A RETURN TO THE MANIFEST JUSTICE PRINCIPLE: A CRITICAL EXAMINATION OF THE "REASONABLE SUSPICION/APPREHENSION OF BIAS" AND "REAL POSSIBILITY OF BIAS" TESTS FOR JUDICIAL BIAS IN SOUTH AFRICA AND ENGLAND

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Summary

The impartiality of judges often expressed in the Latin maxim *nemo iudex in propria causa* interpreted to mean that no man should be a judge in his own cause together with the right of fair hearing make up the right to natural justice. This principle is recognized by a number of provisions of the Constitution of the Republic of South Africa, 1996. Section 165 (4) provides that the organs of state shall through legislative and other measures assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. Furthermore, section 34 of the same Constitution provides that everyone has the right to have any dispute resolved by the application of law by a court or, where appropriate another independent and impartial tribunal or forum. Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms 1950 as incorporated in the Human Rights Act 1988, applicable in England since 2000 provides that: "In the determination of his civil rights and obligations … everyone is entitled to a fair hearing … by an independent and impartial tribunal established by law." The independence of courts and impartiality of judges are closely related in that they operate to sustain public confidence in the administration of justice.

This article advocates a return to the use of the manifest justice principle enshrined as the proper context for the application of the tests of "reasonable apprehension of bias" adopted by South African courts and "real possibility of bias" adopted by English courts in the consideration of allegation of apparent bias. This paper argues that the tests are different and that while the English test is a move of English courts from the real danger/likelihood

test in consonance with an overwhelming global jurisprudence the South African test is a move away from this global jurisprudence and arguably back to the real danger/likelihood test. This paper also argues that the reasonable apprehension test as applied by the minority in *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* is a more acceptable interpretation of the reasonable apprehension test than the test laid down in *President of the Republic of South Africa v South Africa Rugby Football Union* (2) and its interpretation by the majority in *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing).* More importantly there is an examination of cases where the tests have been applied which hopefully shows that there are considerable problems and inconsistency in their application and argue that the manifest justice principle provides the proper context for the tests to be properly applied.