



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 48/2013

HELD AT MBABANE

In the matter between:

**AFRICAN ECHO [PTY] LTD
THULANI THWALA
MABANDLA BHEMBE**

**1st APPELLANT
2nd APPELLANT
3rd APPELLANT**

and

INKHOSATANA GELANE SIMELANE

RESPONDENT

and

**RAPHAEL MHLANGA
AFRICAN ECHO [PTY] LTD t/a
THE TIMES OF SWAZILAND**

**1st APPELLANT
2nd APPELLANT**

And

BOYCEY MAGONGO

RESPONDENT

Neutral Citation : African Echo [Pty] Ltd, ThulaniThwala, Mabandla
Bhembe v InkhosatanaGelaneSimelane (48/2013) [2013]
SZSC 71 (29 NOVEMBER 2013)

Coram : A.M. EBRAHIM J.A., S.A. MOORE J.A., P.LEVINSOHN
J.A.

Heard : 8 NOVEMBER 2013

Delivered : 29 NOVEMBER 2013

Summary : Misleading headlines and inaccurate story published in the Times Newspaper -Freedom of the press guaranteed by section 24 of the Constitution -That freedom is however not absolute and unrestrained. Its exercise must not be conducted in a manner which impinges upon the rights and reputations of individual persons or groups of persons, or upon the freedoms and reputations of corporate or public entities and institutions - Trial judge telephoning newspaper to complain about misleading and inaccurate story which was capable of misleading the public into thinking that the judge had imposed two life sentences upon the accused - the judge had properly sentenced the accused to an appropriate period of 20 years imprisonment for 8 contraventions of the Suppression of Terrorism Act and 3 infringements of the Public Order Act - The judge had completed the hearing of 2 defamation actions in which the applicants for his recusal were the defendants - Application for judge's recusal on the ground of bias - Newspaper published 'clarification' of misleading and inaccurate story - 'Clarification' not given the same prominence as misleading headlines and inaccurate story - Swaziland Journalists' Code of Ethics - Provisions of the Code infringed by the newspaper in several respects- Applications for recusal of a judge - Applicable tests- No grounds for judge's recusal disclosed in the affidavit evidence supporting application for recusal - Judge fully justified in refusing application for his recusal - Appeal dismissed with costs.

JUDGMENT

MOORE JA

OPENING

- [1] The Times of Swaziland is described in the World Newspapers and Magazines Website as an Independent Daily. This Newspaper circulates around the globe in cyberspace on a 24x7x 365/366 day basis. It also covers the land frontiers of this Kingdom and even extends at the surface beyond its national borders. Swaziland has been described as a Constitutional Monarchy governed by a Constitution which is the supreme law. Chapter III of the Constitution is entitled: PROTECTION AND PROMOTION OF FUNDAMENTAL RIGHTS AND FREEDOMS.

FREEDOM OF THE PRESS

- [2] Freedom of the press is guaranteed under Section 24 of the Constitution. Subsection (1) declares plainly and simply but powerfully that:

“(1) A person has a right to freedom of expression and opinion.”

Subsection (2) gives examples of the freedoms covered under subsection (1). It may be argued however, that in a democratic Kingdom such as Swaziland there may even be other freedoms enjoyable by persons besides those expressly set out. Subsection (2) reads:

“(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say-

(a) freedom to hold opinions without interference;

(b) freedom to receive ideas and information without interference;

(c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and

(d) freedom from interference with the correspondence of that person.

It is a fundamental characteristic of all freedoms, however, that they are enjoyable subject to corresponding responsibilities, duties and obligations.

- [3] Some writers on Constitutional law have suggested that captions above the provisions relating to fundamental rights and freedoms should include the word ‘obligations’ and should therefore read ‘Protection of Fundamental

Rights, Freedoms and Obligations’ so as to focus the minds of readers of constitutions that, whereas constitutions protect freedoms, they also impose obligations designed to protect the rights and freedoms of other persons, and also to secure the public interest. A proper balance must therefore be struck between Constitutional rights and freedoms while also giving full consideration to Constitutional duties and obligations.

- [4] The fundamental rights and freedoms expressed in subsections (1) and (2) must be read and interpreted against the background of the qualifications contained in subsection (3) which is of such critical importance that I set it out in full. It reads:

“(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of –

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

- (ii) *preventing the disclosure of information received in confidence;*
- (iii) *maintaining the authority and independence of the courts; or*
- (iv) *regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or*

(c) that imposes reasonable restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.”

[5] In the context of this case, subsection (3) (b) (i) is perhaps of the greatest relevance. It enables the passage of laws that give protective cover to the individual person in the areas of his or her or its greatest vulnerabilities and which are not only most precious to the individual but which also give insulation from the irreparable harm which a person could suffer if those rights are infringed.

MISLEADING HEADLINES

- [6] Misleading Headlines lie at the very heart of this appeal. They provide the *fons et origo* of Hlophe J's concern that the public should not be misinformed, or have its sense of justice affronted by what, as the Times portrayed it, were manifestly excessive and startlingly severe sentences. Under the caption: **Headlines, picturecaptions and posters**, the authors of Kelsey Stuart's Newspaperman's **GUIDE TO THE LAW** set out the proper role and function of headlines as reproduced hereunder:

*'Headlines and picture captions must give a reasonable reflection of the contents of the news reports or articles over which they appear or the pictures to which they refer (4.1 of the Code) and posters must fulfil two requirements. Firstly, they must not exaggerate and, secondly, they must reflect fairly the news reports or articles to which they refer (4.2 of the Code). Here again, it is submitted that the tests are objective and not subjective. Research in the United Kingdom has shown that only one reader in every four spends more than an hour on the reading of his daily paper. The chairman of the Press Council expressed the view that the South African reader is probably no different and he deduced that **headlines play a great part in imparting news to the public. He expressed the view that sensationalism is akin to bias. Headlines must be accurate and must correctly reflect the contents of the reports to which they refer.'***

Emphasis added.

[7] Counsel for the Appellants submitted that “The Times article - of which more later - did not express or convey any criticism of the presiding judge’s sentences or actions.” Though the story did not say in so many words that it criticised or censured or condemned the judge, the subtle and subliminal thrust of the presentation was that:

- (i) The judge had imposed startlingly inappropriate and excessively severe penalties of two life sentences plus 15 years for the spate of bombings.
- (ii) That statement was made in attention grabbing headlines designed to convey to the reader the message that the sentences imposed by the trial judge were outrageously heavy handed and oppressive.

[8] Many readers of newspapers simply glance at the bold headings only and then move on. The impression implanted in the mind of the reader by such blaring headlines is likely to be both deep and lasting. Most readers do not read the whole story. But even in the case of those who read the main story and the four subsidiary pieces in the Times of Thursday, June 20, 2013, the likelihood of the first impression imprinted in their minds by the main story being completely dislodged by the rest of the material is extremely remote.

What is more, in modern societies where the habits of reading are sadly on the wane, it is a near certainty that few readers will have scanned all five stories and most likely that few if any, would have looked down to the very bottom of the box, microscope in hand, to pore over the minute details of each sentence on the 11 counts set out under the caption “The Sentences.”

