



IN THE HIGH COURT OF SWAZILAND

Case no.1138/1999

In the matter between:-

African Echo (pty) ltd	1st Applicant
Thulani Thwala	2nd applicant
Mabandla Bhembhe	3rd Applicant

In Re:-	
Inkhosatana Gelane Simelane	plaintiff
And	
African Echo (pty) ltd	1st Defendant
Thulani Thwala	2nd Defendant
Mabandla Bhembe	3rd Defendant

In Re:-	
Boyce Magongo	plaintiff
And	
Raphael Mhlanga	1st Defendant
Africa Echo (pty) ltd	2nd Defendant
The Times of Swaziland	3rd Defendant

Neutral citation: *African Echo (Pty) ltd & 2 Others In re; Inkhosatana Gelane Simelane v Mhlanga & 2 Others* (1138/1999) [2013] SZHC 159 (19 July 2013)

Coram: HLOPHE J

HEARD 17/07/2013

DELIVERED 19/07/201

JUDGMENT.

- [1] The applicant who is the defendant in the two main matters whose case numbers are cited above, instituted two application proceedings under a certificate of urgency seeking mainly an order to the effect that I as the presiding judge, recuses myself from hearing each one of the above mentioned matters.
- [2] It needs to be clarified from the onset that both matters in which my recusal is sought, are not in reality matters in which any hearing or trial is pending in the strict sense of the term, given that they are both matters in which, as trial matters, evidence has been led and finalized in each case such that submissions were made with only a judgment being awaited in each matter.
- [3] Owing to the fact that the two matters are characterized by similar facts and circumstances, particularly as regards the current proceedings, it was agreed at the commencement of the matter that they be consolidated and heard as one.
- [4] For purposes of clarity the matters in which I am being asked to recuse myself are that of **Inkhosatana Gelane Simelane vs. African Echo (pty) ltd and others as well as that of Boycey Magongo vs. Raphael Mhlanga and others.** I shall otherwise refer to the matters as the Inkhosatana Gelane Simelane matter and the other one as the Boycey Magongo matter in the course of this judgment

- [5]. The foundation of the applications as contained in the applicants's papers are statements allegedly made by me when I called the ombudsman of the Times of Swaziland newspaper and allegedly angrily berated her and also allegedly issued an insult about a certain article the newspaper had published on the 20th June 2013 relating to a sentencing matter I had handled the previous day. It is further alleged that I angrily told her to stay out of the matter and that I later referred to myself as a Royal Judge including later on allegedly stating that the appointment of the former Judge of this court, Mr. Masuku as chairman of the Media Complains Commission was a joke. It is also alleged that in the telephonic discussions I had with both the applicants' Ombudsman and Managing Director I had alleged that the newspaper concerned had an agenda against me.
- [6] It is imperative that I indicate my stance at this stage of my judgment that the said salty and unfortunate allegations are not true, with some aspects of what actually transpired being deliberately distorted and put out of context. This aspect of the matter shall be reverted to later on in the course of this judgment where a true picture of what actually transpired shall be set out. It suffices to state that these embarrassing allegations would possibly not have been an issue in court was the established and peremptory salutary procedure on the institution of proceedings of this nature followed.
- [7] This peremptory and established procedure on the institution of Recusal proceedings was stated in the following words in the case of **The President of the Republic of South Africa and another vs. The South African**

Rugby Football Union and others (SARFU CASE) 1999 (2) SA 14 at para. 50:-

“...The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in Chambers with the Judge or Judges in the presence of her or his opponent. The grounds for recusal are put to the Judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge the applicant would, if so advised, move the application in open court”

- [8] Referring to this procedure the full Bench of this court in the case of **Minister of Justice and Constitutional Affairs vs. Stanley Wilfred Sapire Civil Case No. 1822/2001 at page 3**, had the following to say:-

“We find it apposite, for reasons that will appear below, to state authoritatively, the procedure, which has become salutary and which all practitioners are enjoined to follow in matters in which the recusation of a Judge or other presiding officer is sought”

- [9] The Honourable Court per the full Bench went on to refer to the above cited extract from the SARFU case as well as to the following extract from a book by Eric Morris; Technique in Litigation, 3rd Edition, Juta and company, 1985 at page 60 in support of the procedure it authoritatively stated practitioners were enjoined to follow:-

