CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 2/00

SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION — First Applicant

PATRICK NKATU AND OTHERS — Second and Further Applicants

versus

IRVIN & JOHNSON LIMITED SEAFOODS
DIVISION FISH PROCESSING — Respondent

Heard on : 18 May 2000

Decided on : 09 June 2000

JUDGMENT

CAMERON AJ:

Introduction

[1] When the applicants' appeal against the industrial court's refusal to grant them unfair labour practice relief was called in the Labour Appeal Court, they moved for the recusal of two of the three judges on the ground that they reasonably apprehended bias against their appeal. The application was refused,[1] and a negative certificate in terms of Rule 18[2] of this Court later

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1 *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (2000) 21 *ILJ* 330 (LAC) (Nicholson JA; Conradie JA and Mogoeng AJA concurring).

2 Rule 18(2) provides that a litigant wishing to appeal directly to the Constitutional Court from any court

issued. The applicants — a trade union and a number of dismissed workers who are its members — now apply for leave to appeal against the recusal decision.

[2] It was not disputed that, since *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[3] established that the question

[3] of judicial recusal is a constitutional matter,[4] the appeal proceedings were competently directed to this Court.[5]

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other than the Supreme Court of Appeal must apply to the court in question for a certificate "that it is in the interests of justice for the matter to be brought directly to the Constitutional Court and that there is reason to believe that the Court may give leave to the appellant to note an appeal". The criteria for the grant of a positive certificate, set out in Rule 18(6)(a), are that "the constitutional matter is one of substance on which a ruling by the Court is desirable"; that the evidence "is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the court concerned for further evidence"; and that "there is a reasonable prospect that the Court will reverse or materially alter the judgment if permission to bring the appeal is given". In terms of Rule 18(6)(b), the certificate "shall also indicate whether, in the opinion of the court concerned, it is in the interests of justice for the appeal to be brought directly to the Constitutional Court".

3 1999 (4) SA 147; 1999 (7) BCLR 725 (CC).

4 Id at para 30.

5 In terms of section 167(3)(a), the Constitutional Court is "the highest court in all constitutional matters".

Section 167(6) provides that national legislation or the rules of this Court "must allow a person" when it is in the interests of justice and with this Court's leave (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court.

[4] The parties were also in agreement that, despite the absence of explicit provision in the relevant statute,[6] this Court has jurisdiction to decide any question arising from or connected with the Labour Courts' interpretation of the right to fair labour practices, which is a constitutional right.[7]

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6 Schedule 7, item 22(6) of the Labour Relations Act, 66 of 1995 provides in part that "Despite the provisions of any other law but subject to the Constitution, no appeal will lie against any judgment or order given or made by the Labour Appeal Court".

7 In terms of section 23(1) of the Constitution, "Everyone has the right to fair labour practices". Subsections 23(2)-(6) set out associated rights. See *Johnson & Johnson (Pty) Ltd v Chemical Workers' Industrial Union* (1999) 20 *ILJ* 89 (LAC) at 94H-95A, paras 22-23.

[5] In the Labour Appeal Court it appears to have been common cause that although the dismissal of the recusal application was interlocutory, the applicants could at that stage as of right take the recusal question on appeal. In the certificate proceedings, Conradie JA expressed the view that the applicants "were entitled" to attempt to proceed with their recusal appeal first before arguing the merits of the dismissal. This they decided to do despite an express intimation from the court that it would be "highly desirable" for the appeal itself to be disposed of first. The learned judge's view on this issue, which is directly connected with the constitutional question and affects the practice of this Court, which has to decide in every case whether to grant leave to appeal, does not reflect the correct approach. An applicant for recusal cannot be said to be "entitled" to prosecute an appeal immediately. Two considerations suggest the contrary. First, though there is some early authority that a decision by an applicant for recusal to proceed with the merits of the matter instead of insisting on challenging the refusal to recuse by way of appeal may constitute a waiver of the recusal objection,[8] it is clear from subsequent authority that waiver in these circumstances occurs only if it is unambiguous.[9] The recusal point unless so abandoned therefore remains good for a later appeal. There can accordingly be no question of an "entitlement" to proceed immediately.

[6] Second, a court that has dismissed a challenge to its composition has ruled that it is

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8 *Muller and Cloete v Lady Grey Divisional Council* 1929 EDL 307 at 313-316.

9 *Liebenberg and Others v Brakpan Liquor Licensing Board and Another* 1944 WLD 52 at 59; *Snyman and Others v Liquor Licensing Court, Windhoek and Another (2)* 1963 (1) SA 460 (SW) at 462H and 465E-F. In *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [2000] 1 All ER 65 (CA) at para 15, the Court of Appeal of England and Wales put it thus:

> ". . . a party with an irresistible right to object to a judge hearing or continuing to hear a case may, as in other cases . . ., waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not."

properly constituted. In these circumstances, the Labour Appeal Court had the power to regulate its own proceedings, including the power to direct that the party whose challenge has been dismissed should proceed with the merits of the matter before it. Generally considerations point strongly against piecemeal appeals, though the matter remains overridingly one of convenience.[10] Whether a court that has dismissed a recusal application permits the applicants to bring appeal proceedings first will depend on a range of factors. These include the nature of the matter, the nature of the objection to the court's composition, the prospects of success in the recusal, and, in the case of an appellate court, the length of the record. The decision on these factors lies with the court itself. The applicants were therefore not entitled to proceed as of right with the application for leave to appeal.

[7] After the application for leave to appeal was lodged, the Court directed inquiries to the parties regarding the nature of the issues and the means of disposing of them. After the parties' responses were received, the application was set down for oral argument. The parties were directed to deal not only with the application, but with the merits of the appeal against the judges' refusal to recuse themselves. They did so. The substantive issues have accordingly been fully canvassed.

Background

[8] The individual applicants (to whom I refer as "the dismissed workers") were dismissed on

10 *S v Malinde and Others* 1990 (1) SA 57 (A) 67D-68G and the authorities cited there.

