

IN THE HIGH COURT OF LESOTHO

Held in Maseru

CIV/APN/0055c/2023

In the matter between:

THABO MOTOKO

1ST APPLICANT

DR KAMOHO MATLAMA

2ND APPLICANT

ADV. BERENG MAKOTOKO

3RD APPLICANT

MASEKHOBE S. MOHOLOBELA

4TH APPLICANT

MATELA THABANE

5TH APPLICANT

AND

PRIME MINISTER OF LESOTHO

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

JUDGMENT ON RECUSAL

Neutral Citation: Motoko & Others vs Prime Minister of Lesotho & Another
[2023] LSHC 252 Civ (29 December 2023)

Coram : His Honour Justice Keketso L. Moahloli
Heard : 8 June, 7 and 18 August 2023
Delivered : 15 September 2023
Written reasons : 29 December 2023

SUMMARY

Recusal – Application for recusal of Judge on basis of appearance of bias – The test 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

Costs de bonis propriis against a party’s legal representative – May only be awarded where special circumstances or considerations justify such an order – In the present case punitive costs ordered because of: use of insulting and defamatory language and making of scandalous and irresponsible statements/insinuations against the Judge – Also dilatory, improper, obstructive and reprehensible tactics and conduct by legal representative – And failure to obey and comply with court orders and directions without apologizing and/or seeking condonation

ANNOTATIONS

CASES

Ablyazov v JSC BTA Bank [2012] EWCA Civ 1551

Almazeedi v Penner & Another 2018 UKPC 3

Bates v Post Office [2019] EWHC 871 (QB)

Belize Bank Ltd v AG of Belize [2011] UKPC 36

Bennet & Another v The State 2021 (2) SA 439

Bernert v Absa Bank Ltd 2011(3) SA 92 CC

BMF Assets No 1 Ltd and others v Sanne Group plc and others [2022] EWHC 140 (Ch)

Broughal v Walsh Brothers Builders Ltd and another [2018] EWCA Civ 1610

Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468

Commander of the Lesotho Defence Force and Others v Maluke, LAC (2013-2014) 297

Committee for Justice and Liberty v National Energy Board, [1978] 1 SCR 369

Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz [2016] EWCA Civ 556

Hawell and others v Lees-Millais and others [2007] EWCA Civ 720

Helow v Secretary of State for the Home Department and Another [2008] UKHL 62

Le Car Auto Traders v Degswa 10138 CC 2013 JDR 1651

Letuka v Abubaker N.O. and Others LAC (2011-2012) 386

Locaball v Bayfield [2000] QB 451

Mahase and Others v Hlaele and Another, Cons Case No.1(a) 2019

Makeka v Africa Media Holdings [2022] LSCA 62 (11 November 2022)

Mbana v Shepstone & Wylie (2015) 36 ILJ 1805 (CC)

Miglin v Miglin, 2003 SCC 24

Mokaeane v Palime & Others 2023 LSCA (12 May 2023)

Ncube and another v Health and Hygiene (Pty) Ltd 2023 JDR 0019

Otkritie International Investment Management Ltd and others v Urumov [2014] EWCA Civ 1315

Prince Jefri Bolkiah v State of Brunei Darussalam [2007] UKPC 62

R v Abdroikor [2007] 1 WLR 2679

Registrar Lesotho Medical Dental and Pharmacy Council and Others v Yangindu [2022] LSCA (11 November 2022)

Sengupta v General Medical Council [2002] EWCA Civ 1104

Shaw v Kovac [2017] EWCA Civ 1028

Sole v Cullinan NO and Others, LAC (2000-2004) 572

South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC)

Speaker of National Assembly & Others v Tampane (2019) LSHC 35 (20 August 2019)

President the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)

Thunder Cats Investment 49 (Pty) Ltd v Fenton 2009 (4) SA 138 (C) at 151

United States v Cordova (D.C, Cir. 2015)

Viridi v Law Society [2010] EWCA Civ 100

Zuma v Downer and Another [2023] ZASCA 132 (13 October 2023)

STATUTES

High Court Rules 1980

BOOKS

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Andries C. Cilliers, Cheryl Loots & Hendrik C. Nel SC. The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa. 5th Ed., Vol. 2 (2009 Juta & Co)

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ARTICLES

Okpaluba, C and Juma, L, "The Problems of Proving Actual or Apprehended Bias: An Analysis of Contemporary Development in South Africa" PER/PELJ 2011 (14)

MOAHLOLI, J

INTRODUCTION

[1] On 15 September 2023 I handed down the following order orally, together with brief reasons:

- “1. The application is dismissed.
2. The applicants’ legal practitioners/representatives are ordered to pay the costs of this application *de bonis propriis* on an attorney-and-client scale.
3. A written judgment with full reasons will be handed down during the first week of next term.”

These are my full reasons:

BACKGROUND

[2] This is an application for my recusal as presiding judge over CIV/APN/0055/2023. The application was filed on 24 May 2023. The respondents filed a notice of intention to oppose, and answering affidavits on 29 May 2023. On the same day I met Applicants’ counsel (Adv K Monate, at the instance of Adv CJ Lephuthing) and Respondents’ attorney (Atty. ’Mateboho Tohlang-Phafane) to discuss a roadmap. I then made the following consent order: (i) Applicants shall file their replying affidavits by close of business on 31 May 2023; (ii) Both parties shall file heads of arguments by close of business on 2 June 2023; and (iii) The matter is postponed to 8 June 2023 at 09.30 for argument.

