THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 692/09

In the matter between:

SONWABISO MAXWELL NDIMENI **Appellant**

and

MEEG BANK LIMITED (BANK OF TRANSKEI) **Respondent**

Neutral citation: *Sonwabiso Maxwell Ndimeni v Meeg Bank Limited (Bank of Transkei)* (629/09) [2010] ZASCA 165 (01 December 2010)

Coram: MPATI P, LEWIS, HEHER, SNYDERS and TSHIQI JJA

Heard: 01 November 2010

Delivered: 01 December 2010

Summary: Recusal – On grounds of appearance of bias – acting judge, in capacity as attorney and conveyancer in private practice, having commercial relationship with one of the litigants – duty to disclose fact of commercial relationship – failure to make disclosure resulting in proceedings being a nullity.

ORDER

On appeal from: Labour Appeal Court (Davis, Jappie and Leeuw JJA sitting as court of appeal).

The following order is made:

1. The application to lead further evidence is granted.
2. The appeal is upheld with costs.
3. The order of the court below is set aside and for it the following is substituted:
   '(a) The appeal is upheld with costs.
   (b) The order of the court below is set aside.
   (c) The matter is remitted to the Labour Court for trial *de novo* before another judge.'

JUDGMENT

MPATI P (LEWIS, HEHER, SNYDERS and TSHIQI JJA .....):

[1] On 15 September 1998 the appellant was dismissed from his position as manager of the Lusikisiki branch of the respondent following a disciplinary enquiry. The chairman of the enquiry had found him to have acted irregularly and contrary to the standing bank procedures or practice in the execution of his duties as branch manager, particularly in respect of transactions relating to the account of Mr Y I Docrat, who owned a supermarket at Flagstaff (charge 1). There were three further charges in respect of which the appellant was found guilty and for which he was given a final written warning. It is not necessary to mention these charges for present purposes.

[2] The appellant challenged the findings of the chairman of the disciplinary enquiry before the Labour Court (Zilwa AJ) on grounds of lack of procedural and substantive

fairness. The Labour Court confirmed the findings of the chairman in respect of three of the charges and imposed a sanction of summary dismissal for the first charge and a final written warning for the second and third charges. The appellant subsequently gave notice of his intention to apply for leave to appeal against the order of the Labour Court, but later discovered that Zilwa AJ and 'close members of his family' each allegedly had some commercial relationship with the respondent. He promptly gave notice that 'at the hearing of the application for leave to appeal on 16 November 2001' he would apply to amend his grounds of appeal by adding the following ground:

'Leave to appeal to the [LAC] is granted for the purpose of enabling the [appellant] to apply to the [LAC] for an order permitting the leading of oral evidence on why the trial judge should have recused himself.'

In his affidavit in support of the application to amend his grounds of appeal the appellant alleged that he believed Zilwa AJ 'was biased in [his] case and had [he] been aware of the above facts at the time of the trial of this matter [he] would have instructed [his] representative to request him [Zilwa AJ] to recuse himself'.

[3] However, for reasons that have not been disclosed, Zilwa AJ failed to hear the appellant's application for leave to appeal, with the result that the appellant approached the Labour Appeal Court (LAC) for leave to appeal to it on the ground of constructive refusal of leave by the Labour Court. (I should mention that the application was set down for hearing on 12 November 2001, but was postponed to 16 November 2001 at the instance of the appellant. It was again postponed on that day *sine die* and never set down again despite the appellant's endeavours, according to him.) The LAC granted the leave sought, but subsequently dismissed the appeal with costs. This appeal is before us with the special leave of this court.

[4] At the commencement of his argument in this court counsel for the appellant sought leave, on behalf of the appellant, as was done in the LAC, to introduce the evidence upon which reliance was placed for the assertion that Zilwa AJ should not have presided at the trial but should have recused himself. It has been held that where a reasonable apprehension of bias is found to be present, the judicial officer is duty bound to recuse him

or herself.[1] This is so because the common-law right of each individual to a fair trial, which is now constitutionally entrenched, must be respected. The issue in this appeal, therefore, is whether the evidence sought to be introduced by the appellant satisfies the test of 'reasonable apprehension of bias' and, if so, whether the proceedings before the Labour Court were a nullity.

