondent

Heard on : 8 February 2011

Decided on : 24 May 2011

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JUDGMENT

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MOSENEKE DCJ:

*Introduction*

[1] In an application for direct access to this Court, the applicants seek an order declaring that a judgment of the Supreme Court of Appeal delivered on 13 May 2009 by Nugent JA (Farlam, Navsa, Van Heerden and Mlambo JJA concurring)[1] constitutes an

[1] *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) (SCA judgment).

infringement of their right to equal protection and benefit of the law,[2] the right to a fair hearing[3] and the right to be heard by an independent court that must apply the law impartially and without fear, favour or prejudice.[4] In addition, they ask us to set aside the impugned judgment with its order, and in effect dismiss the appeal and uphold the cross appeal that were before the Supreme Court of Appeal. In the alternative, they seek to move us to remit the appeal to that Court for its reconsideration.

[2] The dispute arises from an award by the South African Post Office (Post Office or respondent) of a contract to provide an electronic pension and benefits payment service on behalf of the government of the North West Province to Kumo Consortium (Kumo), a competing tenderer. The applicants claimed that they had suffered damages because their consortium, Cornastone e-Commerce Services (Pty) Ltd (Cornastone), was not awarded the contract. The High Court upheld the claim in part and awarded the applicants damages for loss of profits in the amount of R60 million with costs. However, on appeal the Supreme Court of Appeal reversed the decision of the High Court and dismissed the claim with costs. This Court has already dismissed two applications for leave to appeal directed at setting aside the same decision of the Supreme Court of Appeal – one in July 2009 and another in May 2010.

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[2] Section 9(1) of the Constitution provides: "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[3] Section 34 of the Constitution provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[4] Section 165(2) of the Constitution provides: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[3] It may well light the path of the reader if, at this early stage, I relate the latest grievance that the applicants have put up in this third attempt to upset the decision of the Supreme Court of Appeal.

[4] Their founding deposition levels grave accusations against the Supreme Court of Appeal. They name its judgment a gross miscarriage of justice and attribute actual bias to the Court. They charge that the judgment has not been delivered impartially and without favour or prejudice "inasmuch as it was specifically designed to favour [the Post Office] and prejudice the applicants". The applicants add that at the hearing of the appeal, in their very words, "[it] was patently obvious to anyone sitting in the appeal, as both the second applicant and I did, that Nugent JA had made up his mind to reverse Hartzenberg J's judgment, irrespective of the evidence and the facts and would do whatever was necessary to achieve this purpose."

[5] They accuse the Court and Nugent JA in particular of "deliberate" distortion of the facts and say that in no fewer than 114 separate instances it wilfully ignored or sought to interpret the evidence in a manner and to an extent inconsistent with the record. The applicants explain in their own words that the Supreme Court of Appeal, "for reasons best known to Nugent JA and at the instance of Nugent JA, decided to find against the applicants and in order to give effect to such decision, elected either to disregard the

record for such purpose, or to apply interpretations to the record that are inconsistent with any reasonable understanding of the record."

[6] After traversing a few selected examples of the alleged 114 wilful distortions of the evidence, the applicants conclude their founding affidavit by observing that the integrity, probity and impartiality of our judiciary ought to be above suspicion and that a commitment to the values of the Constitution ought to be shown not only in word but also in deed, which necessitates an adjudication that is done properly and fairly. They claim that this is not what happened with their appeal before the Supreme Court of Appeal.

[7] This indictment of premeditated bias is echoed by the applicants' counsel in written argument. He too hurls several accusations at the Court. He submits that it has failed to distinguish between "facts and own interpretations thereof for the purpose of arriving at predetermined findings". The Court, he submits, "disregarded" or "nullified" admitted facts to support predetermined findings. He makes bold that the Court "wilfully" ignored the evidence in a manner inconsistent with the record and that there are 114 examples of what he calls "grossly incorrect findings" that are "a deliberate attempt in certain instances, to justify the award of the tender to Kumo". Counsel charges that the applicants' complaint is not a matter relating to "findings of fact" but rather one where the judgment has not been delivered impartially and that the integrity, probity and impartiality required of the judicial function were not displayed when the

Court decided the appeal. These grave charges were absent from the first application for leave to appeal.

*Background*

[8] I say now a little more about the background. The applicants are Mr Brian Patrick De Lacy and Mr Barry Jack Beadon. In the North Gauteng High Court, Pretoria they sued the Post Office for damages as cessionaries of Cornastone. Seemingly, Cornastone elected to cede its claim in order to avoid litigating against the Post Office because at the time it worked for the Post Office in an unrelated contract.

[9] The applicants boast experience of more than 20 years in the field of information technology in the private sector. In 2000, both are said to have left comfortable careers in the corporate environment and committed considerable skill and funds to develop biometric payment systems technology. The technology would link the database of personal information of beneficiaries to remote pay points and identify beneficiaries who are entitled to payment with their fingerprints. The envisaged technology was aimed at providing a secure electronic payment service to recipients of government pensions and social grants. The payment was known to be plagued by rampant inefficiency and fraud. The Post Office with its far-flung offices in urban and rural areas historically fulfilled the role of the paymaster of the country. Thus, the prospect of a secure and fraud-proof biometric payment solution enthused it.

[10] In February 2002, the Post Office invited tenders for the supply of a biometric payment system for the North West Province. Cornastone was one of three bidders shortlisted. On 2 September 2002, the tender was awarded to one of the other bidders, a consortium known as Kumo. About this, Cornastone was much unhappy. It complained that the award of the tender was riddled with irregularities. The Post Office, citing "operational considerations", cancelled the award to Kumo. Cornastone persisted in trying to obtain the tender, but failed. The Post Office chose not to invite fresh tenders but to develop its own system.

*In the High Court*

[11] In three claims the applicants sought to recover over R514 million in delictual damages arising from loss of profits. Claim A was for an amount of R108 million representing loss of profits Cornastone would have made had it been awarded the tender. In Claim B the applicants sought to recover loss of profits of R406 million on the basis that had they been awarded the North West Province tender they would have been awarded similar contracts in other provinces. Claim C was premised on unjust enrichment and debatement of accounts. The applicants alleged that after withdrawing the tender, the Post Office used the technology of Cornastone to set up its own biometric payment system and was thus unjustly enriched at their expense. They sought an order requiring the respondent to render an account of the biometric payment system it operated, to debate the account and to pay the applicants whatever amount may appear to be due.

[12] The High Court found that Kumo should have been disqualified at the outset of the tender process because it did not comply with the Request for Proposals (RFP).[5] Kumo provided no fixed consortium agreements, financial statements or tax certificates. Embedded in the finding that Kumo had no fixed consortium agreements is the fact that its tender documents never disclosed that Labat Africa Ltd (Labat), a black empowerment company led by Mr Van Rooyen, was part of its bidding consortium.[6] Even so, on 18 April 2002 at a presentation ordered by the Tender Board, Mr Van Rooyen presented the tender as if Labat was the main tenderer in place of Kumo. The applicants persuaded the High Court that this late introduction of Labat by Kumo had been a major irregularity that was fatal to the award to Kumo.

[13] The High Court found that one of the members of the Evaluation Committee "was manipulating things to get the tender awarded to Kumo at all cost."[7] In addition to negligence and incompetence, the High Court found that there was also "dishonest manipulation and corruption" in the tender process.[8] The High Court singled out Mr Topper, at the time an employee of the Post Office, as the person who had been "touting

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[5] *Brian Patrick De Lacy and Barry Jack Beadon v South African Post Office*, Case No. 11477/2003, Transvaal Provincial Division (now North Gauteng High Court, Pretoria), 11 December 2007, unreported (High Court judgment), at para 20.

[6] Paragraph 6.3.1.2 of the RFP provides that: "[I]f the proposal is submitted by a consortium, each company forming part of the consortium must complete Annexure 'G' individually and submit it as part of the proposal." Annexure G required that each company involved in the tender submit fixed consortium agreements, financial statements or tax certificates.

[7] High Court judgment above n 5 at para 22.

[8] Id at para 25.

for a bribe and a job" and who "fraudulently . . . supported the Kumo tender." The High Court elaborated that Mr Topper could not have achieved this object alone and that he must have been acting with the assistance of one or other unidentified officials "higher up in the hierarchy".[9]

[14] The High Court's reasoning on the core finding of "dishonest manipulation and corruption" in the tender process appears from a series of sweeping factual inferences:

> "It is accepted that Topper fraudulently, due to circumstances of which only he was aware, underplayed the Cornastone tender and supported the Kumo tender. It could not have been the only irregularity. It must have been obvious to some of the senior members that Kumo had to be disqualified. Labat's late appearance was patently obvious. The fact that that did not happen can only lead to a conclusion that a person or persons, other than Topper, with influence, did not want Kumo to leave the scene. It is unlikely that it was only because of the good impression that was made by Kumo's tender bid, Inman [another person associated with Kumo] or Van Rooyen. It is impossible that Topper's conduct could remain unnoticed unless there was higher up in the hierarchy also manipulation coinciding with Topper's aims. In my view apart from negligence, incompetence and Topper's manipulation, there must have been further actions with ulterior motives that led to the non detection of all the irregularities, and the decision to award the tender to Kumo. I am mindful of Mr. Fabricius's argument that originally the plaintiffs' main contention was that Topper's actions were the prime reason for the wrong award. I do not agree with the argument because before the commencement of the trial the plaintiffs' pleadings already alleged improper conduct throughout the SAPO administration. Labat's dramatic entrance could only have passed unnoticed if influential persons kept their eyes shut."[10]

[9] Id at para 26.

[10] Id.