2 August 1995 for participation in a march at the premises of the respondent ("the employer") on 21 June 1995. The dismissals took place after disciplinary inquiries were held in terms of a procedural agreement concluded between the first applicant ("the union") and the employer after the march. The events triggering the dismissals had their origin in bitter rivalry between the union and the Food & Allied Workers' Union (FAWU). Notwithstanding the agreed procedure, the union organised protest action against the dismissals of its members at the employer's premises between 25 and 31 August 1995. A second group of thirty-five employees was in consequence dismissed. Of these, seventeen were already under final written warning for participating in the 21 June march.

[9] The two groups of dismissed employees brought separate proceedings for unfair labour practice relief in the industrial court. The first to reach trial were the thirty-five dismissed as a result of the August protests. I refer to their matter as did the Labour Appeal Court, by the name of the first individual applicant amongst them, Mr Nomoyi. Of these, the industrial court confirmed the dismissal of the seventeen who were already under final written warning — but reinstated the remaining eighteen who had not been so disciplined.

[10] Both employer and union took the *Nomoyi* matter on appeal. The Labour Appeal Court, per Conradie JA (Froneman DJP and Nicholson JA concurring) on 24 May 1999 dismissed the appeals of the seventeen employees who had failed in the industrial court, but allowed the employer's cross-appeal in respect of the eighteen who had succeeded.[11] The upshot was that the

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[11] *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd* (1999) 20 *ILJ* 2302

Labour Appeal Court confirmed all thirty-five original dismissals.

[11] Although the events that led to the present proceedings took place before those in *Nomoyi*, the dismissed workers came to trial some five weeks later. The industrial court refused their application for unfair labour practice relief in its entirety. Their appeal was set down for hearing in the Labour Appeal Court on 31 August 1999 before Conradie and Nicholson JJA and Mogoeng AJA. The application for the recusal of Conradie and Nicholson JJA was based on the Labour Appeal Court's judgment in *Nomoyi*. Before considering the grounds of that application in more detail, it is necessary to set out the basis on which the law requires that they be assessed.

The Test For Recusal

[12] In *Sarfu*, this Court formulated the proper approach to recusal as follows:

(LAC); [1999] 8 BLLR 741 (LAC).

"... 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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."[12]

12 Above n 3 at para 48.

[13] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes.[13] As later emerges from the *Sarfu* judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality.[14] On the other, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted.[15]

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13 Id at paras 40-41.

14 Id at paras 45 and 48.

15 Id at para 40.

[14] The second in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context.[16] This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge's performance of his or her judicial duties.[17] But colourless neutrality stands in contrast to judicial impartiality[18] — a distinction the *Sarfu* decision itself vividly illustrates.[19] Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication. Impartiality requires in short "a mind open to persuasion by the evidence and the submissions of counsel";[20] and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that —

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. . . . Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."[21]

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16 Id at para 42.

17 Id.

18 *R v S (RD)* (1997) 118 CCC (3d) 353 (SCC), per l'Heureux-Dubé and McLachlin JJ at paras 35-84.

19 Above n 3 at paras 74-75.

20 Id at para 48.

21 Id at para 35.

[15] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable.[22] This two-fold aspect finds reflection also in *S v Roberts*,[23] decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.[24]

[16] It is no doubt possible to compact the "double" aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden

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22 Id at para 45.

23 1999 (4) SA 915 (SCA) at para 32, per Howie JA.

24 The Supreme Court of Appeal alluded to a "suspicion" of bias, but in *Sarfu* (n 3 above at para 38) this Court, in common with the House of Lords, the High Court of Australia and the Supreme Court of Canada, expressly preferred the term "apprehension" of bias, because of the "inappropriate connotations" that might flow from "suspicion".

resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

> "Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity."[25]

[17] The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased ― even a strongly and honestly felt anxiety ― is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law.

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25 *R v S (RD)* above n 18 at para 113.

[18] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged.[26] The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from "the evils and immorality of the old order"[27] remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is "as wrong to yield to a tenuous or frivolous objection" as it is "to ignore an objection of substance".[28]

The applicants' case for recusal

[19] To establish whether the applicants have crossed the high threshold needed to satisfy the test for recusal, it is necessary to examine their case in some detail. Discerning that case is not made simpler by the fact that one counsel conducted their case in the industrial court; a second

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26 In *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC) both the majority and minority judgments (at paras 20 and 74-77) considered the practical application of the concept of reasonableness in the context of the criminal law.

27 *Sarfu* above n 3 at para 74.

28 *Locabail* above n 9 at para 21. The English courts continue to apply the test of "real danger (or possibility) of bias": *Locabail* at para 16.

was added to argue the recusal application; and a third to argue the application for a certificate and for leave to appeal.

[20] The recusal application lodged in the Labour Appeal Court in August 1999 was deposed to by Ms Holland, the paralegal official employed by the union. Her affidavit bases the applicants' case squarely and solely on the contention that the issues and a number of the witnesses in the *Nomoyi* and the present appeals are identical. The applicants assert that the Labour Appeal Court's "findings" on the issues and witnesses in *Nomoyi* give rise to a reasonable apprehension of bias in the present matter. In her affidavit Ms Holland states that there is a "striking" similarity in the facts and issues in the two appeals, and that since the present issues are "identical to those issues in respect of which the Judges have already made certain (crucial) findings in the *Nomoyi* appeal", there is a reasonable apprehension of bias. She claims in particular that the *Nomoyi* court made "certain factual findings with regard to what happened on 21 June 1995" and that having regard to these findings the judges would "find it very difficult to abandon the mental picture they formed" about the June events in *Nomoyi*. She further states that the credibility of three witnesses has already been pronounced upon in *Nomoyi*.[29]

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[29] In her affidavit in the application, Ms Holland states:

> "3. "....
> Essentially, the key issues which this Court will be dealing with in the Nkatu appeal appear to be firstly, the conduct of the individual applicants on 21 June 1995 at the respondents' premises; secondly, my conduct (as the union official concerned) and that of the first applicant itself in the aftermath of what happened on 21 June 1995; thirdly, the mediation agreement reached between the respondent and the first applicant; fourthly, the credibility of certain key witnesses Mark Anema (the factory manager), Nkatu, Catto and me; and fifthly, the background events which occurred earlier in the year (1995) dealing with the union first establishing its presence at the respondent's Woodstock factory.