[5] It is perhaps convenient, for a better understanding of the circumstances of the case, to set out a brief summary of the facts relating to the charge in respect of which the appellant was summarily dismissed. Mr Jacobus Daniel Marais, the collection manager of the respondent, testified that he discovered an activity by Docrat called 'cross firing' or 'kite flying'[2] on his account with the respondent, which resulted in the latter suffering a loss of approximately R9 million. In order to recoup some of its losses the respondent allowed Docrat to operate a trading account at its Lusikisiki branch, but he was not allowed an overdraft facility on it. It is not in dispute that Docrat's loan account was managed by Marais at the respondent's head office in Umthatha. The trading account was managed by the appellant. Although he had no overdraft facility in respect of the trading account Docrat was allowed an unofficial overdraft of R130 000. Marais testified, however, that the branch was required to report to head office as soon as the account went into overdraft.

[6] In March 1998 the trading account was overdrawn by more than a million rand due to the deposit of a bad cheque for the sum of R727 190.16, which was returned three times but redeposited each time. In the meantime cheques drawn on the account were met against the uncleared positive balance reflected in it. The respondent reacted by sequestrating Docrat and closing his business. It took a loss of more than one million rand in the process.

[7] The appellant, on the other hand, testified that all transactions on Docrat's trading account were effected on the express instructions of Marais, who was responsible for the operation of the account, together with the managing director, Mr George Kaltenbrünn. He therefore contended that Marais was responsible for the loss suffered by the respondent.

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[1] *Take and Save Trading CC & others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 2.
[2] This involved the depositing of cheques and drawing against uncleared effects in different accounts, in effect borrowing against non-existent funds.

But Marais's version was that he and the credit manager at head office, a certain Ms Ntuli, only monitored the overdraft part of the account, but that the administration of the account remained with the branch where it was operated. The appellant was thus to blame for the loss because he had failed to report to head office accurately and to follow established policies relating to drawing against uncleared effects. Mr Batembu Diko, the accountant at the Lusikisiki branch, testified that he acted as manager of the branch in the absence of the appellant. He said that he would report to the head office on Docrat's account only when it was overdrawn and Docrat wished to draw on it. The authority to allow Docrat to withdraw money on his overdrawn account would thus be obtained from head office. The Labour Court disbelieved the appellant and found him guilty of misconduct as charged.

[8] Although it made reference to the evidence relating to the claim of bias, the LAC did not consider this ground of appeal. Its reason for this appears from the following passage in the judgment:[3]

'Mr Pillemer, who appeared on behalf of appellant, accepted that, were this court to find, on the substance of the dispute, that the probabilities were clearly in favour of respondent after an analysis of the record, credibility questions would have no bearing on the decision, no purpose would be served by referring the case back to another judge. For this reason therefore, the critical issue turns on the evidence relating to the charge.'

The court thus proceeded to consider the evidence presented before Zilwa AJ and concluded that there was 'simply no justification for referring this matter back for hearing before a different judge'; that the dispute 'does not turn on the credibility findings of witnesses but on the plausibility of the evidence and an evaluation of the probabilities', and that the competing versions 'can be justified or rejected exclusively on the evidence placed before the [Labour Court] and which was available to this court'. The probabilities, so the court held, clearly supported the decision of the respondent to dismiss the appellant.

[3] Per Davis JA (Jappie and Leeuw JJA concurring), para 7.

[9] In this court Mr Pillemer, for the appellant, disputed the correctness of the LAC's interpretation of his submission before it in this regard. And a reading of the transcript of the exchanges between the court and counsel reveals that the latter's submission was indeed misinterpreted. The relevant part of the transcript reads as follows:

'COURT: But if we have read this record and we are satisfied that there is absolutely no basis by which this appeal should succeed then?

MR PILLEMER: It must still go back because this case turns critically on questions of credibility.

COURT: So in other words with great respect if you have read a record and you read it from start to finish and there are no merits on the appeal what then it is not answering my question? Credibility is only relevant Mr Pillemer when you read a record and you are absolutely sure about it assuming one is totally sure.

