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Pecuniary interests and the rule against adjudicative bias: The automatic disqualification or objective reasonable approach?

Summary

This article deals with the issue of bias arising from pecuniary interest of a judge. Essentially, it asks the question: when does the pecuniary interest of a judge diminish his/her ability to apply his/her mind impartially to the dispute before him/her. To answer this question, the article undertakes a synthesis of the various rules and tests applied across Commonwealth jurisdictions and then compares them with the South African approach as outlined in two recent cases, namely *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) and *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* 2011 (1) SA 560 (SCA). Broadly, the article discusses the key aspects of the *automatic disqualification* approach preferred by the English courts, the Canadian *objective reasonable* approach and the *realistic possibility* approach recently adopted by the Australian courts. The article concludes that the South African approach that places emphasis on the objective reasonable test, complemented by the realistic possibility approach, may be most suitable, given the nature of complaints so far dealt with by the courts and the full propriety of the injunction in section 34 of the Constitution.

Geldelike belange en die reël teen beslissingsvooroordeel: Outomatiese diskwalifikasie of objektiewe redelike benadering?

Hierdie artikel hanteer die kwessie van vooroordeel wat ontstaan as gevolg van die geldelike belange van 'n regter. In wese word die vraag gestel: Wanneer verminder die geldelike belange van 'n regter sy/haar vermoë om onpartydig aandag te bestee aan die betrokke geskil. Om hierdie vraag te beantwoord, word verskeie reëls en toetse toegepas in Statebond jurisdiksies saamgevat en vergelyk met die Suid-Afrikaanse benadering soos uiteengesit in *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) en *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* 2011 (1) SA 560 (SCA). Oor die algemeen bespreek die artikel die hoofaspekte van die *outomatiese diskwalifikasie*-benadering wat deur die Engelse howe verkies word, die Kanadese *objektiewe redelike*-benadering en die *realis moontlikheid*-benadering wat onlangs deur die Australiese howe aanvaar is. Daar word tot die gevolgtrekking gekom dat die Suid-Afrikaanse benadering wat die objektiewe redelike toets vooropstel, aangevul deur die realis moontlikheid-benadering, die geskikste mag wees, gegewe die aard van die klagtes wat die howe tot dusver hanteer het en die volle eiendom van die konstitusionele bevel soos vervat in artikel 34.

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1. Introduction

It is a universal precept of the common law and indeed an essential requirement of the principle of impartiality that where bias or the apprehension of bias is shown, the judge must recuse himself/herself from adjudicating the matter. This is because the law forbids a person being a judge in own cause. Admittedly, there are various kinds of interests, relationships and associations that may disqualify a judge from adjudicating a matter[1]. However, such interests, relationships or associations must be of a nature that diminishes a judge's ability to determine a dispute fairly and impartially. In other words, the impugned interest or relationship must give rise to actual or apparent bias. Elsewhere, we have examined in general terms how actual or apparent bias occurs and some of the thresholds of proof that a litigant alleging bias must surmount[2]. In this article, we limit our attention to economic interests and their effect on the impartial exercise of adjudicative functions. From the onset, it must be acknowledged that determining how economic or financial interests of an individual judge could affect his/her impartial discharge of judicial functions is not always an easy task. Judges, like other members of society, have economic freedom to buy shares or other forms of property and can, therefore, have financial dealings with institutions that also serve the public. Judges are not special human beings in this regard. Kirby J in *Re Minister for Immigration and Multicultural Affairs and Another; Ex parte Epeabaka*[3] captured this assertion succinctly:

> … decision-makers (whether in the judiciary, in adjudicative tribunals or elsewhere vested with public power) are human beings. They have foibles and personal characteristics that vary substantially, reflecting differences of view that also exist in the community at large.[4]

What makes a difference is the responsibility of their offices and the calling to perform their functions independently and impartially. But maintaining the balance between private interests and the responsibility of a public office is not often easy, and as discussed in this article, it gives rise to complex legal questions about standards and approaches in determining bias.

In this article we focus on the general effect of pecuniary interest of a judge. We ask questions such as when does financial interest of a judicial officer in a litigant company give rise to a reasonable apprehension of bias and what should be the appropriate methodology for making such a determination. These questions have recently come under scrutiny

1 For factors disqualifying a judge, see Hoexter 2007:407-412; Burns & Beukes 2007:305-307; Devenish *et al*. 2001:321-333; Wade & Forsyth 1994:484-491; Okpaluba 1990:185-204; Devenish 2000:399-408.
2 See generally, Okpaluba & Juma 2011a.
3 (2001) 206 CLR 128 (HCA).
4 (2001) 206 CLR 128 (HCA) 158 paragraph 90.

in *Bernert v ABSA Bank Ltd*[5] and are important in contemporary South African public law for four main reasons. First, they elicit considerations as to whether the English concept of automatic disqualification on the ground of pecuniary or other interests should be adopted as part of South African law. Secondly, whether the quantum of the interest involved should be a relevant factor to be taken into account when determining whether or not a judge should be disqualified from sitting in the case. Thirdly, what probable concerns should be raised, in light of the emergent jurisprudence, as to the desirability or otherwise of adopting the English or any other Commonwealth position by the South African courts, given the constitutional injunction in section 34 of the Constitution of South Africa 1996? Lastly, since *SARFU 2*,[6] allegations of apprehension of bias against judges in South Africa have questioned their associations with one of the parties or their conduct in the course of the proceedings[7], does this suggest that concerns about the effect of 'pecuniary interests' on judge's performance of adjudicative functions offer an opportunity, at this point in time, to develop the law in this area?

The issues raised above should be considered against a background of differing approaches and tests applied across jurisdictions to determine allegations of bias based on a judge's financial interest(s). Imperative to such considerations is the fact that the Constitution enjoins our courts to take benefit of international and foreign law within acceptable parameters.[8] In our view, therefore, the Constitutional Court was correct to have considered some of these approaches and tests in this case. In common law jurisdictions, for example, at least two distinct approaches to tackling the disqualification of a judge on account of pecuniary interest may be identified. Quite apart from the automatic disqualification approach which English courts apply where pecuniary or other interests of a judge is revealed, there is the more generally accepted objective reasonable standard approach which prevails in Canada, Australia and, quite recently, New Zealand. Unlike Canada, the basic framework of the objective reasonable standard approach applies in Australia with slight modifications. In Australia, the *objective reasonable* standard approach is blended with the *realistic possibility* approach – where the court has to ask itself whether there exists a *realistic possibility* that the outcome of the litigation would affect the value of the shares or interest of the judge in the litigant company. As we shall demonstrate, the position in

5 (2010) ZACC 28, 2011 (3) SA 92, 2011 (4) BCLR 329 (CC) (*Bernert*) paragraph 4.

