



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1825/2019**
Heard: **22/11/2021**
Delivered: **25/02/2022**

In the matter between:

KGOMOTSO PAM MAKUKUMARE N.O.

(Estate late Tatlhoeng Magraret Makukukumare:
no. 1377/2017)

Applicant

and

MAGISTRATE JP BRITS
GAREPALELELWE PETER MOREMI

1st Respondent
2nd Respondent

Coram: Mamosebo J and Erasmus, AJ

JUDGMENT

ERASMUS, AJ

[1] The applicant lodged an application in terms of Rule 53(1)(a) for reviewing and setting aside the first respondent's decision not to recuse himself in a civil matter under case number 34/2017, held at the Pampierstad Magistrates Court. The applicant also sought a cost order

against the first respondent, alternatively that the costs of the application be paid by the first and second respondents, further alternatively by the second respondent, on a scale as between attorney and client.

[2] The application against the second respondent was later withdrawn and the applicant tendered the costs of the second respondent.

[3] The basis for the relief sought is that the applicant reasonably suspected and apprehended that the first respondent '*would or might be biased against her and will not bring an impartial mind to bear on the adjudication of the civil matter ...*'. The applicant listed, in the Notice of Motion, several grounds which appear to be the grounds for the perception of bias. These grounds entail that the first respondent:

3.1 Constantly communicated with the second respondent in connection with the pending civil matter in the absence of the applicant;

3.2 Refused to make appropriate orders against the second respondent where such applications were not opposed by the second respondent and such orders were imperative;

3.3 Accepted an *ex parte* application and granted two conflicting and parallel orders to stay the execution

of the warrant and changed dates of the hearing without notice to or the knowledge of the applicant and to wrongfully substitute and amend the second respondent's initial application;

3.4 Contrary to Rule 3 of the Magistrates Court Rules, issued the second respondent's application to stay the execution and thereby usurping the statutory duties and functions of the clerk of the court to benefit and favour the second respondent; and

3.5 Kept the court file to himself, which raised suspicion and the apprehension that the first respondent had a specific purpose in mind.

[4] The first respondent abides the decision of this Court but opposed the cost order sought against him. He filed an affidavit in which he set out the background to the civil claim and the chronology of the events. The first respondent disputed the allegations of bias, *mala fides* and/or that he had acted in contravention of his duties as a magistrate.

[5] From the affidavit of the first respondent, it appears, *inter alia*, that the first respondent had already recused himself in August 2019, shortly after the review application was lodged, when new facts came to light. I pause to mention that these facts have nothing to do with the merits of the recusal application or the civil

matter itself. The first respondent also averred that he had informed the legal representatives of both parties in the civil matter under case number 34/2017.

- [6] The applicant denied both the allegations about the recusal and about informing the parties thereof in the replying affidavit. Mr Bojosinyane, on behalf of the applicant, conceded during argument before us that this was correct. This renders the relief sought moot in that any order pertaining to the recusal will have no practical effect. Despite knowledge of the recusal, the applicant proceeded with the application and Mr Bojosinyane argued the merits of the application before us.
- [7] The merits of the application are relevant to the issue of costs, at least up and until the date of recusal of the first respondent.
- [8] On 3 July 2019 and before the first respondent, Mr Bojosinyane, the attorney for the applicant, made oral submissions and requested that the first respondent recuse himself from the civil matter under case no 34/2017. This was done without lodging a substantive application, supported by evidence under oath and without notice to the second respondent.¹ He set out the background to the application and complained about the conduct of the second respondent's attorneys. From the document, relied upon by the applicant, it appears

¹ Annexure KPM 1

that the real issues in dispute were between the attorneys of the applicant and the second respondent in the civil matter.

[9] Recusal is a matter regulated by the constitutional fair trial requirement, the common law and case law. Article 13 of the Judicial Code of Conduct, adopted in terms of section 12 of the Judicial Service Commission Act², addresses the issue of recusal and provides that a judge must recuse him- or herself from a case if there is a —

- (a) real or reasonably perceived conflict of interest or
- (b) reasonable suspicion of bias based upon objective facts, and shall not recuse him- or herself on insubstantial grounds.

