



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 376/2022

In the matter between:

**SAP SE**

**APPELLANT**

and

**SYSTEMS APPLICATIONS CONSULTANTS**

**(PTY) LTD t/a SECURINFO**

**FIRST RESPONDENT**

**UNGANI INVESTMENTS (PTY) LTD**

**SECOND RESPONDENT**

**Neutral citation:** *SAP SE v Systems Applications Consultants (Pty) Ltd t/a Securinfo and Another* (Case no 376/2022) [2024] ZASCA 26 (20 March 2024)

**Coram:** PONNAN, GORVEN and MEYER JJA and KOEN and BAARTMAN AJJA

**Heard:** 20 & 21 February 2024

**Delivered:** 20 March 2024

**Summary:** Application for recusal – reasonable apprehension of bias – trial judge – misconceiving the issue in the evidence – preventing counsel from properly developing a line of cross-examination – irritatedly abstracting himself from the hearing and directing that the cross-examination continue in his absence – test satisfied.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Tsoka J, sitting as court of first instance):

- 1 The application for leave to appeal succeeds.
- 2 The appeal is upheld.
- 3 The first and second respondents are directed, jointly and severally, to pay the costs of the application for leave to appeal and of the appeal, such costs to include the costs of two counsel.
- 4 The orders of the court *a quo* dated 13 November 2020 and 7 December 2021 under case number 20378/2008 are set aside and replaced with the following:
  - a. The application for recusal is granted and the first and second respondents in the recusal application are directed, jointly and severally, to pay the costs of the application, including the costs of two counsel;
  - b. The plaintiff and the second defendant are directed, jointly and severally, to pay the costs of the trial, including the costs reserved by Satchwell J on 25 May 2011, such costs to include the costs of two counsel and the qualifying costs of the first defendant's experts, Professors Wagner and Wainer and Messrs Burke and O'Neill.'

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## JUDGMENT

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**Ponnan JA (Gorven and Meyer JJA and Koen and Baartman AJJA concurring):**

[1] In 2008, the first respondent, Systems Applications Consultants (Pty) Limited, trading as Securinfo (SAC), a local software development company, caused summons to be issued out of the Gauteng Division of the High Court, Johannesburg (the high court) for damages in the amount of €609 803 145 against the appellant, Systems Applications Products AG (since renamed SAP SE) (SAP), a German global software company involved in the development and sale of software systems application products. SAC's assertion, denied in general terms by SAP, is that it had concluded a Software Distribution Agreement (the SDA) with a German IT consulting company,

SAP Systems Integration (SAPSI), in respect of a software security product (Securinfo) that had been developed by it. The broad thrust of SAC's case is that, subsequent thereto, SAP acquired a controlling share in SAPSI and an interest in a competing security product known as VIRSA and thereafter unlawfully interfered in the SDA.

[2] In the particulars of claim (as amended) annexed to the summons, it was alleged on behalf of SAC that:

'12. In terms of the SDA:

12.1. SAPSI was obligated to use all reasonable efforts to promote and extend the market for the Plaintiff's product to all potential licensees and to work diligently to obtain orders for the Plaintiff's product;

12.2. SAPSI undertook that it would not during the currency of the SDA market or distribute, either directly or through intermediaries, any products directly or indirectly competing with the Plaintiff's product;

12.3. The SDA would endure for a period of 3 years.

12A The Plaintiff had an established and operating business in exploiting its Securinfo products . . . including in particular with SAPSI . . . ("the Plaintiff's business").

13. From August 2004 *alternatively* from after August 2004 but by March 2005 at the latest, the Defendant had knowledge of the conclusion of the SDA between the Plaintiff and SAPSI and of the Plaintiff's business.

14. The Defendant was at all material times under a legal duty:

14.1. not to intentionally and unlawfully interfere with the contractual relationship between SAPSI and the Plaintiff with the intention of causing the Plaintiff a loss in terms of section 826 of the German Civil Code ("the BGB"); and

14.2. not to intentionally *alternatively* negligently and unlawfully injure the Plaintiff's business in terms of section 823(1) of the BGB.

15. Between February 2005 and the expiry date of the SDA and in breach of the aforesaid legal duties, the Defendant acting directly and/or through its wholly owned subsidiaries:

15.1. ceased its support and promotion of the SAPSI-Securinfo partnership based on the SDA (or at all) and the sale of the Plaintiff's product to SAP customers globally;

15.2. promoted the marketing and sale of the IT security product and/or products produced by Virsa Systems Inc, a company then incorporated in accordance with the laws of the United States of America (such product and/or products hereafter referred to as “VIRSA”) by all its subsidiaries, including SAPSI, and discouraged the sale of the Plaintiff’s product and other similar or competing products.

. . .

16. But for the actions of the Defendant, SAPSI would not have breached the SDA and would have continued implementing the business relationship with the Plaintiff as set out . . . above.

17. The Defendant foresaw and intended that its said conduct in interfering with and/or causing SAPSI to breach the SDA would cause a loss to the Plaintiff, alternatively, the Defendant with reckless regard for the consequence of causing Plaintiff a loss, nonetheless interfered with and/or caused SAPSI to breach the SDA as aforesaid and the Defendant is accordingly liable to compensate the Plaintiff for such loss in terms of section 826 of the BGB above *alternatively* the Defendant’s conduct described in paragraph 15 above constituted the unlawful and intentional *alternatively* negligent injuring of the Plaintiff’s business and the Defendant is accordingly liable to compensate the Plaintiff for the loss sustained in consequence of such injury in terms of section 823(1) of the BGB above.

18. By reason of the aforesaid breaches of its legal duties by the Defendant, the Plaintiff suffered a direct loss of sales of its security software, which, but for the intentional and unlawful conduct of the Defendant, it would otherwise have made.’

[3] SAP filed several special pleas and a plea over, inter alia, putting in issue the conclusion of the alleged SDA. It also denied having unlawfully interfered with the SDA and disputed liability for the damages claimed. The issues of the merits and quantum having been separated, the matter proceeded to trial in respect of the former before Tsoka J. The trial commenced in October 2020 and ran in total for some 74 days, generating a record in excess of 60 volumes comprising some 12 000 pages. In the course of the trial, SAC ran out of funds and had to turn to the second respondent, Ungani Investments (Pty) Limited (Ungani), for funding to enable it to continue to prosecute the claims. Ungani came to be joined by consent as the second defendant to the proceedings in its admitted capacity as the funder of SAC’s litigation against SAP to meet any order for costs that may issue against SAC.