4. The Nomoyi appeal dealt with the conduct, *inter alia,* of the appellants during a protest demonstration outside the respondent's premises on 25, 29 and 31 August 1995. I respectfully submit that apart from the fact that the alleged incidents of misconduct in the Nkatu matter took place on 21 June 1995 (and that the alleged incidents of misconduct which arose in the Nomoyi matter took place on 25, 29 and 31 August 1995) the issues which I have identified above as being the key issues to be decided by this Court in the Nkatu appeal, are identical to those issues in respect of which the Judges have already made certain (crucial) findings in the Nomoyi appeal.

5. This is an application for the recusal of the Judges on the grounds that they have already made certain findings (adverse to the applicants) which (the applicants reasonably apprehend) will prejudice the applicants in the Nkatu appeal.

Having been informed of the facts and circumstances and the issues involved in both the Nomoyi appeal and the Nkatu appeal; having viewed the matter realistically and practically; and having thought the matter through, the applicants have come to the conclusion that there is a reasonable apprehension that the Judges will be biased against them in the hearing of the Nkatu appeal.

I regard it as vitally important at the outset to state that the application must in no way be seen to be casting doubt on, or impugning the integrity of, the Judges. No personal affront or attack is directed at the Judges.

I respectfully submit that the Judges should not sit to hear the Nkatu appeal since, in all the circumstances, the applicants entertain a reasonable apprehension that they might not bring an impartial and unprejudiced mind to the resolution of the questions involved in the Nkatu appeal."

[21] It is the applicants' case as thus formulated that Nicholson JA addresses in his judgment refusing the recusal application.[30] He records that apart from the Labour Appeal Court's findings in *Nomoyi*, "no other ground for recusal" was advanced.[31] After detailed consideration of the issues at stake in the pending appeal, derived from the applicants' written argument, Nicholson JA concludes that though the judgment in *Nomoyi* dealt in certain instances with "the same personalities", in fact the two appeals concern "different sets of events".[32]

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30 Above n 1.

31 Id at para 14.

32 Id at para 27.

> "The *Nomoyi* judgment was delivered on appeal after a full ventilation of the relevant issues in the Industrial Court. It dealt with different employees and different events, though the events of 21 June 1995 (relevant for the [pending] appeal) formed part of the background."[33]

[22] It is of some importance to assessing these findings by Nicholson JA that the applicants at no stage put the *Nomoyi* court's characterisation of the events of 21 June in issue. It was indeed at all times common cause in regard to the events of 21 June, and expressly conceded in the applicants' written argument in the recusal application, that ―

> "On Wednesday 21 June 1995, approximately 200 of the first applicant's members employed by the respondent toyi-toyied and marched through the respondent's factory, causing production to come to a standstill."

[23] In their written argument before the Labour Appeal Court on the merits of the dismissal, the applicants moreover record their own version of the events of 21 June as follows:

> "At 15h00 SACCAWU members, inclusive of some of the Appellants as will appear *infra*, assembled in the cloak room and started their march (toi-toi). **NKATU** testified that prior to this march starting, he contacted **ANEMA** [the employer's factory manager] as well as **CARLIN** [the general manager] to inform them that the march was going to take place during tea time, which allegation is denied by **ANEMA**.
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> When the marchers were in the corridor, three FAWU shop stewards approached the march from the opposite direction. A confrontation ensued between the marchers and

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33 Id at para 31.

> two of the three FAWU shop stewards. Chaos ensued, during which '***. . . people started running . . .***' The marchers split and reassembled, having armed themselves with bin hooks and various other objects.
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> Thereafter a toi-toi started on the premises. Production was stopped and workers sent home at approximately **16h30**. SACCAWU officials arrived at the premises of the respondent and negotiations ensued." [references to record omitted].

[24] It was against this background that Nicholson JA observed that the management evidence regarding the June events, which formed the backdrop to the August protest that sparked the *Nomoyi* dismissals, was unchallenged in *Nomoyi*, and thus on well-established principles had to be accepted by the *Nomoyi* court except where it was so inherently improbable as to warrant rejection without controverting testimony.

[25] In dismissing the application Nicholson JA concluded that the applicants' arguments in respect of both the "identity of issues" and the overlap in witnesses had to be rejected. The adverse findings in *Nomoyi* against Ms Holland and the union were "of very little relevance in the present appeal":

> "The first applicant and Ms Holland play very little if any part in the events which unfolded on 21 June. The actions were initiated by Nkatu [the first individual applicant] and the officials of first applicant only made their appearance on the scene later in the day. The officials of first applicant were not eyewitnesses to the actions of the employees during the march. Any positive credibility findings with regard to the respondent's witnesses concerning the events of 21 June were made in the context of

their evidence being [uncontroverted]."[34]

[26] It was no part of the applicants' case as originally advanced in the Labour Appeal Court that the language in which the *Nomoyi* court expressed its conclusions was of such tenor, tone, spirit or robustness as to instil in reasonable litigants in the position of the union and the dismissed workers a reasonable apprehension that the judges concerned would be biased against them.

[27] The application for a certificate in terms of Rule 18, lodged in October 1999, in some measure appears to seek to widen the basis of the applicants' objection to the two judges. In it, the applicants put in issue the finding by Nicholson JA that no other ground for recusal was advanced, in so far as this implied "that only a few selected grounds are and/or ought to be recognised". And for the first time they intimate that certain "utterances" on the part of the *Nomoyi* court "may create a reasonable apprehension of bias". However, the certificate application merely lists the utterances in question. It does not specify in what way the statements might reasonably elicit the apprehension relied upon about the judges' impartiality.

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34 Above n 1 at para 35.