- [9] In its edition of Thursday, June 20, 2013, The Times carried the arresting headline in the top half of approximately two thirds of the front page. That headline read as follows:

“SWAYOCO’S SILOLO”	– coloured white
GETS	– coloured white
65 YEARS	– coloured red
IN JAIL”	– coloured white

In a box measuring 20cm x 13cm approximately, there was a photograph said to be that of Thandaza Silolo measuring approximately 10cm x 8cm. More importantly, that box directed readers’ attention to the inside pages by inviting them to “see pages 4&5.” The layout and colouring of the front page display were quite deliberate. It was clearly intended to convey to readers, or even to persons who may have had only a glance at the paper, that Thandaza Silolo had been condemned to a net term of 65 years imprisonment. The true

position - which The Times would have known when it published that headline - is that Thandaza Silolo had been ordered to serve only 20 years imprisonment.

- [10] Pages 4 and 5 are adjoining pages which lie beside each other when the newspaper is spread open. In those pages, the fate of Thandaza Silolo degenerates from 65 years in jail as the front page incorrectly proclaimed, to **“Silogets two life sentences”** as broadcast by the story on pages 4 and 5. The life sentences story is prominently placed in the center of these two pages as they lie side by side creating what was in essence a double page so to speak.
- [11] Clearly with a view to enhancing its effect upon the reader, the story is bordered by four heavy lines so that the material is displayed within a large rectangular box measuring approximately 33cm x 26cm. Unrelated stories are set out on either side of the central box in spaces measuring 11cm on each side. Unrelated stories are also to be found below the central box in approximately 9cm of space.

[12] The material within the central box is segmented into five subdivisions. What counsel for the appellant has aptly described as ‘the main article’ is the one situated directly under the banner headline referred to in paragraph [10] above. Beneath the banner headline is a subsidiary heading which aggravates the impact it was likely to make upon the public. It reads:

“...plus 15 years for the spate of bombings.”

The four subsidiary articles - in reproducing their headlines here, an attempt is made to illustrate their differing sizes and prominences - are captioned:

- **“Silolo weeps**
- LETTER OF APPOLOGY TO THEIR MAGESTIES
- **Pudemo members allegedly training in Mpumalanga**
- **“THE SENTENCES”**

[13] The headline reproduced in paragraph [10] supra which sat atop all five stories was, in relative terms, printed in letters of Brobdingnagian proportions, whereas the other four headlines were noticeably smaller. The material under the headline **“THE SENTENCES”** where the penalties imposed for each of the eleven counts upon which Mr. Silolo was duly convicted was printed

in a relatively eye-straining microscopic type of Lilliputian size. It simply records the penalty for each of the 11 counts. The table in paragraph [23] below reveals that, viewed against the maximum penalties applicable upon each count, the sentences imposed by the trial judge were eminently appropriate, and well within his proper sentencing discretion. They were by no means harsh, or draconian, or startlingly excessive, as the bold headline on page 1, together with its counterpart on pages 4 & 5, sensationally proclaimed.

- [14] The dramatic effect of the printed material was highlighted by two graphic photographs. In the first, a sad and subdued looking accused was seated beside a stern and burly corrections officer. It was underlined with the words: **“Thandaza Silolo (L) before he was slapped with two life sentences at the High Court yesterday.”** The second picture was one of the imposing façade of a structure which was described below it as **“The High Court of Swaziland building.”** From the way that the story is displayed on pages 1, 4 & 5, it is clear beyond contradiction that the editors and or those responsible for those studied layouts, resorted to a number of crafty and Freudian devices which are characteristic of tabloid publications, and which

are callously calculated to sacrifice accuracy upon the alter of sensational attractiveness to potential purchasers of those papers.

[15] Clearly, the overwhelming import of the banner headlines was that The Honourable Mr. Justice Hlophe had sentenced Mr. Silolo to two life sentences plus 15 years imprisonment. The question which immediately arises for consideration in the context of this aspect of the case is whether the subsidiary stories beneath the screaming headlines, portray a full and accurate picture of the 20 year sentence which the judge actually did impose, and if they did, whether the material beneath the headlines was capable of undoing the mischief which both the representatives of The Times and their legal advisers readily accept was wrought by the headlines on the front page and on pages 4 & 5.

[16] But these damaging headlines were not the only materials beclouding the truth. It is common knowledge that blazing headlines are regularly reproduced upon sizable posters and bill boards which are prominently displayed at strategic locations throughout the country. Those hoardings also help to propagate stories of doubtful accuracy.

SWAZILAND JOURNALISTS' CODE OF ETHICS

[17] Before subjecting the articles under consideration to further analysis, it may be germane to refer to the Swaziland Journalists' Code of Ethics for two reasons. First because the November 17, 2013 issue of the Times of Swaziland SUNDAY, a sister paper of The Times, invited the public's attention to what it described as the media Code of Ethics under the caption: **HELP US TO BE MORE ACCURATE**, and secondly because the code to which the article leads a reader contains several precepts which were gravely violated in the publication of June 20, 2013. The little box containing the material under that headline measures roughly 6cm x 6cm in ordinary type tucked away at the bottom left side of page 2. The lack of prominence given to this piece clearly indicates that the paper was simply going through the motions of inviting public assistance in its search for accuracy.

[18] The entire Code of Ethics can be downloaded from <http://miaswaziland.com/snaj-code-of-ethics-2/>. Several of its provisions are of relevance to this matter. **Article 1: People's Right to Information:** contains two important sub-articles:

1. *'The duty of every journalist is to write and report, adhere to and faithfully defend the truth.'*

2. *A journalist should make adequate enquiries, do cross-checking of facts in order to provide the public with unbiased, accurate, balanced and comprehensive information.'*

Article 5:1 prescribes that:

'Journalists should respect the right of the individual, privacy and human dignity.'

The expression 'individual' in this context includes Justice Hlophe both in his personal and official capacities.

[19] The all-important **Article 9** deals with the matter of **Corrections**. It deserves to be set out in bold letters lest it be overlooked by readers of this judgment as it is evidently overlooked or observed in the breach by journalists. This is what it says simply but powerfully:

'Whenever there is an inaccurate or misleading report, it should be corrected promptly and given due prominence. An apology should be published whenever appropriate.'

As excerpts from the newspapers referred to infra have amply demonstrated, if and when a true apology - as distinct from tongue in cheek regrets - is in

fact published, every device is employed to ensure that it is denied the prominence which the code demands, and is published in as inconspicuous a manner as possible in clear violation of both the letter and spirit of the code.

[20] Under the caption **Rejoinders** in **Article 10:** sub-article 2 reminds journalists and informs the public that;

‘Any report or write-up affecting the reputation of an individual or an organization without a chance to reply is unfair and must be avoided by journalists. ‘Emphasis added’.

Because of the many constraints inhibiting him or her from entering into public debate on controversial subjects, a judicial officer is effectively muzzled from replying publicly to write-ups adversely affecting his or her personal or professional reputation. That is why fair minded journalists, true to the ethics and values of their profession, are scrupulously careful in write-ups about defenseless judicial officers. Contempt of court is a blunt instrument which judicial officers are loath to deploy, even where it could be properly unsheathed in a case warranting its use.

[21] **Article 12** stresses the necessity of separating Comments from Facts in these words:

‘While free to take positions on any issue, journalists shall draw a clear line between comment, conjecture and fact.’

Article 18- News Headlines and Sensationalism - is perhaps of the greatest applicability to the circumstances of this case. It declares in plain, simple and readily understandable language which requires no recourse to any tome on the subject of linguistic interpretation that:

‘Newspaper headlines must be fully warranted by contents of the articles they announce.’

