



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. 307/2020

In the matter between:

SIYABULELA MZENDANA

Applicant

and

THE MAGISTRATE: Ms MULLER

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

JUDGMENT

RUGUNANAN J

- [1] This is an application for review emanating from the district magistrates' court in Stutterheim. The applicant seeks orders reviewing and setting aside the first respondent's decision refusing and/or dismissing the

applicant's recusal application in criminal proceedings pending before the first respondent, and directing that the matter proceed *de novo* before another magistrate. The applicant is an accused in criminal proceedings in which he faces a charge of reckless or negligent driving. The first respondent is the magistrate who presided in the criminal proceedings and the second respondent is the Director of Public Prosecutions.

- [2] The application is founded on section 22(1)(b) of the Superior Courts Act 10 of 2013, which will be referred to later in this judgment.
- [3] The first and second respondents have opposed these proceedings and have sworn out answering affidavits in opposition thereto. Both respondents have made common cause in their opposition to the merits of this application and in raising the point *in limine* that the applicant has unreasonably delayed by more than a year in bringing these proceedings. Although in his papers the applicant simultaneously took the point that the respondents have not sought condonation for their delay approximating some 10 months in filing their answering affidavits, this aspect was, in the interests of expedition and finality, not pursued with in argument.
- [4] The decision on which the review application is posited was made on 28 January 2019 and the proceedings were instituted on 11 February 2020, almost 13 months after the first respondent's refusal to recuse herself.
- [5] I should add that the respondents' point *in limine* is taken in circumstances in which the applicant's founding affidavit does not at all address the delay in launching these proceedings. Seeking to address the issue in reply, the scant detail proffered by the applicant is limited to the averment

that the record was made available to his attorneys in dribs and drabs until 20 September 2019, whereafter it was wholly transcribed as a complete copy on 9 January 2020.

- [6] In *Valor IT v Premier, North West Province and Others*¹ the approach to the question of delay - and a court's discretion to condone it - was put as follows:

‘Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a “factual, multi-factor and context-sensitive” enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.’

- [7] In their sweep, the factors suggest that the exercise is not undertaken in a vacuum.² The ‘factual, multi-factor, context-sensitive’ framework broadens the scope of the exercise, and although in certain circumstances some factors may justifiably be left out of consideration³, the advised framework renders the inquiry flexible.⁴

- [8] In the present case the applicant's prospects of success on the merits, as a particular attribute of the inquiry, renders it unnecessary to labour this judgment by dealing with the preliminary issues in any particular detail. While I consider the delay by the parties to be culpable (this having been correctly conceded for the applicant by his counsel), it affords neither of

¹ [2020] ZASCA 62 at paragraph [30]

² *Altech Radio Holdings (Pty) Ltd & Others v Tshwane City* 2021 (3) SA 25 (SCA) at paragraph [36]

³ *Road Accident Fund v Applegate and Others* (52500/2015) [2021] ZAGPPHC (27 May 2021) at paragraph [46]

⁴ *Altech Radio Holdings supra* at paragraph [37]

them any substantial advantage. The papers are, in any event, not voluminous – and the conclusion reached in this judgment, quite sensibly, necessitates that this matter be disposed of as expediently as possible and in the interests of justice. I hasten to add that future litigants approaching this court in review matters emanating from the lower courts should not presume that this court will adopt an indulgent attitude in circumstances of delay. In this matter, the approach adopted should be seen as the exception rather than the norm.

- [9] I now turn to address the merits of the review application and its legal framework.
- [10] The point of substance in the applicant's argument is that the first respondent was biased in favour of the State. The factual matrix occasioning the applicant's cause for complaint is set out as follows.
- [11] The trial commenced on 3 August 2017. On 28 January 2019, being the date on which the application for recusal was made, the State had already called and disposed of the evidence of two witnesses. The third witness was still under cross-examination by the applicant's legal representative when the application for recusal was made.
- [12] Relying on excerpts from the transcript of the proceedings before the first respondent, and quoted at length in the applicant's heads of argument, the submission is made that the material at the very least is indicative of an apprehension of bias on the part of the first respondent. It is contended for the applicant that the clarity seeking questions posed by the first respondent are problematic because they were leading in nature and some were on aspects that had not been raised in examination in chief nor during cross-examination. In amplification, it was contended that in some

instances the effect of questioning by the first respondent was that of augmenting the case for the State on issues that were left out in the evidence in chief by the prosecutor. In short, it was argued for the applicant that the first respondent had donned the cap of the prosecution and effectively enhanced the case for the State.