[28] The application for a certificate was argued before Conradie and Nicholson JJA and Mogoeng AJA in November 1999. In a reserved judgment, Conradie JA (Nicholson JA and Mogoeng AJA concurring) issued a negative certificate. It is apparent from the judgment that the application was again argued on the basis that there was an identity of issues and witnesses in the two appeals. Conradie JA recorded that the applicants' new counsel, Mr Brassey, accepted that the issues the Labour Appeal Court was called upon to decide in the pending appeal had been correctly identified by Nicholson JA in the recusal judgment, and that Mr Brassey confined his argument on bias to only two of those issues. These were whether there was proof that each individual employee took part in the march of 21 June or shared a common purpose with those who did; and whether the disciplinary procedure envisaged in the mediation agreement concluded after the events of 21 June was fair.[35]

[29] Conradie JA concluded that the suggested inference that the Labour Appeal Court's previous criticism of the union would dispose the later court to find that the union had instigated the 21 June march, and thus that all the marchers had shared a common purpose in the commission of dismissible offences, was "far-fetched". The union was not alleged to have had anything to do with the march, since it came onto the scene only later. As for the fairness of the mediated agreement, Conradie JA held that there had been no adverse credibility finding against Ms Holland; and that in any event the fairness of the agreement would depend on the facts

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35 I am therefore unable to agree with the suggestion in the dissenting judgment of Mokgoro andSachs JJ that the Labour Appeal Court has already pronounced on "whether the litigants concerned behaved in a defiant and confrontational manner which so disrupted production and the work environment as to merit their dismissal." At para 15 of dissent.

surrounding its conclusion, and not on Ms Holland's reliability as a witness.

[30] In their application for leave to appeal to this Court, the applicants add nothing to the grounds of recusal already advanced, merely averring in their notice of motion that the Labour Appeal Court "erred in fact and in law" in not consenting to the recusal.

[31] In arguing the matter before this Court, Mr Brassey did not put in issue the accuracy of the Labour Appeal Court's observations on the course of the proceedings before it in the recusal and certificate proceedings. However, his written argument portended a substantial shift in the applicants' approach. For the first time the applicants now focussed on the Labour Appeal Court's "pronouncements" in the *Nomoyi* matter, identifying them as "those that condemn the conduct, stance and attitude of [the union], its officials and office-bearers during the period leading up to the protest march" on 21 June. Mr Brassey asserted that the union constituted the critical link between the court's *Nomoyi* dicta and the present matter. He argued that in determining whether the march participants had a common purpose, "the conduct of the union — the body that links them together — is of considerable importance". He also contended that the *Nomoyi* court's statements are important in determining the question of procedural fairness, since Ms Holland claimed that she signed the mediation agreement under pressure.

[32] Mr Brassey did not suggest that the Labour Appeal Court's contested statements in *Nomoyi* were not justified on the evidence before it. Indeed, he intimated that his submissions did not derive from a reading of the *Nomoyi* record. Instead, he submitted that it was "immaterial" whether the court's comments on the two questions in issue were justified or borne

out by the evidence: the critical issue was the impact of the statements on the minds of reasonable persons in the position of the applicants. This was the bite of his argument. The Labour Appeal Court in *Nomoyi* had made its findings in "strong, emotive and indeed emphatic" language, and it was this that was said to "permeate the judgment as a whole", thus giving rise to a reasonable apprehension of bias.

[33] The high threshold a litigant must pass in a trial alleged to involve the same issues or witnesses was usefully formulated in *Livesey v New South Wales Bar Association*,[36] where "the central issues" in the case had already been determined by the judges whose recusal was sought, and they had expressed a "strong view" destructive of the credibility of a witness crucial to both hearings. In finding that the judges in question should have recused themselves, the High Court of Australia stated as far as trial proceedings are concerned that a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment —

> ". . . if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact."[37]

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36 (1983) 151 CLR 288.

37 Id at 300.

[34] As will appear below, this test cannot be applied without reservation to appellate proceedings, where the presumption of impartiality has an added practical force. Assuming however in favour of the applicants that the test for trial proceedings is applicable, the question is whether there is "a live and significant issue" in the pending appeal on which (or about the credibility of a witness significant to which) the judges in question expressed "clear views" in *Nomoyi*. The answer must, in my view, be No. The logic of the Labour Appeal Court's ruling that the issues in the two cases are not identical, and that credibility findings directly adverse to the union were not made in *Nomoyi*, is difficult to assail, and Mr Brassey made only a circumspect attempt to do so. The march of 21 June was not in issue before the *Nomoyi* court, and the background evidence management led in respect of the earlier events was in any event not contested by the union. The applicants did not at any stage suggest that the background evidence placed before the *Nomoyi* court was so inherently improbable as to warrant rejection without controverting testimony. In these circumstances, the *Nomoyi* court's recital of the uncontested evidence does not constitute the expression of "clear views" on the reliability of that evidence, and has no bearing on how it will evaluate any contested evidence on the points in question in the present appeal.

[35] There is a further consideration. An unfair labour practice determination involves two inquiries. The first concerns whether the employees concerned are guilty of misconduct. The second arises only if they are. In that case, the court must determine whether the sanction the

employer imposed was fair.[38] The distinction has a bearing on the applicants' case. Even if the *Nomoyi* court's findings addressed the question whether the employees misconducted themselves in the course of the 21 June march, this was as already indicated on the basis of uncontroverted evidence. The pending appeal offers the dismissed workers a still untrammelled opportunity to explain their conduct in relation to the court's duty to determine whether the sanction of dismissal for that conduct was appropriate . In that critical respect, the *Nomoyi* court expressed no views relevant to the present appeal.

[36] The reasons for the union's decision during the *Nomoyi* trial not to dispute the "background" evidence led in *Nomoyi* are not at present relevant. What is of importance is that the *Nomoyi* court was not required nor asked to pronounce upon the merits or demerits of the 21 June march, nor was the justification for the consequent dismissals in issue or argued before it. The court criticised Ms Holland's conduct in relation to the August protests, but it expressed no views — let alone "clear views" — about her credibility as a witness. The sole question the *Nomoyi* court had to decide was the justification for the dismissals in consequence of the August protests. A reasonable litigant, properly informed, would therefore attribute appreciably less significance to the court's recounting of the background evidence than if it reflected contested terrain.

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38 *National Union of Metalworkers of South Africa and Others v Henred Fruehauf Trailers (Pty)Ltd* 1995 (4) SA 456 (A) at 462C-D.