6 *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9, 1999 (4) SA 147. See also *S v Basson 2* 2005 (12) BCLR 1192 (CC), 2007 (1) SACR 566 (CC); *S v Le Grange* 2009 (2) SA 434 (SCA); *S v Khoza* 2010 (2) SACR 207 (SCA).

7 See e.g. *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA), [2004] 1 All SA 597 (SCA); *S v May* 2005 (10) BCLR 944, 2005 (2) SACR 331 (SCA); *S v Mlimo* [2008] ZASCA 7, 2008 (2) SACR 48 (SCA); *Gade v S* [2007] 3 All SA 43 (NC); *Melani v S* [2005] 2 All S A 280 (N); *Matroos v S* 2004 (4) SA 1, [2005] 2 All SA 404 (NC).

8 Section 39(1)(b) and (c), 1996 Constitution.

South Africa is leaning towards the *realistic possibility* approach although there is some lingering uncertainty. And while some courts have shown some deference to the *objective reasonable* standard and the *realistic possibility* approaches, others seemed to have embraced the *automatic disqualification* approach. For example, in *Bernert,* the Constitutional Court expressly rejected the *automatic disqualification* approach in preference for the Australian *realistic possibility* test. Interestingly, however, the Supreme Court of Appeal, in a judgment delivered just eight days before *Bernert*, seemed to suggest that the automatic disqualification approach would be preferred where the commercial interest of a judge was in issue.[9] This suggests that whereas the courts in South Africa are bound to follow the Constitutional Court decision and thus apply the *realistic possibility* test, there is all likelihood that the fuzziness evident in the law in this area may take a while to be resolved.

2. The automatic disqualification approach

The rule that a man cannot be a judge in his own cause enunciated by the House of Lords in the celebrated case of *Dimes v Grand Junction Canal*[10] was accompanied by the principle of automatic disqualification. By that concept, a judge shown to have a financial interest in the outcome of the proceedings is automatically disqualified from sitting to hear the matter. This principle applies however trivial the interest of the judge might be and notwithstanding the absence of bias on his part.[11] Indeed, English courts have consistently held that where the nature of the interest is such that "public confidence in the administration of justice requires that a decision should not stand", an investigation as to whether there exists a real likelihood or reasonable suspicion of bias may not be warranted. Thus, the courts have tended to emphasise the importance of financial interests of a judge to the outcome of the proceedings.[12]

The automatic disqualification principle operates even where no financial interest was shown to exist but if the circumstances would lead to the promotion of a cause in which the judge was associated with one of the

9 *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* [2010] ZASCA 165, 2011 (1) SA 560 (SCA) (*Ndimeni*).

10 (1852) 3 HLC 759, 10 ER 301.

11 *R v Rand* (1866) LR 1 QB 230.

12 See e.g. per Lord Campbell, *Dimes v Grand Junction Canal* (1852) 3 HLC 759 at 793; per Lord Blackburn, *R v Rand* (1866) LR 1 QB 230 at 232 ("any direct pecuniary interest, however small, in the subject of inquiry"); per Bowen LJ, *Leeson v General Council of Medical Education & Registration* [1889] 43 CH D 366 at 384 ("a pecuniary interest in the decision" and "a pecuniary interest in the success of the accusation"); per Lords Goff and Woolf, *R v Gough* [1993] AC 646 at 661, 664 and 673 ("a pecuniary interest in the outcome of the proceedings" and "a pecuniary or proprietary interest in the subject matter of the proceedings").

parties. This was the case of *Ex parte Pinochet (No 2)*,[13] where the House of Lords held that Lord Hoffman was automatically disqualified from sitting in an extradition proceedings against the former Chilean dictator. Amnesty International was an intervener in the case while Lord Hoffman was a non-salaried director and chairperson of Amnesty International Charity Ltd which had been incorporated to carry out charitable works on behalf of Amnesty International. This fact was neither disclosed nor known to the parties to the proceedings. Lord Browne-Wilkinson held that, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there was no good reason in principle for so limiting the application of the concept. According to him:

> The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact. A judge is therefore automatically disqualified if he stands to make financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale for disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.[14]

The Law Lord advanced two further reasons for the application of the automatic disqualification principle. First, it may be applied literally such as where a judge was in fact a party to the litigation or had a financial or proprietary interest in its outcome. In that case, he was indeed sitting as a judge in his own cause. The mere fact that he was a party to the action or had a financial or proprietary interest in its outcome was sufficient to cause his automatic disqualification. Secondly, it applies where a judge was not a party to the suit and did not have a financial interest in its outcome, but his conduct or behaviour created a suspicion that he was not impartial, for example, because of his friendship with a party. This type of case was not strictly an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.[15]

In other words, the existence of bias is effectively presumed in a circumstance where a judge is shown to have a financial interest in the outcome of the matter, and in a limited class of non-financial interests where the judge is associated with a party promoting a cause. The English courts have, however, shown reluctance in extending the automatic disqualification rule any further than it would be desirable to do so beyond the bounds set by existing authority. The exception would be where the

13 *R v Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Urgate (No 2)* [1999] 1 All ER 577 (HL).
14 *Ex parte Pinochet (No 2)* at 588.
15 *Ex parte Pinochet (No 2)* at 586.

extension plainly gives effect to the important underlying principles upon which the rule is based.[16] Indeed, the Court of Appeal held in *Locabail* that:

> In practice, the most effective guarantee of the fundamental right [to a fair hearing before an impartial tribunal] is afforded not ... by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias.[17]