Any breach of its precepts must therefore be deliberate and contrived.

THEIMPUGNED ARTICLES

[22] The opening paragraph of the main article under the by-line Mbongiseni Ndzimandze repeats and underscores in bold print the patent falsity of the misleading banner headline. Dipping into the vocabulary of spicy language which is the common fare of journalists of the popular press the world over, the main article misinforms the public in heavy type and bold print that:

‘Political activist Thandaza Silolo has been slapped with two life sentences and 15 years for the spate of bombings he committed in different parts of the country.’

[23] The article then continues in ordinary un-accentuated type to repeat the falsehood emblazoned on page 1 as described in paragraph [22] above that Mr. Silolo had got 65 years imprisonment. If the paper had been concerned with accuracy rather than with reckless and misleading sensationalism, it would have reported in print of equal exaggeration, that the accused had been sentenced on 11 counts to terms of imprisonment amounting in aggregate to 65 years: but that that aggregate had been reduced to a net term of 20 years because the judge had ordered that several of his sentences or parts thereof should run concurrently. The newspaper would, for good measure have pointed out with matching stridency, that only two of those 11 sentences were of 10 years each whereas the other 9 sentences were of 5 years each. It would also have highlighted the fact that the highest individual sentence was thus one of only 10 years imprisonment as the table hereunder illustrates.

THE CHARGES AND MAXIMUM PENALTIES			
COUNT	OFFENCE	MAXIMUM PENALTY	IMPOSED SENTENCE
1	Committing a terrorist act	25 years imprisonment or life sentences	5 years imprisonment
2	Committing a terrorist act	25 years imprisonment or life sentences	5 years imprisonment
3	Committing a terrorist act	25 years imprisonment or life sentences	5 years imprisonment
4	Committing a terrorist act	25 years imprisonment or life sentences	10 years imprisonment
5	Committing a terrorist act	25 years imprisonment or life sentences	5 years imprisonment
6	Committing a terrorist act	25 years imprisonment or life sentences	5 years imprisonment
7	Committing a terrorist act	25 years imprisonment or life sentences	5 years imprisonment
8	Sabotage	Imprisonment for life	10 years imprisonment
9	Sabotage	5 years imprisonment	5 years imprisonment
10	Committing a terrorist act	25 years imprisonment	5 years imprisonment
11	Sabotage	5 years imprisonment	5 years imprisonment

[24] It is true, as Advocate Kennedy was at pains to point out in his heads of argument, that:

‘there was another article, on the same page, setting out full and accurate details of sentences...the article complained of was not conveying any criticism of the presiding judge’

But, as has been amply demonstrated in the foregoing paragraphs, the attention of a good number of readers would have been riveted solely upon the headlines. Even in the minds of those relatively few who went on to read all five stories in full, some of the damage caused by the misleading headlines might have been only partially erased. Some of that damage, alas, would not have been completely exfoliated by the minimized presentation of the less inaccurate or incomplete elements of the stories. As a matter of fact, Silolo was not ‘facing 11 counts of contravening the Suppression of Terrorism Act’ as the paper erroneously reported. Three of his convictions were for contravening the less serious Public Order Act.

[25] The report that Silolo had been sentenced to two life sentences plus 15 years was constructed by unleashing upon the public a deliberately misleading stratagem. Delving into CHAPTER III - perhaps the most sacred chapter of the Constitution - PROTECTION AND PROMOTION OF

FUNDAMENTAL RIGHTS AND FREEDOMS – the craftsmen of the deceptive headlines plucked section 15 (3) of the Constitution out of its proper context which is that of securing an enhanced level of protection of the right to life, circumscribing the imposition of the death penalty, and curbing the duration of a sentence of life imprisonment by prescribing a minimum period of 25 years.

[26] It is a notorious fact that life sentences are reserved for some of the most serious offences known to law. When the average person hears that a life sentence has been imposed, the offence which readily springs to his or her lay mind is that of murder. Out of the gross period of 65 years imposed for 8 offences of committing a terrorist act and 3 offences of sabotage, the ingenious journalists miraculously created two life sentences which the court did not impose. They produced this startling result by dividing 65 by 25 which gives a quotient of 2, and then heaping the remainder as an additional burden of 15 years upon the accused.

[27] A clearer and more deliberate artifice designed to mislead could hardly be imagined. By the worst kind of journalistic sleight of hand, the editors had succeeded in morphing in the minds of the public, Judge Hlophe's just

penalties, totaling 20 years imprisonment, to sentences which could possibly have been impossible for two murders at the highest levels of heinousness plus 15 years.

[28] In **Tfwala v R** [2012] SZSC 15 Swazilii at paragraph [8] Agim JA wrote:

‘In **Mosiiwa v S** [2006] BWCA 26 the Botswana Court of Appeal per Moore JA stated that:

“It is also in the public interest, particularly in the case of serious or prevalent offences, that the sentencer’s message should be crystal clear so that the full effect of deterrent sentences may be realized, and that the public may be satisfied that the court has taken adequate measures within the law to protect them from serious offenders. By the same token, a sentence should not be of such severity as to be out of all proportion to the offence, or to be manifestly excessive, or to break the offender, or to produce in the minds of the public the feeling that he has been unfairly and harshly treated.”
 ‘Emphasis added.’

The cumulative effect of the stories on pages 1, 4 & 5 of the impugned newspaper is that Justice Hlophe had imposed cruel, merciless and inhumane sentences such as those which were so roundly condemned in the

last sentence of the much cited dictum of Moore JA reproduced above. The Hon. Mr. Justice N.H. Hlophe had done no such thing.

[29] Kelly Stuart's Newspaperman's Guide to the Law 5th Edition discusses the essential pre-requisites of headlines and posters and the mischief which they should eschew. These precepts represent no more than commonsense and common fairness: bearing in mind that the object of a misleading story, falling short of defamation or not challenged in court as such, very often has no recourse but to suffer in silence while the authors of the inaccurate piece enjoy the financial benefits stemming from increased circulation generated by distorted attention grabbing headlines. A work such as Kelly Stuart's should be essential reading for all those whose task it is to design headlines for a popular daily. The highly instructive passage reads:

'Headlines and picture captions must give a reasonable reflection of the contents of the news reports or articles over which they appear or the pictures to which they refer (4.1 of the Code) and posters must fulfil two requirements. Firstly, they must not exaggerate and, secondly, they must reflect fairly the news reports or articles to which they refer (4.2 of the Code). Here again, it is submitted that the tests are objective and not subjective. Research in the United Kingdom has shown that only one reader in every four spends more than an hour on

*the reading of his daily paper. The chairman of the Press Council expressed the view that the South African reader is probably no different and he deduced that **headlines play a great part in imparting news to the public. He expressed the view that sensationalism is akin to bias. Headlines must be accurate and must correctly reflect the contents of the reports to which they refer.***’
 ‘Emphasis added.’

[30] The code to which reference is made in the piece above is the Code of Conduct of The South African Media Council. The authors posit that a newspaperman will:

‘in complying with the Code, find that he is to a fair extent complying with many of the important requirements of the common law, of good manners and also, indeed, of certain statutes.’

Those who violate these principles do a disservice both to the public at large, as well as to those persons whose personal reputations or business interests are adversely affected by misleading headlines.

