IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 62/2020**

In the matter between

NUR & SAM (PTY) LIMITED t/a BIG TREE FILLING STATION **APPLICANT**

AND

GALP ESWATINI (PTY) LIMITED **RESPONDENT**

Neutral Citation: *NUR & SAM (PTY) LIMITED v GALP ESWATINI (PTY) LIMITED 62/2020) [2022] SZSC 43 (06 OCTOBER, 2022)*

Coram : S.P. DLAMINI, M. J. DLAMINI JJA, M. D. MAMBA, A. M. LUKHELE et S. M. MASUKU AJJA.

Heard and Decided (ex tempore) 27 May, 2022

Reasons Handed Down : 06 October, 2022

[1] *Civil law and Practice- allocation of case to Judges by Chief Justice – Allegation that Chief Justice conflicted – Complaint pending. Averment that allocation of cases to Judges tainted and Judges similarly tainted and disqualified. Application for recusal of entire bench.*

[2] Civil law and Procedure- Judge having made a prior legal finding on applicability of provisions of statute – Application for recusal on this ground – Held Judges presumed impartial and the reasonable fair-minded and informed observer would not apprehend any bias on these grounds. Application dismissed.

MAMBA AJA.

[1] This is an application for the recusal of the entire panel of 5 Judges of this Court constituted to hear the review application launched by the applicant in terms of section 148 (2) of the Constitution.

[2] The applicant is Nur & Sam (Pty) Ltd t/a Big Tree Filling Station, a company duly registered and incorporated in terms of the company laws of Eswatini. It has its principal place of business at Big Tree Shopping Complex in the Matsapha Industrial Site in the Region of Manzini.

[3] The respondent is Galp Swaziland (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of Eswatini. It also has its principal place of business in Matsapha Industrial Site, King Sobhuza II Avenue, in the Region of Manzini.

[4] The application for review follows or is consequent upon a judgment of this Court on appeal delivered on 03 June 2021 wherein the Court upheld the appeal by the respondent and held that the applicant '- - - could not have obtained spoliatory relief under the mandament van spolie since its possession of the filling station did not extend further than a contractual dispute. The supply of fuel by Galp was not an incident of possession, which otherwise might have entitled it to the relief which was erroneously ordered by the Court *a quo*.'

[5] When the review application was called for hearing on 08 February 2022, Counsel for the applicant informed the Court in chambers that the applicant intended to apply for the recusal of the entire panel of five Judges constituted to hear this review. The grounds for such recusal of each judge were stated. Each Judge, individually, stated that the reasons or grounds given were without merit and he would decline the application. Accordingly, the applicant was permitted, if so minded, to file and serve a substantive application for recusal, on or before 25 February 2022. Timelines were stipulated for the filing and doing of further processes in the application. The review application

was postponed *sine die,* pending the outcome of the recusal application.

[6] The application for recusal was filed and served on 25 February and is opposed by the respondent.

[7] The applicant has listed or stated two grounds in support of my recusal. The grounds are as follows:

> '19. In general, the panel has been constituted by the Chief Justice. The applicant has lodged a complaint against the Chief Justice and is awaiting the processing of the complaint and its final determination. The complaint relates to his interfering in proceedings at the High Court between the applicant and the respondent which are ancillary proceedings to this matter. - - -
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> 20. The Honourable Chief Justice cannot do anything pertaining to this matter whilst the complaint is pending. - - - The applicant cannot guarantee that he will not continue interfering with the matter. - - - A litigant in the applicant's position would reasonably apprehend that he may interfere with the matter when allocating it or empanelling the bench.'

That is the first ground. The second ground is stated in paragraph 33 of the Founding affidavit, and is that I "dealt with this matter in 2015, where [I] was part of the minority decision which decided that Section 19 of the Constitution does not apply where an oil company acquires a business from an operator by reason of termination of the relationship. [I] expressed a view that Section19 applies to an acquisition by the state or public institutions and not by private persons.'

The applicant states further that the Franchise agreement was in issue in the 2015 proceedings as is the case in this review application. The applicant states that it now knows my views on the matter and it does not believe that I 'will bring an impartial mind on the issue of the Franchise agreement and Section 19 having already expressed an opinion.' These two grounds, although said to be three by the applicant, are the same as those filed against the Honourable M. J. Dlamini JA whilst the first ground is raised against the entire panel.

[8] That this bench was empanelled by the Honourable Chief Justice is not in dispute. Similarly that I definitively stated in the 2015 proceedings that Section 19 of the Constitution governs or regulates expropriation and not the acquisition of property between private individuals or persons, is not in dispute. Likewise Justice M. J. Dlamini JA was part of the bench that amongst other things, ordered the applicant to vacate the premises in question by not later than 31 August 2015. However, as I shall demonstrate below, these are not grounds that would or should disqualify a judicial officer or any adjudicating body for that matter, from hearing a dispute. I now examine in detail, the applicable law in matters of recusal or disqualification of a judge in particular.

