
**ANYONE BUT YOU, M'LORD: THE TEST FOR
RECUSAL OF A JUDICIAL OFFICER**

1 Introduction

It is trite that judicial officers should perform their adjudicative functions in a trial or hearing without bias or predisposition in favour of any party. Judicial officers must act independently and impartially in discharging their duties (see *Van Rooyen v The State* 2002 5 SA 246 (CC) par 31). Should this not be the case, a party can move an application for the recusal of the presiding officer. Lately, there have been a number of these applications, including the successful application for the recusal of Ngoepe JP on the first day of the rape trial of Jacob Zuma, former Deputy President of South Africa. According to media reports, the reason cited for the recusal was "to protect the credibility of the judiciary" (see "Zuma Judge Steps Aside to Defuse Bias Charges" 2006-02-14 *Business Day*). Ngoepe JP is alleged to have said:

"The legal points for the recusal are not sound and do not hold. However, this is no ordinary matter and is a high-profile case. These considerations invite me to look beyond the personal fears of [Zuma] and take a broader view."

But what are the legal requirements that must be satisfied for a successful application for the recusal of a judicial officer? Before a discussion of the test for recusal, the question of which sources regulate the doctrine of recusal will be briefly discussed.

2 Is the doctrine of recusal a constitutional matter?

Traditionally, the doctrine of recusal has been regulated by the common law. In a series of decisions, the Appellate Division (later the Supreme Court of Appeal) based its decisions on recusal on common law principles. As stated by Corbett CJ in *Council of Review, South African Defence Force v Mönnig* (1992 3 SA 482 (A) 491E-F), "[t]he recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial". There was some confusion, however, regarding the precise formulation of the test to determine recusal. The confusion was no doubt compounded by the uncertainty whether the common law principles relied upon were derived from English law or Roman Law as some judgments relied on authority from Roman law (see *eg S v Radebe* 1973 1 SA 796 (A); and *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 4 SA 808 (T)), whilst others relied on authority from English law (see in general the exposition of the English position given in *Mönnig v Council of Review* 1989 4 SA 866 (C)).

The question can validly be asked whether the doctrine of recusal is still exclusively part of the common law, or whether it is now a constitutional matter for purposes of section 167(3) of the Constitution of the Republic of South Africa, 1996. This question was answered by the Constitutional Court in *President of the RSA v SARFU* (1999 4 SA 147 (CC)). In reaching its decision, the court provided an overview of various constitutional provisions affecting recusal, finding that judicial recusal is a constitutional matter within the meaning of section 167(3) of the Constitution (*SARFU* par 30):

“A Judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such Judge might be biased, acts in a manner that is inconsistent with s 34 of the Constitution, and in breach of the requirements of s 165(2) and the prescribed oath of office. We have no doubt, therefore, that the application for recusal raised a ‘constitutional matter’ ...”

This was confirmed in the later case of *South African Commercial Catering and Allied Workers Union (SACCAWU) v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (2000 3 SA 705 (CC) par 2).

There are many provisions in the Constitution which directly or indirectly impact on judicial recusal. Section 35 applies in respect of criminal proceedings and provides for the rights of arrested, detained and accused persons. Included in this body of rights, is the right to a fair trial. For other proceedings, section 34 applies. It provides that everyone has the right to have a dispute adjudicated in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Inherent in all these rights is judicial independence and impartiality (see *Van Rooyen v The State supra* par 34). Chapter 8 of the Constitution, entitled “Courts and Administration of Justice”, also contains a number of applicable provisions. Section 165 vests the judicial authority in the courts and specifically provides that the courts are “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice” (ss (1)). Also, no person or organ of state may interfere with the functioning of the courts (ss (2)). These provisions clearly provide for judicial independence and impartiality, which constitute fundamental pillars of the judicial function.

