IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1681/2006

In the matter between:

SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY LIMITED	**APPLICANT**
VS	
PAUL FRIEDLANDER	**1st RESPONDENT**
MYRA ANNE SALKINDER	**2nd RESPONDENT**
ANTON PRETORIUS	**3rd RESPONDENT**
KIRSH HOLDINGS LTD	**4th RESPONDENT**
SWAZI PLAZA PROPERTIES (PTY) LTD	**5th RESPONDENT**
MBABANE DEVELOPMENT CORPORATION (PTY) LTD	**6th RESPONDENT**
SWAZI PLAZA TOWERS	**7th RESPONDENT**
S & B BUILDING (PTY) LTD	**8th RESPONDENT**

CORAM: **MAMBA AJ**

FOR APPLICANT: **M. MAGAGULA**

FOR 1ST - 7TH RESPONDENTS: **ADV. D.A. SMITH SC (Instructed by E J Henwood)**

FOR 8th RESPONDENTS:ADV. LUDERITZ (Instructed By M. Mabila)

JUDGEMENT

24th OCTOBER, 2006

[1] On the 11th October, 2006 after hearing arguments, I dismissed with costs the applicant's application that I should recuse myself from hearing its application for leave to execute the judgement of my brother Justice Maphalala that was issued in its favour on the 19th July 2006, against which an appeal has been noted.

[2] I indicated in my brief judgement that the applicant has failed to prove that any right thinking person would find that there are reasonable grounds for me to recuse myself from hearing the application. My reasons for judgement and the order I made on the 11th October 2006 appear from this judgement.

[3] The recusal application is the third in a sequel of 3 applications involving the parties herein. In the first of these applications, which is the main application, the applicant successfully applied to this court before my Brother Maphalala J for an order that

> "the respondents be interdicted and restrained from carrying out or continuing with the construction works at Swazi Plaza or development of Corporate Place pursuant to the illegal and or irregular resolution purportedly passed by the Board of Directors on the 22nd February 2006 authorising the development of Corporate Place"

and other ancillary relief. The judgement by Maphalala J was handed down on the 19th July 2006 and has been appealed against by all the respondents. The grounds of appeal involve both issues of law and fact. That appeal is yet to be heard by the Supreme Court.

[4] Following the respondents' notice of appeal referred to above, the applicant filed an application for leave to execute, pending appeal, the judgement issued in its favour by Maphalala J. I shall refer to this application for leave to execute as the second application and the application for my recusal simply as the application.

[5] The second application was set down for hearing before my brother Justice Matsebula on the 11th August 2006. It would appear that it could not be heard on that day, because ***inter alia,*** it could not be possibly heard and finalized on the afternoon of that day. It was then postponed for hearing on 28th August 2006.

[6] Sometime before the 28th August 2006 the Registrar of this Court informed me that I was allocated to hear the application and the court record was given to me by the said Registrar. It was a very voluminous or thick record consisting of over twelve hundred pages. The Registrar informed me upon my enquiry from her, that I was being assigned to hear the matter because it was urgent and I would be the duty judge in the week beginning the 28th August 2006. I immediately, verbally, instructed the Registrar to request counsel to prepare and submit to her heads of argument before the date of hearing of the matter.

[7] When I was initially assigned to hear the second application, Justice Maphalala who heard the main application was away in Zambia, sitting in the Comesa court, wherein he is a member of that bench. Again sometime before the 28th August 2006 before Counsel could file their heads of argument, Maphalala J returned to his duties at the High Court from Zambia. I immediately consulted with the Acting Chief Justice and one other colleague, informally over tea, and it was agreed amongst ourselves that Maphalala J, because of his knowledge of the facts and or issues in the main application, was best suited to hear the 2nd application and I should be relieved of it and he be assigned to it. The Registrar was immediately given the court record and instructed by me to reverse my earlier instructions to Counsel. Counsel were now to be informed of the new date of hearing determined by Maphalala J.