- [3] On the day appointed for argument the parties' counsel came to my chambers around 09.30. Adv Lephuthing requested 25 minutes grace so that he could 'wrap up some settlement involving one of the Applicants. When we eventually started the hearing in open court later he placed it on record that the dispute between the 1st Applicant, Thabo Motoko, and the Respondents had been mutually resolved that morning. And at his instance the duly signed settlement agreement between the two parties, filed of record, was made an order of court.
- [4] Then Adv Lephuthing only then informed the court that he had been unable to file replying affidavits and heads of argument as they had undertaken and been directed by the court. He said that he had spoken to the respondents' attorney about his inability to file, but she was busy.
- [5] The Respondents' counsel, Adv Cooke, replied that he was hearing all this for the first time as applicants' legal representatives had never even written to them asking for a postponement. Adv Cooke claimed that this was further evidence of a pattern of delay by applicants since the start of these proceedings and a continuation of the unprofessional practice of waiting until the last minute to raise issues. He said that his instructing attorney (Atty. Tohlang-Phafane) who was in court, denies ever being approached by Adv Lephuthing about their inability to file and possible postponement.
- [6] When responding, Adv Lephuthing persisted with his claim that he had approached Atty. Tohlang-Phafane about his difficulties filing, and denied that there was any pattern of delay on their part. He said he was ready to

proceed without heads of argument. Adv Cooke said they were happy to proceed, but noted that they stood to suffer prejudice when the matter proceeded without respondents and the court having had the benefit of seeing Adv Lephuthing's heads. I should mention that applicants' legal representatives at no point approached my Judge's Clerk or myself to raise these issues.

- [7] When I realized that this exchange was not getting us anywhere, I directed counsel to get on with their oral submissions since we had already used up a lot of time without starting with the actual business of the day. Counsel then proceeded to present their oral submissions. Before I discuss these in detail, I shall first set out the legal test employed to determine recusal applications for reason of perceived bias.

The Test For Recusal On The Basis Of Apprehended Bias

- [8] As it shall become apparent later in the judgment, the applicants' case is predicated on apprehended bias on my part. Our Court of Appeal has in several decisions¹ endorsed the approach to recusal for perceived bias formulated by the Constitutional Court of South Africa in the *locus classicus* ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others***² (hereafter "Sarfu") as follows:

"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

¹ For example, in Sole v Cullinan NO and Others, LAC (2000-2004) 572 at 586E - 587A; Commander of the Lesotho Defence Force and Others v Maluke, LAC (2013-2014) at 306E-G

² 1999 (4) SA 147 (CC) at 177B-E.

persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.” [My emphases]

- [9] A year later in ***South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*** (hereafter “SACCAWU”), Cameron AJ writing for the same court, added the following³:

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

[13] The second in-built aspect of the test is that ‘absolute neutrality’ is something of a chimera in the judicial context. This is because Judges are

³ 2000 (3) SA 705 (CC) at 713-715 at para 12-17

human. They are unavoidably the product of their own life experience and the perspective thus derived inevitably and instinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality – a distinction the Sarfu decision itself vividly illustrates. 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 civilized 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. The reason is that:

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

[14] The Court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect 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.

[15] It is no doubt possible to compact the “double” aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias

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

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

[16] *The “double” unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinize 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. In South Africa, adjudging the objective legal value to be attached to a litigant’s apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from ‘the evils and immorality of the old order’ remains vulnerable to attacks on its legitimacy and integrity. Court considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the hand, it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged. On the other, the courts’ very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is ‘as*

wrong to yield to a tenuous or frivolous objection’ as it is ‘to ignore an objection of substance’.” [My emphases/underlining]

- [10] To be able to properly apply the **Sarfu** test, it is important to have a correct conception of who this “reasonable, objective and informed person” (referred to in some jurisdictions as the “fair-minded and informed observer”) is. What is the appropriate level of knowledge to be imputed to the ‘informed’ observer?
- [11] Lord Hope of Graighead posited as follows in the 2008 House of Lords judgment of *Helow v Secretary of State for the Home Department and Another*⁴:

“1. The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word “he”), she has attributes which many of us might struggle to attain to.

*2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness*

⁴ [2008] UKHL 62

requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is “informed”. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

[12] In *Almazeedi v Penner & Another* 2018 UKPC 3, at para 20, Lord Mance said that the fair-minded and informed observer (i.e our “reasonable, objective and informed person”):-

- *is a person who reserves judgment until both sides of any argument are apparent;*
- *is not unduly sensitive or suspicious;*
- *is not to be confused with the person raising the complaint of apparent bias. The last is an important point in a case like the present where the appellant has made some allegations which on any view appear extreme and improbable;*
- *is not, on the other hand complacent;*
- *knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weaknesses - an observation with perhaps particular relevance in relation to unconscious predisposition;*
- *“will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially”; and*

- will also take the trouble to inform themselves on all matters that are relevant, and see it in “its overall social, political and geographical context”: para 3.

[13] In *United States v Cordova* (D.C, Cir. 2015) the court held that the test requires that the court “take the perspective of a fully informed third-party observer who understands all the relevant facts and has examined the record and the law.”

[14] In *Belize Bank Ltd v AG of Belize*⁵ the Privy Council endorsed the court *a quo*’s assertion that the fair-minded objective observer is not overly suspicious or finicky; he should be given some credit for his intelligence not to be swayed by any or every fancy of bias.

[15] Lord Bingham of Cornhill, in *R v Abdroikor*⁶, noted that:

“The characteristics of the fair minded and informed observer are now well-understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious”.

[16] Returning to the same concept of the “fair-minded and informed observer” in *Prince Jefri Bolkiah v State of Brunei Darussalam*⁷, Lord Bingham added:

“The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.”