[37] Counsel for the employer relied on the decision of the Appellate Division in *R v T*,[39] in which it was held that "there is no rule in South Africa which lays down that a Judge in cases other than appeals from his judgments is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case".[40] In their argument they submitted that *R v T* had been approved in *S v Somciza*[41] and had been cited in the *Sarfu* judgment.[42] In *R v T* a magistrate, who on uncontested evidence regarding a charge involving a sexual offence had in previous criminal proceedings found one party to the act guilty, thereafter on contested evidence in a second trial, where the prosecution called the previous accused to testify, convicted the other party to the act. It was contended that the magistrate ought to have recused himself from the second trial and that his failure to do so constituted an

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39 1953 (2) SA 479 (A).

40 Id at 482G-H.

41 1990 (1) SA 361 (A).

42 Above n 3 at para 40, footnote 39.

irregularity vitiating the conviction. The Appellate Division dismissed this contention.

[38] The Court in *Sarfu* cited *R v T* as authority for the proposition that Canadian cases dealing with the presumption that a judicial officer will act impartially in any matter that he or she is called upon to decide were consistent with our law.[43] It was not necessary in *Sarfu* to consider the application of that principle to the facts in *R v T*, and *Sarfu* is not authority for the proposition that the failure of the magistrate to recuse himself in such circumstances would be consistent with the substantive elements of the constitutional right to a fair trial.[44] In any event, for *R v T* still to constitute good law today, it would have to survive the test set out above,

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43 Id.

44 As Kentridge AJ pointed out *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 16, the constitutional requirement since the adoption of the interim Constitution in 1994 has been that trials be conducted in accordance with "notions of basic fairness and justice." In *Shabalala and Others v Attorney-General, of Transvaal, and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 29, Mahomed DP underscored the inapplicability of the distinction, valid in the pre-Constitutional legal regime, between the "right to a fair trial" and an attack based on "the narrow ground that certain specific rules and formalities . . . were not satisfied."

namely whether the magistrate had already in the earlier trial decided an issue that was "live and significant" in the second trial. I doubt whether it does.

[39] *R v T* was distinguished in *S v Somciza*,[45] where the Appellate Division held that a magistrate whose decision convicting an accused had been set aside on appeal should not preside at a resumed hearing. Although the accused had not testified in the first proceedings, the magistrate in convicting him had made "strong credibility findings" in respect of all the State witnesses in which he had accepted the prosecution evidence. Hence: "However dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate."[46] The basis on which the court distinguished *R v T* was that the magistrate there was trying a different accused.[47]

[40] The applicants' case is, however, very different from that in *S v Somciza*. The Labour Appeal Court is not called upon to conduct a trial. It is hearing an appeal, and has to determine whether the findings made by the industrial court on the evidence before it were wrong, and, if

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45 Above n 41.

46 Above n 45 at 365H-366A, per Friedman AJA.

47 Id at 366E-F.

they are not, whether the sanction imposed by the industrial court should be varied on appeal.

[41] Apart from *Sarfu*[48] (where apprehended bias was in issue) and the *Pinochet* case[49] (which involved a technical "interest" on the part of one of the judges), I am not aware of any decision involving the recusal of members of appellate tribunals, where it seems plain that the presumption of judicial impartiality has an added practical force.[50] A trial is a dynamic process where the issues develop under the supervision of the presiding judicial officer. Oral testimony is led. Pleadings may be amended as the issues take shape. The nature of the process imposes duties of evaluation on the judge or magistrate, who is required to gauge the personal attributes of the witnesses who are called and to hold an even hand between the contenders. A claim that "a live and significant issue" relevant to the proceedings has already been decided by the trial judge could well excite apprehension that the judge, in shaping the issues as the trial proceeds, might not be able to show the requisite dispassion and open-mindedness.

[42] An appellate court, by contrast, normally evaluates a written record. The issues of both fact and law have usually long been crystallised, and the court has the benefit of advance written argument in which the parties' contentions in regard to those issues are set out. The collegial nature of an appellate bench moreover reduces the leeway within which the personal attributes, traits and dispositions of each of the judges operate. In addition, appellate judges, being

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48 Above n 3.

49 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL); [1999] 2 WLR 272.

50 *Livesey*, above n 36, involved an application for recusal directed to members of the Court of Appeal of New South Wales, but sitting as a court of first instance.

entrusted with a higher level of judicial office, are generally more experienced in the craft of judging.

[43] For these reasons, the presumption of judicial impartiality must generally apply with added force in an appellate court, where the law rightly supposes that the reasonable litigant will have knowledge of the institutional aspects that operate to guarantee a fair appreciation of his or her appeal.

[44] What is undeniable, however, is that the June events form a continuous thread with the August protest, which they sparked. It is in this context that the tone of the *Nomoyi* court's comments on the June events attain significance, and in this Court considerable time was spent during oral argument in analysing the meaning and the likely impact on the reasonable litigant in the applicants' position of certain observations Conradie JA made in *Nomoyi*. One was his comment, in allowing the employer's cross-appeal, that those employees already under final written warning for the march of 21 June 1995 who were dismissed for the August 1995 protest "doubly deserved to be dismissed".[51] Conradie JA also referred to the "confrontational attitude" displayed throughout not only by the August demonstrators, but "by their leaders and by SACCAWU's officials";[52] while in determining the true character of the August demonstrations,

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51 Above n 11 at para 32.

52 Id at para 24.

he held that the union was "determined to build upon the image of the defiant union it had begun to establish in June of that year".[53]

[45] The case as advanced by Mr Brassey in this Court is not however the case argued before the Labour Appeal Court. This in my view places two substantial obstacles in the path of the applicants. First, if an applicant is to advance "cogent" or "convincing" evidence of reasonably apprehended bias, the least that can be expected is that he or she will set out the case to that effect unambiguously in the founding papers. This the applicants did not begin to do. Nowhere in the papers do they complain that, having been informed that the Labour Appeal Court had branded their union "defiant" and had declared that the *Nomoyi* workers under final written warning for the June march "doubly" deserved dismissal, they feared that this language betokened a partiality on the part of the judges against their own case. Instead, Ms Holland put her case solely on the basis that the issues in the two cases were identical; an argument which in my view the Labour Appeal Court correctly rejected, and which Mr Brassey but faintly contested.