[8] On the 24th August 2006 the Acting Chief Justice informed me that there was an objection by the 1st to 7th Respondents against Maphalala J hearing the 2nd application and as the judge who had been initially assigned to hear it and who at that time had at least studied a portion or part of it, I was being re-assigned to hear it. The Acting Chief Justice informed me that he or the Registrar would inform counsel of the fact that another Judge other than Maphalala J had since been allocated to hear the matter and a new trial date would be set by that other judge.

[9] After observing that an informal objection had been raised, by letter, to the matter being heard by Maphalala J and that my name had been mentioned in that letter, I suggested to the Acting Chief Justice that perhaps to avoid Judges of this court being mentioned and or being subjects of extra curial objections in matters already filed in court, the name of the judge (me) who had since been allocated to the case need not be mentioned in his reply to counsel's letter of objection. Respondents' letter referred to herein is ETG1 of applicant's founding affidavit and the Acting Chief Justice's response thereto is ETG3 of the same affidavit and was copied to the applicant's attorneys. I shall return to the contents of these letters later in the course of this judgement. ETG4 is the applicant's response to ETG3.

[10] Meanwhile, I then determined and appointed the 1st day of September, 2006 as the hearing date for the 2nd application. This fact was, I believe, communicated by the Registrar to Counsel.

[11] On the 29th day of August, 2006 ETG4 was brought to my attention by the office of the Registrar and after considering the contents thereof, immediately instructed counsel to attend at my chambers which they did the following day. There, I explained to Counsel the administrative history of the matter and my involvement therein as stated above. The administrative history related purely and simply to and on the issue as to which judge should be allocated to hear the case and the reasons for the Registrar's or the learned Acting Chief Justice's choice of one judge instead of any of the other judges of the High Court.

[12] In my meeting with Counsel, I informed them that;

(a) I would rather have Maphalala J deal with the issue of whether or not he was disqualified from hearing the matter. I further pointed out to counsel that, it was, in my view, incorrect to suggest that Maphalala J was seized with the 2nd Application and therefore he should either recuse himself from hearing it or hear it himself to the exclusion of the other judges.

(b) As it was common cause, I had been the 2nd judge, to be

allocated to the 2nd application.

(c) Maphalala J had been allocated to the 2nd application upon his return from Zambia at my suggestion after my consultation with my colleagues.

(d) In view of the controversy contained in the 3 letters referred to above, if after consultation, another judge other than myself is allocated to the case, it might not proceed on the 1st as that was a date arranged by myself and may not be suitable to the new judge.

(e) I would, that same day be engaging my fellow judges, including Maphalala J in an attempt to persuade them that Maphalala J must, in open court decide whether or not he is disqualified from hearing the second application. These facts are common cause and were known to Counsel before the filing of the recusal application.

[13] Present in the meeting in my chambers on the 30th August, 2006 was Messrs Magagula & Hlophe for the applicant, Mr Henwood for the **Ist**_7th Respondents, Mr Mabila for the 8th Respondent and Gcebile Dlamini, a Clerk in the Registrar's Office.

[14] Upon consultation with the Acting Chief Justice and Maphalala J, it was determined that Maphalala J would hear the issue of his recusal or disqualification in court on the 1st day of September. On that day, Maphalala J recused himself from the matter and I was again, for the 3rd time allocated to hear the 2nd application and it was, on that day set-down for hearing before me on the 11th October 2006. What followed was the recusal application, after due notice to me in Chambers by the applicant's attorneys.

[15] The applicant's grounds for my recusal are as follows, and I quote these verbatim as contained in the applicant's founding affidavit;

> "12. On reading the request by the **Respondents** to the honourable Chief Justice and the one-sided manner in which it was written, it became patently clear to the **Applicant** that if the letter was given to any of the Judges, it may reasonably affect their partiality in dealing with he matter.
>
> 13. Furthermore, the request by the **Respondents** and its grant

by the Acting Chief Justice without hearing the **Applicant** was not in accordance with legal principle and further confounded what was already a polluted atmosphere created by the letter from the **Respondents.**

14. The facts, **in casu,** demonstrate that there were actions and events which give rise to **Applicant** reasonably apprehending that His Lordship Justice Mamba may not be able to objectively and impartially adjudicate upon the dispute for the following reasons:

14.1 the **Respondents'** attorneys in their request to have Justice Maphalala removed from hearing the matter had indicated that they would prefer the matter to be heard by **"Justice Mamba or any other Judge."** Indeed the acting Chief Justice granted their request as suggested and motivated by the **Respondents'** Attorneys' letter requested the honourable Acting Chief Justice to allocate the matter to his Lordship Justice Mamba and indeed the request was granted. It is clear that his Lordship Justice Mamba was preferred choice of the Respondents' attorneys.