“Ordinary, as well as professional, courtesy requires that the judicial officer whose recusal is sought should be informed that such an application will be made. Often an informal approach, made timeously, will avoid embarrassment both to the court and to Counsel. The usual procedure is to request the Judge or Magistrate to receive both your opponent and yourself in Chambers where you indicate tactfully the facts and grounds of your application”

[10] Clarifying what the purpose of this procedure was in the same judgment the Full Bench in the Stanley Sapire matter said the following with which this court fully agrees at page 5:-

“This practice has noble intentions, viz to inform the Judges concerned of the intended application and the grounds thereof and to allow them to consider and hopefully decide thereon. Certain misconceptions and or misinformation and or distortion of facts by the applicant may be dispelled and indeed concessions by the Judges of the facts may be settled in this informal meeting thus obviating the embarrassment that is associated with these applications when raised in open court. In our view, the fact that the grounds for recusation do not call into question the probity or impropriety on the part of a Judge whose recusal is sought makes no difference. The proper procedure in all cases should be followed”, (emphasis mine).

[11] This peremptory procedure was not followed in this matter to satisfy the purpose for which it is intended as mentioned in the foregoing paragraph. It is for this reason that this court found itself in an embarrassing situation of having to correct Counsel on what actually transpired during the argument of the matter. On what I am constrained to refer to as paying lip service to this peremptory procedure, Counsel for the applicants caused a meeting to be held in chambers on the 1st July 2013 where Mr. Flynn indicated that they had instructions from their client to ask for my recusal in the applicant's two matters, particularly the Inkhosatana Gelane matter, in which I had reserved Judgments following the completion of trial as characterized by the leading of evidence and the making of submissions on the 20th and 24th June respectively. The ground put forth in support of the recusal sought was that I had called the Ombudsman and the Managing Director of the Times of Swaziland on the 20th June 2013 and said they had an agenda against me following their having published an article in connection with a matter I had dealt with the previous day. He thereafter said I should me to heed their application and not to continue with the judgments I had reserved and avoid facing an application, which came out as blackmail and or an intimidation tactic, which I rejected.

[12] It was clarified there and then that I had never on the telephone conversation referred to or any other stage said that their client had an agenda against me as alleged. I clarified that the inaccuracy contained in the article in question was not the first such inaccuracy as it is true that numerous such inaccuracies

had been published and eventually corrected through their ombudsman procedure after I had complained except for one or so. I referred to this explaining my surprise at not getting the co-operation I used to receive during the lodging of such complains in the past yet the matter I was complaining about was very serious in my view. I also explained that my being upset was caused by the negativity and lack of co-operation I received from their client's ombudsman on that day hence my having had to call the Managing Director to report my frustration. It was after Mr. Flynn suggested that I simply recuse myself and avoid an application that I felt I was being intimidated and caused to drop the matters on conjured grounds. I clarified no sound grounds had been put forward to justify the recusal sought.

[13] No mention was made of the serious allegations being made against me in the applicants affidavits which include the rude, insulting, commandeering and boastful language I allegedly used as expressed in paragraphs 8, 12, 15, 16 and 17 of the founding affidavit deposed to by Mrs Siphwo Mabila which they now seek to rely on in pursuing their application.

[14] Their proceeding with the matter in the manner they did deprived the court the opportunity to state its side in Chambers so as to clear the 'misconceptions and or misinformation and or distortion of facts, particularly the later by the applicant' as was observed by the court in the **Stanley Sapire** matter referred to above. I have no doubt had the proper procedure been followed these unfortunate and baseless serious accusations would not have found their way to the court papers as they would have been cleared earlier

[15] I therefore cannot agree with the submissions by Mr. Kennedy that the procedure to be followed in recusal matters does not require the disclosure of all the facts and grounds to be relied upon. This contention or submission goes against established authority in this Jurisdiction, which a Full Bench of this court directed was the procedure of which practitioners were enjoined to follow.

[16] Since the court was not given an opportunity to react to the one sided and distorted allegations by the applicants with the result that their say so has since been elevated to factual accuracy when they are not, it is important that I state the following so as to set the record straight. It would be understood I am constrained to do so following the fact that I was not afforded an opportunity in chambers as such facts and allegations were never mentioned to call for my reaction threto.

