CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 101/24

In the matter between:

SYSTEMS APPLICATIONS CONSULTANTS (PTY) LIMITED T/A SECURINFO Applicant

and

SAP SE First Respondent

UNGANI INVESTMENTS (PTY) LIMITED Second Respondent

Neutral citation:	*Systems Applications Consultants (Pty) Ltd t/a Securinfo v SAP SE and Another* [2026] ZACC 13
Coram:	Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J
Judgment:	Madlanga ADCJ (unanimous)
Heard on:	8 May 2025
Decided on:	8 April 2026

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Johannesburg):

The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the Supreme Court of Appeal is set aside.
4. The appeal on the merits against the judgment of the High Court of South Africa, Gauteng Division, Johannesburg (High Court), delivered on 7 December 2022, is remitted to the Supreme Court of Appeal for adjudication.
5. All questions of costs relating to the appeal referred to in paragraph 4 are reserved for determination by the Supreme Court of Appeal.
6. The first respondent must pay the applicant's costs in the Supreme Court of Appeal relating to the first respondent's appeal against the dismissal of its application for recusal by the High Court, such costs to include the costs of two counsel.

JUDGMENT

MADLANGA ADCJ (Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J):

Introduction

[1] At issue is whether a trial Judge should have recused himself after leaving a hearing for a short period, without first adjourning proceedings, when presiding over a matter involving the applicant, Systems Applications Consultants (Pty) Ltd trading as Securinfo (SAC), and the first respondent, SAP SE (SAP). The second respondent is Ungani Investments (Pty) Ltd (Ungani), which funded SAC's action against SAP and which was accordingly joined to the proceedings by SAP solely for the purpose of meeting any costs orders made against SAC.

Background

[2] Here is how this all arose. In 2008 SAC instituted proceedings against SAP in the High Court of South Africa, Gauteng Division, Johannesburg. 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 by SAC against SAP. SAC alleged that SAP had unlawfully interfered with and frustrated the performance of the alleged contract between SAC and SAPSI.

[3] What is material from that initial dispute between SAC and SAP, for purposes of the matter before us, are certain key facts that arose in respect of 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. SAP subsequently disputed SAC's version that the distribution agreement had been concluded. 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. One email is particularly relevant to this matter, and I will return to it later.

[4] On 12 October 2020 the hearing of the merits of the initial dispute commenced. The hearing was scheduled to be held over an uninterrupted period of 50 days, though in the event it ran for 74 days. The hearing was conducted over the Zoom virtual conference platform pursuant to the High Courts' practice during the COVID-19 pandemic. Albeit virtual, the hearing was designed to resemble proceedings in open court. All participants were connected to the same virtual meeting. The usual formalities and decorum of the court were observed. The trial Judge and counsel were robed, and witnesses testified under oath.

[5] On 6 November 2020, the 20th day of the hearing, SAP's counsel cross-examined Mr Mario Linkies, a key witness for SAC and the co-lead of SAPSI's security consulting division in 2004-2005, 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. It read as follows:

> "I regret to have to follow up again, but I urgently request the approval of the contract with [SAC]. As we have had the details scrutinised by various colleagues, there should be no further problems. *Peter Tattersall is breathing down my neck*, and I can quite understand that [SAC] 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. I am therefore at present refraining from a further conversation with Peter until the matter is clarified on our side." (Emphasis added.)

[6] This email turned out to be a key point of dispute. SAP's counsel sought clarity during the cross-examination as to who was breathing down Mr Linkies' neck and whether it was indeed Mr Tattersall. In response, Mr Linkies explained that Mr Tattersall had not actually been breathing down his neck, but that he (Mr Linkies) was merely pressurising his own organisation to countersign the distribution agreement. SAP's counsel asked if Mr Linkies had lied to his colleagues when he wrote that Mr Tattersall had been breathing down his neck. Mr Linkies denied this.

[7] 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." A question arises as to whether this was a ruling. That question is addressed later. 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. Eventually, the trial Judge said, "When you've 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.

[8] Around two-and-a-half minutes later, the trial Judge returned, after which SAP's counsel raised concerns with him about his conduct. During this exchange, the trial Judge explained, "You keep repeating one question after the other and you want a different answer." This exchange culminated in the trial Judge asking SAP's counsel whether he wanted the trial Judge to recuse himself. The trial was adjourned to afford SAP's counsel an opportunity to take instructions on whether to file a recusal application.

[9] On 9 November 2020 SAP filed an application for the recusal of the trial Judge. SAC opposed it. SAP argued that the trial Judge's conduct was alarming and intolerable, especially given his unilateral and intemperate exit from the trial proceedings without a proper adjournment, his refusal to listen to what SAP's counsel wanted to ask Mr Linkies, and his suggestion that the proceedings should continue in his absence. SAP argued that the trial Judge had closed his mind to persuasion on certain key issues in the matter. SAP, therefore, reasonably perceived that, based on the trial Judge's conduct and utterances, the trial Judge was biased and not impartial. As a result, so SAP concluded, it would not receive a fair trial before the trial Judge.