MR PILLEMER: If you are totally sure [that] even accepting everything the appellant says is true, he has got no case then there would be no point in sending it back I accept that. There would not be a failure of justice.'

What counsel thus conceded was that if, in spite of an acceptance of the appellant's version, the court were still to find that the appellant has no case, there would have been no failure of justice and consequently there would be no need to refer the matter back to the Labour Court for a hearing *de novo* before a different judge.

[10] As will become evident later in this judgment, I consider that the LAC erred in any event in failing to deal with the issue of the alleged bias. It is indeed so that the fact that an allegation of bias might be established does not necessarily mean that the entire proceedings will be vitiated.[4] But where the issue is pertinently raised on appeal the appeal court should, in my view, deal with it, as failure to do so might detrimentally affect the public's confidence in the courts.

[11] Before us the appellant did not rely on the record of the proceedings at the trial for purposes of determination of the appeal. Nor was there any suggestion that Zilwa AJ exhibited actual bias 'in the sense that he had approached the issues before him with a

[4] *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A) at 590H*; President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (2) SA 14 (CC) para 42.

mind which was in fact prejudiced or not open to conviction'.[5] The appellant sought to have the judgment set aside and the matter referred back to the Labour Court for the trial to commence *de novo* before a different judge, on the grounds of an alleged commercial relationship between Zilwa AJ and the respondent, which engendered a fear that the learned acting judge would not be impartial in the case. It was submitted on behalf of the appellant that in the light of the alleged commercial relationship there had not been a fair trial. The appeal, so the argument continued, therefore turns on the question whether or not Zilwa AJ was disqualified from hearing the matter.

[12] In our law the ground for the disqualification of a judicial officer is the existence of a reasonable apprehension that he or she will not decide the case impartially or without prejudice, and not that he or she will decide the case adversely to one party.[6] And 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 a case, that is a mind open to persuasion by the evidence and the submissions of counsel'.[7] In the same paragraph the Constitutional Court observed that 'it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and the judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial'.

[13] The facts upon which the appellant relied for his claim that Zilwa AJ should have recused himself are contained in an affidavit deposed to by Kaltenbrünn in answer to the appellant's allegations in support of his application to amend his grounds of appeal. Those allegations were:

'(a) Ms S V Zilwa, the judge's wife is a shareholder in and director of [the respondent];

(b) . . . Ms S V Zilwa is a chartered accountant and in that capacity is sub-contracted by

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[5] *BTR Industries South Africa (Pty) Ltd & others v Metal and Allied Workers' Union & others* 1992 (3) SA 673 (A) at 690A-B.

[6] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) para 46 in which reference was made with approval to a passage in *Re JRL : Ex parte CJL* (1986) 161 CLR 342 (HCA) at 352.

[7] *President of the Republic of South Africa v South African Rugby Football Union*, above n6, para 48; *SA Commercial Catering and Allied Workers' Union v Irvin & Johnson Ltd (Seafood Division Fish Processing)* 2000 (3) SA 705 (CC) para 11; *Sager v Smith* 2001 (3) SA 1004 (SCA) para 15; *Take and Save Trading CC v Standard Bank of SA Ltd*, above n1 para 2.

KPMG to audit the books of [the respondent];

(c) Bank of Transkei Insurance Brokers have been closed and all the work formerly done by this division is now done by Sikhona Financial Services. Ms S V Zilwa is the sole director of Sikhona Financial Services;

(d) Advocate P H S Zilwa, the judge's brother is a director of [the respondent];

(e) Mr D Z Nkonki, the judge's brother-in-law, is an Executive Director of [the respondent];

(f) In his practice as an attorney, the judge handles commercial bonds of [the respondent] and is thus reliant on [the respondent] for a portion of his income.'

[14] As I have mentioned above, Zilwa AJ did not hear the appellant's application for leave to appeal, which would have afforded him an opportunity to respond to these allegations in his judgment. But Kaltenbrünn responded as follows to the allegation that Zilwa AJ handles commercial bonds of the respondent:

'The Honourable Acting Judge Zilwa is a qualified attorney in partnership with Mandela Makaula. The firm was appointed to the panel of attorneys for TNBS Mutual Bank. No work was ever done by the firm for Meeg Bank prior to 1 May 2001. Accordingly this allegation does not demonstrate any facts upon which an apprehension of bias may be founded.'

