



**INDUSTRIAL COURT OF APPEAL OF ESWATINI**

**JUDGEMENT**

Case No.15/2021 C

In the matter between

**ESWATINI DEVELOPMENT AND  
SAVINGS BANK**

Applicant

**And**

**SWAZILAND UNION OF FINANCIAL  
INSTITUTIONS & ALLIED WORKERS**

1<sup>st</sup> Respondent

**SANDILE MAMBA**

2<sup>nd</sup> Respondent

**KWANELE VILANE**

3<sup>rd</sup> Respondent

In re:

**SWAZILAND UNION OF FINANCIAL  
INSTITUTIONS & ALLIED WORKERS**

1<sup>st</sup> Appellant

**SANDILE MAMBA**

2<sup>nd</sup> Appellant

**KWANELE VILANE**

3<sup>rd</sup> Appellant

**And**

**SWAZILAND DEVELOPMENT &  
SAVINGS BANK**

1<sup>st</sup> Respondent

**NOZIZWE MULELA N.O**

2<sup>nd</sup> Respondent

**Neutral citation** Swaziland Union of Financial Institutions & Allied Workers and 2 Others vs Swaziland Development & Savings Bank and Two Others (15/2021) 15/2021 C [2021] SZICA 5 (2021)

**Coram:** MAZIBUKO JA, NSIBANDE JP, NKONYANE JA

**Heard:** 17<sup>th</sup> December 2021

**Delivered:** 20<sup>th</sup> May 2022

*Summary:* APPLICATION FOR COURT TO RECUSE ITSELF.

- i) *The test for recusal of a Court from a case before it is : whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Court 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 submission of counsel.*
- ii) *The application must be based on reasonable grounds – supported by facts.*

*Held:* Application for recusal is based on unreasonable grounds viz; hearsay evidence, contradictory allegations, dishonest submissions and ulterior motive. The Applicant has failed to act like a reasonable, objective and informed persons. Application for recusal dismissed with costs.

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**JUDGEMENT ON APPLICATION FOR RECUSAL**

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**THE PARTIES BEFORE COURT**

1. The Applicant is Eswatini Development and Savings Bank, a financial institution established in accordance with the laws of the Kingdom of Eswatini (hereinafter referred to as the bank). The Applicant has capacity to sue and be sued.
2. The 1<sup>st</sup> Respondent is Swaziland Union of Financial Institutions and Allied Workers, a trade union duly established in accordance with its constitution (hereinafter referred to as the union). It is common cause that the union has capacity to sue and be sued.
3. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents are Mr Kwanele Vilane and Mr Sandile Mamba, who each concluded a contract of employment with the bank. For the sake of convenience the 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall be referred to as the employees.
4. The present matter is a sequel to 2 (two) Court matters, viz; one from the Industrial Court registered as SZIC case no. 292/20 and another before this

Court which (for the sake of convenience), shall be referred to as SZICA case no. 15/2021A.

#### SZIC CASE NO 292/20 BEFORE THE INDUSTRIAL COURT

4.1. About the 28<sup>th</sup> October 2020 the Industrial Court heard an application that had been brought under a Certificate of Urgency and registered as SZIC case no.292/20. The union and the employees were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants respectively. The bank was 1<sup>st</sup> Respondent. A certain Dumase Nxumalo was cited *nomine officio* as 2<sup>nd</sup> Respondent.

4.2 The union and the employees had prayed for relief before the Industrial Court as follows:

“1. *That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis.*

2. *That a rule nisi be and is hereby issued calling upon the Respondents to show cause why:*

2.1 *An order should not be issued temporarily stopping the disciplinary hearing against the 2<sup>nd</sup> Applicant scheduled for the 29<sup>th</sup> October 2020 pending finalization of the present application before the above Honourable Court.*

*2.2 The rule nisi issued in terms of prayer (2.1) above operates with immediate interim relief and be returnable on a date and time to be determined by the above Honourable Court.*

- 3. That an order be and is hereby issued declaring that the written decision issued by the 2<sup>nd</sup> Respondent effectively denying that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants be represented by the 1<sup>st</sup> Applicant in their on-going disciplinary hearing is wrongful and unlawful.*
- 4. That an order be and is hereby issued declaring that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants have a Constitutional right in terms of Section 32(2) (a) and (b) to join the 1<sup>st</sup> Applicant and thereafter to be represented by the said union in any disciplinary proceedings in accordance with the collective agreement entered into between the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Respondent.*
- 5. Costs of Application against the 1<sup>st</sup> Respondent.*
- 6. Further and/or alternative relief.”*

(Record SZICA case no.15/2020A pages 5 – 6)

- 4.3 The application (SZIC 292/20) was opposed. The bank filed its opposing papers and the matter was argued. The Industrial Court issued an Ex Tempore ruling in which it dismissed the application.*

SZICA CASE NO 15/2020A

5. The union and the employees appealed the Ex tempore ruling of the 28<sup>th</sup> October 2020, which the Industrial Court had delivered. The appeal was registered under SZICA case no 15/2020A. The Court will refer to both the union and the employees as appellants.

APPEAL BEFORE INDUSTRIAL COURT OF APPEAL ON 18<sup>TH</sup> MAY  
2021

6. The appeal was placed before the present bench of the Industrial Court of Appeal for argument on the 18<sup>th</sup> May 2021.

- 6.1 When the matter was called, the bank's attorney raised a point of law to the effect that the appeal had been overtaken by events and was therefore moot and should be struck off the roll. The bank's attorney relied on his heads of argument as the basis for his argument.

- 6.2 The appellant's attorney argued that there was a live matter on appeal which should be determined by Court. There was therefore a dispute before Court based on the argument that was advanced by the bank's attorney; on whether or not the appeal was moot. The Court found that there was a live appeal before it which deserved to be heard. The Court ordered that the appeal should proceed to be argued on its merits. The details regarding this aspect of the case

are documented in another decision of this Court which is yet to be delivered.

6.3 The Court noted that the written reasons- in support of the decision which the Industrial Court had delivered Ex Tempore, on the 28<sup>th</sup> October 2020, had not been filed in the appeal record. Those reasons were relevant for the determination of the merits of the appeal that was before the present Court. Consequently, the present Court directed that the written reasons should be filed before the appeal is heard on the merits.

6.4 The attorney for the appellant informed this Court that the Industrial Court had eventually issued the awaited written reasons. He mentioned also that he had taken a quick glance at that document and noticed that the written reasons (referred to as a Ruling) addressed new issues which the Industrial Court had not mentioned in its Ex Tempore ruling. The learned attorney mentioned that he needed time to study the written reasons and that he would also need to amend his papers in order to address the new issues that had allegedly been mentioned for the first time in the written reasons.