[31] The question of misleading headlines is not confined only to the newspaper involved and the person or entity which complains about the headlines under review. The public at large also has an interest. That interest is to be

provided with accurate information, rational comment not disguised as news, and a presentation of news and public interest stories which manifests due regard for public cannons of good taste and decency, and which show a proper concern for the reputations of both public and private persons who are the subject of the stories which they print, and for the public institutions which are so vital to the good governance of this Kingdom. The function of the press is set out in this way at Page 1 of Kelsey Stuart's book:

*“The function of the press, as described in an article by Professor J C van der Walt which was approved by Rumpff CJ in **Pakendorf en Andere v De Flamingh** 1982 3 SA 146 (A) 158 and again by Coetzee J in **Zillie v Johnson and Another** 1984 2 SA 186 (W) 195 (translated from Afrikaans), is:*

...to serve the public interest. What does the public interest embrace? The public interest is served by making available information and criticism which is relevant to the community about all aspects of the public, political and socio-economic activities and contributing to the formation of public opinion. This function guarantees the freedom of the press and at the same time sets the limits.”

APOLOGIES

[32] Counsel for the appellant admitted in his heads of argument that the newspaper had published an apology. There was some complaint that the judge had insisted on vetting the text of the apology before it was published. It is hardly surprising that the judge did so. His wariness about the accuracy of the proffered apology is understandable having regard to the fact that the paper had had to tender several apologies in the past. He quite rightly thought it prudent to vet the draft apology lest he find himself having to correct the cobbled together correction(s) over and over again.

[33] The basic rule regarding apologies was stated by Kelsey Stuart at page 68 to be that:

*‘The sooner the apology is published, the more effect it will have as a mitigating factor. **Similarly the greater the degree of prominence given to the publication of the apology, the greater will be its mitigating effect.** To constitute a proper apology it is necessary that **all adverse imputations made be retracted and that an unqualified expression of regret be recorded for having made the imputations in the first place.**’*

‘Emphasis added.’

The Times under review did publish an apology concerning an unrelated story at the extreme left of page 2 - an inside page as distinct from the more

readily visible front or back page - beside its main story on the page 2 & 3 spread. That apology measured 9cm x 6cm. It is doubtful that that apology was as prominent as the erroneous story which it purported to correct.

[34] Another example of a recently published apology by The Times is germane to the question of apologies and their potential effectiveness. The Swazi News of Saturday, November 9, 2013 carried a banner headline on the front page which read:

“JUSTICE MINISTER

CHARGED WITH FRAUD

- **He faces E 222 000 charge with former Swazi Observer MD Alpheous Nxumalo**
- **Court papers have finally been signed”**

The reader’s attention was directed thus: “See Pages 2 & 3.” The front page spread measured 26.5cm x 10.5 cm. The two page story on adjoining pages 2 & 3 measured 34.5cm x27.5cm. It was capped by banner headlines which spread across both pages 2 and 3 and which read:

**“MINISTER OF JUSTICE FACES FRAUD
CHARGES”**

There was also the minister's photograph from the top of the head to a portion of the thigh measuring 14 cm x 8.5 cm. The words "Minister of Justice and Constitutional Affairs Sibusiso Shongwe" were super imposed upon the photograph.

[35] The Times of Tuesday November 12, 2013 carried an item on page 2 captioned CLARRIFICATION. Below that headline in bold print the following material appeared in smaller un-accentuated print:

'In our Swazi News Edition (November 9) we ran a headline "Justice Minister Charged with Fraud." We wish to retract this headline in its entirety and state that Civil proceedings have been instituted against the Law firm, Sibusiso B. Shongwe and Associates, to which the Honourable Minister is a senior partner, by the Swazi Observer who alleges to have been defrauded of E222 630. We wish to clarify that the Honourable Minister has not been charged with fraud. We regret the error and would like to apologise to the Honourable Minister for any embarrassment that this might have caused.'

Published inconspicuously in an inside page, well away from the centre and in the outside left column, the above material, including the caption,

measures 6cm x 6cm. It takes but a moment's reflection to conclude that that 'clarification' or apology is almost worthless if its ostensible purpose was to undo the massive damage caused by the material published with such a grand splash in the Swazi News of November, 9, 2013.

[36] The apology published in respect of the stories contained in the publication of Thursday, June 20, 2013 and which led to Judge Hlophe's complaint, is to be found in the issue of the Times of Swaziland dated Friday, June 21, 2013. That apology is also secreted at the top left hand corner of page 2 - away from the centre - and measures approximately 15cm x 6 cm on the photocopy which has been made available to this Court. That 'clarification' speaks volumes about Judge Hlophe's magnanimity of spirit and generosity of heart that he persuaded himself to accept what others, more demanding, would regard as a woefully inadequate antidote to the extensive damage which had been done to truth itself, as well as to his own reputation as a judge who was capable of awarding just and appropriate sentences. Objective assessors would posit that the newspaper's 'clarification' of the misleading headlines concerning Judge Hlophe's sentences is entirely deserving of the strictures contained in the last sentence of paragraph [35] supra.

JUDICIAL OFFICERS AND THE MEDIA

[37] It is common cause that Hlophe J, evidently and justifiably irritated by the lurid and intentionally fallacious headlines described in foregoing paragraphs above, thought that it was no more than his public duty to attempt to have that deliberately distorted report corrected. Even the appellant and their lawyers do not ascribe any sinister motives to the judge's telephone call to the newspaper. On the contrary, the core of their complaint is not that the judge's call was unjustified, but rather that he was angry, or livid, or upset, or that he shouted repeatedly in an outburst.

[38] The judge has strenuously denied the allegations made against him both in relation to what was said in those telephone calls and concerning the manner in which he spoke to the paper's representatives at the other end of the line. It is impossible, in the absence of a recording of those telephone conversations, to determine their levels of civility and politeness. For even if the judge's voice reflected a note of understandable irritation at the admittedly misleading report, it is a leap too far to conclude that his

participation in those telephone conversations was so inappropriate as to warrant his recusal.

[39] What is more, it is admitted by both affiants in support of the Notices of Motion that “His Lordship, in a much calmer tone said that he does not mean to be difficult.” He had also acceded to a request “to meet Ms. Mabila together with the Managing Editor on Monday, the 24th June 2013 to get to the bottom of his concerns.” The judge’s legitimate concerns were the correction of the inaccuracies published by the newspaper. His willingness to meet with senior representatives of the newspaper reveals a complete lack of any hostile animus on his part towards the Times warranting his recusal or at all. His sole intent was to help the newspaper concerned to avoid repetitions of the potentially damaging errors about which he had rightly complained.

[40] The judge’s well-meaning communication with the newspaper is a laudable attempt to assist it in meeting its obligation to the public to publish only accurate material in a professional manner, consistent with the canons of good journalism and with those portions of the Swaziland Journalists’ Code

of Ethics reproduced in paragraphs [17-21] supra. The judge's noble initiative succeeded in achieving its objective in part. Unfortunate side effects however are the misunderstandings and misconceptions culminating in this litigation.

