RULING

PHSDSBC
Public Health and Social Development Sectoral Bargaining Council

Commissioner: **Ronnie Bracks**
Case No: **PSHS999-24/25**
Date of ruling: **30 June 2025**

In the matter between:

PSA obo Maseko, Sifiso Goodwood Applicant

and

Department of Health– Gauteng Respondent

DETAILS OF HEARING AND REPRESENTATION

1 The Arbitration was scheduled for hearing at the Respondent's office at 45 Commissioner Street in Johannesburg on 12 and 13 June 2025.

2 The Applicant was represented by Bongane Qankase the Labour Relations Officer of the union. The Respondent was represented by Osborne Molatudi from Malatji and Co. Attorneys.

3 At the commence of the Arbitration the Respondent brought an application for postponement as they intended reviewing the Consolidation Ruling issued on 6 May 2025. They then brought an application for my recusal.

4 The Respondent then served the application on me and the Applicant who had filed their answer on the same day. The Respondent then invoked the rules of the Council which allow it seven (7) days within which

to respond. The matter was then accordingly adjourned for the Respondent to serve their response. This has accordingly been done and is the subject of this ruling.

ISSUE TO BE DECIDED

5 I need to determine if I need to recuse myself from the matter and whether or not the matter should proceed in the light of the review application to the Labour Court.

SUBMISSIONS

Respondent's Submissions

6 The Respondent made substantial submissions after I had advised the parties that the recusal application must be dealt with first and that pending the outcome of thereof, the application to postpone the matter on the basis of the review application will then be considered.

7 The applications and responses were all done in writing and are a matter of record. It will therefore not be repeated herein, save to state that the Respondent's basis for their application for my recusal was that they believed that there was a reasonable apprehension of bias of this dispute because I had previous or prior knowledge of the merits and factual events in respect of the joint inquiry because I was served with the Respondent's application on 3 April 2025.

8 The consolidation application referred to the merits and facts surrounding the dismissal of the Applicant. This was contained in the founding affidavit of this application.

Applicant's Submissions

9 The Applicant opposed the application on the grounds that to prove bias it must be based on objective facts.

10 He also submitted that the Respondent sited my ruling in which I summarized the submissions on the issue of the cost of the AGA skyrocketing.

11 The grounds of the Respondent do not enunciate how I dealt with the merits of the dispute to the extent that I formed a view regarding the merits of the dispute since the founding affidavit in the joinder application did not explicitly state the facts/merits of the dispute regarding the fairness of the outcome.

12 In the joinder application I was not called on by either of the parties to make a determination on the merits of the dispute and my ruling only dealt with the legal principles and why the application was denied. I was also not called to consider the evidence presented at the disciplinary hearing to determine the necessity for joinder. I therefore could not have knowledge of the merits of the case.

ANALYSIS OF THIS APPLICATION

13 After careful consideration of the submissions made by the parties, I therefore make the following Ruling.

14 At the commencement of the hearing the Respondent applied for my recusal. The basis for this has been set out above. This was opposed by the Applicant, and I have considered the Application which is denied on the basis as set out hereunder.

15 Our law recognises the duty placed on judicial officers presiding over court proceedings to exercise their functions in an objective and unbiased manner. If it is found that a judicial officer cannot bring an impartial mind to the adjudication of the matter, then in certain circumstances, the judicial officer may have a duty to recuse himself. {see *S v Radebe* 1973 (1) SA 796 (A)}

16 In *S v Malindi & Others* 1990 (1) SA 962 (A) at 969 G – H).the court stated "The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of S v Radebe 1973 (1) SA 796 (A) and South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T). Broadly speaking, the duty of *recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer that is, that he will not adjudicate partially*. (my emphasis). The matter must be regarded from the point of view of the reasonable litigant and *the test is an objective one*. (my emphasis). The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."

17 It can happen that parties before a court/tribunal may also launch an application for the recusal of a judicial officer. In such a case a formal application is brought and heard by the judicial officer whose recusal is sought by the applicant as is the case in this matter.

18 The common law principles applicable to court proceedings apply similarly to the application by a party for the recusal of the person presiding at tribunal/council/CCMA proceedings.

19 In the context of the judicial review of administrative action, the common law principle of "*no-one should be a judge in their own cause"* has been set out in section 6(2)(a)(iii) of the Promotion of Administrative Justice Act, No. 3 of 2000 (*"PAJA"*), in terms of which the "administrative action" taken by an administrator may be reviewed and set aside on the basis of bias or a reasonable suspicion of bias on the part of the administrator.

20 For any application to succeed, the appli*cant is n*ot required to demonstrate actua**l bias (see *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*** 1992 (3) SA 673 (A) at 690 A – B (*"the BTR Industries case"*). The test which had been developed by our courts is a "**reasonable apprehension of bias"** test on the part of the judicial officer. It was stated that in the case that the formulation of the test for recusal on the ground of perceived bias has used the expression "apprehension of bias" as an equivalent for "suspicion of bias". Thus, the following passage from the *BTR* judgment: "The law does not seek . .. to measure the amount of his [the judicial officer's] interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."

