INTRODUCTION

A perusal of contemporary Commonwealth case law reveals that allegations of bias or apprehension of bias tend to revolve around the pecuniary or other interests of the Judge arising from kinship, previous relationship, or association with party or counsel.\textsuperscript{1} Apparent bias could also be inferred from the judge’s conduct or utterances, especially, his/her criticisms or cumulative criticisms of a party during proceedings or in adjudication.\textsuperscript{2} In other instances, a judge’s previous knowledge or association with the case in court, or of an important witness, may disqualify him/her from sitting or passing judgment in the case.\textsuperscript{3} Arguably, these are the three most litigated grounds of bias emerging from contemporary jurisprudence across the Commonwealth. But these so-called common grounds are by no means the only bases upon which allegations of bias could be made. There is a fourth, albeit seemingly miscellaneous ground, upon which apprehension of bias has increasingly been contested in recent times—that of prejudgment. Prejudgment is a claim that, as a consequence of an opinion expressed extra-judicially, or earlier in a judgment or ruling, the judge might not approach the case in court with a mind open to argument or persuasion. An adjudicator’s predetermined position—discerned from either his/her

\begin{footnotesize}
\begin{enumerate}
\item Wewaykum v Indian Band [2004] 231 DLR (4th) 1 (SCC); Locabail (UK) Ltd v Bayfield Properties Ltd (1999) 7 BHRC 583; Man O’ War Station Ltd v Auckland City Council [2002] 3 NZLR 577 (PC); AWG Group Ltd v Morrison [2006] 1 WLR 1163 (CA); R v Quinn 2006 BCCA 225; Eckervogt v R 2004 BCCA 398; Fletcher v Automobile Injury Compensation Appeal Commission 2004 MBCA 192.
\end{enumerate}
\end{footnotesize}
preconceived opinion or the extent of his/her involvement with the conduct of the matter—obviously compromises his/her ability to adjudge the dispute fairly, and should in all cases necessitate a recusal. But while it may seem intuitive or even commonplace that adjudicators will conduct proceedings with an open mind, waiting to be persuaded by the arguments of parties, it is not often easy to say whether this is the case in any other set of circumstances.4 Moreover, the assumption that a judge will act free of any preconception is in itself a misnomer. It has long been recognised that a judge’s mind will never be free from the abject reality of life, or as intoned by Flick, “the great tides and currents that engulf the rest of mankind”.5 Thus, it is not the personal convictions of a judge that is at issue, but the assurance that her determination of the dispute will be based on objective appraisal of the facts placed before her.

However, the determination of the kind of activities, conduct or even prior engagement that should raise legitimate concerns about the adjudicator’s ability to fairly apply his/her mind to the case has always proved elusive. Even in cases where an adjudicator’s participation in an appeal is contested on the ground of his/her past engagement with the dispute, as in South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) (SACCAWU),6 questions still arise as to whether the level of the adjudicator’s prior involvement was of a kind that “a fair minded observer might entertain a reasonable apprehension of bias by reason of pre-judgement”.7 The threshold to be surmounted by the litigant alleging bias was stated in this case to be whether there was a live and significant issue in the matter before the appeal, or about a witness significant to the same, upon which the judge had expressed clear views on, and which would cause a reasonable person to apprehend bias.8 But the precise guidelines for determining whether circumstances met this threshold were not provided. In fact, by reading the dissenting opinion

4See e.g. the Canadian cases of Halfway River First Nation v British Columbia (Ministry of Forests) (1999) 178 DLR (4th) 666 paras 67-75, where a District Manager acted in both investigative and adjudicative capacities, and the court held that the expression of a tentative or preliminary opinion on what the evidence showed at the investigative stage did not necessarily amount to a reasonable apprehension of bias); Liszkay v Robinson (2004) 232 DLR (4th) 276 paras 49- 57 and 70, where the British Columbia Court of Appeal held that where a judge had a relevant interest in a case before him/her, such as having a broadly similar personal claim against one of the parties before the court, there existed a substantial basis from which a reasonable apprehension of bias could arise.


62000 (3) SA 705 (CC).

7See para 32.

8See para 33. Note the construction here of the “double reasonableness” test adopted from President of the Republic of South Africa and Others v SARFU and Others (2) 1999 (7) BCLR 725 (SARFU).
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of Mokgoro and Sachs JJ in the same case, one gets the feel of the complexity of the matter and the differences that arise among judges on whether the test has been met.\(^9\)

In this article, we attempt to analyse the trends in the law of prejudgement that emerge from the decisions of the courts in the Commonwealth with a view to predict how South African law in this area is likely to develop. We begin by attempting to place a meaning to prejudgement as a distinct area of law. In this regard we posit what we consider to be the differences that can be discerned between prejudgement and other interests that equally give rise to apprehended bias. From utility perspective, we distil the applicable test—that of the “fair minded observer”—and attempt a rather broad analysis of how the test has been applied across jurisdictions.