[41] With the full benefit of hindsight, it would undoubtedly have been much safer for the Registrar or some other court official - a public relations officer perhaps - to undertake the delicate task of persuading a prickly journalist that, in publishing the story under review, he had got it seriously wrong. An approach by an officer who is not a member of the judiciary would have insulated the judge from some of the allegations which, in this case he has successfully fended off, but which he would not have faced if a lay member of the High Court staff had undertaken that task. The lesson to be learned here is that it is undesirable for a sitting judge, however irritated he or she might be by an inaccurate article in the press, to seek in person, to have corrections made of errors which do not place him or her in a favourable light.

[42] This is perhaps a strategic point at which to discuss what happened in the judge's chambers when the legal representatives of the appellants approached him there to make the case for his recusal in an informal atmosphere. In the light of the allegations and denials concerning what actually took place, it seems clear, again with the benefit of hindsight, that it would have been desirable that an accurate recording or transcript of what transpired there should have been made. I do not for a moment seek to suggest that informal conversations between the judge and the representatives of both sides of a given controversy cannot still serve a useful purpose. However, it must be left to the judicial officer to determine when, in his or her good judgment, it would be prudent to conduct such conversations on the record so to speak.

[43] It is against the foregoing background then, that we must now turn to the questions of the plea that Hlophe J should recuse himself from delivering judgments in the two defamation cases brought against the appellants which had been fully heard by him without complaint, and to the appeal against that judge's undoubtedly correct decision that there was no warrant, in all of the circumstances, for his recusal. There was nothing remaining in those

cases but the delivery of judgments which were already in the course of preparation when the motions for the judge's recusal were launched.

THE RECUSAL APPLICATIONS

[44] In Notice of Motion case no. 2362/2009 dated 8th day of July 2013 under the hand of an indecipherable signature purportedly that of an attorney of the firm Musa Nsibandze Attorneys, the applicants African Echo [Pty] Ltd, Thulani Thwala and Mabandla Bhembe, hereinafter the 2362/2009 applicants, sought an order:

*“That His Lordship Justice N.J. Hlophe recuses himself from hearing this matter on the grounds set out in the **Founding Affidavit** and its supporting affidavit which is an annexure thereto”*

In Notice of Motion in case no. 1138/1999 Raphael Mhlanga 1st Applicant and African Echo [Pty] Ltd t/a The Times of Swaziland 2nd Applicant, hereinafter referred to as the case no. 1138/1999 applicants, sought an order:

*“That **His Lordship Justice NJ Hlophe** recuses himself from hearing this matter on the grounds set out in the **Founding Affidavit** and its **Supporting Affidavit** which is an annexure thereto.”*

THE EVIDENCE

[45] In case No. 2362/2009, the evidence upon which the application for the recusal of Judge Hlophe is based is to be found in the affidavit of Sipiwo Mabila and Paul Loffler. Neither of these two persons can be properly described as a disinterested or independent witness. Each of them is in essence a defender of the cause of a newspaper which had admittedly published a grotesque distortion of a lawful order properly made by the trial judge. It is to the credit of Advocate Paul Kennedy SC Appellants’ counsel who, acting in the finest traditions of the Bar, both in writing and openly and publicly before this Court, renounced any further reliance upon the allegation that the judge had used the word “agenda” or that he had uttered the expletive s..t. En passant, it may be relevant to note that the Concise Oxford Dictionary defines that alleged expletive as meaning nonsense or rubbish. Neither nonsense nor rubbish would be an entirely inept or inapt

description of the material published by the Times as described in several paragraphs above.

[46] Turning to the affidavits which in both applications were virtually the same: and which must now be stripped of any references to “agenda” or to s..t, - the affidavit of Siphwo Mabila discloses that:

- (i) She has had to investigate complaints by readers of the various newspapers published by the Corporate Appellants and to arrange apologies in the event of inaccuracies.
- (ii) The appellants’ newspapers have a track record for inaccuracies and apologies.
- (iii) The appellants had been involved as defendants in actions for defamation.
- (iv) The appellants sought recusal in these actions.
- (v) She could tell from the tone - in a telephone conversation with him - that the judge was extremely angry.

The concept of anger being purely a matter of perception, and there being no standard gradation of anger similar to the Richter scale, the allegation of anger is accordingly purely subjective, nebulous, and ephemeral. In any event, it has been denied.

- (vi) The judge asked “what do you people want from me?...what is this you have written about me in the newspaper?”

These questions, if they were indeed asked in that way, are readily understandable in the light of the lurid inaccuracies and misrepresentations set out in earlier paragraphs.

- (vii) She had ‘established’ that the judge was not referring to the lead story.

She claimed that he was referring only to the story in page 4 of the Times of Swaziland of the 20th June 2013. As demonstrated in foregoing paragraphs, the bold headline in the lead story on page 1, as well as those on pages 4 and 5, contained inaccurate and misleading distortions of the sentences which the judge had passed. It is inconceivable that he would refer only to page 4 and not to pages 1 and 5 as well.

- (viii) His Lordship was livid.

The questions allegedly asked by the judge and the statements attributed him do not indicate that he was ‘furiously angry’ as the Concise Oxford Dictionary defines the word ‘livid’.

- (ix) The judge asked for “The Managing Editor (Nathi Dlamini) and Mr Paul Loffler’s (The Publisher) mobile numbers.
- (x) The judge insisted that he approve the text of the apology, which the Times conceded that it should make, before that apology went to press.
- (xi) The judge’s ‘anger’ had subsided after the text of the apology had been settled. He then spoke ‘in a much calmer tone and said he does not mean to be difficult.’
- (xii) The judge had agreed to meet with the management of the Times to discuss the accuracy of that paper’s reporting.
- (xiii) The judge had ‘made a general comment with regard to the conduct of the media’ which ‘indicates the negative view’ which he had with regard to the publications of African Echo [Pty] Ltd. No particulars whatever of that general comment were provided.

- (xiv) The Applicant Siphwo Mabila promised that support for her complaint about general comments by the judge would be forthcoming in the affidavit of Mr Paul Loffler.

But Mr Loffler's affidavit was if anything, even more lacking in specificity than that of Ms. Mabila.

- (xv) This applicant swore that the perception of bias and partiality was created 'in any mind.'

The test for bias is, upon all of the authorities, objective rather than subjective.

[47] The supporting affidavit of Mr Paul Loffler was even more anaemic in terms of particulars of the mysterious 'general comment' allegedly made by the judge than that of Ms. Mabila. The relevant portions of his affidavit were that:

- He received a telephone call from the judge on the 20th June 2013.
- The judge complained about a story published in the Times of Swaziland on that particular day.
- He could tell from the tone of the judge's voice that he was upset.

- The judge complained that the reporter of the story had got it wrong as he did not hand down the life sentences.
- The judge said that the Times of Swaziland is always getting things wrong.
- The judge shouted repeatedly. He reiterated that he had never passed two life sentences and the journalist got it all wrong. ‘He also said we are trying to destroy him.’
- As a result of the judge’s outburst he could not see how the judge ‘can deal and be seen to deal objectively with our matters’.

THE PRESUMPTION OF JUDICIAL IMPARTIALITY

[48] This topic was discussed in a scholarly paper entitled **THE PROBLEMS OF PROVING ACTUAL OR APPARENT BIAS: AN ANALYSIS OF CONTEMPORARY DEVELOPMENTS IN SOUTH AFRICA** which was the result of collaboration between Professor Chuks Okpaluba, Adjunct Professor, Nelson Mandela School of Law, University of Fort Hare and Laurence Juma, Associate Professor, Faculty of Law, Rhodes University. My own relationship with Professor Okpaluba is an example of the interchanges and cross-fertilizations between scholars and judges of the Commonwealth Countries of Africa and of the Caribbean. Professor Okpaluba and I served together in the Nineteen Seventies as Examiners and as Members of the Law Faculty Board of the Faculty of Law of the

University of the West Indies at Cave Hill Barbados. It is therefore with much confidence that I have adopted extracts from the valuable learning on the subject in the Professors' paper.