- [13] Section 22(1)(b) of the Superior Courts Act, provides that the grounds upon which the proceedings in any Magistrates' Court may be brought under review before a court of a Division are 'interest in the cause, bias malice or corruption on the part of the presiding judicial officer'.
- [14] Bias in the judicial sense has been said to mean – 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'.⁵
- [15] Not only does the law require a judicial officer to conduct a trial open-mindedly, impartially and fairly, but such conduct must be – 'manifest to all those who are concerned in the trial and its outcome, especially the accused'.⁶
- [16] It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings.⁷
- [17] The above principles are so well established that they are now locked into section 165(2) of the Constitution⁸ which provides that 'the courts are independent and subject only to the Constitution and the law, which they

⁵ *Roberts v Additional Magistrate for the District of Johannesburg and Another* [1999] 4 All SA 285 (A) at page 292e

⁶ *Roberts supra* at page 292f

⁷ *Roberts supra* at page 292g

⁸ Constitution of the Republic of South Africa, 1996

must apply impartially and without fear, favour or prejudice'. Viewed objectively, a judicial officer who thus sits on a case in which he or she should not be sitting, is either actually biased or there exists a reasonable apprehension of bias.⁹

- [18] In *President of the Republic of South Africa and others v South African Rugby Football Union and others*¹⁰, the test for the determination of whether or not a judicial officer should be disqualified on the grounds of bias was laid out as follows:

'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the *onus* of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and the ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any relevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial.'

⁹ *Mulaudzi v Old Mutual Life Assurance* 2017 (6) SA 90 (SCA) at paragraph [46].

¹⁰ 1999 (4) SA 147 (CC) at paragraph [48]

[19] Paring down the foregoing, the requirements of the test are the following:¹¹

- ‘(1) There must be a suspicion that the judicial officer might, not would, be biased.
- (2) The suspicion must be that of a reasonable person in the position of the accused or litigant.
- (3) The suspicion must be based on reasonable grounds.
- (4) The suspicion is one which the reasonable person referred to would, not might, have.’

[20] Proceeding to the merits of the matter, and mindful that each case must be dealt with according to its own circumstances, one may generally accept that judicial officers will rein in attributes of their personal and professional experience and training to fulfil their adjudicative function – and that engagement with legal practitioners may also, and in appropriate circumstances, be robust.

[21] It is evident from the segments of the transcript quoted at length in the applicant’s heads of argument that aspects of these attributes – particularly on the merits of the case – have been brought into the matter from a subjective position assumed by the first respondent. These aspects related to the absence of cattle on the road, the speed at which the accused had been travelling, and whether there were skid marks on the tarmac. Against the backdrop of having raised a defence of sudden emergency, in which the version of the applicant is that a collision with an oncoming vehicle ensued when he tried to avoid cattle on the road, counsel for the

¹¹ *Roberts v Additional Magistrate for the District of Johannesburg and Another* [1999] 4 All SA 285 (A) at paragraphs [32] and [34].

respondents submitted that the evidence elicited by the first respondent's 'eagerness' in questioning of the State witnesses was neutral and does not on its own establish a basis for her disqualification. To the contrary, it was submitted for the applicant that the above issues affect the onus and go to the heart of the State's case, and where such evidence was not led by the State, it was impermissible for the first respondent to have engaged with these issues under the guise of seeking clarity.