14.2 When he called the attorneys in chambers, Justice Mamba indicated his uneasiness about the letters and that the matter (resulting in his appointment therein) had not been handled properly.

In fact the matter was subsequently reallocated to Justice Maphalala who then recused himself on the basis of having read the letters, which Judge Mamba had also read.

14.3. As things stand, the position is as per the request of the **Respondents'** attorneys in their letter that they would prefer the matter to be heard by Justice Mamba who however had himself noted it was not appropriate for him to hear the matter in view of the contents therein.

14.4. I am advised that his Lordship Justice Mamba also made

suggestions to the Acting Chief Justice that the name of the Judge who will hear the matter be not disclosed and this was a process which, the **Applicant** has always complained about because it was not given a hearing and the decision was made on the basis of allegations by the **Respondents'** attorneys. It is common course that the Acting Chief Justice indeed did not disclose in his letter granting the request, who the Judge to hear the matter was.

15. I respectfully submit that the **Applicant's** apprehension that his Lordship may not decide the matter impartially is reasonable and grounded on facts that are true. The Applicant apprehends that it may not receive justice. It is important for litigants not only to have justice done but to see it being done as the adage goes that **justice must not only be done but to be seen to be done.** The Applicant will not see justice being done if his Lordship hears the mater in a situation whereby he was the preferred choice of the Respondents' attorneys and the request to him being allocated the matter was decided in the absence of the Applicants' representatives and without them being given an opportunity to make representations.

16. The **Applicant,** as a litigant has approached the fountains of Justice and it is entitled to ask for the recusal of his Lordship if it has a reasonable perception that he may not be impartial in determining the dispute. If the **Applicant** folds its arms it will have acquiesced and lost its right which it possesses in law and by virtue of the **Constitution of Swaziland Act No. 001 of 2005.**

17. The **Applicant** has set out a well-grounded basis for seeking the recusal of his Lordship. The **Applicant** is not being vexacious or frivolous in seeking the recusal but has set out a basis for its apprehension that his Lordship may not bring an objective mind to bear in determining the dispute.

18. The **Applicant** has no reason to question the integrity of his Lordship Justice Mamba and have the utmost respect for his office but the circumstances are such that they give rise to a reasonable apprehension that owing to the facts of the present case, his Lordship may not bring a impartial mind to bear on the issues before him."

[16] The application is founded or based on one or more of the following three (3) grounds or complaints, namely :

(i) ETG 1 was irregularly included in the court file and the contents thereof are prejudicial to the applicant's case. The prejudicial contents are known to me or because of my knowledge thereof I, in the eyes of the right-thinking person, would not be able to adjudicate the matter fairly and impartially.

(ii) The respondents applied to the Acting Chief Justice, in the absence of the applicant, that I be allocated to the case instead of Maphalala J. In other words, I am their preferred or favoured judge &

(iii) I took part in having Maphalala J removed from hearing the case and that I be allocated to hear it.

In summary form, these are the grounds of the applicant's application, as I understand them and as articulated and amplified by Mr Magagula for the applicant during submissions.