[10] On 13 November 2020 the trial Judge dismissed the recusal application[1] and remarked that SAP failed to take into account additional facts and the context which had led to him leaving the hearing, mainly that he needed to go to the bathroom. Further, in respect of the line of questioning concerning the SAPSI email, he said that the same question had been asked multiple times and – despite the fact that the same answer was given by Mr Linkies several times – this line of questioning had continued. This had irritated the trial Judge and resulted in him leaving the court for a bathroom break.

[1] *Systems Applications Consultants (Pty) Ltd v Systems Application Products*, unreported judgment of the High Court of South Africa, Gauteng Division, Johannesburg, Case No 2008/20378 (13 November 2020) (High Court recusal judgment).

Finally, so continued the Judge, he had left the camera and microphone on with the hope that, in his absence, SAP's counsel would "force" Mr Linkies to provide the answer he required and such answer would appear on the record.

[11] 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 to be liable for such damages as SAC could prove.[2] On 28 December 2021 SAP applied to the trial Judge for leave to appeal to the Supreme Court of Appeal against the recusal and merits judgments. The trial Judge dismissed both applications for leave to appeal.

[12] The Supreme Court of Appeal granted leave to appeal on 13 July 2022 in respect of both High Court judgments. Both appeals were argued. In its judgment,[3] the Supreme Court of Appeal first proceeded to deal with the appeal against the recusal judgment. In this regard, it considered the question whether the trial Judge's conduct created a reasonable apprehension of bias. In examining the trial Judge's conduct and the recusal judgment, the Supreme Court of Appeal noted the following, which it considered to be fundamental errors.

[13] First, the trial Judge had misconceived the evidence relating to the questioning about the SAPSI email.[4] The Supreme Court of Appeal found that, on a proper assessment of the evidence, it was incorrect that the same question had been asked repeatedly and answered.[5] This misunderstanding by the trial Judge had provoked his irritation and led to the direction that the hearing continue in his absence.[6] As a result, the trial Judge had prevented SAP's counsel from properly developing the line of

[2] *Systems Applications Consultants (Pty) Ltd v Systems Application Products* [2021] ZAGPJHC 792; [2022] 1 All SA 824 (GJ) (High Court merits judgment).

[3] *SAP SE v Systems Applications Consultants (Pty) Ltd* [2024] ZASCA 26; [2024] 2 All SA 639 (SCA); 2024 (5) SA 514 (SCA) (Supreme Court of Appeal judgment).

[4] Id at para 14.

[5] Id.

[6] Id.

questioning[7] and, absent a proper factual foundation, counsel would not have been able to call Mr Linkies' truthfulness into question.[8]

[14] Second, the trial Judge had "abandoned" the hearing with the expectation that the cross-examination would continue in his absence.[9] However, absent a presiding officer, a court cannot be properly or duly constituted.[10] Any proceedings that continued during the trial Judge's absence would have been flawed and not in accordance with the law.[11]

[15] Third, the trial Judge's belated explanation that he had left the proceedings urgently to go to the bathroom only compounded matters,[12] as the bathroom break was first mentioned in the recusal application.[13]

[16] Fourth, the trial Judge's *ex post facto* (after the fact) explanation that both the camera and microphone were left unmuted to ensure that the witness' answers would appear on the record was irrelevant and merely confirmed that the trial Judge had intended for the proceedings to continue in his absence.[14] If the proceedings had continued during his absence, the trial Judge would not have been in a position to make a proper assessment of the credibility of the witness.[15]

[17] Fifth, the correct facts demonstrated to the reasonable, objective and informed person that the trial Judge had closed his mind to appreciating the extent to which or

[7] Id at para 17.

[8] Id.

[9] Id at para 18.

[10] Id.

[11] Id.

[12] Id at para 19.

[13] Id.

[14] Id at para 20.

[15] Id.

why Mr Linkies had, on SAP's version, demonstrated himself to be a liar.[16] This was material evidence relevant to the merits.[17] Here, the Supreme Court of Appeal referred to certain extracts of the trial Judge's judgment on the merits of the initial dispute as evidence, in its view, that the trial Judge had closed his mind to SAP's case.[18]

[18] Finally, even if the same question had been asked and answered, the trial Judge's conduct created the inescapable impression that the trial Judge no longer took any interest in the further evidence on that issue and his mind was no longer open to persuasion.[19]

[19] In conclusion, the Supreme Court of Appeal held that the trial Judge's conduct created a reasonable apprehension of bias in that: the trial Judge prevented SAP's counsel from cross-examining Mr Linkies in respect of his credibility;[20] the trial Judge "irritatedly" left the hearing for a period without first adjourning proceedings and directed that the hearing continue in his absence;[21] and the trial Judge's belated explanation that he had taken a bathroom break, where such explanation was only provided in the recusal judgment, merely exacerbated the apprehension of bias.[22]

[20] The Supreme Court of Appeal then held that the trial Judge's judgment on the merits of the initial dispute was a nullity. The 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.[23]

[16] Id at para 21.