2 WHAT CONSTITUTES PREJUDGMENT?

Simply put, prejudgment means preconception, predisposition or bias.\(^10\) It means that a decision has been made or an opinion has been formed, most often unfavourable, about a person or issue before knowing or examining all the facts. With this understanding, the courts do not often attempt a definition of the term perhaps, justifiably so. As already stated, prejudgment equates to bias, which is an equally complex term. In effect, prejudgment and bias are two different terms expressing the same thing. In a way, therefore, prejudgment defines the category of bias alleged by a party or identified in a judgment. Where it is found to exist, it is equivalent to saying that there was bias in fact. The true essence of prejudgment is, however, revealed in decided cases, judicial proceedings and the decision-making process. For instance, the language of the majority of the Supreme Court of Canada in Old St Boniface Residents Association Inc. v City of Winnipeg\(^11\) clearly brings out the point argued here. To begin with, the decision-maker must be “capable of being persuaded”, whereas prejudgment operates to the extent that any representation(s) “would be futile”.\(^12\) And a statement amounting to prejudgment must be an expression of final opinion “which cannot be dislodged” and the position of the person deciding must be “incapable of change”.\(^13\)

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\(^9\) The dissenting opinion laid emphasis on the objective assessment of the litigant’s perception of impartiality: “It is not as though the learned judges were on trial….The test should rather be whether any litigant in the shoes of the appellant would, from reading the judgment as a whole including words of particular pertinence, come to a reasonable grounding that a prejudgment had been made by the members of the court.” Para 66.

\(^10\) It may also mean “prejudice”. See Newman “Prejudice and prejudgment” (1979) 90 (1) Ethics 47.


\(^12\)Ibid at 1197c-e.

\(^13\)Ibid at 1197f-g. See also Save Richmond Farmland Society v Richmond [1990] 3 SCR 1213 at 1224.
Australian decisions disclose similar trends to Canadian case law. For instance, Gleeson CJ and Gummow J, in *Minister for Immigration & Multicultural Affairs v Jia Legeng*\(^{14}\) framed the question in the form of the test whether the decision-maker was open to persuasion. In their view, prejudgment contemplated the question whether the “conclusion already formed was incapable of alteration, whatever evidence or arguments may be presented”. \(^{15}\) Another judge in the same case, Hayne J, held that a decision-maker has prejudiced or will prejudge an issue, if: (a) there is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case; (b) there is the contention that the decision-maker will apply that opinion to the matter in issue; and (c) there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. \(^{16}\) However, he observed that preconceived opinion or allegation of bias through prejudgment did not constitute bias if it did not follow that the evidence would be regarded. \(^{17}\) Thus, the notion “open to persuasion” is central to the manner of formulating bias by prejudgment. \(^{18}\)

### 2.1 Predetermination and Bias: Do they mean the same thing?

Although we have seen that predetermination and bias often go together, Fogarty J of the High Court of New Zealand suggested in *Howe v Keown*, \(^{19}\) that it was dangerous to think of the two as synonyms. His reasoning was that “a person can be predetermined upon an outcome being in favour of any particular person” and that “a person can be biased without being predetermined as to the outcome.” \(^{20}\) The Judge was dealing with a situation where, upon allegation that a councillor had publicly stated his support for the reappointment of the outgoing CEO of the Christchurch City Council, an injunction was sought, by a concerned ratepayer, restraining the councillor from participating in the selection of the new CEO. The applicant relied on three different actions of the councillor which cumulatively precipitated the risk of apparent bias. The first was obviously the demonstration by the councillor that he had predetermined the appointment. Secondly, that he had demonstrated apparent bias, and

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\(^{15}\) Ibid para 72. See also per Gaudron & McHugh JJ in *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 100; *F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No 2)* [2007] NSWLEC 537.

\(^{16}\) *Jia Legeng* [2001] HCA 17 para 185.

\(^{17}\) Para 186; per Charles J, *R v London County Council; Re Empire Theatre* (1894) 71 LT 638 at 638.


\(^{19}\) [2011] NZHC 947 (2 September 2011).

\(^{20}\) Para 4.
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Lastly that he breached the statutory code of conduct by not being objective, an act which in itself “demonstrated a real danger of bias in that he might unfairly regard with favour the application of other applicants”.\textsuperscript{21} The question therefore was whether the defendant, in favouring the retention of the CEO, should either stand aside, or be excluded by injunction from participating in the Council’s deliberations.\textsuperscript{22} There was no suggestion that the councillor in question favoured the CEO because of family affiliations, social connections or financial considerations. The matter all boiled down to closed mind or predetermination.\textsuperscript{23}

After analysing the statutory criteria and process governing the appointment of the CEO, the trial judge held, first, that Parliament intended the councillors to take full political accountability to the ratepayers for the appointment of the CEO.\textsuperscript{24} Secondly, the law requires the council to review the employment of the CEO at least six months before the end of the term.\textsuperscript{25} In the circumstances, it is only natural that councillors would have individual views as to the quality of the performance of the CEO and his suitability for retention during discussions and selection.\textsuperscript{26} Thirdly, the council has discretion under clause 34(4) of the Schedule to the Local Government Act either to reappoint the CEO for two years or to advertise the post. Fourthly, the councillors can develop a policy, individually or as a group as to how the candidates are to be selected having regard to the statutory criteria and any additional criteria of their own.\textsuperscript{27} Fifthly, that “there is an important difference between developing a policy before a decision is made and pre-determining a decision”. So, whereas certain case may raise questions of an overly strong policy, they should be evaluated “in terms of the language of pre-determination or closed mind, rather than in the language of bias”.\textsuperscript{28} Although, in the final analysis, Fogarty J did not rule out as a possibility that the defendant might have had a closed mind, subconsciously, this was not proved on the facts. It was therefore not proper to order an injunction on the basis that there was a possibility that he might have closed his mind in a case where Parliament had deliberately required the decision