A valuable summary of the application of the automatic disqualification approach was provided by the English Court of Appeal in *AWG Group v Morrison.*[18] In the first instance, a judge will be automatically disqualified from hearing a case on the ground of apparent bias if, on an assessment of all the relevant circumstances, a conclusion is reached that the principle of judicial impartiality would be breached. Obviously, such disqualification is not a discretionary case management decision reached by weighing various relevant factors (such as inconvenience, costs, and delay) since the die was already cast — either there was a real possibility of bias or there was not.[19] Secondly, the preferable test should, therefore, be whether in the circumstances, those contingent upon the suggestion that the judge was (or could be) biased, "would lead a fair-minded and informed observer to conclude that there was a real possibility ... that the tribunal was biased".[20] In this regard, the Appellate Court should assume the position of "a fair-minded and informed observer with knowledge of the relevant circumstances" and must "make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias".[21] Thirdly, there may be many instances where the danger of bias could exist, for example, where there is "animosity between the judge and any member of the public involved in the case",[22] or "a real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections". In such a situation recusal would be necessary.[23] Although in most cases, "the answer, one way or the other, will be obvious; there

16 *Locabail (UK) Ltd and Others v Bayfield Properties Ltd and Others* [2000] QB 451, [2000] 1 All ER 65:paragraph 14 (*Locabail*).
17 *Locabail:*paragraph 16.
18 [2006] EWCA Civ. 6, [2006] 1 WLR 1163 (CA).
19 *AWG:*paragraph 6.
20 *AWG:*paragraph 7, quoting *Taylor v Lawrence* [2003] QB 528 paragraph 60 (CA); per Lord Hope in *Potter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357 (HL):paragraph 103.
21 *AWG:*paragraph 20.
22 *Locabail:*paragraph 25.
23 *Locabail:*paragraph 25; *AWG* paragraph 8.

are situations in which there is real ground for doubt". In all such cases, the doubt "should be resolved in favour of recusal".[24] Lastly, in the event that hearing has not begun, the courts better be advised to apply the precautionary principle: "… [p]rudence naturally leans on the side of being safe rather than sorry".[25]

The automatic disqualification principle and the test settled in *Potter v Magill*[26] have been applied side by side in English courts. The application of both principles was contested before the House of Lords in *Helow v Secretary of State for the Home Department*[27] where a Palestinian claimant alleged that the judge, Lady Cosgrove's decision dismissing her petition for review of refusal of leave to appeal against her asylum claim, was vitiated for apparent bias and want of objective impartiality because of the judge's membership of the International Association of Jewish Lawyers and Jurists which had expressed extremist pro-Israeli views and, in particular, by its President. The question, on the one hand, was whether a fair-minded and informed observer would conclude that there existed a real possibility that the judge was biased by reason of her membership of the association in that it represented the views the judge shared. On the other hand, the appellant similarly invoked the principle of automatic disqualification as applied in *Ex parte Pinochet (No 2).* The case failed on both accounts. The *Helow* case neither involved financial interest of the judge nor was the association to which the judge was alleged to be a member like any instance where automatic disqualification has been held to apply. In a judgment led by Lord Mance and agreed to by the other four Law Lords, it was held that, since the association was not a party to or in any way concerned with the present proceedings involving Ms Helow, mere membership of the association, as opposed to active involvement in its affairs or in the institution of the proceedings, may not bring the principle in *Ex parte Pinochet (No 2)* into play.[28]

Their Lordships unanimously held that a fair-minded and informed observer, having considered the relevant facts, would not conclude that there was a real possibility that the judge was biased by her membership of the association.[29] There was nothing save membership of the association to link the judge and the president of the association. Apart from her membership, the judge was in no different position to any judge who might or might not have private views about issues which came before the court but who was expected to put them aside and decide the case according to the law. It was no doubt possible to conceive of circumstances involving words or conduct so extreme that members might be expected to become aware of them and dissociate themselves by resignation if they did not

24 *Locabail:*at 480; *AWG:*paragraph 8.
25 *AWG:*paragraph 9.
26 [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357 (HL).
27 [2008] UKHL 62, [2009] 2 All ER 1031 (HL):paragraph 39 (*Helow*).
28 *Helow:*paragraph 40. See also per Lord Hope in *Meerabux v Attorney General of Belize* [2005] UKPC 12, [2005] 4 LRC 281, [2005] 2 AC 513:paragraph 24.
29 Per Lords Hope, Rodger and Cullen paragraphs 6, 14, 20 and 28.

approve or wish to be thought to approve them, but the material in the instant case fell far short of involving such circumstances. The suggestion that mere membership in an association gave rise in the eyes of a fair-minded observer to a real possibility of unconscious influence, through a form of osmosis, by materials in the relevant association's periodical which would be available to be read by the member was to be rejected.[30]

3. The objective reasonable standard approach

In Canada, a common standard has emerged as the criterion for disqualifying a judicial officer: it is on the ground of *reasonable apprehension* of bias as enunciated in *Committee for Justice and Liberty v National Energy Board.*[31] So, the automatic disqualification does not avail in every case, for the objective reasonable standard of apprehension of bias is judged from the perspective of the reasonable observer. Therefore, in Canada, the courts insist on disqualification resting either on actual or on reasonable apprehension of bias. Emphasis is placed on the primary requirement that there must be "convincing",[32] "clear"[33] or "cogent evidence"[34] that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. Thus, in *Utracuts Franchises v Wal-Mart Canada Corp*[35] it was held that a reasonable person, aware of the public share ownership disclosure, the small number of shares owned by Judge Clinger in both Wal-Mart and CIFRA, the billions of outstanding Wal-Mart shares, the vast size of Wal-Mart, the over one billion outstanding shares of CIFRA and its vast size, together with the traditions of the judiciary mentioned above, would not conclude that it is, more likely than not, that Judge Clinger would not decide the matter fairly. Put differently, a reasonable person would not conclude that it was, more likely than not, that Judge Clinger would or did decide in favour of one party at the expense of the other or that there was a real likelihood of bias on the part of Judge Clinger. Likewise, given the very small number of shares owned by Judge Glaze and the fact that he disposed of all of his shares in the year before he sat on this matter, a reasonable person would not conclude that it was, more likely than not, that Judge Glaze would not decide the matter fairly. Thus, based on the facts of this case, Ultracuts had not proven that there was a reasonable apprehension of bias on the part of either Judge Clinger or Justice Glaze. Similarly, in *Wewaykum Indian Band v Canada*,[36] the disqualification of a member of the Supreme Court was urged on the court for alleged involvement of the judge (Binnie J) in the matter some 15 years