[17] Id.

[18] Id.

[19] Id at para 23.

[20] Id at para 30.

[21] Id.

[22] Id.

[23] Id.

[21] The Supreme Court of Appeal also held that if an appellate court finds that a Judge in the court below failed to act with the requisite impartiality, it must inevitably set aside the relevant order without considering the merits of the appeal.[24]

[22] The Supreme Court of Appeal ordered SAC and Ungani to pay SAP's legal costs for the entire 74-day trial.

[23] The Supreme Court of Appeal judgment is now before this Court for leave to appeal and appeal if leave is granted on the question of recusal.

SAC's submissions

Jurisdiction

[24] SAC submits that this matter engages the Court's constitutional jurisdiction on three grounds. First, recusal applications implicate section 34 of the Constitution and thus constitute "constitutional matters" in terms of section 167 of the Constitution.

[25] Second, SAC submits that the Supreme Court of Appeal was mistaken in holding that, once it found that the trial Judge had failed to act with the requisite impartiality, it was inevitable that it should set aside the proceedings without considering the merits of the appeal. SAC argues that this conclusion was informed by the Supreme Court of Appeal's incorrect interpretation of its own jurisprudence on this point. That jurisprudence, so SAC argues, holds that, where judicial conduct in the course of proceedings gives rise to an apprehension of bias, an appellate court may: remit the matter for a narrow hearing on certain parts of the evidence; or determine the merits, taking into account the degree of the trial court's aberration. These two options, submits SAC, balance the section 34 rights of the party complaining of bias against those of the party who seeks to have its cause of action determined. SAC concludes that the failure of the Supreme Court of Appeal to exercise the aforementioned

[24] Id at para 12.

discretion was a material irregularity that deprived SAC of its right to a fair hearing in terms of section 34 of the Constitution.

[26] Finally, SAC contends that the question of what constitutes a just and equitable remedy in terms of section 172(1)(b) of the Constitution[25] following a finding of bias requires this Court's attention, especially given the purported tension in existing jurisprudence on this issue.[26] Given that this question involves a court's constitutional powers, it, similarly, engages this Court's constitutional jurisdiction.

Interests of justice

[27] SAC argues that: it is in the interests of justice for this Court to hear this appeal as there are reasonable prospects of success; SAC cannot afford to begin the trial afresh; given that the available funds for running the trial on the merits have now been exhausted, the costs order granted by the Supreme Court of Appeal is manifestly unjust and irrational; and this matter raises questions of fundamental constitutional import.

Merits

[28] SAC refers to this Court's judgments in *SARFU*[27] and *Basson*[28] for guidance on how to determine whether a reasonable apprehension of bias existed on these facts. In respect of *SARFU*, SAC specifically notes that the "correct facts" on which an apprehension of bias is assessed are the "true facts as they emerge at the hearing of the

[25] Section 172(1)(b) of the Constitution states: "When deciding a constitutional matter within its power, a court . . . may make any order that is just and equitable".

[26] According to SAC, the tension is between two conflicting approaches on remedy in the case law. On the first approach, a reasonable apprehension of bias always results in the nullity of the subsequent proceedings. *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) is cited as an example. On the second approach, a failure to recuse need not result in the proceedings being a nullity, with the appropriate course depending on the nature of the irregularity, considered in the context of the proceedings as a whole. *Take and Save Trading CC v Standard Bank of SA Ltd* [2004] ZASCA 1; [2004] 1 All SA 597 (SCA); 2004 (4) SA 1 (SCA) is cited as an example.

[27] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC).

[28] *S v Basson* [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC).

application"[29] for recusal. In respect of *Basson*, SAC relies upon this Court's dictum on the importance of context in assessing whether a Judge's conduct created a reasonable apprehension of bias.[30]

[29] In the light of the above, SAC argues that – on the correct facts and as properly contextualised – the trial Judge could not reasonably have been suspected of bias as: he conducted the trial in an impartial and even-handed manner over the 74-day hearing; the "incident" about which SAP is complaining was caused by the repetitive cross-examination of Mr Linkies, who provided the same explanation "eleven times"; the trial Judge's ruling was fair and reasonable; the trial Judge fairly made the point that the question had been repeatedly answered; the trial Judge only left the virtual hearing once SAP's counsel openly and repeatedly challenged the trial Judge's ruling; the trial Judge regained his composure and returned to the hearing within minutes; the trial Judge's first words on his return about his conduct were "[y]ou keep asking one question after another, and you want a different answer"; the trial Judge's reaction to further confrontation on the incident was a reference to his ruling that SAP's counsel was at liberty to argue the point and that he should proceed to the next point; and the trial Judge acted with dignity and restraint when falsely accused of conducting the trial in a manner that showed constant hostility and one-sidedness. As a result, concludes the argument, there was no "cogent" or "convincing" evidence that dislodged the presumption of judicial impartiality.