[49] The authors were undoubtedly correct when, supported by binding authorities, they wrote that:

*'The courtsapproach an allegation of apprehension of bias against superior court judges with the presumption of impartiality. This is the first hurdle to surmount in an attempt to show that a judge had conducted the proceeding in a way that raises an apprehension of bias. The courts take the view that given the nature of the judicial office and the oath of office of superior court judges, there is no presumption that such a highly dignified public functionary would discharge his/her important judicial office with favour, prejudice or partiality. On the other hand, the rationale for the presumption is founded on: (a) public confidence in the common law system, which is rooted in the fundamental belief that those who engage in adjudication must always do so without bias or prejudice and must be perceived to do so; (b) impartiality is the fundamental qualification of a judge and the core attribute of the judiciary; it is the key to the common law judicial process and must be presumed on the part of a judge; See e.g. **R v S (RD)** 1997 3 SCR 484 para. 106; **Wewaykum** paras. 58 and 59. See also **Canadian Judicial Council Ethical***

Principles 30 (c) in view of the training and experience; the fact that they are persons of conscience and intellectual discipline; and capable of judging a particular controversy fairly on the basis of its own circumstances - **US v Morgan** 313 US 409 (1941) 421 - appellate courts inquiring about apprehension of bias grant considerable deference to judges by the presumption of impartiality on the part of judges; and (d) this presumption carries “considerable weight” - Per L’Heureux-Dube and McLachlin JJ, **R v S (RD)** 1997 3 SCR 484 para. 32 - since the law “will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.” See Blackstone Commentaries on the Laws of England III 361.

Restating this ancient rule in **R v S (RD)**, Cory J said:

“Courts have rightly recognised that there is a presumption that judges will carry out their oath of office.... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with ‘cogent evidence’ that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.”

The persistence of this presumption in Canadian law was recently reiterated by the Supreme Court in these words: “the presumption of impartiality carries considerable weight, and the law should not

carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. “The effect of this presumption is that “while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.”

*South African courts also apply the presumption that judicial officers are impartial in adjudicating disputes. Thus, in adopting the opinion expressed in **R v S (RD)** as “entirely consistent with the approach of South African courts to applications for the recusal of a judicial officer,” the Constitutional Court held in **SARFU 2** that a presumption in favour of judges’ impartiality must be taken into account in deciding whether or not a reasonable litigant would have entertained a reasonable apprehension that the judicial officer was or might be biased. The court emphasised the effect of the presumption to be that the person alleging must go further to prove. It must be recalled that the applicant in this case requested that about half of the Constitutional Court bench should be recused from sitting in appeal on his matter. It would appear, therefore, that the higher in the*

judicial hierarchy, the higher is the burden of proof of the apprehended bias against the judge, especially in a multi-judge panel.

In considering the numerous allegations based on the apprehension of bias in S v Basson 2, the Constitutional Court held that the presumption in favour of the trial judge must apply. This means, first, that the court considering a claim of bias must take into account the presumption of impartiality. Secondly, in order to establish bias, a complainant would have to show that the remarks made by the trial judge were of such a number and quality as to go beyond any suggestion of mere irritation by the judge caused by a long trial. It had to be shown that the trial judge's was a pattern of conduct sufficient to "dislodge the presumption of impartiality and replace it with reasonable apprehension of bias." In Bernert, the court stressed that both the person who apprehends bias and the apprehension itself must be reasonable. Thus, the two-fold emphasis serves 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 apprehension to determine if it is, in all the circumstances, a reasonable one. ‘Emphasis added’.

TESTS FOR ESTABLISHING JUDICIAL BIAS

[50] As the authorities cited in this judgment have shown, the search for a single universally accepted test for the establishment of judicial bias is still evolving over the years. In jurisdictions of the common law world, the following tests have been applied and have produced, in the main, results which have received broad acceptance. These tests are:

- Reasonable Apprehension of Bias
- Reasonable Perception of Bias
- Reasonable Suspicion of Bias
- Real likelihood of Bias
- Real Possibility of Bias
- Apparent Bias
- Non-Apparent Bias

The list is not exhaustive. It should be noticed however that there are certain elements which are common to all of the tests which have been deployed by judges in every jurisdiction where this question has been considered. The

most prominent of these elements have been Reasonableness and Objectivity. In applying all of these several tests, judges have sought to be fair to the judge whose recusal has been sought, to the party seeking recusal, to the Courts, to the system of justice, and to the general public. In addition, courts have enquired whether the party seeking recusal is a Reasonable person duly informed, and whether the courts entertained a significant doubt that justice could be done by the judge's recusal.

[51] Professors Okpaluba and Juma were fully aware of the history of the various tests which preceded their paper, and of the manner in which those tests had been applied. They also identified what they described as 'The Current Double Reasonableness Test' which commenced its journey in the Supreme Court of Canada, and then travelled through the High Court of Australia. The nomenclature of this test arises out of the fact that it translates into a two-stage requirement of reasonableness. The learned professors, developing their exposition of the relatively new test, wrote that:

*'There must be an apprehension of bias that must be reasonably entertained. That is the first stage. In the second stage, the apprehension must be one held by a reasonable person, **someone who need not have interest in the outcome of the matter in court other***

than the general interest shared by the public in the fair administration of justice. The fulfilment of this general interest is mainly a pre-occupation with a fair administration of justice; a concern that justice is not only done but is manifestly and undoubtedly seen to be done.'

*'In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray. It follows that an application for the disqualification of a judge will not succeed if the applicant fails to demonstrate that the adjudicator in the circumstances might have departed or was in danger of departing from the standard of even-handed justice, or that there appeared the possibility that the judge might incline to one side or the other in the dispute. This requirement for anyone occupying the judicial office applies equally in England, Lesotho—**Sole v Cullinan** 2003 8 BCLR 935 (Les CA); **Sekoati v President of the Court Martial** 2001 7 BCLR 750 (LAC), Swaziland – **Re Sapire; Law Society of Swaziland v Swaziland Government** Civil Case No. 743/2003 (17 April 2003); **Lawyers for Human Rights v Attorney General of Swaziland** 2001 (Unreported) Appeal Case No. 34/2001; **Dumisa Mbusi Dlamini v***

Swaziland Electricity Board Appeals Nos. 15 and 18 of 19 and the European Human Rights regime.'