[9] In *Goode Concrete v CRH PLC [2015] IESC 70 (31 July 2015)* Denham CJ stated the test in the following terms:

'53. While the Bangalore Principles and Commentary go into some detail as to the principles underlining the exercise of recusal, the test is that of the reasonable observer. The jurisprudence of this jurisdiction, the reasonable, objective and informed person, is

fundamentally consistent with the approach in the Bangalore Principles.

54. The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts.

55. The test to be applied when considering issues of perceived bias is important in protecting the administration of justice, and necessary to preserve public confidence in the judiciary. Thus, the issue is not simply a matter as between parties, but it is an issue for consideration in relation to the manifest impartial administration of justice in the State, and the confidence which the people rest in the judiciary.'

[10] On the question of prior or prejudgment, as in this case, the Court in *O'Callagham v Mahon & Others (No.2) IEHC 265 at 80.*

'The principles to be applied to the determination of this appeal are thus, well established:-

(a) objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial.

(b) the apprehensions of the actual affected party are not relevant; (this Court's emphasis).

(c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;

(d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or show prejudice, hostility or dislike towards one party or his witnesses.'

See also Shri S. C. Kainthla v State of H. P. & Others (12 December 2018).

[11] In *Edmund Mazibuko N.O. and 5 Others v Total Swaziland (Pty) Ltd (44B/2022) [2022] SZSC 12 (16 May 2022)*, I had occasion to say

'[39]- - - The main or leading decision in this Court on the issue of recusal is that of [*Minister of Justice v Stanley Wilfred Sapire, Civil Appeal No. 49/2001 (unreported)]*. It followed and applied the principles stated in several judgments of the Supreme Court of Appeal in South Africa and English Case law such as *Locabail (UK) Ltd v Bayfield properties Ltd [2000] QB 451, Porter v Magill [2001] UKHL 67; [2002] 2 AC 357 and Johnson v Johnson (2000) 201 CLR 488.*

[40] It is a fundamental or cardinal principle of law that every person is equal before the law and both his civil and criminal rights and obligations must be adjudicated upon by a fair and impartial authority or forum. Therefore, every judge or adjudicative body must be impartial and is presumed to be so. Partisanship or partiality is the very antithesis of justice and fairness. Legality, however, may not necessarily yield the same result. This is enshrined or affirmed under Sections 20 and 21 of the Constitution. The rule is that justice must not only be done but be manifestly seen to be done. Therefore, where the circumstances are such that this cannot be achieved or attained, a judge or adjudicating authority must recuse himself or itself from

hearing the matter. It is not a matter of discretion. Actual lack of impartiality or presence of bias need not be established. Apparent bias or partiality suffices.

[41] In *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance (Ltd) [2020] UKSC 48 (delivered 27 November 2020),* emphasising the importance of impartiality, Lord Hodge observed that "it is axiomatic that a judge or arbitrator must be impartial.' He stated that this was a core principle of the law and the judge had a primary or cardinal duty to follow or uphold it. However, English law holds that 'the law does not countenance the questioning of a judge about extraneous influences affecting his mind.' (*Locabail (supra) at 471).* The test for the assessment of impartiality and unconscious or apparent apprehension of bias is objective. The apprehension of bias must be reasonable and be made by a reasonable fair-minded and informed person. He is, however, not unduly sensitive or suspicious: see *Ince Gordon Dadds LLP v Mellitah Oil and Gas BV [2022] EWHC 997 (Ch) (03 May 2022) at paragraph 86.*

[42] In *Halliburton (supra*), the Court stated as follows:

'52. In this appeal the Court is concerned with an allegation of apparent bias. We are not concerned with any disqualifying interest in the outcome of the arbitration nor are we required to "make widows into men's souls" in search of an animus against a party or any other actual bias, whether conscious or unconscious. No such allegation is made against Mr. Rokison. We are concerned only with how things appear objectively. There is no disagreement as to the relevant test. As Lord Hope of Craighead stated in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The Courts have been given further guidance on the nature of this judicial construct, the fair-minded and informed observer" (to whom in this judgment I also refer as "the objective observer"). Thus, in *Helow v Secretary of State for the Home Department [2008]UKHL 62: [2008] 1 WLR 2416,* Lord Hope (paragraphs 1-3) explained that the epithet "fair-minded" means that the observer does not reach a judgment on any point before acquiring a full understanding of both sides of the argument. The conclusions which the observer reaches

must be justified objectively and the "real possibility" test ensures the exercise of a detached judgment. He continued:

"Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment." (Emphasis added).

