REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 038392/2023

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

30/9/2024
DATE

[redacted]

In the matter between:

PRIMROSE NOKUTHULA MAZIBO Applicant/Plaintiff

AND

KHOSI MAHLANGU 1st Defendant/ 1st Excipient

GAUTENG DEPARTMENT OF EDUCATION 2nd Defendant/ 2nd Excipient

JUDGMENT

MAKUME, J:

INTRODUCTION

[1] There are two applications before me in which the applicant seek the following orders:

1.1 An order that the presiding officer being myself recuse myself from the matter.

1.2 Application for leave to appeal my order dated the 29th of February 2024 when I upheld the exception by the defendant in respect of the applicant's particulars of claim which I found not to disclose a cause of action.

[2] The applicant filed an application for leave to appeal my judgment. That application served before me in open court on the 16th of April 2024. It was during submission by the applicant's attorneys, Ms Hadebe, when it turned out that the applicant desires my recusal from the matter. I then adjourned the matter to enable the applicant to file and serve a recusal application.

[3] On the 22nd of July 2024 I issued the following directive to the parties:

3.1 That the first and second defendants file their answering affidavit to the recusal application by not later than the 2nd of August 2024.

3.2 The parties to file their heads of argument in respect of the recusal application by not later that the 16th of August 2024.

3.3 That both the recusal as well as the application for leave to appeal be heard in the same sitting in open court on the 10th of September 2024 at 10:00 am.

[4] On the 10th of September 2024 it was only counsel for the defendant who appeared. I stood the matter down till 12:00 noon awaiting the arrival of Ms Hadebe for the applicant.

[5] Shortly after adjourning it was brought to my attention that the applicant's attorney had filed a notice of motion to amend the recusal application. On reading the founding affidavit it became clear that the applicant and her attorneys had no intention of attending Court. Paragraph 13 of that affidavit reads as follows:

"[13] As such the Applicant cannot appear before the Honourable Judge Makume, due to the conflict of interest in this matter, the Applicant's legal representative having mistrust in the Honourable Court especially with Mr Thobane after 9 activities with persons of his age group and calling them his elders. Therefore, the Honourable Judge Makume is welcome to give judgement in absentia of the Applicant's legal representative and the Applicant stands by her papers. The Applicant's legal representative has further not received any signed and commissioner answering affidavit from the Respondents."

[6] The Court reconvened at 12:00 noon still there was no sign of the applicant and her legal representative. I accordingly in view of what the applicant had deposed to in an affidavit directed that the defendant address me on both applications.

[7] In her papers the applicant maintains that in adjudicating the exception I was biased and raised my voice in addressing her legal representative. Her attorney also alleges that the judge being myself upheld the exception at the instance of a Mr Thobane also an attorney. Briefly that this Court acted on instructions of Thobane.

[8] I shall in this matter refer to the parties as in the particulars of claim.

FACTUAL BACKGROUND

[9] Summons and particulars of claim were served on the defendants on the 3rd and 9th May 2023.

[10] On the 10th of May 2023 the second defendant entered appearance to defend and simultaneously served a notice in terms of Rule 36(4) on the plaintiff. On 11th of July 2023 the defendants delivered and served on the plaintiff's attorneys a notice in terms of Rule 23(1) of the Uniform Rules of Court and pointed out to the plaintiff in what respects her particulars of claim do not disclose a cause of action and were thus vague and embarrassing.

[11] The application excepting to the plaintiff's summons and particulars of claim served before my brother Vally J on the 8th November 2023 who made the following order:

11.1 The exception application is removed from the unopposed roll and is to be placed on the opposed interlocutory application roll.

11.2 The first and second defendants were directed to file heads of argument on the 17th November 2023.

11.3 The plaintiff to file heads on the 24 November 2023.

11.4 The exception application was set down for hearing on the 26th February 2024.

PROCEEDINGS ON THE 28 FEBRUARY 2024

[12] The excipients (first and second defendants) were represented by Advocate Ntshangase duly instructed by the office of the State Attorney whilst attorney SN Hadebe appeared on behalf of the plaintiff.

[13] I informed both legal representatives that I was not in possession of the plaintiff's heads of argument as same were not uploaded. A copy was made and handed up to the Court.