\textsuperscript{21}Para 3.  
\textsuperscript{22}Para 5.  
\textsuperscript{23}Howe paras 31 and 32.  
\textsuperscript{24}Howe para 19.  
\textsuperscript{25}Local Government Act 2002 Schedule 7 Clause 32(1).  
\textsuperscript{26}Howe para 20.  
\textsuperscript{27}Howe paras 27 and 28.  
\textsuperscript{28}Ibid paras 29, 30 and 31. See also, Creed NZ v Governor General [1981] 1 NZLR 172 (CA); Devonport BC v Local Government Commission [1989] 2 NZLR 203 (CA).
to be taken by all elected councillors. The defendant was one of 12 or 13 councillors who were to consider and debate the merits of the competing applicants. ²⁹

It may be worthwhile to note that the distinction between the two terms as elucidated above may be tenable in administrative processes than in judicial proceedings. In judicial proceedings, preconceptions held by judges are more likely to give rise to an apprehension of bias than the preconception of a commissioner participating in an administrative enquiry in the field of that agency’s professional competence. The justification is not hard to find. To begin with, there is often a presumption that individuals appointed to run administrative agencies are persons having expertise in the fields relevant to the functions of the respective agencies. It is therefore fool hardy to expect that the experts will not have preconception about the issues their agency is tasked to deal with. Consider for a moment the kind of personality an ideal commissioner say, a human rights protection agency, would have. Personalities suited for such appointment would be those who hold strong opinion about human rights issues and may have been victims of egregious human rights violations themselves.

Apart from the forgoing, factors such as statutory authority, policy issues and sometimes codes of practice often combine to mellow the stringent effects of predetermination by a councillor or commissioner in the discharge of his/her administrative decision-making function. This is especially the case where decisions have to be made by many people and not just the one councillor or commissioner whose predetermination is called into question. This point was canvassed in Howe. Similarly, in McGovern v Ku-Ring-Gai Council and Another, ³⁰ the decision of a multi-member municipal council was challenged on the ground that two members of the council had predetermined A’s application for approval of development on her property. A’s neighbours, who were the applicants, alleged that e-mail communications after the lodgement of the plan between A and two councillors showed that the councillors supported the plan. Accordingly, they challenged the council’s approval on the basis of apprehension of bias on questions of partiality and prejudgment on the part of the Mayor and Deputy Mayor who were part of the majority who voted for the approval of the development application.

²⁹ Howe para 43.
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The Court of Appeal of New South Wales reiterated the view that in the context of a multi-member elected decision-making body, there is no requirement that each kept an open mind until every decision-maker was prepared to make a decision. And where apprehension of bias was held to exist in the circumstances of multi-member elected decision-making body, it involved conflict of interests which would require the person not to participate, not prejudgment situations as in the case of a court of law. Again, Spigelman CJ (Campbell J agreeing) observed that the fact that the two councillors came to a conclusion that the application should be approved prior to the final decision, and expressed themselves, in strong terms did not of itself establish that they were not open to persuasion. It was apparent the councillors formed their views after considering all the information available to them, particularly the report by council officers, and on direct observations. The judge also found that none of the councillors had taken steps or made statements that constituted a proper basis for a finding that they were not open to persuasion.

So, whereas the common law may require public powers to be exercised fairly, the statutory provisions may in certain instances, impose a process which virtually guarantees that the decision-makers would have formed strong views before the hearings started. This by no means infers that the law against prejudgment is not applicable in administrative decision-making processes. Our discussions thus far have demonstrated that there can be a premise for characterising its application in administrative processes as being less stringent. But this apart, the requirement that administrative decision making should be approached with an open mind is still of cardinal importance.

2.2 Distinguishing prejudgment from interests

It is important to mention that there is a distinction between the allegation of prejudgment and the personal interest of the judge in the outcome of the case in court. Both Canadian and Australian courts have endeavoured to provide that distinction. Thus, in Old St Boniface

31 Spigelman CJ paras 51 and 56, per Campbell J para 236.
32 Examples cited by Spigelman CJ [paras 38-39] include: (a) the person is the complainant or accuser with respect to the matters the subject of inquiry: Dickason v Edwards (1910) 10 CLR 243; Stollery v Greyhound Racing Control Board (1972) 128 CLR 509; (b) the person formally opposed an application and made representations to the decision-making body of which s/he was a member, where those representations were required by statute to be taken into account: R v West Coast Council; Ex parte Strachan Motor Inn (1995) 4 Tas. R 411; (c) the person opposed the application and instructed a lawyer to appear at the hearing to argue against its acceptance: R v London County Council; Ex parte Akkersdyk & Fermentia [1892] 1 QB 190; (d) the person otherwise becomes, in substance, a party to the proceedings: Cooper v Wilson [1937] 2 KB 309.
33Spigelman CJ, paras 49- 50, 59-61.
Residents Association Inc v City of Winnipeg, 35 Sopinka J sought to distinguish the case of partiality by reason of prejudgment, on the one hand, from that of personal interest on the other. While in the present case there was inherent in the role of the councillors a degree of prejudgment, such did not exist in respect of interest. The court observed:

“There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make a mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest… Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.”36

Again, in McGovern v Ku-Ring-Gai Council37 Spigelman CJ held that if, as a matter of substance, the decision-maker had placed him/herself in the position of conflict of interest, and therefore became a party to the decision-making process, a conflict of interest could then arise. Similarly, where the involvement of a person in the decision-making process could “be characterised, in substance, as constituting him or her a party to the proceedings” the issue was not one of ‘prejudgment’ but of ‘conflict of interest.’38

3 THE “FAIR-MINDED OBSERVER” TEST

It is clear from the jurisprudence of the common law that the test for the independence of the court and impartiality on the part of the judge as universally applied by the courts is an objective one expressed in the time-honoured language of “reasonableness”. And yet specifying the characteristics of this ubiquitous and hypothetical persona of the common law has remained a difficult task. In the early development of the common law, the predominant phrase was that of “the reasonable man”. However, the common law judges in their effort to pinpoint that elusive human to whom the standard of public justice should be ascribed, have used a number of phrases, such as: “the parties or the public”;39 “reasonable and well-informed member of the community”;40 “well-informed, thoughtful and objective observer” and “reasonable and informed observer”;41 “reasonable and right-minded persons”