I have added the emphasis in this citation because the context in which the test falls to be applied in this appeal is of particular importance.

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54. This objective test of the appearance of bias is similar to the test of "justifiable doubts" which (UNCITRAL") Model Law on International Commercial Arbitration 1985 (as amended in 2006) article 12(2) ("the UNCITRAL Model Law"), the IBA Guidelines (General Standard 2 (c) and article 10.1 of the LCIA Arbitration Rules

(2014). It is not necessary to determine whether the test as to the nature of the doubts in the UNCITRAL Model Law, the IBA Guidelines and the LCIA Rules are precisely the same as those of English Law. The important point is that the test in English Law, involving the fair-minded and informed observer, requires objectivity and detachment in relation to the appearance of bias.

55. The objective test of the fair-minded and informed observer applies equally to judges and all arbitrators. There is no difference between the test in section 24 (1) (a) of the 1996 Act, which speaks of the existence of circumstances "that give rise to justifiable doubts as the [the arbitrator's] impartiality" and the common law test above. But in applying the test to arbitrators it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes.'

[43] It must also be noted and emphasized that, a judge, upon ascending to the bench, takes a solemn oath to do justice to all manner of people without fear, favour or ill will. Therefore, he has a duty to sit and hear matters allocated to him. He has a duty not to accede too readily to allegations of apparent or apprehension of bias or lack of impartiality. As the Court observed in *Locabail (supra)* paragraph 21

'everything will depend on the facts, which may include the nature of the issue to be decided. - - - If the objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.'

[44] Though not a lawyer or person trained in law, the fair-minded and informed observer is knowledgeable – knowledgeable because informed and observant – of the professional duties, ethos, training and experience of a judicial officer.

[45] In the present case, the issue of the applicability or otherwise of the provisions of Section 19 of the Constitution is a question of law and not fact or evidence. It is a matter of interpretation of those provisions. The finding or ruling in question had nothing to do with the evidence. Any finding on a matter of law may be varied and modified or changed altogether depending on the force of the argument made for a particular stance or interpretation. Our law or jurisprudence is replete with cases where the Courts or judges have had to interpret the law contrary to their earlier judgments. For example, for over a century, this Court held that a convicted individual had the onus to satisfy the Court of the existence of extenuating

circumstances. This was, however, changed or reversed by the very same Court in *Daniel Mbudlane Dlamini v Rex (11/1998) [1998] SZSC 30 (29 September 1998).* The list is endless.

[46] On issues of law simpliciter, judges are, by the very nature of their professional undertaking or training, open-minded. They are ready and amenable to persuasion, notwithstanding their *prima-facie* views.

[47] In *Nur and Sam (supra),* after holding that Section 19 was not applicable in that case, we stated further that:

> '[78] Even if the Section applied and was not complied with, it would not have constituted a ground for review because it would be a new matter which was not raised in the earlier proceedings, when the applicants had opportunity to do so. It would be unfair to require the respondent to face a new case on review which the applicants could have raised in earlier proceedings. The applicants would have a remedy to bring fresh action against the respondent.'

From the above excerpt, it is clear to me that the Court also considered the possibility that the Section may be applicable. The Court was thus

not dogmatic or absolute on the issue. Since it is a question of law it is not inconceivable that another interpretation may be equally valid.

[48] I am mindful of the last paragraph in *SACCAWU* (*supra*) where the minority judges held that:

'[71] Ordinary people would say that a judge should not sit in a matter where she or he has already pronounced on the live and central facts in issue. The saying that not only must justice be done, it must be seen to be done, is a well-worn one, and for good reason. Much of our work involves continuing defence of such simple verities. We believe that the present is a case in point, and would uphold the appeal.'

The underlining has been added by me for emphasis. This relates to findings of fact or facts and not law. It has no relevance to the issue under the spotlight in this application. Additionally, I am not sure whether the ordinary person referred to here is the same as the reasonable, fair-minded and informed person or litigant. Again, Lord Bingham of Cornhill in *Locabail* (*supra)* at paragraph 25 held that:

'- - - The mere fact that a judge earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the

evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think the answer, one way or the other, will be obvious. But if in any case there is a real ground for doubt, that doubt would be resolved in favour of recusal.'

This case was followed and applied in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd {2005] 1 ALL ER 723, [2004] EWCA Civ 1418;* where the Court reasoned as follows:

'[20] In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias, something more is required. Judges are presumed to be trustworthy and to understand that they should approach every case with an open mind.