⁵

⁶ [2007] 1 WLR 2679 at para 15

⁷ [2007] UKPC 62, para 16

- [17] The position of the fair-minded and informed observer is not to be confused with that of the person making the allegation of bias; such a litigant lacks the objectivity which is the characteristic of the fair-minded and informed observer (*Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz* [2016] EWCA Civ 556, at paragraph 69). Nor is the opinion of the fair-minded and informed observer to be equated with the presumed or actual views of practicing lawyers (*Sengupta v General Medical Council* [2002] EWCA Civ 1104, at paragraph 10-11).
- [18] The relevant facts that are to be taken to the fair-minded and informed observer are not limited to those which are in the public domain (*Viridi v Law Society* [2010] EWCA Civ 100, at paragraph 42-49).
- [19] The matters that will be considered by the fair-minded and informed observer include any explanation given by the judge as to their knowledge or appreciation of the relevant circumstances, the issue being not whether such explanation is to be accepted or rejected but whether there is a real possibility of bias notwithstanding the explanation. This may be of particular relevance when a decision in relation to recusal is being made or reviewed on appeal (*Hawell and others v Lees-Millais and others* [2007] EWCA Civ 720, at paragraph 7).
- [20] Our fictional reasonable, objective and informed person is not a lawyer, but neither is he/she a person wholly uninformed about the law in general or the issue to be decided. He/she is not to be assumed to have a detailed

knowledge of the law, or of the character or ability of a particular judge. Yet he/she is taken to understand the dynamics of modern judicial practice. Modern judges ‘are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are often assisted by hearing those opinions, and being given an opportunity to deal with them’. The expression of tentative views during the course of arguments as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias. [*AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236]

- [21] The fact that a judge has previously dealt with other aspect of the litigation in respect of which the application for recusal is made, or that the judge has previously (whether in the same case or another case) found that evidence of one of the parties or a witness to be unreliable, is not of itself sufficient to give rise to apparent bias on the part of that judge.
- [22] There should be proper grounds for the objection to the judge; a recusal application is not a vehicle by which a litigant can attempt to select the judge that they want to hear their case (*Triodos Bank NV*, at paragraph 7).
- [23] A recusal application should not be delayed for tactical reasons, a litigant cannot seek to have “the best of both worlds” by waiting to see if they will be successful in the litigation once they have become aware of the facts that give rise to a complaint of bias, only raising the point once they have lost. The law does not permit a litigant to do this (*Lacabail*, of paragraph 68-70).

A litigant has a duty to speak, once they become aware of such matters, if they are to sustain an objection on the ground of bias (*Ablyazov*, at paragraph 89). As the Court of Appeal held in *Baker*: “it is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable.” (Paragraph 6.). In *BMF Assets No 1 Ltd and others v Sanne Group PLC and others* [2022] EWHC 140 (Ch), an application for recusal of the judge managing the litigation was refused on the ground of inexcusable delay alone (paragraph 142), where it had been made two days before a hearing which had been listed before the judge several months in advance, and where the matters giving rise to the application had occurred between two and 11 months beforehand.”

SURVEY AND ANALYSIS OF PARTIES’ SUBMISSIONS

- [24] The Applicants’ case for my recusal is contained in Thabo Motoko’s founding affidavit. And the Respondents’ case is found in the opposing answering affidavit of Hon Richard Ramoetsi and the confirmatory affidavit of Respondents’ attorney Mrs. ’Mateboho Tohlang-Phafane. The status of Mr. Motoko’s affidavit in these proceedings may be questioned because, according to his own lawyer, his dispute with the respondents was settled prior to oral submissions. Secondly, as correctly pointed out in Respondents’ opposing affidavit, Mr. Motoko has not made allegation in his founding affidavit that he has authority to launch the application on behalf of the rest of the applicants, and they have not filed any confirmatory affidavits. Be that as it may, it must be borne in mind that as the applicants

have not filed any replying affidavits, then according to the Plascon-Evans Pains principle endorsed by our apex court on numerous occasions, the respondents' version prevails.

[25] The main reason why the Applicants claim they perceive me to be biased may be garnered from paragraphs 3, 6 and 8 of the founding affidavit. As this document is drafted in language that is so opaque, unclear, confusing and often unintelligible, I shall reproduce the aforementioned portions verbatim to avoid any accusations that I have misstated their case. Mr. Motoko avers that:

“3. His Lordship had turned the Deed of Settlement executed between the Respondents and our colleagues into an order of court. He is prepared to proceed with our case with the ultimate objective using the extra-affidavit of Hon. Ramoeletsi as part of the proceedings. He is not open to persuasion that the affidavit to which the interlocutory application of irregular proceeding is related is attacking his ruling that admitted the extra affidavit without an application for leave. His Lordship effectively granted an order to hold the affidavit of Hon. Ramoeletsi is part of the record in a private meeting between him and the lawyers of the Respondents and this happened under controversial circumstances and without formal papers. This point is made on the basis that the complaint we made to say it was an irregular step for His Lordship to make a case for the state in the private meeting is wrong. His Lordship ultimately dismissed the application and reached the conclusion that the order he granted on the 30th March cannot be interfered with, yet he inexplicably decided not to deal with propriety of meeting with one side of lawyers and making such serious orders without papers which was of real significant importance in the matter before him.