- 6.5 This Court concluded that it would be fair that the bank's attorney should also be given access to the written reasons for the Ex Tempore ruling of the Industrial Court. Each of the attorneys was expected to study the reasons and then decide whether or not to amend its papers or supplement its submissions.
- 6.6 The assertion by the appellants' attorney that: the written reasons contained new issues which had not been mentioned when the Ex Tempore ruling was delivered, made it even more imperative that the learned attorneys be given time to amend their papers and/or supplement their submissions.
- 6.7 The matter was adjourned to the 2<sup>nd</sup> June 2021 in order to give the attorneys time to study the aforesaid written reasons and to decide on the next course to take. The Court also needed time to study the written reasons since they form the basis for the appeal.

#### APPEAL BEFORE COURT ON 2<sup>nd</sup> JUNE 2021

- 6.8 The matter was called again on the 2<sup>nd</sup> June 2021. The Appellants' attorney indicated that he had exhausted his argument on the 18<sup>th</sup> May 2021 and expected a ruling on the point of law afore – mentioned. The bank's attorney also indicated that he had nothing else to add even after receiving the written reasons from the



Industrial Court. The learned attorney added that he also awaited a ruling from this Court on the said point of law.

6.9 Prior to the 2<sup>nd</sup> June 2021 the Court had not been notified that; after the attorneys had studied the written reasons from the Industrial Court, each had decided neither to file supplementary papers nor present further submission. The Court acknowledges that the learned attorneys had acted within their right in the decision each had taken – as aforestated. However their conduct took the Court by surprise. It appears that learned attorneys expected the Court to prepare a ruling in advance even before the Court had been informed that each of the attorneys had no further submissions to present or supplementary papers to file. Meanwhile the Court had expected each of the attorneys to refer to the written reasons (for the Industrial Court’s Ex Tempore ruling), in support of their submission, since it was that ruling and its reasons that was subject of appeal.

6.10 It would have been irregular for this Court to prepare a ruling in advance, particularly on the point of law (that had been argued by the learned attorneys) – while there was still a possibility that the attorneys could file supplementary papers or present additional

submissions. Court procedure and common sense require that the Court should allow the attorneys to file the necessary pleadings and exhaust their argument or submission before the matter is ready for judgment or ruling.

6.11 When the Court was informed that the attorneys had exhausted their argument and completed the filing of papers in Court (namely on the 2<sup>nd</sup> June 2021), it is then that the Court became seized with jurisdiction to determine the point of law that the bank's attorney had raised. The matter was postponed to the 24<sup>th</sup> June 2021 inter alia, for the Court to consider the submissions made by the attorneys.

6.12 In the founding affidavit of Ms Thembi A Dlamini (dated 14<sup>th</sup> October 2021 and filed in the recusal application), she boldly stated that on the 2<sup>nd</sup> June 2021 the Court had forgotten its obligation to deliver its ruling. An excerpt of the founding affidavit reads thus at paragraph 24:

6.12.1 *“It became apparent at this early stage that the court had forgotten that there had been an argument on the preliminary issues and that it was obliged to hand down a ruling. I refer the Honourable Court to the supporting affidavit of Zwelethu Jele in*

*this respect. The matter was then postponed to 24<sup>th</sup> June for the ruling.”*

(Pleadings SZICA case 15/2021C, page 13)

6.12.2 In order to avoid giving hearsay evidence, Ms Thembi A Dlamini referred to the supporting affidavit of attorney Zwelethu Jele. Attorney Jele did not specifically confirm the allegation made by Ms Thembi A Dlamini as quoted above, but did not dissociated himself from that statement either.

6.12.3 The statement that was made by Ms Thembi A Dlamini concerning the Court (as aforestated) is incorrect and disrespectful to the Court. The Court has explained the reason its ruling (on the point of law), was delivered after the 2<sup>nd</sup> June 2021.

EX TEMPORE RULING DELIVERED – 24<sup>TH</sup> JUNE 2021

6.13. On the 24<sup>th</sup> June 2021 the Court delivered the Ex Tempore ruling. The Court ordered that the appeal is not moot and that it should therefore proceed to argument. Initially the Court had planned to deliver the reasons for its ruling together with the judgment on the merits of the appeal. At that time it appeared convenient to the Court to deliver both decisions at the same time.

6.14 After this Court had delivered its ruling both attorneys indicated that they needed time to make preparation in order to argue the merits of the appeal. The matter was accordingly postponed to 8<sup>th</sup> July 2021.

LEAVE TO AMEND COURT PAPERS GRANTED – 8<sup>TH</sup> July 2021

7. On the 8<sup>th</sup> July 2021, just before argument commenced, the appellants' attorney applied from the bar for leave of Court to amend the Notice of Appeal and to file supplementary heads of argument: this application was in response to the written reasons for the Ex Tempore ruling from the Industrial Court. This Court stated that it expected an application of this nature on the 2<sup>nd</sup> June 2021, for instance, soon after the attorneys had studied the written reasons for the Industrial Court's Ex Tempore ruling. Nevertheless leave to amend and to supplement – as aforementioned was granted with the consent of the bank's attorney. The bank's attorney was also granted leave to file papers in opposition – if so advised. The attorneys were put to time limits

regarding filing of further papers. The matter was postponed to the 23<sup>rd</sup> July 2021.

#### ARGUMENT ON THE MERITS – COMPLETED – 26<sup>TH</sup> JULY 2020

8. On the 23<sup>rd</sup> July 2021 argument commenced but was not completed. The matter was postponed to 26<sup>th</sup> July 2021. Argument proceed on the 26<sup>th</sup> July 2021 and was finalized. Judgment was reserved.
  
9. The drafting of the judgment on the merits of the appeal was the first to be completed. The Court noticed from the draft that, that judgment was lengthy. When the Court was drafting the written reasons for the Ex Tempore ruling (which ruling the Court had delivered on the 24<sup>th</sup> June 2021), the Court noticed that, that draft document was also lengthy. Based on the length or volume of each decision, and in the exercise of its discretion, the Court concluded that its work would be better organized if the reasons for the ruling are contained in a stand-alone document, for instance, separate from the judgment on the merits of the appeal. What had earlier appeared to the Court as convenient was overtaken by reasons of practicality.

- 9.1 When the circumstances of the case permit, the Court may deliver its decision on the point of law, as well as the merits of the case - in one document. Circumstances may change and the Court may consequently find it convenient to deliver each of the aforesaid decisions separately. The fact that the Court has adopted one approach and not the other – does not mean that the Court should be perceived as biased or that it has refused to deliver its decision.
- 9.2. The judgment on the merits of the appeal and the reasons for the Ex Tempore ruling are independent of each other and can therefore be delivered separately. The litigants suffer no prejudice if one decision is delivered after the other.
- 9.3 In this case the Court concluded that justice would be better served if the work of the Court is presented in 2 (two) separate documents in order to avoid a Court decision that is inordinately long and cumbersome to read. The Court exercised its judicial discretion in arriving at that conclusion. There is no prejudice that any of the litigants would suffer if a decision on the merits of the appeal is contained in a separate document from the reasons for the Ex Tempore ruling.