[21] The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear. As was said in the *Locabail* case, the mere fact that the tribunal had previously

commented adversely on a party or found his evidence unreliable would not found a sustainable objection.'

[12] In the present review application, the main or central prayer is "setting aside in *toto* the judgment of [this Court] dated 03 June [2021].' The crux or nub of the decision by the Court was, as stated in paragraph 4 herein above, that the mandament van spolie (spoliation) was in the circumstances of the case pleaded, not available to the applicant. Whilst accepting that the Court did state that the Franchise agreement had terminated on 30 September 2020, this was, in my view, obiter and perhaps not even in issue in the appeal or even at the High Court. I say so in view of the fact that the right of the applicant to be in occupation of the premises in question was not and could not have been in issue in an application for spoliation. I only mention this in passing as it is a matter essentially for the review application and not the recusal one.

[13] Again, from the above detailing or characterisation of the issues in the review, I fail, totally, to understand how the provisions of Section 19 of the Constitution finds application or relevance in the review

application where the crisp issue is not who owns what property but rather whether an act of spoliation has been committed or not. I say this fully mindful of the applicant's assertions in paragraph 11.4 of the founding affidavit. The matter is to be argued or determined in the review application. The underlying legal point though is that the mere fact that in the 2015 decision I definitively came to the conclusion that Section 19 of the Constitution governs expropriations only, is not a ground for my disqualification. That decision was a mere legal interpretation of the law and not a finding on credibility or on the evidence of any party in the proceedings, including the applicant. For these reasons, this ground for my disqualification or recusal is without merit and is declined or dismissed.

[14] It is common cause that all the Judges in this case were empanelled by the Honourable Chief Justice. The applicant avers that because it has lodged or instituted a complaint against the Honourable Chief Justice for alleged interference in a matter between the parties in the High Court, the Honourable Chief Justice is thereby barred from allocating this matter to any Judge. He is conflicted, it is argued by the applicant. Should the Honourable Chief Justice do such allocation,

as he has done in this case, the whole process is tainted and any reasonable person 'in the position of the applicant would reasonably apprehend that he may interfere with the matter when allocating it or empanelling the bench.' (Per paragraph 20). This is a very strange assertion and reasoning.

[15] First, the implied suggestion by the applicant is that all the Judges in this case are beholden to the Honourable Chief Justice. They take instructions from him on how to deal with this matter. They are merely puppets or charlatans. Essentially therefore, any decision reached in the proceedings would be that dictated to the bench by the Honourable Chief Justice. These are the reasonable apprehensions of the reasonable person who is informed of all the relevant facts, observant and fair-minded, who is in the position of the applicant, it is argued. This is a frivolous, vicious and brutal attack on the integrity and independence of the bench. It is contrived, unwarranted, undeserved and baseless. Secondly, whilst a complaint has been filed against the Honourable Chief Justice, the matter is still pending. This Court has not been apprised of the details of this complaint. No determination has been made on the merits of that complaint. Thirdly, the

Honourable Chief Justice has not been cited in these proceedings or afforded the chance to respond to these allegations of interference against him. This case is therefore distinguishable from *The Chief Justice of the Kingdom of Eswatini N.O. and Another v The Clerk of Parliament and 3 Others (906/2021) [2021] SZHC 45 (8 April 2022)* relied upon by the applicant; where the Court, after hearing the parties ordered that the matter be heard by a full bench constituted or empanelled by the Honourable Principal Judge. See also the Lesotho matter of *Director of Public Prosecutions v Kamoli & Others (C of A) (CRI) 2 of 2022 [2022] LSCA 2 (21 April 2022).* Again, in this case, the Honourable Chief Justice was actually involved in the proceedings inasmuch as he had heard and made certain findings in the matter and his recusal had been ordered by the Court. The duty to empanel or allocate the case was bestowed on the Registrar of the Court. (The Honourable Chief Justice has publicly made it known that he views this as unlawful. This is, however, irrelevant for present purposes).

[16] The apprehension by the applicant that the Judges in this case are going to do the Honourable Chief Justice's bidding or take instructions from him on how to deal with this case is, frankly,

ridiculous. I believe that all the Judges in this case enjoy complete adjudicative and intellectual independence. All cases, in line with the Judges' oath of office, are dealt with openly and fairly. They are decided solely on the merits of each particular case; in terms of both the law and the facts. Judges execute or carry-out their judicial functions without any improper influence or pressure from any source whatsoever, including the Honourable Chief Justice; subject only to the supreme law of the land. This much is, in this jurisdiction, known or perceived by the reasonable, fair-minded and informed observer. That observer does not share the allegations made or fears held by the applicant in this case. The apprehension or suspicion of bias by the applicant is not reasonable or informed by all the relevant facts in this case. As was stated by the Court in *Attorney-General of Kenya v Professor Anyang Nyongo & Others [2010] EKLR*

> 'It is indisputable that different minds are capable of perceiving different images from the same set of facts. This results from diverse facts. A 'suspicious' mind in the literal sense will suspect even where no cause of suspicion arises. Unfortunately, this is a common phenomenon among unsuccessful litigants.'

