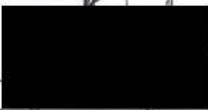


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature	 28/7/2021

CASE NO: REV 25/2021
REGIONAL COURT CASE NUMBER: SH96/2020

In the matter between:

LESIBANA OBED BOSHOMANE

APPLICANT

And

N.G. PRETORIUS N.O.

1ST RESPONDENT

**THE DIRECTOR OF PUBLIC PROSECUTIONS
(LIMPOPO)**

2ND RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] This is an application to review and set aside the decision of the First Respondent, a Magistrate in the Mokopane Regional Court, for refusing to recuse himself as a presiding officer in a criminal case involving the Applicant. At the hearing of the matter the Applicant was legally represented by Attorney Oupa Thabethe who is also the Applicant's attorney of record in the present review application.
- [2] The review application is brought in terms of section 22 (1)(b) of the Superior Courts Act 10 of 2013 read with Rule 53 of the Uniform Rules of Court, on the ground of bias on the part of the presiding officer.
- [3] The factual matrix in this matter is common cause or not in dispute. In fact the facts in this case are derived from the transcribed Court record. In order to do justice to the parties I shall state such facts and/or utterances by each party verbatim.
- [4] The Applicant appeared before the First Respondent in the Mokopane Regional Court under case number SH96/2020 on 2 November 2020 represented by Attorney Oupa Thabethe. Before the hearing could continue in the criminal trial the First Respondent ordered the stenographer to playback the court recording machine in relation to another case, SH48/2019, wherein the First Respondent sought to put it to the attorney that the attorney had previously misled him in

that other matter (SH48/2019) where another client of the attorney had taken a decision of the First Respondent on review.

- [5] Arising from a dispute between the attorney and the First Respondent on whether the attorney had misled the First Respondent in that matter, the First Respondent refused to hear the attorney, to recognize his presence as representing the Applicant until the attorney had furnished him with “written reasons” ostensibly relating to the attorney’s alleged misconduct in the other matter.
- [6] What follows is the exchange of words between the First Respondent and Attorney Thabethe:

***“COURT:** Mr. Thabethe, you have heard the recording. You have heard what you said. It was wrong. I just want a reasonable explanation why you informed me or supplied me with incorrect information which is wrong.*

***MR THABETHE:** And this is not...*

COURT: *No, no, no, I want a written reason. I want a written reason. And before, I have to decide whether I can trust you as a court official, because if I cannot then obviously, I have to take it further.*

MR THABETHE: *That was the information at my disposal.*

COURT: *Mr Thabethe, I want a written explanation from you. You may be seated. Thank you. The accused is appearing for what?"*

- [7] From that point on the First Respondent went on to engage the Applicant as if he was unrepresented, completely thinking his attorney away, up to actually explaining his rights to legal representation before remarking as follows:

"COURT: *As you might have noticed there is a situation that has to be clarified and I know that Mr Thabethe instructed him but before I receive that document as I require, I cannot allow him...I have to consider his reasons. Now for him to clarify the situation I will postpone the matter until tomorrow and if I am satisfied, I will allow him to appear again. In the meantime, you will remain in custody. Is that clear?"*

On the next appearance, having received a written explanation from the attorney, the First Respondent was still not appeased. He instructed the

attorney to withdraw certain paragraphs from the written explanation failing which he would bar the attorney from appearing in his court.

When the attorney refused to withdraw the allegedly offensive paragraphs, the First Respondent told the Applicant that he was not going to allow the attorney to appear because of personal differences and practically suggested that the Applicant get another attorney. The applicant indicated that he wished to consult with his attorney of record to which the First Respondent once again emphatically said that he was not going to allow the allegedly “contemptuous” legal representative to appear for the Applicant.

The matter was then postponed several times without the “personal difference” between the First Respondent and the attorney being resolved.

- [8] Subsequently on 4 March 2021 the Applicant brought a recusal application against the First Respondent citing the above background as a reasonable apprehension of bias against him. The application was moved by his attorney of choice, Mr Thabethe.