[17] Having completed submissions in the Inkhosatana Gelane Simelane matter around 13.20 hours on the 20th June 2013 I got the opportunity to look at the newspapers of the day as I had not been able to do so earliar in view of the bulky documents I had to go through that morning in preparation for the submissions. The version of the Times of Swaziland contained an article with the bold title, '**SILOLO GETS TWO LIFE SENTENCES...plus 15 years for the spate of bombings**'. This sentence was attributed to me. As I had dealt with the matter the previous day it was clear that this was not the

sentence I had imposed. The one I had imposed had followed upon the accused persons own plea of guilty to 11 serious counts of bombings under The Suppression of Terrorism Act which provided for a maximum sentence of 25 years and consisted of 5years on 9 of the counts with two comprising 10 years each. The sentences had been made to run concurrently such that the accused was to serve 20 years. Concerned with this inaccuracy I called the ombudsman of the Times of Swaziland on the contact numbers set out in the news paper itself.

[18] At this stage I was not angry but firm and wanted to know from the ombudsman if she was aware of the inaccurate article contained in their newspaper that day about me having imposed two life sentences plus 15 years on the accused person. Mrs Mabila was a person known to me as an attorney and wife to Attorney Mabila as well as a person I had dealt with on numerous occasions when inaccurate articles had been published about me. Except for one or two all such inaccurate articles had been corrected. There was therefore no need for me to be angry at her particularly because I believed she is neither a reporter nor an editor just as there was no need for me to be insulting. I only became unhappy when she showed neither co-operation nor interest in correcting the inaccuracy. This prompted me to ask to talk to her Managing Director, Mr. Loffler who I eventually called.

[19] I expressed my disappointment at my not being assisted when I talked to their ombudsman of which Mr. Loffler expressed awareness as he said he had heard me talk to her some 2 minutes earlier. I explained to him the cause of my problem namely the inaccuracy in the article referred to above and that

this time around I was not getting the co-operation of getting it corrected as had happened with numerous articles in the past. He threatened to dismiss the reporter and to get the inaccuracy corrected after which I was to be called for approval. I expressed my displeasure as I did not understand how the inaccuracy arose as it was a bold distortion from the true position yet it had the effect of casting me in bad light. I referred to the previous matters in context of my failure to obtain the necessary- co-operation from Mrs. Mabila this time around. Her emphasis had not been an investigation that she was to carry out but a total negativity and lack of co- operation which triggered my complaint hence my disappointment at her as an Attorney who understood legal matters owing to her training. Other than explaining that this inaccuracy was not the only one in line with what is stated above I must indicate I never talked of an agenda they have and I do not know whether or not they do have same.

[20] It was around 15.20 hours that day when I got a call from Attorney Mr. Musa Sibandze who informed me he had been instructed by his client to find out how he can address my concern which he himself noted was casting me in bad light. He said as he had no deeper understanding of criminal law I should explain to him the nature of the problem. Having explained that I had not passed even a single life sentence yet I was being said to have passed two plus 15 years above, with the reality the sentence was to run over twenty years in all being ignored or obscurely expressed, he indicated that the heading complained of indeed made it look like I had passed a severe sentence and undertook to prepare a draft apology which he was to run by me before causing it to be published. We otherwise had a very light and co-

operative discussion with Mr. Sibandze, without a mention of discomfort on the part of his clients being made.

[21] Sometime after 1600 hours on that day I received a telephone call from Mrs Mabila who was now very co-operative and informed me that they had prepared a clarification report which she required me to approve before it could be published. I clarified that I was expecting it from our discussion with Mr. Sibandze earlier. This discussion was very friendly and light. After we agreed on what the clarification was to read, we engaged in further light discussion. It was then that I asked why there seemed to be an insistence on the life sentence and section 15(2) of the constitution. She said she was doing it for purposes of the Media Complain Commission, which Commission she said helps in media complaints and suggested I could utilize it too. In lightness of the discussion and the informality that went with it, I stated that I could not use it as Mr. Masuku, was its chairman and I did not have a good relationship with him and therefore I could not get Justice from it. Further to this lightness of the situation, and talking to a person I knew, and could talk to, I explained what to me had remained a small misunderstanding that morning. It was in that spirit that I explained to her that I was not being difficult, but was trying to have correct a distortion that sought to unfairly cast me in bad light. This was particularly because the lack of such clarification had the tendency of making it appear like what was not correct was being accepted. I never and would not have boasted of being a Royal Judge whose meaning I do not even understand.