9.4 Secondly, as mentioned earlier the judgment on the merits of the appeal became ready for delivery earlier than the written reasons for the Ex Tempore ruling. The Court delivered that judgment on the 24<sup>th</sup> September 2021. It could serve no purpose to delay delivery of a judgment that was ready for delivery. At that point it was not clear as to when the written reasons for the Ex Tempore ruling would be ready for delivery. It is in the interest of justice that a Court decision should be delivered as soon as it is ready especially where there is no reason to delay delivery of same.

#### CONTEMPT PROCEEDINGS

10. About the 13<sup>th</sup> October 2021 an application was brought before Court by the appellants under a Certificate of Urgency for contempt proceedings against 2 (two) officers namely the Managing Director of the bank (Ms Nozizwe Mulela) and a certain Mr Sicelo M. Dlamini.

#### RECUSAL APPLICATION MOVED FROM THE BAR

11. On the 13<sup>th</sup> October 2021 before the contempt application could proceed, the attorney for the bank moved an application from the bar viz: that the present bench of the Industrial Court of Appeal should recuse itself on the basis that the bench was perceived to be biased.

11.1 The bank's attorney was allowed to motivate his application over bar which was followed by contrary argument from the attorney for the appellants. The Court was not persuaded by the submissions made by the bank's attorney. The Court directed the learned attorney Jele to file a formal application for recusal and time limits were set for filing the necessary affidavits by both attorneys.

#### WRITTEN APPLICATION FOR RECUSAL

11.2 On the 15<sup>th</sup> October 2021 a written application for recusal was filed. The founding affidavit was deposed to by the aforementioned Ms Thembi A Dlamini who referred to herself as – Executive Manager Corporate Services. The supporting affidavit was deposed to by attorney Zwelethu Desmond Jele. The application for recusal was opposed and an answering affidavit was deposed to by Mr Kwanele



Vilane. The bank also filed a replying affidavit. The set of pleadings in the recusal application are identified as SZICA case no 15/2021C, and the contempt application is identified as SZICA case no. 15/2021B.

11.3 The contempt application was filed earlier than the recusal application. The Court however permitted the recusal application to take precedence over the contempt application. Consequently the recusal application was postponed to the 27<sup>th</sup> October 2021 for hearing. The contempt application is still pending before Court.

12. The recusal application was postponed on several occasions until it was argued on the 17<sup>th</sup> December 2021. The grounds that were advanced in support of the recusal application (as stated in the founding affidavit) read as follows:

*“The applicant is concerned, [sic] which is based on a reasonable apprehension in view of the learned judges’ failure to consider and pronounce on (with reasons) preliminary objections that were raised by the applicant in the appeal, as well as the failure to consider and make reference to all the submissions that were made on behalf of the applicant during the course of the appeal hearing.”*

(Pleadings SZICA case no.15/2021C, page 7)

12.1 According to Ms Thembi A. Dlamini this Court failed to pronounce the reasons for the Ex Tempore ruling on the point of law that the bank had raised.

12.2 The second ground was that this Court did not make reference to all the submissions that the bank's attorney had made during the course of the appeal hearing.

12.3 The bank's attorney stated as follows when supporting the founding affidavit:

*“I further confirm that the Industrial Court of Appeal did not provide reasons for holding that there was still a live issue in the matter.”*

(Pleading SZICA case no. 15/2021 C, page 93).

12.4 According to the bank's attorney this Court did not provide reasons for the Ex Tempore ruling which the Court delivered on the 24<sup>th</sup> June 2021.

13. Contrary to the allegations that have been made in the founding and supporting affidavits, this Court has never refused or failed to deliver its written reasons in support of the Ex tempore ruling. There is no indication in both the founding and supporting affidavits as to how exactly did the Court communicate its alleged refusal. For instance, if the Court's alleged

refusal was in writing, the bank should have disclosed that particular correspondence – as proof of the allegation made. Alternatively, if the alleged refusal was oral, the bank should have stated clearly, as to when, how and by whom was the alleged refusal communicated to the bank’s attorney. The absence of evidence indicates that the bank’s accusation is baseless.

13.1 The Court has already explained the reasons it issued a judgment on the merits of the appeal as a separate decision from the reasons for the Ex Tempore ruling.

13.2 When a litigant is concerned that it has not received a judgment or ruling (which in the litigant’s opinion is due or overdue), that circumstance does not mean that the Court is biased or is refusing to deliver the anticipated decision. The concerned litigant is entitled to request the Court to deliver the pending decision or to inquire for reasons for the deferment of that decision. The Court would then be in a position either to arrange a date wherein it would deliver the decision or explain to the litigants, the cause for the delay – that is if there is in fact a delay.

13.3 It is established practice in this jurisdiction, for an attorney to write to the Registrar of Court and politely convey his concern about a

judgment or ruling which (in the opinion of the attorney) is pending delivery. This channel of communication is open to every attorney who has a concern about a particular judgment or ruling. In the matter before Court the bank (duly assisted by its attorney), could have communicated its concern with the Registrar – but it decided not to.

14. In paragraph 26 of the answering affidavit, the deponent (Mr Kwanele Vilane) referred to a letter dated 27<sup>th</sup> September 2021, written by the bank’s attorney, to the Registrar of Court. An excerpt of the letter reads thus:

*“RE: SWAZILAND FINANCIAL INSTITUTION & ALLIED WORKERS ESWATINI BANK & OTHERS – INDUSTRIAL COURT OF APPEAL CASE NO: 15/2020*

- 1. Reference is made to the above caption matter*
- 2. We request a recording with regards to a ruling delivered by the Judge President S. Nsibande on the 24<sup>th</sup> June 2021. The ruling was made on a point of law raised by the Respondent.”*

- 14.1 The aforesaid letter is exhibit KV1 to the answering affidavit. In exhibit KV1 the Court places emphasis on the following words “... a recording with regard to the ruling that was delivered by the Judge President ...”

14.2 In exhibit KV1, the bank's attorney asked specifically for an audio recording of the Ex Tempore ruling. The learned attorney did not ask for the written reasons for the ruling. If the said attorney had a genuine concern for the written reasons for the ruling, he could have written to the Registrar and asked for those reasons as he did in exhibit KV1. Alternatively, the learned attorney could have included a paragraph in exhibit KV1 and inquired about the reasons, as well – but he did not.

14.3 In paragraph 4.4 in the replying affidavit the bank confirmed that the Registrar did comply with the request for an audio recording of the Ex Tempore ruling. Since the bank's attorney had successfully requested for the audio recording from the Registrar the learned attorney could have also inquired from the same Registrar about the written reasons and he was entitled to expect similar co-operation from the Registrar. The conduct of the bank as well as that of its attorney was inconsistent with that of a litigant who was interested in receiving the aforesaid written reasons.