Section 174 deals with the appointment of judicial officers. Subsection (1) contains the general requirement that a judicial officer must be a fit and proper person, and appropriately qualified. The requirement of appropriate qualification is regulated by legislation (see *eg*, the Magistrates Act 90 of 1993). Implicit in the requirement that a person must be fit and proper, is the ability of the person to perform the functions of a judicial officer in an impartial and unbiased manner. This is supported by subsection (8) which provides for judicial officers to take an oath of office that they will uphold and protect the Constitution. The oath for judges reads as follows (Schedule 2: Oath or solemn affirmation of judicial officers):

“I, _____, swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/_____ Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons

alike without fear, favour or prejudice, in accordance with the Constitution and the law.”

Judicial officers and acting judicial officers other than judges must swear/affirm in terms of national legislation (see Olivier “The Role of Judicial Officers in Transforming South Africa” 2001 *SALJ* 455 459-460 on the oath of office taken by magistrates).

These provisions collectively guarantee the right of an accused person or a litigant to have a fair trial or hearing before an impartial, unbiased and independent Bench.

3 The test for recusal

As earlier referred to, impartiality in the adjudication of disputes is one of the foundations of a fair and just legal system (see *SARFU supra* par 35). It is also constitutionally protected (see above). If the presiding officer is not impartial, the proceedings are compromised. A presiding officer who is not in fact impartial or who appears not to be impartial, is under an obligation to recuse himself. Arguably the primary factor affecting impartiality is bias, either actual bias, or the appearance of bias on the part of a presiding officer. Bias has generally been accepted as founding an application for the recusal of a presiding officer. Judicial bias has been described as “a departure from the standard of even-handed justice which the law requires from those who occupy judicial office” (*Franklin v Minister of Town and Country Planning* [1948] AC 87 (HL) 103; [1947] 2 All ER 289 296B-C, as quoted with approval by Howie JA in *S v Roberts* 1999 4 SA 915 (A) par 25). An application for recusal is usually brought *ab initio litis*. It can under certain circumstances be made during the course of a trial (see *R v Silber* 1952 2 SA 475 (A)). It is possible for a judicial officer to recuse himself *mero motu* without an application being brought (*S v Malindi* 1990 1 SA 962 (A) 969I). Actual bias is not required; the appearance of bias is sufficient to justify recusal (*S v Roberts supra* par 26). In the case of actual bias, the matter is simple, as one deals with a mind which is in fact prejudiced. In such a case, the judicial officer is required to make a value judgment about his own state of mind. In the case of the appearance of bias, one deals with perceptions. As earlier referred to, there has been controversy and uncertainty both here and abroad about the proper formulation of the test in cases involving the appearance of bias (see *SARFU supra* par 36; and *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers’ Union* 1992 3 SA 673 (A) 690D). What follows is a brief exposition of the recent development of the formulation of the test for determining appearance of bias as formulated by the courts.

3.1 Development of the test

Essentially, the formulations of the test ranged from “a real likelihood of bias”, to “a reasonable suspicion of bias”, to “a reasonable apprehension of bias”. It would appear that part of the reason for the confusion between the “real likelihood of bias” and “the reasonable suspicion of bias” test is the incorrect and improper use of terminology, appropriate to the former test, to

formulate the latter test (*Mönnig's* case per Conradie J 877I-J; and see also below).

3 1 1 Real likelihood of bias

The real likelihood of bias test has its origins in English law (see eg, *R (Donohue) v County Cork Justices* [1910] 2 IR 271; *R v Camborne Justices: Ex Parte Pearce* [1954] 2 All ER 850 (QB); *R v Barnsley County Borough Licensing Justices; Ex Parte Barnsley & District Licensed Victuallers' Association* [1960] 2 All ER 703 (CA); and *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304 (CA)). It has also been applied in South Africa (see eg *Danisa v British and Overseas Insurance Co Ltd* 1960 1 SA 800 (D)). Baxter (*Administrative Law* (1984) 56) has stated that “[d]isqualifying bias will be found to exist where the reasonable lay observer would gain the impression that there is a real likelihood that the decision-maker will be biased”. Essentially, the test entails that there must be a probability, not merely a possibility, that the presiding officer will be biased. Compared to the requirement of “a reasonable suspicion of bias”, it is a stricter test. The two tests each require a different standard. In the words of Hoexter JA in *BTR Industries* (690E-G):

“The essential connotation of the word ‘likelihood’ is that of probability. In the present context the word signifies that there is a stronger than 50 per cent prospect that the contemplated state of affairs will eventuate. The phrase ‘real likelihood’ reinforces that meaning. On the other hand the criterion of a ‘reasonable suspicion’ necessarily imports a less exacting test.”

