REPORTABLE
Case number: 185/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

S SAGER **APPELLANT**

and

N SMITH **RESPONDENT**

CORAM: **SMALBERGER ADCJ, HARMS, OLIVIER, STREICHER JJA and MTHIYANE AJA**

DATE OF HEARING: **12 MARCH 2001**

DELIVERY DATE: **29 MARCH 2001**

Recusal - test - reasonable apprehension of bias - application of test - whether comments made by magistrate in the course of ruling on recusal meets test.

JUDGMENT

MTHIYANE AJA

MTHIYANE AJA:

[1] This appeal raises the question whether certain comments made by a magistrate and his conduct during a trial justified a reasonable apprehension that he was biased against the respondent (defendant) thus warranting his recusal.

[2] The appellant (plaintiff), an interior designer, instituted action against the defendant in the Magistrates' Court, Cape Town, for payment of the sum of R36 350,91. The claim was based on an alleged breach of an agreement in terms of which the plaintiff had undertaken the interior decoration and furnishing of the defendant's holiday apartment at Saunders's Rocks, in Bantry Bay. The defendant had already paid an amount in excess of R250 000,00 in respect of the contract price, but refused to pay the balance of R36 350,91, alleging that the plaintiff's services had not been rendered in a proper, efficient and workman-like manner. The defendant also alleged in his plea that some of the goods and materials delivered by the plaintiff were

defective.

[3] During the course of the trial the magistrate turned down two applications for his recusal. He eventually found for the plaintiff, and after allowing for certain deductions he awarded her a reduced sum of R26 123,46, other relief and costs. A counter-claim by the defendant for an alleged overpayment was dismissed with costs.

[4] The defendant appealed (and the plaintiff cross-appealed) to the Cape Provincial Division (Comrie J *et* Van Heerden AJ) against the magistrate's judgment on the merits, and his refusal to recuse himself. At the hearing the appeal could not be dealt with on the merits because the magistrate's reasons had not been filed as required by rule 51 of the magistrates' courts' rules. By agreement between the parties only the recusal point was dealt with. It was agreed that if the point was decided against the defendant the appeal on the merits would be postponed to a later date.

[5] The court *a quo* upheld the appeal in respect of the first application for recusal

but the second application was found to be ill-conceived. With regard to the latter, Comrie J came to the conclusion that what the magistrate had said in chambers and in open court was not "sufficient in itself to found a reasonable suspicion of bias against the defendant". The learned judge found that the second application was merely calculated to reinforce defendant's earlier perception of bias. This finding has not been challenged and no further attention will be devoted to it in this judgment. Suffice it to say that in what follows any reference to the application for recusal should be understood as referring only to the first application, unless otherwise indicated.

[6] The plaintiff appeals to this Court, with leave of the court *a quo*, against its decision overturning the magistrate's refusal to recuse himself. In his judgment Comrie J criticised the magistrate for commenting on the merits in the course of his ruling. Without going into the grounds on which the application for recusal was based the learned judge came to the conclusion that:

> ". . . by the very terms of his ruling . . . the magistrate disqualified himself from further presiding over the trial."

[7] Before turning to the main issue it is necessary to sketch briefly the background events leading up to the application for recusal and the magistrate's ruling thereon. The trial ran for seven days and a number of witnesses (including the plaintiff) were called to give evidence on the plaintiff's behalf. While the plaintiff was giving evidence in chief the defendant's attorney objected to the handing in of certain photographs, contending that Magistrates' Courts rule 24(10) had not been complied with. He raised two grounds of objection. The first was that insufficient notice had been given and the second was that the photographs were misleading in that they did not depict the defects in the goods supplied by the plaintiff to the defendant. After the matter was argued briefly counsel for the plaintiff decided not to press for the handing in of the photographs at that stage. The matter was adjourned to another date and the

magistrate was not called upon to make a ruling on the objection.

[8] On resumption some three or four months later, counsel for the plaintiff once again sought to introduce the 'offending' photographs. By then proper notice had been filed as required by rule 24(10). No proof of a notice of objection was forthcoming. As a consequence rule 24(10(c) would apply. It reads as follows:

> "(*c*) If the party receiving the notice fails within the period specified in the notice to state whether he objects to the admission in evidence of the plan, diagram, model or photograph referred to in the notice, such plan, diagram, model or photograph, as the case may be, shall be received in evidence upon its mere production and without further proof thereof."