[15] In making these findings, the High Court relied on reports from the Ombudsman and from a firm of auditors, which pointed to some suspicion concerning the tender award. It concluded that, but for the fraudulent conduct of Post Office employees, Mr Topper and others unnamed, Cornastone would have been awarded the tender. It ruled that the Post Office was vicariously liable, upheld claim A and, after some adjustment to the original amount claimed, ordered it to pay the applicants R60 million being approximately 50% of their claim for lost profits.

[16] In relation to the other claims, the High Court observed that by not inviting fresh tenders, the Post Office exposed itself to justified suspicion that it had used information obtained in the tender process to develop its own system. Even so, the High Court found that the applicants had not proven either claim B or C. It further reasoned that none of the litigants would be happy about its decision and, on its own, granted the applicants and the Post Office leave to appeal its decision to the Supreme Court of Appeal.

*In the Supreme Court of Appeal*

[17] The Post Office appealed against the order awarding damages of R60 million. In turn, the applicants cross-appealed against the quantum of damages awarded under claim A and against the dismissal of claim B and in the alternative, of claim C.

[18] The Supreme Court of Appeal held that the applicants would be entitled to succeed only if their claim fell within the decisions in *Minister of Finance and Others v*

*Gore NO*[11] and *Steenkamp NO v Provincial Tender Board, Eastern Cape*.[12] These cases held that irregularities in a tender process falling short of dishonesty, or that merely amount to incompetence or negligence on the part of those awarding a tender, will not found a claim for damages by an unsuccessful tenderer. A claim will lie only if the award to a competing tenderer resulted from dishonest or fraudulent conduct, on the part of one or more officials for whose conduct the Post Office is vicariously liable, but for which the contract would have been awarded to the complainant.[13]

[19] The Supreme Court of Appeal unanimously found that the evidence offered no basis for the High Court's finding that Post Office employees committed fraud during the tender process.[14] Despite various sweeping allegations of dishonesty, the applicants were unable to provide any direct evidence of any act of fraud committed by any individual. In addition, no allegations of fraud or dishonesty were put in cross-examination to the witnesses the Post Office called to testify.[15] The factual findings of the High Court, it found, rested on inference. Applying the test for inferential findings in civil contests, the Court found that the conclusion that there was a conspiracy to deprive Cornastone of the

[11] 2007 (1) SA 111 (SCA).

[12] [2006] ZACC 26; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC). The Supreme Court of Appeal's judgment in that case is reported as *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA).

[13] SCA judgment above n 1 at para 14.

[14] Id at para 32.

[15] Id at para 33.

contract was not the most natural or plausible inference from the evidence seen as a whole.[16]

[20] The Court noted that the heart of the applicants' complaint is that when points were allocated to each tender in the three weighted categories, Cornastone received more points in aggregate but Kumo was nonetheless awarded the contract. The applicants reasoned that because Cornastone had scored the most points it was entitled to be awarded the contract and "that there must have been a conspiracy dishonestly to deprive it of the contract."[17] The Court noted that in this case there is no need for conjecture or inferences on why Cornastone was not awarded the contract despite its higher points because what happened "is revealed explicitly in the evidence."[18]

[21] The explanation that emerged from the evidence, it held, was that the Evaluation Committee and the Tender Board took the honest view that it was not appropriate to adhere strictly to the general policy of awarding tenders to the tenderer that scored the highest points.[19] The Supreme Court of Appeal found it significant that while Cornastone may have had a higher black economic empowerment rating,[20] which caused its overall rating to outstrip that of Kumo, Kumo's score for technical ability was significantly

[16] Id at paras 39-41.

[17] Id at para 39.

[18] Id.

[19] Id at para 40.

[20] See the Broad-Based Black Economic Empowerment Act 53 of 2003.

higher than Cornastone's. The Evaluation Committee recommended to the Tender Board that Kumo be awarded the contract because it considered technological expertise the overriding criterion. The Court found that the evidence provided "no proper grounds for inferring that its view was not honestly held in good faith".[21]

[22] Whether the Evaluation Committee or the Tender Board was right or wrong in the view that they took, the Court observed, that "is neither here nor there".[22] The only decisive question is whether "they were honestly of [the] view" that it was not appropriate to adhere slavishly to the general policy that the tenderer that scored the most points should be awarded the contract. The reasons given by the Evaluation Committee for its recommendation to the Tender Board make it plain that it considered it in the best interest of the Post Office that Kumo, whose combined scores for technical and commercial criteria outstripped that of Cornastone, should be awarded the tender despite Cornastone's superior black economic empowerment rating. The Tender Board accepted this recommendation. The Court held that there is no reason to think that they did not hold this view honestly. On the contrary, "it is perfectly understandable why they took that view."[23] The Court concluded that when the evidence is viewed as a whole and weighed against the probabilities, there are no proper grounds for inferring that the Evaluation Committee or subsequently the Tender Board did not hold that view honestly.

[21] SCA judgment above n 1 at para 45.

[22] Id at para 40.

[23] Id.

[23] The Supreme Court of Appeal rejected the inference of the trial court that Mr Topper dishonestly manipulated the scoring by members of the technical Review Panel. It found that undisputed evidence showed that each evaluator had scored independently of one another and that there had been no room for Mr Topper to manipulate other members of the committee.

[24] In the final instance, the Supreme Court of Appeal found no evidence of manipulation or dishonesty on the part of the members of the Review Panels, or in the course of the deliberations of and the reporting by the Evaluation Committee, or on the part of the Tender Board. For this conclusion, it found fortification in the fact that the Evaluation Committee recommended to the Tender Board the joint appointment of Cornastone and Kumo to provide the biometric payment system under tender. That, the Court reasoned, "is altogether at odds with an intention on its part to dishonestly prefer Kumo above Cornastone."[24]

[25] The Court found that the applicants had failed to discharge the onus that the contract was awarded to Kumo as a consequence of dishonesty on the part of one or more of the officials concerned.

[24] Id at para 117.

*In this Court*

[26] On 3 June 2009, the applicants submitted their first application for leave to appeal. It was based on what they called "a technical constitutional aspect of *dolus directus/dolus eventualis*." Their papers framed the constitutional issue as follows:

> "Is an organ of State vicariously liable in delict for the conduct of its employees, only in the event where they acted with Dolus Directus [direct intent], or, is it also vicariously liable, where they acted with Dolus Eventualis [indirect intent]?"

[27] Then, the essence of their contention was that the Supreme Court of Appeal should have held that indirect intent was sufficient to render an organ of state vicariously liable for the wrongs of its employees and that on the evidence they had established that the Post Office's employees had acted with indirect intent to defraud.

[28] That was the applicants' constitutional focus. And yet the bulk of its papers were devoted to an exhaustive critique of the factual findings of the Supreme Court of Appeal. Their grievance had all the hallmarks of a mere dissatisfaction with factual findings. The Post Office opposed the application. On 9 July 2009, this Court dismissed it for lack of prospects of success.

[29] In the present application for direct access, the applicants inform that the first unsuccessful application for leave to appeal was made on limited grounds of "indirect intent" on the advice of their legal representatives, including senior counsel. This they

say led to the bona fide but mistaken belief that they enjoyed no further rights of recourse other than the narrow "technical" avenue they had pleaded.

[30] During July of 2009, shortly after this Court had dismissed their application, the applicants lodged a complaint with the Judicial Service Commission (JSC)[25] against the judges of the Supreme Court of Appeal who dismissed their appeal. The applicants tell us they alleged gross incompetence and gross misconduct on the part of Nugent JA.[26] Seemingly, the JSC requested Nugent JA who heard the appeal to respond to their allegations, but in a letter dated 9 September 2009 Nugent JA declined to respond to accusations prompted merely by the dissatisfaction of litigants over their decision. Eventually, on 21 May 2010 the JSC advised the applicants that it had dismissed their complaint. It added that any remedy they might enjoy is to be found at the Constitutional Court by way of "leave to appeal the judgment to it, not merely on a technical point, but on the grounds as set out in your complaint."

[31] Two months before, and over nine months after their first application, on 24 March 2010, the applicants approached this Court again. Their papers attributed the prolonged delay to the complaint process they initiated before the JSC. The relief they

[25] Established in terms of section 178 of the Constitution and the Judicial Service Commission Act 9 of 1994, as amended by the Judicial Service Commission Amendment Act 20 of 2008.

[26] Section 177(1) of the Constitution contemplates the removal from office of a judge if the Judicial Service Commission finds that she or he is grossly incompetent or is guilty of gross misconduct.

sought was twofold. In the first instance, they sought direct access in terms of rule 18[27] on the ground that the appellate court was tainted by judicial bias. In the alternative, they asked for leave to appeal in terms of rule 19[28] against the same decision and on the same ground.

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[27] Rule 18(1)-(3) of the Rules of this Court provides:

> "(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
>
> (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
>
> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
>
> (b) the nature of the relief sought and the grounds upon which such relief is based;
>
> (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;
>
> (d) how such evidence should be adduced and conflicts of fact resolved.
>
> (3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose."

[28] Rule 19(1)-(3) of the Rules of this Court provides:

> "(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.
>
> (2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.
>
> (3) An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—
>
> (a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;
>
> (b) a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter;
>
> (c) such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and

[32] On 3 May 2010, the Court dismissed the second application for leave to appeal for lack of prospects of success. This was for two reasons. First, the grounds for appeal were in substance the same as those in the previous application: namely, that the Supreme Court of Appeal's findings of fact were inconsistent with the evidence. Second, having already given a final order on the application for leave on substantially the same grounds, this Court had discharged its function, and its authority over the matter had ceased (*functus officio*).[29] It therefore had no further jurisdiction over it.

[33] On the same day, this Court issued directions in terms of rule 18[30] calling on the Post Office to file a written response dealing solely with the question whether the application for direct access should be granted. Having considered the written

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(d) a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so—

(i) which court;

(ii) whether such application is conditional upon the application to the Court being refused; and

(iii) the outcome of such application, if known at the time of the application to the Court."