30 Per Lord Mance, *Helow:*paragraphs 45, 49, 53 and 56.
31 1976 CanLII 2 (SCC), [1978] 1 SCR 369:at 394. See also *Wewaykum Indian Band v Canada* (2004) 231 DLR (4th) 1:paragraph 74; *R v Quinn* 2006 BCCA 255 (CanLII), (2006) 227 BCAC 83.
32 L'Heureux-Dubé J and McLachlin J in *RDS:*paragraph 32.
33 *RDS:*paragraph 49.
34 *RDS:*paragraph 117 per Cory J.
35 2005 MBQB 222 (CanLII):paragraphs 63, 64-65.
36 (2004) 231 DLR (4th) 1:paragraphs 73, 74 and 93.

ago as counsel in the civil service.[37] Insofar as the court was concerned, if disqualification were to be argued in that case, it could only be contested on a reasonable apprehension of bias basis. Further, it could only succeed if it were established that reasonable, right-minded and properly informed persons would think that the judge was consciously or unconsciously influenced in an inappropriate manner by his participation in the case over 15 years before he participated in hearing it in the Supreme Court of Canada.[38]

Although the issue in *Wewaykum* did not concern the disqualification of a judge on ground of financial interest, the Supreme Court took the opportunity to lay down the guiding principles in Canadian law. Thus, the key principles governing the determination of whether there is a reasonable apprehension of bias distilled from the *Wewaykum* case and more or less followed in subsequent decisions[39] are that a judge's impartiality is presumed; a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified; the criterion of disqualification is the reasonable apprehension of bias, and that the test is what an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, would conclude. The test thus enunciated cannot be satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is, more likely than not, that the judge, whether consciously or unconsciously, would not decide fairly. This requires a demonstration of serious grounds on which to base the apprehension. Moreover, this requires that each case be examined contextually and that the inquiry be fact-specific.

3.1 The Australian *realistic possibility* approach

The Court of Appeal of the Australian State of Victoria was considering in *Clenae Pty v Australia & New Zealand Banking Group Ltd*[40] whether the trial judge had a direct pecuniary interest in the outcome of the litigation and was therefore disqualified himself from the case. Sometime after the hearing, while judgment was pending in the case between the bank and its borrowers, the judge inherited 2400 shares in the bank. He subsequently gave judgment for the bank rejecting the borrower's counterclaim in part because he preferred the evidence of the deceased witness to that of the borrowers. The judge did not disclose the fact of his inheritance and it was after judgment that the borrowers learnt of his shareholding in the bank. The borrowers then appealed to the Court of Appeal arguing, *inter alia,*

37 (2004) 231 DLR (4th) 1:paragraph 72.
38 (2004) 231 DLR (4th) 1:paragraph 73.
39 See e.g. *Taylor Ventures Ltd (Trustee of) v Taylor* 2005 BCCA 350 (CanLII) (2005), 49 BCLR (4th) 134:paragraph 7; *Lesiczka v Sahota et al.* 2007 BCSC 479 (CanLII):paragraph 12.
40 [1999] 2 VSCA 573.

that the judge was automatically disqualified from giving judgment in the case by reason of direct pecuniary interest.

The majority held that, since neither the value of the judge's shareholding in the bank nor any dividends on the shares would have been affected by the outcome of the litigation, he did not have a direct pecuniary interest in the outcome of the litigation and was therefore not required to disqualify himself from the case.[41] Winneke P and Charles J doubted whether there was a separate rule of automatic disqualification for financial interest and that, if there were, it must be where the judicial officer has a direct pecuniary interest in the outcome of the proceeding.[42] Alternatively, if it continued to exist, it could not operate to automatically disqualify a judge on grounds of mere shareholding in a party alone.[43] Indeed, Charles J held that relevant matters in determining whether a judge, by virtue of a shareholding in a corporate party to litigation, has a financial interest in the outcome of the litigation, would include the ratio of the judge's shareholding to the party's total issued share capital; the amount involved in the litigation; whether the party was a public or private company, and to what extent the issue under adjudication would have any effect on the judge's interest as shareholder. In order that justice may positively be seen to be done, any reasonable doubt in a marginal case would usually be resolved in favour of disqualification.[44]

Like the Canadian Supreme Court, the majority of the Australian High Court emphatically laid down what the Court of Appeal had muted in subdued tone in *Clenae.* In their judgment in the consolidated case of *Ebner v Official Trustee in Bankruptcy,*[45] it was held that there was no separate rule of automatic disqualification that applies where a judge has a direct pecuniary interest, however small, in the outcome of the case over which the judge is presiding.[46] The apprehension of bias principle is to be applied to all cases in which it is suggested that, by reason of interest, conduct, association, extraneous information or some other circumstance,

41 [1999] 2 VSCA 573:paragraphs 3 and 31.
42 Per Charles JA, *Clenae:*paragraph 59.
43 Per Winneke P, *Clenae:*paragraph 9.
44 [1999] 2 VSCA 573:paragraph 55 (Winneke P concurring). See also *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 at 148. Dissenting, Callaway JA [paragraph 89] held that to hold that a judge who was the beneficial owner of 2.400 shares in a bank should automatically disqualify him-/herself accords with well-established practice and causes little inconvenience and no injustice if the position becomes apparent at the outset. In the unusual case where it becomes apparent later, justice is served by balancing the competing considerations. The contrary view would give rise to undesirable questions of fact and degree on which reasonable minds might differ. In particular, an appellate court may differ from a judicial officer's assessment as to whether the result of the case might affect the value of his/her shares. In the absence of exceptional circumstances, there will then have to be a retrial.
45 (2000) 205 CLR 337.
46 Contra the House of Lords approach in *Ex parte Pinochet Urgarte (No. 2)* [2000] 1 AC 119.

a judge might not bring an impartial mind to the resolution of the question she was required to decide.[47] The question to be asked is whether there is a *realistic possibility* that the outcome of the litigation would affect the value of the shares or interests of the judge in the litigant company. In effect:

> … where a judge owns shares in a listed public company which is a party to, or is otherwise affected by, litigation, and there is no other suggested form of interest or association, the question whether there is a *realistic possibility* that the outcome of the litigation would affect the value of the shares will be a useful practical method of deciding whether a fair-minded observer might hold the relevant apprehension. In such a case, if the answer to the question is in the negative, the judge is not disqualified. If the answer to the question is in the affirmative, the judge is disqualified, not 'automatically', but because, in the absence of some countervailing consideration of sufficient weight, a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case (emphasis added).[48]

Apparently, the Court agreed with what the English Court of Appeal had to say on the principles of apprehension of bias except that the former would substitute the test of "real danger" of bias adopted by the English Court in *Locabail* for "apprehension" of bias.[49] Therefore, *Ebner* afforded the majority the opportunity of restating the reasonable apprehension test it had earlier reaffirmed in *Johnson v Johnson*.[50]

3.2 Restating the objective reasonable test

Three discernible guiding rules emerge from the majority judgment in *Ebner.*[51] The first rule was laid down as follows: where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror) as was the case in this instance, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded

47 (2000) 205 CLR 337 at 356:paragraph 54. *Contra Dimes v Grand Junction Canal* [1852] 10 ER 301. Cf *Ex parte Pinochet (No 2)* [2000] 1 AC 119.

