Reportable
Case No 21/2003

In the matter between:

TAKE & SAVE TRADING CC	**1st Appellant**
TIASO INVESTMENTS (PTY) LTD	**2nd Appellant**
AHMED YACOOB MANSOOR NO	**3rd Appellant**
AYISHA BIBI AMOJEE	**4th Appellant**
AHMED YACOOB MANSOOR	**5th Appellant**

and

THE STANDARD BANK OF SA LIMITED	**Respondent**

Coram: HARMS, SCOTT, CAMERON, MTHIYANE and CONRADIE JJA
Heard: 16 FEBRUARY 2004
Delivered: 27 FEBRUARY 2004

Subject: Recusal application during the course of proceedings – appealability – reasonable apprehension of bias.

JUDGMENT

HARMS JA/

HARMS JA:

[1] During the course of the plaintiff's case in a trial, and at a crucial stage when the last of the plaintiff's witnesses had to be cross-examined, the defendants' legal team withdrew without proffering any reason. The defendants represented by one of them (Mr Mansoor) then applied for a postponement of the trial. The learned trial judge (PC Combrinck J in the D&CLD) debated the merits of the postponement application with him because it seemed to the judge that the application was nothing but a tactical move to gain time. During the course of the debate the judge expressed in no uncertain terms that he thought that there was little merit in two aspects of the defendants' case and that the postponement would have amounted to an exercise in futility; the other defences depended on Mansoor's evidence, which he, the judge suggested, could give without the benefit of counsel. Eventually, however, the judge granted a postponement. When the matter was again enrolled, the defendants, now represented by another counsel, applied by way of notice of motion for the judge to recuse himself. He refused the application and the subsequent one for leave to appeal met the same fate. This Court eventually granted leave.

[2] Everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator. This common law right is now constitutionally entrenched. Present a reasonable apprehension of bias, the

judicial officer is duty bound to recuse him or herself. The law in this regard is clear, having been the subject of recent judgments of both this Court and the Constitutional Court, and does not require any restatement.[1] It is nevertheless convenient for present purposes to quote the following extracts from a Constitutional Court judgment for purposes of emphasis and because they are particularly germane to this case:[2]

'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.'

'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.'

[3] That is one side of the coin. The other is this:[3]

'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to

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[1] *President of the Republic of South Africa and others v South African Football Union and others* 1999 (4) SA 147 (CC); *S v Roberts* 1999 (4) SA 915 (SCA); *Sager v Smith* 2001 (3) SA 1004 (SCA); *SA Commercial Catering & Allied Workers Unionand others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC).

[2] *President of the Republic of South Africa and others v South African Football Union and others* 1999 (4) SA 147 (CC) para 48.

[3] *R v Hepworth* 1928 AD 265 277 per Curlewis JA.

direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'

The same applies to civil proceedings: a judge is not simply a 'silent umpire'.[4] A judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said.[5] Fairness of court proceedings requires 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 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. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.

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[4] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) 570E-F.
[5] *Jones v National Coal Board* [1957] 2 All ER 155 (CA) 159B.

[4] A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration.[6] In any event, an appeal *in medias res* in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience[7] more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed.[8]

[5] This approach, which has been followed for many years by this Court, may at first blush appear to be in conflict with the statement that a biased (or apparently biased) judge commits 'an irregularity in the proceedings every minute he remains on the bench'.[9] That statement was contextualised in *S v Khala*[10]:

'The circumstances of the litigant complaining of the conduct of the Judge during the trial itself, differ materially from those of one who relies on outside factors which he cannot judge on the strength of personal observation - factors which raise questions such

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[6] *R v Roopsingh* 1956 (4) SA 510 (A) 515B-H; *Hamman v Moolman* 1968 (4) SA 340 (A) 344H; *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A) 590H; *Solomon and another NNO v De Waal* 1972 (1) SA 575 (A) 581A.
[7] Cf *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para 16.
[8] Cf *R v Silber* 1952 (2) SA 475 (A) 481E; *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) para 4-5.
[9] *R v Milne and Erleigh (6)* 1951 (1) SA 1 (A) 6H; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) 9B-G.
[10] 1995 (1) SACR 246 (A) 252c-253b.