In *Mönnig*, Conradie J (with Friedman and Howie JJ concurring), after an exhaustive survey of relevant South African and English authorities, concluded that the real likelihood test does not apply in South Africa (879A-B):

“I do not believe that this test correctly states the present South African law. Our courts have not, in the last 20 years or so, regarded it as necessary for disqualifying bias to exist that a reasonable observer should suspect that there was a real likelihood of bias ... Our Courts have not in recent times applied the ‘real likelihood of bias’ test ...”

In *S v Malindi*, an Appellate Division decision given after Conradie J’s judgment in *Mönnig*, Corbett CJ expressed support for a “likelihood of bias” test (the court appears to have jettisoned the term “real”):

“Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important” (969G-I).

In the *Mönnig* appeal, Corbett CJ elaborated on the meaning of “likelihood of bias” (490C-E):

“It may be that this formulation [the likelihood of bias] requires some elucidation, particularly in regard to the meaning of the word ‘likelihood’

whether it postulates a probability or a mere possibility. Conceivably it is more accurate to speak of 'a reasonable suspicion of bias'. Suspicion, in this context, includes the idea of the mere possibility of the existence, present or future, of some state of affairs ... but before the suspicion can constitute a ground for recusal it must be founded on reasonable grounds."

The Chief Justice found that it was not necessary in the present case to make a finding regarding the correct formulation of the test (490F). Shortly after this decision, ten days in fact, Hoexter JA in *BTR Industries*, after referring to the judgment in the *Mönnig* appeal, made a definitive finding and settled the question of which test was correct at the time (the *Mönnig* appeal judgment was delivered on 15 May 1992; the *BTR Industries* judgment was delivered on 25 May 1992).

3 1 2 Reasonable suspicion of bias

In *BTR Industries*, the Appellate Division jettisoned the "real likelihood of bias" test and expressed itself in favour of the "reasonable suspicion of bias" test (693I-J):

"[I]n our law the existence of a reasonable suspicion of bias satisfies the test ... an *apprehension* of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias" (own emphasis).

And further (694G-695A):

"To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him ... 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 *suspicion* is *reasonably apprehended*, then that is an end to the matter" (own emphasis).

This was confirmed in the subsequent case of *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* (1996 3 SA 1 (A) (8H-I)). In *S v Roberts* Howie JA formulated the requirements for the recusal test as follows:

- 1 There must be a suspicion that the judicial officer might, not would, be biased (par 32).
- 2 The suspicion must be that of a reasonable person in the position of the accused or litigant (par 32).
- 3 The suspicion must be based on reasonable grounds (par 32).
- 4 The suspicion is one which the reasonable person referred to would, not might, have (par 34).

Similar to *BTR Industries* and some earlier cases, the court again expressed a preference for the use of "suspicion" as the criterion. In *SARFU*,

the first recusal case heard by the Constitutional Court, the court commented on the use of “suspicion” instead of “apprehension” (par 37):

“In the *BTR* judgment itself and in other South African and foreign judgments, the formulation of the test for recusal on the ground of perceived bias has used the expression ‘apprehension of bias’ as an equivalent for ‘suspicion of bias’.”

After referring to selected foreign authorities, the court concluded that the correct formulation of the test is that of “apprehension of bias”, and not “suspicion of bias” (par 38):

“Because of the inappropriate connotations which might flow from the use of the word ‘suspicion’ in this context, we agree and share this preference for ‘apprehension of bias’ rather than ‘suspicion of bias’. This is also the manner in which the Supreme Court of Canada formulates the test, where its use is in no way inconsistent with the judgements of the Supreme Court of Appeal in *BTR* or *Moch*.”