[4] The hearing was conducted virtually on the Zoom platform in accordance with the then prevailing practice in the high court as a result of the COVID 19 pandemic. Throughout the proceedings, all of the participants were connected to the same virtual meeting, which was designed, as closely as possible, to resemble proceedings in open court. The trial was recorded (both audio and video) and transcribed on a daily basis by RealTime Transcriptions. It was envisaged that all the usual formalities and decorum of the court would be observed, such as the judge and counsel were robed; the witnesses testified under oath and, whilst the court was in session, the proceedings were at all times to be presided over by the presiding judge, who could be observed on a video link and heard on an audio link.

[5] On Friday, 6 November 2020, when the trial was into its 20<sup>th</sup> day and whilst one of SAC's witnesses, Mr Mario Linkies, was being cross-examined by counsel for SAP, the following occurred:

'MR BADENHORST SC: So is your evidence, and let me just get clarity on this once and for all, you are saying at the beginning Mr Tattersall asked for the signed agreement, and that means July/August 2004, correct?

MR LINKIES: This could be, yes, yes.

MR BADENHORST SC: And then he asked you once, at a later time, but only once he did not ask frequently, is that what you said?

MR LINKIES: He may have asked me again but I am not sure (inaudible).

. . .

MR LINKIES: Yes, he may have asked me, I do not recall it, but he may have asked me once or twice or thrice, I am not sure, but it was not a big issue, but he certainly talked about the contract and the final signature, ja, especially at the beginning; later on, I do not think we talked about that, but at the beginning I am sure we talked about this, because for me it was also an issue to get this done.

MR BADENHORST SC: . . . We have found several indicators in the months from August to February 2005, in every month there is an indication of some issue being raised concerning the signed agreement, it is either by Mr Tattersall to you, or yourself raising the issue with your colleagues, and I will put to you that it is very likely that all these instances are related back to your and Mr Tattersall discussing this problem of not having the signed contract . . .

. . . Then on the 21 September 2004 you wrote that email to your colleagues about "Tattersall is 'breathing down my neck'", remember that?

MR LINKIES: Ja, ja, I saw this email.

MR BADENHORST SC: And I put to you that if one reads all the emails exchanged on that day about that particular subject, it is obvious that it was Mr Tattersall who was indeed “breathing down your neck”. Do you agree with me?

MR LINKIES: No, he was not; again, I expressed and I used certain German wording to push my own organisation, and I do this all the time, but we informed Mr Tattersall on the fact that he should not be worried. This we told him all the time, and we informed him that we are working based on the SDA, but I was not a lawyer and I was not in charge of making sure, or have a good understanding if the contract had been legally bound or not; for me it was clear that once Mr Ahrens told us it is done and we got approval from him, that we can work based on the SDA, but what you are asking maybe about my understand of Mr Tattersall’s understanding, and I cannot comment on that, I can only tell you what I have told Mr Tattersall, and maybe if Mr Tattersall was asking me often, but he did not ask me often, it was not an issue for him, but it was an issue for me to make sure I get internally all the signatures, and that is why I was following up every few months, every month even, this was just my way of doing it –

MR BADENHORST SC: Yes, Mr Linkies, you have said this before, I just do not know why you keep on going on about an issue that I did not ask you about. My question to you, what I am putting to you is simply that this email . . . that is on the screen, of 21 September 2004 speaks for itself. The email you wrote is in its terms saying, “I regret to have to follow up again, but urgently request the approval of the contract with Securinfo, as we have had the details scrutinised by various colleagues”, no doubt you are referring to the internal approval process, “There should be no further problems. Peter Tattersall is ‘breathing down my neck’, and I can quite understand that Securinfo wants a definite statement on whether the partnership with SAPSI is now put on an official basis or whether we do not have legal certainty. That of course has implications for our collaboration.”

. . . And then the crucial statement, I am therefore at present refraining from a further conversation with Peter until the matter is clarified on our side . . . So, Mr Linkies, you have a very clear choice here before His Lordship. You either have to own up and say, yes, of course what I wrote there is correctly recording the facts. Mr Tattersall was breathing down my neck. He was asking for the contract. As I said numerous times later on the proceedings I showed you how you told Mr Hoffman that Mr Tattersall was asking at regular intervals for the contract. Isn’t that what you said in December 2006?

MR LINKIES: I don’t know what I said there, but certainly this text here is part of my following up that the internal list has been done. This is what I’m also – what I always do. This was part of my job. And my understanding at that time and maybe even now is that a contract has to be signed. This is my understanding

MR BADENHORST SC: Mr Linkies, I'm sorry. You can go round and round my question. I can assure you that –

...

... Now you've seen the email. The question is, is your email correct or not?

MR LINKIES: My email at that point is very, very clear. I wanted to push my own organisation to make sure we have the in – we are doing our internal tasks but I used – of course I used some people. In that case I used Peter Tattersall of Securinfo to push my own people and this is something I'm doing also with my kids you know. I do this – those things. Maybe it's right, maybe wrong but this is what I do.

MR BADENHORST SC: So is what you're saying is you were lying to your colleagues?

MR LINKIES: Why are you saying I am lying? I don't – I didn't lie.

...

MR BADENHORST SC: But then you must agree if you're not – you will only not be lying if in fact Mr Tattersall was sitting on your neck because ... You're saying to your colleagues, Manfred and Frank, that is Manfred Wittmer and Frank Off, you're saying Peter Tattersall is breathing down my neck. Now did – was he breathing down your neck or not? If you're saying to His Lordship he was not breathing down my neck then what you wrote there is a lie.

MR LINKIES: I pushed my organisation –

COURT: Mr Badenhorst may we proceed please and then you can argue that point. The question has been answered repeatedly.

MR BADENHORST SC: M'Lord, I am putting to the witness that he was lying in his email and he has to –

COURT: He said the answer is no. I was pushing my own organisation.

MR BADENHORST SC: But, M'Lord, with great respect if he's pushing his own organisation by using –

COURT: Yes.

MR BADENHORST SC: A false statement, I'm entitled to force him to answer it. It's not a matter of argument. It's a matter –

COURT: When you've finished you'll let me know. I'm taking a break.

MR BADENHORST SC: That is now interesting. It is now 11:11.

[COURT ADJOURNS                      COURT RESUMES]

[11:14] COURT: I'm back.

MR BADENHORST SC: M'Lord, I just want to place on record that Your Lordship walked out of court now, at about 11 minutes past 11, when Your Lordship simply announced that you are simply taking a break and that we must let you know, when I have finished.

COURT: You keep repeating one question after the other, and you want a different answer.