as: Could senior Defence Force officers be unbiased in judging an attack on the legality of actions and policies of the Defence Force?[11] Or the president of the industrial court, in a lengthy dispute before him between labour and management, be unbiased despite having in mid-litigation participated in a seminar arranged by management's industrial relations consultants and in which management's lawyers all presented papers?[12] Or more mundanely, would the magistrate be prepared to make an adverse credibility finding against an important State witness if that witness is his own wife? - merely as examples. Schreiner JA pointed out the differences between the two in *R v Silber* 1952 (2) SA 475 (A) at 481C-H, a matter similar to the present one in that the application for recusal was not made at the outset of the trial but when it was well on its way. There too

> "the grounds relied upon for suggesting bias were not facts outside the course of proceedings such as are ordinarily put forward as reasons why the judicial officer in question should not try the case. The grounds related purely to what had happened in the course of the trial. Neither counsel has been able to find any reported case in which an application for recusal has been made in the course of a trial on the ground that the judicial officer has shown bias by his conduct of the proceedings. And this is not surprising, since the ordinary way of meeting any apparent bias shown by the court in its conduct of the proceedings would be by challenging his eventual decision in an appeal or review. Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that

[11] The allusion is to *Council of Review, South African Defence Force, and others v Mönnig and others* 1992 (3) SA 482 (A).

> stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias."

S v Rall 1982 (1) SA 828 (A) sets out guidelines to ensure that in seeing that justice is done the Judge also ensures that justice is seen to be done. It is unnecessary to repeat them here. The question is whether the trial Judge's questioning of [the litigant] strayed outside of those guidelines at all and if so, could reasonably create the appearance, not at some passing stage in the course of the trial but in making an overall assessment, that his approach to the defence evidence was not objective and impartial.'

[Underlining added.]

[6] Context, it has been said somewhat hyperbolically, is everything in law.[13] This case is not an exception. The plaintiff bank, the present respondent, claimed payment of some R10m in two actions that have been consolidated. The main cause of action is against the first appellant, a close corporation, and is based on an overdraft account. The other appellants were cited as sureties. The mentioned Mansoor, the sole member of the close

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[12] This refers to *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Workers' Union and another* 1992 (3) SA 673 (A).

corporation, apart from being a surety, is being held liable for the same amount in terms of s 64 (liability for reckless or fraudulent carrying-on of the business of a close corporation) and/or s 65 (liability in a case of abuse of the separate juristic personality of a close corporation) of the Close Corporations Act 69 of 1984.

[7] The close corporation and Mansoor were valued clients of the bank and had special privileges. The close corporation was entitled to draw against uncleared effects and it could make payment to third parties by way of electronic transfer. Mansoor, as sole member, ran the close corporation and he was the designated operator of its electronic bank facility. He was also in control of an account at Nedbank which was purportedly being held by one A Mohamed trading as Highway Distributors. (One of the factual issues flowing from the claim based on the Close Corporation Act's provisions is whether Mohamed is the same person as Mansoor but this aspect of the matter has no bearing on the appeal.)

[8] Mansoor drew a number of cheques, totalling R9 970 947, against the account of Highway and deposited them on 9 August 2001, a public holiday, at an electronic banking facility (an autobank) into the account of the close corporation. Almost immediately he, in tranches, transferred R9 983 952.93 from the latter account into the banking accounts of Metro Cash and Carry.

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[13] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) 447*a* quoted in *Aktiebolaget Hässle and another v Triomed (Pty) Ltd* 2003 (1) SA 114 (SCA) para 1.

These payments were made as consideration for cigarettes bought by the close corporation, allegedly as broker on behalf of Highway. The seller required cash before delivery and only after the amounts had been deposited in its accounts, did it release the cigarettes to Mansoor or his agent.

[9] The cheques of Highway were dishonoured because of a lack of funds soon after delivery of the cigarettes. Somewhat brazenly, one would have thought, Mansoor instructed the bank to 'reverse' the payments by debiting the account of the seller and crediting that of the close corporation. Surprisingly, the bank began to comply with the instruction; less surprisingly, the seller – *sans* R10m worth of cigarettes – objected and the bank, not surprisingly, then refrained from complying with the instruction.

[10] The main defence against the bank's claim is that the bank was instructed by Mansoor to reverse the entries and that it failed to do so. Shortly after the trial began, the judge raised the question whether this was at all a defence. He ordered argument but refrained, for reasons that are not apparent, from making a ruling on the issue before the completion of the evidence.