48 (2000) 205 CLR 337:paragraph 37.

49 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 457.

50 (2000) 201 CLR 488.

51 Kirby J dissented. He supported the continuation of the automatic disqualification test for financial interest where it is "direct" and not saved by a *de minimis* principle. This is akin to the view expressed by Cooke P in *Auckland Casino* [1995] NZLR 142 (CA) at 148 when he said: "A firm and realistic rule of pecuniary disqualification is necessary to assist public confidence in the administration of justice and the impartiality of licensing bodies. The existence of an irrebuttable presumption in cases of direct pecuniary interest was assumed in argument. As already mentioned, we think that it may be subject to the *de minimis* rule."

lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[52] That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.[53]

Secondly, the apprehension of bias principle may be thought to find its justification in the importance of the basic principle that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.[54]

Thirdly, that the application of the apprehension of bias principle requires two steps, namely the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits, and the articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. For example, the financial interest which was alleged to disqualify a judge in *Smits v Roach*[55] was that of his brother. It was a professional negligence case which came before McClellan J. His brother was at all relevant times chairman of partners of the law firm against whom the action was instituted. The judge raised the issue of his brother's position in the law firm but no objection was made about his presiding over the case. Although the case turned to be decided on waiver, the majority held that the Court of Appeal erred in finding that a fair-minded lay observer might reasonably have apprehended that Judge McClellan might not bring an impartial mind to his task. In doing so, it failed to articulate a logical connection between the matter complained of and the feared deviation from impartial decision-making, or explain why it would be reasonable to apprehend that the judge might otherwise decide the case than on its legal and factual merits.

Again, in their joint judgment, Gummow and Hayne JJ held that in failing to so articulate the said logical connection, the Court of Appeal fixed its attention upon the first limb of the two necessary steps stipulated in *Ebner*

52 *R v Sussex JJ: Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.
53 *Ebner*:paragraph 6.
54 *Ebner*:paragraph 7.
55 [2006] HCA 36, (2006) 228 ALR 262, (2006) 80 ALJR 1309.

at the expense of the second. Thus, the bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.[56] Lastly, the apprehension of bias principle must admit of the possibility of human frailty and that its application should be as diverse as differences existing in the community.[57]

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56 *Ebner:*paragraph 8. Reference could also be made to the Federal Court of Australia judgment in *Kirby and Others v Centro Properties Ltd and Others (No 2)* [2008] FCA 1657, (2008) 252 ALR 557 (FCA):paragraphs 15, 16, 19, 20 and 23, where the question was whether Finkelstein J should recuse himself from hearing three shareholder class actions brought against Centro group of companies. The basis of the recusal application was the ownership by Motown Investments (Pty) Ltd, the trustee of a self-managed superannuation fund of which Finkelstein J was a member, of shares in one of the respondents, Centro Properties Ltd. An additional problem was that the trustee was a member of the group on whose behalf one action was brought. The judge was one of two members of the self-managed superannuation fund and a director of the trustee. In August 2007, Motown purchased shares in Centro Properties Group (CNP). Owing to administrative oversight it did not immediately come to the Judge's attention that Motown held CNP shares. CNP submitted that there may be a reasonable apprehension by fair-minded lay observers, including other CNP security holders, that Finkelstein J may not bring an impartial mind to the proceedings. It was also submitted that, even if Motown was removed from the class, the apprehension of bias would remain because of the *realistic possibility* that the outcome of the litigation would affect the value of the shares and the fact that Motown could still bring its own independent action. In conceding to the request to recuse himself from hearing the case, Finkelstein J made the following observations. First, although a lay observer would appreciate that, having regard to the experience and qualifications of judges, the high standards of independence to which they must conform, judges would be able to decide cases fairly even if they were victims of the actions that were the subject of the complaint. It was, however, possible that the lay observer would see things differently. Secondly, in the case of doubt, as in the present case, prudence dictates caution on the part of the judge. Thirdly, the public interest in seeing justice done openly was best served by allowing, but not always mandating, recusal applications to be brought in public by motion and whatever process was required to see that the allegations were fully ventilated. See e.g. *Idoport Pty Ltd v National Australia Bank* [2004] NSWSC 270 paragraphs 8 and 9; *Gas & Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48, 123 ALR 323; *Parramatta Design & Development Pty Ltd v Concrete Pty Ltd* [2005] FCAFC 138:paragraph 37. Finally, it would be odd, if not legally unsound, to direct oneself not to hear the cases. Although there was nothing that prevented a trial judge from circumventing that problem by simply framing the recusal in terms of an order granting the respondents' motion, in the end, all that was necessary was to make a direction for the cases to be allocated to another judge.

57 In this regard, reference could be made to the speech of Kirby J in *Re Minister for Immigration and Multicultural Affairs and Another; Ex parte Epeabaka* (2001) 206 CLR 128 (HCA) at 158:paragraph 90.

4. The South African context

Courts in South Africa have generally affirmed that the ground for the disqualification of a judicial officer is the existence of a reasonable apprehension that s/he will not decide the case impartially or without prejudice, and not that s/he will decide the case adversely to one party.[58] The Constitutional Court stated the test to be "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".[59] Further, that

> it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and the judicial officer should not hesitate to recuse herself or himself 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.[60]

Based on this fact, financial or pecuniary interests are no less fundamental in adjudging impartiality as much as other relationships that a judge in South Africa might have, and must be subjected to the same level of scrutiny in adjudging whether they meet the threshold for bias. Thus, the inconsistency of courts alluded to earlier, resident in the cases of *Bernert* and *Ndimeni*, must be construed against the overall objective of achieving the higher goals of impartiality and fair trial.