[14] Advocate Ntshangase made his submissions referring the Court to the heads of argument as well as to the impugned particulars of claim and concluded by praying that the application be upheld with costs.

[15] Attorney Hadebe for the plaintiff commenced with her submissions by pointing out that the excipients were not properly before the Court as they had filed their notice to defend late, also that the heads of argument were filed late at 11pm on the 17th of November 2023 and that the excipient did not apply for condonation.

[16] This Court then engaged Ms Hadebe on the procedure she followed seeing that according to her the defendants were out of time and should not be before Court. The response from Ms Hadebe was as follows:

> "My Lord there was no reason to serve a notice of bar because their notice of intention to defend was late."

[17] I then enquired whether the plaintiff did apply for default judgment seeing that the defendants were out of time. The response from Ms Hadebe was that the application for default judgment was filed and served before Acting Judge Karam who struck the application off the roll.

[18] I then requested Ms Hadebe to now deal with the exception as it had been ordered by Vally J on the 8th November 2023. The response I received from Ms Hadebe was to say the least strange she indicated that the defendants

> "do not have legal standing to have filed the Rule 23 notice in July 2023 because they never filed notices to defend on time"

[19] I once again requested Ms Hadebe to please deal with the exception as she had filed heads of argument. It was at this stage that she said the following:

> "Also M'Lord the very same Court order that M'Lord is referring to, stipulates that the Respondents are to file their heads of argument for Exception. Can I just open it quickly. They are to file them by 17 November 2023 however, they only filed their heads of argument at 10 minutes past 11pm on 17 November and that falls on to the next day and since the next day was now a weekend it fell on to 20 November 2023."

[20] The response by Ms Hadebe in my view was a strange one as a result I asked her to indicate what prejudice the plaintiff had suffered by the service of heads at that late hour. Her response was that the defendants were supposed to have applied for condonation and failed to do so.

[21] I once more directed Ms Hadebe to please deal with the exception before me. After a few exchanges Ms Hadebe said she is dealing with the exception by indicating that the defendants "do not have a legal standing before this honourable Court."

[22] This Court in a last ditch to direct the plaintiff's legal representative to deal with the exception referred to Rule 18(4) and 18(10). The response by Ms Hadebe was to say the least indicative of a legal representative who either did not understand or appreciate the provisions of the Rules or was simply being arrogant her response which I quote verbation from the record reads as follows:

> "Yes, M'Lord. M'Lord I respectfully submit that for them to expect for us to deal with the exception in a manner which in the form of a trial without us having to without them following the due course of the civil procedure, namely filing the Rule 23 in time so that we can respond to the exception is irregular, so they have taken an irregular step."

[23] The further interaction between this Court and the plaintiff's legal representative went as follows:

"COURT:	Ma'am do you have any further submissions to make on the exception?
MS HADEBE:	That is the only submission M'Lord
COURT:	Are you done, are you sure you are done?
MS HADEBE:	Hundred percent M'Lord
COURT:	You are not going to deal with your heads of argument, address me on the heads of argument. Are you done
MS HADEBE:	We are done M'Lord"

[24] Advocate Ntshangase for the excipient addressed the Court in reply where after this Court once again took up the issue with Ms Hadebe and the exchange went as follows:

"COURT: Ms Hadebe let me come back to you again I am giving you an opportunity just to make sure that when I go and do my judgment there is not going to be that you were not given an opportunity

The Defendant says that the particulars of claim do not disclose a cause of action and do not comply with Rule 18(4) and 18(10). You have not said anything to me about that

MS HADEBE: M'Lord I respectfully submit that it is correct that I have not said anything about the exception mainly because my submission is the Respondent do not have a standing before the honourable Court today. They do not have a standing and the Respondents are misleading the Court by stipulating that they have complied with everything which is not correct.

The Respondents are attempting for me to respond to, to condone their non-compliance and basically respond to the exception which they filed. So, they are asking me to respond and condone their non-compliance to not filing a notice of intention to defend to not their plea at all

My respectful submission is M'Lord I do not condone it. I as the Respondent do not condone it, it is by responding to the submissions which the Respondents are making before this honourable Court. I would be condoning their non-compliance I am not condoning it M'Lord. Thank you."