[29] See *Zondi v MEC, Traditional and Local Government Affairs, and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); (2006) 3 BCLR 423 (CC) at para 28, citing *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 178 per Innes CJ and *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G.

[30] Rule 18(4) of the Rules of this Court provides:

"After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—

(a) a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or

(b) a direction indicating that no written submissions or affidavits need be filed."

submission, further directions setting the application for direct access down for hearing were issued.

*Issues*

[34] The directions restricted written argument to:

> "(a) whether it is in the interests of justice to grant the application for direct access in view of the fact that, in the application for leave to appeal to this Court lodged on 3 June 2009 the applicants did not raise the grounds on which they now rely;
>
> (b) the extent to which admissions were made in paragraphs 20.3 and 20.7 of the plea and the significance of those admissions to the issues of fact and law the trial court and the Supreme Court of Appeal had to determine;
>
> (c) whether the attention of (i) the trial court and (ii) the Supreme Court of Appeal was drawn to these admissions at any stage during the proceedings in either court;
>
> (d) if so, full details of when, where and in what manner this was done;
>
> (e) if not, what bearing has the failure of the parties to draw the attention of either court to these admissions has on the relief the applicants are entitled to seek in this Court;
>
> (f) the exact paragraphs in the judgment of the Supreme Court of Appeal upon which the applicants rely for their contention that the judgment warrants an inference of bias or perceived bias, as well as references to the precise portions of the record upon which the applicants rely in this regard;
>
> (g) the relief this Court should order, in the event direct access is granted and the Supreme Court of Appeal judgment is set aside".

[35] However, there was an unexpected turn of events. Only two clear court days before the hearing, on 3 February 2011, counsel for the applicants wrote a letter to the

Registrar. Save for paragraphs 1 and 6, which are of no moment, I reproduce its contents in full:

> "1. . . . .
>
> 2. Having considered the Respondent's Heads of Argument and reviewed the Applicants' Heads of Argument (including Annexure "B" thereto, which was prepared by the First Applicant), it would appear that the Applicants' Heads of Argument may be viewed as attributing a deliberate distortion of the facts as contained in the Record and actual bias by the Supreme Court of Appeal and by Nugent JA in particular.
>
> 3. These are in fact a reflection of the perceptions of the Applicants which have given rise to their reasonable apprehension of bias and on reflection, the Applicants' Heads of Argument should have made it clear that:
>
> 3.1 same reflect the Applicants' perceptions;
>
> 3.2 the Applicants' do not seek to attribute either actual distortion or actual bias, beyond such perception of a reasonable apprehension of bias;
>
> 3.3 this aspect of the Argument will be confined to a reasonable apprehension of bias inter alia on the basis that the factual findings are so unreasonable on the Record and so out of kilter with the evidence led, that it is explicable only on the grounds of bias. (See Judgment in *Bernert v ABSA Bank* CCT37/10, para 103).
>
> 4. The language used in asserting a deliberate distortion of the facts and actual bias, without emphasising that these are in fact a reflection of the perceptions of the Applicants, is regretted and any such assertions are unqualifiedly withdrawn.
>
> 5. An unconditional apology is accordingly tendered to all parties concerned and particularly to the Supreme Court of Appeal.
>
> 6. . . . .
>
> 7. You are kindly requested to place this letter before the Judges of the Constitutional Court.
>
> 8. I have also requested the Applicants' Attorneys of Record to furnish a copy of this letter to the Respondent's Attorneys of Record.
>
> Yours faithfully

Advocate M Nowitz"

[36] The contents of the letter are truly remarkable. After all, over nearly two years, the same applicants laid bare their smouldering grievance over the Court decision that overturned their handsome award of damages. Before the JSC they complained that, by holding against them, the judges had made themselves guilty of gross misconduct and gross incompetence – a charge which if proven may have led to their removal from office.[31] Under oath before this Court they made acerbic and unremitting accusations of deliberate distortions of evidence and premeditated and actual bias against a panel of five appellate judges.

[37] On most occasions they singled out Nugent JA who wrote for the Court and heaped the scorn of dishonest factual findings and deliberate bias on him. On other occasions they heaped the scorn of dishonest factual findings and deliberate bias on the entire panel. The applicants did not even bother to proffer either a motive or purpose that may have collectively moved an entire bench of senior judges towards the egregious judicial impropriety attributed to them. And now, by a belated letter from their counsel, not even a statement under oath from counsel or litigant, we are informed that the

[31] Section 177(1) of the Constitution provides:

"A judge may be removed from office only if—

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members."

applicants regret having made these damning accusations which they unqualifiedly sought to withdraw. What is more, they tendered an unconditional apology to all concerned and particularly to the Supreme Court of Appeal.

[38] As was to be expected, on the morning of the hearing, as counsel for the applicants rose, this startling turn of events took precedence. From the bar, he assured the Court that he had written the letter at the instance and firm mandate of his clients, one of whom, he said, was present in the courtroom. He did not say why he and not his instructing attorney wrote the letter. He conceded that the letter amounted to a radical departure from the sworn affidavits of his clients and from his own written argument attributing judicial dishonesty to the appellate court and to Nugent JA in particular. Counsel repeated that his clients no longer attributed deliberate distortion or actual bias to the appellate court. They regretted any like previous assertions, which were unqualifiedly withdrawn. Counsel restated his clients' unconditional apology and particularly to the judges concerned. He undertook to convey the apology to the Supreme Court of Appeal promptly.

[39] It is so that ordinarily a court relies on or accepts statements made to it by counsel from the bar without the necessity of an affidavit. They ordinarily amount to credible assurances by an officer of the court. However, different considerations apply where statements made by counsel from the bar substantially depart from sworn statements made by clients. Here the statements by counsel from the bar were of a different order.

They consisted of unqualified retractions of vital accusations in the applicants' founding affidavit and written argument and an unreserved apology to the judges concerned, made in a letter authored by counsel and not in an affidavit sworn to by his clients. For this, no adequate explanation was forthcoming. Nor could counsel explain why this fundamental change to the basis of his clients' case and the circumstances that prompted it were made so belatedly.

[40] Counsel however made it clear that, although his clients' founding affidavits had remained the same, their contentions would be confined to a claim that they had only a reasonable apprehension of bias on the ground that the factual findings are so unreasonable on the record and so out of kilter with the evidence that they are explicable only on the ground of bias. Of course, this astonishing turnabout poses the question whether, without more, a party may by mere letter or statements from the bar, abandon the substance of its founding affidavit and thereby opt to alter the basis of the relief it seeks. I revert to this matter when I consider whether it is in interests of justice to grant the direct access application.

[41] Despite these twists and turns, it seems to me that we are still obliged to consider whether an adequate case has been made out for the grant of direct access. Relevant to that enquiry is the question whether the applicants have, on the papers, pleaded the case they now seek to embrace. That case now is whether they have established a reasonable apprehension of bias for the reason that the factual findings of the appeal court are so

unreasonable, or so out of kilter with the evidence that they are explicable only on the grounds of bias.

[42] Thus the central issue remains whether the application for direct access should be granted. In turn, that enquiry spawns a number of sub-enquiries which are:

(a) whether the matter raises a constitutional issue;

(b) if so, whether it is in the interests of justice to grant direct access. Core to that enquiry would be:

(i) whether the claim of perceived bias carries a reasonable prospect of success;

(ii) whether there are 114 instances of factual error that are explicable only on the grounds of bias;

(iii) whether, in the light of the admissions in paragraph 20.3 and 20.7 of the plea, the Supreme Court of Appeal was obliged to accept as common cause facts that there was gross misconduct, fraud and corruption in the tender process;

(c) what relief, if any, should be granted; and

(d) what costs order should be made?

*Brief description of submissions of the parties*

[43] I restate briefly the submissions of the parties in response to this Court's directions.[32] As we have seen, the applicants have jettisoned the case premised on deliberate bias. This does mean that their papers are bereft of the context within which the fear of judicial partiality has arisen. Their initial sworn accusations are misaligned with the case they now seek to make. They urged upon us to decide their case on the traction that the factual findings they impugn are so unreasonable and out of kilter with

[32] On 3 May 2010 the Chief Justice issued the following directions:

> "The respondent is directed in terms of Rule 18 to file a written response by Friday 14 May 2010 dealing solely with the question whether the application for direct access should be granted."

On 17 May 2010 the Chief Justice issued the following directions:

> "1. The application will be dealt with without hearing oral argument.
>
> 2. The parties are directed to file brief written submissions by Friday 28 May 2010 as to whether—
>
> (i) the application for direct access should be granted; and, if not
>
> (ii) whether there are grounds for an order as to costs on a higher scale."

On 23 August 2010 the Chief Justice issued the following directions:

> "1. Whether the pleadings that appear in volumes 1 to 5 of the appeal record are the pleadings upon which the matter was adjudicated in the High Court and the Supreme Court of Appeal;
>
> 2. If not, what the contents of the pleadings upon which the matter was adjudicated are and where these pleadings appear in the record;
>
> 3. If the pleadings are those that appear in volumes 1 to 5 of the appeal record, whether the admissions of—
>
> a. paragraphs 14.2.3.2, 14.2.4, 14.2.5, 14.2.6 (p 13, vol 1 of the appeal record) and 16.3.1 to 16.3.9 (pp 15-18, vol 1) of the Plaintiff's Particulars of Claim, made in paragraph 20.3 (vol 5, p 407) of the Plea, and
>
> b. paragraphs 16.5.1, 16.5.3, 16.5.5 and 16.5.6 (p 19, vol 1) of the Plaintiff's Particulars of Claim, made in paragraph 20.7 (vol 5, p 408) of the Plea—
>
> were at any stage withdrawn during the trial and, if they were, where this appears in the appeal record.
>
> 4. If the admissions in question were not withdrawn, whether on the pleadings, it was common cause between the applicants and the Post Office that the tender process that led to the award to Kumo, was materially prejudiced and compromised as a result of bias, gross misconduct and corruption, including the underhanded and dishonest conduct of Topper."

the record that they can be explained only on the ground of bias. For this contention, they rely on the same so-called 114 factual errors they had advanced to establish actual bias.