According to Kaltenbrünn the respondent merged with TNBS Mutual Bank during the beginning of 2001 although the effective date of the transaction which foreshadowed the actual merger was 1 April 2000. The two banks commenced functioning as one entity from 1 April 2001.

[15] The appellant attached to his application to the LAC for leave to appeal copies of two mortgage bonds prepared by Zilwa AJ, which clearly contradict Kalternbrünn's assertion that no work was ever done by the former's firm of attorneys on behalf of the respondent prior to 1 May 2001. The first bond was executed at the office of the Registrar of Deeds, Umthatha, on 20 March 2000 and the second on 8 August 2000. Both bonds were passed in favour of the respondent. It is a well-known practice in this country that the mortgagee bank or financial institution takes responsibility for the registration of a bond. In the absence of any evidence to the contrary, it must be accepted that the instructions for the preparation and execution of the bonds by Zilwa AJ (as conveyancer) emanated from the respondent, as mortgagee.

[16] In *BTR Industries*[8] Hoexter JA said:

'It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so trivial in nature as to be disregarded under the *de minimis* principle) he is disqualified, no matter how small the interest may be. . . The law does not seek, in such a case, to measure the amount of his 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 a suspicion is reasonably apprehended, then that is the end to the matter.'

That case involved a refusal by the presiding member of a three-member Industrial Court (IC), to recuse himself in a matter in which the IC was hearing an application for an unfair labour practice determination between BTR Industries (BTR) and the Metal and Allied Workers Union (union) of which BTR's employees were members. The presiding member had attended and addressed a seminar during an adjournment in the trial, which had been organised by a certain firm of consultants and advisers on industrial and labour relations. He had been invited to the seminar by the firm of consultants upon which BTR had relied 'very heavily' for advice during the negotiations between it and the union on the dispute that was now before the IC. Three other speakers at the seminar, which had been advertised as 'for management and senior legal practitioners', were counsel representing BTR. In confirming the reviewing court's (Didcott J) order setting aside the proceedings in the IC for the reason that the presiding member should have recused himself, this court reasoned that the facts of the matter were strong enough 'to meet the less exacting requirements of the "reasonable suspicion of bias" test'.[9]

[17] The present is not a case where the judicial officer would have been automatically disqualified. The allegations against him are not that he had an interest or potential interest in the case in the sense of owning a substantial number of shares in the respondent, or that he had any other direct pecuniary interest in the outcome of the proceedings, in which event he would have been automatically disqualified.[10] The rationale for this rule is that no one can be a judge in his or her own cause. But the rule (of

[8] Above n5, at 694J – 695A.
[9] At 696I – J.
[10] *See Dimes v Properties of Grand Junction Canal* (1852) 3 HL 759; *Re Ebner*; *Ebner v Official Trustee in Bankruptcy* [1999] FCA 10 paras 41 – 43; *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [2000] 1 All ER 65 (CA); *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd* [1999] VSA 35.

automatic disqualification) does not apply only in instances where the judicial officer concerned has a pecuniary interest in the outcome of the proceedings. It also applies where a non-pecuniary interest to achieve a particular result exists. In *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)*[11] Senator Pinochet, a former head of state of Chile, applied for an order setting aside an earlier order of the House of Lords in an appeal to it reinstating one of two warrants issued by a metropolitan stipendiary magistrate but later quashed by the Queen's Bench Divisional Court. The warrants had authorised the arrest of Senator Pinochet so as to facilitate proceedings for his extradition to Spain to be tried there for crimes against humanity allegedly committed whilst he was head of state in Chile. The House of Lords had granted leave to Amnesty International (AI) to intervene in the appeal proceedings before it. The order of the House of Lords reinstating the warrant was by a majority of three Law Lords, among whom was Lord Hoffmann, to two.