In *SACCAWU*, the Constitutional Court interpreted *S v Roberts* as authority for the double reasonableness, “reasonable apprehension of bias” test (par 14):

“[The double-reasonableness test] finds reflection also in *S v Roberts*, 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.”

In essence, therefore, the “reasonable suspicion of bias” test formulated by the Supreme Court of Appeal over the years which found expression in the double reasonableness test formulated by Howie JA in *S v Roberts*, was viewed by the Constitutional Court as similar to the “reasonable apprehension of bias” test. As expressed subsequently by Mthiyane AJA in *Sager v Smith* (2001 3 SA 1004 (SCA)), the difference between this test and the “reasonable suspicion of bias” test is “one of semantics rather than substance” (par 15). It is submitted that this is incorrect. It is submitted that it is more than mere semantics as there is a difference in the standard required by each of the two tests. “Suspicion” is defined as “a feeling that something is possible or probable ...” or “cautious distrust”, while “apprehension” is defined as “anxious or fearful anticipation” (*South African Concise Oxford Dictionary* (2002)). An “apprehension of bias” test is therefore a more exacting test and requires a stricter standard than a “suspicion of bias” test.

3 1 3 Reasonable apprehension of bias

The content of the reasonable apprehension of bias test was formulated as follows by the Constitutional Court in *SARFU* (par 48):

“[T]he 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 submission of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judge 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 that fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

In essence, the question is how a well-informed, thoughtful and objective observer, not a hyper-sensitive, cynical and suspicious person, would view the facts (see *Sole v Cullinan* (2003 8 BCLR 935 (LesCA) par 48; and see also *Van Rooyen v The State supra* 273B). The test has been described as a double reasonableness test; both the person apprehending the bias, and the bias itself, must be reasonable (*S v Shackell* (2001 4 SA 1 (SCA)) par 20). An unreasonable apprehension is not a justifiable basis for a recusal application (*SARFU supra* par 45). Even "a strongly and honestly felt anxiety" will not satisfy the test (*SACCAWU* par 16). The test is objective (*SACCAWU* par 16-17):

"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 it should be countenanced in law ...

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised."

The following excerpt from *BTR Industries* further explains the objective nature of the determination of the reasonableness of the apprehension (695C-E):

"The test to be applied therefore involves the legal fiction of the reasonable man – someone endowed with ordinary intelligence, knowledge and common sense. That the test prescribed is an objective one, however, does not mean that the *exceptio recusationis* is to be applied *in vacuo*, as it were. The hypothetical reasonable man is to be envisaged in the circumstances of the litigant who raises the objection to the tribunal hearing the case. It is important, nevertheless, to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies or the superstitions or the intelligence of particular litigants."

It is therefore clear that there is no subjective element to the test (*Sager v Smith supra* par 17):

"The statement in the judgment of the Court *a quo* [Smith v Sager, unreported, CPD, Comrie J et Van Heerden AJ] that '(t)he existence of such suspicion is a matter of subjective perception by the complainant party' is accordingly contrary to the principles laid down in the above cases [S v Roberts, SARFU & SACCAWU], requiring that the apprehension must be that of a reasonable person."

In their minority judgment in *SACCAWU*, Mokgoro J and Sachs J expressed the opinion that the test should in addition take into account the context of the particular litigant before the court (par 57):

“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. 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 ... In all circumstances, the test emphasises reasonableness in light of the true facts, not the technical legal nuances of the particular case. It is our contention that the reasonableness of the apprehension also requires that a Judge assess the lay litigant in her or his context.”

It is submitted that the contention of the minority introduces a subjective element into the test, similar to the “idiosyncrasies, suspicions or intelligence of particular litigants” which the then Appellate Division warned against in *BTR Industries* (see quotation above).