- [22] What was submitted to have been the first respondent's eagerness led to an impasse during cross-examination of the third state witness by the applicant's legal representative. It is timely to repeat the following exchange between the first respondent and the applicant's legal representative:

'Mr Sonamzi: Madam, can I go back to the question that you can answer, what else after you saw the flickering, after the warning, what else do you see other than the cattle?

Court: Isn't the question a bit wide? I mean there is a lot of things to see, on the road.

Mr Sonamzi: Madam, may I request that I be given an opportunity to cross-examine the witness freely, because.

Court: Are you alleging that I am interfering?

Mr Sonamzi: I am not.

Court: Are you alleging that I am interfering.

Mr Sonamzi: Maybe madam, I am not comfortable.

Court: Then you should put it on record so.

Mr Sonamzi: I have that belief, every time I am asking a question.

- Court: Let me tell you what is going on here, you are hammering on the one point and one point and one point, you want cattle on that road, and the lady said now for the past 20 minutes there was no cattle on the road her side.
- Mr Sonamzi: We have done with that.
- Court: Now I am talking, stop interfering.
- Mr Sonamzi: Okay, ma'am, please.
- Court: And stop interrupting me, is it clear?
- Mr Sonamzi: It is clear, ma'am.
- Court: I am talking.
- Mr Sonamzi: Okay, please.
- Court: You put a question to her, that is as wide as the road, what else did you see, what else did she see, did she [see] trees, did she see cars, did she see cattle, did she see people running, did she [see] little birds in the sky, be more specific.
- Mr Sonamzi: I don't want to suggest answers to her, I was not there.
- Court: You are not suggesting answers to her, you are asking questions that she cannot answer, because your questions are too wide.
- Mr Sonamzi: With due respect ma'am, that is [how] I was [taught] to cross-examine the person.
- Court: Then go ahead how you were [taught], but just get to the point.
- Mr Sonamzi: Hence I am saying, Your Worship, may I be allowed to cross-examine the witness.
- Court: Sir, don't teach my job to me, is that clear?
- Mr Sonamzi: It is clear madam. Hence I am saying.

Court: You are this far from contempt of court, I am warning you.

Mr Sonamzi: Okay, okay, it is fine.’

[23] Upon contextualising the scope of the above engagement with the evidence traversed by the first respondent’s questioning of the State’s witnesses, there is no room for suggesting that they are random or inconspicuous occurrences that do not by themselves establish a basis for disqualification. Although the atmosphere in the courtroom and conduct of the participants cannot be recreated by reference to the record, I am of the opinion that a more restrained approach by the first respondent would have been salutary. Objectively considered, it is the cumulative effect of the entire scenario that assumes gravity for disqualifying her.

[24] I recognise that a high court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a lower court¹² unless a grave injustice might otherwise result. In applying the appropriate test to the facts and circumstances of the present matter, I am persuaded that the first respondent would have provided the reasonable person in the position of the applicant with eminently reasonable grounds for thinking that she might be biased. Even by the time the recusal application had been made, enough had occurred to create that impression. That application was wrongly refused, and to deny the applicant relief might lead to an injustice.

[25] Before concluding this judgment there is the further aspect of costs that necessitates comment. This was not claimed in the relief set out in the applicant’s notice of motion and was conspicuously not prayed for in his

¹² *Motata v Nair NO and Another* 2009 (2) SA 575 (T) at paragraph [9], and *Sizani v Mpofu and Another* (642/2017) [2017] ZAECHGHC 127 (12 December 2017) at paragraphs [5], [6] and [7]

founding affidavit in the event of a successful outcome. Considering that both parties had been culpable, as alluded to earlier in this judgment, it is appropriate that no order as to costs be made.

[26] In the circumstances, the following order issues:

1. The first respondent's decision refusing and/or dismissing the applicant's application for her recusal in the proceedings pending under Case No. 211/2017 is hereby reviewed and set aside.
2. The matter is referred to the second respondent to decide whether the applicant is to be re-arraigned.
3. In the event that it is decided that the applicant be re-arraigned, the trial must commence *de novo* before another magistrate.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree

G. H. BLOEM

JUDGE OF THE HIGH COURT

APPEARANCES:

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