[25] The proceedings of the 28th of February 2024 was concluded on that note when this Court reserved judgement and handed same down on the 29th of February 2024 by upholding the exception and striking off the plaintiff's summons and particulars of claim for not disclosing a cause of action and were thus vague and embarrassing. I also ordered the plaintiff to pay the defendants party and party costs.

[26] On the 15th of March 2024 the plaintiff filed a document titled "Notice of Leave to Appeal and Conflict of Interest"

[27] The document referred to above encompasses two applications rolled into one. The first is an application seeking leave to appeal my judgment dated the 29th of February 2024 the second is not necessarily an application but a series of averments by plaintiff's legal representative to the effect that I was conflicted and should not have presided over the exception.

[28] It was as a result of the plaintiff's attorney's averments and serious allegations against me in my capacity that I enquired if it is the intention of the plaintiff that I should recuse myself. Plaintiff's attorney indeed confirmed that her instructions are that I should recuse myself. I then postponed the matter *sine die* and directed the plaintiff to file their recusal application and have it served on the defendants.

THE RECUSAL APPLICATION

[29] The founding affidavit in the recusal application read together with the deposition in the document titled "conflict of interest" levels grave accusations against the presiding judge being myself. The following seem to be the grounds of dissatisfaction by the applicant namely:

i) That the Court did not read the applicant's heads of argument.
ii) That the Court made a decision prior to even hearing the matter.
iii) That the Court erred in referring to the applicant's legal representative as "ma'am."
iv) That the Court addressed the applicant's legal representative in a high pitch tone which amount to scolding.
v) The Court erred in hearing the exception when in fact the defendants were not properly before the Court as they had not entered appearance to defend.
vi) The Court erred in referring to the particulars of claim as having been badly drawn up and erred in asking the representative as to who drew up the particulars of claim.

vii) That the Judge is the "father of a Mr Thobane" who once worked with the applicant's legal representative and having fallen out with each other the Judge took instructions form Thobane hence the adverse judgement as the Judge was clearly conflicted.

viii) The judge's "closeness" to Mr Thobane made it difficult for him to be impartial and was thus biased against the plaintiff.

[30] The founding affidavit in the recusal application was deposed to by the plaintiff herself. In it she Mrs Mazibuko maintains that I should recuse myself because of the following:

30.1 That the honourable Makume J has a personal relationship with a Mr T.T. Thobane who was previously on record as a legal representative in this matter for the plaintiff.

30.2 That the honourable Makume J was biased and not impartial in the conduct and ruling of the exception.

30.3 The honourable Judge was disrespectful of attorney Hadebe by addressing her as "Ma'am" and speaking with a high-pitched voice which amounts to scolding.

30.4 The honourable Judge did not ask the plaintiff's legal representative to introduce herself on the 28th of February 2024 as she had already done so when she appeared with Mr Thobane in a matter before Makume J on the 11th of May 2023.

30.5 That Mr Thobane had previously introduced the plaintiff's attorney being Ms SN Hadebe as his "wife to be" when the two met the Judge in his chambers and the honourable judge referred to Mr Thobane as "Son" and that Judge congratulated Thobane for having picked up his mate well.

30.6 The honourable Judge erred by hearing the exception when the excipient had failed to file heads of argument and were therefore in contempt of Court. The honourable Court showed bias when he heard the matter without the defendant's heads of argument.

30.7 The honourable Judge acted contrary to his oath of office.

30.8 In paragraph 23 of her founding affidavit the applicant makes a startling statement which reads as follows:

> "The conflict of interest only became clear and magnified when the Plaintiff received a call from Mr Thobane, immediately after the matter was heard on 26th February 2024 informing her (prior to the Applicant's legal representative) of what transpired in Court (even though he was not there) and enticing her to rather withdrew her mandate from her legal representative and give him the mandate and instructions. Further Mr Thobane informed and reminded the Applicant with his friendship with the head of Gauteng person in the Department of Education which he can ask a favour from at any time and that he would rather share the proceeds of this matter with his friends and family. It is questionable whether a "father and son" relationship constitutes a family. In support of same, the notice of leave to appeal and conflict of interest attached hereto forms part of this affidavit and the contents thereto in whole are attested to and referred to as support for the manner in which the proceedings were conducted and is attached hereto as "Annexure SNH 3"

30.9 Mr Thobane telephoned applicant's legal representative on the 26th of February 2024 and informed her that he would ensure that nothing goes right with her until she agrees to work with him again.