3 1 3 1 Judicial impartiality and bias

The presumption of judicial impartiality is one of the foundations of the reasonable apprehension of bias test. The presumption means that a court hearing an application for recusal presumes that judicial officers are impartial in adjudicating disputes (*SARFU supra* par 40-41, *SACCAWU supra* par 12). The onus to rebut the presumption is on the applicant. The presumption is one of the cornerstones of the judicial function and should not be easily rebutted (*SACCAWU* par 12). That is why the double reasonableness test, although it imposes a heavy burden on the applicant, is appropriate (see *SACCAWU* par 15). The apprehension must be that the judicial officer will be biased, not merely that he may be biased (see *S v Shackell supra* par 20; *cf S v Roberts supra* par 32). The presumption will only be rebutted by cogent or convincing evidence (*SARFU supra* par 40, *SACCAWU supra* par 12). The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the application hearing (*SARFU supra* par 45). The presumption of judicial impartiality applies with added force to appellate courts, where judges have more experience and where they evaluate written records (*SACCAWU supra* par 40-42).

Both in *SARFU* and *SACCAWU* the Constitutional Court placed emphasis on the character of the bias, and the (mistaken) notion of absolute neutrality on the part of judicial officers. As expressed by Cameron AJ in *SACCAWU* (*supra* par 13):

“‘[A]bsolute neutrality’ is something of a chimera in the judicial context. 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” (see also *SARFU* par 42; and *Sager v Smith* par 16).

And further (par 13):

“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’; and, in contrast to neutrality,

this is an absolute requirement in every judicial proceeding” (see also *Shackell* par 22).

Does past political association on the part of a judicial officer indicate bias *per se*? In the *SARFU* case, the applicant applied for the recusal of five of the eleven Constitutional Court justices on a number of grounds, including their past political affiliations and involvement with the liberation movement. The past political activity of judges is an issue particularly relevant to South Africa due to its chequered past. Section 174(2) of the Constitution requires that in the appointment of judicial officers, the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered. During apartheid, only white people were considered for judicial appointment. At the time of the 1994 elections, with the exception of two females, all judges were male. With the end of apartheid, there was therefore a need for the face of the judiciary to be changed to be more representative of the composition of the country, both in terms of race and gender. In South Africa, many lawyers were intimately involved in the liberation movement. It was only logical that many of these prominent figures would be involved in the branches of government in the new dispensation, some in the executive and legislative branches, and some others still in the judicial branch as judicial officers (*SARFU supra* par 75):

“In South Africa ... it would be surprising if many candidates for appointment to the Bench had not been active in or publicly sympathetic towards the liberation struggle. It would be ironic and a matter for regret if they were not eligible for appointment by reason of that kind of activity.”

Many were appointed as magistrates and judges, some to the Constitutional Court. When appointed to the Bench, judicial officers are expected to terminate political affiliations, and it is generally accepted that they do so (*SARFU supra* par 75). As judicial officers, they are required to decide the cases before them without fear or favour according to the facts and the law, and not according to their own personal beliefs (*SARFU supra* par 70). Provided they do so, there is no basis for recusal. Past political affiliations *per se* therefore do not constitute a ground for recusal.

Due to South Africa's apartheid legacy, the issue of race is also important. In both the corruption trial of Schabir Shaik, and the rape trial of Jacob Zuma, the race of the presiding judge was a contentious issue. In *SARFU* (*supra* par 43), it was reaffirmed that a litigant cannot insist that the judicial officer should be of the same race or sex as him or her. The race of the presiding officer cannot be a basis for recusal. South Africa is a multicultural, multilingual and multi-ethnic country. As stated by the court in *S v Collier* (1995 2 SACR 648 (C) 650F-G), “the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or Judge could ever administer justice fairly and evenhandedly in a matter involving white accused.” Judicial officers obviously bring their own life experiences to the Bench. In a diverse society such as South Africa, this is particularly important, especially as one of the aims of judicial transformation is to achieve a diverse Bench (*R v S (RD)*

(1997) 118 CCC (3d) 353 (SCC) par 38-39, quoted with approval in *SARFU supra* par 42):

“[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the Bench. In fact such a transformation would deny society the benefit of the valuable knowledge gained by the Judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the Judiciary. The reasonable person does not expect that Judges will function as neutral ciphers; however, the reasonable person does demand that Judges achieve impartiality in their judging.