*'Like the Australian High Court in **Livesey**, and the Canadian Supreme Court in **R v S (RD)**, the Constitutional Court of South Africa opted for the "reasonable apprehension" test because of: "the inappropriate connotations which might flow from the use of the word 'suspicion' in this context." As formulated, the test 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 submissions of counsel.'*

[52] In **Gaetsaloe v Debswana Diamon Co Pty Ltd** 2 2010 1 BLR 110 CA, a full bench of the Botswana Court of Appeal restated the law relating to recusal in a comprehensive manner, drawing upon authorities from local and sister common law jurisdictions. My opening sentences under the above topic read as follows at pages 117 H to 118 D:

"A judge faced with an application for his or her recusal must of course afford it H the same careful and studied consideration that he

*brings to bear in contentious matters between litigants. Since the application in a case of recusal is brought against the judge in person, he or she may very well incline to bend over backwards so as to ensure that whatever decision is arrived at does justice not only between the applicant and the judge but also to the court and to the public which it serves. But a judge who has been duly appointed to hold a judicial office must discharge the duties of that office without fear or favour and must not yield unquestioningly to suggestions of bias. A Mason J, sitting in the High Court of Australia in the case of **RE JRL; Ex parte CJL** (1986) 161 CLR 342 (HCA) at p 352, entered a note of caution." He warned that:*

‘Although it is important that justice must be seen to be done, it is equally important B that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.’

I also agree with a further observation made by Mason J in the same case that:

‘It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than he will decide the case adversely to one party.’ D”

[53] Having made a number of procedural twists and turns, this matter – **Donald Gaetsaloe v Debswana Diamond Company (Proprietary) Limited** Civil Appeal No. CACLB-027-08 eventually reached another Full Bench of the Botswana Court of Appeal. That court was called upon to determine whether the refusal of four of its members to recuse themselves was justified in all of the circumstances of the case. Writing for a unanimous Court of Appeal, Ramodibedi JA laid down the law relating to bias and recusal in these terms at paragraphs [23-24] of his authoritative judgment. It is to be noted that the current Chief Justice of Swaziland applied several tests including the ‘double requirement of reasonableness’ test in coming to the conclusion that there was no basis for the recusal of the judges concerned. Howie JA also applied the new double reasonableness test in *Gaetsaloe 4* to which reference is made infra. Accordingly, the Kingdom of Swaziland must now be taken to have effected a reception of this test into its law. Ramodibedi JA wrote:

“[23] As a matter of first principle it is of the utmost importance to recognise that our judicial system is based on independent and impartial tribunals. Essentially for that matter, the courts must not only be independent and impartial but they must also be seen to be independent and impartial in order to instil public confidence. It cannot be overemphasised that public confidence is in turn an

indispensable cog in any credible judicial system such as ours. The effectiveness of the system depends upon the presumption of impartiality. Indeed, judges are sworn to do justice without fear, favour or prejudice and in accordance with the law. They are sufficiently equipped to do so by virtue of their special training.

[24] *In our jurisdiction the test for recusal is an objective one, namely whether there is a reasonable suspicion of bias. See, for example Mafeelela v The State [1996] BLR 15 (CA) at page 20; Popo v The State [2007] 2 BLR 696 (CA) at pages 698-699. In South Africa the test as laid down in such cases as President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 [4] SA 147 (CC) and Bernert v ABSA Bank Ltd [CCT] 37/10 [2010] ZACC 28 (9 December 2010) is “whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.” There is no material difference in the phrases “reasonable suspicion of bias” and “reasonable apprehension of bias” and accordingly our law on the subject tallies with that of South Africa. Authorities from that jurisdiction are, therefore, highly persuasive here. I am mainly attracted by the following remarks of Ngcobo CJ in Bernert’s case at paragraph 34, 35 and 36 namely:-*

34. *The other aspect to emphasise is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself*

must be reasonable. As we pointed out in SACCAWU, ‘the two-fold emphasis...serve[s] to underscore the weight of the burden resting on a person alleging judicial bias or its appearance.’ 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 scrutinize the apprehension to determine whether it is, in all the circumstances, a reasonable one.

35. *The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. 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 case; 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.’*

36. *But equally true, it is plain from our Constitution that ‘an impartial Judge is a fundamental prerequisite for a fair trial.’ Therefore, a judicial officer should not hesitate to recuse himself or herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial. In a case of doubt, it will ordinarily be prudent for a judicial officer to recuse himself or herself in order to avoid the inconvenience that could result if, on appeal, the appeal court takes a different view on the issue of recusal. But, as the High Court of Australia warns:-*

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

[54] Echoing much the same sentiments, I observed in *Gaetsaloe* 2 2010 1 BLR

110 CA at 127 A – D, that:

“A party to litigation is entitled to the cold neutrality of an impartial judge, but it is improper for an application to recuse to be used for the purpose of judge selection or forum shopping. A judge has an obligation to recuse himself when it is clear that he should do so, for example where he has an interest in the outcome of the matter.

Equally, he has a duty to himself and to the court not to recuse himself where unsustainable applications for his recusal have been made. B A party should not be allowed to abuse the recusal process in efforts to ‘judge shop’, delay his case, vent his frustration at an unfavourable ruling, or otherwise attempt to gain some perceived strategic advantage.

*Recusal is appropriate only if an objective, disinterested observer, fully informed of the facts and the underlying grounds upon which recusal is sought, would C entertain significant doubt that justice would be done. In the American case of **Faith Temple Church v Town of Brighton** 348 F Supp 2d 18 (WDNY 2004) it was held that where standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited. Such a rule relieves a judge from having to decide to recuse himself in an unmeritorious case. It D protects him from going out of his way so as not to offend an unworthy applicant, and insulates the judicial process from the chaos which will ensue if every man were allowed to choose or discard a judge as and when he pleased.”*

[55] In **Gaetsaloe 3** 2010 1BLR 127 CA, Twum JA made his own unique contribution to the exposition of the law relating to judicial bias in this way at page 129 D – E:

“The subject of judicial bias has received serious attention in many jurisdictions. It is a matter of grave public interest and ought to be treated as such. In particular, it is important that judges should be alert to the possibility that a litigant could use the threat of an application for recusal to shop around and select his own judges he perceives will be favourably disposed to him. I have always worked on the principle that judges should be fair but not timorous.”

[56] Twum JA then proceeded to discuss some of the tests which have been employed in his native Ghana and in England in determining whether a court should come to a finding of judicial bias. His Lordship wrote:

*“Over the years a number of tests have been formulated for judicial bias, at least in the Commonwealth countries; I will mention some of these tests. In **Sallah v Attorney-General** (1970) 2 G & G 487 SC, the Attorney-General of Ghana brought an application in the Court of Appeal, sitting as the Supreme Court, for the recusal of two justices of the Court of Appeal from sitting on a constitutional case on the ground that those judges were alleged friends of the plaintiff. Amissah JA, who later had a distinguished career as President of this Court, said: B ‘We are of the view that real likelihood of bias is the*

*proper test to apply in these cases.’ He added that whether there is a real likelihood of bias depends on the circumstances in which the judge sits. He quoted with approval the statement by Devlin LJ in **R v Barnsley Licensing Justices Ex parte Barnsley and District Licensed Victuallers’ Association** [1960] 2 QB 167 when he said:*

‘But in my judgment, we do not have to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias - not merely satisfy ourselves that there was some sort of impression that might reasonably get abroad.’ C

The application for recusal was dismissed.