[22] The lightness of our discussion was marked by her requesting to meet me privately together with the Managing Editor so that we could understand each other or words to that effect. I accepted her proposal in principle for a meeting on a date to be arranged, about which she was to call me on Monday the 24th June 2013. It shall be noted that she herself deposes to me having been much calmer after we had agreed on the publication to be made. Testimony to the unreasonableness of any fears a reasonable man would have had about their having an agenda against me.

[23] The verbatim version of the correction or clarification prepared by the applicants after the complaint was made is as follows:-

“CLARIFICATION

In yesterday’s publication (Pages 4 & 5) we published an article “Silolo gets two life sentences plus 15 years for the spate of bombings.” We wish to clarify that Judge Nkululeko Hlophe did not hand down a life sentence. He handed out varying sentences on the 11 counts pleaded guilty to by Mr Silolo, the aggregate of which is 65 years.

We wrongly interpreted the provisions of section 15(3) of the Constitution which stipulates that a life sentence shall not be less than 25 years and applied it yet we were not entitled to do so in the circumstances of this matter as no life sentence had in fact been imposed. Mr Silolo will serve an effective 20 years since some of the sentences were ordered to run concurrently.

We wish to apologise to the Honourable Judge for any misconception that may have been created by the aforementioned interpretation.”

[24] On Monday the 24th June 2013 there had been set to proceed before me on submissions the Boycey Magongo matter. Mrs Mabila was part of the applicant's team in court. No indication of any discomfort in my presiding over the matter was expressed in light of the applicant's alleged fears, said to have been harboured as of the 24th June 2013. Around 16.30hours that day I was called by Mrs Mabila again in a very friendly co-operative tone who asked to meet me together with their Managing Editor that day as previously proposed.

[25] I clarified that whilst I would welcome a meeting with them it was impossible to do it that day or anytime before I had handed down the outstanding judgments because we could be easily misinterpreted. I suggested they give me two weeks to finalise my Judgments after which we could meet comfortably.

[26] It therefore came as a surprise when I learnt late on the 25TH June 2013, as I was from court through the assistant registrar I work with that the applicants's Attorneys had requested a meeting with me in Chambers for the 26th of June 2013. On this date I received another message they were now asking for the proposed meeting to be held sometime on Thursday the 27th June at a time I was to suggest. I confirmed 1400hours of their suggested day through the clerk I work with even though it ended up not materializing resulting in the proposed meeting being held on the 1st July 2013. It was in this meeting that I was requested by Mr. Flyn to recuse myself for the reasons

set out in paragraphs 12 and 13 above. Like I pointed out, the only issue relied upon for the said recusal in chambers was an alleged agenda I allegedly said they had against me, without all these other allegations now being raised on the founding affidavit now being mentioned which was clearly an afterthought to try and boost their case.

[27] Something that merits mention from the above chronology is that whilst both Mr. Lofler and Mrs. Mabila claimed to have formed the impression that I was not going to approach the pending judgments in the matters referred to above at the time I talked to them over the phone, their conduct between that time and the date they asked for a meeting in chambers to informally move the recusal application, does not bare this out.

[28] According to Wade and Forsyth, Administrative law, 7th edition at page 481 and as cited in **Amos Mbulaheni Mbedze vs the King crim. Case No. 236/2009:-**

“The right to object to a disqualified adjudicator may be waived and this may be so even where the disqualification is statutory. The court normally insists that the objection shall be taken as soon as the party prejudised knows the facts which entitle him to object. If after he or his advisors know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged.”

[29] The court went on to cite the Judgment of the Supreme Court of Lesotho in **Sole vs Cullinan and others (2004) 1LRC 559-560** whereat the English case of **Locabail (UK)ltd vs Bayfield properties ltd (2000) 3 LRC 482 at 508** was cited with the following extract being made:-

“It is not open to a litigant to wait and see how her claimes...turned out before pursuing her claim of bias... she wanted to have the best of both Worlds. The law will not allow her to do so.”

[30] The said court concluded as follows at page 559 of the Judgment:-

“Objection is generally deemed to have been waived if the party or his legal Representative knew of the disqualification and acquiesced to the proceedings by failing to take objection at the earliest possible opportunity.”