[11] Ms Bolstridge, an employee of the bank, was called to explain how electronic banking works. The appellants' counsel objected to her evidence on the basis that it had to be pleaded – a silly objection – but the judge allowed the evidence provisionally. She told the court what it already knew

namely that an electronic transfer amounts to an immediate transfer of money by a client from one account to another. Because of the appellants' objection, the bank's counsel decided not to ask the witness whether a reversal is possible. This did not satisfy appellants' counsel: he did not want to cross-examine the witness at all because, he said, the fact that a reversal is not possible had to be pleaded – another untenable objection especially since the appellants had not alleged any obligation on the bank to heed the instruction.

[12] In order to break the deadlock the judge requested the bank's counsel to ask of the witness whether an electronic payment could be reversed and he told the appellants' counsel that he would be given time to prepare on this issue. Ms Bolstridge then testified about an inter-bank agreement under the auspices of the Automatic Clearing Bureau which provides that without the beneficiary's consent an electronic transfer cannot be reversed.

[13] The judge thereafter informed the witness that he was going to postpone the case for a week. When he gave the date and time to counsel, the appellants' lead counsel informed the court that he was not available and was withdrawing as counsel – an event that places a question mark behind the request for time to prepare for cross-examination.

[14] At the resumed hearing Mansoor appeared in person on behalf of himself, the close corporation and the other defendants. Since the previous

hearing his junior counsel and attorneys had also abandoned ship and, as mentioned, he applied for a postponement. Understandably, the court asked him why he was no longer represented since, as he said, money was not an issue between him and his legal team. He did not know. The judge thought that it was because counsel had lost faith in the case which, he said, was not surprising considering the evidence that had been led. On the question whether the bank could reverse the entries, the judge enquired of Mansoor whether the evidence was going to be disputed. Mansoor thought it might be; he said he did not know. There is, possibly, an expert – of whom no notice had been given but who had been consulted by counsel – who could testify that the banks did not have such an agreement. (If true, it places a question mark behind counsel's objection.) Mansoor wished, in the middle of the trial, to explore the area by consulting some professors at law.

[15] The other evidence to which the judge referred that seemed to him to have been incontrovertible was a letter by the appellants' attorneys, which had already been proved and in respect of which no version had been put, in which there was an unqualified admission of liability by the close corporation and an undertaking to pay the amount claimed in full. In order to test the purpose of the postponement in the light of the undertaking the court asked Mansoor some questions to determine what evidence he proposed to lead on this aspect. Mansoor was either not able or not prepared to answer

the questions. Nothing was made of this part of the judge's interrogation during oral argument before us.

[16] The argument for the appellants before us is quite simple: The questions crucial to a decision of the bank's claim are (i) did Mansoor give the instruction to reverse the transfer and (ii) if so, could it have been carried out? These, said counsel, are factual disputes (the only factual issue in relation to (ii) being whether there was an interbank agreement or not). The judge's attitude evinced a strongly held belief that these questions could not be answered in favour of the appellants, which view was expressed before the cross-examination of Ms Bolstridge and, obviously, before the appellants had presented their evidence. This, appellants argued, created a reasonable apprehension of bias because the judge had effectively judged the case even before the bank's case had been closed.

[17] As counsel for the appellants), Mr Shaw QC (who did not appear at the trial), rightly accepted, unless these questions raise live issues, which can sustain the appellants' case, the appeal has to fail at the outset. I am satisfied that they have no bearing on the outcome of the case for a simple reason. One may assume in the appellants' favour that the instruction had been given. One may even assume in their favour that there is no inter-bank agreement preventing the reversal of electronic transfers. All that being assumed, how can a bank retransfer an amount transferred by A into the

account of B back into the account of A without the concurrence of B? Mr Shaw could not suggest any ground on which this can be done; there simply is none. Once transferred, the money or credit belongs to B and the bank has to keep it at B's disposal. And, as 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' litigant in possession of 'the correct facts'.

[18] In view of this, certain possibly injudicious remarks by the judge, including that that the legal team, in the absence of any other explanation, had withdrawn because 'there is a loss of faith in the client' in context meant, as appears from the whole surrounding debate and also from the judgment on the postponement application, that he believed that the team could not carry out Mansoor's mandate either in relation to the admission of liability or the reversal point. In the context the implication that the appellants could not succeed on these points, irrespective of further evidence, was therefore fully justified and would never found a well-informed or reasonable apprehension of bias.[14]

[19] The appeal is dismissed with costs.

L T C HARMS
JUDGE OF APPEAL

AGREE:

SCOTT JA
CAMERON JA
MTHIYANE JA
CONRADIE JA

[14] Cf *Rowe v Assistant Magistrate Pretoria and another* 1925 TPD 361 365-366.