[10] Note 13(v) provides:

'Whether a judge ought to recuse him- or herself is a matter to be decided by the judge concerned and a judge ought not to defer to the opinion of the parties or their legal representatives.'

[11] Although the Code of Conduct applies to judges, the principles regulating recusal also applies to magistrates as reflected in our case law on the question.³

[12] The test for a reasonable apprehension of bias is objective and the *onus* of establishing it rests upon the applicant. There is a presumption of impartiality and it is derived

² No 9 of 1994

³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999(4) SA 147(CC) para [45];

See also *Ex parte Goosen and Others* 2020 (1)SA 569 (GJ)

from s 34 of the Constitution.⁴ Judicial officers, through their training and experience, carry out their oath of office and it must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased.

[13] **Evidence** is required that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The fate of a recusal application depends on the totality of the relevant facts in a given case. This means that the person who is 'reasonably' aggrieved by the presence of a particular judge would also have to have been 'properly informed as to the relevant facts and take an objective view of those facts'.⁵

[14] The applicant for recusal bore the onus of rebutting the presumption of judicial impartiality. The presumption is not easily dislodged and required cogent or convincing evidence to be rebutted. The mere apprehension of bias – even strongly and honestly felt anxiety – is not good enough.⁶

[15] The request/application for recusal was not based on evidence of the applicant (plaintiff in the civil action) but

⁴ *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) paras 31 – 33

⁵ *Ex parte Goosen* supra paras [13] – [14] and the cases quoted therein

⁶ *Ledwaba v Regional Magistrate, Mudau* NO 2015 JDR 0485 p6; *South African Commercial Catering and Allied Workers Union and Others vs Irvin and Johnson Ltd (Sea Foods division: Fish processing)* 2000 (3) SA 705 (CC) at 713 to 715

merely on allegations of collusion between the first respondent and the second respondent's attorneys. The application consisted of an address from the Bar by Mr Bojosinyane and was not supported by affidavit or viva voce evidence by the applicant. I did not come across any case where an application for recusal was not supported by evidence of the litigant. The perception or opinion of the legal representative of a party does not constitute grounds for recusal. In this instance, there was no evidence of real or reasonably perceived conflict of interest or reasonable suspicion of bias on the side of the applicant herein/plaintiff in the action, based upon objective facts. I am of the view that the applicant in the recusal application did not rebut the presumption of impartiality. In my view, the first respondent (magistrate) was correct in not recusing himself on application by Mr Bojosinyane.

[16] If I am wrong in finding that the recusal application had to be brought as a substantive application, supported by evidence under oath, the application also stands to be dismissed on other grounds.

[17] The first respondent raised the issue of non-joinder of the Minister of Justice and Correctional Services based thereupon that the decision complained of was taken in his capacity as a magistrate within the scope of his

employment by the Department of Justice. This point appears to be valid. In terms of section 9(1)(a) of the Magistrates' Court Act⁷ and s 10 of the Magistrates Act⁸ the Minister is the overall employer of all magistrates in the lower courts and appoints magistrates in consultation with the Magistrates Commission. In *Bambeni v Msimeki*⁹ the court found that a decision, granting relief of this nature, will impact materially, directly and adversely on the administration of justice, in particular the running of the courts. This being so, the Minister of Justice and Constitutional Development has a legal interest in the finding of the court and accordingly, the failure by the applicant to join the Minister amounted to a material non-joinder which renders the application defective.

[18] No notice of the review application was given to the defendant's attorneys, despite serious allegations about their perceived dishonest conduct levelled against them. These allegations could be prejudicial to their reputation and practice. As such, they have a substantial and material interest in the matter. Had it not been for the fact that this application is moot, I would have directed that the attorneys be joined in these proceedings.