Having summarily dismissed the recusal application, the First Respondent went on to state the following:

*“**COURT:** Mr Thabethe, in any case, as from today... As from today, you will make arrangements with the Regional Court President whenever you have a case in this court. And you will not come into this court again. It is not in the interest of the court that we have a personal conflict in an open court. So I am not chasing you out, I am just saying you cannot appear under these circumstances in my court. Your office is welcome to appear, but you in person, not.”*

- [9] Having clearly banned the Applicant’s attorney from further representing the Applicant in that matter, the First Respondent postponed the matter to 1 April 2021 for the Applicant “to make up his mind regarding legal representation”.

It is this undisputed background captured above which has seen the Applicant bring this review application as he still wants to be represented by the same attorney, Mr Thabethe.

- [10] It was contended on behalf of the Applicant that when a presiding officer expressly tells a legal representative on record that he has an ongoing unresolved conflict with that legal representative and that *“you will not come into this Court again. It is not in the interest of the Court that we have a personal conflict in open court. So I am not chasing you out, I am just saying you cannot appear under these circumstances in my Court. Your office is welcome to*

appear, but not you in person...” then an accused person has every reason to reasonably apprehend that his right to a fair trial before such a magistrate is seriously in jeopardy for as long as he is represented by that disliked legal representative.

[11] Counsel for the First Respondent argued that this ground for review is baseless and frivolous. He submitted that it is unfortunately so that human beings do not always like each other. It is also a factual truth that some presiding officers (be they magistrates or judges) and legal representatives (be they advocates or attorneys) sometimes dislike each other intensely but, they still do their duty as judicial officers of court. After all, a judge and a magistrate take an oath of office and likewise a legal representative takes an oath that he will be true and faithful to the Constitution and the Republic of South Africa. Counsel submitted further that a judge or magistrate may dislike a legal representative, but this is no ground for the recusal of such a judge or magistrate.

[12] Before resolving this vexed question or issue before us, I find it appropriate to make some observations regarding the conduct of the First Respondent. The First Respondent, as a presiding officer, in case number SH96/2020 had no cause whatsoever to deal with issues relating to a different case (Case number SH48/2019) which was unrelated to a case before him. He deliberately did this with the intention of causing a confrontation between himself and Attorney

Thabethe. This is inappropriate. The First Respondent has no authority to banish a legal representative from the Court. A courtroom is not a personal domain of any presiding officer. The First Respondent correctly stated that "*It is not in the interest of the Court that we have a personal conflict in open court*". It is advisable that if a presiding officer foresees any potential conflict with a legal representative he should call the legal representative to his chambers in order to resolve their issues behind closed doors. Regrettably, the First Respondent failed to do so.

[13] It is regrettable to note that in this matter we observe intolerance on the part of the presiding officer and insolence on the side of the legal representative. Be that as it may, this Court has to decide, given the conspectus of evidence before us, whether the Applicant has made out a case for the recusal of the First Respondent.

[14] The test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of a reasonable apprehension of bias was enunciated in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others***¹. In that case the Constitutional Court said:

¹ 1994 (4) SA 147 (CC); 1999 (7) BCLR 725.

“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 the 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 their 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 irrelevant 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 reasons, was not or will not be impartial.”

- [15] Where the claimed disqualification is based on a reasonable apprehension, the court has to make a normative evaluation of the facts to determine whether a

reasonable person faced with the same facts would entertain the apprehension. The enquiry involves a value judgment of the court applying prevailing morality and common sense.² A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused.³

[16] In ***S v Roberts***⁴, the requirements of the test for the appearance of judicial bias are as follows as applied in judicial proceedings:

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.

[17] The test in the SARFU judgment does not relate to counsel, but to the litigant, that is the accused in the present case. It is the litigant or accused who must entertain a reasonable apprehension of bias for the disqualification to be

² *S v Basson* 2004 (1) SACR 285 (CC) (2005 (1) SA 171; 2004 (6) BCLR 620) para 53.

