



CONSTITUTIONAL COURT OF SOUTH AFRICA

Systems Applications Consultants (Pty) Ltd t/a Securinfo v SAP SE and Another

CCT 101/24

Date of hearing: 8 May 2025
Date of judgment: 8 April 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday 8 April 2026, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the Supreme Court of Appeal, which found that the conduct of a trial Judge created a reasonable apprehension of bias, and that the trial Judge’s judgment on the merits on a dispute whether a distribution agreement, which dispute is explained below, (the initial dispute) was a nullity, and ordered Systems Applications Consultants (Pty) Ltd (SAC) to pay the legal costs of SAP SE (SAP) for the entire 74-day trial.

In 2008 SAC instituted proceedings against SAP in the High Court of South Africa, Gauteng Division, Johannesburg (High Court). The matter concerned a contractual dispute involving the existence or otherwise of a software distribution agreement between SAC and a subsidiary of SAP, SAP Systems Integration (SAPSI), and a claim for damages against SAP. SAC alleged that SAP had unlawfully interfered with and frustrated the performance of the alleged contract between SAC and SAPSI.

Here are the key facts relating to the alleged conclusion of the distribution agreement. On or about 6 August 2004 SAC’s director, Mr Peter Tattersall, signed two copies of

the distribution agreement at a meeting with SAPSI. SAPSI did not countersign. Despite the lack of signature by SAPSI, SAC adopted the stance that the distribution agreement had been concluded. SAP disputed this. It did so by referring to four emails by means of which SAC sought a countersigned copy of the distribution agreement. According to SAP, these emails demonstrated that Mr Tattersall was aware that if SAPSI did not sign the distribution agreement, there would be no binding agreement between SAC and SAPSI.

On 12 October 2020 the hearing of the merits of the initial dispute commenced. The hearing was conducted over the Zoom virtual conference platform pursuant to the High Court's practice during the COVID-19 pandemic. On 7 November 2020, the 20th day of the hearing, SAP's counsel cross-examined Mr Linkies, a key witness for SAC, about a specific email, dated 21 September 2004 (SAPSI email). The SAPSI email had been circulated internally by Mr Linkies to his colleagues, urgently requesting internal approval of the distribution agreement. In the email Mr Linkies said that Mr Tattersall of SAC was breathing down his neck regarding the signing of the distribution agreement by SAPSI.

This email turned out to be a key point of dispute. At the hearing SAP's counsel sought clarity through cross-examining Mr Linkies on the question of Mr Tattersall having breathed down his neck. This line of questioning persisted for a while. The trial Judge intervened and directed SAP's counsel to desist from the line of questioning, saying, "May we proceed please and then you can argue that point. The question has been answered repeatedly." Thereafter, an exchange ensued between SAP's counsel and the trial Judge. SAP's counsel attempted to justify his line of questioning. The trial Judge questioned its necessity in the light of the questions that had already been asked and answered. SAP's counsel did not relent. Eventually, the trial Judge said, "When you're finished, you'll let me know. I'm taking a break." The trial Judge proceeded to leave the virtual courtroom without first adjourning the proceedings, leaving the parties in silence.

Around two-and-a-half minutes later, the trial Judge returned, after which SAP's counsel raised concerns with him about his conduct. The trial Judge explained, "You keep repeating one question after the other and you want a different answer." The

exchange culminated in the trial Judge asking SAP's counsel whether he wanted the trial Judge to recuse himself. The trial Judge adjourned to afford SAP's counsel an opportunity to take instructions on whether to file a recusal application.

On 9 November 2020 SAP filed an application for the recusal of the trial Judge. SAC opposed it. On 13 November 2020 the trial Judge dismissed the recusal application, and remarked that SAP failed to take into account additional facts and context which had led him to leaving the hearing, mainly that he needed to go to the bathroom. The initial dispute proceeded before the trial Judge and judgment was delivered on 7 December 2021. The trial Judge found against SAP, and declared SAP liable for such damages as SAC could prove. On 28 December 2021 SAP applied to the trial Judge for leave to appeal to the Supreme Court of Appeal against the recusal and the merits judgment. The trial Judge dismissed both applications for leave to appeal.

The Supreme Court of Appeal granted leave to appeal on 13 July 2022 in respect of both High Court judgments. Both appeals were argued before it. The Supreme Court of Appeal held that the trial Judge's conduct created a reasonable apprehension of bias. It then held that the trial Judge's judgment on the merits was a nullity. The merits judgment was vitiated by the fact that the trial Judge continued to preside over the trial in circumstances where he ought to have recused himself. Thus the Supreme Court of Appeal set aside the order on the merits without considering the merits of the appeal.