I have always understood the law to be that, in dealing with judicial bias, a good starting point is to differentiate two tests:

- (i) *Where it is alleged that the judge has some pecuniary or proprietary interest in the subject-matter of the dispute. This is sometimes D referred to as apparent bias. Here, no matter however trivial or tenuous the interest, the law assumes bias and the judge must recuse himself. This is what happened in **R v Bow Street Magistrate; Ex Parte Pinochet Ugarte (No 2)** [2000] 1 AC 119 (HL).*
- (ii) *The other is the non-apparent bias. Here there is no suggestion that the judge has any financial interest in the matter.*

*In cases of non-apparent bias a line must obviously be drawn between genuine and fanciful complaints. In **R v Camborne Justices, Ex parte Pearce** [1955] 1 QB 41, the English Court of Appeal protested against ‘the tendency to impeach judicial decisions upon the flimsiest pretext of bias’. It is important that such allegations, when made, must have substance in them. It will be wholly wrong for a party to be allowed to raise objections to a judge based on allegations of bias without any foundation. It should be a matter of concern that, in a case where the reputation of judges of the highest court of this country is bound to suffer in some measure (whatever lawyers might say about the harmless nature of objections on the ground of bias), the judges should recuse themselves on a mere allegation, however baseless it is.*

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*I am aware that there is another test for bias and that is the ‘reasonable suspicion’ test which seeks to answer the question ‘whether the fair-minded and informed observer having considered the facts, would conclude that there was a real possibility that the judge was biased’. In **Lawal v Northern Spirit Ltd** [2003] UKHL 35 Lord Bingham said that it is expected that the informed H observer would none the less adopt a ‘balanced approach’ and would be ‘neither complacent nor unduly sensitive and suspicious’. See also **Popo v The State** [2007] 2 B.L.R 696, CA.”*

[57] Applying the above principles, Twum JA was driven to the conclusion that, in the case before him, where the appellant had advanced flimsy grounds,

based upon linguistic minutiae and on the subjective but baseless and irrational belief that, because of alleged unfavourable attitudes in the court's judgment in earlier proceedings, he was unlikely to be afforded a fair hearing in the present appeal, he had not made out any case for recusal. This is how he assessed the spurious technicalities raised by the appellant at page 131A – C:

*“With all respect to the applicant, it is not altogether unreasonable to suggest B that the technical nature of the knowledge required to appreciate these subtle differences as presented in legal arguments to the court in the discovery appeal would be above the comprehension of the fair-minded and informed observer, presumably including the applicant. In such situations Lord Goff’s caveat becomes relevant. He said in **R v Gough** [1993] AC 646:*

‘...I think it unnecessary, in formulating the appropriate test, to require that the court C should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.’”

[58] In **Gaetsaloe 4** 2010 1 BLR 132 CA Howie JA described the ineffectiveness of an unavailing apprehension of bias when he said at page 133 E to page 134 C:

*“An unfounded or unreasonable apprehension concerning a judicial officer is F not a justifiable basis for a recusal application. The test for the bias which a recusal applicant must show is an objective one. Actual bias need not be shown, merely apprehended bias. After citing Canadian authority, the South African Constitutional Court, in **President of the Republic of South and Others v South African Rugby Football Union and Others 1999** (4) SA 147 (CC) at p 175C-E explained that the test contains a twofold objective element. The G person considering the alleged bias must be reasonable and the apprehension of bias must itself be reasonable in the circumstances of the case. The court referred to the dissenting judgment by De Grandpr J in the Canadian case **Committee for Justice and Liberty et al v National Energy Board** (1976) 68 DLR (3d) 716 at p 735, where it was put as follows: H*

‘...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ... [The] test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude”.’

In the South African case the application of the test led to the conclusion, in A respect of imputations specifically directed to a particular judge of the Constitutional Court, that the allegations and complaints against him ‘would not cause a reasonable and informed person reasonably to apprehend that [he] would be biased ...’ There is every reason, in my view, to say that the decision of that case is authoritative also as to the relevant legal principles applicable in this country.

*The formulation of that conclusion is significant. The apprehension had to be one which the reasonable person would entertain and the apprehension was that the judicial officer would be biased. I mention this because counsel relied on **S v Roberts** 1999 (4) SA 915 (SCA) at 924E, where the relevant apprehension was formulated as being that the judicial officer might be biased....I conclude that the reasonable person, duly informed, would have no grounds to apprehend that the members of this court who heard the discovery appeal would, or even might, be biased in their deciding the prescription appeal.”*

CONCLUSION

[59] This case has afforded a unique opportunity for the examination of the undoubted freedom of the press in a democratic society to publish information and to express ideas free from unlawful and improper restraints stemming from any quarter. That freedom is however not absolute and

unrestrained. Its exercise must not be conducted in a manner which impinges upon the rights and reputations of individual persons or groups of persons, or upon the freedoms and reputations of corporate or public entities and institutions.

[60] The duty of the media to act responsibly is accentuated by the fact that individual persons, including judicial officers, do not enjoy the opportunity, or the financial resources, to respond effectively to inaccuracies published in the media which, in the main, is owned by companies with relatively deep pockets. Some Corporations and Public Entities have been put to the trouble and expense of taking out Full Page Advertisements, or of issuing Public Statements, in an effort to neutralise the harmful effects of misleading headlines and inaccurate stories. Hopefully, this judgment might encourage journalists and media practitioners of all branches, to adhere to the articles of the Swaziland Journalists Code of Ethics to which reference has been in earlier paragraphs.

[61] The question whether there is a sufficiently established factual base from which to launch an investigation into the separate question of recusal of a judicial officer can only be satisfactorily answered by reference to the evidence before the court or tribunal. Evidence in support of a recusal

application must of necessity be of high probative quality and sufficiently cogent if it to be relied upon.

[62] Professors Okpaluba and Juma articulate the self-evident principle that:

“Bias claims are not only fact-driven, they are highly fact-specific. A claim based on the adjudicative partiality of a court must be based on facts.”

They cited in the footnotes the Canadian cases of **Pearl v Peel Police** 2006 Can L II 37566 (Ont CA) para. 40; **Lesiozka v Sahota** BCSC479 (CanLII) para. 13, and the New Zealand case of **Smith v Attorney General** 2010 NZCA (CA).

[63] It goes without saying that, as has been amply demonstrated under the heading THE EVIDENCE herein at paragraphs [45-47], the material contained in the affidavits of Siphwo Mabila and Paul Loffler falls unacceptably and critically short of the standard required to support an allegation of bias against a Judge of the High Court of the Kingdom of Swaziland.

[64] Taken at their highest, the affidavits allege no more than that the judge was justifiably irritated by an admittedly grotesque and wilful distortion of the truth, and an egregious deception of the public. The Times undertook to

publish an apology. The judge's irritation quickly subsided. He was even willing to assist the newspaper's management in their efforts to avoid similar errors in the future. All that was now required of him was the delivery of his judgments in the two cases which he had conducted impeccably. The Times published a CLARIFICATION on the day following the publication of the misleading headlines and inaccurate story.

[65] In these circumstances, this Court is unable to say that the appellants came even close to discharging the heavy burden resting upon them, and of establishing that the capacity of Hlophe J to hold the scales of justice evenly between the parties in the cases before him was impaired to a degree warranting his recusal. They have not even shown that the judge's capacity was impaired at all. It follows ineluctably therefore that no case for his recusal has been made out and that the appeal must accordingly fail.

ORDER

It is the order of this Court that:

The appeal be and is hereby dismissed with costs.

S. A. MOORE
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

P. LEVINSOHN
JUSTICE OF APPEAL

For Appellants	:	Mr. Paul Kennedy S.C
For Respondent Inkhosatana Gelane Simelane	:	Mr. Zwelethu D. Jele
For Respondent Boycey Magongo	:	Mr. Mzwandile Dlamini