6. *We have advised that the decisions of the Court of Appeal are binding on the High Court, particularly a decision in the matter of Lehana that cases must be heard in open court. The test for apprehended bias is objective and once it is accepted that His Lordship had a private meeting with the lawyers of Respondents where a letter was used to generate a court order, what occurred in chambers renders further proceedings a nullity and His Lordship must recuse himself.*

8. *The other worrying element is that when challenged to account for departing from previous decisions of the Court of appeal cited to it which militate against the Court making a case for the government, this Honourable Court resisted to depart from its previous order of 30th March 2023. This is leaving much to be desired. As it had been confirmed, the order of 30th March 2023 resulted from a private meeting in chambers despite repeated directives of the Court of Appeal that the integrity of the decisions of the High Court must be preserved at all times and against all other considerations by conducting the proceedings transparently before the open Court.”*

[26] In the above extracts Mr. Motoko seems to be alleging that by holding a private/secret meeting with one of the parties in my chambers, in defiance of a directive of the Court of Appeal forbidding the holding of High Court hearings furtively in chambers, and making an order which is irregular, unlawful and prejudicial to them without proper basis, I have raised an apprehension that I am biased against them.

[27] When I asked Adv Lephuthing to clarify what he meant by a private and secret meeting, he had the temerity to rudely and disrespectfully reply that “a secret meeting, in this context, means one where people discuss things which they would not dare discuss in the open”. He added that they wondered why I was so insistent on covering up what transpired in my

unlawful and secret meeting in my chambers with the Respondents. He added that what happened in my chambers had not been accounted for, and that it was up to my conscience to just recuse myself because neither myself nor the Respondents have told them what took place in that secret meeting. He simply ignored the Respondents' explanation in their papers and submissions.

[28] Respondents' counsel, Adv Cooke emphatically and categorically disputed that the meeting that took place in my chambers was private and secret. He said that their attorney arranged it through my Judge's Clerk, who was present throughout. It was arranged as a follow up to the order made by Justice Makhetha the previous day in her chambers, (after hearing Advocates Tšabeha and Lephuthing for Applicants, and Cooke for Respondents) to the effect that the two applications (CIV/APN/0055/2023 and CIV/APN/0061/2023 including the main) were being postponed to 30 March 2023 for the parties to appear before the substantive judge (myself). The hearing in chambers only proceeded *ex parte* because Adv Lephuthing never answered numerous telephone calls made to him by Respondents' Attorney, with the view to ensuring that he attended. These calls got through but were inexplicably ignored. At that hearing no decision was made on any substantive issues and the merits of the main application were neither mentioned nor adjudicated. It was a purely case management hearing for the purpose of giving counsel directions as to the further conduct of the main application.

[29] Advocate Lephuthing's complaint about the allegedly private and secret meeting is what is classified as 'overstatement and strawman/scarecrow in

the discipline of ‘critical thinking’⁸. It is a textbook example of the specious strategy of creating a strawman/scarecrow by distorting, exaggerating, and misrepresenting the true state of affairs because the strawman is easier to attack and condemn than the truth. *In casu* Adv Lephuthing’s strawman is in the form of constantly referring to and demonizing, the *ex parte* hearing I held in chambers as a private and secret meeting because it is easier to attack and condemn than what in actual fact transpired that day. “A strawman or scarecrow may scare the crows, but it need not deceive the rest of us.” This fallacious type of argument or tactic undermines a rational debate as one side of the discourse has had their argument deliberately distorted against their will.

- [30] 1. Advocate Lephuthing’s argument deliberately distorts, exaggerates and misrepresents the true position. He purposely fails and omits to disclose that the hearing was a sequel to a directive of my colleague Justice Makhetha the previous day; that he and Advocate Tšabeha were fully aware that the matter was expected to continue on the 30 March 2023 before the substantive judge who had been allocated the cases; that a tentative roadmap had already been agreed upon by the parties’ counsel; that my Judge’s Clerk was openly engaged to facilitate the appearance of counsel before me; and most importantly that such hearings in chambers were expressly permitted in urgent applications such as this one by High Court Rule 8(22) (a) which provides:

“(22) (a) *In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and*

⁸ See Colin Swatridge. The Oxford Guide to Effective Argument and Critical Thinking (2014 OUP) at 59-61

may dispose of such matter at such time and place and in such manner and in accordance with such procedure at the court or judge may deem fit.” [My underlining]

2. What does the Rule mean by ‘the court or a judge’? In the interpretation Rule 1(1) a judge is defined as a “judge of the High Court sitting otherwise than in open court”. And according to Stroud’s Dictionary,⁹ when a statute says “the court or a judge” it is understood that ‘the court’ means a judge or judges in open court, and ‘a judge’ means a judge sitting in chambers {per Kay L.J in Re Bathe [1892] 1 Ch. 463}. “It is well recognised that that phrase always includes a judge at chambers unless there is some express enactment limiting the meaning of the phrase” (per Brett M.R. in Dallow v Garrold). There is no such express limitation in our High Court Rules.

3. There was nothing furtive, surreptitious, sinister or under hand about this *ex parte* hearing. It was held as ordered by my colleague Judge Makhetha on the 29th March as already stated above. And to date Advocate Lephuthing has not explained why he did not attend, let alone apologise. Instead he has at every opportunity persisted to make specious, sophistic and derogatory accusations that I held a private and secret meeting with the respondents’ attorney. This despite the fact that besides myself and the Respondents’ attorney, the hearing was attended by Advocate Thakalekoala and my Judge’s Clerk who kept a note of the hearing. I find Advocate Lephuthing’s complaint about this hearing profoundly misplaced and disingenuous. In similar circumstances in Moaeane v Palime & Others, the Court of Appeal

⁹ Stroud’s Dictionary of Words and Phrases 6th Ed, Vol. 1 (2000 Sweet & Maxwell) at 565

found that there was nothing wrong with the appearance of respondent's counsel before the learned Judge in the absence of the other side, where the appellant, as *dominis litis*, had failed to be in the forefront of complying with the directions of the judge and appear when the matter was rolled over to the next day and again when counsel for the respondent was heard.¹⁰

[31] To summarise, the applicants' vicious insinuations concerning the hearing on 30th March 2023 are fundamentally misconceived and without any merit whatsoever. There is nothing irregular about a Judge conducting a hearing in chambers in relation to procedural matters. This is a common feature of practice, particularly in urgent applications [see Rule 8(22) (a) supra]. Indeed, procedural hearings were held before Justice Makhetha on 29 March and she made an order in chambers without any demur from applicants¹¹ about her Ladyship defying the Court of Appeal's injunction to always conduct hearings in open court. This shows that Advocate Lephuthing's objection is just opportunistic. Much like Don Quixote he is tilting at windmills.