[46] The shift in the applicants' case creates a further problem. The judges in the Labour Appeal Court were not only deprived of the benefit of the argument advanced before us. They were denied any opportunity of commenting upon it. The statement that the workers already under final written warning "doubly deserved" to be dismissed in August, for instance, may have

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53 Id at para 25.

a meaning very distant from that suggested at the hearing. The phrase, as it was said, might instill apprehension in the applicants that the August protesters deserved dismissal also for the June march. What it may in fact mean is that Conradie JA was of the view merely that participation in the dismissible misconduct of the August protests on its own warranted dismissal, but that those workers who were already under disciplinary admonition for a previous infraction — regardless of its character — "doubly deserved" dismissal. Conradie and Nicholson JJA had the duty, in the first instance, of determining whether any apprehension about that comment would have been reasonable, but were never given the opportunity to do so.

[47] In similar vein, Mr Brassey's contention that the allusion by Conradie JA to the defiance evinced by the union from June included the events of 21 June loses a great deal of its persuasive force when the common cause facts are borne in mind. These are that there is no evidence that the union as an organisation was involved in the march of 21 June. Its involvement seems to have commenced only when Ms Holland arrived on the scene late in the day after the events were largely over. The union's active involvement commenced only the following day, 22 June, when it intervened by refusing to sign a peace agreement brokered between the parent union, Cosatu, and the employer, which FAWU signed. This, to say the least, offers room for the interpretation that Conradie JA's comment is quite unconnected with the march of the preceding day, the sole event in issue in the present appeal.

[48] But because the case was not argued on that basis before the Labour Appeal Court, both Conradie and Nicholson JJA were deprived of the opportunity to determine, as would have been required of them, whether a reasonable litigant, well informed, and excluding incorrect facts

from his or her apprehension, might reasonably have concluded that the allusion to defiance embraced events on 21 June in which the union did not participate.

[49] It is not necessary for this Court to determine in the case of any of these comments which meaning is appropriate, or whether either is "reasonable", since that was not the case the union made out in its founding affidavit in the recusal application, nor was it the case put before the Labour Appeal Court in the proceedings from which appeal is now sought to be brought. In my respectful view, the considerations set out by my colleagues Mokgoro and Sachs JJ in their dissent do not meet this point.

[50] On the assumption that the applicants are granted leave to appeal, this Court would be asked to reverse a judgment the findings of which are not persuasively assailed before us, which was directed to a case materially different from the main substance of that urged before us, and to which none of the litigants alleged to apprehend bias attested. This does not present the "cogent" and "convincing" evidence required in cases of bias or apprehended bias, and accordingly in my view does not pass the high threshold demanded in such cases.

Costs, disposition and order

[51] Although I am of the view that the applicants' recusal application was rightly rejected in the Labour Appeal Court, I do not consider their complaints to have so little substance that leave to appeal would not have been granted in this Court. The appropriate order is therefore one granting the applicants leave to appeal, but dismissing the appeal.

[52] The employer in successfully resisting the recusal application in the court below was awarded its costs. In the Labour Courts it is an established principle that the usual rule that costs follow the event does not apply, since where there is a long-standing and continuing labour and employment relationship such orders might not be in the best interests of that relationship.[54] This principle however has less force when a point such as recusal is taken, which does not derive from the employment association. In this Court, the general principle has been established that parties should not be discouraged from asserting and vindicating their fundamental constitutional rights and freedoms as against the state.[55] This principle does not apply to all private litigants unsuccessfully asserting constitutional claims against the state.[56]

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54 *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A) at 738F-739G per Goldstone JA; *Unilong Freight Distributors (Pty) Ltd v Muller* 1998 (1) SA 581 (SCA); *De Beers Consolidated Mines Ltd v National Union of Mineworkers and another* [1998] 12 BLLR 1201 (LAC) 1208B-C.

55 *Motsepe v Commissioner For Inland Revenue* 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at paras 30-31.

56 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at paras 51-54; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059

This Court has for instance ordered such litigants to pay costs in the absence of good faith,[57] or where the litigant mulcted in costs was apparently pursuing private commercial interests.[58]

(CC) at paras 251-259. Compare *Harksen v President of the Republic of South Africa and Others* 2000 (5) BCLR 478 (CC) at para 30, where there was no order as to costs.

57 *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 30.

58 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 116.

[53] In *Transvaal Agricultural Union v Minister of Land Affairs and Another*,[59] this Court observed that there may be good reasons why a losing litigant who raises a substantial constitutional issue in proceedings before it ought not to be ordered to pay the costs of the successful party. In my view, the present is such a case. While the union has failed in its appeal, the Labour Appeal Court itself permitted it to proceed with the recusal point while the main appeal was still pending. The union's conduct in persisting with that point is in the circumstances understandable, and the point it raised, though ultimately unsuccessful, was not without substance. I am of the view that in these circumstances the fairest would be to make no order as to costs.

[54] There is accordingly an order as follows:

(1) The application for leave to appeal is granted.

(2) The appeal is dismissed.

(3) There is no order as to costs.

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J, and Yacoob J

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[59] 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 47, where the applicant was ordered to pay the successful respondent's costs.

concur in the judgment of Cameron AJ.

MOKGORO AND SACHS JJ:

[55] Cameron AJ has set out the facts with meticulous precision and enunciated the legal issues in an elegant and persuasive manner. We agree in broad terms with the way in which he has outlined the test for recusal, but believe that the test as formulated in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[1] requires that more weight be given than he does to the perception of the lay litigant and her or his right to a fair hearing. We accordingly note our dissent from his judgment.

[56] The test for recusal places a heavy burden of persuasion on the person alleging judicial bias or its appearance.[2] But despite the presumption in favour of judges' impartiality, the test requires an assessment of the litigant's perception of impartiality.
The litigant's perception must be objectively reasonable, however:

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1 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) at para 48.