Only eight days separated the two recent cases, *Ndimeni* and *Bernert*, in which recusal of judges on grounds of commercial and financial interests was raised. The judgments by the Supreme Court of Appeal in *Ndimeni* and the Constitutional Court in *Bernert* differ not only in terms of the conclusions arrived at in each case, but also in terms of the methods of reaching those conclusions. Interestingly, *Ndimeni* was not mentioned in *Bernert* where the Constitutional Court expressly considered whether a South African court should apply the automatic disqualification test or the reasonable apprehension of bias test in an application for recusal based on a judge's financial interest. But let us consider the methodology and reasoning in the two cases so that we can attempt to construct what could reasonably be stated as the South African position.

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58 *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) *(SARFU 2):* paragraph 46. See also *Re JRL: Ex parte CJL* [1986] HCA 39, (1986) 161 CLR 342 (HCA) at 352.

59 *SARFU 2* paragraph 48; *SACCAWU* [2000] ZACC 10, 2000 (3) SA 705 (CC):paragraph 11; *Sager v Smith* 2001 (3) SA 1004 (SCA):paragraph 15; *Take and Save Trading CC & Others v Standard Bank of SA Ltd* [2004] ZASCA 1, 2004 (4) SA 1 (SCA):paragraph 2.

60 *SARFU 2:*paragraph 48. See also *Ndimeni:*paragraph 12.

4.1 *Ndimeni v Meeg Bank Ltd (Bank of Transkei)*

The dispute in this case arose out of the dismissal of a manager following a disciplinary enquiry. The manager had been accused of misconduct, which the Bank alleged had caused it substantial financial loss. The Labour Court upheld the finding of the disciplinary enquiry and sanctioned the dismissal of the manager. Prior to the judgment, however, the manager discovered that the bank had a financial relationship with the firm of lawyers in which the Acting Judge was a partner. The manager raised the matter of impartiality, alleging that there was reasonable apprehension that the Acting Judge would not be impartial due to the commercial relationship between him and the Bank. The Labour Court dismissed the claim. On appeal to the Supreme Court of Appeal the main issue was whether the evidence sought to be introduced by the appellant satisfied the test of "reasonable apprehension of bias" and, if so, whether the proceedings before the Labour Court were a nullity.[61] The court held that a reasonable person would reasonably apprehend bias, especially since the Acting Judge had executed mortgage bonds for the bank and had listed the acting judge's law firm as one to which instructions of this nature were to be given. The court observed that the Acting judge should have disclosed his relationship with the bank so that the manager could have the option to apply for his recusal or not. This was in accordance with the general principle that where a reasonable apprehension of bias was found to be present, the judicial officer was duty bound to recuse him-/herself.[62] Moreover, this was in consonance with the common-law right of each individual to a fair trial, which is constitutionally entrenched. Since there was no "sufficient disclosure" and the appellant's rights to a fair trial were infringed, the proceedings of the trial court were declared a nullity and the matter remitted back to the Labour Court for trial *de novo* before another judge.

As regards the issue of automatic disqualification, the court's findings raise some interesting points worthy of consideration. First, it held that the Acting Judge would have been automatically disqualified if he had any interest or potential interest, "in the sense of owning a substantial number of shares in the respondent, or any other direct pecuniary interest in the outcome of the case".[63] Nonetheless, the court still went ahead to find that the rule of automatic disqualification applies not only in instances where the judicial officer concerned has a pecuniary interest in the outcome of the proceedings, but also where a non-pecuniary interest to achieve a particular result exists. Thus, although the Acting Judge had no pecuniary interests of the nature that could trigger automatic disqualification, the court was still prepared to hold that the commercial relationship, of the kind that existed between the acting judge and the Bank, engendered a

61 *Ndimeni*:paragraph 4.

62 *Take and Save Trading CC & others v Standard Bank of SA Ltd* [2004] ZASCA 1, 2004 (4) SA 1 (SCA):paragraph 2.

63 *Ndimeni*:paragraph 17. The Judge President relied on the case of *BTR Industries South Africa (Pty) Ltd & Others v Metal and Allied Workers Union & Others* 1992 (3) SA 673 (A) for this proposition.

reasonable apprehension of bias. The distinction between commercial relationship between the judge and litigant as opposed to direct pecuniary relationship that the court attempted to draw as to find application for the automatic disqualification does not appear to make much sense and leaves the law in a confused state. Secondly, the court may have taken for granted the fact that the English automatic disqualification requirement was an integral part of South African law. Not surprisingly, it pointed to no South African authority to support its assumption. It may be argued that this was to be expected since the court relied on cases from the English jurisdiction where the automatic disqualification approach originated, but the obligation to develop the law, especially after *SARFU (2)*, should have been upmost in the court's mind. Lastly, this case illustrates the occupational hazard inherent in the use of legal practitioners acting as judges for they go back to their law practice at the end of the acting appointment.[64] The court seemed to suggest that whenever issues of impartiality arose in similar contexts, the element of knowledge of the facts, quite apart from the directness of the pecuniary interests as between the judge and a litigant, may be relevant. No wonder the court made reference to *Locabail*,[65] where allegations of apprehension of bias were refuted by the court on the grounds that the adjudicator had no knowledge of the facts upon which the allegations were based.

4.2 *Bernert v ABSA Bank Ltd*

After *SARFU 2* and SACCAWU, *Bernert* represents a more recent pedigree in the Constitutional Court's foray into the bias jurisprudence. The applicants in this case submitted before the Constitutional Court that Cachalia JA who participated at the hearing of the case at the Supreme Court of Appeal should have recused himself of his own accord because he had a financial interest in the defendant Absa Bank. The Judge owned 1000 shares of Absa Bank stock valued at approximately R138.800 while the issued Absa shares at the material time totalled 718 201 000 worth approximately R100 billion. The applicant submitted that the value, nature and extent of the ownership of the shares were irrelevant and that it was reasonable to apprehend that Cachalia JA would not hand down a judgment in his favour, given the magnitude of his claim. There was no reference to any specific authority to support these submissions other than reference broadly to the Supreme Court of Appeal case law on bias.[66] Absa contended that the applicant was barred from raising bias based on recusal because his attorney had knowledge of the circumstances immediately before the

64 [2010] ZASCA 165, 2011 (1) SA 560 (SCA):paragraph 20. See also to the same effect the English Court of Appeal judgment in *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004, [2000] 1 All ER 65, [2000] QB 451 (CA).