[44] The Post Office stuck to its original submissions. It argued that no special circumstances have been advanced for the grant of direct access. This was in substance a disguised application for leave to appeal on the facts. The applicants have attempted to disguise an appeal on the facts "by making scandalous allegations of incompetence" against the Supreme Court of Appeal. The second application for leave to appeal and the applicants' JSC complaint amounted to no less than scandalising the Supreme Court of Appeal. More so, maintained the Post Office, no explanation had been offered for why the grounds for direct access had not been canvassed in the first application for leave to appeal.

[45] Turning to bias, the Post Office denied that the Supreme Court of Appeal hearing was unfairly conducted. It asserted that the judgment was factually and legally sound and that the inference of fraud on the part of its employees is plainly inconsistent with the proven facts.

*Should the application for direct access be granted?*

[46] The threshold requirements for granting direct access are whether the dispute concerns a constitutional issue and whether it is in the interest of justice to do so. The first requirement ought not to detain us.

*A constitutional issue?*

[47] A complaint of perceived judicial bias is a constitutional matter.[33] There are several reasons for this, but stating a few should make the point. Judicial authority is an integral and indispensible cog of our constitutional architecture. Our supreme law vests judicial authority in the courts.[34] It commands that courts must function without fear, favour or prejudice, and subject only to the Constitution and the law. It follows that, at all times, the judicial function must be exercised in accordance with the Constitution. At a bare minimum this means that courts must act not only independently but also without bias, with unremitting fidelity to the law, and must be seen to be doing so.

[48] Thus when a litigant complains that a judicial officer has acted with bias or perceived bias he is in effect saying that the judicial officer has breached the Constitution and her oath of office. This is so because courts are final arbiters on the meaning of the Constitution and the law – a high duty that must be discharged without real or perceived bias. The issue is one of grave constitutional concern that demands the unfailing attention of the court seized with the complaint.

[33] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (*Basson I*) at paras 21-2. See also *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC).

[34] Section 165(1) of the Constitution.

[49] Here, too, the trenchant indictment of judicial bias or of its apprehension instantly attracted constitutional concern. Another consideration is that once a claim of judicial bias is made, the judicial officer concerned would generally be entitled to a definitive outcome on the accusations. An accusation of bias, however frivolous, if not dispelled, may tarnish the judicial officer concerned and corrode public confidence in the judiciary as a whole. We are indeed seized with a constitutional matter.

*Is it in the interests of justice to grant direct access?*

[50] Section 167(6)[35] of the Constitution requires this Court to allow a person to bring a matter directly should it be in the interests of justice to do so. Where the interests of justice lie depends on the outcome of a meticulous weighing-up of relevant considerations. Chief of these, but not solely decisive, would be whether there are prospects of success. For instance, the public importance of the issue raised or its impact on the administration of justice may well favour granting direct access in a matter in which prospects of success may be open to some doubt. This Court would permit direct

[35] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

access only in exceptional circumstances.[36] This is particularly so in a dispute where other courts too may have jurisdiction to decide the dispute.

[51] Here, several considerations relevant to the interests of justice spring to the fore. Foremost would be, (a) whether the newly formulated claim of perceived bias is likely to succeed. This would not be the only consideration. We would also have to ask: (b) whether the complaint of apprehension of bias could have been decided by a court other than this one; (c) whether the applicants have previously approached this Court seeking mainly the same relief; (d) what the importance of the issues is to the public interest and to the administration of justice; (e) whether the applicants have furnished an adequate explanation for the delay before applying for direct access; (f) and whether the applicants have furnished an adequate explanation for making trenchant accusations of deliberate judicial bias, ulterior motive and impropriety, only later to withdraw them and tender an unqualified apology. The weight to be placed on these considerations will indeed depend much on whether the relief sought bears any prospect of success. I will look at each of these factors more closely.

[36] *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4. See also *AParty and Another v Minister for Home Affairs and Others; Moloko and Others v Minister of Home Affairs and Another* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 30, citing among others: *Dormehl v Minister of Justice and Others* [2000] ZACC 4; 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) at para 5; *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at paras 3-4; and *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 11.

[52] Before doing so, it is well to say this at the outset. As will transpire, the applicants' attempt to obtain direct access to this Court entailed an attempt to impugn the credibility of the Supreme Court of Appeal judgment, and to sully the integrity of the judges who decided the matter, which was thoroughly without warrant.

*Relevant considerations*

[53] Earlier I pointed out that there are considerations, other than prospects of success, relevant to the question whether direct access should be granted. It is convenient that I get them out of the way before I consider the merits of the claim of bias.

[54] The first is whether another court could have decided the dispute in issue. In this case, not. The complaint of apprehension of bias is against judges of the Supreme Court of Appeal and after they have delivered their judgment. This means that only this Court may resolve the complaint provided it raises a constitutional issue. It certainly does. Thus this Court is the only one the applicants may approach. For that reason, they need not establish exceptional circumstances in order to gain direct access. If it were otherwise, that requirement would place an insurmountable hurdle for a litigant similarly placed. In *Glenister v President of the Republic of South Africa and Others*,[37] we recognised this hurdle and held that where an applicant approaches this Court by way of direct access and it was the only one that could entertain the complaint, the litigant would

[37] [2011] ZACC 6, Case No CCT 48/10, 17 March 2011, as yet unreported, at paras 24-5.

be entitled to approach this Court as of right and not only when exceptional circumstances exist.

[55] Thus, aside from the constitutional importance of the complaint of judicial bias the applicants were entitled to approach this Court by way of direct access in as much as this is the only Court that may hear their complaint and grant them relief. This is indeed a relevant consideration in favour of granting direct access. However, it cannot be seen in isolation.

[56] Have the applicants approached this Court before, seeking the same relief? That is another relevant factor. We have seen that the present approach is the third attempt by the applicants to overturn the decision of the Supreme Court of Appeal.[38] This Court has considered their motions twice and on as many occasions dismissed their applications for leave to appeal. The first application was mounted during June 2009, premised on the "technical issue" related to indirect intent to defraud. Nine months later, during March 2010, the applicants sought leave to appeal on the grounds of actual bias and wilful distortion of the facts on record.

[57] The constitutional issues in the two applications diverged but the common feature was the exhaustive attack on the findings of the Supreme Court of Appeal. Save for

[38] The first attempt, an application for leave to appeal to this Court, was lodged on 3 June 2009 (see [26] above). The second attempt, a further application for leave to appeal, was lodged on 24 March 2010 (see [31] above).

carrying a new label of actual or perceived bias, the direct access application too amounts to no more than a raging discontent over the factual findings of the Supreme Court of Appeal.[39] Although the complaint is clothed in the apparel of actual or perceived bias, it rests on the same scathing attack of the Court's findings.

[58] It is, indeed, not open to a litigant whose application for leave to appeal is dismissed to approach the same court for the same relief under the guise of direct access. If that were permitted, abuse of court process would result and misguided applications would multiply. The principle that once a court has considered a matter on the merits, it may not decide it again would be severely undermined if direct access were granted.

[59] A further consideration is whether the applicants have furnished adequate explanation for the delay before applying for direct access. Once this Court had refused their first application for leave on 17 July 2009, they lodged a complaint against the judges with the JSC alleging gross incompetence and gross misconduct on the part of Nugent JA.[40] On 9 September 2009, Nugent JA wrote:

> "The complainant was the unsuccessful party in the appeal. It is generally accepted judicial practice not to engage in debate with a litigant on the merits of a case that has been finalised."

[39] For examples of cases where this Court has dismissed applications because they were based purely on a dispute of fact with a lower court, see *S v Marais* [2010] ZACC 16; 2011 (1) SA 502 (CC); 2010 (12) BCLR 1223 (CC) and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[40] See above n 26.

Eventually, on 25 March 2010, the JSC dismissed the complaint. The direct access application was initiated only on 23 March 2010 in this Court – more than nine months after the first application for leave was dismissed and some ten months after the judgment of the Supreme Court of Appeal. The applicants did not furnish a satisfactory explanation for the delay.

[60] When applicants approach this Court by way of leave to appeal or direct access with a view to setting aside a decision of another court they must do so within the prescribed time after the decision. If there is a delay in bringing their application an adequate explanation has to be furnished for the delay.[41] Absent an adequate explanation in an appropriate case, the application must fail.

[61] It must be added that a litigant who raises a complaint of bias or its apprehension must do so at the earliest possible opportunity, setting out the details of the time and circumstances under which the apprehension of bias would have arisen.[42] These details would be singularly important in assessing whether the apprehension advanced is reasonable. Here the applicants have neither furnished an explanation for the delay nor any details of the circumstances under which their apprehension of bias has arisen. The

[41] Rule 32(1) of the Rules of this Court provides that the Court or the Chief Justice may "of their own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules". See also: *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) and *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 2009 (10) BCLR 1040 (CC) at para 15.

[42] *Bernert* above n 33 at para 71.

applicants have furnished no explanation except for narrating their failed exploits at the JSC. One would imagine that their legal representatives would have had them know, before the JSC did so, that only this Court may entertain a claim of judicial bias in relation to a decision of the Supreme Court of Appeal.

[62] It escapes me why their complaint to the JSC of gross incompetence and gross misconduct stood in the way of their approaching this Court as they ultimately did nine months later. What is more, under oath, they criticise Nugent JA for his response to the JSC alleging that in effect he—

> "is simply saying that his findings are beyond reproach and that he does not have to answer to anybody regarding his conduct, which resulted in no less than 114 instances where he ignored the Record". (Emphasis removed.)