2 See Cameron AJ above at paras 12, 14 and 15.

> "[t]he law does not seek . . . to measure the amount of [the judicial officer's] interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."[3]

[57] The issue in this case is not whether we, as judges in this Court, have a reasonable apprehension that the two judges concerned in the Labour Appeal Court would fail to handle the appeal before them with appropriate professionalism and impartiality. Nor is the issue whether, in fact, the bias exists.[4] We are fully confident that, given their training and experience, the judges concerned would be able to set aside any knowledge gained in the course of their hearing of the first matter, and disabuse themselves of any opinions they may have formed. The fact that it is an appeal to be decided purely on the record strengthens our conviction in this regard. Indeed, the Labour Appeal Court by its very nature hears matters where the same parties appear

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3 *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 694I-695A, quoted with approval in *Sarfu* above n 1 at para 37.

4 *Sarfu* above n 1 at paras 30 and 36; see also BTR Industries above n 3 at 690A-695B, concluding that in South African jurisprudence "a real likelihood of bias" is not a prerequisite for disqualifying bias, but that the existence of a reasonable apprehension will suffice.

again and again as litigants and where disputes frequently have their antecedents in matters previously litigated upon.

[58] A judge called upon to decide whether or not a disqualifying apprehension of bias exists, however, should consider the apprehension of the lay litigant alleging bias and the reasonableness of that apprehension based on the actual circumstances of the case.[5] As Cameron AJ points out, the lay litigant is assumed to be well-informed and equipped with the correct facts. But the lay litigant should not be expected to have the understanding of a trained lawyer and to appreciate the implications of the different nature of the appeal process. In both cases, it will be the judges who decide and who must have open minds. In all circumstances, the test emphasises reasonableness in light of the true facts, not the technical legal nuances of the particular case.[6] It is our contention that the reasonableness of the apprehension also requires that a judge assess the lay litigant in her or his context. The profile of the lay litigant in the present matter is that of a factory worker dismissed for alleged misconduct and participation in an unlawful work stoppage, and who is a member of the minority union in question.

[59] The problem in the present case relates to the peculiar proximity of the matters in issue, which relate to two closely interconnected episodes leading to two sets of interrelated dismissals. The most obvious overlap is the fact that the applicants are members of the same union responsible for the actions that were found inappropriate in the *Nomoyi* appeal. The *Nomoyi* and *Nkatu* dismissals directly relate to demonstrations that took place on separate dates (*Nkatu*: 21

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5 See *Sarfu* above n 1 at para 45.

6 Id.

June 1995; *Nomoyi*: 25 - 31 August 1995); both matters, however, concern the actions of the SACCAWU members on 21 June 1995. In fact 17 applicants in the *Nomoyi* matter were given disciplinary warnings in terms of a mediation agreement arising from the events of 21 June. Those warnings were relevant to the final decision in *Nomoyi*.[7]

[60] Indeed the events and findings appear to overlap so closely that the applicants fear that they will not get the "fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum", guaranteed by section 34 of the Constitution. We believe that any litigant in the position of the applicants would entertain such apprehension, and that in the very special circumstances of the case, where forceful pronouncements by the judges concerned have already been made on crucial matters in issue, they would not do so unreasonably. We should stress that the overlapping issues in the new appeal relate not only to questions of fact - many of which might be uncontroversial - but to normative evaluations of the conduct concerned that must inevitably affect the remedy to be applied.

[61] There is nothing in the forceful language used by the judges in the earlier matter that suggests bias in itself against the applicants. On the contrary, the comments in the judgment are congruent with the facts as found to be proved and are clearly intended to indicate which forms

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[7] See *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd* (1999) 20 *ILJ* 2302 (LAC); [1999] 8 BLLR 741 (LAC) at para 32.

of worker conduct are consistent with industrial law principles and which are not. In our view, it is quite appropriate for judicial officers to comment in forthright terms on matters that have factually been established. Yet it is the very strength and aptness of these findings and observations that give rise to the difficulty in the present matter. They related not just to the behaviour of the SACCAWU members in general during the period concerned, but to an evaluation of conduct of central relevance to the present case. Such evaluative characterisation of the member's conduct would, if followed in the present matter, be largely determinative of the appeal. It deals precisely with the activities which are said to justify and require dismissal in the present matter.

[62] It should be borne in mind that what is in issue in this recusal application is not the close technical reasoning that might be appropriate in a criminal matter, where questions of splitting of charges or *autrefois acquit* are considered, or, more generally in relation to questions of *res judicata*. Rather, it concerns the subjectively-felt and objectively-viewed state of mind of the SACCAWU workers. This is the kind of case where we believe it should be especially important to avoid putting form above substance. The heart of the matter before us does not concern the precise manner in which the applicants' lawyers presented their complaint at different stages. It was clear from the beginning that the substantive complaint of the applicants was that they would not get a fair hearing.

[63] We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track

record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping. Where, however, the judicial officer has already pronounced on an actual, live, concrete and highly relevant issue in question, the position is different. In some cases such pronouncement could relate to the credibility of a key witness, concerning the very issues in dispute.[8] In other cases, such as the present, the judicial officer might have expressed a judgement on a significant feature of the new matter, not by way of articulating a general philosophical position, but by way of making a finding on the very matter in issue.

[64] In their judgment in the *Nomoyi* matter, the judges devoted paragraphs 2 through 11 to narrating the events of June, which in fact constitute the substance of the present appeal. These events accounted for a third of their judgment, and clearly were included as part of an integral and continuous process of action and reaction which culminated in the precise episodes which led to the dismissals in that matter. Put simply, the behaviour of the SACCAWU members in June was seen as directly relevant to an appreciation of their conduct in August. This judicially perceived overlap between the events of June and August is strengthened by the comment that "it was in this atmosphere of alarm and despondency [after the June events] that the next mass

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8 See *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 at 300.

demonstration occurred".[9]

[9] *SA Commercial Catering & Allied Workers Union and Others* above n 7 at para 11.

