IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, CIRCUIT COURT BHISHO)

Case No: 816/18

REPORTABLE

In the matter between:

BUSISWA BERYL MAKAPHELA	First Applicant
ANDISWA MBEBE	Second Applicant
NOVAKALISA ALBERTINA APRIL	Third Applicant
NOKUBONGA JONGIHLATHI	Fourth Applicant

and

ACTING REGIONAL COURT MAGISTRATE MR DUMANI	First Respondent
DIRECTOR OF PUBLIC PROSECUTIONS BHISHO	Second Respondent
DEPUTY DIRECTOR SPECIALISED COMMERCIAL CRIMES UNIT, PORT ELIZABETH	Third Respondent

MINISTER OF JUSTICE & CORRECTIONAL SERVICES Fourth Respondent

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REVIEW JUDGMENT

THE COURT:

[1] This is an application for the review of the decision of the Zwelitsha Acting Regional Court Magistrate (first respondent), who refused to recuse himself from a criminal case (number RCZ112/2015). The first and fourth respondents did not oppose the application but are opposing a costs order only. The matter came before us on 1 August 2019. Due to the urgency with which we regarded the matter on that day we made the following order:

'1. The applicant's failure to bring this review application timeously is condoned.

2. The first respondent's decision not to recuse himself as a presiding officer in the part-heard criminal matter in the Zwelitsha Regional Court under case no. RCZ 112/2015 is reviewed and set aside.

3. The trial in the matter mentioned in paragraph 2 above is directed to start de novo before another Regional Magistrate.

4. The issue of costs is reserved.

5. The first respondent is invited to show cause (in writing) within two weeks of the date of this order, why he should not be directed to pay the costs of this application in his personal capacity.

6. Reasons for this order and any costs order which may follow, are reserved pending the response from the first respondent.'

[2] The first respondent has filed an affidavit in accordance with paragraph 5 of our order in an attempt to persuade us not to mulct him with a costs order *de bonis propriis*. The applicants filed an opposing affidavit.

[3] Before dealing with the affidavit of the first respondent it is necessary to briefly set out the background to the review. The applicants together with seven other accused stood trial in the Zwelitsha regional court before the first respondent under case number RCZ 112/2015 on various charges of fraud, corruption and money laundering. They all pleaded not guilty to the charges. After various postponements, the trial commenced on 20 February 2017. The first witness for the State was called to give evidence.

[4] On 11 June 2018, while the State was still busy leading its first witness, the erstwhile accused number 7 decided to change her plea of not guilty to one of guilty. On 21 June 2018 the first respondent proceeded with the case and accepted her plea explanation in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 {“the Act”). In the plea explanation she implicated her co-accused in the commission of the offences with which they had been charged.

[5] In the premises she was allocated a new case number to be tried separately from her co-accused. On that same day the first respondent, having satisfied himself of the correctness of the guilty plea, convicted and sentenced her accordingly. Thereafter the prosecutor applied for and was granted a separation of trials. The remaining accused were remanded to 13 August 2018.

[6] On that day the matter did not proceed but was rolled over to 14 August 2018. On 14 August 2018 the first respondent wanted to continue with the matter as if nothing had happened. Defence counsel on behalf of accused number 6 (the first applicant) applied for his recusal. This application was supported by all the defence counsel including the prosecutor. The first respondent nevertheless dismissed the application to recuse himself. Thereafter the parties applied for the matter to be adjourned as they wanted to take his decision on review. The matter was then adjourned pending the finalisation of this review application.

[7] As indicated earlier, at the hearing of the review before us all the parties were *ad idem* that the magistrate ought to have recused himself (correctly in our view) and that the review application should accordingly succeed. It was on that basis that we made the order mentioned in paragraph 1 above. It is therefore not strictly necessary to deal with the merits of the recusal except where it has a bearing on the costs occasioned by the review application. The only issue to be decided then is the costs of this application.