14.4 In paragraph 20.1 of the replying affidavit, the deponent (Ms Thembi A Dlamini) stated that:

*“20.1 The court’s ex tempore ruling was as I have captured it in the founding affidavit, but necessarily make reference to the reasons being contained in the final judgment. There was therefore no need for the applicant to request reasons for the ruling.”*

(Pleadings SZICA case no.15/2021 C page 132)

- 14.5 This evidence indicates clearly that the bank as well as its attorney purposely refrained from making inquiry about a decision in which they were allegedly interested.
- 14.6 When the bank as well as its attorney did not find the written reasons in the judgment that was delivered on the merits of the appeal, it had a right and duty to inquire (through the Registrar)- for the Court’s directive on that particular issue. After an inquiry had been made the bank as well as its attorney – would have been informed and consequently placed in a position where they would draw conclusions that are based on fact as opposed to speculation.
- 14.7 According to the bank it did not receive the written reasons at the time it expected delivery of same. The bank concluded there and then that absence of the reasons has no other explanation except

bias on the part of the Court. Before a litigant can conclude that there is no other explanation, that litigant ought to explore and consider other possible options. In the present case an obvious and reasonable option was to inquire (through the Registrar), about the position concerning the written reasons. The Registrar would have answered the bank's inquiry. The bank would have placed itself in a position to make an informed decision. In the present case the bank's accusation is based on assumption and not evidence. An application or action that has been brought to Court without evidential support, cannot succeed.

14.8 The conduct of the bank and its attorney indicates clearly that its interest is not in receiving the reasons for the ruling but to create a false impression that the Court has failed to deliver the reasons. An application for recusal must be based on fact and not disingenuous allegations.

15. In practice, when a Court is hearing a trial or application; at the end of the hearing the Court may give an indication as to when or how it proposes to deliver its decision. When the court does not deliver its decision on the proposed date or in the proposed manner, an alternative date or method of delivering its decision does not amount to bias or a refusal to deliver that

decision. A change in the circumstances may cause the Court to reschedule its administrative plans regarding a matter before it.

16. While the bank's attorney was making submission on the recusal application, the Court asked him whether he was not interested in having the written reason for the Ex Tempore ruling delivered, since same is ready for delivery. The learned attorney stated that the said written reasons were; pointless, inconsequential and therefore not requested. At that point it became clear that the application for recusal was being used to achieve an ulterior purpose. An attorney who has a genuine expectation of delivery of a Court decision is not expected to show resistance when the Court proposes to deliver that decision.

17. What the bank's attorney is actually arguing is that: once the Court has communicated its intention to deliver its decision on a particular date or in a particular manner, that Court cannot adopt an alternative date or method to deliver that decision. That argument is clearly incorrect in that it equates the Court's administrative function with a Court decision. A Court decision is distinct from the Court's administrative function and that point should be emphasized.



- 17.1 A Court decision is a determination by the Court of the case before it taking into consideration the facts and the applicable legal provisions. On the other hand the exercise by the Court of its administrative function is not concerned with the law or the facts that are applicable to the case but with organizing the work of the Court.
- 17.2 The Court may lawfully delegate some of its administrative function to the Registrar, for instance, corresponding with attorneys. The Court cannot delegate its judicial function viz; to determine a case before it. A variation in the Court's programme relating to its administrative function does not amount to a variation of a Court decision.
- 17.3 In the exercise of its administrative function the Court is entitled to vary a proposal it had previously made, in order to organize or re-organize its work.
- 17.3.1 That variation may be a response to a change in circumstances – which affected the Court's programme.
- 17.3.2 That variation may result in a shift in the date of delivery of the Court's decision backward or forward.

- 17.3.3 The Court retains the power to vary a proposal it has made in the exercise its administrative function provided that the ideals of justice and fairness are not adversely affected.
- 17.3.4 However that variation does not amount to bias or failure by the Court to deliver its decision. The Court would still be obligated to deliver its decision in line with the alternative proposal.
- 17.4 With the use of an example the Court may clarify the point – as shown below.
- 17.4.1 After hearing an urgent application the Court may retire into its chambers in order to prepare an Ex Tempore ruling. The Court may return into the Courtroom and inform the attorneys that the matter is complicated and the Court would therefore need time to consider the issues and would in due course deliver its ruling in writing.
- 17.4.2 It would be correct to say that; in that scenario the Court has changed the method which it had earlier proposed regarding the delivery of its decision. That change became necessary due to a change in the circumstances. However that change does not mean that the Court is therefore biased or has failed to deliver its

decision. The Court has the power to make that variation since it retains control over its administrative exercise.

18. It should be emphasized that the date and method which the Court has proposed for delivering its judgment is not the judgment itself. This is an administrative exercise, within the Court's discretion which is necessary to enable the Court to carry out its work, in an orderly fashion. A change in the Court's administrative function does not mean a change in its decision on the case before it. The Court is entitled to make changes in its administrative function if compelled by a change in the circumstances.
  
19. The bank's argument may be examined from another angle. Assuming an upper Court (with jurisdiction), were to consider the facts of this case and were to find that this Court has failed to deliver its decision (as alleged by the bank), still that upper Court would not thereby conclude that this Court is therefore biased. At best that upper Court would direct this Court to deliver the pending decision within a specified time period. Supposing the upper Court were to issue that order, the bank would be directed to appear before this Court in order to note the delivery of the Court's decision and that is exactly what the bank is avoiding and resisting.

20. The bank has stated through its attorney and by conduct that it is not interested in receiving the written reasons for the Ex Tempore ruling. In order to avoid delivery of that decision the bank has instituted the recusal application. In this case the recusal application is based on an ulterior motive and for that reason it deserves to be dismissed.

20.1 A second ground for the recusal application is the allegation that: this Court has failed to take into consideration (in its judgment on the merits of the appeal), some of the submissions that were made by its attorney. The bank has based its claim solely on the contents of the judgment on the merits of the appeal. The Court's answer to the bank's complaint is two fold.

20.2 Firstly, the Court's decision on the reasons for the Ex Tempore ruling has not been delivered yet. The bank has resisted delivery of that decision – as aforementioned. The bank is therefore challenging a decision which has not been delivered yet. The bank's approach is irregular and contrary to logic.

20.3 Secondly, when the decision of the Court (on the written reasons) is eventually delivered, and assuming the bank identifies an error on that decision, that error would not amount to bias. An error on the part of

the Court (any Court), is not a ground on which a litigant could base a claim for bias. The bank's complaint that this Court is biased or has an appearance of bias, is baseless.

21. The Court has observed that the bank has attempted to introduce new evidence into the record – irregularly and to re-argue the appeal - which is also irregular. The following are examples of the bank's irregular conduct.