Despite the absence of such notice the defendant's attorney informed the magistrate he was still opposing the handing in of the photographs. At that point the magistrate warned the defendant's attorney against needlessly objecting and drew his attention to the possible costs implication of such exercise. This seemingly innocuous caution

triggered an unpleasant verbal exchange which was immediately followed by the launching of an application for the magistrate to recuse himself. I consider it necessary to refer to the salient features of that exchange *in extenso*:

> "Court: All right. Well, you know the penalties when a photographer gets called with regard to costs and so on."

The defendant's attorney assumed that he was being threatened and reacted as follows:

> "Mr Bielderman: Your worship, with respect, I will not be threatened.
> Court: No, you won't be threatened. All right.
> Mr Bielderman: Your worship, this case must be taken seriously. At this stage, with that comment in mind, I'd like to place on record, your worship the last time we were in your chambers you made a statement which has concerned my client tremendously, that you think we are splitting hairs. This is a serious case involving over R300 000 ultimately. We're dealing with high class clients. I would ask you with absolute respect to take this case seriously and consider the complaints of the parties. This is not a willy-nilly people clutching at straws and petty little defences. Here is a man that's paid close to R250 000,00 in cash on this plaintiff's own version, sometimes ahead of the requirements and he was

then met with defective and shoddy workmanship and he's not splitting hairs. And I'd like you to take that seriously and if the plaintiff must prove their case, your worship, they are coming here and they're submitting without prejudice negotiations. You're admitting hearsay evidence. You now state that I know [what the] penalties [are] as far as calling photographers are concerned. There are rules of this Court, rules of evidence, your worship, with respect. I want to place on record the defendant will not be threatened by that."

[9] The magistrate responded:

"Court: As much as the defendant won't be threatened, I believe it is proper to point out to you that if you object to these photographs being handed in merely because you - merely for the sake of or and if you oblige the plaintiff to call the photographer, then as the law says and as the rule says and as the commentary on the rule says, you may be [mulcted] in costs. And I'm pointing that out to you, your client is in court, and my statement is now on record that I say I consider that you are splitting hairs. I do so consider that you're splitting hairs and at the end of the case when it comes to costs then those types of considerations will come into play and if you want to take it as a threat do so by all means. I believe it's proper for a judicial officer to point out to counsel and to his client that when he does waste time on frivolous matters in court that there comes a day of reckoning at the end of the case. So there you have my threat, Mr Bielderman if you want to take it

as a threat."

[10] At the request of the defendant's attorney the matter was allowed to stand down to enable him to take instructions. On resumption he moved the application for the magistrate's recusal and submitted as follows:

> "Mr Bielderman: Your worship, you may have noticed I'm somewhat angered by the results of events in this court and I apologise if I appear a bit abrupt. But what does surprise me and my client, I've taken instructions now, it would appear that nobody in this court is actually listening to me. I made it quite clear that Mrs Sager can testify on the photographs and I will cross-examine her on those photographs. Subsequent to that my learned friend then addresses and the court threatens me or rather my client with a cost order if we are taking technical points, but yet I had already said the photographs can go in and I reserve my right to cross-examine on those photographs. Based on that, your worship, and your ruling earlier where my learned friend has addressed you and she quoted authority, the Beyer's case, saying if there is a final agreement the first one's novated, the new agreement then without prejudice falls away. You allowed that to come in although they're relying here on the first agreement. She shot herself in the foot with the argument. Nobody actually listened to that point. She

> contradicted herself, quoted authority which shoots her case down. Your worship, on that basis, I'm instructed to bring an application for your recusal and I beg leave to put my client in the witness box to make the application and to give his evidence under oath regarding the application."

[11] After this brief address the defendant was called to give evidence, whereupon he advanced three grounds for his belief that the magistrate was biased against him. He summed up his complaints as follows:

> "[O]n a previous occasion in court [1] the magistrate was falling asleep. The magistrate said today that [2] this is a frivolous matter. Every argument that you bring [3] we're splitting hairs. I think the magistrate has prejudged the whole issue." [Emphasis added]

The defendant went on to say that he did not think that he would get a fair hearing.

[12] After argument the magistrate refused the application for recusal and ruled as follows:

> "
>
> Ruling
>
> My ruling on the application is as follows. I cannot recall the precise

> context in which I said that the complaints regarding the plaintiff's work raised by Mr Bielderman in cross-examination amounted to a splitting of hairs. Taken on their own, the complaints would be seen by any objective observer to be trivial. However, taken together and against the background of the matter, the obvious high standard of the furnishings and the expense involved, it may well be that the defendant was or is entitled to cancel the contract, one of the issues which I still have to decide once the evidence of the interior designers which the defendant proposes calling is before me.
>
> I do not consider that on all the factors placed before me there is a reasonable suspicion that I have prejudged the matter and the application for my recusal is refused. I make no order as to costs."