[32] For emphasis I reiterate that there was nothing irregular about proceeding with the hearing *ex parte*, given that –

1. Judge Makhetha had directed, by agreement, that: “The two applications are postponed to 30 March 2023 for the parties to appear before the substantive Judge.”

¹⁰ 2023 LSCA (12 May 2023) at para [33]

¹¹ Record, pages 156-157

2. The respondents' attorney has detailed the extraordinary attempts made to contact the applicants' counsel with a view to ensuring that he attended the hearing in chambers. These calls were inexplicably ignored.
3. Besides myself and the respondents' attorney, the hearing was attended by Advocate Thakalekoala and the Judge's Clerk. The latter kept a note of the hearing and I minuted it in the judge's file.
4. In circumstances where the parties were obliged to appear before the Presiding Judge on 30 March 2023, and the applicants' counsel failed to comply with the order and failed to respond to the several attempts to contact him, the complaint regarding a clandestine, secret private meeting is profoundly misplaced, scandalous, malicious and disingenuous.

[33] Advocate Lephuthing also alleges that at my “private meeting with the lawyers of Respondents... a letter was used to generate a court order.” This is just another of his strawmen or scarecrows! Yes, in my order I referred to the letter sent by Respondents' attorneys to the Applicants' attorneys on 29 March 2023. It is not disputed that this letter recorded the agreement reached between the parties regarding the further conduct of the main application.¹² I did not act improperly or irregularly by having regard to this written record of the parties' agreement in making my case management Order. This is especially so insofar as the applicants' counsel failed, without ever giving a reason or apologising, to attend the hearing. At any rate if

¹² Answering Affidavit (Recusal) para 8.16-8.17, 8.28, 8.31, to which Applicants never replied despite their undertaking to.

applicants were genuinely disaffected, the proper recourse for them was to seek a rescission of my Order or to appeal against it.

[34] The Order was served on the applicants' legal representatives on 3 April 2023. If the applicants sincerely considered that the Order was unlawful, or that it evidenced bias on my part, one would have expected them to forthwith launch proceedings, or at least to send a letter of objection to the respondents' legal representatives and/or the Presiding Judge. To the contrary, on 14 April 2023 the applicants' counsel advised the respondents' attorney that a replying affidavit would be filed by 18 April 2023 (i.e. that he would attempt to comply with the Order).¹³ It was only thereafter, when the shoe pinched, that correspondence was sent objecting to the circumstances in which the Order had been granted.

[35] In my considered opinion the events of 30 March 2023 certainly do not constitute evidence upon which a reasonable, objective and informed person would reasonably apprehend that I have not or will not bring an impartial mind to bear on the adjudication of the case. They are a very far cry from the compelling, cogent and convincing evidence required to dislodge the presumption of judicial impartiality. The Applicants have dismally failed to discharge the onus of such rebuttal. An informed person, possessing the attributes I have detailed above would never share Adv Lephuthing's strawman description of the *ex parte* hearing I held in Chambers in terms of Rule 8 (22) (a).

¹³ Answering Affidavit (Recusal) para 8.34

- [36] It is very instructive that my recusal was only raised on 17 May 2023 after both the irregular step application, and the application for leave to appeal, had been dismissed, and immediately before the main application was to be (eventually) argued.
- [37] If Applicant sincerely believed that the events of 30 March 2023 demonstrated bias on my part, why did they not seek my recusal before the hearing of the irregular step application, or before the hearing of the application for leave to appeal?¹⁴
- [38] The following finding of the South African Constitutional Court in ***Bernert v Absa Bank Ltd*** is germane.¹⁵

“It was not open to the applicant to wait for the outcome of the appeal before pursuing his complaint of bias. It is highly desirable, if extra costs, delay and inconvenience are to be avoided, that complaints of this nature be raised at the earliest possible stage. A litigant should not wait for the outcome of the appeal before raising a complaint based on recusal, where all the facts giving rise to the recusal complaint were known to the litigant. The conduct of the applicant is simply inconsistent with a reasonable apprehension of bias. If he had any apprehension, it must have been of the kind that he thought could be cured by a judgment in his favour. But that can hardly be said to be a reasonable apprehension of bias that is reasonably entertained. The applicant wanted to have the best of both worlds.”