21.1 In the Heads of Argument, (dated 22<sup>nd</sup> April 2021), filed in the appeal matter (viz; SZICA case no 15/2021 A), the bank stated as follows regarding its employee – Mr Sandile Mamba (who was referred to as the second appellant).

*“With respect to the second appellant, [Mr Mamba] the disciplinary proceedings have now been completed.”*

(At paragraph 5)

#### A VERDICT ISSUED AGAINST MR MAMBA

21.2 The Court has taken notice of the fact that in the aforementioned quotation, the bank has failed to disclose what the outcome of the

allegedly - completed disciplinary proceedings was. It was strategic for the bank to refrain from disclosing that particular relevant information to the Court.

21.3 In the supplementary Heads of Argument dated 20<sup>th</sup> July 2021 filed in the appeal matter (SZICA case no 15/2020A) the bank stated as follows concerning Mr Mamba:

*“22.1 The second appellant, Sandile Mamba proceeded to the disciplinary hearing ...”*

...

*His disciplinary hearing has been completed and a verdict issued.”*

(Underlining added)

(At paragraph 22.1)

21.4 According to the bank, the disciplinary hearing of Mr Mamba proceeded and had reached the stage of a verdict. In this case, a verdict is a finding by the chairperson or tribunal on whether the accused – employee is guilty or not guilty of the disciplinary charge or charges which he was facing.

21.5 The Court has once again observed that while the bank was willing to make the point that the chairperson had reached a verdict, it was however not willing to disclose what the verdict was. It is however

common knowledge that: in a fair disciplinary hearing, there is always room for the verdict to go either way, for instance, guilty or not guilty. It was again strategic for the bank to present an obviously incomplete submission to the Court.

21.6 The worst case scenario for any employee who has been subjected to a disciplinary hearing is that - he could be found guilty as charged. An employee who is found guilty in a disciplinary hearing - is legally entitled to make submission on mitigation of sentence. Therefore a verdict – even if it is adverse to the employee, does not terminate the contract of employment.

21.7 Assuming the bank's submission was factually correct, viz: that a verdict had been issued at the disciplinary hearing concerning Mr Mamba, that verdict did not have the effect of terminating the employment contract between the bank and Mr Mamba. Mr Mamba was still an employee of the bank even after a verdict had been issued. Mr Mamba was therefore entitled to exercise his rights as an employee including the right to make submission on mitigation. In short, a verdict issued in the course of a disciplinary hearing, is not dismissal.

21.8 The verdict did not deprive Mr Mamba his right to appeal a decision of the Industrial Court – before this Court. Moreover every litigant (including Mr Mamba), is entitled to challenge the decision of the Court a quo to the present Court.

21.9 The learned author; J Riekert stated the legal position regarding a verdict in a disciplinary hearing as follows:

*“... and after a verdict is decided, a penalty should be determined which is appropriate for the offence and the particular employee.”*

RIEKERT J: RIEKERT’S BASIC EMPLOYMENT LAW, 2<sup>nd</sup> edition, Juta (ISBN 0 7021 2916 x) page 106.

21.10 The aforementioned authority has clearly distinguished a verdict from a penalty (or sanction). A penalty invariably follows the mitigation process, and the mitigation process invariably follows a guilty – verdict. The aforesaid authority re-iterates the point that : a person whose disciplinary hearing is at the stage of a verdict is still an employee and can exercise his rights up to the highest Court – that has jurisdiction.

21.11 At the time the Court issued its judgment (dated 24<sup>th</sup> September 2021) it relied, inter alia, on the assurance given in the bank’s written submission that: Mr Mamba’s disciplinary hearing was at



the stage where a verdict had been issued. The extract of the bank's supplementary heads of argument as quoted in paragraph 21.3 of this judgment is self – explanatory. The Court places emphasis on the fact that (according to the bank's submission), Mr Mamba was still an employee of the bank when the appeal was argued.

21.12 A verdict is issued by the chairperson in a disciplinary hearing. The chairperson is not the employer, but a trier of fact. Therefore the chairperson has no power to terminate an employment contract to which he is not a party. A contract of employment can only be terminated by a party or both parties, thereto.

21.13 In the application for recusal which the bank filed on the 15<sup>th</sup> October 2021 (as aforementioned), the bank made the following statement in its founding affidavit concerning Mr Mamba:

*“The disciplinary hearing in respect of Mr Mamba proceeded and culminated in the termination of his services.”*

(Underlining added)

(Pleadings SZICA 15/2021 C, page 11 paragraph 22.1)

21.14 The Court has taken notice of the fact that the bank discloses the fact of the termination of Mr Mamba's services, but strategically

avoided stating the date Mr Mamba's services were terminated. In this case the date of termination of Mr Mamba services is as important as the event itself.

21.15 The founding affidavit in the recusal application was deposed to on the 14<sup>th</sup> October 2021. The allegation that was made in that founding affidavit, viz; that the disciplinary enquiry concerning Mr Mamba “...culminated in the termination of his services” does not appear in both the initial as well as the supplementary heads of argument that the bank had filed. The bank's attorney argued the appeal based on the contents of the bank's heads of argument aforementioned, as well as the record from the Industrial Court. The bank did not amend what it had stated in both the initial and the supplementary heads argument.

#### BANK PRESENTS CONTRADICTIONARY STATEMENTS

21.16 The allegation that was made in the bank's founding affidavit, in the recusal application (concerning Mr Mamba), contradicts the submission that was made on behalf of the bank, during argument of the appeal – as shown in the heads of argument. The law does not permit a litigant to present contradictory statements or

allegations before Court - when advancing his case or defence. The aforementioned contradictions in the bank's case have rendered the application for recusal – devoid of both the facts and the truth, and is consequently without merit. The application fails for this reason.

21.17 Furthermore, by this conduct the bank is trying to introduce new evidence in a matter that has already been argued and also decided by this Court. The bank's approach is irregular and highly prejudicial to the appellants. The appellants cannot go back in time and re-appear in this Court in order to make counter – submissions in response to the new submissions that the bank has irregularly – attempted to introduce – by way of recusal application. The bank's new submissions form the basis of the application for recusal.

21.17.1 Moreover, once the Court makes a judgment (on the merits), in a matter, it is no longer permissible for either party to introduce evidence in that case, no matter how relevant that evidence may be perceived (by that party) to be. The Court rejects the new evidence that the bank has attempted to introduce.

21.17.2 The irregularity in the bank's conduct vitiates the legitimacy of the application for recusal. The Court finds that the recusal application is a ruse employed by the bank in order to introduce new evidence

to the matter – after the appeal has been decided. The Court cannot open matters that are closed.