[18] I reproduce herein the terms of ETG1 in full :

23rd August, 2006

"Dear Sir

RE : SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY LIMITED / PAUL FRIEDLANDER & SEVEN (7) OTHERS

1. As you know the above application was on 11 August 2006 postponed for finalization on 28 August 2006. In postponing the matter on 11 August 2006, Matsebula J requested the attorneys for the parties to approach the Registrar to arrange a Judge to hear the matter on the basis that the allocated Judge would be given sufficient time to acquaint himself with the voluminous papers file of record in the main application. The directive of Matsebula J was complied with and the Registrar informed us that Mamba J had been allocated to the matter and that he would hear the matter if not on 28 August 2006, most certainly would be in a position to hear the matter during the week commencing on 28 August

2006. After so having been informed, it appears that the Judges of the High Court deliberation were to the view that it would be practical and convenient that Maphalala J be allocated for the hearing of the matter as he was well acquainted with the voluminous papers filed of record in the main application and as such it would not necessitate him having to acquaint himself *de novo* with the contents thereof. In consequence of the deliberations referred to herein, our respective offices were informed that the matter would no longer be heard by his Lordship Mr Justice Mamba, but by his Lordship Mr. Justice Maphalala.

15.1 With regard to the allocation of the matter to Maphalala J we record that, already, on 11 August 2006, Adv Smith informed you that, while the Respondents had no preference with regard to any specific Judge, the Respondents would object if the Registrar allocated Judge Maphalala to hear the matter. The writer, Mr Mabila and yourself were specifically requested to convey the Respondent's sentiments to the Registrar so as to ensure that Maphalala J would not be allocated to the matter. The request so directed to the attorneys by Adv Smith was further based on the premise that if the matter was to be allocated to Judge Maphalala, this could entail a further delay in the finalization of the matter in that it may become necessary for the Respondents to ask his Lordship to recuse himself from the matter. Contrary to the views of your Mr Magagula, the Respondents are desirous of having this matter disposed of as soon as is possible as any further delay in the finalization thereof is not in the interest of any of the parties involved. In amplification of what is stated herein, your office is already in possession of a letter addressed by the Respondents to the Honourable Judge President of the Supreme Court requesting him to constitute an appeal court for the urgent adjudication of the Respondents' appeal.

15.2 In order that your client's present application can be disposed of in the week commencing on 28 August 2006,we

have considered it prudent that the Respondents' objections to the appointment of Maphalala J as the presiding judge in the application be addressed to the Chief Justice. For the sake of transparency, a copy of the letter so addressed to him is attached hereunto, marked 'A'. The said letter will be delivered to the Chief Justice simultaneously with the delivery of this letter to you. Lastly we wish to record that the Respondents have the utmost respect for Justice Maphalala and his office and the request addressed to the Chief Justice must in no way be construed as derogating from our client's respect for him. We would also like to record that the Respondents do not have a preference for any other Judge and we have requested the Honourable Chief Justice to allocate any Judge to the matter, save for his Lordship Mr Justice Maphalala, for the reasons set out in the attached letter.

Yours faithfully

E J HENWOOD

22nd August 2006

Dear Judge

RE : APPLICATION BY SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY FOR LEAVE TO EXECUTE THE JUDGEMENT AND ORDER OF MAPHALALA J DATED 19 JULY 2006 NOTWITHSTANDING THE NOTING OF AN APPEAL

15.3 This firm, and more specifically he writer hereof, acts on behalf of the first to seventh respondents in an application by Swaziland Industrial Development Company Limited ("the applicant") for an order granting the Applicant leave to execute the judgement and order granted by his Lordship Mr Justice Maphalala ("Maphalala J") on 19th July 2006 ("the judgement") notwithstanding the noting of an appeal against the judgement.

15.4 Mabila Attorneys act on behalf of the eight respondent. The eight respondent supports this approach to you.

15.5 Magagula & Hlophe Attorneys represent the applicant.

4. The application was served on our offices on 7th August 2006. In terms of the notice of motion, the respondents were called upon to-

15.6 give notice of their intention to oppose the application on or before noon on 8 August 2006; and

15.7 file their answering affidavits by 09.00 on 10 August 2006

The application was enrolled for hearing at 14.15 on 11 August 2006.

5. Shortly before the hearing of the application was due to commence, counsel representing the parties were summoned to the chambers of His Lordship Mr Justice Matsebula ("Matsebula J"). Matsebula J advised counsel -

15.8 that he had not had sufficient occasion to consider the application; and

15.9 in any event, that the (Friday) afternoon session would be hopelessly inadequate to entertain a hearing of the application.