⁷ No 32 of 1944

⁸ No 90 of 1993

⁹ 2019 JDR 2658 (GJ) para [23]; See also *Van Rooyen v The State* 2002 (5) SA 246 (CC) para [52]

- [19] The recusal application was based thereupon that it appeared to Mr Bojosinyane that the first respondent has an interest in the case, which might lead him not to adjudicate impartially, fairly and objectively. This contention and reasons averred are without merit. I would also dismiss the application on the basis that the applicant has not established any real or reasonably perceived conflict of interest or reasonable suspicion of bias based upon objective facts.
- [20] It is necessary to deal, in short, with the long and protracted history of the civil matter between the applicant and second respondent when considering both the conduct of the first respondent and whether the applicant has established a reasonable perception of bias or malice.
- [21] The first respondent had granted default judgment against the second respondent in October 2017, in favour of the applicant herein. The second respondent thereafter, on 4 April 2018, lodged an application for rescission in April 2018.
- [22] On 11 April 2018, the applicant served a notice in terms of Rule 60A of the Magistrates Court Rules in that, according to the applicant, the rescission application constituted an irregular step. The second respondent did not react to the notice and did not remove the cause of the complaint within the 10 days allowed.

- [23] On 8 June 2018, **outside** the 15 days allowed after the expiry of the initial 10-day period, the applicant delivered an application to have the irregular proceedings (the rescission application of the second respondent) struck out. This application bears the date stamp of the clerk of the court and appears to have been filed on 19 June 2018. The application was set down for hearing on 4 July 2018.
- [24] The applicant alleges that her attorneys ascertained that an acting magistrate had refused to grant the second respondent's rescission application on 2 May 2018. This allegation is not supported by the record of the court proceedings. The records show that on 2 May 2018 the acting magistrate merely postponed the rescission application to 6 June 2018. On that day, the first respondent rescinded the judgment against the second respondent. According to the first respondent, the applicant and her attorney were absent and he was satisfied that the applicant had made out a good case for rescission.
- [25] The applicant takes issue with the first respondent's decision to rescind the default judgment without considering whether an irregular step had been taken against the applicant. It was also alleged that the delay in finalization of the second respondent's application for rescission of the default judgment was due to the

actions of the first respondent. This is not borne out by the history set out above.

[26] The applicant then applied for rescission of the earlier judgment granted in the rescission application of the first respondent. This application was set down for 3 October 2018. The applicant takes issue with the fact that the first respondent was informed by the applicant's attorneys that, according to the second respondent's attorneys, it had been agreed that the application would be postponed to 7 November 2018. The second respondent's attorneys informed Mr Bojosinyane on 25 September 2018 that the applicant's notice of motion is irregular and that the second respondent requests that the parties agree to a postponement to 7 November 2018.¹⁰ The applicant did not attach Mr Bojosinyane's response to these papers. The applicant failed to disclose that Ms Bojosinyane, apparently another attorney of the firm BG Bojosinyane & Associates, represented the applicant on 3 October 2018 and that she did not take issue with the contents of the letter of the second respondent's attorneys confirming the agreement to postpone the matter to 7 November 2018.

[27] It is common cause that the first respondent granted rescission of the first rescission judgment in favour of the applicant herein on 7 November 2018. The costs were reserved. Furthermore, the second respondent

¹⁰ p75 Annexure KPM 9

was granted leave to amend his application for rescission of the default judgment of October 2017.

[28] The second respondent did not amend his papers. The applicant then set the Rule 60A-application down for 6 February 2019. The second respondent was granted leave to amend his application for rescission of the default judgment and it was ordered that costs of that day were to be costs in the cause. The applicant takes issue with this order, as the second respondent's attorneys did not oppose the cost order sought by the applicant. The first respondent, in his affidavit before this court, stated that he had applied his mind and exercised his discretion to order costs to be costs in the cause. A court has wide discretion in awarding costs. In the absence of facts showing the discretion was not exercised judicially, it cannot be found that the costs order of the first respondent could reasonably be perceived as a conflict of interest or could lead to a reasonable suspicion of bias.

[29] The second respondent delivered a notice of the amendment in terms of Rule 55A dated 19 February 2019 which forms part of the applicant's papers.¹¹

[30] According to the applicant's attorney, he instructed the sheriff to proceed with the sale in execution *'as there was no application that could be adjudicated upon by the*

¹¹ Annexure KPM 6 to the founding papers

court'. The notice of the sale in execution is dated 4 February 2019.¹² In the recusal application, Mr Bojosinyane averred that the second respondent had failed to serve notice of the proposed amendment timeously. This is not correct as the first respondent had done so on 19 February 2019, within the period allowed for such notice, after leave to do so was granted on 6 February 2019.