#### DISCIPLINARY HEARING OF MR KWANELE VILANE

21.18 In the supplementary heads of argument that the bank filed in the appeal matter (aforementioned), the bank stated the following concerning its employee – Mr Kwanele Vilane:

*“The third appellant, Mr Kwanele Vilane, proceeded to his disciplinary enquiry ...”*

*“The completion of his disciplinary hearing has been frustrated and delayed by his attorney.”*

(Underlining added)

(At paragraph 22.2)

21.19 The point that the bank was making in the abovementioned quotation was that Mr Kwanele Vilane was still its employee, whose disciplinary hearing had not been finalized at the time of arguing the appeal. The appeal, inter alia, was decided on the basis of the submission that the bank made concerning Mr Vilane as well as the record from the Industrial Court.

21.20 In the founding affidavit that the bank filed in the recusal application (aforementioned) the bank stated as follows concerning Mr Vilane.

*“The disciplinary hearing in respect of Vilane [Mr Vilane] commenced on the 17<sup>th</sup> November 2020 ...”*

...

*The disciplinary hearing proceeded and ultimately, Vilane’s services were terminated.”*

(Underlining added)

(At page 12 paragraph 22.2)

21.21 Again the Court takes notice of the fact that the bank has stated that it has terminated the services of Mr Vilane but strategically avoided stating the date it allegedly terminated those services. As aforementioned, in this case, the date of termination of the services of Mr Vilane is as important as the event itself.

21.22 The allegation that Mr Vilane has been dismissed does not appear in any of the 2 (two) sets of heads of arguments that the bank filed during the appeal hearing.

21.23 If Mr Mamba and/or Mr Vilane had already been dismissed at the time the appeal was argued, that statement could and should have

been disclosed in the bank's heads of argument. The reason that statement does not appear in either of the heads of argument that the bank had filed - is because it was not a fact, viz: that event had not occurred.

21.24 The allegations which the bank has made in its founding affidavit (in the recusal application), is contrary to the submissions that the bank has presented before Court in both heads of argument (aforementioned) – concerning both Mr Mamba and Mr Vilane. The appeal was decided inter alia on the submissions that are contained in the heads of argument.

21.25 In short what the bank is saying is that: for the purpose of arguing the appeal in July 2021 it would adopt the position that Mr Mamba and Mr Vilane are its employees and that each of them has an ongoing disciplinary hearing. However for the purpose of arguing the recusal application (in December 2021) the bank would adopt the position that Mr Mamba and Mr Vilane had been dismissed from work and that, that dismissal would be backdated to the time when the appeal was argued.

21.26 The statements, that were made by the bank, as stated in the recusal application, cannot be permitted to contradict submissions that the

bank had already made before Court, concerning Mr Mamba and Mr Vilane, during argument on the appeal. The approach by the bank is contrary to law and logic, as shown below:

21.26.1 The law provides as follows:

*“ALLEGANS CONTRARIA NON EST AUDIENDUS*

*He is not to be heard who alleges things contrary to each other”*

BROOM H: A SELECTION OF LEGAL MAXIMS, 8<sup>th</sup> edition, 1911, SWEET AND MAXWELL LTD, page 135.

(ISBN not provided).

21.26.2 *“... a man shall not be permitted to , ‘blow hot and cold’ with reference to the same transaction, or insist, at different times, on the truth of each of the two conflicting allegations, according to the promptings of his private interest”*

BROOM H: (supra) page 135.

21.26.3 The recusal application is further rendered defective by the contradictory statements and evidence that has been presented before Court. The contradictory statements and evidence form the basis of the recusal application.

22. A third incident regarding the bank’s irregular conduct – relates to the filing of exhibits TD 3 and TD 4. The bank has filed these exhibits before Court –

for the first time, in its recusal application. The bank's intention in filing the said exhibits is to rely on their contents in order to support its argument on the recusal application. Exhibits TD3 and TD 4 contain information relating to the disciplinary hearing of Mr Mamba and Mr Vilane respectively and are both dated 20<sup>th</sup> October 2020.

22.1 Exhibits TD 3 and TD 4 were in existence already and were under the possession and/or control of the bank during argument of the urgent application before the Industrial Court. The bank did not present exhibits TD 3 and TD 4 as exhibits before the Industrial Court. The urgent application was argued before the Industrial Court on the 28<sup>th</sup> October 2020 and an Ex Tempore ruling was issued – which was made subject of the appeal before this Court. The appeal was enrolled before this Court on the 18<sup>th</sup> May 2021 and exhibits TD 3 and TD 4 were not part of the record that was presented before this Court. Consequently the Industrial Court and this Court did not make a determination regarding exhibit TD 3 and TD 4. It would be improper for this Court to make a determination of the contents of exhibit TD 3 and TD 4 at this stage. These documents should have been presented before the Industrial Court for determination – as the Court of first instance.



- 22.2 Again the bank has attempted to irregularly introduce evidence before this Court, after the matter had been determined by both the Industrial Court and subsequently this Court. Information that was not before Court at the time the Court heard submissions or argument, is not evidence. That information cannot be introduced as evidence after the Court has delivered its decision on the matter.
- 22.3 The Court reiterates the point that the recusal application is a ruse which the bank has used in order to introduce evidence which was not before Court at the time the appeal was argued. That approach by the bank is irregular and renders the application for recusal fatally defective.
- 22.4 When a decision of a Court is being challenged, it must be challenged based on the facts that were in existence and were before Court – at the time the matter was tried or argued before Court.
- 22.5 When a Court is being accused of having an appearance of bias – based on the contents of a judgment which it had issued, that accusation must be determined based on the facts that were before the Court at the time that judgment was issued. Exhibits TD 3 and TD4 were not among the facts that were before this court when the appeal was argued. An attempt to introduce exhibit TD 3 and TD 4

before Court, at this stage, is an attempt by the bank to manipulate evidence and it is refused.

22.6 The judgment of this Court gave clear directive as to how the matter of Mr Mamba and Mr Vilane should be dealt with at the Industrial Court. That judgment is valid and binding until it is set aside by an upper Court – that has jurisdiction. The bank has a duty to comply with that judgment.

23. An excerpt from the replying affidavit which the bank has filed in the recusal application reads thus:

*“4.7 Prayers 3 and 4 of the judgment of the Industrial Court of Appeal can still be given effect. The Industrial Court of Appeal issued these orders, being well aware that the disciplinary hearing against Mamba had concluded and his services terminated. This fact was communicated to the Industrial Court of Appeal at the first hearing of the appeal on 18<sup>th</sup> May. The same circumstances that obtain in respect of Mamba now obtain in respect of Vilane. There is simply no basis for contending that the finalization of the disciplinary hearing in respect of Vilane presents a unique situation.”*

(Pleadings SZICA case no. 15/2021C, page 124)

23.1 The said replying affidavit was also deposed to by Ms Thembi A Dlamini on the 21<sup>st</sup> October 2021. During argument on the recusal application, especially on the 17<sup>th</sup> December 2021 this Court asked the bank's attorney: whether or not Ms Thembi A Dlamini had personal knowledge of the particular allegations (as quoted above) that which she deposed to in her affidavit. The bank's attorney replied that Ms Thembi A Dlamini had no personal knowledge this particular content of her replying affidavit, but she relied on what she had been told by the bank's attorney, viz, Attorney Jele himself. Attorney Jele confirmed that Ms Thembi A Dlamini had not attended Court to witness the proceedings relating to the matter between the litigants. The learned attorney also mentioned that he had filed a supporting affidavit in this matter since he is the one who witnessed the proceedings in this case – as attorney for the bank.