36Ibid at 1196.
38Para 28.
39Livesey v NSW Bar Association (1983) 151 CLR 288 at 293.
41Sole v Cullinan 2003 (8) BCLR 935 (Les CA) at 950 paras 48 and 49.
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or “informed person”;42 “reasonable, objective and informed person”;43 “right-minded people”;44 “hypothetical reasonable observer”; “the fictional observer” or “the fictitious bystander”.45 In recent times, however, the constant reasonableness standard has been attributed to “a fair-minded observer”.46 This latter terminology has gained popularity over the others previously employed by the courts and it is currently deployed by judges in their modern formulations of the double-reasonableness test.47

The reality of the matter is that notwithstanding the interposition of the fair-minded observer, it is the decision of the judge, and in most instances, the very judge against whom the recusal application is filed that eventually counts. It is thus not surprising that Olowofoyeku submits: “In the end, despite the pitch on objectivity and the view that the apprehensions of bias must have an objective basis, it is the opinion of the reviewing court on this issue that matters.”48

What, however, is contentious, is his view that the judicial construct of the informed observer no longer provides a reliable guide to decision-making on the issue of apparent bias.49 Be that argument as it may, the view expressed by French CJ’s in British American Tobacco Australia Services Limited v Laurie (BATAS)50 that the utility of the construct is that it reminds judges of the need to view the circumstances of claimed apparent bias through the eyes of non-judicial observers, presents a balanced counter argument. According to the Chief Justice the use of lay observers who do not have recourse to all the information that a judge or practising lawyer would have, requires the judges to identify the information on which they are to make their determinations. “While it is necessary to be realistic about the limitations of the test, in my opinion it retains its utility as a guide to decision-making in this difficult area.”51

43President of the Republic of South Africa and Others v SARFU and Others(2) 1999 (7) BCLR 725 para 48.
44Metropolitan Properties Ltd v Lannon [1969] 1 QB 577 at 599.
47In addition to the instances discussed in this section, see also the emphasis on the “fair-minded observer” by Deane J in Webb v The Queen (1994) 181 CLR 41 at 73-74.
49Olowofoyeku, 396.
51BATAS para 48.
In light of the fact that the issue of judicial impartiality or the rule against bias at common law has been characterised by a “legacy of confusion”\(^{52}\) and a “somewhat confusing welter of authority”\(^{53}\) left by the real likelihood and reasonable suspicion tests, respectively, attempts have been made in the last two decades by courts across the Commonwealth not only to streamline and refine but also to reformulate the test for determining the impartiality of a judge. This effort has brought about two seemingly desirable results. First, while the reasonableness standard has remained literally immutable, the vocabulary of the “reasonable man”, has given way to that of the “fair-minded observer”. Secondly, the real likelihood and reasonable suspicion tests along with the tentative English “real danger” test, supposedly meant to ensure that “the court is thinking of possibility rather than probability of bias”\(^{54}\) have all been jettisoned and replaced in many jurisdictions with the double-reasonableness test.

3.1 Knowledge attributable to the fair-minded observer

By far, the Australian courts are foremost in articulating the role, qualities and characteristics of the fair-minded observer in the context of judicial impartiality and bias. In assessing what the hypothetical reaction of a fair-minded observer would be in *Laws v Australian Broadcasting Tribunal*,\(^{55}\) Mason CJ and Brennan J stated that the knowledge to be attributed to the fair-minded observer must relate to the actual circumstances of the case. In *Webb v R*,\(^{56}\) Deane J held that it must be “a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court. The material objective facts include, of course, any published statement, whether prior, contemporaneous or subsequent, of the person consent.”\(^{57}\) Further emphasis was laid on the facts of the case in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*\(^{58}\) where the question was whether the trial judge was disqualified from sitting because when he was in practice, he had been “a Caltex barrister”. Kirby P held that whether there was an apprehension of bias depended upon “a full

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\(^{52}\) Lord Goff, *R v Gough* [1993] 2 All ER 724 (HL) (*Gough*).

\(^{53}\) *Hannan v Bradford Corporation* [1970] 1 WLR 937 per Widgery LJ.

\(^{54}\) *Gough* at 670. See also *R v Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All ER 139 at 162; *R v Spencer* [1987] AC 128.


\(^{56}\) (1994) 181 CLR 41 at 73.


\(^{58}\) (1988) 12 NSWLR 358 (CA) at 368-369.
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understanding of the facts from which it is suggested that such apprehension [of bias] arises”. For instance, where such facts involved a family, financial or professional relationship, its duration, intensity and nature were all relevant. Again, Kirby P dissented in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* because the majority attributed excessive “sophistication and knowledge about the law and its ways which [he believed] to be quite atypical of the general community”. Again, in *Australian National Industries Ltd v Spedley Securities Ltd*, Kirby J at the High Court held that the court should not attribute “to the hypothetical reasonable observer a level of sophistication which may be enjoyed by judges and other lawyers (or by educated or informed citizens)”.61