- [39] The above dictum echoes the principle I have already emphasized in paragraph [22] above. Failing to apply for recusal immediately a

¹⁴ See answering affidavit (recusal) para 11.3

¹⁵ 2011(3) SA 92 (CC) at para 71

party becomes aware of the facts that give rise to a perception of bias, and only doing so after such party has lost on some interlocutory application (s) is enough justification for the recusal application to be refused on the ground of this inexcusable delay alone. Such delay has counted against the party seeking recusal in innumerable cases; for instance in *Mbana v Shepstone & Wylie*.¹⁶

[40] The only plausible inference is that the Applicants' recusal application is contrived to delay the proceedings and avoid the hearing of the main application. As in the *Tampane* case, this recusal application is calculated to delay the main application.¹⁷

[41] It is submitted that the warning of Spilg J in *Bennet and Another v the State*¹⁸ is apposite:–

*“More and more recusal applications are brought as a tactical device or simply because the litigant does not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners bring or threaten to bring recusal applications is cause for concern. The recusal of a presiding officer, whether it be a magistrate or a judge, should not become standard equipment in litigant’s arsenal, but should be exercised for its true intended objective, which is to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people whom they serve.”*¹⁹

¹⁶ (2015) 36 ILJ 1805 (CC)

¹⁷ Speaker of the National Assembly and Others v Likeleli Tampane CIV/APN/235/2018 at para 18

¹⁸ 2021 (2) SA 439 (GJ)

¹⁹ Para 113

“One would like to believe that, where a judge’s character is seriously impugned, and clearly defamatory statements are made at a personal level in respect of an alleged extracurial event or incident, the legal representative should bring a more analytical appraisal to bear, particularly where the judge’s recusal was not pursued expeditiously.”²⁰

[42] Insofar as the recusal application is based on adverse findings made by the Presiding Judge, this is not a sound basis for recusal.

[43] As Peete J, for the Full Court, pointed out in Mahase²¹:

“Often bias is perceived when a litigant loses a case, and when victorious, the judge is impartial. It is all about human perception.”

“At the end of the day, the litigant who loses a case will impute bias on the part of the presiding judge and his victorious (counterpart) will praise the judge for fairness and justice, it is human nature.”

[44] Simply, according to Ngcobo CJ in Bernert:

“The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her.”

[45] Furthermore, as put by Okpaluba and Juma²²:

“The bare fact that a judge has ruled against an applicant is not evidence sufficient to show the state of the judge’s mind. It alone cannot support a claim of bias nor can it serve as evidence to impeach the legal quality of an otherwise well conducted judicial proceeding.”

²⁰ Para 116

²¹ Mahase and Others v Hlaele and Another, Cons Case No.1(a) 2019

²² “The Problems of Proving Actual or Apprehended Bias: An Analysis of Contemporary Development in South Africa” PER/PELJ 2011 (14)

[46] Therefore, the adverse determination of the irregular step application and the application for leave to appeal does not amount to evidence upon which a reasonable, objective and informed person would reasonably that the Presiding Judge has not or will not bring an impartial mind to bear on the adjudication of the case.

[47] I turn now to address the further grievance expressed by the Applicants.

[48] The Applicant complains that authorities cited by them in the irregular step application were not addressed in the Court's reasons.

[49] However:

41.1 A Judge, though obliged to give reasons, is not required to address each and every submission that was advanced during the course of the hearing. As long as the reasons deal with the principal issues upon which the decision turns, they will normally pass muster.

41.2 The authorities cited by the applicants were irrelevant. I identified authorities which were on point and cited these in my judgment.

41.3 Authorities relied upon by the respondents were also not addressed in the judgment.

41.4 It follows that no inference of partiality may be deduced.

The detailed reasoning and supporting authorities I provide in my 'irregular step judgment', plainly dispel the likelihood that a reasonable, objective and

informed person would reasonably apprehend that I have not or will not bring an impartial mind to bear on the adjudication of this case.

- [50] Another ground the Applicants rely upon as indicative of my impartiality seems to be that my admittance of the Respondents' supplementary founding affidavit, absent a formal application for leave is grossly irregular. In my view this is not a valid ground or basis for seeking recusal. I have already meticulously explained why my decision to admit the said affidavit, is not an irregularly step in my interlocutory order delivered on 5 May 2023 under reference CIV/APN/0055a/2023. Applicants are at liberty to challenge that ruling by appeal; not by application for recusal.
- [51] Furthermore, Applicants seem to complain that I prejudged the outcome of the irregular step urgent application (set down on 28 April 2023) by indicating that I would proceed with the case because the appeal noted (on 5 May 2023) was not pending before the High Court but before the Court of Appeal. This is a *mala fide* distortion of what transpired. All I said was that as there had been no application for stay at that stage, and the appeal purportedly noted before the Court of Appeal was a nullity because Applicants had not sought and obtained leave of that Court before noting it, there was no legal impediment to the main case proceeding as scheduled.
- [52] Lastly the Applicants claim that I was advancing a case for the Respondents. All because I rejected their argument that there had been an irregular step or proceeding, and proceeded to give full reasons (backed by authority) why it was not necessary in the circumstances for there to be a specific application for leave to file Hon. Ramoetsi's supplementary affidavit on the merits.

Awarding costs *de bonis propriis* against a legal practitioner: The Applicable law

[53] This Court has inherent power to make costs orders against legal practitioners, derived from its supervisory jurisdiction.²³ The exercise of such power is discretionary,²⁴ but must be judicially exercised. An order to hold a litigants' legal practitioner liable to pay the costs of legal proceedings is unusual and far-reaching. Costs orders of this nature are not easily entertained and will only be considered in exceptional circumstances.²⁵ "The tendency is to award costs *de bonis propriis* against erring practitioners only in reasonably serious cases, such as cases of dishonesty, willfulness, or negligence in a serious degree... [Such costs have been awarded against a practitioner] where his tactics were improper and reprehensible."²⁶ However the courts have made it clear that their discretion to award costs *de bonis propriis* is not restricted to cases of dishonest, improper, or fraudulent conduct and that no exhaustive list existed: it includes all cases where special circumstances or considerations justify such an order.²⁷

[54] An overview of the law reports and textbooks indicates that such an order has been made in cases where the practitioner was guilty of:²⁸

²³ Per Chinhengo AJA at para 19 in Makeka v Africa Media Holdings [2022] LSCA. [The full citation of this case appears in the Annotations section at page 2 above].