MR BADENHORST SC: M'Lord, with great respect, I would like to record that Your Lordship was asking me about the questions that I had been putting. I responded to Your Lordship to say why I was putting the question and why it was important for me to get an answer from the witness and that I have and am obliged in terms of high authority, namely the SARFU case to put to the witness when I will ultimately be arguing that he is a lying witness and that –

COURT: That's the point, I say, I said that's a point. May I do that.

MR BADENHORST SC: Yes, but I have a more serious issue, M'Lord, that I have to raise because it concerns the conduct of the bench. Your Lordship was so upset with me that is consistently with Your Lordship's constant attitude towards my side to take a clearly one sided approach to this matter. Your Lordship stormed out of Court and you were so upset with me that you said I must call you back when I have finished and I wish to put, place that on record because it's a deeply concerning attitude from the bench.

COURT: Please do so.

MR BADENHORST SC: I have done so, M'Lord and the record will read for itself.

COURT: Yes.

MR BADENHORST SC: I really hope, M'Lord, that we are engaged here in a very complex and long matter and I am urging Your Lordship to take a balanced view and to treat both sides even handed. Your Lordship –

COURT: (Inaudible).

MR BADENHORST SC: M'Lord, Your Lordship has taken a very clear sympathetic approach to Mr Tattersall. You'd constantly, constantly taken a very hostile attitude to my questioning and to my approach to the matter and I cannot understand it because I've noted M'Lord for a very long –

COURT: That is new to me.

. . .

MR BADENHORST SC: M'Lord, I have noted my position and I would ask Your Lordship to take the tea adjournment.

COURT: Yes, we will take the tea adjournment. He said I've constantly been hostile.

MR BADENHORST SC: M'Lord, I do not wish to say anything more, the record will speak for itself and I am simply urging Your Lordship to please adopt an even handed approach to the parties in this matter. I do respectfully request Your Lordship to patiently await the case that we will present for the defendant, the first defendant, and to give the first defendant confidence that it will have a hearing on equal terms before this Court and that it will receive the attention that it deserves without bias, fear or favour.

COURT: Yes, (inaudible) but I've said to you, you said, I took a – constantly been hostile to your client's case.

MR BADENHORST SC: That is what I have said, M'Lord.



COURT: Yes. Is that correct?

MR BADENHORST SC: M'Lord, I'm afraid that is the impression that I have.

COURT: Sorry, no, no I asked a different question. I'm not asking you about your impression. Is that correct that I was hostile?

MR BADENHORST SC: M'Lord, I have said what I have wanted to say and I'm not going to be forced by Your Lordship to say anything else. I have said what I wanted to say and that is where I end.

COURT: And which is (inaudible).

MR BADENHORST SC: Which is what I said, M'Lord. Must I repeat it?

COURT: Yes.

MR BADENHORST SC: I have the impression that Your Lordship has taken a very sympathetic view towards the plaintiff's case and a very hostile approach towards the defendant's case. Your Lordship at one stage I may remind you made the laconic remark that, who are these defendants, do they believe in the supernatural and that was at a stage as early as the opening address. That kind of remark M'Lord does not go unnoticed, it has a deeply disturbing effect on a –

COURT: – it was during argument where the defendant (inaudible).

MR BADENHORST SC: Why, with the greatest respect, does the Court say those things to belittle a very serious defence that the defendant is pursuing in a very large and complex case.

COURT: So, do you want me to recuse myself, is that the indication?

MR BADENHORST SC: I have no instructions M'Lord, as far as that is concerned.

COURT: You must take instructions during the tea break?

MR BADENHORST SC: I shall, M'Lord.

COURT: Thank you.

[COURT ADJOURNS

COURT RESUMES]

[11:33] MR BADENHORST SC: My Lord –

...

MR BADENHORST SC: My Lord, may I report back. I've had an opportunity to only have a very brief discussion with my instructing attorney, and I will . . . need to ask Your Lordship to allow me further time to take instructions on Your Lordship's question to me and I would propose M'Lord that we take the adjournment for the – long adjournment now, until Monday morning, and then I will have an opportunity. My instructing client is in Germany. We obviously have to explain the situation fully to the people who have to make the decisions, and I will need time for that, M'Lord. So I ask that Your Lordship adjourns the proceedings now until Monday morning at 09:30?'

[6] On 9 November 2020, SAP brought an application, which was opposed by SAC, for the recusal of Tsoka J. In support of the application, it was stated by Mr Alexander Leyh, SAP's senior legal counsel:

'27. Upon reading the transcript, listening to and watching the relevant part of the audio visual recording of the proceedings on 6 November 2020 and receiving confirmation from Dr Levenstein that it fairly reflects what occurred and on the basis of Dr Levenstein's affidavit attached, I state the following:

27.1. SAP has not, prior to the events recounted in Dr Levenstein's affidavit, ever experienced a judicial officer conducting himself or herself in the manner revealed from the transcript and Dr Levenstein's observations.

27.2. Hitherto, judicial officers always permitted SAP to present its case – as plaintiff or as defendant – while (in addition and especially) always remaining in attendance and presiding over the proceedings at all times. This is not to say that there have not been frank (or indeed vigorous) exchanges between SAP's lawyers and the Court on occasion; I say only that the conduct displayed by the presiding Judge in the present instance, namely a unilateral and intemperate exit from the trial proceedings and a refusal to listen to what counsel for SAP wanted to ask of SAC's principal witnesses, and suggesting that the proceedings should continue in the absence of the Judge, has never occurred.

...

27.5. SAP considers the Court's conduct on 6 November 2020 to be alarming and intolerable.

27.6. SAP apprehends on the basis of the events described herein and in the affidavit of Dr Levenstein, that the Presiding Judge, for whatever reasons, will not be impartial.

27.7. SAP has lost confidence in the ability of the Presiding Judge to fairly and impartially arrive at the balanced and reasoned decisions required for the numerous important questions of fact, German law and credibility arising in this matter.

27.8. SAP reasonably perceives, on the basis of the Court's conduct on 6 November 2020, that it has closed its mind to persuasion to a case contrary to that put forward by the SAC's witness, Mr Mario Linkies, on a key issue in the trial, namely whether the plaintiff had knowledge at all times that the agreement relied on by the plaintiff for its claim would only be valid when it was signed for SAPSI (which never happened). This is a fundamental point in the case; SAC's case pivots on it.

27.9. The Court's apparent closure of its mind to persuasion contrary to SAC's case on that key issue in the trial, causes SAP reasonably to perceive that the Court's mind is (or most likely will be at the appropriate time) similarly closed to persuasion against SAC's case on other issues in the trial.