[30] SAC further contends that the Supreme Court of Appeal made material errors of law and fact in its assessment of the trial Judge's conduct. For example, the Supreme Court of Appeal ignored the trial Judge's impartial and even-handed conduct over the course of the 74-day hearing and overlooked the tedious and repetitive cross-examination regarding the SAPSI email. As another example, the Supreme Court of Appeal overplayed the importance of the interruption of the cross-

[29] *SARFU* above n 27 at para 45.

[30] *Basson* above n 28 at paras 32-3.

examination. Also, it was incorrect in finding that the trial Judge was wrong to have stated that "the question ha[d] been answered repeatedly", when – according to the Supreme Court of Appeal – it had not been. As a final example, the Supreme Court of Appeal failed to follow the proper approach to an assessment of bias arising from the conduct of a single Judge during the course of a long trial.

[31] In short, SAC submits that the Supreme Court of Appeal would have reached a different conclusion if it had assessed the apprehension of bias on the true facts, considered all important facts and properly contextualised the recusal issue in the light of a live trial hearing with human dynamics at play.

[32] If, however, this Court finds that the trial Judge's conduct gave rise to a reasonable apprehension of bias, SAC submits that the question that follows is whether all the proceedings are a nullity and have to be set aside or whether the subsequent evidence can be reassessed on appeal. On the former approach, the position is that a reasonable apprehension of bias invariably results in the proceedings being a nullity in their entirety. In this case – as the Supreme Court of Appeal held – the proceedings had to be declared invalid without a consideration of the merits. On the other approach, nullity of the proceedings does not necessarily follow. Here, SAC contends that the Supreme Court of Appeal's jurisprudence diverges. Whether proceedings are declared a nullity ultimately depends on the pertinent irregularity, considered in the context of the proceedings as a whole.

[33] SAC argues that the dissonant approaches to remedy in cases such as this can be reconciled as follows. First, if a reasonable apprehension of bias is a result of external factors (for example, a personal interest in or relationship with one of the litigants), the presiding officer should never have tried the case, and subsequent proceedings are a nullity. Second, if a reasonable apprehension of bias arises from the Judge's conduct during the proceedings, it will not necessarily result in a nullity as, depending on the nature of the irregularity, it can be remedied on appeal. SAC submits that, depending on the circumstances, it may well be possible for an appellate court to decide the merits

based on the record before that court. This approach, according to SAC, strikes the appropriate balance between litigants' rights in terms of section 34 of the Constitution.

[34] In this matter, SAC asserts that the trial Judge did not cause any significant or irreparable trial prejudice to SAP. For example, there were no external factors suggesting or justifying a reasonable apprehension of bias and the trial Judge leaving the hearing without formally adjourning did not give rise to a reasonable apprehension of bias. SAC submits that if this Court declares these proceedings a nullity, it will result in a severe limitation of SAC's section 34 rights, as the merits effectively cannot be relitigated, given the fact that SAC lacks funds to pursue the matter afresh. 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 for adjudication by either the Supreme Court of Appeal or High Court upon remittal.

[35] Finally, SAC contends that, even if the judgment of the Supreme Court of Appeal is upheld, the costs order is not justifiable. SAC did nothing to warrant such an adverse costs order. Instead, SAC asserts that the Supreme Court of Appeal ought to have ordered SAC and Ungani to pay only the costs of the recusal application. SAC thus submits that the adverse costs order constitutes a clear misdirection and should be set aside.

SAP's submissions

[36] In the main, SAP argues that this matter turns on three issues: whether it is in the interests of justice to grant leave to appeal in respect of the recusal application (recusal question); whether it is open to SAC, at this stage of the proceedings, to present evidence and argue that, as a result of the Supreme Court of Appeal's costs order, SAC has been deprived of its section 34 rights (access to courts question); and whether this Court can intervene to resolve the alleged "tension" between the Supreme Court of Appeal's jurisprudence concerning an appropriate remedy following a finding of an apprehension of bias (tension question).

[37] SAP contends that this Court's jurisdiction is only engaged in respect of one issue, the recusal question. However, SAP argues that it is not in the interests of justice for this Court to hear this issue, there being no reasonable prospects of success. SAP submits that the Supreme Court of Appeal was correct in holding that the trial Judge's conduct satisfied the test for apprehension of bias set in *SARFU*.

[38] On the access to courts question, SAP submits that SAC is raising this issue for the first time before this Court and that it impermissibly supports it by introducing new evidence. SAP alleges that, at the hearing before the Supreme Court of Appeal, SAC did not object to the form of the costs order that was claimed by SAP, let alone present any of the new evidence that it now seeks to introduce for the first time as a justification for the engagement of this Court's jurisdiction. SAP submits that this Court's jurisdiction is not engaged, whilst noting that SAC failed to provide reasons for failing to raise this issue before the Supreme Court of Appeal.