23.2 The learned attorney Jele did file an affidavit particularly supporting the founding affidavit. The supporting affidavit was deposed to on the 15<sup>th</sup> October 2021. An excerpt from the supporting affidavit reads thus:

*“3. I have read the founding affidavit of Thembi Dlamini and confirm its accuracy in so far as it relates to me.”*

(Underlining added)

(Pleadings SZICA case no 15/2021C, page 93)

- 23.3 Attorney Jele confirmed specifically the contents of the founding affidavit, and only where it related to himself (Attorney Jele). Attorney Jele did not file an affidavit that would support the replying affidavit. Before Court there is no affidavit that supported the replying affidavit. Attorney Jele was not persuaded to confirm the contents of the replying affidavit.
- 23.4 When attorney Jele deposed to the supporting affidavit (aforementioned) he was confirming allegations that are contained in an existing affidavit viz; the founding affidavit of Ms Thembi A Dlamini. At that point the replying affidavit was not in existence. Attorney Jele could not confirm allegations which were not in existence when he deposed to his only supporting affidavit.
- 23.5 The particular allegation that is quoted in clause 4.7 of the replying affidavit was presented before Court by Ms Thembi A Dlamini – in order to prove the truth of the contents therein. Ms Thembi A Dlamini did not witness the proceedings in Court, and she could not therefore testify as to events that she had no personal knowledge of. The allegation that is contained in clause 4.7 in the replying

affidavit is therefore hearsay and is accordingly rejected by the Court.

23.6 According to law, hearsay information is inadmissible as evidence in Court.

23.6.1 *“If, for example, a witness’s statement as to what he heard another person say is elicited to prove the truth of what that other person said, it is hearsay.”*

GIFIS STEVEN H: LAW DICTIONARY, 3rd edition,  
(ISBN 0 -8120 – 4628 – 5) page 216.

23.6.2 *“HEARSAY EVIDENCE, [is] second –hand evidence. For history of rule rejecting hearsay evidence see Best’s Law of Evidence, 10<sup>th</sup> ed. Section 15.”*

(Underlining added)

BELL W.H.S. : SOUTH AFRICAN LEGAL DICTIONARY, 2<sup>nd</sup> edition, Juta, 1925 (ISBN not printed) page 248.

23.6.3 *“If something is alleged to have been seen, the evidence must be of that person who says he saw it; if heard that of the person who says he heard it;”*

CLASSEN C.J. : DICTIONARY OF LEGAL WORDS AND PHRASES, vol. 2, Butterworths, 1976 (SBN 409 01981 6) page 168.

23.6.4 Ms Thembi A Dlamini purposely omitted to disclose in her replying affidavit the fact that; she did not witness the Court proceedings which she referred to in clause 4.7 of her replying affidavit. Ms Thembi A Dlamini further purposely omitted to disclose her source of information – which she is legally obligated to disclose. The law demands that a deponent to an affidavit who has no personal knowledge of the facts must disclose his source.

*“The source of the deponent’s information must be given”*

ERASMUS HJ : SUPERIOR COURT PRACTICE, Juta, 1994 (ISBN 0 7021 3213 6) page B1 – 39.

23.6.5 Clause 4.7 in the replying affidavit is drafted in such a manner that Ms Thembi A. Dlamini gave hearsay evidence and passed it off as if it was evidence within her personal knowledge – when in fact that was not the case. It is fair to say that Ms Thembi A Dlamini did not conduct herself honestly in the manner she presented the contents of clause 4.7 of her replying affidavit.

23.6.6 Clause 4.7 in the replying affidavit is inadmissible for being hearsay.

23.7 Moreover, the effect of the statement made by Ms Thembi A Dlamini in clause 4.7 in the replying affidavit (if it was admissible as evidence), would mean that the bank has intentionally presented inconsistent and contradictory evidence before Court in order to mislead the Court. Such conduct is grossly irregular and should be condemned in the strongest terms. This is another reason the recusal application is refused, viz the application is based on allegations that are self – contradictory.

24. In addition to the foregoing, the bank has overlooked the fact that: in law admissions of fact that are made before Court by a legal representative on behalf of his client, are binding on that client. Therefore, admissions that are contained in the bank's heads of argument were consequently presented in Court by attorney Jele and are binding on the bank. The bank cannot be allowed to present evidence or new admissions that would contradict admissions that have already been presented before Court.

24.1 According to authority:

*“Admissions of fact by counsel or attorney within their authority to conduct the litigation or transaction in question are admissible against their client.”*

HOFFMANN LH et al : THE SOUTH AFRICAN LAW OF EVIDENCE, 4<sup>th</sup> edition Butterworths, 1988 (ISBN 0 409 033 25 1) page 188 -189.

- 24.2 When attorney Jele stated in his heads of argument that; the disciplinary hearing regarding Mr Vilane has not been completed yet, he thereby made an admission that Mr Vilane was an employee of the bank – as at the 20<sup>th</sup> July 2021.
- 24.3 When attorney Jele again stated in his heads of argument that; the disciplinary hearing of Mr Mamba was at the stage of a verdict, he thereby made an admission that Mr Mamba was an employee of the bank – whose disciplinary hearing had not been completed yet – as at the 20<sup>th</sup> July 2021.
- 24.4 The aforementioned admission was made by attorney Jele – exercising his authority as the attorney for the bank, in the course of arguing the appeal. Consequently the aforesaid admission is binding on the bank. The appeal was decided, inter alia, on the admission of fact that was presented before Court by the bank’s attorney. The bank



cannot be allowed to argue contrary to the admission of fact which it had already presented before Court.

24.5 Authority states further that:

*“While the admission stands on the pleadings the ... [party who made the admission] is estopped for the purposes of that case from contending to the contrary of the facts which have been admitted”*

ERASMUS HJ: (supra) page B1 – 44.

24.6 It would amount to a dishonest statement for a litigant to submit before Court on the 20<sup>th</sup> July 2021 that; the completion of the disciplinary hearing of Mr Vilane has been delayed, and later state by way of affidavit (dated the 21<sup>st</sup> October 2021), that in actual fact Mr Vilane had already been dismissed from employment as at the 18<sup>th</sup> May 2021.