27.10. The Court's perceived bias is manifested by the following conduct of the Presiding Judge on 6 November 2020:

27.10.1. The Presiding Judge's refusal to permit counsel for SAP to put SAP's case on a key issue (and conclusion, based upon that case) to the witness;

27.10.2. And thereafter, when counsel for SAP sought to resist and then to persist, the Presiding Judge instructing counsel for SAP to let the Court know "when he (had) finished", declaring "I'm taking a break" and then 'storming out of Court' (by abruptly and in a visibly angry state abandoning his seat in front of the Zoom monitor and walking away so that he was no longer visible to those attending the proceedings and only returning after several minutes).

27.11. The Court's conduct is clearly visible on the external camera which was set up to record and project to all attendees the movements of the Presiding Judge.

27.12. SAP, Mr Hamel and I agree with Dr Levenstein that it is clear that the Presiding Judge became visibly upset and acted in rage when counsel for SAP explained to him that it was his (counsel's) duty to put to the witness that he had lied in the email to his colleagues dated 21 September 2004 at 1:25:59 PM (referred to as SI\_0729 in the trial bundle);

27.12.1. By his conduct and words – which were clearly intended and also appeared to be unambiguously conveying a refusal to listen to (let alone consider) SAP's case being put to the witness Mr Linkies – the Presiding Judge then in fact refused to listen to or observe the proceedings and evidence on a central issue in the case, extraordinarily suggesting that counsel for SAP should carry on with his questions in the absence of the Presiding Judge.

27.12.2. The latter suggestion (communicated by the Presiding Judge's statement shortly before his abrupt exit that, "When you've finished you'll let me know. I'm taking a break") clearly conveys the impression to any informed and objective observer that his mind is closed to SAP's version being put to the witness and to any evidence that SAP might elicit from the witness Mr Linkies affecting his credibility;

27.12.3. The submissions made by counsel for SAP at the relevant time based on universally accepted authority – not only fell on deaf ears but were actively proscribed by the Court, and this to such a degree that when counsel for SAP sought to persist, the presiding Judge simply exited the proceedings in a rage and advised counsel for SAP to continue in the Court's absence and to let the Court know "when (counsel had) finished".

27.12.4. The meaning and implication being that the Presiding Judge was content for the proceedings to continue in his absence and without the Presiding Judge listening to or taking any interest in the further cross-examination of SAC's witness by counsel for SAP.

27.12.5. The Court's attitude thus displayed founds a reasonable perception of bias on the part of the Presiding Judge who should accordingly recuse himself.

27.13. SAP reasonably perceives – on the basis of the behaviour and utterances of the Presiding Judge on 6 November 2020 – that the Presiding Judge is biased and will not be impartial.

27.14. Accordingly, SAP verily believes that it will not receive a fair trial before the Presiding Judge.

28. In the circumstances, it is with deep regret that SAP requests the recusal of the Presiding Judge.'

[7] Dr Eric Levenstein, a director of Werksmans Incorporated, SAP's attorney of record, who deposed to a confirmatory affidavit in the recusal application, had this to say:

'5. The immediately relevant events appear from pages . . . of the transcript.

6. I confirm that it fairly reflects and records what was said, subject to correction of the following errors (which are established on the basis of me personally listening to and viewing the original zoom audio visual recording):

6.1. At page 95 the transcript contains the following inaccurate entry in brackets:

"[COURT ADJOURNS COURT RESUMES]"

Which is inaccurate – there was no adjournment of the Court proceedings at that time.

. . .

6.6. It was obvious to all the observers that the presiding Judge had not taken an adjournment for any of the usual reasons, such as a tea or lunch or comfort break. These breaks are always clearly announced by the presiding Judge at the appropriate time before the Court rises and before he leaves his post.

. . .

10. I confirm the following, with reference to the transcript and audio/video tape of the proceedings on 6 November 2020:

10.1. One of the key issues in the case before the presiding Judge is whether or not a software distribution agreement (or SDA) was concluded between SAC and a subsidiary of SAP, called SAPSI. SAC's claim against SAP turn on the proposition that the SDA was concluded. SAP disputes this central plank of SAC's case.

10.2. SAC's case on this issue, briefly summarised, is that the representative of SAC (Mr Tattersall) prepared a draft SDA (which contains a "term" clause of 3 years from date of signature, together with a "no prior representations" clause) for consideration and discussion by representatives of SAPSI including, among others, the witness in question, Mr Mario Linkies (who was formerly – in 2004 – a consultant employed by SAPSI)

10.3. SAC's case is, further, that SAC's representative (Mr Tattersall) signed the SDA on behalf of SAC on 6 August 2004 at a meeting held in Bensheim in the presence of Mr Linkies and two other SAPSI employees namely Mr Wittmer and Mr Ahrens.

10.4. SAC's case goes on to allege, having abandoned its pleaded case that SAPSI also signed the SDA on an unknown date by an unknown person, that SAC and SAPSI thereafter concluded the SDA in various ways, in terms of principles of German law, without a signature by SAPSI.

10.5. In support of that case, SAC's two main witnesses, Messers Tattersall and Linkies, testified that Mr Tattersall did not inquire after 6 August 2004 whether SAPSI had signed the SDA because (so Mr Tattersall's testimony went) Mr Tattersall considered the SDA to have been concluded (in one of the ways allegedly permitted by German law, namely by conduct).

10.6. In terms of the relevant provisions of German law, the so-called "good faith contractor", that is, one who contracts with another in good faith, is entitled in certain circumstances to assume for his benefit that the other contracting party's representative is authorised to represent that party in concluding a contract – it is a form of ostensible authority.

10.7. The critical issue, however, is that these provisions of German law – referred to as *Duldungsvollmacht* and *Anscheinsvollmacht* – protect only the good faith contractor, that is, the contractor who does not have knowledge of any defect in authority of the other party's representative to conclude the contract on that party's behalf.

10.8. These issues were submitted and explained to the presiding Judge by counsel for SAP earlier in the proceedings on 6 November 2020, as appears in the transcript from page 72 line 20 to page 2802 line 19.

10.9. In doing so, counsel for SAP was referring (and referred the Court) to the agreed legal propositions recorded in the joint expert minute dated 17 September 2020 (signed by three professors of German Law, two of whom SAC intends calling and one who SAP intends calling) notably paragraphs 2, 3 and 4, as follows:

2. "Under German law, the formation of a contract requires the consent of both parties which may be expressed tacitly or by conduct including implementation. In the case of corporations, consent of a duly authorised agent is necessary. German company law provides that the power to bind the corporation is vested in the members of the management board. In addition, other corporate officers, such as a "Prokurist", may be granted authority to bind the corporation individually or together with others.