21 In ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** 1999 (4) SA 147 (CC) the Constitutional Court stated that: [42] Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. This consideration was elegantly described as follows by Cardozo J: "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. ... In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. ... Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge."

22 The court went on to state that *"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 persuasion by the evidence and the submissions of counsel."*

23 The test requires an **objective and reasonable apprehension** by the applicant that the judicial officer would not adjudicate the matter in an impartial manner or without prejudice to the applicant. Mere subjective suspicion of bias and/or mere apprehension of bias on the part of the applicant has been deemed insufficient by our courts. (see also ***S v Malindi & Others*** 1990 (1) SA 962 (A) at 969 G – H; ***BTR Industries*** case at 693 I – J and ***SARFU*** case at 177B – E and ***South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafood Division Fish Processing)*** 2000 (3) SA 705 (CC)).

24 In ***Bernert v. Absa Bank Ltd*** [2010] ZACC 28, the court dealt with the issue of two judges having a prior association with one of the parties, Absa Bank. Bernert contended that this association could lead to bias. However, the court ruled that unless the subject matter of the litigation directly arose from this association, there was no obligation for the judges to disclose it. Further in ***Mulaudzi v. Old Mutual Life Insurance Company (South Africa) Limited and Others*** [2017] ZASCA 88 the **Supreme Court of Appeal** (SCA) found that the judge, Hlophe JP, had a personal relationship with Mulaudzi's attorney, which raised concerns about his impartiality. Hlophe JP's actions, including assigning the case to himself without justification and issuing a brief judgment without reason, contributed to a reasonable apprehension of bias. The SCA concluded that the order issued by Hlophe JP was flawed, and the case was remitted to a different judge to ensure fairness.

25 Last year the court had the opportunity to visit the topic in case of ***AfriForum v. Economic Freedom Fighters and Others***, AfriForum applied for the recusal of Acting Justice Keightley. The basis for this application was remarks she made during a 2018 case concerning Afrikaans at the University of South Africa, where she suggested that AfriForum's legal actions were ideologically driven and outdated. AfriForum argued that these comments demonstrated an inability to adjudicate their appeal impartially.

26 The SCA dismissed AfriForum's recusal application, concluding that AfriForum failed to meet the objective test for recusal. The court highlighted the following points: The court noted that there is a presumption of judicial impartiality, and Keightley's remarks, when viewed in context, did not demonstrate actual bias or a reasonable apprehension of bias. The courts in the AfriForum case emphasized that the principles of judicial recusal in South African law are designed to maintain the integrity and impartiality of the judiciary, ensuring public confidence in the judicial process.

27 In the present case this is exactly what the Respondent has not proven. The only reason proffered by the Respondent as to why I would be biased is that the Respondent had brought an application for consolidation and that through this application I obtained knowledge of the merits of the case.

28 If this is true, then none of us as commissioners will be able to hear any matters where preliminary issues are raised during any matter.

29 ***What is required is an apprehension, based on reasonable grounds****, that the Judge will not be impartial."* Again, in the Respondent's case they have failed. The Respondent bears the onus of rebutting the presumption in favour of judicial impartiality. (See ***SACCAWU case*** at 713H – I to 714A – E). For the presumption to be successfully rebutted, the applicant is required to substantiate its submissions with **accurate and persuasive facts and evidence in support of the apprehension of bias**. As previously stated, the Respondent submitted that I would be biased since I had obtained knowledge of the merits of the case through a consolidation application brought by the Respondent. This is absurd.

30 ***The above case illustrates that there is a strict onus on the applicant to establish the correctness of the facts and/or evidence led to rebut the presumption in favour of judicial impartiality***. A mere perception of bias on the part of the applicant will not suffice to succeed in an application for the recusal of a judicial officer.

31 In the present case the Respondent has stated that the apprehension of bias on my part is based on the fact that the Respondent had brought an application for consolidation and as a result I obtained knowledge of the merits of the case. This is preposterous, as I was not required to consider the merits of the case.

32 In the light of the above the Respondent has not shown in what way there would be an apprehension of bias on my part and the Application is accordingly dismissed.

33 With regard to the application to postpone the arbitration on the basis of taking the consolidation ruling on review, I wish to refer to Section 158(1B) of the Labour Relations Act ("LRA") which prohibits the Labour Court from reviewing any decision or ruling made during conciliation or arbitration proceedings conducted under the aegis of the Commission for Conciliation, Mediation and Arbitration ("CCMA") or any bargaining council before the final outcome of the arbitration unless where the Court is of the opinion that it is just and equitable to do so.

34 In the light of the above the application is similarly dismissed

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35 Both applications are accordingly dismissed.

Adv. RONNIE BRACKS