24.7 It would also amount to a dishonest statement for a litigant to submit before Court on the 20<sup>th</sup> July 2021 that the disciplinary hearing of Mr Mamba is at the stage of a verdict, and later state on affidavit (dated 21<sup>st</sup> October 2021), that in fact Mr Mamba had already been dismissed from employment as at the 18<sup>th</sup> May 2021.

LITIGANTS AND LEGAL REPRESENTATIVES MUST PRESENT  
THE TRUTH BEFORE COURT

24.8 Litigants and their legal representatives are legally obligated to be scrupulously honest with the truth when presenting their facts and submissions before Court. This point is confirmed by legal authority.

24.8.1 In the matter of Ex parte Swain 1973 (2) SA 427 at 434, the Court, per James JP, stated as follows:

*“The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court.”*

(Underlining added)

24.8.2 *“Neither attorneys nor counsel are mere agents for their clients: they have duties towards the judiciary to ensure the ‘efficient and fair administration of justice’ ”*

MORRIS E: TECHNIQUE IN LITIGATION, 6th edition, 2016, Juta (ISBN 978 0 70218 458 1) page 27.

24.8.3 *“The duty probably arises out of the fact that counsel and attorneys are officers of the Court and is consistent with Voet’s description of the profession as an honourable one.”*

MORRIS E: (supra) page 27.

24.8.4 The application for recusal has failed to comply with the mandatory requirements that are laid down in the immediately preceding authorities. The principle is that: a litigant cannot succeed in Court if his case or defence is based on dishonest evidence or submission. This is another reason the recusal application fails.

25. Overall, on the facts before Court, the bank has failed to support an application for recusal. The application before Court for refusal is based on hearsay evidence, alternatively contradictory statements that are devoid of honesty. In addition, the application relies on statements and allegations that have been manipulated by the bank. The application for recusal is therefore not based on correct facts. Consequently, the recusal application stands to be dismissed.

THE TEST FOR PERCEPTION OF BIAS

26. The test for - perception of bias – has been analysed by the Court in various cases including that of S V ROBERTS 1999 (4) SA 915 (SCA). Legal authorities have studied the case of S V ROBERTS and have listed 4 (four) requirements that are essential to support a claim for - a perception of bias – on the part of the Court, viz:

- “1. *There must be a suspicion that the judicial officer might (not would) be biased.*
2. *The suspicion must be that of a reasonable person in the position of ... the litigant.*
3. *The suspicion must be based on reasonable grounds.*
4. *The suspicion is something that the reasonable person would (not might) have.”*

HOEXTER et al : ADMINISTRATIVE LAW IN SOUTH AFRICA,  
3<sup>rd</sup> edition, Juta, 2021 (ISBN 978 1 48513 528 9) page 618.

26.1 The test for – perception of bias – on the part of the Court, was also dealt with extensively in the local case of MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS VS SAPIRE STANLEY, SLR 2000 – 2005 vol 1, 196. The Supreme Court of Appeal summarized the requirements for recusal of the Court as follows:

*“After referring to a number of cases the Court a quo adopted what has been referred to as the double requirement of reasonableness test i.e. :*

- 1. The apprehension of bias must be held by a reasonable objective and informed person; and*
- 2. The apprehension itself must in the circumstances be reasonable.”*

*(At page 199)*

26.2 The case of S V ROBERTS was quoted with approval in the STANLEY SAPIRE case and other subsequent local cases – and it is considered authority on the subject. A litigant therefore who has an apprehension that the Court might be biased, alternatively who claims that the Court has a perception of bias – should satisfy the requirements that are listed in the authorities aforementioned, in order to succeed in his claim.

26.3 A reasonable, objective and informed person - in the position of the bank and its officials would have realised that the bank’s real concern was a Court decision (aforementioned) that was due delivery.

- 26.3.1 Such a person would have also realised that making inquiry with the Court Registrar would expedite the delivery of the pending Court decision and that would be a reasonable thing to do in the circumstances.
- 26.3.2 Such a person would have realised also that it is unreasonable to avoid or resist delivery of a Court decision by raising a baseless allegation of apprehension of bias.
- 26.3.3 Such a person would have also realised that it is unreasonable to decline or resist delivery of a Court decision and then complain that the Court has not delivered that particular decision.
- 26.3.4 Such a person would have realised also that a perception on its part that the Court has delayed delivery of its decision, does not give rise to a perception that the Court is therefore biased.
- 26.4 The finding of this Court is that a reasonable litigant (in the position of the bank), would first inquire from the Court (through the Registrar), regarding progress made so far that would lead to the delivery of the pending Court decision. In the event that the Court fails to deliver its decision or fails to explain the cause for the delay in delivering that decision (after a reasonable time- period had elapsed from the time the inquiry

was made), it would be reasonable for the litigant to complain about the delay in delivering the awaited decision.

26.5 It was unreasonable for the bank to draw conclusions without gathering the necessary facts about the pending decision. A litigant who draws conclusions without factual basis fails to act like a reasonable person. The bank therefore failed to act like a reasonable, informed and objective person in the circumstances.

26.6 Consequently, the bank has failed to satisfy the factual and legal requirements for an application for recusal of the Court- in a matter before it.

#### PRESUMPTION OF IMPARTIALITY IN FAVOUR OF THE COURT

27. Another important legal consideration - relevant to the matter at hand: is the rebuttable presumption in favour of impartiality of the Courts in deciding matters before them.

27.1 In the STANLEY SAPIRE case (supra) the Supreme Court of Appeal expressed itself as follows:

*“The Court presumes that judicial officers are impartial in adjudicating disputes.*

...

*The onus to rebut the presumption is on the person alleging bias or the appearance of it.”*

(At page 203 b – c)

27.2 In the matter of: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS VS SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 1999 (4) SA 147 (CC), the Constitutional Court re-stated the principle as follows:

*“40 In applying the test for recusal, Courts have recognized a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare Judges for the often difficult task of determining where the truth may lie in the welter of contradictory evidence.”*

(At page 172 paragraph 40)

27.3 The bank has failed to rebut the presumption of impartiality. There is no evidence before Court to support the perception that the Court might be biased in this case. The allegation and statements that were presented by the bank fell short of supporting the application. Consequently, the bank has failed to satisfy the legal and factual requirements for bias or perception of bias.



28. The general rule is that costs follow the event. That rule applies in this case.

29. Wherefore the Court orders as follows:

The application for recusal is dismissed with costs.

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D. MAZIBUKO

JUDGE - INDUSTRIAL COURT OF  
APPEAL

I agree

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S. NSIBANDE JP

I agree

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N. NKONYANE JA

For Appellant:

Attorney B.S Dlamini

C/o B.S. Dlamini & Associates

For Respondent:

Attorney Z. D. Jele

C/o Robinson Bertram