English courts have of late contributed in this regard. Lord Woolf CJ held in *Taylor and Another v Lawrence and Another* that the informed observer in England today can perhaps “be expected to beware of the legal traditions and culture of this jurisdiction.” And in *Lawal v Northern Spirit Ltd*, the House of Lords added that such an observer “may not be wholly uncritical of this culture.” Their Lordships equally accepted that the fair-minded observer might be more prone to adopt a balanced approach and be “neither complacent nor unduly sensitive or suspicious.”64 Again, in *R v Abdroikov and Another* where Lord Bingham said that the characteristics of the fair-minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious. Lord Mance spoke of the fair-minded and informed observer as a reasonable member of the public neither unduly compliant or naïve nor unduly cynical or suspicious and adopting a balanced approach.67

Quite recently, Lord Hope captured the practical utility of the fair-minded and informed observer who, though a relative “newcomer”, is “among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs

59 (1988) 12 NSWLR 358 (CA) at 376.
60 (1992) 26 NSWLR 411 at 419.
62 [2003] QB 528 paras 61-64.
64 See also *R v Khan and Others* [2008] EWCA Crim. 531, [2008] 3 All ER 502, [2008] 2 Cr App R 161 (CA).
66 Para 81.
67 See also per Lord Clarke, *Tibbetts v Attorney General of the Cayman Islands* [2010] UKPC 8 paras 3 and 4.
to be solved objectively.\textsuperscript{68} First, like the reasonable man of the common law,\textsuperscript{69} the fair-minded observer is a creature of fiction. Secondly, because it is gender-neutral, she possesses attributes which ordinary mortal might struggle to attain to.\textsuperscript{70} Thirdly, the fair-minded observer is the kind of person who always reserves judgment on every issue so as to fully understand the arguments of the parties.\textsuperscript{71} Fourthly, she is not unduly sensitive or suspicious neither is she complacent.\textsuperscript{72} Fifthly, and most importantly, her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. The fair-minded observer “knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.”\textsuperscript{73} Finally, there is the attribute that the observer is "informed". This means that “before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”\textsuperscript{74}

Thus, when in \textit{Saxmere 1},\textsuperscript{75} Blanchard J adverted to the fair-minded lay observer being presumed to be intelligent and to view matters objectively, he was reiterating views already expressed by Commonwealth judges and already discussed in this paper. Adopting per Lord Hope in \textit{Helow}, Blanchard J added that the fair-minded lay observer must be taken to be a non-lawyer but reasonably informed about the workings of the judicial system, the nature of

\textsuperscript{68}\textit{Helow v Secretary of State for the Home Department}, [2009] 2 All ER 1031 (HL) para 1 (\textit{Helow}).
\textsuperscript{69} Speaking of the characteristics of the reasonable person in \textit{Herschel v Mrupe} 1954 (3) SA 464 (A), the Appellate Division observed that he/she is not “a timorous faint-hearted always in trepidation lest he or others suffer some injury; on the contrary, he ventures out in the world, engages in affairs and takes reasonable chances.”\textsuperscript{71}
\textsuperscript{70}\textit{Helow} para 1.
\textsuperscript{71}\textit{Helow} para 2.
\textsuperscript{73}\textit{Helow} para 2.
\textsuperscript{74}\textit{Helow} para 3.
\textsuperscript{75}\textit{Saxmere 1} para 5.
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the issues in the case and the facts pertaining to the situation which gave rise to an appearance or apprehension of bias. Given the attributes accorded the fair-minded observer, According to McGrath J thought that he/she should take a balanced and intelligent view of the matter in consideration. And while informed of matters of legal tradition and culture, the fair-minded observer will in appropriate circumstances be prepared to question them. This approach to ascertaining if there is disqualifying bias is a principled one which will require judges to be guided by reasonable public perspectives. Properly administered by the courts, it will be capable of engendering the necessary public confidence in the integrity of the judicial system in this aspect of administration of justice.76

4 APPLICATION OF THE “FAIR-MINDED OBSERVER” TEST TO PREJUDGMENT CASES

As already alluded to, prejudgement is dependent on whether a fair-minded observer would on the facts available apprehend bias on the part of the judge. But the application of the fair-minded observer test in any given case, like every guiding tool of adjudication, presents its own peculiar problems. For instance, we have shown in the previous section that courts battle to determine the level of knowledge with which the fair minded observer should view the administration of justice. Secondly, the terminology may often be confusing. In South Africa for example, incipient decisions talk of a “reasonable, objective and properly informed person”, as opposed to a “fair minded observer”, when dealing with prejudgment cases.77 The other problem that is often mentioned is that the application of the test does not necessarily guarantee that the judges in a case will come to the same conclusion. Whether or not a “fair minded observer” in any particular instance could apprehend bias is, and will always be, a matter of opinion of the individual judge. It is thus true as an Australian Judge once said that the test is not always easy to apply as “it may involve questions of degree and particular circumstances may strike different minds in different ways”.78 But this difference of opinion among judges is not unique to prejudgment. Moreover, we have come to agree that the broad principle of fair hearing—upon which the “fair minded observer” test is based—is never undermined solely by a difference in opinion among the panel of adjudicators.