[39] On the merits of this issue, SAP argues that, because SAC's section 34 argument was not raised in the High Court or the Supreme Court of Appeal, there is no evidence on record in support of the argument nor was there an attempt to introduce such evidence in the Supreme Court of Appeal or in this Court.

[40] SAP further argues that SAC has failed to satisfy the threshold for this Court to disturb the Supreme Court of Appeal's costs award. More specifically, SAC's belated claim that the costs order "slams shut the doors of court" is without factual basis and unpersuasive, considering that Ungani failed to disclose any financial hardship before this Court.

[41] SAP takes issue with SAC's submission on the tension question. It argues that – on existing authority – there is no tension. It argues that this Court in *Masuku*[31]

[31] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC).

affirmed that, where a reasonable apprehension of bias exists, the remedy is to set aside the proceedings in their entirety. SAP quotes the following statement from that case:

> "[The] test is not informed nor is it guided by any consideration other than whether there is 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."[32]

Jurisdiction and leave to appeal

[42] On the recusal issue, this Court's jurisdiction is directly engaged. This Court has repeatedly held that recusal applications are a constitutional matter.[33] Thus, our constitutional jurisdiction is engaged.

[43] Is it in the interests of justice to grant leave to appeal on this issue? In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry.[34] As will soon become plain, there are reasonable prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal. Given the importance of the issues raised, and the implications for the parties, it is in the interests of justice to grant leave to appeal.

Apprehension of bias

[44] The complaint is one of reasonable apprehension of bias, not actual bias. For brevity, I will sometimes refer to bias, and not to reasonable apprehension of bias or apprehension of bias. It is trite that – to determine whether a reasonable apprehension of bias exists – one must apply the *SARFU* test. This test says:

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[32] Id at para 74.

[33] See, for example, *SARFU* above n 27 at para 28; *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Limited Seafoods Division Fish Processing* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (*SACCAWU*) at paras 2-3; and *Basson* above n 228 at para 5.

[34] *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC); 2001 (1) SACR 1 (CC) at para 12.

> "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."[35]

[45] The following principles, as formulated by this Court in *SACCAWU* and *Basson*, warrant repetition. In considering an application for recusal, a court's starting point is to presume that judicial officers are impartial in adjudicating disputes.[36] The presumption of judicial impartiality is not easily dislodged, requiring "cogent" or "convincing" evidence to be rebutted.[37] Both the person apprehending bias and the apprehension itself must be reasonable in the circumstances.[38] To establish bias based on a judicial officer's remarks, a complainant must show that the remarks were of such a number or quality to go beyond mere irritation and establish a pattern of conduct sufficient to dislodge the presumption of impartiality.[39] And impartiality requires, in short, "a mind open to persuasion by the evidence and the submissions of counsel".[40]

[46] I deal briefly with two preliminary points. The first is whether the trial Judge, in fact, made a ruling. The second is whether this Court is confined to considering whether bias is established on the basis of the case made out in the founding papers of the recusal application, or whether the Court can also consider factors and circumstances beyond the recusal application, 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 their recusal.

[47] The trial Judge may not have used language explicitly indicating that he was making a ruling. However, without doubt, the trial Judge's language unequivocally

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[35] *SARFU* above n 27 at para 48 (*SARFU* test).

[36] *SACCAWU* above n 33 at para 12.

[37] Id.

[38] Id at para 15.

[39] *Basson* above n 228 at para 42.

[40] *SACCAWU* above n 33 at para 13.

directed SAP's counsel to move on to a different line of questioning. This was clearly a ruling.

[48] On the scope of what must be considered in determining whether there was bias, this Court has adopted different approaches. In *SACCAWU* it determined bias pursuant to the case made out in the founding papers of the recusal application.[41] In *Stainbank*[42] the Court determined bias by considering the Judge's overall conduct during the proceedings in the light of the entire record.[43] And in *Ramabele*[44] the Court considered certain comments made by the Judge in the context of the proceedings as a whole.

[49] The position in English law is instructive in this respect. In *Lesage*,[45] while looking at the particular facts and determining whether, overall, the relevant proceedings would have created a reasonable apprehension of bias, Lord Kerr held:

> "Whether, in the mind of the informed observer, the failure to consider the propriety of their continuing to hear the case creates a possibility of bias is to be judged both prospectively and retrospectively. The actual conduct of the Judges *during the trial is to be examined therefore to see whether it supports or detracts from the suggestion that there was the appearance of possible prejudice*." (Emphasis added.)

[50] In *Porter*[46] the House of Lords quoted with approval a passage from *In re Medicaments*,[47] which says that – in assessing bias – "[t]he Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased".[48] It seems to me that a court should assess all relevant circumstances that

[41] Id at para 44.

[42] *Stainbank v South African Apartheid Museum at Freedom Park* [2011] ZACC 20; [2011] JDR 0706 (CC); 2011 (10) BCLR 1058 (CC) at para 45.

[43] Id at para 39.

[44] *Ramabele v S; Msimango v S* [2020] ZACC 22; 2020 (2) SACR 604 (CC); 2020 (11) BCLR 1312 (CC) at paras 51-3.