²⁴ *Id*, para 25,

²⁵ Thunder Cats Investment 49 (Pty) Ltd v Fenton, 2009 (4) SA 138 (C) at 151

²⁶ Cilliers, A.C and Celliers, CR. Law of Costs 3rd Ed, Service Issue 33, April 2016 (Durban: Lexis Nexis) at p.10-28 para 10.25

²⁷ *Ibid*

²⁸ Wessels, B. The Legal Profession in South Africa: History, Liability and Regulation. (2021 Cape Town: Juta & Co) p 499 - 529

- *Improper and reprehensible tactics;*
- *Failure to act in good faith;*
- *Failure to comply with court rules and/or practice directions;*
- *Exploitation of court rules;*
- *Settling without authority;*
- *Gross negligence relating to postponements;*
- *Failure to produce accurate copy of document on which claim was based;*
- *Gross negligence relating to the handling of the record;*
- *Failure to prepare for a hearing;*
- *Failure to read correspondence from the court before filing it;*
- *Abuse of process;*
- *Failure to ventilate real issues that called for judgment;*
- *Dilatory and obstructive conduct of legal practitioners;*
- *Failure to file practice note;*
- *Fruitless defence and unsigned affidavits;*
- *Failure to inform clients of the obligation under a court order;*
- *Failure to respond to correspondence;*
- *Over-burdening the appeal records;*
- *Dishonesty;*
- *Litigating recklessly;*
- *Misleading the court;*
- *Dilatory tactics;*
- *Pursuing a hopeless case;*
- *Frivolous and vexatious litigation*

[55] In the ***Makeka v Africa Media Holdings*** case referred to above, the Court issued the following cautionary injunction about the awarding of punitive costs against legal practitioners:

“[21] There are several principles to take into account when considering to make an order of costs de bonis propriis. The jurisdiction must be exercised with ‘care and discretion and only in clear cases’; a legal practitioner is not to be held to have acted improperly, unreasonably or negligently simply because he or she acts for a party who pursues a claim or defence which is plainly doomed to fail; the legal practitioner is not the judge of the credibility of witnesses or the validity of arguments; in considering such order, arising from a legal practitioner’s conduct of the proceedings, a court must make full allowance for exigencies of acting in that environment and only when a legal practitioner’s conduct of proceedings is plainly unjustifiable can it be appropriate to make such order”. [My emphasis]

Function of the order

[56] A personal costs order against a legal practitioner:

- provides the court with an opportunity to mark its profound displeasure with the practitioner’s conduct and punish him/her for behaviour that departs from the responsibility associated with his/her office;²⁹
- serves as a deterrent on other practitioners;³⁰
- holds them to account for their conduct;³¹
- indemnifies innocent clients and/or consumers of legal services;³²
- ensures that tax-payers’ funds are not wasted on unnecessary litigation where the case involves a public entity.³³

²⁹ Wessels at p. 493

³⁰ Ibid

³¹ Ibid

³² Id, p. 494

³³ Id, p. 494

Application of the legal principles on costs to the facts

- [57] On 7 August 2023 I called the parties' representatives to a case management hearing. I apologized for the delay preparing this recusal judgment, caused by the crippling of the entire government computer network and our work computers by a virus infection. I then informed them that since both sides had prayed for punitive costs in their founding and answering papers, and respondents had in addition sought costs *de bonis propriis*, I was giving them the opportunity to make full representations on costs. I therefore ordered both sides to file supplementary heads of argument and bundles of authorities on the issue of punitive costs by close of business on 18 August 2023. Respondents' representatives duly filed as requested. Applicants' representatives did not.
- [58] As already discussed in my summary of the applicable legal principles above, this Court is competent to grant costs *de bonis propriis* against a legal practitioner where special circumstances or considerations justify such an order. In the present case I have identified the following exceptional circumstances which cumulatively justify such an order.
- [59] Use of unrestrained, insulting and defamatory language. And the making of scandalous and irresponsible statements/insinuations by Applicants and their legal representatives.

Right from the time I was assigned this case the Applicants and their counsel Adv Lephuthing have subjected me to an incessant barrage of vitriolic, discourteous, insulting, untrue and derogatory remarks,

statements and insinuations. In the nine years that I have been on the bench I have never suffered such abuse. Among the disgraceful, scandalous and irresponsible statements / insinuations made by Applicants and/or their counsel are:

- (a) That I conducted private or secret meetings with the respondents' attorney;
- (b) That the meeting was held secretly so that we could talk about matters that I would not dare to discuss in the open;
- (c) That I have an ulterior objective (at para 3 of the founding affidavit);
- (d) That I made a case for the respondents (at paras 3 of the founding affidavit);
- (e) That I was "incensed" with the applicants' submissions (at para 5 of the founding affidavit);
- (f) That I am "clinging" to papers filed by Government (at para 13 of the founding affidavit);
- (g) That I "can't see the woods for the trees" and do not appear to understand a thing (at para 15 of the founding affidavit);
- (h) That I was insistent on covering up what transpired in my unlawful secret meeting in chambers with Respondents; and
- (i) That I insisted on scheduling the case for hearing of the merits even though Applicants had appealed against the ruling on the alleged irregular step or process. When he raised this point during his oral submissions, I pointed out to Adv Lephuthing that he was accusing me falsely because he had never approached this Court for stay of proceedings. Instead he had purported to lodge an

appeal with the Court of Appeal against my interlocutory order without seeking and obtaining leave to appeal from that Court. He had instead sought leave from this Court, which I had refused because

in terms of section 16(1) (b) of the Court of Appeal Act 1978

this Court was not the correct forum for granting such leave.