[8] It is evident that the first respondent adopted an intransigent attitude in his refusal to recuse himself from presiding over the trial of the remaining accused. He filed an answering affidavit in which he merely stated that he was not opposing the review application but would abide the decision of this court. He further submitted that he had acted in his official capacity in the discharge of his duties and had committed no irregularity. Except to say that there was no magistrate available, he did not take the opportunity to explain why he refused to recuse himself.

[9] The obligation to give reasons for a decision fulfils a variety of functions. Reasons serve to ensure accountability. They inform the person affected by the decision as to the justification thereof. Reasons enable the person affected to determine whether he or she should abide the decision or take steps to have it corrected or set aside. **Baxter: Administrative Law at 228** puts it thus:

'In the first place a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached and requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair- it is also conducive to public confidence in the administrative decision-making process. Thirdly, - and probably a major reason for the reluctance to give reasons - rational criticism of a decision may only be made when the reasons for it are known…'[1] [footnotes omitted].

[10] We further gave him an opportunity to give us reasons why the State should be saddled with the costs of this application. He contended that when he refused the application for recusal he was exercising his discretion. He argued that he exercised this discretion in terms of section 157 of the Act. He reasoned that previously it had been held that a judicial officer who took a plea of guilty should not continue with the remaining accused who pleaded not guilty because he will no longer be free from prejudice. He argued that this view was rejected by the Appellate Division which held that the magistrate is a trained judicial officer.

[11] It must be assumed that the discretion alluded to by the first respondent relates to a separation of trials because this is what section 157 is about. The Court

[1] See also Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others 1986 (2) SA 756 (A) at 772I - J

has a discretion, in terms of s 157 of the Act, to order a separation of trials. In exercising its discretion under that section, the trial court has to weigh up the prejudice likely to be caused to the applicant by a refusal to separate, against the prejudice likely to be suffered by the other accused or the State if the trials are separated and then to decide whether or not, in the interests of justice, a separation of trials should be ordered. [2]

[12] Section 157 of the Act has nothing to do with whether or not the magistrate should recuse himself from the case. If the first respondent had in mind the provisions of this section when he refused to recuse himself that was an error on his part.

[13] After the first respondent had filed his affidavit in relation to costs we invited the parties including the first respondent to submit heads of argument. Heads of argument were duly filed on behalf of the first respondent and the applicants. The cases to which the first respondent had referred as Appellate Division cases in his explanatory affidavit are presumably **R v T 1953 (2) SA 479 (A)** and **R v D and Another 1953 (4) SA 384 (A).** The correctness of these decisions was doubted in **SACCAWU and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC)** especially in the light of the Constitution.

[14] In his affidavit the first respondent seems to have relied on his training as a judicial officer as one who knows that he must decide the case on the basis of the

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[2] S v Ntuli and Others 1978 (2) SA 69 (A) at 73F-G

evidence before him. The *dictum* in **S v Somciza 1990 (1) SA 361 (A) at 365J** is apposite: Friedman AJA said:

'*However dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate.*'

In the circumstances of this case the first respondent ought to have realised that his conduct would not be in keeping with the spirit of our Constitution. The perception that the accused would not receive a fair trial where the same magistrate had convicted their co-accused who had implicated them was unavoidable. This was properly submitted in argument by all the legal representatives and particularly by the State prosecutor.

[15] The applicants have argued that we should draw an inference that the first respondent was acting with mala fides when he refused the recusal application. It has been submitted that the fact that first respondent looked for another magistrate to continue with the trial is an indication that he knew that it was not proper for him to continue with the rest of the accused. With this knowledge, so the argument ran, he nevertheless persisted with his conduct and resisted all attempts to facilitate his recusal. The applicants accordingly contend that the first respondent should be ordered to pay the costs of the review *de bonis propriis* on an attorney and client scale. In the alternative, they contend that the first and the fourth respondents should be ordered to pay punitive costs jointly and severally, the one paying the other to be absolved.

[16] In respect of a *de bonis propriis* costs order the applicants rely in the main on constitutional court authority decided in the context of the conduct of public officials. The argument is attractive but loses sight of the fact that magistrates are not viewed in the same light as other public officials who discharge public duties. Furthermore in the notice of motion the applicants did not pray for a punitive cost order. Differently put, the argument in support of a punitive costs order has not been motivated in the founding affidavit.