30.10 In conclusion at paragraph 29 of her affidavit the applicant says the following:

> "It is for this and many reasons that the relations between the honourable Judge as well as the Applicant and Applicant's legal representative have presented a mistrust in the honourable Judge his oath of office his conduct his competence to carry this matter out in an impartial unbiased and fair manner and his reasonableness and independence without due or undue influence which may exist on his end."

31. In summary the applicant's grounds for seeking my removal from presiding in her application for leave to appeal are briefly this:

a) That I did not read the papers.
b) That I prejudged the issue.
c) That I have a close "family relationship" with a Mr Thobane who has influenced me to find against the applicant.

32. It is against this background that I deem it appropriate to at this stage deal with and discuss the principles applicable to an application for recusal as espoused in many judgements.

APPLICABLE LEGAL PRINCIPLES

33. In *Take and Save Trading CC and Others vs Standard Bank of SA Ltd*[1] the SCA was confronted with an appeal against the refusal of the trial judge to recuse himself. There are two important principles that emerge from that judgment. The first is a proper understanding of a judge's role in civil proceedings. Harms JA writing for a unanimous bench said:

> "[A] Judge is not simply a silent umpire. A Judge 'is not a mere umpire to answer the question "How is that"' Lord Denning once said. Fairness of Court proceedings require of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out and when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources."

34. Pullinger AJ in *Chung-Fung (Pty) Ltd vs Mayfair Residents Association*[2] writes as follows at paragraph 32 of that judgement:

> "I believe with respect to the imminent judge of Appeal, the role of a judge goes further that. A Judge is obliged to put his/her difficulties with a litigant's case to its representatives so that they may be afforded an opportunity to address it,

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[1] 2004 (4) SA 1 (SCA).
[2] Case number 2023/080436 dated 13 October 2023 GSJ.

lest a decision is made against a party without them having had the benefit of addressing that issue. This, to my mind, is an inextricable part of the right to a fair hearing as guaranteed in section 34 of the Constitution."

[35] When this Court enquired from the plaintiff's attorneys as to who drew up the particulars of claim it was because of the concern that I noticed at the style and language used in the particulars of claim my preliminary impressions were that the particulars of claim could not have been settled by an experienced litigation attorney or counsel. The particulars of claim are a mixture of facts and evidence and lacked particularly and do not comply with the rules of civil procedure. The plaintiff's attorneys having been asked by me on several occasions declined to deal with the application. She indirectly abandoned the plaintiff's heads of argument and said on more than one occasion that "I am hundred percent sure". Plaintiff's attorneys did not deal with what was before me instead latched on the issue that the defendants were not legally or properly before the Court, this is despite the order by Vally J handed down on the 8th November 2023.

[36] The plaintiff and her attorney object to this Court addressing the attorney as "ma'am" and do not say how this Court should have addressed Ms Hadebe. The use of eh word "ma'am" which is short for madam is used everyday in our Courts. It therefore boggles one's mind how this in itself shows bias. The plaintiff and her attorney are clutching at straws. I may have raised my voice in addressing Ms Hadebe, this was done in an attempt to draw her attention to deal with the application before me instead of harping on one and the same thing namely that the defendants are not properly before Court.

[37] Justice Harms in *Take and Save Trading CC* at para 17 put it beyond argument when he said the following:

"[A]s Mr Shaw rightly accepted, a deadly legal point forcefully made by the Court during argument cannot give rise to an apprehension of bias in the eye of the 'reasonable, objective and informed' litigants in possession of 'the correct facts'."

[38] In *Chung-Fung* Pullinger AJ in supporting the statement made by Harmse JA said the following at paragraph 34:

> "Therefore when a Court that puts a proposition to a party with which that party does not agree and a robust debate ensues, that on its own, cannot give rise to a reasonable apprehension of bias."

[39] The Constitutional Court in *Bernert vs Absa Bank Ltd*[3] expressed a similar sentiment where it said:

> "The presumption of impartiality and the double requirements of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."