[17] The conclusion I reached pertaining to section 19 of the Constitution is a legal interpretation of the meaning, scope, purport and applicability of that law or provision. Where, however, my judgment is shown to be wrong as a matter of law, I have a duty to recant my decision or overrule myself thereon. That is an entirely different matter from disqualification or recusal. The said finding is not a finding of fact or a finding on the credibility of any of the witnesses or parties to the proceedings. For that reason, it is not a factor or reason which disqualifies me from hearing this review application. As stated in *AMEC Capital Projects Ltd v Whitefriars City Estate Ltd [2005] 1 ALL ER 723, [2004] EWCA, Civil 1418,* cited with approval in *Edmund Mazibuko N.O. (Supra)* at para 48

> "[20]In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias, something more is required. Judges are presumed to be trustworthy and to understand that they should approach every case with an open mind.
>
> [21] The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed

observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear. As was said in the *Locabail* case, the mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection.'

Consequently, this ground for my recusal is without merit and is hereby dismissed. (I also note and observe that in most of the jurisdictions with review powers similar to our 148 (2) of the Constitution, the review is, as a general rule and practice, heard by the same panel of judges whose judgment is under review. The panel may of course be augmented or enhanced as the situation may dictate).

[18] The applicant bears the onus to satisfy this Court that its fears or apprehension of bias are reasonable and are those of the reasonable, fair-minded and informed observer who is in possession of all the relevant facts in this case. Again, it is trite law that because of the presumption of impartiality on the part of a judicial officer, it is not easy to discharge this onus. In the case at hand, the applicant has failed to discharge this onus.

[19] For the above reasons, the application for my disqualification or recusal is hereby dismissed with costs.

MAMBA AJA,

I AGREE

M. J. DLAMINI JA.

I ALSO AGREE

A. M. LUKHELE AJA.

MASUKU AJA

[20] This is an application in which the Applicant sought the recusal of the entire bench comprising of Justices of Appeal S.P. Dlamini JA, M.J. Dlamini JA, M.D. Mamba AJA, A.M. Lukhele AJA and S.M. Masuku AJA.

[21] The interlocutory application for recusal was brought within a pending review application under Section 148 (2) of The Constitution Act, 2005. The Court delivered its judgment *ex tempore* dismissing the recusal application. I agreed and these are my reasons for the dismissal.

[22] I should not burden this judgment with a repeat of the facts as they appear fully in the judgment by The Court. This judgment is part of the judgment with regards to what has been termed the general ground and the specific ground that pertains to the application for my recusal.

The Applicant's Case for Recusal

[23] The general ground alleged by the Applicant is that the entire panel was constituted by His Lordship The Chief Justice of Eswatini, against whom the Applicant had lodged a complaint that relates to the Honourable Chief Justice's interference with the matter before the High Court between the same parties which are ancillary proceedings to the matter before this Court. The Applicant alleges that the said complaint is pending before that forum (the Founding Affidavit does not mention which forum save to say it was filed in terms of Section 158 of the Constitution and 240 of The Constitution Act, 2005) and that the Honourable Chief Justice cannot therefore do anything pertaining this matter whilst the complaint is pending. The allegation and argument is that he cannot do anything, including empaneling and allocating a hearing date on the matter.

[24] It is alleged in the Founding Affidavit, as the first reason for my recusal that I was appointed by His Lordship The Chief Justice when he should not appoint anyone to hear a matter in respect of which a complaint has been laid against him.

[25] The second tier of the application is as I understand it that the complaint against His Lordship The Chief Justice was laid with The Commission on Human Rights and Public Administration/Integrity of which I am the substantive Chairman and Commissioner. The Applicant emphasized in its application that the complaint was filed in terms of Section 158 of The Constitution Act 2005 ('the Constitution') and Section 240 of the Constitution with The Integrity Commission.

[26] It is alleged that Judges of the Superior Courts are office holders to which Section 240 and 241 of The Constitution Act, 2005 applies. It is alleged by the Applicant further that the complaint against the Honourable Chief Justice relates, *inter alia*, to conflict of interest and the complaint was served to the Commission. It is averred that I cannot therefore sit as a Judge in a matter involving parties that are before the Commission and involving His Lordship The Chief Justice that appointed me and who is meant to be investigated by The Commission for which I chair.