Accordingly - and after some debate - the learned judge ordered that the application be postponed to 28 August 2006 and that the wasted costs occasioned by the enrolment of the application in the manner described above be reserved for determination by the learned judge hearing the application.

15.10 Subsequent to the order referred to above, it was agreed between the writer, Mr Mabila and Mr Magagula (for the applicant) that your Registrar would be approached to arrange a judge for the hearing of the application so that the allocated judge could timeously be favoured with the papers. Counsel representing the respondents made it clear - already at this stage - that Maphalala J could not hear the application and if the application indeed was to be allocated to him the respondents would object. In this regard, we refer to the self-explanatory letter addressed by the writer to Mr Magagula, annexed hereto as annexure "A". Mr Magagula did not take issue with the views expressed by counsel

for the respondents.

15.11 During the course of discussions between counsel and Matsebula J, the learned judge was informed by counsel representing the respondents that they (the respondents) intended approaching the Honourable Judge President of the Supreme Court of Swaziland with the request that an appeal tribunal be constituted as a matter of urgency. The proposal found favour with and was supported by Matsebula J.

15.12 We annex hereto, as annexures **"B"** and **"C"** respectively, true copies of the written communications that have been directed by the first to seventh and the eight respondent to the Honourable Judge President of the Supreme Court of Swaziland in this regard. The background to and the nature of the litigation between the parties are fully canvassed in the aforesaid written communications.

15.13 This office was advised by your Registrar that the application would be heard (on 28 August 2006) by his Lordship Mr Justice Mamba ("Mamba J"). Shortly after having been advised that the application would be heard by Mamba J, writer was advised that Mamba J would be unable to deal with the application on the allocated date by reason of the fact that he required an opportunity to properly consider the voluminous papers in the application. (We interpose to point out that the applicant has seen fit to incorporate - by express reference all the papers in the main application into the present application. We deal with this aspect more fully below.) Writer was advised that Mamba J would advise in due course on 3 alternative dates for hearing of the application. Having been advised of the aforesaid, writer communicated the advises that he had received to counsel representing the respondents and requesting them to no longer keep themselves available for the hearing of the application on 28 August 2006. They (Counsel representing the respondents) were advised by writer that they would, in due course, be advised of the dates proposed by Mamba

J-

15.14 Writer has now been advised by your Registrar that the application will indeed proceed on 28 August 2006 and that same will be heard by Maphalala J.

15.15 It is our considered and respectful view that it would be inappropriate, unjust and inequitable if indeed the application was to be considered and determined by Maphalala J.

15.16 One of the fundamental requirements to be considered in the application is the prospect of success on appeal. This is an issue that, of necessity, will have to be considered by an impartial judicial officer. Maphalala J, as mentioned above, has already considered the arguments advanced on behalf of the respondents in the main application and has already made a finding that is presently the subject matter of (as also mentioned above) an appeal to the Supreme Court of Swaziland.

15.17 In arriving at the conclusion which he did, Maphalala J. simply ignored a number of fundamental arguments raised by the respondents. So, for example, His Lordship simply disregarded and ignored the argument advanced by the eight respondent - a *bona fide* third party - that neither the applicant nor the fourth respondent could, by reason of the provisions of article 92 of the fourth respondent's Articles of Association and Section 72 of the Companies Act of Swaziland, escape the consequences of the agreement concluded between it and the fourth respondent. Article 92 of the fourth respondent's Articles of Association

reads as follows:

> "*92. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director*"

15.18 It is highly unlikely, if not entirely inconceivable, that Maphalala J will, when considering the same questions previously considered by him, come to a different conclusion. Accordingly, it is the respondents' view that they will not receive an impartial hearing if the matter were, once again, to be determined by Maphalala J.