76 Saxmere (1) paras 98 and 99.
77 See Ndlou v Minister of Home Affairs2011 (2) SA 621 (KZD) (Ndlou).
78 Per Aickin J, In Re Lusink and Shaw; Ex parte Shaw (1980) 55 ALJR 12 at 16, 32 ALR 47 at 54. See also Livesey v New South Wales Bar Association (1983) 151 CLR 288 at 294 (Livesey).
Despite these problems, the law on prejudgment seems to be developing. Jurisprudence is replete with instances where the issue of prejudgment have been alleged and the determination thereof made on a case to case basis. One seemingly popular instance tends to revolve around the argument that the earlier writings by judges demonstrate prejudgment and, therefore bias on their part. Another fairly common ground is where parties allege prejudgment arising from the comments during submission or in the motion or, as in Antoun v R, the prejudgment issue consisted of the very strong preliminary view expressed by the judge. The case in R v Curragh Inc was that the Judge telephoned a senior staff in the Attorney General’s office expressing displeasure with Crown Attorney’s handling of case in court. Whereas in Re Colina; Ex parte Torney where public statements by the Chief Justice which were critical of certain persons and taking issues with criticisms of the Family Court would have prejudiced the contempt trial before that court in that the trial judge might not bring a fair and unprejudiced mind to the performance of his task. In Dupas v The Queen, it was contended that the pre-trial publicity gave rise to irremediable prejudice such as would preclude his fair trial at any time. In other words, the apprehended defect in the appellant’s trial, namely unfair consequences of prejudice or prejudgment arising out of extensive adverse pre-trial publicity was capable of being relieved against by the trial, in the conduct of the trial, by thorough and appropriate directions to the jury. There was, therefore, no evidence that the appellant was deprived of a fair trial as to warrant a permanent stay.

In the following part, we set out two areas in which we see the law on prejudgment taking root to illustrate how the test have been applied or misapplied. These are situations where there is an earlier ruling or determination by the tribunal and where the judge had given a public lecture or speech. Apparently, these two situations have attracted broader application of the test because they indicate some possibility of the judges having interacted with the issues prior to the proceedings before the court. Obviously, there are many other situations where prejudgment might arise. The two instances given below are mere examples but they provide,

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80 Livesey; Ndlovu; DPP v Drumbrell [2010] IECCA 84.
81 Downey v Acting District Court Judge Boulton (No 5) [2010] NSWCA 240, (2011) 272 ALR 705 paras 154-175.
83 144 DLR (4th) 614 (SCC).
86 Ibid paras 38-39. See also Banana v Attorney General 1999 (1) BCLR 27 (ZS).
nonetheless, a platform for analysing the utility of the test, and identifying the general trends in the development of the law in this field of public law.

4.1 Earlier ruling of the tribunal

Claims of bias based on prejudgment do not arise because a judge had previous association with a party in court, but most certainly, they arise in situations where a judge or adjudicator is associated with an earlier decision affecting the matter before her/him. The allegation would be that the judge had predetermined the issue and therefore unlikely to approach the matter with an open mind as in any instance of apprehended bias. However, the courts in South Africa have, since R v Silber through Take & Save Trading CC v Standard Bank of SA Ltd down to Basson (2), consistently stated that it is rare that a court will uphold a complaint of bias arising from a judge’s conduct during a trial. They affirm that it is not inappropriate for a court to express views about certain aspects of the evidence; even an incorrect view will not be sufficient to ground a claim for bias.

In British American Tobacco Australia Services Ltd v Laurie, an application was made for disqualification of the judge on the basis of a reasonable apprehension of bias. The judge had made a finding on a different matter that BATAS had drafted and adopted a management policy for purposes of committing fraud. This was an interlocutory finding made in the course of determining the admissibility of evidence tendered by a former employee of BATAS. Although the matters were different, the defendant’s case depended on proof that BATAS had such a policy. Therefore, the company made an application for the judge to disqualify himself from hearing the matter on the ground that his finding in the earlier case gave rise to reasonable apprehension of bias. The judge refused the application, reasoning that in the earlier matter, the finding was interlocutory and therefore not a bar to further evidence being adduced at the trial. On appeal to the High Court, the majority allowed the appeal and ordered that the trial judge be prohibited from further presiding over the matter. They held that the hypothetical observer is reasonable and understands that the judge is a

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87See e.g. BTR Industries South Africa (Pty) Ltd v MAWU 1992 (3) SA 673 (A) where the alleged apparent bias was based on the fact that the President of the Industrial Court, in the middle of a lengthy dispute before him between labour and management, participated in a seminar arranged by management’s industrial relations consultants and in which management’s lawyers all presented papers.

881952 (2) SA 475 (A) at 481C-H.

892004 (4) SA 1 (SCA) para 5.

902005 (12) BCLR 1192 (CC) para 43.

91Basson (2) paras 67-70.

professional judge. Nonetheless, the observer is not presumed to reject the possibility of prejudgment. ⁹³ If it were otherwise an apprehension of bias would never arise in the case of a professional judge. ⁹⁴ On the question that the judge had acknowledged that his earlier findings did not preclude the possibility that different evidence could be called to establish whether the policy was fraudulent, and that this was still alive issue for trial, the High Court found that the judge’s findings were otherwise expressed to be without qualification or doubt, and indicated extreme scepticism about BATAS denials and strong doubt about possibility of different materials leading to different outcome.

The question still remains under what circumstances can findings or statements made in an earlier proceeding give rise to a reasonable apprehension of prejudgment by a fair minded observer? The court in Livesey held that findings on an interlocutory application must have been expressed in a conclusive way—suggesting that the finding must have been intended to be permanent—for it to give rise to a reasonable apprehension of bias. ⁹⁵ However, if a judge merely expresses an opinion on a legal principle before hearing full argument, this alone cannot amount to an apprehension of bias. Similarly, a dialogue between the bench and the bar will not necessarily give rise to apprehension of prejudgment unless certain thresholds are met. If, however, the impression created by the judge’s statement or conduct in earlier proceedings was that his/her mind was closed to persuasion, there would be prejudgment. In BATAS, for example, the court found that despite the possibility of the evidentiary position changing, a reasonable observer would still be persuaded that “the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion,” and that in the circumstances, “a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding”. ⁹⁶