[27] Further that it is the Applicant's apprehension that I cannot be impartial in adjudicating this matter as I am clearly conflicted and should remove myself from hearing the matter on review in this Court.

The Test for Recusal

[28] The leading authorities in South African Courts are the Cases of **The President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147; 1999 (7 BCLR 725 (CC) ("SARFU"); SA Commercial Catering & Allied Workers Union and Others v Irvin & Johnson Ltd. (Seafoods Division Fish Processing) (200) 21 ILJ 330 (LAC) ("SACCAWU")** and in the Kingdom of Eswatini the principles were restated in **The Law Society of Swaziland and Swaziland Government and Others Civil Case No. (743/2003) [2003] SZHC 47 (17th April 2003) and Mazibuko and Others v Total Swaziland (44 of 2022) [2022] SZSC 12 (16 May 2022).**

[29] In **SARFU** *(op. cit)* The Constitutional Court (SA) formulated what it called proper approach to recusal as follows: -

> *"[48] The question is whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of Counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs and dispositions. 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 rescue herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."* (Underlining added)

[30] His Lordship Mr. Justice Cameron in The Constitutional Court (SA) in the **SACCAWU Case** *(supra)* amplified the silent aspects of **SARFU** *(supra)*, I repeat the relevant context as follows at paragraphs 13: -

> *"...In considering the application for recusal, the Court as a starting point presumes that judicial officers are important in adjudicating disputes. As later emerges from the SARFU judgment, this inbuilt aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires "cogent" or convincing evidence to be rebutted." (Underlining added)*

[31] The Court in the **SARFU Case** *(supra)* (at para 45) further alluded to the apparently 'double requirement of reasonableness that the application of the test's imports.

> *"... not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in* ***S v Roberts 1999 (4) SA 915 (SCA) at para 32*** *per Howie JA, decided shortly after SARFU, where the Supreme Court of Appeal required both that the apprehension be that of a*

reasonable person in the position of the litigant and that it be based on reasonable grounds.' ... The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of the 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 to be regarded as reasonable. In adjudging this, the Court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby whether it is such that it should be countenanced in law."

"Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On one hand, it is vital to the integrity of our Courts and the independence of Judges and Magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the Courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is "as wrong to yield to a tenacious or frivolous objection" as it is to ignore an objection of substance." (Underlining added).

[32] The Applicant's alleged apprehension of bias is set out at paragraph 19 of its Founding Affidavit. The Applicant emphasized that the complaint was filed in terms of Section 158 of The Constitution Act, 2005 and Section 240 of The Constitution with the Integrity Commission for violation of that Section. So, it is contended that whilst the complaint is pending, the Honourable Chief Justice appointed me as Acting Justice and at the same time empaneled this bench. The conflict as I understand it is that I cannot hear the review application whilst the complaint is pending and awaiting process. (I presume pending before the Commission) of which I chair.

[33] The Applicant's gravemen sits at the heart of the 'complaint'. Unfortunately, the Applicant neither discloses in detail material facts on which the complaint is based nor does it attach a copy of the complaint that it said still awaits adjudication. The Respondent has disputed the factual accuracy and correctness of the allegations as averred by the Applicant and submitted that the Applicant has not been candid with the Court by its failure to disclose the complaint.

[34] The attachment of the complaint to the Founding Affidavit would have assisted the Court and I in particular in making (its own) scrutiny of the material facts complained of so as to be able to apply the 'double' standard enquiry in assessing whether or not the Applicant's apprehension of bias can be said to be reasonable, objective and informed by the correct facts. It would have further assisted the Court and I to assess if the Applicant apprehending bias is a reasonable person to reasonably apprehend that I will not bring an impartial mind in adjudicating the review case in the main application.

[35] The Appellant's Counsel, Mr. Magagula was asked by this Court if the Applicant had attached a copy of the complaint to its papers as alleged. He responded that, the Applicant did not see the necessity to attach the copy because the complaint was known *[sic]* and it had been alleged on the papers.

[36] The fact is that the Applicant has placed emphasis in that the complaint against His Lordship The Chief Justice was filed in terms of Section 158 and 240 of The Constitution Act 2005. I am mindful that The Constitution is not just another law, it constitutes a sacred

covenant that any allegation of its breach cannot be taken lightly by the Courts. In any event it is not clear in the Applicant's Founding Affidavit on which forum was this complaint filed with and it was important for the Applicant to disclose those details and unfortunately it declined to appreciate the necessity even when asked to do so by this Court.

