MOKGORO AND SACHS JJ ABRIDGED JUDGMENT

South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing

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

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

The litigant's perception must be objectively reasonable, however:

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

[57] The issue in this case is not whether we, as judges in this Court, have a reasonable

apprehension that the two judges concerned in the Labour Appeal Court would fail to handle the appeal before them with appropriate professionalism and impartiality. Nor is the issue whether, in fact, the bias exists. We are fully confident that, given their

training and experience, the judges concerned would be able to set aside any knowledge gained in the course of their hearing of the first matter, and disabuse themselves of any opinions they may have formed. The fact that it is an appeal to be decided purely on the record strengthens our conviction in this regard. Indeed, the Labour Appeal Court by its very nature hears matters where the same parties appear again and again as litigants and where disputes frequently have their antecedents in matters previously litigated upon.

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

[59] The problem in the present case relates to the peculiar proximity of the matters in issue, which relate to two closely interconnected episodes leading to two sets of interrelated dismissals.

ed the events and findings appear to overlap so closely that the applicants fear that will not get the “fair public hearing before a court or, where appropriate, another pendent and impartial tribunal or forum”, guaranteed by section 34 of the stitution. We believe that any litigant in the position of the applicants would rtain such apprehension, and that in the very special circumstances of the case,

re forceful pronouncements by the judges concerned have already been made on ial matters in issue, they would not do so unreasonably. We should stress that the lapping issues in the new appeal relate not only to questions of fact - many of which ıt be uncontroversial - but to normative evaluations of the conduct concerned that t inevitably affect the remedy to be applied.

e is nothing in the forceful language used by the judges in the earlier matter that ests bias in itself against the applicants. On the contrary, the comments in the ment are congruent with the facts as found to be proved and are clearly intended to ate which forms of worker conduct are consistent with industrial law principles and h are not. In our view, it is quite appropriate for judicial officers to comment in ıright terms on matters that have factually been established. Yet it is the very strength aptness of these findings and observations that give rise to the difficulty in the ent matter. They related not just to the behaviour of the SACCAWU members in ral during the period concerned, but to an evaluation of conduct of central relevance e present case. Such evaluative characterisation of the member's conduct would, if wed in the present matter, be largely determinative of the appeal. It deals precisely the activities which are said to justify and require dismissal in the present matter.

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

3] are aware of the need to prevent litigants from being able freely to use recusal lications to secure a bench that they regard as more likely to favour them. ceptions of bias or predisposition, no matter how strongly entertained, should not s the threshold for requiring recusal merely because such perceptions, even if urate, relate to a consistent judicial "track record" in similar matters or a broad pensity to view issues in a certain way. Recusal applications should never be

ntenanced as a pretext for judge-shopping. Where, however, the judicial officer already pronounced on an actual, live, concrete and highly relevant issue in stion, the position is different. In some cases such pronouncement could relate to credibility of a key witness, concerning the very issues in dispute. In other cases, h as the present, the judicial officer might have expressed a judgement on a nificant feature of the new matter, not by way of articulating a general losophical position, but by way of making a finding on the very matter in issue.

64] n their judgment in the *Nomoyi* matter, the judges devoted paragraphs 2 through 1 to narrating the events of June, which in fact constitute the substance of the resent appeal. These events accounted for a third of their judgment, and clearly vere included as part of an integral and continuous process of action and reaction vhich culminated in the precise episodes which led to the dismissals in that matter. ut simply, the behaviour of the SACCAWU members in June was seen as directly elevant to an appreciation of their conduct in August. This judicially perceived verlap between the events of June and August is strengthened by the comment hat "it was in this atmosphere of alarm and despondency [after the June events] hat the next mass demonstration occurred".

65] t was this "next mass demonstration" which formed the basis for the dismissals nd the appeals in the *Nomoyi* matter. Further on, the learned judges go on to state hat by disrupting the respondent's business, SACCAWU sought to reveal itself as he more powerful and militant union whose demands could only be rejected at the espondent's peril. "It was, it seems to me, determined to build upon the image of he defiant union <u>it had begun to establish in June of that year</u>." [Our emphasis.]. The judgement also says

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

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

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

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

67] It is not as though the learned judges were on trial. The cogent evidence calling for recusal lay in the words of the judgment in the *Nomoyi* matter which, as we have said, appear to have been totally merited on the evidence as established. In our view, it would be invidious to ask a judicial officer to explain precisely what

he or he meant in a judgment. The test should rather be whether any litigant in he shoes of the applicants would, from reading the judgment as a whole, ncluding words of particular pertinence, come to a reasonably grounded conclusion that a prejudgement had been made by members of the court, on the very question of whether their conduct merited dismissal or not.

68] The important question is not what had to be decided in *Nomoyi*, but what in fact was decided. Indeed, the very fact that the above findings were made on matters collateral to the issues in *Nomoyi* would go to strengthen rather than weaken an apprehension of moral prejudgement. The narration characterises the conduct of he applicants with such intensity that even if the bare facts in issue might largely have been common cause, the critical question, whether the conduct merited dismissal or some lesser penalty, might appear to have been effectively predetermined.[1][4]

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

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

71] We agree with Cameron AJ's statement that *R v T* would be unlikely today to constitute good law. The facts of that case (which serve as a reminder of the extent to which the courts in the pre-constitutional era were used to enforce unjust and shameful laws) were, in the language used, as follows: a non-European woman was charged before a magistrate with permitting a European male to have carnal intercourse with her. The magistrate convicted the female,

ınd thereafter, when the man was charged before him in a separate trial arising ɾom the same facts in which the woman was a witness, the magistrate refused to ecuse himself. The Appellate Division held that it could not reasonably be nferred that there was a real likelihood that the presiding magistrate was in fact ɔiased, and sustained the decision by the magistrate. Even if one accepts the high hreshold laid down by the Appellate Division regarding the cogency of evidence ıeeded to justify recusal, we find the result surprising. In our view, the Appellate Division's decision in *S v Somciza* is more in accord with our present day law. In hat matter the Appellate Division, although in a different context, held that ıowever dispassionate a magistrate might feel on re-hearing a case where his lecision had been overturned on appeal, the accused was "understandably, ınlikely to feel complacent about his prospects of receiving a fair trial".

72] Ordinary people would say that a judge should not sit in a matter where she or he ıas already pronounced on the live and central facts in issue. The saying that not ɔnly must justice be done, it must be seen to be done, is a well worn one, and for ɡood reason. Much of our work involves continuing defence of such simple ɾerities. We believe that the present is a case in point, and would uphold the ıppeal.