15.19 In further amplification of what is stated above, we are of he respectful view that -

15.20 Maphalala J cannot sit as a judge of appeal on his own judgement;

15.21 Unlike an application for leave to appeal (where the test is whether there is a reasonable prospect that another court may come to a different conclusion) the test in this application is whether there is a reasonable prospect of success on appeal. In order for the learned judge to come to his conclusion he, of necessity, must find that his judgement was wrong;

15.22 Unlike an application for leave to appeal (where one has the further remedy - if the application was to be unsuccessful -to petition a higher court) any finding in this application would be final and definitive and because of its interlocutory nature, not subject to appeal;

15.23 Mr Magagula for the applicant has already indicated that the "attack"on Maphalala J's judgement borders on being contemptuous of court. Whilst this allegation is strenuously denied, it is indicative of the harsh criticism that will in due course be leveled at the judgement of Maphalala J. Counsel for the respondents are justifiably uncomfortable in having to do so in person to the judge involved. Counsel for the respondents hold Maphalala j and his office in high esteem, but are at the same time obliged to do justice to the case of their clients;

15.24 Maphalala J made numerous credibility findings (on affidavit) against the respondents, such as that they acted in bad faith and in breach of their fiduciary duties. Bearing in mind that he has a discretion in this matter, it would be manifestly unfair if he was to be called upon to exercise such discretion in the respondents' filing of the appeals. It is inconceivable that Maphalala J would be able to undertake such an enquiry objectively and impartially. In fact, it would be unfair to him to ask him to divorce his mind from his previous findings.

16. In view of the aforesaid, we respectfully request you to reconsider your direction that the application be heard by Maphalala J. We would urge you to direct that the matter indeed by heard by Mamba J (or any other judge) at a time convenient to the learned judge.

Yours faithfully

B J HBNWOOD

[19] Before turning to the law applicable to this application, I should note that I pointed out to Counsel in my Chambers on the 30th August, 2006 that it would not be appropriate for me to decide or determine whether Maphalala J was disqualified from hearing the 2nd application or not. I did not, as the applicant states in 14.3 of its founding affidavit (by E.T. Gina) say to Counsel that it would not be appropriate for me "to hear the matter in view of the contents therein". This is a serious factual inaccuracy. It suggests that I had in fact recused myself in Chambers even before Maphalala J recused himself. It is false.

[20] I turn now to the law relevant to this application and the leading cases thereon.

[21] The basic and fundamental principle of our law is that a person who seeks justice before a court or tribunal must be afforded a fair trial by an independent and impartial adjudicator. An adjudicator who is bias in favour of or against one party to the dispute is not impartial. This principle is founded on the rules of natural justice, one of which is that no man ought to be a judge in his own cause. The principle obtains irrespective of whether or not it is specifically provided in a constitution. It is a basic tenet of justice and fairness.

In **METROPOLITAN PROPERTIES CO. (F.G.C) LTD VS LANNON AND OTHERS [1968] 3 ALL E.R. 304 (C.A) AT 309-310D (LORD DENNING, M.R.)** stated that:

> "A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject matter. Second, "bias" in favour of one side of [or] against the other. So far as "pecuniary interest" is concerned, I agree with the Divisional Court that there is no evidence that Mr John Lannon had any direct pecuniary interest in the suit. He had no interest in any of the flats in Oakwood Court. The only possible interest was his father's interest in having the rent of 55, Regency Lodge reduced. ...It is neither direct nor certain. It is indirect and uncertain.

> So far as bias is concerned, it was acknowledged that there was no actual bias ...and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of **Lord Hewart, CJ., in R v Sussex Justices, Ex p. McCarthy (6)** [that] ;
>
> "...it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done."

In **R v Barnsley County Borough Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association (7), Devlin, L.J,** appears to have limited that principle considerably, but I would stand by it. It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision can not stand. ...There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

And referring to the phrase or term real likelihood of bias **EDMUND DAVIES, L-J IN METROPOLITAN PROPERTIES (SUPRA) at 314B-E** stated that;

> "It is used to show that it is not necessary that actual bias should be proved. It is unnecessary ...to investigate the state of mind of each individual justice. Real likelihood depends on the impression which the court gets from the circumstances in which the justices were sitting. Do

> they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing. ... The matter must be determined on the probabilities to be inferred from the circumstances in which the justices sat."