In SACCAWU, an earlier South African decision, this general idea had been espoused except that the court was much more explicit on the need to fulfil one of the limbs of the “double reasonableness” test adopted from SARFU that speaks to the necessity of determining the “reasonableness” of the issue upon which the judge had expressed clear views, provoking an

⁹³Livesey at 299 per Mason, Murphy, Brennan, Deane and Dawson JJ.
⁹⁴BATAS para 144.
⁹⁵Livesey at 299.
⁹⁶BATAS para 145.
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It was suggested that the issue must be *live and significant* for it to give rise to apprehension of bias on the basis of prejudgment. It seems, therefore, that unless the statement or finding in an earlier proceeding is conclusive and relates to a live and significant issue, a fair minded observer may not apprehend prejudgment in the circumstances. In the same vein, if the credibility of a witness has been adjudicated and adverse findings made in that regard, that witness cannot give evidence subsequently on the same matter or topic, if her credibility is crucial to the outcome of the case, without incurring apprehension of bias on the basis of prejudgment.

4.2 Public lecture/statement by judge

In the same way that findings in earlier proceedings may give rise to alleged apprehension of prejudgment, so are public statements made by judges. But there are differences in the way the apprehension arises. While in prior proceedings prejudgment is often based on adjudicators past association with the issues for determination or witnesses in court, in public lectures/statements, prejudgment revolves around the link between what was said and the case in court. This difference explains why proving prejudgment in the latter is often much more onerous. Two cases, from two different jurisdictions, are instructive as to how the courts have handled public lectures made by judges on the subjects before them in court—*Ndlovu v Minister of Home Affairs* and *DPP v Drumbell*. In both cases, recusal applications were made based on prejudgment. In *Ndlovu*, an application was made for the recusal of Judge Wallis of the Kwazulu-Natal High Court on the basis of what he had stated in a public lecture regarding contingency fees charged by lawyers. The judge had expressed fears that contingency fee arrangements benefited lawyers more than their clients and that there was no evidence that they facilitated the quick disposal of cases. The lecture was subsequently published in a law journal and thereby became accessible to the litigants. The applicants claimed “that a reasonable person would reasonably apprehend bias on the part of the judge in addressing the question of costs in the applicant’s application”. The matter concerned 252 applications for review made against the Department of Home Affairs. The applicants were unhappy not only with the contents of the lecture and the publication, but also, with what was referred to as “other” conduct. Here, the applicants summarised snippets of

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97 *Ndlovu*[2011] (2) SA 621 (KZD).
98 *Drumbell*[2010] [IECCA] 84.
99 *Ndlovu*, para 15.
questions that the judge had asked during the proceedings in earlier matters, and claimed that these fortified the apprehension of bias arising from the lecture.

Dismissing the claim, Wallis Jacknowledged that what would be relevant in considering whether his lecture and subsequent publication gave rise to apprehension of bias, was the views of a “reasonable person who is fully informed and in possession of the correct facts”. Undoubtedly, this reasonable person is no different from the “fair minded observer” as alluded to in BATAS. The question, therefore, was whether this person, “would on correct facts reasonably apprehend that the judge has not brought 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 submission of counsel”. If the facts upon which the apprehension arose were the speeches and its published version, then the applicant needed to establish that there was a link between the speeches and the case in court. The link must be such that a reasonable, objective and “properly informed person” would perceive as giving rise to apprehension of bias. In this case, such a link did not exist because there was no reference to the cases. The speech was of a general nature, meant to simply highlight some of the concerns about the workings of the legal system. There was no specific reference to the applicants or their cases. In fact, at the time when the speech was made, “the applicant’s case and other 251 were not before the court.” The judge concluded that there was indeed no basis for thinking that a reasonable person would consider him capable of deliberately denying a litigant an order for costs which he/she is entitled to because of the views expressed in the lecture.

Something needs to be said about the reference to “properly informed person”. It seems that such person must be of the kind that would understand the nature of the judge’s work and the legal processes in general. The inference here is that the “properly informed person” must be possessed of some technical knowledge or have insights on the workings of the judicial system. Such a person would probably be aware of the presumption of impartiality which arises from the judge’s oath of office, “to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law”. Secondly, such a person would be aware that public speeches made by judges, not only fulfil an important public need for legal information, but also, provide opportunities for judges to share their

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100 Ndlovu para 21
101 Ndlovu Para 30.
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experience towards dealing with problems within the legal community. And that in the processes of making such speeches judges are not precluded from expressing strong views on legal issues of broader concern to the public. Considering these two aspects, one might view the test of “fair minded observer” as much more onerous on public speeches than on prior proceedings.

In *DPP v Drumbell*, the appeal before the Irish Court of Criminal Appeal was that: “[t]he trial judge erred in law and in fact in failing to discharge the jury during the course of the trial in circumstances where the possibility existed of the jury being biased as against the accused due to the adverse publicity attaching to a lecture delivered by the learned trial judge during the trial”. In essence the applicants submitted that statements made by the learned trial judge at the time of the trial but at another venue, coupled with the ensuing publicity and the particular circumstances of the case, were such that there was a real risk or likelihood that the jury were prejudiced in the issues which they had to decide and that as a consequence the verdict must be considered as unsafe. Counsel for the applicants submitted that the nature and content of the trial judge’s address was such that there was a direct correlation between the contents of the address and the facts and issues in the trial over which the judge who made those remarks was presiding at the time. It was submitted that a trial judge’s relationship with a jury is unique and anything said by a trial judge during the trial, even if outside the trial, which comes to the notice of the jury carries a special weight and neither an accused nor his counsel are in a position to make any countervailing steps. The applicants did not contend for actual bias but objective bias on the part of the jury. They contended that there was objective bias because the nature of the statements made in this case were such as to create in the minds of a reasonable observer an apprehension of bias on the part of the jury against a verdict of manslaughter. It was submitted that to embark on an address on the issue of knife crime and the inappropriateness of sentences in cases where manslaughter verdicts are returned was to create a situation where the accused could have legitimate reason for a fear of lack of impartiality on the grounds that there was a reasonable apprehension the jury may have been influenced by the contents of the speech in question. In the particular circumstances of the case there was a real risk of bias on the part of the jury and therefore, as a matter of law, the verdict must be considered as unsafe.