[60] In *Letuka v Abubaker N.O. and Others*³⁴, our apex court strongly deprecated the use of inappropriate language and warned that such behaviour warranted severe censure. Hurt JA held as follows at para 15:

“[15] ...there is ... a growing tendency, apparent in a number of cases which have recently come before this court for deponents to affidavits to use unrestrained, insulting and often defamatory language. As an example in this case the appellant delivered himself of the comment that “the Respondent is a crook”. It is clear that the affidavit in which this scurrilous statement is contained was drafted for the appellant by his legal representative, and that representative had a duty to temper the language used by his client.the object of an affidavit is to place facts, and occasionally submissions, before the court. The affidavits should not be used as a vehicle to insult or to express adverse opinions about the opponent. If such a practice continues, it may become necessary for the court, mero motu to strike out the offensive language and make a punitive order as to costs, including, if necessary, an order for costs de bonis propriis.”
[my underlining]

[61] In *Le Car Auto Traders v Degswa* 10138 CC 2013 JDR 1651 (GSJ) Sutherland J (as he then was) dealt with a recusal application which was “not conceived with circumspection but with bluster, invective and without regard to the running up of costs in so doing.” The same may be said about the present recusal application.

³⁴ LAC (2011-2012) 386

[62] In *Le Car*, Sutherland J held as follows regarding costs:

“The basis for the application, although put up through the notional mouth of Mr Vorster, is demonstrably founded on alleged perceptions in respect of which a lay person would not have had insight and in respect of which he would be dependent upon advice from his attorney to have conceived, and in turn to have made the complaints. A similar situation occurred in an application before Satchwell J to recuse herself involving Mr Omar (Moola v Director of Public Prosecutions & Others SGHCJ Case No: 2010/30653; 23 March 2012 – as yet unreported). In that matter Satchwell J, having held that the application was without merit, concluded that the source of the false allegations giving rise to the complaints notionally made by the litigant was her attorney. It was held that she should not have to bear the costs of such an application nor should she be obliged to pay a fee to Mr Omar for such application. I agree with that approach.”

[63] In the result Sutherland J ordered that costs be borne by the applicant’s attorney of record on the attorney and client scale *de bonis propriis*.

[64] A similar approach was followed in the recent case of *Ncube and another v Health and Hygiene (Pty) Ltd* 2023 JDR 0019 (GJ).

[65] In the present case, this Court took the view that the applicants’ legal representatives, and not the applicants themselves, were responsible for the objectionable features of the recusal application. It was therefore inclined to order that the costs be paid *de bonis propriis*.

Dilatory, improper obstructive and reprehensible tactics and conduct of legal practitioners

[66] The second reason why I was constrained to make a punitive cost order against applicants’ legal practitioners is that it had now become evident that

there was a pattern of dilatory, improper and reprehensible tactics on the part of the Applicants and their counsel. They instituted a series of interlocutory applications, most of which were meritless and hopeless frivolous, with no *bona fide* intention but to delay and frustrate the hearing of the merits of the case. Similar tactics have now come to be known as Stalingrad tactics in our neighbour South Africa³⁵.

[67] Ever since I started hearing this urgent application on 30 March 2003, I have now had to hear and determine three meritless interlocutory applications, all of which I have dismissed. The common feature of all three is that they were deliberately only brought at the very last minute, a day or two before the date scheduled for hearing of the merits. The first two only came to my attention on the very morning of the scheduled hearing date and forced a postponement. In his arrogance and tone-deafness Adv Lephuthing never found a need apologise for this grave inconvenience and impropriety. The application for leave to appeal took the cake. It was a textbook pursuit of a hopeless case as my judgment in CIV/APN/0055b/2023 amply demonstrates. It was prosecuted purely for the purpose of obstructing the hearing of the merits of this case. It never stood the slightest chance of succeeding.

Failure to obey and comply with Court Orders and Directions

[71] The third serious transgression committed by applicants' counsel, has also developed into a clear pattern of gross misconduct. Throughout all the steps of this litigation before me, Adv Lephuthing has consistently and perennially failed to comply with all case management orders and directions of this

³⁵ For instance in Zuma v Downer and Another [2023] ZASCA 132 (13 October 2023) at paras 6-8, 28

court, including, astonishingly, those issued by agreement with all legal representatives of the parties. To add insult to injury, in all instances he has never bothered to apply to the Court for condonation of his non-compliance or even apologized for same. As can be gleaned from my minutes at every single step of these proceedings, Adv Lephuthing has consistently failed to comply with court directions on time, or at all. It has become his *modus operandi*.

[72] Our law is crystal clear that a court order, even if wrong must be complied with. A dissatisfied party must appeal, not just ignore it. This is trite law in our jurisdiction, backed by a legion of authorities.³⁶ In fact such non-compliance or disobedience is regarded as contempt of court.³⁷

.....
KEKETSO L. MOAHLOLI
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants : Adv CJ Lephuthing, instructed by T. Maiane & Co

For the Respondents: Adv D Cooke, instructed by Webber Newdigate Attorneys

³⁶ Registrar Lesotho Medical Dental and Pharmacy Council and Others v Yangindu [2022] LSCA (11 November 2022) at paras [37] to [47]; Petrus T. Damaseb. Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice (2020 Juta &Co.) at p.244 para 9-125.

³⁷ Andries C. Cilliers, Cheryl Loots & Hendirk C. Nel SC. The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa. 5th Ed., Vol. 2 (2009 Juta & Co) at p.1098 and the cases cited therein. Adv Derek Harms

SC. Civil Procedure in the Superior Courts, Service Issue 77 of August 2023, Vo.1 (Lexus Nexis) at p.B-316 para B45.4