It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, Judges must rely on their background knowledge in fulfilling their adjudicative function.”

In practical terms, what is required from a judicial officer in order to satisfy the requirement of impartiality? The following few principles serve as a guide on how an impartial judicial officer should conduct a trial or hearing:

- Although it is trite that a judicial officer should not “descend into the arena”, a judicial officer’s role in proceedings is not necessarily that of a “silent umpire” (*Take & Save Trading CC v The Standard Bank of SA Ltd* 2004 4 SA 1 (SCA) par 3):

“A judge ‘is not a mere umpire to answer the question “How’s that?”’ Lord Denning once said. 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” (see *Sager v Smith* par 21).

- Forming a *prima facie* view on the issues before him or her does not necessarily indicate bias (*R v Silber* 1952 2 SA 475 (A) 481G-H)):

“It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although 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 law, would think of ascribing this provisional attitude to, or identifying with, bias” (see also *Sager v Smith* par 16, *SACCAWU* par 13, *S v Khala* 1995 1 SACR 246 (A) 252G-J).

More recently, Blieden J expressed a similar view in *Coop v SABC* (2006 2 SA 212 (W) 217A-D):

“A trial is a living phenomenon. It has a life of its own that changes from day to day if not from hour to hour. The Judge in his efforts to come to a just and proper decision is enjoined to participate in this phenomenon. Because he at one time adopts a provisional *prima facie* view, does not in any way demonstrate bias one way or the other.

It is the duty of every judicial officer to be an active participant in the trial. It is the duty of counsel and attorneys to explain this to their clients who are not experienced in the rough and tumble world of court litigation.

Because my body language at some stage or other indicates my admitted irritation or impatience, this is because of the way the proceedings are being conducted and cannot be construed as bias in favour of one or other of the litigants and most certainly cannot lead any reasonable informed layman, duly advised by his legal advisors as already mentioned, to come to the conclusion that I will not impartially and fairly determine the issues in this case to the best of my ability.”

- A judicial officer should treat the parties before him even-handedly. Any remarks made during the trial should not be indicative of any bias. In this regard, the context within which remarks are made is important (*Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 2 SA 586 (A) 589H):

“n Regter is geregtig, en dit kan ook afhangende van omstandighede sy plig wees, om die gedrag van amptenare van die Hof te kritiseer, maar dan moet dit geregverdig wees en nie onoordeelkundig gedoen word nie” (see also *Coop v SABC supra* 215, *Take & Save Trading CC v The Standard Bank of SA Ltd supra* par 6 and 18).

- A judicial officer is entitled to warn counsel that their client could be mulcted in costs at the conclusion of the trial, for example where objections raised by counsel are futile and obstructive (see *Sager v Smith supra* par 21).
- An irregular discussion between a judicial officer and one party's counsel in the absence of the other party's counsel amounts to an irregularity. The presiding judicial officer should have no communication of any kind with either party except in the presence of the other (*R v Maharaj* 1960 4 SA 256 (N) 258B-C, *S v Roberts supra* par 23). This is to avoid the appearance that justice is being administered in secret (see *S v Roberts supra* par 23).

In the final analysis, however, to coin a well-known maxim, justice must not only be seen to be done, but must also actually be done. As stated by Howie JA in *S v Roberts (supra* par 22), “[t]he appearance of justice is not enough. Justice must not simply seem to be done. On the other hand the appearance of bias may be enough to vitiate the trial in whole or in part.” What is required, is conspicuous impartiality (see *BTR Industries* 694G-I; and *Moch supra* 14B-C). The following passage from *S v Rall* (1 SA 828 (A)) is appropriate (831H):

“[T]he Judge must ensure that ‘justice is done’. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.”