And in **R v GOUGH (1993) 2 ALL ER 724 HL at 737a-739a**
quoted with approval in **MINISTER OF JUSTICE & CONSTITUTIONAL AFFAIRS v STANLEY WILFRED SAPIRE (CIV. APPEAL 49/2001)** unreported [judgement delivered on 10/6/02) to which I was referred in Argument by Mr Magagula ; **LORD GOFF OF CHIEVELEY** held that.

> "In conclusion, I wish to express my understanding of the law as follows: I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias. ...Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court 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. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him...."

What emerges from the above is that, the onus of proof rests on the applicant. The applicant need not allege or prove actual bias. It is sufficient that the applicant establishes a real likelihood of bias or a reasonable apprehension of bias or apparent bias or the appearance of bias or a danger of bias. All these phrases seem to refer to the same concept or notion or nature of the required

bias where it is not actual.

The apprehension or fear of bias must be held by a reasonable or right-minded person and must itself be reasonable. This is what is generally referred to as the double requirement of reasonable test.

In Sapire's case (supra) the court of appeal quoted with approval the judgement of the Constitutional Court in South Africa and paragraph 48 where the court laid down the proper approach to recusal in the following terms:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of Counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on a part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

In **R v RADEBE, 1973 (1) SA 797 at 812G** reference is made to the following excerpt from **VOET 5.1.46** (Gane's translation) which appears to support the above text or approach of the Courts in assessing the nature of the bias regarding judges:

> "Trivial reasons insufficient for recusation - Otherwise however no favour should be shown to trivial and foolish reason for suspicion, such as are now and then found to be set up either in malice or thoughtlessness. It seems that we should rather believe that those who are bound by a sworn or tested loyalty and have been raised to the function of judging for their eminent industry and dignity, will not so readily and for such

> slender causes depart from the straight path of justice and give judgement in defiance of their own inner sense of duty."

Applying the above principles to the facts herein one immediately notes that I was allocated to hear the 2nd application by the Registrar of this court after it had been postponed to the 28th August, 2006 by Matsebula J. I had to hear it simply because it fell on a day on which I was the duty judge and because it was brought on an urgent basis, as duty judge that week, I had to hear it. Counsel were all informed of this fact. When it later transpired that the matter would now be heard by Maphalala J, the Respondents voiced their objections to the Acting Chief Justice and suggested that the matter be heard by me "or any other judge" of the High Court. This can not, in my judgement be viewed as the respondents' preference for one judge over another judge. It was nothing more than an objection to the matter being heard by Maphalala J and such notice of objection had been given verbally by the respondents' Counsel to the applicant's attorneys immediately after the matter was postponed by Matsebula J. (see paragraph 6 of ETG1 paragraph 3.9 of the 1st to 7th Respondents' Answering affidavit at page 54 of the Book of Pleadings).

I refer also to the last sentence of ETG1 at page 26 where the respondents' attorneys say :

> "We would also like to record that the respondents do not have a preference for any other judge and we have requested the Honourable Chief Justice to allocate any judge to the matter, save for his Lordship Mr Justice Maphalala, for the reasons set out in the attached letter."

It can not be made too clear that one of the reasons why Matsebula J postponed the case on the 11th August was because he had not had sufficient time to read all the bulky court record. When the Acting Chief Justice decided to remove the matter from Maphalala J and allocate another judge to hear it, I was the only judge, other than Maphalala J, who had studied the application and therefore better placed to here it. The removal of the case from Maphalala J by the Acting Chief Justice on the request or application of the respondents was without my participation or involvement. Even assuming for the moment that I was the judge openly preferred by the respondents, why a reasonable man would ever fear or even think or suspect that I would, armed with that

knowledge, deal with the application in any manner other than a fair, impartial and dispassionate way, is beyond my ken.

The suggestion, or even insinuation that I acted irregularly or to the apparent prejudice of the applicant in accepting to be reallocated to hear the 2nd application by the Acting Chief Justice with my knowledge of the contents of ETG1, is without any merit or justification. The suggestion or apprehension of bias or partiality is unreasonable. No reasonable, informed and objective person would apprehend that I would not bring an impartial mind to bear on the determination of the case.