[45] *Lesage v Mauritius Commercial Bank Ltd* [2012] UKPC 41 at para 51.

[46] *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357; [2002] 1 All ER 465 (HL) at para 102.

[47] *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 (CA) at para 85.

[48] Id.

would lead a "fair-minded and informed observer" to conclude that there was a real possibility of bias.[49] It is therefore not merely the alleged incident of bias but all relevant circumstances, including evidence led during the trial, that should be considered.

[51] In the light of the above, I am inclined to agree with the approach adopted by this Court in *Stainbank* and *Ramabele*, that all relevant evidence, including the record, and the overall conduct of the presiding officer, may be considered in the context of the whole trial. This – it seems to me – would allow an appellate court to adequately place itself in the seat of a reasonable, informed and objective person, bearing witness to the proceedings as a whole and to properly contextualise the conduct of the relevant Judge.

[52] On whether an appellate court should, additionally, consider the judgment on the merits, the answer was given by this Court in *Ramabele*. This Court held:

> "The High Court demonstrated an ability to conduct an objective analysis based on the facts. The High Court did not readily accept the evidence of the State at face value, but evaluated it. This is *evident from the judgment*, and at the end the trial Judge acquitted the applicants on some of the charges."[50] (Emphasis added.)

[53] In *Lesage* the Court said, "That conclusion [of bias] is reinforced by consideration of the way in which the trial was conducted and the manner in which, *in its judgment*, the court dismissed the appellant's defence as unworthy of belief."[51] (Emphasis added.)

[54] I believe, though, that I must say the following in addition to what was held in these cases. In other causes, events that post-date the date of the impugned incident ordinarily do not serve to prove or disprove that incident. A simple point in this regard

[49] Id.

[50] *Ramabele* above n 44 at para 53.

[51] *Lesage* above n 45 at para 53.

is that, at the point of pleading, the impugning litigant would and could not have relied on these events because they did not exist. Also, on ordinary principles, the question is whether the recusal application was justified at the time it was brought. That is, whether at that time the litigant had a reasonable apprehension of bias. Subsequent conduct simply cannot be evidential material capable of being ventilated in the affidavits supporting the recusal application. The inability to be futuristic is true of the opposing litigant as well. This litigant too would and could not have based their defence on later events.

[55] Perhaps the *Ramabele* and *Lesage* principle may be explained on the basis that a recusal complaint is a *sui generis* (unique), and not traditional, cause of action. Even so, evidential matter (be it a judgment or conduct) post-dating the impugned event should likely be accorded less weight than such event. That is so because it is the impugned event itself that is the actual subject of the recusal application. The question is what light the subsequent conduct or judgment sheds on the actual subject in issue.

[56] Regarding the judgment, it may not be susceptible to ordinary appeal on the merits, but there may be hints of bias flowing from the earlier incident. For that reason, the judgment becomes relevant at the appellate consideration of the recusal complaint. Conversely, though, a Judge who has been challenged on the ground of partiality may become wary and couch their judgment on the merits so assiduously as to ensure that it does not have the slightest hint of such partiality. The same is true of the trial Judge's conduct between the impugned incident and the judgment. The conduct may either evince hints of partiality or be so unimpeachable as to point away from any possible bias.

[57] To summarise, what comes after the impugned incident, both in the form of the judgment and conduct, is relevant to the appellate determination of whether there was bias. I next consider whether there was a reasonable apprehension of bias in this matter.

[58] As *Basson* held, the correct facts must be situated in the proper context of the proceedings.[52] This, it seems to me, must include: the line of questioning regarding the SAPSI email, i.e. whether it was repetitive or not; the trial Judge's ruling that SAP's counsel should move on from the line of questioning, as the point sought to be made by the questioning could be argued at a later stage; the engagement between SAP's counsel and the trial Judge during which counsel sought to justify his line of questioning; the trial Judge's return to the hearing, together with his further engagement with SAP's counsel prior to the adjournment for the lodging of the recusal application; the trial Judge's conduct during the remainder of the hearing; and the High Court merits judgment.

[59] At the outset, let me point out that the trial Judge's conduct of leaving the hearing without first adjourning the proceedings and saying that questioning should continue in his absence is most regrettable. I have struggled to find instances of the same occurring,[53] and something comparable is, no doubt, unprecedented in our courts. Needless to say, judicial officers must act honourably, in a manner befitting a Judge,[54] and remain patient and courteous in conducting judicial proceedings.[55] In this respect, the trial Judge's conduct was clearly irregular. However, not all instances of irregular judicial conduct amount to bias – something more is required. That "something more"

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[52] *Basson* above n 28 at para 32.