Before this Court, SAC argued that on the correct facts and as properly contextualised, the trial Judge could not have reasonably been suspected of bias. SAC further contended that the Supreme Court of Appeal made material errors of law and fact. SAC also submitted that, if this Court declares the 74-day proceedings before the trial Judge a nullity, that will result in a severe limitation of its section 34 rights. That, because the SAC lacks the funds to relitigate the merits afresh before the High Court. As a result, an order declaring the proceedings to be a nullity in their entirety is disproportionate. An appropriate remedy would be one that preserves the 74 days of evidence led before the trial Judge.

In the main, SAP argued that this matter turns on three issues. First, it argued that it was not in the interests of justice to grant leave to appeal in respect of the recusal application as there were no reasonable prospects of success. It also submitted that it was not open to SAC, at this stage of the proceedings, to present fresh evidence on its lack of funds to relitigate the merits and argue that it has been deprived of its right of access to court protected under section 34 right of the Constitution. Further, it contended that, where a reasonable apprehension of bias exists, the appropriate remedy is to set aside the proceedings in their entirety.

In a unanimous judgment penned by Madlanga ADCJ (Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring), this Court held that its jurisdiction is engaged on the recusal issue. This Court has repeatedly held that recusal applications are a constitutional matter. Moreover, this Court held that, given the importance of the issues raised, the existence of reasonable prospects of success, and the implications of the outcome for the parties, it is in the interests of justice to have granted leave to appeal.

This Court addressed two preliminary points. The first being whether the trial Judge, in fact, made a ruling. The answer to this question bears relevance to the trial Judge's reaction to SAP's counsel's continued cross-examination after the ruling, if there was one. The second point being whether, in establishing the existence of bias, this Court was confined to look only at the case made out in the founding affidavits in the recusal application, or whether this Court could have also considered factors and circumstances that could be gleaned outside of such affidavits, such as the conduct of the trial Judge during the remainder of the trial, as well as the reasons proffered by the trial Judge in a subsequent judgment on the recusal question.

On the first point, while the trial Judge may not have used language explicitly indicating that he was making a ruling, his language unequivocally directed SAP's counsel to move on to a different line of questioning. This was a ruling. On the second point, different issues were considered to determine whether bias was shown to exist. After considering this Court's jurisprudence on this issue, the conclusion reached was that this Court must consider all relevant evidence, including affidavits

in the application for recusal, evidence in the entire record of proceedings, and the overall conduct of the presiding officer.

On the merits of whether there was a reasonable apprehension of bias in this matter, the trial Judge's conduct of leaving the hearing and saying that cross-examination should continue in his absence without first adjourning the proceedings was most regrettable and clearly irregular. However, not all instances of irregular judicial conduct evince bias. Something more is required. That "something more" is that an informed, objective and reasonable litigant would conclude that the Judge was failing to bring an impartial mind to bear on the adjudication of the matter.

Whilst the conduct of the trial Judge was unacceptable, it did not amount to bias when properly considered. First, at no point did the trial Judge's actions suggest that he disregarded SAP's line of questioning, minimised the issue that SAP's counsel was attempting to establish or made a factual finding, whether preliminary or definitive, on that issue. Even if the trial Judge had intimated some type of inclination, which he did not, this would ordinarily not be a sufficient basis to ground bias. Therefore, a reasonable, informed and objective litigant would not have concluded that there was a reasonable perception of bias. The significance of the interrupted line of cross-examination was overblown by SAP and the Supreme Court of Appeal.

Second, Judges are required to manage a trial actively, direct the trial process, point out when evidence is irrelevant and refuse to listen to it, and – if cross-examination of witnesses exceeds reasonable bounds – curtail it. Through his ruling, the trial Judge clearly wanted to move the proceedings on, with SAP's counsel not being barred from arguing the point he was cross-examining on at a later stage. Of importance, SAP's counsel had cross-examined to a point of tedium on the issue.

Third, a Judge has a duty to preside over, and remain an active participant in, a hearing and not to it – even if only for two minutes and thirty seconds – unless an adjournment has been called. While a reasonable, informed and objective litigant would realise the impropriety of the trial Judge's conduct, properly contextualising the conduct, the

litigant would conclude that the trial Judge was merely irritated and frustrated and likely needed to “cool off”. This did not translate to a reasonable apprehension of bias. Rather, this was a manifestation of absolute frustration with what was plainly annoying conduct by SAP’s counsel.

Based on the above, the appeal on the recusal question succeeded. The appeal on the merits, which was not decided by the Supreme Court of Appeal, was remitted for decision by that Court.