[31] The second leg of the application is that the contents of ETG1 are prejudicial to the applicant's case and were brought to my knowledge irregularly and I can not disabuse my mind of those allegations made in ETG1.

[32] In essence the applicant complains that the Respondents have irregularly revealed or disclosed to me their criticism of the judgement by Maphalala J and this criticism is prejudicial to the applicant's case. The allegation is further that, no reasonable man would ever think that I would

> "in any event dismiss it entirely from my mind in considering the case." **(LORD DENNING, M.R., IN MASON V MASON AND OTHERS [1965] 3 ALL E.R. 492 (C.A.).**

[33] One of the factors to be considered by the court in the second application is the issue of the prospects of success on appeal. This necessarily requires an examination or evaluation of the merits of the main application, the judgement of Maphalala J herein, the Respondent's grounds of appeal and heads of argument.

[34] In ETG1 the respondents have set out some of its criticisms of the judgement of Maphalala J and argue that it would be unfair to the Honourable Judge to be subjected to a criticism of his own judgement by the respondents, as this would be inevitable if he were to hear the 2nd application. Moreso, in presenting its argument on the issue of the prospects of success on appeal before Maphalala J, the respondents would be virtually asking Maphalala J to reconsider or re-evaluate his own judgement and to come to a different

conclusion and this "is highly unlikely" and it would be expecting Maphalala J to "sit as a judge of appeal on his own judgement". I have my doubts about the correctness of this assertion and I say no more about it.

[35] The alleged revelations or disclosures by the respondents are in fact not disclosures or revelations at all. They disclose or reveal no new evidence or material. The material is purely a matter of argument based on the law and the evidence that was available to my Brother in the main application. It is nothing other than (prospective) argument that is to be used in support of the respondent's submissions that there are reasonable prospects of success in its appeal. This argument is repeated in the Respondent's opposing affidavit and, unless of course later abandoned, one would expect it would be contained in the Respondents' heads of argument to be handed in and read by the judge before the actual hearing of the 2nd application. Again, the material complained of, if it be categorized or characterised as revelations or disclosures, discloses or reveals the Respondents' evaluations, views or opinions of the outcome of the main application and nothing more. Accepting being the judge allocated to hear the 2nd application notwithstanding my knowledge of the Respondents' views contained in ETG 1, can not, by any stretch of the imagination be construed by any right-minded person as an endorsement or acceptance of the views of the Respondents on the issues under consideration.

[36] There was no prejudice, actual or potential suffered by the applicant. I may add here that, in matters such as the present case, a judge faced with an application for leave to execute may well properly enquire from counsel why such an application should not be heard by the judge who heard the main application. Of course this enquiry by the judge would be made in the presence of all the parties concerned. And if an explanation or objection similar to ETG1 was given to and accepted by the judge, such acceptance of the explanation would never be construed as an element of bias on the part of that judge in favour of or against any of the litigants. The explanation and his knowledge thereof would not decide any point in issue in the application for leave to execute.

[37] It is my considered view that there is no merit whatsoever in the

application for recusal. The alleged or perceived bias, is contrived, imagined and totally misconstrued by the applicant. It is the unwholesome apprehension of an unreasonable person. No right-minded individual would ever harbour or entertain such thoughts. I have no doubt whatsoever that the reasonable, objective and informed person would have no doubt that the parties herein will have a fair and dispassionate hearing before me or any judge in my position or under similar circumstances. The applicant's apprehension or fear of bias is unreasonable or is not shared by the reasonable person.

[38] For the aforegoing, I dismissed the application for my recusal from hearing the 2nd application and ordered that it should be heard by me as determined by the Registrar on the 1st day of September, 2006.

[39] I note in parenthesis that, as a general rule of practice and legal ethics, an application for the recusal of a judicial officer from hearing a certain matter is not a light issue. It must be done formally and transparently. It must, as a general rule, be made before the officer whose recusal is being sought after due notice to such officer. The applicant followed this procedure in its application for my recusal. The respondents did not do so in their objection or application for the recusal of Maphalala J.

[40] Reference to respondents in this judgement excludes the eighth ^ respondent.

MAMBA, AJ