[31] The point being made through these references is that the applicants failed to move the recusal application timeously and on the first available opportunity, notwithstanding their being aware of what they claim entitled them to the application as having risen from the telephonic discussion of the 20th June 2013. Through their allowing their matter to be proceeded with before me on the 24th June 2013 without raising an objection after they had become aware

of my alleged disqualification on the 20th June 2013 they are deemed to have waived their right to challenge my having to prepare a judgment in the matters. On this ground alone it seems to me that their application cannot succeed.

[32] Otherwise it is settled law that the test applicable in matters of this nature is based on an objective standard, as was stated in the SARFU (Supra) Case as well as in the Stanley Sapire Case (Supra). The position was put in the following words in the SARFU (Supra) Case at page 177 of the law Report:-

“It follows from the foregoing that the correct approach to this application for the recusal of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable objective and informed person would, on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehensions must be assessed in the light of the oath of office taken by the Judge to administer Justice without fear or favor; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should

not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

[33] It has also been said that the above stated test has two inbuilt considerations. These are the considerations that a court faced with a recusal application starts from a presumption that Judicial Officers are impartial in adjudicating disputes, while the other inbuilt consideration is to the effect that absolute neutrality is a chimera and therefore emphasis should be placed on impartiality.

[34] The first inbuilt consideration, viz the presumption that Judges are impartial in adjudicating disputes has attached to it two further considerations namely that the presumed impartiality of the court is not easily dislodged and that for it to be so dislodged cogent or convincing evidence should be provided.

[35] Otherwise the second inbuilt consideration in the recusal test calls for distinguishing between absolute neutrality and impartiality which are clearly not the same thing. Impartiality, which is a requirement of this inbuilt consideration, has been defined as ‘an open-minded readiness to be persuaded without unfitting adherence to either party or to the Judge’s own predelictions, preconceptions and personal views’. See in this regard page 9 of the Stanley Sapire matter (SUPRA).

[36] The *foregoing* summary of the applicable test and the inbuilt considerations in it cannot be best expressed without a mention of what was stated in the following words by Cameron A. J. in the **SouthAfrican Commercial Cattering and Allied Workers Union vs I &J LTD 2000 (3) SA 705 para. 12 :-**

“In formulating the test in the terms quoted above, the court observed that two considerations are built into the test itself. The first is that in considering the application for recusal the court as a starting point presumes that Judicial officers are impartial in adjudicating disputes. As later emerges from the SARFU judgment, this in built aspect entails two further consequences. On the one hand the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted.

The second inbuilt aspect of the test is that absolute neutrality is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences and the perspective that’s derived inevitably and distinctively informs each judge’s performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality – a distinction the SARFU decision itself vividly illustrates. Impartiality is that quality of open minded readiness to persuasion without unfitting adherence to either party or to the judge’s own predilections, preconceptions and personal views- that is a key stone of a civilized system of adjudication. Impartiality

requires, in short, a mind open to persuasion by the evidence and submission of counsel, and in contrast to neutrality, this is an absolute requirement in every judicial proceedings.”

[37] Our courts have also enunciated what has come to be known as the double reasonableness test. This test decrees that not only must the person apprehending bias be a reasonable person, but the apprehension of bias itself must be in the circumstances also be reasonable.

[38] This was expressed as follows in the SACCAWU (supra) case:-

“Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable ... The two fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance.”

[39] It has also been observed that despite the different words used to describe the test that is in itself proof that the threshold for a finding of a real or perceived bias is high and is one to be reached after careful consideration as it calls into question an element of judicial integrity.

[40] The effect of the double requirement of reasonableness was clarified by Cameron AJ in the SACCAWU matter in the following words:-

“The double reasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be

biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinize the application to determine whether it is to be regarded as reasonable.”

[41] Coming back to the matter at hand the question to determine is whether the complaint by the applicant meets the required standard or put differently, is the apprehension by the applicant reasonable in the circumstances.

[42] Other than the fact that applicant is not entitled to rely on the other allegations referred to above as they were never raised in chambers for the judge to consider his position vis-a-vis their correctness or accuracy, it is also a fact, that such allegations as seeking to show that I was insulting, rude and commandeering are not grounds for recusal on their own and are therefore irrelevant for considering the question of recusal. Since they are irrelevant they cannot be reasonable and therefore do not meet the standard required by the test of reasonable apprehension so as to ground a recusal. The application cannot succeed on this ground alone.