[18] Senator Pinochet's application was based on information that came to light after the House of Lords had made its order. It transpired that Lord Hoffmann's wife had been working at the international secretariat of AI since 1977 – the judgment of the House of Lords was given on 25 November 1998 – and that Lord Hoffmann was himself a Director and Chairperson of Amnesty International Charity Limited (the Charity), one of two registered companies that undertake work of the international headquarters of AI, and had helped, in 1997, in the organisation of a fundraising appeal for a new building for Amnesty International UK. He had also helped to organise the appeal to the House of Lords together with other senior legal figures. On the facts before it the House of Lords reasoned that AI shared with the government of Spain not a financial interest, but an interest to establish that there was no immunity for ex-heads of state in relation to crimes against humanity; and that the Charity, which has the same objects as the AI, one of which is 'to procure the abolition of torture, extra-judicial execution and disappearance', plainly had a non-pecuniary interest to establish that Senator Pinochet was not immune.

[19] After a discussion on the rule relating to automatic disqualification due to pecuniary interest the court said:

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[11] [1999] 1 All ER 577 (HL).

'But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.'[12]

The court thus concluded that Lord Hoffmann, being a member of AI, 'would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity'. It consequently set aside its order of 25 November 1998 reinstating the warrant. In the course of its judgment the House of Lords remarked that the mere fact of a judicial officer's interest in the cause is sufficient to disqualify him 'unless he has made sufficient disclosure'.[13] As to the other factors, such as the connection between AI and Lady Hoffmann and Lord Hoffmann's involvement in organizing the appeal to it, the House of Lords found that these factors might have been relevant if Senator Pinochet had been required to show 'a real danger or reasonable apprehension of bias'.[14]

[20] I have indicated above that in the present matter the appellant did not allege that Zilwa AJ had a pecuniary interest in the outcome of the case, but that there is a commercial relationship between him and the respondent, which engendered in him (appellant) a reasonable apprehension that the learned acting judge would not be impartial. Zilwa AJ is an attorney who would have returned to his practice at the end of his acting appointment. Problems that arise when members of the legal profession, in particular members of the Bar and Side-Bar, act on the bench, were discussed in *Locabail*[15] where the learned Lord Justices of the Court of Appeal said the following in respect of attorneys (solicitors):

'But we think the problems can usually be overcome if, before embarking on the trial of any assigned civil case, the solicitor . . . conducts a careful conflict search within the firm of which he is a partner. . . While parties for and against whom the firm has acted, and parties closely associated, would (we hope) be identified, the possibility must exist that individuals involved in such parties, and parties more remotely associated, may not be identified. When in the course of a trial properly embarked upon some such association comes to light (as could equally happen with a barrister-

[12] Per Lord Browne-Wilkinson at 588e – f.
[13] At 586f.
[14] At 588j – 589a.
[15] Above, n10.

judge), the association should be disclosed and addressed, bearing in mind the test laid down in *R v Gough*.'[16]

(The test laid down in *R v Gough*[17] is whether '. . . in the circumstances of the case . . . it appears that there was a real likelihood, in the sense of a real possibility, of bias . . .' on the part of the judicial officer, which is not the test in this country.)

[21] It seems obvious, as the Court of Appeal observed in *Locabail*, that there can be no reasonable apprehension of bias if the judicial officer does not know of the facts that would be relied upon as giving rise to a conflict of interest. In the present matter Zilwa AJ executed the second bond on 8 August 2000. Only six days thereafter, on 14 August 2000, he commenced with the hearing of evidence in the trial of this matter. In my view, he must have known at the commencement of the trial, that six days before, and at least once before that, he had executed bonds on behalf of the respondent. The appellant's application to the LAC for leave to appeal was opposed by the respondent. The opposing affidavit was deposed to by Mr Hendrik Stefanus Coetzee, a director of the respondent's Johannesburg attorneys. He asserted, on the instructions of his client, that Zilwa AJ was not employed by the respondent 'at the time that he heard this matter' and denied that the respondent 'was in any position to have exerted undue influence on the Judge'. He further denied that the two copies of the bond documents demonstrated that Zilwa AJ 'was employed' by the respondent. He continued by saying that whilst the documents seemed to suggest that Zilwa AJ was a conveyancing attorney who registered a bond in favour of the respondent, there was no indication that that was on the instructions of the respondent or that the respondent remunerated him for those services.

