



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, HELD AT BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	YES

Case number: **66/2019**

In the matter between:

THE STATE

versus

JAN GYSBERT MARITZ

ACCUSED

**JUDGMENT - LEAVE TO APPEAL RE:
APPLICATION FOR RECUSAL**

CORAM: **NAIDOO, J**

HEARD ON: **2 SEPTEMBER 2022**

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 14h00 on **16 September 2022**.

- [1] This is an application by the applicant/accused (accused) for leave to appeal against my judgment handed down on 14 April 2022 in respect of an application brought by him for my recusal from further hearing of the trial in this matter. He seeks leave to appeal to the Supreme Court of Appeal, alternatively, to the Full Court of this Division. The respondent (the state) opposed the application. The accused was represented by Adv DJ Joubert SC, instructed by BDK Attorneys. Adv Joubert attended the hearing virtually while all other parties were present in court.
- [2] The judgment was assailed on a number of grounds, which, in summary are that the court erred or misdirected itself by finding that:
- 2.1 the judge's forty years' experience in the legal profession and as presiding officer enabled her to disabuse her mind of her personal views when adjudicating a matter before her and that the accused failed to show otherwise;
 - 2.2 the unilateral revocation of the accused's bail was not motivated by any untoward reason;
 - 2.3 the court should have found that the acknowledgement of certain objective facts constitutes a reasonable suspicion in the accused of bias;
 - 2.4 the revocation of the accused's bail was wrong in law and not in terms of the Criminal Procedure Act, creating the perception that the court is not impartial;

2.5 the court should have recused herself and ordered the trial to start *de novo* before another court.

[3] The test applicable to an application for leave to appeal was correctly set out in the Heads of Argument on behalf of the accused, with which the state agreed. For the sake of completeness, I repeat the legal position as it currently stands. Section 17 of the Superior Courts Act 10 of 2013 regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;”

(my emphasis and underlining)

[4] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(I), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of

success and not merely a possibility of success. In the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, Bertelsmann J held that:

“It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion....The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

- [5] The Mont Chevaux decision was cited with approval in a number of cases, one such matter being *Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8 June 2017)*, a decision emanating from this Division, where my brother Daffue J echoed the remarks of Bertelsmann J at paragraph 5 and remarked that “There can be no doubt that the bar for granting leave to appeal has been raised...The use by the legislature of the word “only” emphasized supra, is a further indication of a more stringent test.”

The Full Court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016)* also cited Mont Cheveaux with approval.

- [6] In this matter it is useful to bear in mind that the accused, after initially pleading not guilty, decided to change his plea and made numerous admissions in this regard. He was represented at the time by two Senior Counsel. This court convicted him on the basis of those admissions. What remains now is for the accused to be sentenced.

He has not specified how he would be prejudiced in the sentencing procedure but appears to have based his application for recusal on the premise that he would not have a fair trial. Another factor to bear in mind is that piecemeal adjudication is strongly discouraged by our courts, as it impedes the expeditious finalisation of matters, which in turn offends against the constitutional rights of an accused and, by implication, the state, to the speedy finalisation of trials. The manner in which the accused has dealt with this matter has caused this matter to drag on for more than a year. See in this regard *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) and *Guardian National Insurance Co Ltd v Searle* NO 1999(3) SA 296 (SCA) at 301B. The dicta of the court in the Health Professions Council case have been reiterated and applied in a number of subsequent cases by the Supreme Court of Appeal.

- [7] The judgment in this matter sets out comprehensively the law relating to recusal of a judicial officer and deals extensively with each ground upon which the accused relied in support of his application for recusal. The grounds relied upon in this application restate the grounds in the recusal application and simply ignore the response to each of those grounds set out in the judgment. It is clear when regard is had to the judgment, that the accused's apprehension of bias was not reasonable as it was based on incorrect facts and perceptions. If a judicial officer errs either on the facts or the law, it cannot be interpreted as an indication of bias on the part of the judicial officer. It also noteworthy that the accused has not persisted in his reliance on the statements of

Ms Terblanche, which have been detailed in the judgment. The accused has not put forward any cogent argument that the appeal would have a reasonable prospect of success on the issue of the recusal of the presiding officer in this matter. The sentencing of the accused would not mean the end of the road for the accused, as he would retain his right to appeal against both his convictions and sentences in this matter, if he so chooses.

[8] Based on the court's explanation in respect of each ground of appeal, the accused now contends that on a factual basis, his apprehension was reasonable. I have set out in the judgment the authority for the test in this regard. If the facts upon which the apprehension is based are incorrect, then the apprehension of bias is not reasonable. If the accused's perception of a situation is distorted due to lack of knowledge of the correct facts, as has happened in this matter, it does not render the apprehension of bias reasonable.

[9] In argument, Mr Joubert again raised the point that the affidavit deposed to by Adv Edeling stands as Mr Bantam did not gainsay it. This ignores the objective facts pointed out by the court in relation to Mr Edeling's interactions with the Judge while he was in the company of the prosecutor, as well as Mr Bantam's interactions with Mr Edeling and the attorney who purported to be acting for the accused after his previous legal representatives withdrew. From what I have set out in the judgment, it appears that Mr Edeling's recollection of the events in question may not accord with what actually happened.

[10] A further point raised in argument is that my confirmation of my membership of the South African Chapter of the International Association of Women Judges (SACIAWJ) confirms that I would actively support the cause of violence against women and not bring an impartial mind to bear upon this matter. The SACIAWJ is a professional body whose primary objective is to empower and advance female judicial officers, and is unlike the organisation called the Free Masons, which Mr Joubert likened the SACIAWJ to. This is an untenable and unreasonable proposition as, by implication, it would mean that half of the Judges of the Free State Division as well as other female (and male) judges in South Africa, who are members of the SACIAWJ would be disqualified from hearing any matter involving violence against women. All the female judges of the Free State Division, bar one, are members of the SACIAWJ. I should perhaps also mention that the impugned teddy bear was in my Chambers before the trial started and at the time the accused made the admissions that led to his convictions. The issue of bias only arose some five months later, after he spent some time in custody.

[11] For the reasons set out in my judgment, I am of the view that the accused has not satisfied the threshold of the requirement that there is a reasonable prospect of success on appeal and that another court could would come to a different conclusion.

[12] In the circumstances, I make the following order:

The application for leave to appeal is dismissed.

A handwritten signature in black ink, appearing to read 'S. Naidoo', positioned above a horizontal line.

S NAIDOO J