[53] I have found an example of a judge walking out of court during the third week of a trial in the United States of America, because he thought that the proceedings were being dragged out by the prosecution and the defence. Mordowanec, "Judge suddenly leaves trial of man accused of shooting migrant" *Newsweek* (12 April 2024), available at https://www.newsweek.com/george-alan-kelly-trial-migrant-shooting-judge-walks-out-1889822. The relevant Commission of Judicial Conduct found that, by limiting cross-examination and walking off the bench while a party was busy advancing their case, the Judge acted improperly in terms of certain sections of the relevant Judicial Code of Conduct but none of those provisions related to bias. The findings of the Commission of Judicial Conduct can be found at https://azcjc.azcourts.gov/Portals/5/137/reports/2024/24-167.pdf.

Something that is rather unusual concerns Justice Etienne "Oefie" de Villiers who was acting in the Appellate Division whilst holding the substantive position of Judge President of the Orange Free State Provincial Division of the Supreme Court. The following is said of him:

> "Each Wednesday he and his clerk would go to see the latest film at the bioscope (taking turns to pay). It did not matter that an appeal had dragged into the afternoon. On a signal from Sir Etienne, both would leave for the bioscope. If the appeal had not concluded upon their return, Sir Etienne would resume his seat on the bench. Apparently, none of the succession of Chief Justices could do anything about his unusual conduct." (Schutz "Sir Etienne de Villiers" (1988) 1 *Consultus* 43).

[54] Article 5 of the Code of Judicial Conduct.

[55] Article 9 of the Code of Judicial Conduct.

is, of course, that an informed, objective and reasonable litigant[56] would conclude that the Judge was failing to bring an impartial mind to bear on the adjudication of the matter.

[60] This is not to say that irregular conduct can never be so grave as to dislodge the presumption of judicial impartiality. Indeed, there may well be cases where such irregular conduct creates a reasonable apprehension of bias. At this juncture, however, and for what will follow, it is unnecessary for me to provide examples of such a situation. Whether such a case arises will ultimately depend on the facts of each matter. For now – and in respect of these facts – I am of the view that the trial Judge's conduct, whilst unacceptable, does not amount to bias when properly considered.

[61] First, at no point do the trial Judge's actions suggest that he disregarded SAP's line of questioning, minimised the issue that SAP's counsel was attempting to tease out or made a preliminary or definitive factual finding on Mr Linkies' credibility, which appears to have been the direction in which the questioning was meant to go. Even if the trial Judge had intimated some type of inclination, which he did not do here, this would ordinarily not be a sufficient basis to ground bias. As the Appellate Division correctly held in *Silber*:

> "Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours

[56] See, for example, *Bernert v Absa Bank Limited* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 97.

> the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias."[57]

[62] Therefore, in the present matter, a reasonable, informed and objective litigant would be hard-pressed to conclude that the trial Judge had closed his mind to any material issue in the case, namely in respect of the SAPSI email and the witness's credibility.

[63] In any case, the significance of the interrupted line of cross-examination has been overblown by SAP and the Supreme Court of Appeal. The questioning related to the defence that SAP could not have accepted in good faith that the distribution agreement was being implemented without signature by SAPSI, having regard to the fact that Mr Tattersall was supposedly putting pressure on, or in Mr Linkies' words, "breathing down [the] neck" of, Mr Linkies to countersign the distribution agreement. If Mr Tattersall regarded SAPSI's signature to be that important, this might have suggested that he did not regard the contract as already being in place through implementation.

[64] Mr Linkies' evidence was that he would have liked to see the contractual relationship between the parties regularised by SAPSI's signing of the distribution agreement. He used Mr Tattersall's name as a strategy to put pressure on his superiors to get the distribution agreement signed. Mr Tattersall himself was not "breathing down [Mr Linkies'] neck". In the interrupted line of cross-examination, SAP's counsel was dealing with the SAPSI email. The cross-examiner was effectively putting to Mr Linkies that there were only two possibilities: that Mr Tattersall really was breathing down Mr Linkies' neck; or that Mr Linkies was lying to his colleagues.

[65] Either way, the cross-examiner had made his point and he had complied with his duty to confront the witness. Mr Linkies, for his part, had given his answers several

[57] *R v Silber* [1952] 2 All SA 441 (A); 1952 (2) SA 475 (A) at 481E-H.

times: Mr Tattersall was not breathing down his neck, and he was only using Mr Tattersall's name to bring pressure to bear on his own organisation to sign the distribution agreement. In the light of this, the cross-examiner had his answer: Mr Linkies was (on counsel's binary proposition) "lying". The trial Judge was alive to this implication that the cross-examiner sought to make on the credibility of Mr Linkies. He simply did not allow SAP's counsel to belabour the point as it was already made.

[66] Second, it is clear that the trial Judge, through his ruling, merely wanted to move the proceedings on, with the possibility of SAP's counsel arguing the point at a later stage. Judges are not "silent umpires".[58] Judges are required to manage the trial actively, direct the trial process, point out when evidence is irrelevant and refuse to listen to it,[59] and – if examination or cross-examination of witnesses exceeds reasonable bounds – curtail it.[60] Actions such as making rulings are well within the purview of judicial function and are integral to efficient judicial case management. The following comment from an English case is apposite: "There is . . . a line, and it may be a thin line in some cases, between case management, on the one hand, and premature adjudication on the other."[61] On the facts before us, this is clearly an instance of the former.