Here again the applicants have resorted to baseless and gratuitous attacks. It is a time-honoured judicial practice not to engage in debate with a litigant on the merits of a case that has been concluded. The wisdom of this practice is self-evident.

[63] However, the purpose of the practice is not to shield the judiciary from legitimate criticism or robust debate of the judgments they hand down. In *State v Mamabolo*, this Court reminded us all that:

> "The primary function of the Judiciary today is happily to protect a just rather than an unjust legal order. Yet criticism, however robust and painful, is as necessary as ever. It is not just the public that has the right to scrutinise the Judiciary, but the Judiciary that

> has the right to have its activities subjected to the most rigorous critique. The health and strength of the Judiciary, and its capacity to fulfil time-honoured functions in new and rapidly changing circumstances, demand no less. There are no intrinsically closed areas in an open and democratic society."[43]

[64] As we have seen, the applicants failed to furnish a proper explanation for a delay of many months. They have not presented any other compelling reason why, notwithstanding the delay, it would be in the interests of justice to permit them to approach this Court by way of direct access.

[65] A final consideration, before I discuss the merits of the bias claim, is whether the applicants have furnished an adequate explanation for two crucial matters. The first is why the allegations of bias, ulterior motive and impropriety on the part of five appellate judges were not made in the first two applications before this Court. The second is why they, under oath, made these trenchant accusations only later to withdraw them and tender an unqualified apology in a letter by their counsel. The applicants have not explained adequately their grievous conduct. If anything, it points to a remarkable lack of good faith in vindicating rights that they might have imagined they have.

[66] For several months the applicants mounted a crusade of unwarranted and unfounded allegations of the worst kind against judges whose decision they hated to live with. The applicants charged volubly to all concerned that these judges breached their

[43] *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 77.

oath of office and with ulterior motives returned a decision which they knew not to be supported by the facts at hand. The scurrilous charges had a distinct tendency to bring into disrepute not only the five appellate court judges concerned, but also all of our judiciary. Even now, we still do not know why they resorted to this kind of damaging crusade because they have not sworn to the circumstances under which they chose to retract unconditionally the scurrilous allegations and apologise. These circumstances are indeed a powerful consideration on whether to grant an application for direct access.

*Prospects of success on the claim of perceived bias*

[67] For the applicants to succeed they have to persuade us that their claim bears some prospects of success. They must establish a reasonable apprehension of partiality. Before examining whether the facts they advance do bolster their claim, I restate first the legal principles that govern a complaint of judicial bias.

[68] Recently, in *Bernert v Absa Bank Ltd*[44] this Court had occasion to revisit the overarching legal principle that governs allegations of judicial bias. A judicial officer who sits on a case in which there exists a reasonable apprehension that he or she might be biased acts in a manner that is inconsistent with the Constitution.[45] Our judicial system requires that courts must not only be impartial and independent but that they must also be

[44] *Bernert* above n 33.

[45] Id at para 28. 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 35.

seen to be so. Thus an apprehension of bias, if reasonable, would entitle an aggrieved litigant to have the adverse decision set aside.

[69] We explained that a claim of an apprehension of bias is assessed with regard to the presumption of judicial impartiality and the double-requirement of reasonableness. About the presumption, we said:

> "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. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. 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.' An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias."[46] (Footnotes omitted.)

[70] And about the double-requirement of reasonableness, we stressed:

> "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.' 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.' The court must carefully scrutinise the

[46] *Bernert* above n 33 at para 35.

> apprehension to determine whether it is, in all the circumstances, a reasonable one."[47] (Footnotes omitted.)

[71] What remains is to consider whether the applicants have shown a reasonable apprehension of bias. They advance only one basis for their perceived bias. They allege that the Supreme Court of Appeal committed 114 factual errors which are not borne out by the record. To advance this cause, they adopt the formulation of this Court in *State v Basson*[48] and *Bernert*[49] where we stated that 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.

[72] In both cases we held that a mistake on the facts, even if it is so shown, is not ordinarily sufficient on its own to justify a reasonable apprehension of bias. A litigant who relies on bias based on incorrect factual findings indeed carries the onus of establishing the partiality. And this Court has said that this is indeed a formidable onus to discharge. For that to happen, an applicant must, in the first instance, show that the factual findings are erroneous on the appeal record. This is a threshold requirement. If it is not met "the question of unreasonableness will not arise, and the litigant fails at the first hurdle."[50] However, if a mistake on the facts is shown it will justify a reasonable

[47] Id at para 34.

[48] *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson II*) at para 70.

[49] *Bernert* above n 33 at para 102.

[50] Id at para 103.

apprehension of bias only if the error relates to a material fact and it is so unreasonable that it is inexplicable except on the grounds of bias.

*Are there 114 factual errors?*

[73] The stomping ground of the applicants is that the Supreme Court of Appeal ignored the record or interpreted the evidence in a manner, and to an extent, inconsistent with the record in no less than 114 separate instances. This they say attracts an inference of bias. In dealing with portions of the record required for the determination of their application in this Court, their practice note states that the entire record (which covers a 77-day trial and consists of 137 volumes) is necessary. However, in the end, they did not lodge the full record with this Court, but only nine volumes. They also made it known that they will rely only on the evidence contained in volumes 6, 7, 8 and 9. These volumes contain cherry-picked parts of the main record. Of its own accord, this Court has procured and reviewed the full record of 137 volumes that was placed before the Supreme Court of Appeal.

[74] It is however significant that nowhere in their founding affidavit or written argument do the applicants deal with 114 instances of factual error. This they say they would not do "[i]n order not to burden this Honourable Court with all 114 instances as afore-referred to, (same being available, if so required by this Honourable Court)". They say they would "highlight . . . a few main examples of the very obvious differing findings of fact". The "few main examples" turn out to be six findings:

(a) the evidence did not show that Mr Topper, an employee of the Post Office, fraudulently supported the bid of Kumo;

(b) the appearance of Labat at the presentation of 18 April 2002 had no material effect on the evaluation and award of the tender and did not indicate a dishonest manipulation of the tender process by Post Office officials;

(c) the evidence does not establish dishonesty and fraud in the tender process;

(d) the technical evaluation took place in the presence of a representative of the auditing firm KPMG;

(e) the biometric system proposed by Cornastone had yet to be fully developed and tested and the Evaluation Committee had good and rational grounds to have had greater confidence in the Kumo system as reflected in the differentials in their scores; and

(f) the forensic report by Ernst & Young is inadmissible evidence.

In addition there was a generalised complaint that the findings of the Supreme Court of Appeal on tender requirements were wrong. It was also contended that the Supreme Court of Appeal did not take account of the fact that the relevant fraud had been admitted in the pleadings.

[75] I have reviewed all the alleged factual errors the applicants have listed. Firstly, they are not 114 in number. Virtually all are sub-sets of the six main factual findings I have already listed. Secondly, those which fall outside the rubric of their six main

complaints are neither factual errors nor decisive of their case. For instance, the applicants would list as a factual error, an inference from the facts different to the one arrived at by the Supreme Court Appeal without pointing to an underlying factual mistake. Even where a factual mistake has been pointed out it is no more than a mere misdirection which cannot be said to induce an apprehension of bias.

[76] Therefore, as I embark on a review of the impugned factual findings, I must remind myself of three important requirements in a case where applicants rely on a reasonable apprehension of bias based on incorrect factual findings. They must show, as we have found in *Bernert*,[51] the following. Firstly, that the impugned findings are not supported by the record. Secondly, that the findings are not mere misdirections but are errors that are so unreasonable that they are inexplicable except on the basis of a reasonable apprehension of bias. To these two requirements one more must be added: that the factual findings complained of are material to the outcome of the underlying claim. It is self-evident that if an error complained of is immaterial or unrelated to the outcome of the case, then it can hardly be said to induce a reasonable apprehension of bias.

*Did Mr Topper fraudulently support the bid of Kumo?*

[77] Arguably, the single most crucial finding the High Court made in favour of the applicants' case was the inference that Mr Topper "dishonestly manipulated the scoring

[51] *Bernert* above n 33 at para 103.

by the members" of the Tender Evaluation Committee. At the time of the tender process he was an employee of the Post Office, the tender project sponsor and a member of the Tender Evaluation Committee. The High Court accepted that Mr Topper acted fraudulently "due to circumstances of which only he was aware" and that he "underplayed the Cornastone tender and supported the Kumo tender." It further inferred that "[i]t must have been obvious to some of the senior members that Kumo had to be disqualified."[52] The High Court added that Mr Topper acted fraudulently in the scope of his employment and again inferred that "there must have been other employees who could have influenced the outcome of the process to a different result than to what it came, who corruptly turned a blind eye."[53]

[78] The Supreme Court of Appeal evaluated the evidence differently. It found that there was no basis in the evidence, whether directly or by inference, for the finding by the High Court that Mr Topper fraudulently supported the Kumo bid. For this pivotal finding it furnished several reasons. A few should suffice. It found that the evidence did not support the conclusion that Mr Topper was "touting for bribes" and that the subsequent allegations of "extortion" by the Ombudsman were baseless, as the applicants well knew. What is more, the Supreme Court of Appeal found, Mr De Lacy testified that throughout the tender process he was given no reason to think that Mr Topper was in some way dishonestly going about his task.

[52] High Court judgment above n 5 at para 26.

[53] Id at para 56.

[79] Relying on the findings made by the auditors, Ernst & Young, who were appointed on the recommendation of the Ombudsman, the applicants sought to persuade the Supreme Court of Appeal to find that Mr Topper dishonestly manipulated the process in order to favour the Kumo bid. The Court declined the invitation. It ruled that the findings of the auditors were inadmissible hearsay evidence and that, in any event, their report makes plain that their conclusions were "tentative" and "based on an incomplete examination of all the evidence" and "subject to various disclaimers."[54] The Court took the view that in those circumstances the report could not be accorded any weight and also that it is for a court and not auditors to decide the case upon evidence that is properly before it.