[40] The last decision I wish to refer to is that of *Afriforum vs Economic Freedom Fighters and Others*[4] in that matter the SCA Bench included Madam Justice Keightley as an Acting Judge in that Court. After the parties had made submissions, judgment was reserved. Afriforum then brought an application that Justice Keightley should play no further part in the reserved judgement and that she be recalled. The basis for the application was that sometime in the past and whilst sitting as a judge in an application for leave to appeal in a matter *AfriForum v Chairman of the Council of the University of South Africa* Madam Justice Keightley had made remarks to the effect that Afriforum was litigating

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[3] 2011 (3) SA 92 CC.
[4](1105/2022) [2024] ZASCA 82; [2024] 3 All SA 319 (SCA) (28 May 2024).

on archaic matters and not in keeping with the new democratic dispensation. According to Afriforum the comments by Madam Justice Keightley demonstrated bias against it as their Counsel put it. In the alternative it was argued that Justice Keightley had in that matter expressed herself in terms directed at Afriforum such as to establish a reasonable apprehension of bias against it.

[41] It is significant to note that in that matter the comments by Justice Keightley were made on the 15 June 2018 and the application for her recusal was launched on the 20th September 2023. It is necessary to set out comments' complained of for purposes of this judgement.

[42] The SCA in dismissing Afriforum recusal application writes as follows at paragraph 23[5]:

> "The test for recusal is objective, with the applicant bearing the onus of establishing bias or a reasonable apprehension of bias. 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. A double reasonableness requirement is involved in the application of the test: the apprehension of bias must be that of a reasonable person in the position of the litigant, and it must be based on reasonable grounds. The test requires a reasonable apprehension that the judicial officer might be biased, not that they would be biased."

[43] In the present matter the Applicant Mrs Primrose Mazibuko says the following at paragraph 7 of her founding affidavit:

> "This is an application for the recusal of the Honourable Judge Makume as presiding Judge in this matter. The grounds for this recusal application are set out in great detail herein below and will be more fully elaborated upon during the proposed oral presentation of the application. They are mainly centred

[5] See also *S v Roberts* 1999 (4) SA 915 (SCA) paragraph 32-34.

around the personal relationship and many interactions between the Honourable Judge and Mr T.T. Thobane who was previously on record as a legal representative in this matter."

[44] It is necessary for the Court to deal with this nonsensical statement made by the applicant supported by her attorney to the effect that T.T. Thobane as "my son" and that me and him have a personal relationship. The said Thobane and a lady I was seeing for the first time walked into my chamber sometime in the year 2023. Thobane who I had seen on TV appearing for one of the accused in the Senzo Meyiwa trial introduced himself and told me that he had served articles in the law firm in which I was a partner. I had been practicing as an attorney since 1980 until 2010 when I took up position as a judge. During the 30 years as an attorney, I had been involved in partnership firstly as Moshidi, Kunene & Makume then later as Makume & Associates and finally in the law firm of Maluleke, Seriti, Makume, Matlala Inc. We had offices in Johannesburg Germiston and Pretoria and employed a large number of Candidate Attorneys and other support staff. I could not recall TT Thobane as he was never at any stage supervised by me as principal.

[45] The meeting in my chamber was to greet me and introduce the lady as his law firm partner and it ended there. I have never handled any matter in which the said Thobane was involved. If the fact that I know Mr Thobane and there was an apprehension that I would be biased, why was it not brought to my attention at the beginning of the exception application, why is it brought after my judgment. My view is that the applicant and her attorney are being disingenuous, the truth of the matter is that applicant never addressed this Court on the merits of the exception application despite being asked several times to do so.

[46] The applicant's heads of argument in the exception application once more demonstrate a serious defect in the pleadings. This could either be that the drafter of the heads did not understand what he or she had to deal with or just did not care as long as a document titled heads of argument is filed. The heads of argument do not deal with issues raised in the Rule 23 notice. The heads

deal with the defendants not being properly before Court. Paragraphs 6-7 of the heads makes some shocking reading. They read as follows:

> "[6] We submit that there is no foreseeable prejudice that may be suffered by the Respondents if the above Honourable Court grants this application to the contrary this will allow the Court to have the matter properly ventilated which is in line with my constitutional right to have any dispute resolved by an impartial tribunal and to be head in open court.
>
> [7] In the event that the above Honourable court refuses this application, the doors of justice will be closed on the face of the Applicant in that he will not have his side of the story heard by the Court and we respectfully submit that the whole ordeal of the Applicant being abused by the first Respondent still continues and is more extreme to which the second Respondent has not consequential or investigative measures taken against the first Respondent. There has been no enquiry, no disciplinary enquiry, no hearing or corrective measures taken by the second Respondent against the first Respondent."