3. The contractual assent of corporate employees other than duly authorized agents is not sufficient to bind the corporation to an agreement. The German-law doctrines of "tolerated power of representation (*Duldungsvollmacht*)" and "apparent power of representation (*Anscheinsvollmacht*)" have as their common purpose to protect the good faith contractor. They require that the represented legal juristic person knows the actions of the person

representing it and does not impede such actions. They also both require that the other party to the contract acted in good faith, i.e. that it relied and had reason to rely on the perceived authority of the would-be agent.

4 Section 154 para 2 BGB does not stipulate a form requirement. Rather, it stipulates a rule of interpretation: where the parties have privately agreed to reduce their agreement to writing, when in doubt, no agreement is formed until the relevant document was signed.”

10.10. In this legal context, it was essential for SAP, in meeting SAC’s case that Mr Tattersall had not inquired after the meeting of 6 August 2004 whether the SDA had indeed been signed by SAPSI, to put to Mr Linkies that the contemporaneous documentary evidence indicated that Mr Tattersall had indeed made such inquiries after 6 August 2004. Mr Linkies, too, had testified for SAC that Mr Tattersall had not made such inquiries, therefore it became necessary to put SAP’s version to him on that issue.

10.11. Accordingly, counsel put it to Mr Linkies (who agreed) that he was Mr Tattersall’s main contact person at SAPSI at the relevant time and counsel for SAP also put a variety [of] contemporaneous documents to Mr Linkies in support of its case that Mr Tattersall had indeed made inquiries with Mr Linkies about obtaining a signed SDA from SAPSI.

10.12. Four such documents – all dated 21 September 2004 – were critical to this issue, and ultimately provoked the events which form the subject matter of this application, namely

. . .

10.14. The critical one proved to be “EL 3A”, an agreed English translation of which reads as follows:

“From: Linkies, Mario

To: Wittmer, Manfred; Off, Frank

Cc: Hoefer, Dirk

Subject: Securinfo: Vertrag/Contract

Date: Tuesday, September 21, 2004 1:25:59 PM

Importance: High

Sensitivity: Confidential

Hello Manfred, Frank:

I regret to have to follow up again, but I urgently request the approval of the contract with Securinfo. As we have had the details scrutinised by various colleagues, there should be no further problems. Peter Tattersall is breathing do(w)n my neck, and I can quite understand that Securinfo wants a definite statement on whether the partnership with SAP SI is now put on an official basis, or whether we do not have legal certainty. That of course has implications for our collaboration. I am therefore at present refraining from a further conversation with Peter until the matter is clarified on our side.

Thank you and kind regards . . .

Mario Linkies”

10.15. During his evidence in chief, and in cross-examination, the witness (Mr Linkies) testified that where his email speaks of Mr Tattersall “breathing down my neck” to obtain the signature, this was in fact not true: in essence, he had written that simply to put pressure on his colleagues to approve and sign (or have approved and signed) the SDA . . .’

[8] On 13 November 2020, Tsoka J, in dismissing the recusal application, recorded:

‘[8] SAP SE’s alleged bias is based on what transpired on 6 November 2020. Although the recordings of the proceedings of that day are attached to the application, the readings, bar few typographical errors and few inaudibles, appear to be correct. However, the application is based on selective, subjective and contrived interpretation as to what happened on that day without taking into account the correct facts and the context that led me to leave the court, with the camera and microphone unmuted as I urgently had to go to the bathroom.

. . .

[16] Counsel’s so-called right to force Mr Linkies to answer the already answered question just before tea break, which question was asked on more than one occasion and the same answer was given by the witness, irritated me with the result that I took my face mask and left the court for the bathroom. Although irritated, at no stage did I storm out of court in a rage as alleged. Neither did I raise my voice hence I informed counsel that I am taking a break and when he got the answer he wanted, he will let me know. This is the reason why both the camera and the microphone were left unmuted. Hopefully, counsel in my absence would indeed force Mr Linkies to give the answer he required, which answer would, undoubtedly, in the short break I took, would appear on the record.’

[9] The matter thereafter proceeded on the separated issue to finality before Tsoka J, who, on 7 December 2021, delivered a written judgment, in which he concluded:

‘[214] In the result, the following order is made –

214.1 It is declared that the first defendant, SAP SE, is in breach of its legal duties to the plaintiff, SAC, as provided for in section 826 alternatively section 823 of the BGB;

214.2 In consequence of paragraph 1 above, the first defendant, SAP SE, is liable to the plaintiff, SAC, for such damages as may be shown to have been suffered by the plaintiff as a consequence of such breaches;

214.3 The first defendant, SAP SE, is liable to pay the plaintiff’s costs of suit, including the costs of three counsel where three counsel were so employed;

214.4 The first defendant, SAP SE, is liable to pay the plaintiff's qualifying costs of the plaintiff's expert, Professor Dauner-Lieb;

214.5 The first defendant, SAP SE, is liable to pay the costs reserved by Satchwell J on 25 May 2011.'

[10] On 28 December 2021, SAP applied to the learned judge for leave to appeal to this Court in respect of both his judgment on the recusal application as well as his judgment on the merits. Both applications were dismissed in an all too brief judgment consisting of four paragraphs spanning less than two pages in the record. This despite the learned judge having earlier recorded in his judgment on the merits:

'[213] The issues raised in the determination of the merits is not only complex but difficult as well. The determination of the merits involved foreign law, in the present matter codified German Law. Most of the issues raised at this stage are contained in voluminous emails written by Germans and in the German language. Utilization of three counsel, one or some of whom speak German, was not only reasonable but necessary and warranted as well. In my view, the employment of three counsel, where such counsel were so employed, cannot, in the circumstances of this matter, be regarded as unreasonable.'

[11] On 5 May 2022, SAP petitioned this Court for leave to appeal. On 13 July 2022, the two judges, who considered the petition, referred the applications for leave to appeal in respect of both the merits and the recusal for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 and directed the parties to be prepared, if called upon to do so, to address the court on the merits. As observed in *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd*:

'... Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for the applicant to convince the court that it has a reasonable prospect of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, the argument on the application would, to a large extent, have to address the merits of the appeal.'

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<sup>1</sup> *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [2019] ZASCA 161; 2020 (2) SA 61 (SCA) para 1.



[12] It would be appropriate to begin with the recusal appeal, which brought to the fore the question whether the learned judge's conduct bore the appearance of bias. The law will not lightly suppose the possibility of bias in a judge. But, there is also the simple fact that bias is such an insidious thing that even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by it.<sup>2</sup> It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. '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 the judge may be biased, acts in a manner inconsistent with s 34 of the Constitution and in breach of the requirements of s 165(2) and the prescribed oath of office'.<sup>3</sup> The disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity.<sup>4</sup> Where the offending conduct sustains the inference that in fact the presiding judge was not open-minded, impartial or fair during the trial, this Court will intervene and grant appropriate relief.<sup>5</sup> In such a case the Court will declare the proceedings invalid without considering the merits.