[80] In relation to the role of Mr Topper in the technical evaluation of the two bids, the Supreme Court of Appeal found that undisputed evidence shows that each evaluator had scored independently of one another and that there had been no room for Mr Topper to manipulate other members of the committee. Moreover, neither Mr Prins nor Ms Richter, two members of the committee, complained that Mr Topper sought to influence improperly their technical evaluation of the two bids.

[81] Then the Court made this incisive observation about Mr Topper:

[54] SCA judgment above n 1 at para 30.

> "Certainly Topper explained features of the tenders to the others, but that is to be expected, bearing in mind that he had greater technical knowledge than they did. Had he been intent on manipulating the scores so as to favour Kumo, one would expect that his scores would be at least as high as the highest score of the others. Yet his scores are more favourable to Cornastone than the scores of Prins (described by the court below as a 'decent and solid citizen'). And Richter scored the two tenders almost equally, which is hardly consistent with manipulation by Topper so as to favour Kumo."[55]

[82] The Supreme Court of Appeal discounted the allegations of dishonest support for the Kumo bid on another cogent ground. On 22 April 2002 and again on 18 June 2002 the Evaluation Committee, on which Mr Topper served, recommended to the Tender Board that "no one provider could be singled out to supply a total solution" and that both Kumo and Cornastone be appointed to provide a total solution. The recommendation listed various parts of the systems that should be provided by each. The Court saw this inclusive recommendation as being at variance with a dishonest and partisan purpose. It held that there simply can be no basis in the evidence to suggest, as the applicants do, that Mr Topper dishonestly favoured the bid by Kumo, or as they say Labat, or that there was dishonesty on the part of the officials concerned in order to disadvantage Cornastone.

[83] It seems to me there is no obvious factual error which the Supreme Court of Appeal has made. What is apparent is that in the absence of direct evidence of dishonesty and corrupt manipulation the two courts have made entirely different inferences. One of the obvious reasons for the divergent conclusion on Mr Topper's

[55] Id at para 81.

conduct is that the High Court made much of the contents of the reports by the Ombudsman and the auditors. The Supreme Court of Appeal discounted them as hearsay or of little evidentiary weight. In any event, even if there were errors of fact in evaluating Mr Topper's conduct in relation to the tender process, it seems plain to me that the reasoning of the Supreme Court of Appeal on the factual findings is as reasonable as it is cogent. Besides, the decision whether the report of the Ombudsman or of the auditors is admissible or ought to carry any weight is a matter of law which in my view is not open to any criticism.

[84] It must be borne in mind that, in exercising its appellate jurisdiction, a court is entitled to review findings of fact, and so too unsatisfactory reasoning on the part of a lower court. In emphasising this point, in *Bernert*, we held that:

> "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'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. 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. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it."[56] (Footnotes omitted.)

[56] *Bernert* above n 33 at para 106.

[85] I conclude that the findings of the Supreme Court of Appeal in relation to Mr Topper are not incorrect. This means that the applicants do not pass the threshold requirement and therefore the issue whether the factual error is reasonable does not even begin to arise.

*The Labat issue*

[86] On 18 April 2002, the three shortlisted bidders were required to make oral presentations. Mr Van Rooyen, who was the group chief executive officer of a black economic empowerment group of companies known as Labat, turned up at the meeting and participated in the presentation of the Kumo tender. It appears common cause that Labat did not appear on the Kumo proposal as a company forming part of the consortium as prescribed by the RFP.[57] At the presentation, Mr Van Rooyen explained that Labat was the prime contractor and that the other companies listed in the Kumo proposal were subcontractors. On these facts, the High Court found that Kumo had no fixed consortium agreements and that therefore there had not been proper compliance with the requirements of the RFP by Kumo.

[87] The question that arose was whether the late entry of Labat to the process had any effect on the evaluation and award of the tender and if so, did that indicate a dishonest manipulation of the process by Post Office officials? That was indeed the submission of the applicants. They urged upon the Supreme Court of Appeal, to find, as the High Court

[57] See above n 6.

did, that the Kumo tender was fatally flawed because Labat did not feature in the original Kumo tender. They added that, even so, the Post Office dishonestly evaluated the Kumo tender taking into account Labat's black economic empowerment credentials and that in effect the tender was awarded to Labat and not to Kumo.

[88] The Supreme Court of Appeal reviewed in considerable detail the relevant minutes of the Evaluation Committee and of the Tender Board and concluded that although the belated appearance of Labat caused confusion amongst members of the Evaluation Committee and of the Tender Board, it had no effect on the evaluation of the tender. The Court found that the Kumo tender was evaluated as it was presented with no regard to the late entrance of Labat. It also found that, in any event, the evidence does not show that the officials concerned dishonestly awarded the tender on the strength of the submissions presented by Labat. The Court concluded that the tender was indeed awarded to Kumo; that the Labat issue was a "red herring" and that "the appearance of Labat had no effect on the evaluation and award of the tenders."[58]

[89] The applicants take issue with these findings. They prefer and support the finding of the High Court that:

> "It must have been obvious to some of the senior members that Kumo had to be disqualified. Labat's late appearance was patently obvious. The fact that that did not

[58] SCA judgment above n 1 at para 107.

> happen can only lead to a conclusion that a person or persons, other than Topper, with influence, did not want Kumo to leave the scene."[59]

[90] I tend to agree with the applicants that the Labat issue was more than a "red herring." It is so that Labat was not originally listed in Kumo's RFP as a member of the consortium and that its subsequent participation in the presentation caused considerable disquiet not only on the part of the Cornastone consortium, but also of the Evaluation Committee and the Tender Board. That, however, is not the end of the enquiry in a delictual claim for damages, such as the present one. Properly so, the Supreme Court of Appeal was preoccupied with the question whether the belated entry of Labat constituted a dishonest or fraudulent manipulation of the evaluation and awarding of the tender and whether but for the manipulation, Cornastone would have been awarded the tender.

[91] To this question, the applicants submit that the Supreme Court of Appeal should have found that the Evaluation Committee and Tender Board dishonestly or fraudulently or corruptly accepted Labat as part of the Kumo consortium and awarded it the tender for that reason. On the other hand the Supreme Court of Appeal carefully examined the Evaluation Committee's scoring and concluded that the presence of Labat made no difference whatsoever to the ultimate scoring which was presented to the ultimate decision maker, the Tender Board. That explains why the Supreme Court of Appeal concluded that the Kumo tender was evaluated precisely as it had been presented, with no consideration being given to Labat, whether in the allocation of black economic

[59] High Court judgment above n 5 at para 26.

empowerment points or not. The Court furthermore made the point that despite the entry of Labat, Cornastone retained a higher black economic empowerment rating than Kumo.

[92] Lastly, it bears repetition that despite the late entry of Labat and its supposed impact on the tender evaluation, the Evaluation Committee recommended as its first preference that the Tender Board award the contract to Cornastone and Kumo jointly. That recommendation is hardly consistent with a corrupt intent to favour Kumo at the expense of Cornastone.

[93] I can find no misdirection, on this score, that justifies an inference that the Supreme Court of Appeal got the facts wrong. They rather took a different view from the High Court. And that is that the late entry of Labat was not fatal to the validity of the process because it did not corruptly taint the evaluation or awarding of the tender. Its preferred approach on the Labat issue, in my judgment, is not wrong and therefore cannot possibly induce a reasonable apprehension of bias.

*Does the evidence establish dishonesty and fraud in the tender process?*

[94] The applicants contend that, despite the finding of the Supreme Court of Appeal that there was no fraud in the tender process, the evidence established dishonesty and fraud. For this they advance only one ground. They say that the most compelling evidence in the record that there was "some fraud in the tender process, is the exchange between [the Post Office's] senior counsel . . . and Hartzenberg J during the trial in the

High Court." The statement made by the senior counsel is: "I am not saying that there was no fraud in this whole process." To this the learned judge replied: "I was just thinking about the same thing. Why did you cancel the Kumo contract?" The applicants contend that this exchange is a concession that there was fraud in the whole process.

[95] The submission has no merit whatsoever. Whatever concession, if indeed counsel made one, can hardly serve as a proxy for admissible evidence of causally related fraud. That is what the applicants were obliged to adduce in order to succeed in their claim.

*Did the technical evaluation take place in the presence of a representative of the auditing firm, KPMG?*

[96] The Supreme Court of Appeal made the finding that the technical evaluation took place in the presence of a representative of the auditing firm, KPMG. This is to be contrasted with the finding of the High Court that the tender process from the beginning to the end was done by Post Office employees and that KPMG was only involved in the opening of the tenders. It is so that, on the record, the technical evaluation was certainly not completed in the presence of KPMG. Their involvement ended on 19 March 2002, just a day after the closing date for the lodging of tender submissions. The Supreme Court of Appeal's finding thus may be an error on the facts. On the back of this, the applicants urge us to find that the Supreme Court of Appeal made this error for a sinister reason. This they say was in order "to lend credibility to the technical evaluation of the

tender process by incorrectly recording that KPMG were part of the technical tender evaluation process."

[97] This startling accusation is a relic of the applicants' original accusation of deliberate bias. Whether the auditors sat in throughout the technical tender evaluation or were there only when the tenders were opened is a difference of no moment to the central issues. It explains nothing about whether the evaluation was tainted by dishonesty that stood in the way of Cornastone being granted the tender. The factual mistake is indeed minute and not material. It cannot serve as any platform for inferring partiality.