[17] The first respondent, on the other hand contends that he has immunity against actions for damages when he is performing his official duties unless malice can be shown. He claims that he has not acted maliciously as he had no direct or indirect interest in the matter. The common law rule is that a successful party is entitled to costs. However costs are not ordinarily awarded against a party acting in his official capacity unless it can be shown that he was actuated by malice or is guilty of grossly improper conduct.[3]

[18] In the present matter the only explanation by the first respondent is that he exercised his discretion. In this regard he erred. Recusal has nothing to do with discretion. It involves a reasonable apprehension on the part of the litigant that the judicial officer may not bring about an impartial mind in the adjudication of the matter and therefore a perception that he may not receive a fair trial.

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[3] Regional Magistrate Du Preez v Walker 1976 (4) SA 849 (A) at 853D and 855F; Cooper NO v First National Bank of SA Ltd 2001 (3) SA 705 (SCA) at para [37]; Darries v Sheriff, Magistrate's Court, Wynberg, and Another 1998 (3) SA 34 (SCA) at 44I/J - 45A/B; Swartbooi and Others v Brink and Others 2006 (1) SA 203 (CC) para.7; Magistrate Pangarker v Botha and Another 2015 (1) SA 503 (SCA) para. 39.

[19] On the facts of this case the question is whether an inference can be drawn that the first respondent was actuated by malice when he refused to recuse himself. That is possible but it is not the only inference that can be drawn from his conduct. It is possible that this was a genuine mistake in the interpretation of the law., albeit that the first respondent does not pertinently state that he relied on cases of the then Appellate Division. His conduct may be regarded as reprehensible especially in the light of the fact that all the parties were *ad idem* that he should recuse himself from the matter. He was alive to the existence of evidence against the applicants from what was contained in the section 112(2) statement of accused number 7. His persistence in continuing with the matter is a source of grave concern. Be that as it may, we are of the view that malice has not been shown. Nor is this a case where the magistrate ought to be mulcted with costs *de bonis propriis.* We will deal with why we say this in due course.

[20] The next question is whether the State should be saddled with costs. The applicants argue, in the alternative, that the first respondent and the State should pay the costs of the application jointly and severally the one paying the other to be absolved. In **Du Preez**[4] it was said:

'*There is no justification for saddling the State with liability for costs where the action of a judicial officer in his capacity as such has been corrected or set aside on review. Costs are not awarded against the State when on appeal a magistrate's judgment is set aside because he is in error as to the law or in his findings of fact. It would be surprising if, in the event of the same result being achieved on review, the State were to be held responsible for the successful applicant's costs. Moreover it is inappropriate that the Court's displeasure with the conduct of an appellant should*

[4] Footnote 3 at 856A.

result in an order mulcting in costs the State which was neither a party to the suit nor responsible for the judicial officer's actions. There is no room in such a case for the application of the doctrine of respondeat superior.'

[21] The decision of the Supreme Court of Appeal in **Du Preez** is binding on us unless it is distinguishable from the present matter. We are not able to find that it is. This is not a civil matter. If the applicants had continued the case to finality and the applicants were thereafter successful on review or on appeal, the result would not have been any different to the numerous criminal convictions which are set aside on appeal or review on a regular basis, without concomitant costs orders against the State and/or presiding officers. However, civil matters are on a different footing. For one, the State, which is by implication a party to all criminal proceedings, is not a party to the proceedings in a civil matter. We refer by way of example to *Ntuli v Zulu*[5] where Jappie J dealt with the categories of cases where costs can be awarded against judicial officers, acting in their judicial capacities. In that matter the court made a cost order against the magistrate in her official capacity having found that she had not acted *mala fide* or with manifest bias, in which case a *de bonis propriis* order against her may have been justified.