[37] I say as much because Section 158 of The Constitution Act 2005 deals with the removal of the Justices of Superior Courts from office. The forum for complaints that may lead to the removal of the Justices ought to be investigated by an *ad hoc* committee in the case of His Lordship The Chief Justice and the Judicial Service Commission for any other Justice of the Superior Court and not the Commission on Human Rights and Public Administration/Integrity (see Section 158 of the constitution). If there is such a complaint with the Commission, it means that the Applicant misconceived or was ill advised about where to place that complaint. It certainly should not be with The Commission on Human Rights and Public Administration/Integrity.

[38] I now come to the complaint that is said to be placed with the Integrity Commission for violation of Section 240 of The Constitution Act 2005. If one refers to Section 240, one should gather that it deals generally with matters in Chapter XVI of the leadership code of conduct that seeks to ensure that all those in leadership including His Lordship The Chief Justice are transparent in their activities and accountable to the people they represent or serve. Section 240 then deals with matters of conflict of interest and states that a person who holds a public office *inter alia* shall avoid conflict of interest in the performance of his functions of office. In instances where the functions of the Commission entails investigation of complaints concerning alleged violations, the Constitution is very specific in spelling out those functions for the Commission, see for example Section 164 (1) (a) (b) and (c) of the Constitution. To the contrary Section 240 does not give the Commission the power to investigate complaints concerning alleged conflict of interest. There cannot therefore be a complaint filed, accepted and enrolled with the Integrity Commission for an investigation of any violation caused by a conflict of interest against any leader including His Lordship The Chief Justice. The Integrity Commission is without the mandate and powers

to admit such a complaint until such time there is promulgated the Leadership Code of Conduct Bill pending before Parliament.

[39] In its Answering Affidavit the Respondent submitted that the Commission was simply presented with the copy of the complaint. This then suggests that the complaint was destined for a specific forum and copied to the Commission. Yet again I am unable to verify which forum it was addressed to because there are no facts by the Applicant to that effect. The complaint was also not attached to the founding papers for me to scrutinize. The upshot is that there is no complaint lodged in terms of Section 240 of the Constitution that is pending for determination before the Integrity Commission, that awaits any ruling for that matter.

[40] The Applicant has therefore failed to make a case for my recusal. There are no sufficient material facts in its Founding Affidavit for the Court to conclude that a reasonable person in the shoes of the Applicant would reasonably apprehend bias on my part. The Applicant has in my view failed to discharge the onus that it carries to rebut the presumption of judicial impartiality which is not easily

dislodged as it requires 'cogent' or 'convincing' evidence to be rebutted.

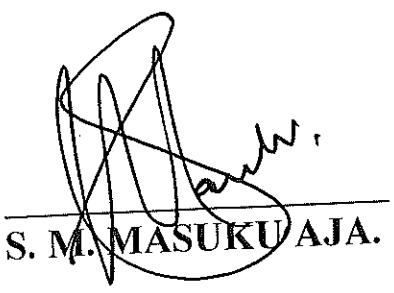
[41] The general rule in application proceedings is that which has been laid down repeatedly, that an applicant must stand or fall by his Founding Affidavit and the facts alleged in it. These are the facts that the Respondent and/or *(in casu)* the Court is called upon to respond to and scrutinize. See **Herbstein and Van Winsen**, *THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4 ed page 366.* In the circumstances the Applicant has failed to bring facts that would enable me to assess if I would not bring "a mind open to persuasion by the evidence and submission of Counsel in the review application pending before this Court. Mere apprehensiveness on the part of the Applicant that I would be bias – even a strongly and honestly felt anxiety is not enough.

[42] On the general ground that the whole bench is incapable of exercising impartiality on the basis that as members of the panel we were selected by His Lordship The Chief Justice who faces a complaint for his alleged interference in this matter, further that the Acting members

including my acting appointment was made by the Chief Justice, it suffices to state as follows: It is common cause that acting appointments were in the first month made by the Honourable Chief Justice, in consultation with The Judicial Service Commission in the exercise of his powers in terms of Section 153 (5) of The Constitution Act 2005. The subsequent appointment was made by His Majesty The King on advise of His Lordship The Chief Justice exercising the powers in terms of Section 153 (3) and (4) of The Constitution Act 2005. The Respondent submitted, quite correctly in my view that at its core the recusal application raises matters of procedural fairness since the recusal of presiding Judge (s) speaks directly to the absence of fairness in the judicial processes. But the challenges on the appointments speaks to the question of lawfulness or legality on the appointments instead of unfairness. In any event I did not understand the Applicant to be pursuing the challenge of appointments any further at the hearing of the matter and as such I should not pursue it in this ruling.