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103 *Drumbell*[2010] IECCA 84 (available at [http://www.bailii.org/ie/cases/IECCA/2010/C84.html]).
The court considered that the case had its own special circumstances which were encapsulated in three factors. The first was that the statements in question were made by the presiding judge at the trial. The trial judge is the central figure of authority in a trial. The jury was exclusively responsible for findings of facts but they exercise their function under the guidance and directions of the trial judge. The second was the immediacy of the statements to the trial. They were made on the evening of the fifth day and publicised primarily on the sixth day of a ten-day trial. The third factor was the nexus between the statements, bearing the key factors in mind and the nature of the trial in which the jury were then sitting and the issues which they had to decide. Having regard to all the circumstances of the case and the evidence before it, and in particular, the combination of the three factors, the court concluded that a reasonable person would have a reasonable apprehension that a juror, or jurors, might have been either consciously or unconsciously influenced by the contents of the address referred to and the subsequent publicity given to it. This apprehension is particularly applicable to any issue as to whether the verdict should be guilty of manslaughter or guilty of murder. Accordingly the court was satisfied that a reasonable person could have a reasonable apprehension that the applicants did not receive a fair trial. In those circumstances the trial was considered as offending against the principles of constitutional justice and the verdict considered unsafe. The court therefore set aside the verdicts in the case of each of the two applicants and ordered a retrial.

Although there is similarity between Drumbell and Ndlovu in the source of the statements that were thought to constitute prejudgment, the outcomes were different. Both statements were made at a public lecture. The judge in Drumbell was an “adjunct professor of law” at the Faculty of Law, University College Cork in Ireland. His lecture was at annual function of the Faculty of Law. Likewise, Judge Wallis was delivering the Victoria and Griffiths Mxenge Memorial Lecture at the University of KwaZulu-Natal. Both lectures received great publicity. But the reason why the outcomes were different can be discerned from the manner in which the reasonable person or fair minded observer test was applied. It is noteworthy that in every case, it wasn’t just the statements made, but an accumulation of factors and events were considered, and these will be different in every case. Consider, for example, the fact in Drumbell, unlike Ndlovu, the trial was on-going at the time the lecture was delivered and the issues allegedly discussed by the judge at the lecture had some link with those that would eventually determine the guilt of the accused. Secondly, Drumbell was a criminal trial, meaning that the liberty of the accused was at stake. Ordinarily, a judge hearing a criminal
case has the responsibility not only to ensure a fair trial but also, safeguard a full array of rights that the accused persons are entitled to. Thirdly, it was a jury trial, which meant that perceived instructions from the judge, in or out of court, at any stage of the trial could be taken seriously by the jurors, no matter the circumstances in which the statements were made. These combination of factors were absent in Ndlovu where the civil proceedings were manned by the alone. Moreover, if the knowledge of the “fair minded observer” were to be pitched on the same level as that of “reasonable, objective and properly informed person” alluded to in Ndlovu, then, the conclusions reached by the appeal court in Drumbell were not at all unreasonable.

5 CONCLUSIONS
We have attempted to distil some of the salient features of the law on prejudgment from the leading cases across the Commonwealth. As readily noticeable, there are not many South African decisions that have dealt with this aspect of bias, but it seems probable that the law will develop along the lines of SARFU, where “double reasonableness” was stated to be the yardstick for measuring the apprehension of bias. Indeed, as we have argued in this article, Ndlovu has extended the “reasonableness” criteria by introducing the qualification of “properly informed person”, thereby creating some consonance with the “fair minded observer test” hallowed in Canada and Australia. Therefore, it may be safe to suggest that prejudgment represents one area where the law in South Africa might develop pari passu with the other Commonwealth jurisdictions. Apart from the foregoing, this article has also shown how the law on prejudgment highlights the difference between judicial and administrative bias, which has long been articulated in several scholarly works.105 As for prejudgment, the jurisprudence discussed in the article indicate that the stringent responsibility placed on judges conform to the prevailing standard in all cases of apprehended bias.

Lastly, we caution that the practical problem inherent in raising the issue of bias, actual or perceived, in the course of proceedings, that is created by the possibility of alienating the judge or tribunal in pursuing bias allegation, cannot be wished away. Judges are human. Imagine how disconcerting it might be to a judge when allegations of bias are raised against her/him. One should, therefore, not be surprised that they, most invariably, get rattled in those

105 See e.g. Nwauche, incomplete!!
circumstances especially where such allegations come as a bolt from the blues.\textsuperscript{106} The fact is that in most instances judges tend to feel that the Oath of Office to which they swear and the presumption of impartiality in their favour are a sufficient guarantee to the general public that they must deliver justice without fear or favour and impartially. That is why counsel must act from an abundance of caution before raising such issues in proceedings.

\textsuperscript{106}De Lacy v South African Post Office [2011] ZACC 17 (24 May 2011) can be cited as perfect illustration of such a case.