4 Judges judging themselves

Judges themselves adjudicate applications for their recusal. In the instance of a trial court consisting of one judge, the decision can be appealed. In the case of a recusal application being brought against members of a court of final instance, such as the Constitutional Court, it would appear that the proper approach would be for each judge to consider their own positions

individually, while also considering the application collectively, as a whole (*SARFU supra* par 34). It is not unusual for judges to sit in judgment of themselves. In fact, it is inherent in the judicial function. In the instance of actual bias, a judicial officer is required to make a value judgement about his own state of mind. Only the judge himself can judge his state of mind. In the case of perceived bias, a judicial officer must apply the reasonable apprehension of bias test. The test is objective and therefore there should not be a subjective flavour to a court's consideration of a recusal application. The judicial officer is required to objectively consider whether the grounds advanced by the applicant lay a basis for the judicial officer's recusal. By virtue of his training, experience, the oath of office, and the presumption of impartiality, a judicial officer is regarded as sufficiently independent, impartial and unbiased to make an objective assessment in this regard. Inevitably, allegations are made in the recusal application regarding the judge's own conduct during the trial. Sometimes, the grounds advanced can appear far-fetched and ludicrous, but a judicial officer is required to consider each ground of the application on its individual merits (see *eg, S v Ismail* 2003 2 SACR 479 (C) where an application was made for the recusal of the presiding judge based on a perception of bias as the judge, a former professor of law, had allegedly lectured the complainant). A judicial officer should guard against over-sensitivity and should not take an application for recusal personally (*Moch supra* 13H-J):

"A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront ... If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a Judge is primarily concerned with the *perceptions* of the applicant for his approval."

Because of the sensitivity of the matter, there is a danger that a judicial officer may be over-critical of his own conduct and concede too readily to an application for recusal. Should a judicial officer do this, he would be hampering the administration of justice, rather than aiding it. Judicial officers have a constitutional obligation to administer justice without fear or favour, and must sit in any case in which they are not under an obligation to recuse themselves (*SARFU supra* par 46). The duty to sit where not disqualified is equally as strong as the duty not to sit where disqualified (*SARFU supra* par 47). Should a judicial officer therefore recuse himself without there being justification for such recusal, he would in fact not be administering justice without fear or favour. The following passage from the judgment of the High Court of Australia is appropriate (see *Re JRL: Ex parte CJL* (1986) 161 CLR 342 (HCA) 352, quoted with approval in *SARFU supra* par 46):

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

In this regard, care should be taken to ensure that recusal applications are not a front for so-called “judge-shopping”. The following passage from the minority judgment of Mokgoro J and Sachs J in *SACCAWU* is very appropriate (par 62):

“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.”

5 Conclusion

In a constitutional democracy, recusal is a vital tool which a litigant should have at his disposal if he has a reasonable apprehension that the judicial officer in his case is or will be biased. Every litigant has the right to have his dispute adjudicated by an impartial and independent judicial officer. Thus, the doctrine of recusal is inextricably linked to sections 34 and 35 of the Constitution which guarantee a fair trial and a fair public hearing respectively. Care should however be taken to ensure that this mechanism to ensure fair proceedings is not abused and degenerates into “judge-shopping”. The test is objective, and both the person and the apprehension must be reasonable. Any factor can be taken into consideration by the court in its determination as to whether there exists a reasonable apprehension. But judicial officers are bound by the confines of the test and cannot move beyond it. Unless the reasonable apprehension of bias test is satisfied, there can be no justification for recusal. An unfounded or unreasonable apprehension is not a justifiable basis for a recusal application. The applicant must present cogent facts to the court in support of his application to discharge his heavy onus. Judicial officers should realise that they have a constitutional duty to sit in every matter. They should only recuse themselves in instances where there is actual bias, or where the reasonable apprehension of bias test is satisfied. Although it is true that justice must be seen to be done, justice must in fact also be done.

In conclusion, the following extract from *SACCAWU* eloquently summarises the contending considerations that judicial officers need to consider in walking the tightrope of the doctrine of recusal (par 17):

“On the one hand, it is vital to the integrity of our courts that 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’.”

Morné Olivier
Nelson Mandela Metropolitan University, Port Elizabeth