*Was the applicants' biometric system incomplete?*

[98] The applicants are unhappy that the Supreme Court of Appeal implied that their system was incomplete in the sense that it "had yet to be fully developed and tested" and that "they had no direct experience upon which to rely."[60] The Court added that the technical evaluation team had "good and rational grounds" to have had greater confidence in the Kumo system, as reflected in the differentials in their scores. The applicants prefer and support the finding of the High Court that "the Evaluation Committee did not give any indication that the system of either Kumo or Cornastone did not comply with the requirements."[61]

[60] SCA judgment above n 1 at para 79.

[61] High Court judgment above n 5 at para 13.

[99] The Kumo tender was lodged with a certificate that its system is EMV level 2 compliant.[62] The Cornastone tender document was not accompanied by similar certification. However, it candidly explained that Cornastone could not achieve the prescribed certification within the timeframes of the tender response but could do so within 3 months and that would not affect the rollout of the project.[63] Even so, the trial court spent much time on the question whether the Cornastone system was EMV level 2 compliant. The Post Office contended that it was not and that for that reason alone their tender should have been disqualified. The High Court dismissed this contention and found that it was an impossible requirement for any bidder to comply with, given the narrow timeframes for the tender responses.

[100] The three technical evaluators were alive to the fact that Cornastone was not appropriately EMV level 2 compliant at the time. Their score sheet remarks reveal so. Plainly there is no merit in the suggestion that the Supreme Court of Appeal was wrong in finding that the Cornastone system had yet to be fully developed and tested. The applicants' own tender document revealed that much, and the High Court too accepted, that Cornastone could not have procured the certification in time for the submission of the tender document.

[62] EMV is an acronym for three major credit card organisations, Europay, Mastercard and Visacard, that have set up an institute to evaluate electronic payment systems for compliance with security standards.

[63] SCA judgment above n 1 at para 85.

[101] Again it must be said that even if their system "can be expressed as 100%", as they demand that the Supreme Court of Appeal should have found, the core question remains. And that is whether the technical evaluators dishonestly scored Kumo's system more favourably than they should have and that, but for that fraud, Cornastone would have been awarded the tender.

[102] Their present contention that the finding on their EMV level 2 compliance is wrong or unreasonable on the record cannot be sustained. They have not shown that in making this finding the Court may reasonably be perceived as less than impartial.

*Are the findings of the Supreme Court of Appeal on tender requirements correct?*

[103] The complaint raised under this rubric is anything but clear. It vacillates from a complaint that the tender was awarded to a tenderer who had not scored the highest points to a claim that there was no proper compliance with the requirements of the RFP by Kumo. No clear-cut factual errors are identified. It may indeed be so that there were irregularities that may or may not have justified any of the bidders being disqualified. That however is of no relevance to the present enquiry. The applicants are called upon to show a disregard of the evidence that is symptomatic of bias. That has not been shown.

*Was the report of Ernst & Young admissible as evidence?*

[104] The applicants are aggrieved that the Court ruled that the findings contained in the Ernst & Young report were inadmissible as evidence. The High Court relied heavily on

the report in concluding that "it is very clear that the whole tender process was flawed."[64] What is very clear is that but for the report the applicants had no prospect of showing fraud and dishonesty, if any, within the tender process. The High Court explains why. It finds that the applicants had harboured suspicions and fear that Mr Topper had acted improperly but that they had no evidence to prove it until they complained to the Ombudsman and later received the report.[65]

[105] Relying on the findings in the report, the applicants sought to persuade the Supreme Court of Appeal to find that Mr Topper dishonestly manipulated the process in order to favour Kumo. The Court declined the invitation. It ruled that the findings of the auditors were inadmissible hearsay and that, in any event, their report makes plain that its conclusions were "tentative", "based on an incomplete examination of all the evidence" and "subject to various disclaimers."[66] The Court thought that in those circumstances the report could not be accorded any weight and also that it "is for a court, not auditors, to decide this case and to do so upon evidence that is properly before it."

[106] The applicants contend that there is no evidence to support the ruling of the Supreme Court of Appeal that the report may not be admitted to evidence particularly because the Post Office never seriously contested the correctness of the findings.

[64] High Court judgment above n 5 at para 24.

[65] Id at para 51.

[66] SCA judgment above n 1 at para 30.

[107] The difficulty the applicants have to contend with is that the difference in a ruling, between a trial court and an appellate court, on whether a particular piece of evidence is admissible is not a difference on the evidence but a matter of law.[67] When the Supreme Court of Appeal decides to exclude or place little weight on the findings in the report, it is in effect making a decision on the law. The mere fact that the trial court made a different ruling on its admissibility cannot induce a reasonable perception of bias. A difference on the law can hardly, without more, be symptomatic of bias.

*Admissions in paragraphs 20.3 and 20.7 of the plea*

[108] Our directions[68] invited submissions on the significance of the admissions made in paragraphs 20.3 and 20.7 of the plea.[69] Both parties confirmed that the admissions were

[67] *Basson I* above n 33 at paras 54-60.

[68] Dated 23 August 2010. Above n 32.

[69] Paragraph 20.3 of the respondent's plea read as follows:

> "The [respondent] upon becoming aware of the allegations made by the [applicants] in paragraphs 14.2.3.2, 14.2.4, 14.2.5, 14.2.6, and 16.3.1 to 16.3.9 (which it admits) withdrew Kumo's conditional appointment and thereafter cancelled the whole of the tender process as it was entitled to do having regard to its general legislative duty to act fairly, equitably, transparently and lawfully."

The relevant parts of the paragraphs in the applicants' particulars of claim to which the respondent admitted in paragraph 20.3 read as follows:

- Paragraph 14.2.3.2: ". . . one or more of the parties evaluating the Tender bids . . . was guilty of gross misconduct and/or corruption";
- Paragraph 14.2.4: ". . . there were anomalies to the Kumo Tender bid which should have disqualified same";
- Paragraph 14.2.5: ". . . the requirement of anonymity of bidding companies was not adhered to";
- Paragraph 14.2.6: ". . . there were unacceptable relationships between certain of the [respondent's] employees (specifically Topper) and members of Kumo, which gave rise to bias, gross misconduct and corruption in the context of the Tender process, which was materially prejudiced and compromised as a result thereof"; and

part of the pleadings that served before the High Court and the Supreme Court of Appeal. The applicants went on to submit that the admissions obliged the Supreme Court of Appeal to accept gross misconduct, fraud and corruption in the tender process as common cause facts. They added that the Supreme Court of Appeal was wrong to the extent that it held that there was no fraud or dishonesty in the tender process.

[109] On the other hand, the Post Office argued that the admissions were carefully pleaded and that whilst there were admissions made about the irregular conduct of Mr Topper there was no admission by it that any of its officials intended to act fraudulently,

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- Paragraph 16.3.1 to 16.3.9: ". . . other bidders and in particular, Kumo, were afforded an unfair or improper advantage".

Paragraph 20.7 of the respondent's plea stated as follows: "The [respondent] admits the allegations made in sub-paragraphs 16.5.1, 16.5.3, 16.5.5 and 16.5.6. In this context [the applicants] repeats the content of paragraph 20.5 and 20.6 above." The relevant parts of the paragraphs in the applicants' particulars of claim to which the respondent admitted in paragraph 20.7 read as follows:

- Paragraph 16.5.1: ". . . the Tender was not conducted in an open, honest and transparent manner and in accordance with the terms and conditions of the Tender itself . . . irregularities occurred in the Tender process, especially insofar as they relate to Topper and Kumo";
- Paragraph 16.5.3: "Topper and Inman had a relationship preceding the Tender, both on a personal and business level, which resulted in Topper not being in a position to adjudicate Cornastone's Tender fairly and impartially and the non disclosure of that fact was material and constituted gross misconduct";
- Paragraph 16.5.5: "the inclusion of Labat in Kumo amounted to an irregularity in the Tender process, as its inclusion occurred after the Tender had closed"; and
- Paragraph 16.5.6: "Topper's prior knowledge of Kumo's tender bid ensured that the evaluation process would be ineffective and in this regard, his conduct was underhanded and amounted to dishonesty".

Paragraph 20.5 and paragraph 20.6, of which the respondent repeated the contents in relation to the admissions in paragraph 27, no doubt in order to qualify the admissions made, read as follows:

- Paragraph 20.5: "The [respondent] had no knowledge of all of Mr Topper's activities referred to therein, but took note of the report of Ernst & Young. However, on 2nd September 2002 first [applicant] wrote to Mr Topper, a member of the [respondent's] Tender Evaluation Committee at the time, accusing him of serious acts of misconduct and unethical behaviour over a period of 2 years"; and
- Paragraph 20.6: "First [applicant] neglected and/or failed to bring these allegations to the attention of the [respondent] which were relevant to the tender process. Accordingly the [respondent] denies that [the applicants] can now rely on any cause of action based on the [respondent's] alleged breach of duty of care and bad faith."

corruptly or dishonestly or in breach of any duty of care owed to Cornastone or that this led to any loss on the part of Cornastone. The respondent explains that the applicants' particulars of claim were drafted before the decisions in *Steenkamp*[70] and *Minister of Finance v Gore NO*[71] were delivered and paid little attention to what was said in *Olitzki Property Holdings v State Tender Board and Another*.[72] The nub of their submission is that for the applicants to succeed, even in the face of the admissions in the pleadings, they have to establish causally relevant fraudulent or dishonest intent as required in those decisions. It would not suffice for them to rely on fraud and corrupt manipulation "in the air". They must establish deliberate dishonesty, fraud or corruption that must have caused the applicants' loss.

[110] The admissions made are indeed far-reaching. At the very least they suggest that Mr Topper had made himself guilty of gross misconduct and corruption, that there were unacceptable relationships between him and members of Kumo which gave rise to bias on his part, and that he inaccurately described to the Tender Board the structure of Kumo.