65 *Locabail (UK) Ltd v Bayfield Properties Ltd & Another* 2000 1 ALL ER 65 (CA).

66 See e.g. *S v Shackell* 2001 (4) SA 1 (SCA); *S v Roberts* 1999 (4) SA 915 (SCA); *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* [1992] ZASCA 85, 1992 (3) SA 673 (A); *Council of Review, South African Defence Force and Others v Mônning* 1992 (3) SA 482 (A).

appeal was argued and the applicant himself had this knowledge after the hearing and some weeks prior to the delivery of judgment. This conduct, Absa maintained, amounted to an unequivocal election by the applicant not to ask for the recusal and therefore a clear and unambiguous intention to abandon the right to raise the issue of recusal. It may be useful to mention that Absa's argument raised the important issue of *waiver of the right to object*, which the court dealt with at some reasonable length, but which we have elected not to discuss in this article. The other grounds upon which the applicant contended that the Supreme Court of Appeal had been biased against him included the fact that two of the judges had a prior relationship with the bank; the manner in which the presiding judge conducted the proceedings, which it contended had created a reasonable apprehension of bias,[67] and lastly, that the factual findings made by the Supreme Court of Appeal were so grossly unreasonable that they were inexplicable, except on the basis of bias.

The court held that, by comparing the amount of the claim with the share capital of the bank, there was no possibility that the outcome of the case could have impacted in any significant way on the bank's share price. Therefore, there was no realistic possibility that the outcome of the proceedings could affect the value of shares held by the judge; nor was there a realistic possibility that his shareholding in the bank could influence his decision either way.[68] Secondly, even if it could be said that there was some basis for a reasonable apprehension of bias, the judge had disclosed his shareholding in the bank. Shortly before the hearing the applicant was told of the shareholding, and yet did not object. Nor had the applicant pointed to any conduct on the part of the judge before, during or after the hearing that could possibly have inspired a reasonable apprehension of bias. And the applicant had not pointed to any aspect of the judgment that had any bearing on the shareholding.[69] Thirdly, the controlling principle in South African law was the interests of justice. Thus, it was not in the interests of justice to permit a litigant, who had knowledge of all the facts upon which recusal was sought, to wait until an adverse judgment before raising the issue of recusal. It was undesirable to cause parties to litigation to live with the uncertainty that, after the outcome of the case is known, there was a possibility that litigation might be commenced afresh because of a late application for recusal, which could and should have been brought earlier. To do otherwise would undermine the administration of justice.[70] It was held that it was not in the interests of justice at that late stage to permit the applicant to raise a complaint of bias based on shareholding by the judge.[71]

67 The allegations regarding the manner in which the presiding judge handled the appeal proceedings and the query over factual findings by the appellate court are dealt with in Okpaluba and Juma 2011b.
68 *Bernert*:paragraph 67.
69 *Bernert*:paragraph 68.
70 *Bernert*:paragraph 75.
71 *Bernert*:paragraph 76.

4.2.1 Framing the issues

Chief Justice Ngcobo, who read the unanimous opinion, drew attention to the fact that the ownership of shares in a litigant company is one of the possible sources of interest that a judicial officer can have in a litigant. And this interest may give rise to a suggestion that the judicial officer has an interest in the outcome of the litigation. The ownership of shares in Absa Bank by one of the judges of appeal, as well as the prior association of the two judges of appeal with Absa Bank, illustrated the difference in the nature and degree of associations and, therefore, any potential interests that might exist. Nonetheless, the association that a judicial officer has with a litigant company may or may not have the potential to raise the question of the impartiality of the judicial officer. And it may or may not give rise to a suggestion that a judicial officer has an interest in the outcome of the proceedings. Therefore, the issue to be decided was when shareholding or other financial interest in a litigant company by a judicial officer can give rise to a reasonable apprehension of bias.[72]

To answer this question, the Chief Justice resorted to the reasonable objective test. In his view, therefore, a reasonable, objective and informed person would reasonably apprehend that a judicial officer who has a direct financial interest in the outcome of proceedings would not bring an impartial mind to bear on the adjudication of the case. Although such officer may have a pecuniary interest in the form of shares, or other financial interest in a company that is a party to the proceedings before him/her, that does not necessarily mean that the judicial officer has a financial interest in the outcome of those proceedings. Indeed, as the Chief Justice observed, in many cases where a company is a party to the litigation, the outcome of the proceedings rarely affect the value of the shares held by the judicial officer or his/her ownership of those shares. And it is for this reason that the so-called reasonably informed litigant would not reasonably apprehend that a judicial officer owning shares in a litigant company would not bring an impartial mind to bear in adjudicating the case. Similarly, it could not be reasonably assumed that proceedings in which a company is a party will not affect the shares held by the judicial officer in that company or his/her interest in those shares.[73] What must always be remembered is the fact that what is at issue is not whether there was actual bias, but whether there was a reasonable apprehension of bias.[74]

4.2.2 The *realistic possibility* approach

The Chief Justice held that the approach of South African law to the problem must be informed by the test for apprehended bias. He reiterated this rule as formulated in *SARFU 2*[75] and affirmed the primacy of the double

72 *Bernert*:paragraph 45.
73 *Bernert*:paragraph 46.
74 *Bernert*:paragraph 53.
75 *Bernert*:paragraph 30; *SARFU 2:* paragraph 48.

reasonableness requirement. As a composite to this formulation, the court also put emphasis on the presumption of impartiality. But this presumption, which can only be dislodged by cogent evidence, "must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of judicial function".[76] Secondly, the court held that the mere allegation that a judicial officer has an interest in the proceedings or an interest in a party to the proceedings is not sufficient to give rise to a reasonable apprehension of bias. What is required is the articulation of the connection between the interest alleged and the feared deviation from impartial adjudication of the case. Thus, in finding an answer to the question, "When does ownership of shares by a judicial officer in a litigant company give rise to such apprehension?",[77] the court compared the English cases of *Dimes*, *Pinochet*, *Locabail* with the Australian cases of *Ebner*, *Vakauta* and *Clenae*, and came to the conclusion that all the courts generally prefer the basic approach to the questions whether an interest in a litigant gives rise to an interest in the outcome. Therefore, the question to ask is whether there is a *realistic possibility* that the outcome of the litigation would affect the interest that the judge has. "It seems to me", the Chief justice stated, "that asking the question whether there is *realistic possibility* that the outcome of the proceedings would affect the judicial officer's interest, is a useful practical method of deciding whether a judicial officer has interest in the outcome of the case."[78] He proceeded to acknowledge that in English law an affirmative answer to this question leads to "automatic disqualification". But this is different from the Australian approach where affirmation may also lead to disqualification, but based on the objective reasonableness test.[79]