[13] After the ruling the defendant's attorney informed the magistrate that he would cross-examine any "person trying to present those photographs" although he was "not admitting that they are correct", notwithstanding the provision of rule 24(10)(c). The trial proceeded and the photographs were duly handed in.

[14] Against this background I turn to consider whether the comments made by the magistrate in the course of his ruling and his conduct during the trial justified a

reasonable apprehension that he was biased against the defendant.

[15] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999(4) SA 147 (CC) ("*SARFU*") at para [30] the Constitutional Court decided that an application for the recusal of a judge raises a "constitutional matter" within the meaning of s 167 of the Constitution in that, in terms of s 34 of the Constitution, everyone has a right to a fair public hearing in a court. Having found that it was a constitutional matter the Constitutional Court at para [48] formulated the proper approach to recusal as follows:

> "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 the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

What is said in respect of a judge applies equally to a magistrate. In *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000(3) SA 705 (CC) ("*SACCAWU*") at paras [11] to [17] the Constitutional Court further elaborated on that test. It follows that the test of "a reasonable apprehension of bias" replaces that of "a reasonable suspicion of bias" previously favoured by this Court. See *S v Roberts* 1999(4) SA 195 (SCA) at paras [32] and [34]. The difference would appear to be one of semantics rather than substance.

[16] In the application of the test two fundamental premises are of importance. The

basic starting point of the enquiry is that the court presumes that judicial officers are impartial in adjudicating disputes. See *SARFU* at para [41]. The *onus* to rebut that presumption is on the person alleging bias or the appearance of it. See *SACCAWU* at para [12]. The second is that absolute impartiality is an unattainable ideal, given that judicial officers are only human. See *SARFU* at para [42]. It is quite normal for a presiding judge to form a *prima facie* view on the issues during the hearing of a matter. But this is not necessarily indicative of bias. As was stated by Schreiner JA in *R v Silber* 1952(2) SA 475 (AD) at 481 F - H:

> "[b]ias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward

> manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias."

See also *SACCAWU* at para [13] and *S v Khala* 1995(1) SACR 246 (A) at 252 G - J.

[17] The test to be applied is an objective one, requiring not only that the person apprehending the bias must be a reasonable person but also that the complaint must be reasonable. See *S v Roberts loc cit*. This two-fold feature of the required objective standard has been described in *SARFU* and *SACCAWU* as the double requirement of reasonableness. In *SACCAWU* it was said the double reasonableness requirement highlights the fact that mere apprehension on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety - is not enough. See paras [14] and [16]. The statement in the judgment of the court *a quo* that "[t]he existence of such

suspicion is a matter of subjective perception by the complainant party" is accordingly contrary to the principles laid down in the above cases, requiring that the apprehension must be that of a reasonable person.

[18] With the above in mind I turn to consider the complaints which formed the basis of the defendant's application for recusal. They may be divided into four classes. They relate to (1) the rulings made by the magistrate in the course of the trial, (2) the admission of the photographs, (3) the refusal to attend an inspection *in loco* and (4) the comments that defendant's attorney was splitting hairs and wasting time on frivolous matters.

[19] I have not included the complaint alluded to by the defendant in his evidence when he said that "on a previous occasion the magistrate was falling asleep". In the appeal before us no argument was advanced in support of this complaint. I consider that the stance adopted by the defendant's counsel was the correct one because there

was in my view no merit in the point. Although it is not necessary to decide the matter it is interesting to note briefly how the problem has been dealt with in other jurisdictions. In (1997) 71 *Australian Law Journal* 745, a case note was published which said that the English Court of Appeal had held that when a judge fell asleep, it was the duty of counsel to wake him or her up, not just to note an appeal point for later. The same result was reached in Queensland in *Stathooles v Mt Isa Mines Ltd* [1997] 2 Qd R106 at 113. See (2001) 75 *Australian Law Journal* 4 - 5.

[20] Turning to the first complaint relating to the rulings in the course of the trial, there can be no doubt that the magistrate acted even-handedly in the way in which he dealt with the objections. This is borne out by the record and counsel for the defendant could not advance any argument to the contrary. There is no merit in the complaint.