[67] Third, the following conduct needs to be examined: the statement "[w]hen you're finished, you'll let me know [;] I'm taking a break," and leaving the hearing without first adjourning proceedings. The statement and conduct are plainly irregular. A Judge has a duty to preside over, and remain an active participant in, hearings and not leave a hearing – even if only for two minutes and thirty seconds – unless an adjournment has been called. However, although 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". That was not enough to translate to a

[58] *Basson* above n 28 at para 35.

[59] Id.

[60] Article 9 of the Code of Judicial Conduct.

[61] *Q (Children)* [2014] EWCA Civ 918 at para 54.

reasonable apprehension of bias. As indicated, SAP's counsel just would not let up despite the Judge's ruling and engagement.

[68] The trial Judge had, however, been courteous in all respects. Even up to the point of the ruling and walkout, he had engaged SAP's counsel patiently. The sudden walkout, which was accompanied by the utterance mentioned a couple of times, was simply a manifestation of a "live situation"[62] reaction. A live situation that obviously "riled" the trial Judge and, thus, gave rise to his emotional response. But none of this sufficiently grounds a reasonable apprehension of bias. As it was aptly held in *Basson*—

> "[i]nappropriate behaviour by a Judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities, but it will not ordinarily give rise to a reasonable apprehension of bias. It will only do so where it is of such a quality that it becomes clear that it arises not from irritation or impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias."[63]

[69] The above sentiment was again echoed by this Court in *Ramabele*. The trial Judge in that matter made the following comments: "I'm not interested in getting somebody else to attend to your matter, you will carry on in person"; and "I don't care what you do . . . this matter is not postponed for you to get legal representation". The applicants took the view that the Judge was biased.[64] In rejecting this view, this Court held:

> "The trial Judge did indeed make use of inappropriate language, particularly when expressing his frustration at the delays occasioned by the applicants . . . . That, however, does not amount to bias or the perception of bias when regard is had to what transpired.
>
> In fairness to the trial Judge, he was pushed to the limit by the accused, who kept requesting postponements and insisting on having a legal representative of their choice

[62] *Basson* above n 28 at para 32.

[63] Id at para 36.

[64] *Ramabele* above n 44 at para 52.

> despite the fact that they lacked funds and had been provided with State-appointed counsel."[65]

[70] It seems to me that a true characterisation of what the trial Judge did in the present matter is that it was not a manifestation of bias, but rather a circumstance of absolute frustration with what was plainly annoying conduct by SAP's counsel.

[71] Finally, on the trial Judge's return, he attempted to explain his frustration. Again, the trial Judge did not, at any point, share his opinion on the case or betray any predisposition in favour of SAC. Further, for the remaining 54 days there is no suggestion that the trial Judge did not conduct the trial even-handedly and impartially. Also, the merits judgment does not support any possible existence of bias. If anything, it is consonant with the trial Judge's conduct, which points away from bias.

[72] I am led to the conclusion that the trial Judge's conduct did not go beyond mere irritation. Thus, the presumption of judicial impartiality has not been dislodged. This means the appeal must succeed. As this success relates only to the question of recusal, the appeal against the merits of the initial dispute before the Supreme Court of Appeal remains undecided. It seems to me that an appropriate order is remittal to the Supreme Court of Appeal for the merits to be argued afresh. I see no factors that warrant dictation by this Court on how the panel hearing that appeal should be constituted. That issue is left to be decided by the President of the Supreme Court of Appeal.

Costs

[73] SAC is successful in its appeal. Costs in this Court must accordingly be granted in its favour. Likewise, costs in the Supreme Court of Appeal that relate only to the question of recusal must be borne by SAP. How such costs are separated from the rest of the costs incurred in that Court is a matter to be determined by that Court's Taxing Master. Obviously, the parties will play a role in that process. The question of costs

[65] Id at paras 52-3.

relating to the merits of the initial dispute is best left for determination by the Supreme Court of Appeal.

Order

[74] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the Supreme Court of Appeal is set aside.
4. The appeal on the merits against the judgment of the High Court of South Africa, Gauteng Division, Johannesburg (High Court), delivered on 7 December 2022, is remitted to the Supreme Court of Appeal for adjudication.
5. All questions of costs relating to the appeal referred to in paragraph 4 are reserved for determination by the Supreme Court of Appeal.
6. The first respondent must pay the applicant's costs in the Supreme Court of Appeal relating to the first respondent's appeal against the dismissal of its application for recusal by the High Court, such costs to include the costs of two counsel.

For the Applicant and Second Respondent:	W Trengove SC, A d'Oliveira, N Ferreira and N Siboza instructed by Bosch Marais and Associates Incorporated
For the First Respondent:	C H J Badenhorst SC and K Spottiswoode instructed by Werksmans Attorneys Incorporated