[13] The key issue for consideration and determination is whether the conduct complained of by SAP created a reasonable apprehension of bias on the application of the test laid down by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (the SARFU test), namely:

'... [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 submissions of counsel.'<sup>6</sup>

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<sup>2</sup> *R v Gough* [1993] UKHL 1; [1993] 2 All ER 724 at 728.

<sup>3</sup> *S v Basson* [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC) para 25; *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) (*South African Human Rights Commission*) para 65.

<sup>4</sup> *Take and Save Trading CC and Others v Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA) para 5.

<sup>5</sup> *S v Rall* 1982 (1) SA 828 (A) at 833B; *S v Meyer* 1972 (3) SA 480 (A) at 484D.

<sup>6</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC) para 48. Recently affirmed by the Constitutional Court in *South African Human Rights Commission* fn 3 above para 63.

[14] As I see it, Tsoka J appears to have erred in several fundamental respects. First, the judge appears to have misconceived the evidence. The learned judge observed that he had become 'irritated' by SAP's counsel seeking 'to force Mr Linkies to answer the already answered question', which was formulated in less than clear language as 'the repetitive asking of Mr Linkies that Mr Tattersall was breathing down his neck was continued even though the witness had already answered the question'. But, on the evidence, properly construed, the question had not been repeatedly asked and repeatedly answered. This misunderstanding on the part of the learned judge provoked the irritation and not just his summarily abandoning the hearing, but also directing that the proceedings should continue in his absence. The line of cross-examination was undoubtedly material to SAC's claim.

[15] That Mr Tattersall was indeed breathing down Mr Linkies' neck to obtain a duly signed copy of the SDA (as stated in Mr Linkies' email), would certainly be supportive of SAP's defence that he (Mr Tattersall) knew that the signature of the other party (SAP SI) was required for a validly concluded agreement. In those circumstances, so the contention advanced by SAP goes, an essential element of the German substantive law for SAC's case would be absent; namely, for SAC to succeed on the strength of so-called apparent authority (*Anscheinsvollmacht*) or tolerated authority (*Duldungsvollmacht*). Both doctrines, so the contention proceeds, require that SAC in the form of Mr Tattersall acted in good faith, i.e. that SAC relied on and had reason to rely on the perceived (apparent or tolerated) authority of its would-be agent. This is an essential requirement under German Law that would not have been fulfilled if Mr Tattersall knew at all times that an official signature by SAP SI was required and remained outstanding. In this context, it was necessary for SAC to prove that Mr Tattersall acted in good faith in relying on the assurance that the SDA had indeed been concluded and that it was not necessary for an authorised person from SAP SI to sign it. Whether or not he continued asking if it had been signed after receiving an assurance that it was operative was central to this issue. If he persisted in requiring a signed copy – that had to bear on the issue of good faith alluded to above.

[16] Mr Linkies testified that contrary to what he had expressly stated in his email, Mr Tattersall was in fact not 'breathing down his neck'. Rather, so testified Mr Linkies, he had expressed himself in that fashion to try to pressurise his colleagues to obtain

the necessary (SAP SI) signature on the SDA. SAP's counsel accordingly put to Mr Linkies that he was therefore lying (to his colleagues) in his email addressed to them. The response elicited from Mr Linkies was: 'why are you saying I am lying? I don't – I didn't lie'. SAP's counsel then sought to probe that response by asking: 'If you're saying to His Lordship he (Mr Tattersall) was not breathing down my neck then what you wrote there is a lie?' Before that question (a perfectly legitimate line of enquiry on the face of it) could be answered, the learned judge interrupted the cross-examination, stating 'the question has been answered repeatedly'. The question, however, had not been answered – repeatedly or at all. The continuing enquiry was not, as the judge incorrectly found, directed at whether Mr Tattersall was breathing down Mr Linkies' neck. That exchange had passed. It had, by that stage, come to be unavoidably accepted by Mr Linkies that the email had indeed stated in terms that Mr Tattersall was breathing down his neck. Mr Linkies had moved on to testifying that he had simply written this to pressure his colleagues and that in truth it would be wrong to attribute to Mr Tattersall what had been stated by him in his email. Mr Linkies denied that he had lied to his colleagues and challenged SAP's counsel to explain to him why he was accused of untruthfulness. Counsel sought to rise to the challenge, but was both incorrectly and prematurely cut off by the judge. In order for it to be argued later that Mr Linkies had lied, when it was expedient for him to do so, it was necessary for counsel to put to him why it would be submitted in due course that the judge should be slow to believe his evidence.

[17] Properly understood, the cross-examination that prompted the abrupt departure of the judge had nothing to do with 'the repetition of a question which had already been put and answered multiple times'. The judge had prevented counsel from properly developing the line of questioning by interjecting: '. . . may we proceed please and then you can argue that point. The question has been answered repeatedly'. However, absent a proper factual foundation, it may likely not have been open to counsel to call Mr Linkies' mendacity into question. In fairness to Mr Linkies, counsel had to afford him an opportunity of dealing with the issue, so that counsel could in due course submit that the evidence left no room for an honest mistake and that Mr Linkies was content to resort to a deliberate falsehood, when it was expedient for him to do so.

[18] Second, when counsel attempted to justify his line of questioning, the judge became irritated and summarily abandoned the proceedings with the parting words, 'when you've finished you'll let me know. I am taking a break'. How long, it was anticipated, the break was to last, no one was to know. What is more, the judge expected the cross-examination to continue in his absence. In the judgment, the judge is at pains to emphasise this by stating:

'I inform counsel that I am taking a break and when he got the answer he wanted, he will let me know. This is the reason why both the camera and the microphone were left unmuted. Hopefully, counsel in my absence would indeed force Mr Linkies to give the answer he required, which answer would, undoubtedly, in the short break I took, would appear on the record.'

In that, the judge appeared to operate on the fallacious supposition that the cross-examination could indeed proceed in his absence. It plainly could not. Absent the judge, there was no properly or duly constituted court. Such proceedings, as the judge envisaged would continue in his absence, would have been fatally flawed and not in accordance with law.