[43] Insofar as the applicant seeks to suggest that I had said they had an agenda against me, there are problems in that it is not clear as the said allegations do not amount to correct facts as that contention is seriously disputed. I understood Mr Kennedy to be conceding this point as he later abandoned it on account of the dispute only to contend that the facts do establish a bad relationship between the judge and newspaper concerned which he submitted

formed the basis of his application for recusal. This submission cannot stand of its own account as there are no clear facts pointing to the bad relationship he referred to existing over a period of time. What the facts established is that on several occasions in the past there has been published inaccurate and or negative articles about the judge which were however corrected utilizing the same ombudsman procedure. It is otherwise denied that there ever were uttered statements to the fact that the newspaper had always harboured ill-fillings against the judge since time of his appointment. This is one of the problems brought about by the failure to disclose all the facts and grounds relied upon as the applicants were enjoined to do in this jurisdiction. Because of this lack of correct facts in this regard the reasonable apprehension requirement has not been met.

[44] This conclusion to which I have come is supported by the fact that the two trials involving the applicants in which judgments are awaited, have gone on for a considerable period running to a year now, particularly the Inkhosatana Gelane Simelane matter. It is not in dispute as conceded to by Mr Kennedy during his submissions, that the entire trials in the said matters were dealt with impartially and fairly. This then suggest that the recusal is sought for other reasons other than that the court will not approach the judgments in the matters with a mind open to persuasion. That being the case authority is abound that the applicant would not be entitled to the relief seeks. I say this because the litigant is not entitled to have a judge recusing himself simply because he has an apprehension that a judge may not find in his favour when possibly another could. It has often been said that judges do not choose

which matters to deal with just as litigants cannot choose before which judge their matter ought to be heard.

[45] The reasonableness of applicant's apprehension is further called to question when considering that whilst they seek to rely on the judges alleged anger, such anger in their own version was limited to the period when a correction of the inaccuracy contained in the article was sought. Otherwise of their own they contend that after a correction to be published had been agreed upon the judge was much calmer which indicates on its own that the cause for complaint had been addressed.

[46] A further indicator of the unreasonableness of their apprehension comes to the fore when one considers their conduct after the 20th June 2013. Whilst they claim to have immediately formed the opinion that their matters may not be dealt with an open mind, which they said was during the telephonic conversation of the 20th June 2013, there is no sound and or acceptable explanation why the application was not immediately moved including why they had to proceed with the Boycey Magongo matter on the 24th June without raising their concern. This should be seen in its proper context when they had asked for a private meeting with the judge only to raise the issue of recusal after the judge had refused to meet them before having handed down judgments in the two matters. It is clear therefore that their conduct was not consistent with that of a litigant who had genuinely harboured a reasonable apprehension of bias.

[47] It should be noted that the applicants' current case is based on a one sided version whose allegations were never revealed to the court as was required in the peremptory procedure of this court when moving such applications. This could only stand if such allegations were being admitted. Insofar as they are not being admitted then clearly there are not correct facts forming the basis of this application and therefore no reasonable apprehension of bias can be found in such a case.

[48] Being the judicial officer concerned, I can only say that the fact that I complained on a specific incident, to which wrong-doing was admitted resulting in an apology, coupled with the fact that there was nothing new in asking for a clarification from the newspaper which had always corrected the articles complained of, I have no reason not to approach the judgments I am duty bound to prepare and hand down, with an open and impartial mind persuaded only by law, evidence and the submissions made by counsel.

[49] Furthermore it is indeed a weighty consideration that the matters are at a stage where I am only required to prepare and pass judgment which can either be correct or wrong in law and which any of the parties has a right to take up on appeal. This becomes even more apparent when considering the length of time the matters have taken together with the costs considerations.

[50] On the basis of the foregoing considerations this court has come to the conclusion that the double reasonableness test has not been met insofar as no

reasonable apprehension of bias, as opposed to perhaps an anxiety on the part of the applicants, has been established.

[51] Consequently I dismiss the applicants' application with costs.

Delivered in open court on this 19th day of July 2013.

N.J. HLOPHE
HIGH COURT JUDGE

For the Applicant:

Mr. P. Kennedy
Mr. Flynn

For the Respondent- in re
Inkhosatana Gelane Simelane matter-

Mr. Z.D. Jele

For the Respondent -in the
Boycey Magongo matter

Mr. M. Dlamini