[22] I have already held that it must be accepted, in the absence of evidence to the contrary, that the instructions to prepare and execute the bonds emanated from the respondent. In my view, it was open to the respondent and Zilwa AJ to rebut the prima facie evidence presented by the appellant that Zilwa AJ executed the bonds on behalf of the respondent. They failed to do so. It would have been quite easy for the respondent to state that the bonds were not executed on its instructions and that it never remunerated Zilwa AJ's firm for them. It is true that in his affidavit in support of the respondent's

[16] Ibid at 76.
[17] [1993] 2 All ER 724 (HL).

opposition to the appellant's application for leave to amend his grounds of appeal Kalternbrünn stated that no work was ever done by Zilwa AJ's firm on behalf of the respondent. But after the appellant had produced copies of the bond documents one would have expected the respondent, or Zilwa AJ, to have stated pertinently that the bonds were not executed on behalf of the respondent, and that the latter never remunerated the firm for the services rendered.

[23] It must be remembered that the case before Zilwa AJ concerned the fairness or otherwise of the appellant's dismissal by the respondent. Two of the witnesses who testified at the trial on behalf of the respondent, namely Marais and Kalternbrünn, were senior members of the respondent's management stationed at head office. The appellant was their subordinate. Their evidence, particularly Marais's, was to be weighed against his because he was placing the blame for the respondent's financial loss on Marais, while Marais was placing it on him. Moreover, the instructions given to the firm of which Zilwa AJ was a partner by the respondent for the preparation and execution of bonds were not a once-off occurrence – and I express no view as to whether a once-off occurrence would have made any difference. The firm is said to be on the respondent's list of attorneys to whom such instructions are given. (It has not been disputed that the firm is on the respondent's list, but merely that it 'was appointed to the panel of attorneys for TNBS Mutual Bank', which, we know, merged with the respondent.) In my view, the appellant would be entitled to believe, reasonably so, that Zilwa AJ would have expected to receive more instructions in the future from the respondent to prepare and execute bonds on its behalf. In these circumstances, I agree with the submission of counsel for the appellant that Zilwa AJ was obliged to disclose his relationship with the respondent, so that the appellant could decide whether to request him to recuse himself, or to waive his right to do so. In my view, the facts satisfy the requirements of the 'reasonable apprehension of bias' test.

[24] Counsel for the respondent conceded that Zilwa AJ should have made disclosure of his relationship with the respondent, in the circumstances of this case, and that the logical conclusion from his failure to do so was that the proceedings before him would be a nullity. He contended, however, that the present being a labour matter which, in terms of the purpose for which the Labour and Labour Appeal Courts were created, should have been

dealt with expeditiously, and in view of the fact that the appellant's dismissal was confirmed almost ten years ago (Zilwa AJ delivered his judgment on 9 March 2001), this court should not set aside the proceedings of the trial court. He argued that this is a case where this court should consider the merits of the appeal as it can be disposed of on the probabilities. There is no reason, in my view, why the appellant or litigants in labour disputes generally, should be denied their right to a fair trial, to which everyone else is entitled. In cases where the judicial officer refuses to recuse himself or herself when he or she should in fact have done so, what occurs thereafter, ie the continuation of the proceedings, is a nullity.[18]

[25] In view of the conclusion I have reached it is unnecessary for me to consider the other factors raised by the appellant as giving rise to a reasonable apprehension of bias. In the result the following order is made:

1. The application to introduce further evidence is granted.
2. The appeal is upheld with costs.
3. The order of the court below is set aside and for it the following is substituted:

   '(a) The appeal is upheld with costs.

   (b) The order of the court below is set aside.

   (c) The matter is remitted to the Labour Court for trial *de novo* before another judge.'

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L Mpati

President

[18] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 8J – 9G and the cases there cited.

APPEARANCES

APPELLANTS:	M Pillemer SC Instructed by Jafta Incorporated, Durban; Matsepes Inc., Bloemfontein
RESPONDENT:	F A Boda Instructed by Cliffe Dekker Hofmeyr Inc, Benmore; Naudés, Bloemfontein