- [31] The instruction to the sheriff to execute and attach the second respondent's assets triggered a further chain of events that eventually led to this review application.
- [32] On 13 March 2019, the second respondent lodged an urgent application to stay the warrant of execution pending the outcome of an application for rescission of the default judgment. This application was set down for 19 March 2019 but did not proceed on the day as the applicant delivered notice to oppose on 14 March 2019. She served her answering papers on 25 March 2019.
- [33] On 27 March 2019, the second respondent delivered a notice of removal of the previous application and lodged an urgent *ex parte* application for the stay of the warrant of execution. A rule *nisi*, returnable on 8 May 2019, was issued. 8 May 2019 was the date on which the applicant's application for rescission of the rescission application was to be heard. The rule *nisi*, the notice of

¹² Annexure A to the *Ex parte* application, which is marked Annexure KPM 11

withdrawal of the earlier application and application papers, were served on the applicant's attorneys on 28 March 2019.¹³

[34] In the founding affidavit herein the applicant avers that no founding affidavit was attached to the notice of motion in the *ex parte* application. It was also alleged that the *ex parte* application was not stamped by the clerk of the court.

34.1 The allegation in respect of the founding affidavit is contradicted in paragraph 7.2 of the document titled '*Plaintiff's Oral Submission In His Application Or Request For Magistrate's Recusal In the Abovementioned Matter*'.¹⁴

34.2 According to the applicant, the notice of the application of the first respondent bore the stamp of '*Administration*'. The first respondent explained that the clerk of the court stamp had expired at the end of 2018 and was replaced with a stamp '*ADMINISTRATION*'. This stamp was in possession and under the control of the clerk of the court. It was used by him on all official documents. The first respondent pointed out that even the applicant's notice in terms of Rule 60A(1) bore this stamp.¹⁵

¹³ Annexure KPM 11

¹⁴ Annexure KPM 1

¹⁵ Annexure KPM 10

- [35] Mr Bojosinyane took issue with both the hearing of the *ex parte* application of the second respondent and the issuing of the rule *nisi*. According to him, it was unacceptable that an application which is ripe for hearing in 2 days, was replaced by an *ex parte* application and thereafter postponed for 2 months. He also did not believe that the '*NOTICE: EX PARTE APPLICATION*' was prepared by the second respondent's attorneys, that it was applied for and that it was granted in chambers.
- [36] I agree with Mr Bojosinyane that the conduct of the second respondent, withdrawing the application for the stay of execution, appears to be wrong and that the first respondent should not have entertained an *ex parte* application for the same relief. This, however, does not mean that the first respondent's decision to not recuse himself was wrong.
- [37] The first respondent would not have known whether the second respondent's attorneys had prepared the notice of the *ex parte* application. To even suggest that the first respondent had done this in the absence of clear evidence to that effect, constitutes an unwarranted attack on the integrity of the first respondent and the courts.
- [38] On 1 April 2019, the applicant anticipated the return day of the rule *nisi* and set the matter down for 3 April 2019.

Mr Bojosinyane averred that the court file was not with the clerk of the court on 3 April 2019. It was also alleged that neither the first respondent nor the second respondent's attorney was at court on 3 April 2019. In response hereto the first respondent averred:

- 38.1 On 3 April 2019, when the first respondent left to attend court in Hartswater, his office was locked. The clerk of the court, as well as the cleaner, had spare keys to his office.
- 38.2 On the first respondent's return from the court in Hartswater, the court file and all other court files of civil matters on the court roll for 3 April 2019 were handed to him by the clerk of the court.
- 38.3 The applicant's attorney was not present at court when the civil matter was called. In support thereof, he attached a copy of the court proceedings of 3 April 2019 that indicates that the second respondent's attorney appeared before him at 10h52, that the applicant's attorney was absent and that the rule *nisi* was confirmed, thereby.¹⁶ The rule *nisi* was confirmed for the staying of the warrant of execution until finalization of the application for rescission of the default judgment.

¹⁶ Annexures D and E to the answering affidavit

[39] Despite the applicant's serious allegations, as referred to above, it was admitted in the replying affidavit that the applicant's attorney had left the court at Pampierstad at around 09h50.