[47] These two paragraphs in the applicant's heads are not only confusing but are misplaced and do not at all deal with the exception application instead prays that the exception be upheld.

[48] The applicant has failed to satisfy the test to be applied to the true facts on which the application is based and must accordingly fail.

THE APPLICATION FOR LEAVE TO APPEAL

[49] The applicant's (plaintiff) case for leave to appeal boils down to the following contentions:

49.1 That this Court erred in that the Court did not read the applicant's heads of argument.

49.2 That the judge had already made a finding prior to hearing argument and submissions.

49.3 The Court ignored the chronology of events and insisted that the applicant's legal representative deal with the exception.

49.4 That the Court erred by referring to the applicant's legal representative as "ma'am."

49.5. The Court should not have heard the defendant as they had no legal stand.

49.6 The Honourable Judge has a family relation with a Mr Thobane who influenced that the judgement goes against the plaintiff.

THE TEST FOR LEAVE TO APPEAL

[50] In terms of Section 17(1) (a) of the Superior Courts Act[6] leave to appeal "may only be given" where one of these two requirements are satisfied namely:

50.1 Where the appeal would have a reasonable prospect of success; or

50.2 There is some other compelling reasons why the appeal should be heard including conflicting judgments on the matter under consideration.

[51] In *Mont Chevaux Trust vs Goosen*[7] the test in Section 17(1) (a) of the Superior Courts Act was summarised as follows:

> "[T]he threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion... . The use of the word "would" in the new statute indicates a measure of certainty that another court would differ from the Court whose judgment is sought to be appealed against."

[52] In *MEC for Health, Eastern Cape vs Mkitha*[8] the Supreme Court of Appeal held as follows:

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[6] 10 of 2013.
[7] 2014 JDR 2325 (LCC).
[8] 2016 JDR 2214 (SCA).

"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospects of success. Section 17(1) (a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospects of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospects or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospects of success on appeal."

[53] The applicant's application for leave to appeal in this matter does not even come close to what is required. The application is full of diatribe and verbal attacks on the Judge and nothing about the actual judgment.

[54] The applicant was not in Court when the exception was argued and yet she deposes to an affidavit about what transpired in Court. Clearly what is attributed to her in that affidavit is what she was told by her attorney Ms Hadebe and it is therefore hearsay and should be struck off.

[55] I also hold the view that my judgment is not appealable in that there is no final decision on the merits. The applicant is free to draft new particulars of claim which comply with the Rules of Court.

[56] The Supreme Court of Appeal in *Zweni vs Minister of Law and Order Republic of South Africa*[9] held that a judgment or order is a decision which as a general rule has three attributes firstly the decision must be final in effect and not susceptible to alteration by the Court of first instance. Secondly it must be definitive of the rights of the parties i.e. it must grant definitive and distinctive relief and lastly it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.

[9] 1993 (1) SA 523 (A).

CONCLUSION

[57] There are two issues that remain to be given attention to the first is the issue of costs the second is whether this is an appropriate case to be referred to the Legal Practice Council in view of the false and scurrilous attacks on the presiding judge. The language used by the attorney for the applicant is not only inflammatory but bothers on contempt which in my view may very well amount to unprofessional conduct.

[58] After serious thinking I have decided to indeed refer this judgment as well as the full record to the Legal Practice Council. As regards costs, counsel for the respondents has asked for a punitive costs order. I agree with that submission. In the result I make the following order:

Order

1. The application for my recusal is dismissed.
2. The application for leave to appeal is dismissed.
3. The applicant and her attorney Ms Hadebe and the law firm are ordered to pay the respondents costs on an attorney and client scale jointly and severally the one paying other to be absolved.

MA MAKUME
JUD HIGH COURT
JOHANNESBURG

Dated at Johannesburg on this 30 day of September 2024

APPEARANCES

For 1st and 2nd Defendants:	Adv. Ntshangase
Instructed by:	Office of the State Attorney

Date of Hearing	10 September 2024
Date of Delivery	30 September 2024