[65] It was this "next mass demonstration" which formed the basis for the dismissals and the appeals in the *Nomoyi* matter. Further on, the learned judges go on to state that by disrupting the respondent's business, SACCAWU sought to reveal itself as the more powerful and militant union whose demands could only be rejected at the respondent's peril. "It was, it seems to me, determined to build upon the image of the defiant union it had begun to establish in June of that year."[10] [Our emphasis.]. The judgement also says

> "Practically none of the employees said a word in his or her defence at the disciplinary enquiries. It is improbable that this could have been by chance. It is more likely to have been a strategy agreed upon beforehand. What the purpose of it was is not easy to say; but it is easy to say that it manifested an attitude of a confrontational sullenness. This confrontational attitude is really not out of keeping with that displayed throughout by the demonstrators, by their leaders and by Saccawu's officials."[11] (Our emphasis)

[66] From the above paragraphs one may reasonably infer that the learned Judge had come to the conclusion that the SACCAWU members and officials had, already in June, deliberately embarked upon a course of inappropriate, sullen and confrontational defiance. This inference is reinforced by a later statement made in support of a conclusion that the decision of the Industrial Court to re-instate seventeen of the dismissed workers had been incorrect. The relevant passage reads:

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10 Id at para 25.

11 Id at para 24.

> "The only basis for distinguishing between them and the other appellants was that they had previously received final written warnings for having taken part in the industrial unrest of 21 June 1995. In coming to this conclusion I believe that the Industrial Court seriously misjudged the gravity of their misdemeanour. As I said earlier, they caused the respondent extensive and long lasting damage. They deserved to be dismissed. That the other individual appellants doubly deserved to be dismissed did not mean that they should have escaped the same fate."[12] [Our emphasis.]

The reference to the fact that those who had received a warning after the 21 June incidents "doubly deserved" to be dismissed, could readily be interpreted as involving a strong negative characterisation of their behaviour on 21 June. In our minds, the fact that, had they been given the chance, the learned judges might have explained that these words were actually intended to mean something else, does not alter the impression that the words could leave on any litigant in the shoes of the applicants. At the very least, the words connoted strong condemnation of the appellant's behaviour in the June period. At worst, the words carried with them a conclusion on the very facts in issue in the present matter. They should also be read in conjunction with the robust description given of the actual events on 21 June.[13]

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12 Id at para 32.

13 See Cameron AJ above at paras 21-5.

[67] It is not as though the learned judges were on trial. The cogent evidence calling for recusal lay in the words of the judgment in the *Nomoyi* matter which, as we have said, appear to have been totally merited on the evidence as established. In our view, it would be invidious to ask a judicial officer to explain precisely what she or he meant in a judgment. The test should rather be whether any litigant in the shoes of the applicants would, from reading the judgment as a whole, including words of particular pertinence, come to a reasonably grounded conclusion that a prejudgement had been made by members of the court, on the very question of whether their conduct merited dismissal or not.

[68] The important question is not what had to be decided in *Nomoyi*, but what in fact was decided. Indeed, the very fact that the above findings were made on matters collateral to the issues in *Nomoyi* would go to strengthen rather than weaken an apprehension of moral prejudgement. The narration characterises the conduct of the applicants with such intensity that even if the bare facts in issue might largely have been common cause, the critical question, whether the conduct merited dismissal or some lesser penalty, might appear to have been effectively predetermined.[14]

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[14] Section 68(5) of the Labour Relations Act 66 of 1995 read with Schedule 8 (The Code of Good Practice: Dismissal) provides for dismissal of employees for participating in unprotected strike action. Item 2(1) of the Code of Good Practice provides that "[w]hether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty." Item 3 of the Code of Good Practice provides for progressive discipline short of dismissal and requires that, in cases of misconduct,

[69] We do not say that the learned judges were wrong to have made these stringent observations, which, we repeat, may have been fully merited. What we do think is that it would be constitutionally impermissible for them now to sit in the appeal, having already pronounced as they have done. The basic issues at stake relate in their substance to matters on which they have already expressed firm opinions, namely, whether the litigants concerned behaved in a defiant and confrontational manner which so disrupted production and the work environment as to merit and require their dismissal.

[70] We have given careful attention to the comprehensive manner in which Cameron AJ has set out the facts, but on balance, we remain of the view that it would not only be wise for fresh judicial minds to be brought to bear on the case, but that it is also constitutionally necessary.

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certain value judgements (such as the circumstances surrounding the infringement) be made in deciding on the appropriate penalty.

[71] We agree with Cameron AJ's statement that *R v T*[15] would be unlikely today to constitute good law. The facts of that case (which serve as a reminder of the extent to which the courts in the pre-constitutional era were used to enforce unjust and shameful laws) were, in the language used, as follows: a non-European woman was charged before a magistrate with permitting a European male to have carnal intercourse with her. The magistrate convicted the female, and thereafter, when the man was charged before him in a separate trial arising from the same facts in which the woman was a witness, the magistrate refused to recuse himself. The Appellate Division held that it could not reasonably be inferred that there was a real likelihood that the presiding magistrate was in fact biased, and sustained the decision by the magistrate. Even if one accepts the high threshold laid down by the Appellate Division regarding the cogency of evidence needed to justify recusal, we find the result surprising. In our view, the Appellate Division's decision in *S v Somciza* [16] is more in accord with our present day law. In that matter the Appellate Division, although in a different context, held that however dispassionate a magistrate might feel on re-hearing a case where his decision had been overturned on appeal, the accused was "understandably, unlikely to feel complacent about his prospects of receiving a fair trial".

[72] Ordinary people would say that a judge should not sit in a matter where she or he has already pronounced on the live and central facts in issue. The saying that not only must justice

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15 1953 (2) SA 479 (A).

16 1990 (1) SA 361 (A).

be done, it must be seen to be done, is a well worn one, and for good reason. Much of our work involves continuing defence of such simple verities. We believe that the present is a case in point, and would uphold the appeal.

For the applicants: MSM Brassey SC, NM Arendse SC and APJ du Plessis instructed by Preller Maimane Incorporated Attorneys, Cape Town.

For the respondents: LA Rose-Innes SC and JC Butler instructed by Findlay and Tait.