³ *S v Roberts* 1999 (2) SACR 243 (SCA) (1999 (4) SA 915) para 25.

⁴ 1999 (2) SACR 243 (SCA); 1999 (4) SA 915 para 25.

sustained. Referring to the present case, it must be the Applicant and not his legal representative (Attorney Thabethe) who must entertain a reasonable apprehension of bias that the First Respondent will not be objective in his trial.

- [18] The rule is clear: generally speaking, a judicial officer must not sit in a case where he or she is aware of the existence of a factor which might reasonably give rise to an apprehension of bias. The rationale for the rule is that one cannot be a judge in one's own cause. Any doubt must be resolved in favour of recusal. It is imperative that judicial officers be sensitive at all times. They must of their own accord consider if there is anything that could influence them in executing their duties or that could be perceived as bias on their part. It is not possible to define or list factors that may give rise to an apprehension of bias – the question of what is proper will depend on the circumstances of each case.

See ***S v Dube and Others* 2009 (2) SACR 99 (SCA)**.

- [19] In ***Saccawu and Others v Irvin and Johnson Seafoods Division Fish Processing***⁵ the Constitutional Court in formulating the test to be applied in an application for the recusal of a presiding officer on the grounds of apprehension of bias observed that two considerations are into the test itself:

⁵ 2000 (3) SA 705 (CC)

1. The first is that in considering the application for recusal, the Court as a starting point presumes that judicial officers are impartial in adjudicating disputes. On the one hand, it is the applicant for recusal who bears the onus rebutting the presumption of judicial impartiality. On the other hand, the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted.
2. The second in-built aspect of the test is that absolute neutrality is something of a chimera in the judicial context. This is so because judges are human.

[20] As a ground for the recusal of the First Respondent, the Applicant stated the following in paragraph 31 of his founding affidavit:

“31. From the afore-going factual background, it is clear that the 1st Respondent is highly conflicted towards Mr Thabethe. The 1st Respondent is on record having stated amongst others that he does not like Mr Thabethe and that he laid a complaint against Mr Thabethe wherein Mr Thabethe is apparently an accused person.”

It is clear from the above statement by the Applicant that this case has more to do with the conflict or hatred between the First Respondent and Attorney Thabethe than with the Applicant having a well-grounded apprehension of bias

which calls for the recusal of the First Respondent. The test in the SARFU judgment above does not relate to counsel, but to the litigant, that is the accused in the present case.

[21] The fact that the First Respondent might dislike Mr Thabethe is, in my view, of no consequence. The test as set out in the case law referred to hereinabove has to be satisfied before one can even remotely come to a conclusion that justice will not be done should the First Respondent continue to preside in the trial in which Mr Thabethe appears for the Applicant.

[22] The Magistrate, Mr Pretorius and the legal representative, Mr Thabethe need a reprimand. In an effort to remedy their strained relationship I can only call upon them to conduct themselves as adults and matured officers of the Court. Already the attitude and approach of both of them has harmed the Applicant's right to a speedy trial as the matter had not progressed owing to their toxic relationship.

A copy of this judgment will be sent to President of the Regional Court, Limpopo, the Magistrate Commission and the Legal Practice Council.

[23] The Applicant has not made out a case for the recusal of the First Respondent from case number SH96/2020 in the Regional Court, Mokopane.

In the result I make the following order:

1. The application is dismissed.
2. There shall be no order as to costs.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE



LGP LEDWABA
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

I agree

APPEARANCES

Heard on	: 23 July 2021
Judgment delivered on	: 28 July 2021
For the Applicants	: Adv. NC Mathabatha
Instructed by	: Oupa Thabethe Inc c/o Ntene Attorneys
For the 1 st Respondent	: Adv. CFJ Brand SC
Instructed by	: Thomas Grobler Attorneys