[111] Also true is that the pleadings need to be read as a whole. On close scrutiny it is clear that the Post Office denied that it owed the applicants any duty of care, or that its employees acted in bad faith, or went about their employment in relation to the tender

[70] Above n 12.

[71] Above n 11.

[72] 2001 (3) SA 1247 (SCA).

process with the intent to act fraudulently, corruptly or dishonestly towards the applicants. In brief, the Post Office denied that the conduct of its employees amounted to a breach of a duty of care, if any, owed to Cornastone.

[112] To the extent that the judgment of the Supreme Court of Appeal suggests that no finger could be pointed at Mr Topper, it may be less than accurate in the light of these admissions. An error of that magnitude would be of no moment. Without more, it cannot be suggested that this error amounts to more than a mere misdirection and that it is inexplicable except on the basis of bias. There are no admissions that the fraud on the part of Mr Topper is causally related to the loss of profits the applicants claim to have suffered. Even more importantly, this could hardly be a valid ground for the complaint that these findings of the Supreme Court of Appeal are so unreasonable as to induce an apprehension of bias.

*Conclusion on prospects of success*

[113] Having examined the big ticket items the applicants have put up as examples of findings that diverge from the record, it is overwhelmingly apparent that the applicants have failed to show that the judgment of the Supreme Court of Appeal contains any material misdirections which may reasonably induce a reasonable apprehension of bias. It must also be said that nothing in the findings of the Supreme Court of Appeal could ever justify the baseless and scurrilous accusations of a deliberate distortion of facts and actual bias on the part of the panel of five judges of an appellate court. I therefore

conclude that the bias claim advanced by the applicants bears no prospects of success whatsoever.

[114] What remains to be considered is an appropriate order as to costs.

*Costs*

[115] The applicants submitted that if they were not to be granted direct access they should not be burdened with costs because they had sought to vindicate a constitutional right against a public entity. The Post Office contended that this Court's approach, which aims to avoid a chilling effect on litigants who seek to vindicate constitutional rights, cannot be allowed to develop into an inflexible rule that encourages litigants to challenge any judgment no matter how spurious the grounds or how poor the prospects of success. It submitted that the application is vexatious, and that it should be dismissed with costs on an attorney and client scale, these costs to be paid by the applicants and their attorney jointly and severally.

[116] An award of costs is a matter which lies in the discretion of a court. The discretion is exercised judicially and with regard to all circumstances relevant to the determination of costs. The standard developed by this Court, to be used in the enquiry, is whether it is just and equitable to make a particular costs order.[73] We have also said

[73] See for example: *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-3 and *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 138-9. Also see *City of Cape*

that where an unsuccessful litigant had sued a state organ with a view to vindicate a protection afforded by the Constitution, the litigant should not ordinarily be ordered to pay costs.[74] That however is not an inflexible rule.

[117] A court may depart from this general rule if it is just and equitable to do so. This may be the case where the unsuccessful litigant is shown to have acted with improper motive, or has abused court process; has conducted the case in a vexatious manner; [75] has not properly adhered to the rules of court; has made sustained and unwarranted attacks on other litigants[76] or witnesses or judicial officers[77] concerned or has not pursued the claim in good faith. This limited catalogue is not intended to be exhaustive in as much as what may be an appropriate costs order, even in constitutional litigation, and may be conditioned by the circumstances of the case.

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*Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC) at para 79; *Masetlha v President of Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 103; *Bothma v Els and Others* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) BCLR 1 (CC) at para 94; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) and others (Bengwenyama-ye-Maswazi Royal Council intervening)* 2010 (3) All SA 577 (SCA) at para 31; and *De Kock and Others v Van Rooyen* 2005 (1) SA 1 (SCA) at para 30.

[74] *Biowatch* above n 73 at para 21 and *Affordable Medicines* above n 73 at para 138. See also *Du Toit v Minister of Transport* [2005] ZACC 9; 2006 (1) SA 297 (CC); 2005 (11) BCLR 1053 (CC) at para 55; *Volks NO v Robinson and Others* [2005] ZACC 2; 2005 (5) BCLR 446 (CC) at para 69; and *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at para 23.

[75] *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T) at 178I-179C and *Ex parte Jordaan: In re Grunow Estates (Edms) Bpk v Jordaan* 1993 (3) SA 448 (O) at 453E-J.

[76] *W v S and Others* 1988 (1) SA 475 (NPD) at 497G-H and *Polverini v General Accident Insurance Co South Africa Ltd* 1998 (3) SA 546 (WLD) at 554I-555A.

[77] *Protea Assurance Co Ltd v Januszkiewicz* 1989 (4) SA 292 (WLD) at 298D-299A.

[118] I have described in great detail the conduct of the applicants in pursuing this case. It does not bear repetition. It is conduct that attracts a punitive costs order. The Post Office invited us to make part of that order payable from the pockets of the applicants' counsel and attorney (*de bonis propriis*). In its oral submissions the Post Office added that the applicants' attorney and counsel were more than hired assassins. They associated themselves with the undignified, wanton and baseless attacks their clients mounted against the integrity of the judges concerned. The Post Office drew attention to written argument authored by counsel. This often repeated word for word the unwarranted sworn accusations. In that way counsel's argument made common cause with their clients' crusade to upset the decision of the Supreme Court of Appeal which in turn deprived their clients of the attractive award of R60 million.

[119] Tempting as it is, this is an invitation we ought to decline. The invitation is tempting because the conduct of the applicants' legal representatives is not without blemish. As we have seen, it is indeed so that as they settled their clients' affidavits and, in written argument authored by counsel, they rehashed word for word the unwarranted accusations of their clients. When their clients changed tack, so did they. They too now accept that their clients' charges were baseless and that they owe an unqualified apology to the judges concerned. The question that remains unanswered is whether these legal representatives had breached the ethical duty they owe to a court as its officers.

[120] An officer of the court may not without more convey to a court allegations or claims by a client when there is reason to believe that the allegations are untruthful or without a factual basis.[78] This duty is heightened in circumstances where imputations of dishonesty and bias are directed at a judicial officer who ordinarily enjoys a presumption of impartiality. It behoves the legal representative concerned to examine carefully the complaints of judicial bias and dishonesty and the facts, if any, upon which the accusations rest. Here it is doubtful whether these legal representatives did so. That, in my view, is a matter which calls for an enquiry by their respective professional bodies to which the applicants' attorneys and advocates belong. An appropriate order drawing the attention of these professional bodies to this judgment will be made.

[121] I nonetheless decline the invitation to make the costs order *de bonis propriis* against these legal representatives. An order of this nature would be justified where the conduct of a legal representative, that is not attributable to a litigant, calls for the court to express its displeasure.[79] This would be the case, for instance, where there is nothing to

[78] It should also be noted that in our law an advocate may be held liable for defamation for statements made from the bar. Van Dijkhorst and Church (14(2) LAWSA (2 ed) at 135) summarises the position as follows:

> "In the conduct of a case the advocate may not use abuse, slander and vituperation. He or she, is however, protected when making a defamatory statement in the interest of the client, pertinent to the matter in issue, even though it may be false, provided he or she has some reasonable cause for such conduct. *There is no protection when the advocate goes out of his or her way to defame an individual and to allege or insinuate calumnious charges not justified by the occasion.*" (Footnotes omitted.) (Emphasis added.)

[79] See *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 54 and *Baphalane Ba Ramokoka Community v Mphela Family and Others, In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others* [2011] ZACC 15, CCT 75/10, 21 April 2011, as yet unreported, at paras 42 and 44. The order is made as a consequence of a material departure from the responsibility of office by a legal representative. The aim of the order is to indemnify a party from an account for costs by ordering that representative to pay the costs himself. Courts will not make such an order lightly. The mere incorrect rendering of legal services will generally not justify an

suggest that the litigant has actively associated herself or himself with the conduct of the legal representative. This cannot be said of the applicants in this case. Both of them deposed to these utterly unfounded accusations of ulterior motive and judicial dishonesty. They actively pursued complaints before the JSC rehashing substantively the same accusations that they made in their affidavits before this Court. When the matter was heard and counsel explained a change of heart of his clients, at least one of them, Mr De Lacy, we were informed, sat in court. We have no reason to infer that the clients did not actively associate themselves with the allegations and it is also fair to assume that the legal representatives repeated these acting on instructions from their clients. There is thus no reason to indemnify the applicants against an adverse and punitive costs order.

[122] The conduct of the applicants' legal representatives may have to be dealt with by their respective professional bodies. They should be requested to consider whether their conduct amounts to a breach of any ethical rule. To this extent, the Registrar will be directed to furnish a copy of this judgment to the Society of Advocates, Johannesburg, and to the Law Society of the Northern Provinces.

[123] In the circumstances it is just and equitable that the applicants bear the full brunt of a costs order on an attorney and own client scale.

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order *de bonis propriis*; it is accepted that it will only be awarded in instances of improper conduct. (See Van Loggerenberg and Farlam *Erasmus Superior Court Practice* (Juta, Cape Town 2010) at E12-3 and E12-27 to 29.) South African courts are not unique in holding legal practitioners personally liable for costs. Similar orders are made in Australia, Canada, New Zealand and England and Wales.

*Order*

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

1. The application for direct access is dismissed.
2. Mr Brian Patrick De Lacy, the first applicant, and Mr Barry Jack Beadon, the second applicant, are ordered to pay the costs of the application on an attorney and own client scale, which costs include the employment of two counsel.
3. The Registrar of this Court is directed to furnish a copy of this judgment to the Law Society of the Northern Provinces and the Society of Advocates, Johannesburg.

Ngcobo CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Moseneke DCJ.

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| For the Applicants: | Adv M Nowitz instructed by Nowitz Attorneys. |
| For the Respondent: | Adv NGD Maritz SC and Adv HF Jacobs instructed by Mahlangu Inc. |