[19] Third, the extraordinary circumstances thus created by the judge were compounded by the explanation offered in the judgment on the recusal. The application was not about an abandonment of the hearing because the judge 'urgently had to go to the bathroom'. The first time that mention was made of a bathroom break was in the recusal judgment. It is common cause that the bathroom explanation was not mentioned at any of the following appropriate times: (a) immediately upon the hearing resuming (when the judge returned to the virtual hearing hosted on the Zoom platform); (b) in the extensive discussions with counsel immediately thereafter; (c) when the judge was informed that a recusal application would be brought; or (d) during the hearing of the recusal application. It follows that the bathroom explanation did not form part of the factual substratum on which the recusal application fell to be determined because it was not disclosed and thus not known to the reasonable, objective and informed person at the relevant time. It is also inconsistent with the direction moments earlier 'may we proceed please and then you can argue that point'. Thus, the bathroom explanation, having not been disclosed at the appropriate time was not only irrelevant for the purposes of applying the *SARFU* test, but there is also much to be said for the suggestion that it is improbable and thus tends to exacerbate

the apprehension of bias. If that was indeed the reason, the judge would have adjourned the court, as he had done on every other occasion, instead of simply leaving in the expectation that the matter would proceed in his absence.

[20] Fourth, the judge's *ex post facto* explanation that 'both the camera and the microphone were left unmuted' to ensure that 'the answer . . . would appear on the record', finds no purchase. An independent service provider, Realtime Transcriptions, was responsible for recording and transcribing the trial proceedings and had access to the virtual hearing at all times for that purpose. The fact that the judge left 'both the camera [sic] and the microphone. . . unmuted' was irrelevant to the recording of the evidence, which continued independently of any action on the part of the judge. The relevance of the observation is that it confirms the intention of the learned judge that the hearing should continue in his absence. However, had the proceedings continued, the judge would not have been in position to observe the witness and assess his evidence in real time. It would have been well-nigh impossible for the judge, who had abstracted himself from the proceedings, to make a proper assessment of the credibility of the witness, with reference, *inter alia*, to demeanour, candour and the calibre and cogency of such witness' performance relative to other witnesses.

[21] Fifth, the correct facts demonstrate to the reasonable, objective and informed person that the judge had closed his mind to – and was not in the least interested in – appreciating the extent to which or why Mr Linkies had demonstrated himself to be a liar. This was material evidence relevant to the success or failure of a critical element of SAC's cause of action in respect of which Mr Linkies was one of SAC's key witnesses of fact. Tellingly, as the judgment on the merits demonstrates, the judge was far too receptive to Mr Linkies' evidence. On that score, the learned judge held:

'[41] Mr Linkies' unchallenged evidence, despite SAP's attempt to put his evidence in doubt, is that he himself pressurized Mr Tattersall to push his own company to regularize the relationship between SAC and SAP SI. In fact, Mr Linkies denied that Mr Tattersall "sat on his neck" by pressurizing him to produce the signed SDA. . . .

[42] . . . Mr Linkies' testimony that Mr Tattersall never pressurized him to produce the signed SDA, and that pressure on SAP SI to sign the SDA came from him, remains unchallenged. The pressure, if any, exerted on Mr Linkies by Mr Tattersall is therefore not a concession on

Mr Tattersall's part that he knew that the SDA had not yet been approved, authorized and signed.

[43] In fact, Mr Linkies explained to the court that he, himself, was put under pressure in order to make the concession that Mr Tattersall pressurized him to produce the signed SDA. He explained to the court that he made the concession as his life and that of his family was put at risk. He testified that he received threatening telephone calls with the result that, to save his and his family's lives, he admitted that Mr Tattersall indeed did pressurize him. To save his life and that of his family, he left SAP. The result is that there is therefore no basis to second-guess Mr Linkies's evidence that he pressurized SAP SI for his own purposes for the signature of the SDA. And that it was not in fact Mr Tattersall but himself who pressurized his employers, through Mr Tattersall, for the production of the signed SDA. The pressure, if any, does not in any way suggest that there was not valid SDA. The pressure, if any, and from whatever source it came from, in all probabilities, was to regularized the formal relationship between the two contracting parties. Nothing else.'

[22] With respect to the learned judge, those findings, on the face of it, appear to be confusing and contradictory. Moreover, as a careful perusal of the record shows, scant regard was paid to important concessions made by Mr Linkies whilst under cross-examination. The rather perfunctory and superficial analysis of Mr Linkies as a witness does little justice to the range of aspects on which SAP took issue with Mr Linkies' evidence and largely ignores both internal and external contradictions, any latent or patent bias – such as there may have been, as also the probabilities. It also largely ignored the evidence adduced on behalf of SAP to gainsay Mr Linkies evidence. Had counsel not been interrupted in his pursuit of a perfectly legitimate line of cross-examination, perhaps the judge would have been less charitable in his assessment of Mr Linkies as a witness. The upshot is that it cannot with any confidence be said that the conduct complained of did not impact substantively and materially on the merits of the claim asserted by SAC and did not conduce to a reasonable apprehension of bias.

[23] Sixth, even were it to be accepted that the question had indeed been repeatedly asked and answered, in instructing that the hearing continue until SAP's counsel had 'finished' before leaving the platform, the inescapable impression is that the judge no longer took any interest in the further evidence on that issue, that counsel was engaged in a fool's errand and that the judge had not only closed his mind to any such

answer as counsel may elicit in cross examination, but also that his mind was no longer open to conviction. As it was put in *S v Le Grange*:

‘It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean ‘a departure from the standard of even-handed justice which the law requires from those who occupy judicial office’. In common usage bias describes ‘a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

Partiality has both an attitudinal and behavioural component.’<sup>7</sup> (Footnotes omitted.)

[24] I recognise that presiding over a matter such as this can be a difficult task. And, in a trial of this length and complexity, the burden on the presiding judge would have been all the greater. One also knows all too well how cross-examination can sometimes appear protracted and seemingly irrelevant. ‘Impatience, though, is something which a judicial officer must, where possible, avoid and in any event always strictly control. For, it can impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it is directed . . . It may serve to undermine the proper course of justice and could lead to a complete miscarriage of justice. A judicial officer can only perform his demanding and socially important duty properly if he also stands guard over himself, mindful of his own weaknesses (such as impatience) and personal views and whims and controls them.’<sup>8</sup>

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<sup>7</sup> *S v Le Grange and Others* [2008] ZASCA 102; 2009 (1) SACR 125 (SCA) 2009 (2) SA 434 (SCA); [2010] 1 All SA 238 (SCA); 2010 (6) BCLR 547 (SCA) paras 21 and 22.

<sup>8</sup> *Ibid* para 18.