[22] As we see it, the matter before us is on all fours with the facts in *Motata v Nair NO and Another*[6]*.* In that matter the accused had applied to the High Court for the review and setting aside of the decision by the magistrate presiding over his criminal trial wherein the magistrate had determined that, for purposes of a *voir dire* into the authenticity and admissibility of certain video clips, the State was entitled to play the recordings and a transcript in order to enable the court to determine their

[5] 2005 (3) SA 49 KZN
[6] 2009 (2) SA 575 TPD

admissibility. The accused brought his application on the basis that the magistrate's decision allegedly constituted a gross irregularity which was severely prejudicial to him in the conduct of his defence, inasmuch as the recordings might be self-incriminating, and therefore interfered with his constitutional right to a fair trial. Although the reviewing court ultimately found in the magistrate's favour and referred the matter back to the trial court to be finalised, the principle enunciated in that matter is equally applicable to the one before us and is stated thus in the judgment of Hancke J and Pickering J:

'[*44] Applicant originally sought an order for costs against such of the respondents as opposed the application. This in turn led Mr Van Zyl to seek an order for costs against applicant in the event of the application being dismissed. Having regard to the fact that this is a criminal matter in which an accused is not usually saddled with costs, we are of the view that it is not appropriate to make any order as to costs. Cilliers The Law of Costs 3 ed paras 12.19 - 12.24.'*

[23] There is one last issue which calls for comment. The applicants seem to rely on the unreported case of **Tsotetsi v The Honourable Magistrate Delize Smith and Another (23969/2015) [2016] ZAGP JHC 329 (29 November 2016**) for the contention that liability for costs on the part of the fourth respondent can be based on vicarious liability. In that matter Van der Linde J approved a finding by Van Der Merwe AJ in **Minister of Safety and Security and Others v Van der Walt and Another**[7] where it was held that magistrates are employees of the Minister of Justice. This aspect was left open on appeal in **Minister of Safety and Security**

[7] [2011] ZAGPJHC 15 (25 January 2011)

and Others v Van der Walt and Another[8] save to mention that the Appeal Court reiterated that a conclusion that the Minister is vicariously liable based on a finding that magistrates are "employed" by the Minister, ignores the well-established principle that magistrates, when they act in the course and scope of their judicial functions, enjoy, like all judicial officers, a status of judicial independence when they perform these judicial functions and in so doing, form part of the judicial branch of government.[9]

[24] Lest we be understood to agree with the finding by Van der Linde J, let us clarify: We do not agree that magistrates are employees of the State. Magistrates do not fall within the category of public servants employed in terms of the Public Service Act Proclamation No. 103 of 1993. They do not fall under the Department of Justice and Correctional Services. The fact that they are appointed by the Minister of Justice by virtue of the provisions of section 9 of the Magistrates' Courts Act 32 of 1944, does not detract from the fact they are not his employees. In terms of section 10 of the Act, the Minister can only appoint them on the recommendation of the Magistrates' Commission just like the President who appoints judges on the recommendation of the Judicial Service Commission. The Minister does not have control and supervisory powers over magistrates. He cannot direct and control them in the execution of their judicial duties. The Constitution provides that: '*The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'*[10] Consequently the control element by the Minister over magistrates is lacking.

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[8] [2015] 1 ALL SA 658 (SCA)
[9] At para 20
[10] Section 165(2) of the Constitution Act, 1996.

[25] Furthermore, the Constitutional court has ruled that magistrates are not employees but they are judicial officers.[11] We are accordingly of the respectful view that the cases relied upon by the applicants defining magistrates as employees of the Minister of Justice are, to that extent, incorrect.

[25] In the result there shall be no order as to costs.

I. T. STRETCH	**B. R. TOKOTA**
JUDGE OF THE HIGH COURT	**JUDGE OF THE HIGH COURT**

Appearances:

For the applicants: T. M Jikwana

Instructed by Mongoato Mavuso & Associates

For the first and fourth respondents: T. Makibi-Mduba

Instructed by The State Attorney

Date heads of argument submitted: 9 October 2019

Date handed down: 14 November 2019

[11] Van Rooyen & others v The State & others (General Council of the Bar intervening) 2002 (5) SA 246 (CC) para 139