[43] I conclude by an observation that the Applicant's objection implies that somewhat I have to pay some form of "allegiance" to His Lordship The Chief Justice for the appointment. That cannot be so, because as Judges we are bound by the oath taken and subscribed in terms of Section 143 of the Constitution. This Court in **Edmund** *supra* stated that "Decisional independence lies at the heart of an independent judiciary" aligned with Section 141 of the Constitution. There is once again no evidence in the Founding Affidavit to substantiate that it would be reasonable to apprehend bias from the facts by the Applicant. It is reasonable to conclude that the Applicant has displayed anxiety which is far too remote and subjective that is insufficient on all accounts to establish that I would be bias in the pending review application. The application that concerns my recusal must fail.

[44] In the circumstances and for the aforesaid reasons, my application for recusal is dismissed with costs including certified costs of Counsel in terms of the High Court Rules.



S. M. MASUKU AJA.

S. P. DLAMINI – JA

[45] I have had occasion to read the Judgments penned by His Lordship Mamba AJA and His Lordship Masuku AJA regarding the recusal application of the entire Bench of the Supreme Court empaneled by His Lordship the Chief Justice to hear an application under section 148 (1) of the Constitution launched by the Applicant.

[46] The background, facts and law relating to this matter sufficiently covered in the judgments of Mamba AJA and Masuku AJA. Therefore, I find it unnecessary to repeat them unless they are relating to the specific point I wish to cover in this judgment.

[47] At the outset I wish to place it on record that I agree with the judgments penned by their Lordships Mamba AJA and Masuku AJA. I have only elected to write this concurring judgment because there were issues that were raised by the Applicant specifically relating to myself.

[48] In every jurisdiction it has long been accepted that an impartial judge is a fundamental prerequisite for a fair trial both as a matter of common law and constitutional requirements.

[49] In the **SANTU CASE** (***supra***) the following flow from the test:

49.1 There is a presumption of impartiality on the part of a judicial officer and the Applicant bears the onus to rebut the prescription through "cogent" on convincing evidence.

49.2 That the test is not of absolute neutrality because judges are human too.

49.3 That actual bias need to be proved but what is required of the Applicant is to meet the requirement of perception of bias viewed from the perspective of a reasonable litigant.

[50] In my view, the application for recusal by the applicant does not meet the requirements for recusal, with respect to each of their Justices including myself to hear this matter and stands to be dismissed with costs.

[51] When the Applicant requested to see the Bench in Chambers regarding the composition of the Bench, which is the proper practice, Applicant's concerns with each of the members of the Bench were raised. With regard to myself, the concern that was raised was allegedly that I was "part of a consortium that wanted to take part in the takeover of the oil industry in the country".

It is categorically false that I am part of any consortium whether to take over the oil industry or anything for that matter hence I declined to recuse myself so did the other Justice. The Counsel for the Applicant was informed by the Court that it was open to the Applicant to launch a fully-fledged application for the recusal of the Bench if so disposed.

[52] When the Application was ultimately launched, the concerns regarding myself took a different tune;

Firstly, nothing was now being said about me being a part of consortium to take over the oil industry in the country.

Secondly, the concerns now was with respect to an alleged friendship with a Mr. Ngomuyayona Gamedze. The said Gamedze apparently

while sitting with me uttered words to the Director of the Applicant that he must sell his business because willing or not it will be taken over.

To buttress the point that Gamedze was my friend, it was alleged that he was in a party where I celebrated being appointed a judge.

[53] I do not know the concerned Director of the Applicant but apparently he knows a lot about me but most of it is either false or a distortion of fact.

53.1. Gamedze is not a friend of mine but an acquaintance; at best so are several eMaswati whose matters I have heard and decided. We are relatively a small country and small population.

53.2 I have never celebrated any appointment into public service and have been appointed to a few. My attitude towards public appointments is that while it is an honour it is a burden at the same time because one so appointed must remind herself or himself of the obligations towards both the appointing authority and citizens.

Bearing this in mind, I have never celebrated my appointments. Such a celebration is just a figment of imagination at the very least.

53.3 I am not part of any business activities of Gamedze. In fact I am vaguely aware of some of his business activities. Therefore, I have never been a party to his alleged activities regarding the Applicant and Gamedze.

[54] Finally, Gamedze is not a party to the proceeding before us and it has not been shown that a decision one way or the other by this Court would benefit him in order to justify an apprehension reasonably of bias on part.

[55] Accordingly, I concur with the decision that the application for the recusal of the empaneled Bench be dismissed with costs. No bias exercised from the perspective of a reasonable litigant has been demonstrated against any of the members of the empaneled Bench.

S. P. DLAMINI
JUSTICE OF APPEAL

FOR THE APPLICANT: **MR. M. MAGAGULA**

FOR THE RESPONDENT: **MR. C. S. BESTER**