Although the slight variance in approaches reflects the differences in the way the common law of recusal in these countries has developed,[80] it lends support to the view that the *realistic possibility* approach should be interpreted as a complementary component of the objective reasonableness test. Moreover, the court in *Bernert* was quick to point out that the *realistic possibility* approach was consistent with the apprehension of bias test enunciated in *SARFU 2* and affirmed in *Basson 2*. The mainstay of the reasoning is that, if *realistic possibility* exists ("that the outcome of the case affects the judge's interest and therefore a reasonably informed litigant can apprehend that the judge will not bring an impartial mind to bear on his adjudication"),[81] the judge would have interest in the outcome of the case and, therefore, a reasonable apprehension of bias exists and the judge must be disqualified from sitting in the case. Conversely, where such possibility is absent, no apprehension of bias arises, and the judge is not disqualified. Interestingly, the court was of the view that where

76 *SARFU 2*:paragraph 48.
77 *Bernert*:paragraph 47.
78 *Bernert*:paragraph 54.
79 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337, 176 *ALR* 644 (HCA):paragraph 37.
80 [2010] ZASCA 165, 2011 (1) SA 560 (SCA): paragraph 52.
81 *Bernet*:paragraph 55.

the number of shares held in a large company is relatively few, or where the adjudicator merely maintains an account, be it savings or current or deposit, the chances of reasonable apprehension of bias cannot arise. At the same time, sight must not be lost of the fact that what is at issue is not whether there was actual bias, but whether there was a reasonable apprehension of bias.[82] In the final analysis, the court held that the nature and extent of the interest in the shares or the value of the shares were relevant to the enquiry since they constitute "the correct facts" which the "informed person" must possess in order to be able to "reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case".[83] Applying these points to the case at hand, the court was

> unable to uphold the submission by the applicant that how many shares in Absa Bank Cachalia JA held, what they were worth and what proportion of the bank's issued share capital they constituted, are irrelevant. These facts are necessary in order to assess the reasonableness of the apprehension of bias and they may well demonstrate whether there is any logical connection between the interest held and the feared deviation from impartial adjudication.[84]

5. Conclusion

We set out, at the beginning, to isolate some of the popular approaches and tests that courts have used to determine whether a judge's pecuniary interest has diminished her/his ability to apply her/his mind impartially to the dispute before the court. We have analysed the divergent approaches from the Commonwealth, mainly Canada, Australia and the United Kingdom, to locate the mainstay of the South African *objective reasonable* standard and *realistic possibility* approach adopted in *Bernert* and the casual accommodation of *automatic disqualification* approach that was evident in *Ndimeni*. Perhaps, one definite and unavoidable conclusion is that, by merging standards and approaches discussed in this article, one can distil some general principles that should guide the courts in South Africa to determine bias based on pecuniary interest. Obviously, the readily noticeable consequence of *Bernert* is that the Supreme Court of Appeal's accommodation of *automatic disqualification* test in South African law has been implicitly overruled. But this does not necessarily discount the premise upon which *Ndimeni* was decided, which for all intents and purposes also affirmed the reasonable apprehension test set out in *SARFU 2*.[85] It is apparent that the Judge President was not completely oblivious of the South African standards, and except for his rather ephemeral foray into the *automatic disqualification* discourse, he could very well have intended

82 *Bernet*:paragraph 53.
83 *Bernert*:paragraph 57, paraphrasing *SARFU 2:*paragraph 48.
84 *Bernert*:paragraph 57.
85 *Ndimeni*:paragraph 12.

to remain within the bounds of the *objective reasonable* test that was to be articulated eight days later by the Constitutional Court in *Bernert*.

Secondly, it may be worthwhile to note that South Africa's adjudicatory standards are based on the constitutional requirements of fair trial. In our view, the *objective reasonable* standard and *realistic possibility* approach seem to foster the objectives of fair trial than can be said of *automatic disqualification*. As we know, fundamental to the requirement of fair trial is the expectation that judicial functions will be administered impartially and without favour or prejudice. This requirement is carried in section 34 of the Constitution. Thus, a judge who sits in a case when s/he is disqualified from doing so, by reason that s/he cannot apply her/his mind impartially to the proceeding, violates this important constitutional principle. But this is not all. The impugned interest must be tested against the threshold for establishing bias, but also against the rights regime established by the Constitution. Thus, care must be taken to ensure that judges are allowed latitude to exercise their freedoms and rights as citizens. In South Africa, therefore, the rule against bias has a constitutional basis that beckons on the widest possible construction of rights of persons involved in any adjudicatory process, be they adjudicators themselves or the parties to a dispute. Thus, while we strive to maintain rights of fair trial, we also recognise the freedom of all citizens, judges included, to engage in commerce and forge beneficial financial relationships with institutions in society.

Bibliography

BURNS Y AND BUEKES M
2007. *Administrative law under the 1996 Constitution*. 3rd ed. Durban: LexisNexis Butterworths.

DEVENISH GE
2000. Disqualifying bias: The second principle of natural justice — the rule against partiality or bias (*nemo judex in propria causa*). *Tydskrif vir Suid-Afrikaanse Reg* (3):397-415.

DEVENISH GE, GOVENDER K AND HULME D
2001. *Administrative law and justice in South Africa*. Pietermaritzburg: LexisNexis Butterworths.

HOEXTER C
2007. *Administrative law in South Africa*. Cape Town: Juta.

OKPALUBA C
1990. *The right to fair hearing in Nigeria*. 2nd ed. Lagos: Matt Madek & Co

OKPALUBA C AND JUMA L
2011a. The problems of proving actual or apparent bias: Analysis of contemporary developments in South Africa. *Potchefstroom Electronic Law Journal* 15(7):13-43.

2011b. The dialogue between the bench and the bar: Implications for adjudicative impartiality. *South African Law Journal* 128(4):659-685.

WADE HWR AND FORSYTH CF
1994. *Administrative law*. 7th ed. Oxford: Oxford University Press.