[40] Further allegations aimed at creating suspicion against the first respondent and the attorney of the second respondent are made in the replying affidavit. These allegations are mostly based on hearsay. The applicant averred that the date for the hearing of the rescission application (8 May 2019) was changed to 5 June 2019 and that it was unnecessary for the first respondent to postpone the application from March 2019 to June 2019.

40.1 From a copy of an extract of the court book of 27 March 2019¹⁷ it appears that the date was changed. The date of 8 May 2019 was election day and therefore declared a public holiday.

40.2 On 5 June 2019 another magistrate who was performing relief duties in Pampierstad, postponed the application to 25 June 2019. From the answering affidavit, it appears that the first respondent was on leave at the time.

40.3 On 25 June 2019 the second respondent's attorney informed the applicant's attorney that the matter had to be postponed to 3 July 2019. The first

¹⁷ Annexure F to the answering affidavit

respondent was involved in a criminal trial at a nearby court. This had allegedly been arranged telephonically between the first respondent and the second respondent's attorney. According to the first respondent the applicant's attorney phoned to enquire whether the matter would proceed on 25 June 2019, as this was a day earmarked for criminal cases.

40.4 Another magistrate was available to do postponements in Pampierstad on 25 June 2019. The second respondent's attorney informed the first respondent that she would arrange with the applicant's attorney that the magistrate postpone the matter to the next motion court day, to wit 3 July 2019. Although the applicant's attorney appears to have been dissatisfied with the arrangement, he did not appear on 25 June 2019 and did not oppose the postponement.

[41] A further ground for the review application relied upon is that as of 3 July 2019, nothing had taken place; neither in terms of the court order of 6 February 2019 nor the one of 27 March 2019. This is not correct because Mr Bojosinyane applied for the recusal of the first respondent on 3 July 2019. This application was dismissed on 18 July 2019, whereafter the applicant lodged the review application on 19 August 2019.

[42] From the facts set out above, the only criticism that can be levelled at the first respondent is the fact that he adjudicated the *ex parte* application for the stay of the warrant of execution on 27 March 2019. Although the first respondent may be criticised for doing so, objectively viewed it is not indicative of a conflict of interest or bias and should not reasonably have given rise to a suspicion of bias or a conflict of interest.

COSTS

[43] The applicant seeks a cost order against the first respondent. In essence, this relief is based on an alleged wrong or incorrect decision. Judicial officers are clothed with immunity against claims. They can only be held liable if fraud or *mala fides* is shown to have influenced their actions. The policy underlying this principle is the protection of the independence of the judiciary to be able to adjudicate fearlessly.¹⁸ Furthermore, a court will only grant a cost order against a judicial officer in a dispute over the performance of his/her judicial functions where bad faith has been established.¹⁹ The applicant has not established bad faith.

[44] As stated earlier, the relief sought in this application is moot. Mr Bojosinyane was aware that the first

¹⁸ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2006(1) SA 461 (SCA) para [19] and [26]; *Tsotetsi v Honourable Magistrate Smith* 2017 JDR 0047 (GJ) paras [9] to [22]

¹⁹ *Pangarker v Botha* 2015 (1) SA 503 (SCA) para [39]

respondent had recused himself as far back as August 2019, shortly after the review application was lodged. The applicant, however, persisted with the application.

[45] It is trite that the award of costs falls within the discretion of the court and that, generally, costs should follow the outcome. I can find no reasons to differ from the general principles in this regard. In the premises the application stands to be dismissed with costs.

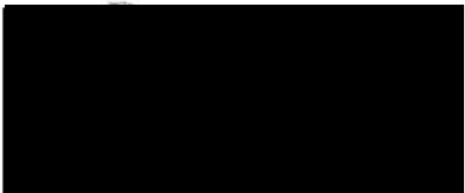
I make the following order:

THE APPLICATION IS DISMISSED WITH COSTS



**SL ERASMUS
ACTING JUDGE**

I concur



**M MAMOSEBO
JUDGE**

For the Applicant:	Mr BG Bojosinyane (BG Bojosinyane & Associates c/o Motlhamme Attorneys)
For the Respondent:	Ms M Olivier (oio of The State Attorney, Kimberley)