[25] Whilst, no doubt, judicial officers can and do form provisional views, including perhaps even in respect of the credibility of a witness, it remains the fundamental duty of every presiding officer not to close their mind to changing those provisional impressions, until the last word has been spoken. After all, a cornerstone of any legal system is the impartial adjudication of disputes that come before the courts. What is required is not only that the trial be conducted open-mindedly, impartially and fairly, but that such conduct be manifest to all those who are concerned in the trial and its outcome. In this regard, language is important and in this case the language employed is in some respects rather unfortunate. Even if unintended, the spectre that it raises is certainly suggestive of one who has certain preconceived notions and who allows those notions to affect his judgement.

[26] In this matter, both parties were represented by very senior counsel. A perusal of the record reveals that the issues of fact that required determination were of a rather involved and complicated nature. It is therefore a matter that occasions some surprise that the learned judge should have found it necessary to intervene as he did. He, no doubt with good intentions, appears to have been anxious to ensure that the matter should not drag on unnecessarily and sought, it would seem, to expedite the hearing. In doing so, it appears that he may have overlooked the judge's usual role in a trial, thereby denying himself the full advantage enjoyed by a trial judge who, 'as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts'.<sup>9</sup>

[27] There was some suggestion that as we are concerned with an isolated occurrence, the threshold set by the authorities - and consequently the test for recusal - has not been met. It was stated on behalf of SAC in answer to the recusal application: ' . . . fundamentally, no reasonable, objective and informed person could reasonably conclude from this single interaction that the Court was biased or would not be impartial in deciding the matter. It is the most remarkable feature of this recusal application that it is entirely founded on a single interaction . . . '

Although SAP relies on an isolated incident; it is likely unprecedented. And, as I have been at pains to demonstrate, not only is the enquiry not a hermetically sealed one,

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<sup>9</sup> Ibid para 28.



but also, in conducting himself as he did, the learned judge breached several canons of good judicial behaviour. Thus, the curtailment of a legitimate avenue of cross examination and the failure to keep an open mind on that issue undoubtedly infected the substantive merits of the matter, thereby resulting in a manifest failure of justice. It is, after all, a fundamental principle of our law and, indeed, of any civilised society that a litigant is entitled to a fair trial. The requirement that justice must not only be done, but also to be seen to be done has been recognised as lying at the heart of the right to a fair trial. This necessarily presupposes that the judicial officer is fair and unbiased and conducts the trial in accordance with those rules and principles or procedure which the law requires.<sup>10</sup> The fairness of a trial would clearly be under threat if a court does not (as happened here) apply the law and assess the facts of the case properly and impartially.

[28] 'Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment'.<sup>11</sup> Judicial scrutiny of counsel's performance must thus be highly deferential.<sup>12</sup> In dealing more generally with the role and attitude expected of a presiding judge, Lord Denning MR had this to say in *Jones v National Coal Board*:

'Now, it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he had given in chief. Excessive judicial interruption inevitably weakens the

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<sup>10</sup> *S v Tyebela* 1989 (2) SA 22 (A) at 29G.

<sup>11</sup> *Strickland, Superintendent, Florida State Prison et al v Washington* [1984] USSC 146; 466 US 668 at 681.

<sup>12</sup> *Ibid* at 689.

effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return.’<sup>13</sup>

[29] Although mindful of the presumption of judicial impartiality, as the Constitutional Court has recognised, ‘there are of course instances where a judicial officer may not be able to demonstrate impartiality or there may exist some apprehension of bias’ and in such instances the presumption can be displaced by ‘cogent evidence’.<sup>14</sup> In such instances, ‘a judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront’.<sup>15</sup> As Ngcobo CJ put it in *Bernert v ABSA Bank Ltd*:

‘a judicial officer should not hesitate to recuse himself or herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial. In a case of doubt, it will ordinarily be prudent for a judicial officer to recuse himself or herself in order to avoid the inconvenience that could result if, on appeal, the appeal court takes a different view on the issue of recusal’.<sup>16</sup>

[30] In the circumstances, the reasonable, objective and informed person in SAP’s position would apprehend that a presiding judge, who: (a) prevents its counsel from cross-examining a witness in response to a challenge from such witness to be shown why his credibility is being impugned; (b) then irritatedly abstracts himself from the hearing, without first adjourning; and, (c) whilst at the same time directing that the hearing continue in his absence until counsel has ‘finished’, has shown himself to have closed his mind to the evidence and the submissions of counsel. The belated improbable explanation by the judge for his abrupt departure serves simply to exacerbate the apprehension. It follows, as a consequence of the cumulative factors alluded to, that the question: whether a reasonable apprehension of bias can be said to exist, must accordingly be answered in the affirmative. What results from this is that the further judgment of Tsoka J on the merits is vitiated by the nullity of the proceedings, which occurred as a result of him continuing to sit in a trial where recusal

<sup>13</sup> *Jones v National Coal Board* [1957] EWCA Civ 3.

<sup>14</sup> *South African Human Rights Commission* fn 3 above para 60.

<sup>15</sup> *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 13H-14C.

<sup>16</sup> *Bernert v ABSA Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC) para 36.

was required.<sup>17</sup> The only question is whether there is a reasonable apprehension of bias: 'if there is, *cadit quaestio* (the question falls away/the case is closed), no matter what effect this might have on the particular proceedings'.<sup>18</sup>

[31] In the result:

1. The application for leave to appeal succeeds.
2. The appeal is upheld.
3. The first and second respondents are directed, jointly and severally, to pay the costs of the application for leave to appeal and of the appeal, such costs to include the costs of two counsel.
4. The orders of the court *a quo* dated 13 November 2020 and 7 December 2021 under case number 20378/2008 are set aside and replaced with the following:
  - 'a. The application for recusal is granted and the first and second respondents in the recusal application are directed, jointly and severally, to pay the costs of the application, including the costs of two counsel;
  - b. The plaintiff and the second defendant are directed, jointly and severally, to pay the costs of the trial, including the costs reserved by Satchwell J on 25 May 2011, such costs to include the costs of two counsel and the qualifying costs of the first defendant's experts, Professors Wagner and Wainer and Messrs Burke and O'Neill.'

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V M PONNAN  
JUDGE OF APPEAL

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<sup>17</sup> *R v Milne and Erleigh* (6) 1951 (1) SA 1 (A) at 6H; *Council of Review, South African Defence Force, and Others v C Monning and Others* 1992 (3) SA 482 (A) at 495A-D.

<sup>18</sup> *South African Human Rights Commission* fn 3 above para 74.

## Appearances

For the appellant:	CHJ Badenhorst SC and K Spottiswoode
Instructed by:	Werkmans Inc., Johannesburg Symington De Kok Inc., Bloemfontein.
For the respondent:	CDA Loxton SC, AJ D'Oliveira and N Siboz-Ruhinda
Instructed by:	Bosch Marais & Associates Inc., Johannesburg Honey Attorneys, Bloemfontein.