[21] As to the photographs, I do not consider the remarks made by the magistrate

in relation thereto to be indicative of bias. At the stage at which the defendant's attorney objected to their introduction in evidence proper notice had been filed as required by rule 24(10) and no notice of objection had been received from the defendant. The objection raised by the defendant's attorney was futile and obstructive, and the magistrate was justified in drawing the attorney's attention to the possibility of his client being mulcted in costs. The warning was not a threat, as the attorney chose to interpret it. The role of a judicial officer in civil proceedings is not necessarily that of a "silent umpire". See *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976(2) SA 565 (A) at 570 E - F. The magistrate certainly acted within his rights in his attempt to bring the defendant's attorney into line. As was said by this Court, "'n Regter is geregtig, en dit kan ook afhangende van omstandighede sy plig wees, om die gedrag van amptenare van die Hof te kritiseer maar dan moet dit geregverdig wees en nie onoordeelkundig gedoen

word nie." See *Rondalia Versekeringskorporasie van S.A. Bpk v Lira* 1971(2) SA 586 (A) at 589 H. The defendant also fails on this point.

[22] Counsel for the defendant did not make any point concerning the magistrate's refusal to conduct an inspection *in loco* and indicated that he was not relying on it. He acted wisely in doing so. It is apparent from the record that there was never an outright refusal by the magistrate to attend an inspection. He intimated that he was not prepared to go "at this stage" i e at the commencement of the proceedings. He made it clear, however, that if justice required it he would consider going on an inspection during the course of the trial. This was consistent with the magistrate's attitude throughout that he would apply an objective mind to the relevant facts once they were all before the court.

[23] That brings me to the complaint that the magistrate accused the defendant's attorney of splitting hairs and wasting time on frivolous matters. The magistrate does

not deny that he said this. In his ruling he stated that he could not recall the context in which he said it. Counsel for the defendant argued that when he made this comment the magistrate was referring to the merits of the defendant's case. He submitted that he was not entitled to do this; that he went too far and consequently that he prejudged the matter.

[24] In my view the magistrate's remarks in this regard may be suspectible to two interpretations. First, the magistrate was giving vent to his frustration with the way in which the defendant's attorney was conducting the trial, in particular his cross-examination. Second, the magistrate may well have been commenting on the merits. On either basis there is no room for the contention that he had prejudged the matter. As to the first point, the defendant's attorney was indeed impeding the smooth progress of the trial by raising pointless objections. His objection to the handing in of letters which had preceded the conclusion of an agreement between the parties and the

photographs in regard to which proper notice had been filed, took the trial nowhere and amounted to a waste of time.

[25] However, even if one assumes in favour of the defendant that when the magistrate alluded to the splitting of hairs, he was referring to the merits this does not avail the defendant. There are two reasons for this. First, the magistrate's comments *per se* do not indicate partiality. They were also subject to qualification. The magistrate clearly stated that if the complaints were taken in isolation they would appear to be trivial, but when taken together and against the background of the matter, the obvious high standard of the furnishings and expense involved, it might well be that the defendant was entitled to cancel the contract. He went on to say that this was one of the issues he still had to decide after hearing the evidence of the defendant's experts. The magistrate was at pains to indicate that he was keeping an open mind and would ultimately decide the matter on the objective evidence placed before him. It is

interesting to note that there is no difference of substance between what the magistrate said on the quality of the complaints and what was said by the defendant's attorney in his opening address. He certainly did not say that the defendant's claim was a trivial matter as suggested by the defendant in his evidence. In any event a magistrate is not necessarily disqualified from presiding in a case merely because he has expressed a *prima facie* opinion on certain aspects of that case. The second reason why the comments on the merits do not avail the defendant is that it was never part of his case that what was said by the magistrate in the course of his ruling justified an application for his recusal. No application for recusal was based on his remarks. It seems to me that if the magistrate had refused the first application for recusal without commenting on the merits that would have been the end of the matter, because the second application was found by the court *a quo* to be without substance, and it can be inferred from the judgment that but for the magistrate's remarks in his ruling the first

application for recusal would also not have been upheld.

[26] In my view the magistrate neither said nor did anything to give rise to a reasonable apprehension that he was biased against the defendant. Nor would any reasonable person in the position of the defendant have had reason to entertain such a belief on a proper appreciation of the facts. In the result the defendant failed to make out a case for recusal and the magistrate was entitled to refuse the application.

[27] On the question of costs, the history of the matter indicates that in the courts below the plaintiff was only represented by one counsel. No argument was advanced in this Court as to why it was considered necessary at this juncture to brief two counsel. I do not consider the matter to be sufficiently complex to warrant the appointment of two counsel at the expense of the defendant.

[28] In the result the following order is made:

a. The appeal succeeds, with costs.

b. The order of the court *a quo* is set aside and the following is substituted in its stead:

"The appeal on the recusal issue is dismissed with costs."

c. The matter is referred back to the court *a quo* for the hearing of the appeal on the merits.

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K K MTHIYANE
ACTING JUDGE OF APPEAL

SMALBERGER ADCJ)Concur

HARMS JA)

OLIVIER JA)

STREICHER JA)