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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

High Court Reference No.: 392/2017
Magistrate's Serial No.: 2/2017
Case No: SH2/97/2014

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

15/01/18
DATE

S. M. S. 7th
SIGNATURE

In the matter between:

EZEKIEL MALATSI LEHASA

Applicant

And

**THE DIRECTOR OF PUBLIC PROSECUTIONS
ADVOCATE J. P. CONRADIE
THE REGIONAL COURT MAGISTRATE
(P. NEL, COURT 1)**

First Respondent
Second Respondent
Third Respondent

REVIEW JUDGMENT

Baqwa J

- [1] The four accused in this matter were arrested and charged in January 2014 on charges of robbery with aggravating circumstances and attempted murder. They are Ezekiel Malatsi Lehasa (accused 1), Nhlanhla Ntuli (accused 2), Solomon Williams (accused 3) and Sipho Vimbele (accused 4).
- [2] They appeared before the Soshanguve Magistrate's Court on several occasions until the matter was eventually transferred to the Pretoria North Regional Court 2 where the matter was again postponed for various reasons on different occasions.
- [3] On 26 January 2015, the charges against accused 2 and 4 were withdrawn by the then Public Prosecutor, Mr T. Motala as a result of which Mr Lehasa, the applicant in this review application, remained the only accused and the matter was set down for trial on 21 and 23 September 2015.
- [4] On 21 September 2015 the matter did not proceed but the Control Public Prosecutor re-visited his decision and re-instated the charges against the other accused. The matter was subsequently postponed for various reasons.
- [5] On 5 September 2016 the matter was transferred to Regional Court 3, apparently due to a congested roll in Regional Court 2, for hearing on 9 September 2016.
- [6] On 9 September 2016 the matter served before the Regional Court 1 and not Regional Court 3.

- [7] I pause to mention that this application for review is brought by accused 1 against the Office of the Director of Public Prosecutions, Pretoria as the first respondent, Advocate H. Conradie, the current Public Prosecutor in this matter and Mr P. Nel, the presiding Regional Magistrate in Regional Court 1 as the third respondent.
- [8] The purpose of the application is to review and/or set aside the decision of the third respondent's refusal to recuse himself. It is pertinent to give a brief background to the decision under review.
- [9] From 9 September 2016 there were various postponements until the matter was set down for trial on 6 February 2017. On 6 February 2017 an application was brought by accused 3's legal representative for the recusal of the second respondent from this matter.
- [10] The basis of the application was that on the date of trial the second respondent went to the third respondent's office in the absence of the accused persons' legal representatives and spent about 30 minutes with the third respondent thereby creating an impression that there was a discussion about the merits of the pending case.

[11] Upon hearing the application, the third respondent would not make a decision on the second respondent's recusal. The matter was referred to the first respondent's office. The first respondent responded by letter as follows on 3 May 2017:

"After careful consideration of all the available information I have decided not to remove Adv. J. P. Conradie as prosecutor from the abovementioned case.

*You are referred to **Porritt and Another v National Director of Public Prosecutions and Others** 2015 (1) SACR 533 (SCA) in this regard. This office is of the opinion that your client was not prejudiced by the prosecutor's action.*

Furthermore, there has been no plea or any evidence tendered by the State as yet. There was also no basis laid in the application of how the prosecutor's action will prejudice or did prejudice your client.

It is for the magistrate to decide whether your client received a fair trial.

Signed Deputy Director of Public Prosecutions."

[12] A further letter on the same date by the clerk to the first respondent states:

"The Director of Public Prosecutions remarks follows:

- 1. I decline to remove Adv. J. P. Conradie as prosecutor from the abovementioned case.*
- 2. Adv. Conradie is, however, advised to refrain from meeting the presiding officer without legal representative being present, in cases that are set down for trial.*

Signed Chief Clerk to the Director of Public Prosecutions, Pretoria."

[13] The matter was enrolled for hearing on 19 June 2017 when an application was brought on behalf of the applicant herein for the recusal of the third respondent. The reasons advanced were the same as the reasons furnished in the application for recusal of the second respondent. The third respondent dismissed the application. Despite the dismissal the matter was further pursued on 3 October 2017 when the third respondent stated that he had already made a ruling, hence this application for review.

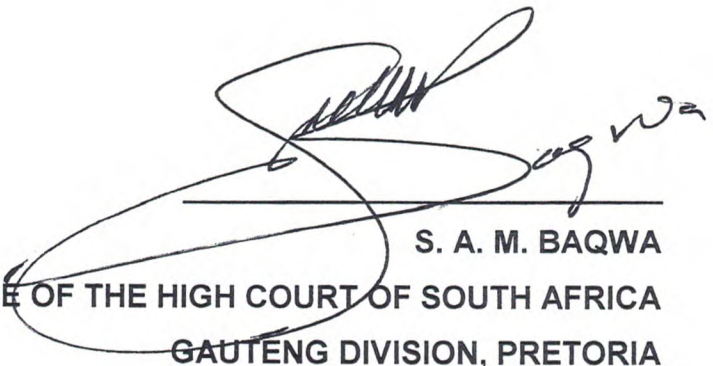
[14] In a similar application in the **Porritt** case (*supra*) at P534 (g - j) to 535a the following was stated:

“There was no suggestion of conduct on his part that could have constituted a basis for the existence of a reasonable apprehension in the minds of the appellants that he was biased against them. That he at all times performed his normal duty as prosecutor and senior official of the NPA was uncontroverted. They could not be removed simply because they were not independent of the complainant which in the present case was the state. The fact that Coetzee was linked to SARS, another component of the state, could not be held to be a basis for his removal from the case. He too was not alleged to have conducted himself in an improper manner at all and their previous roles would not per se bring about substantive unfairness in the ensuing trial. (Paragraph [20] at 543f – 544b.)

Held, further, that the role of prosecutors in a criminal trial could not be equated with that of magistrates or judges: their duties, functions and responsibilities were different, and the test applied by the court a quo was that for the recusal of a judicial officer, and was the wrong test. (Paragraph [21] at 544c.)

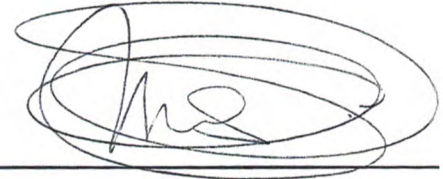
Held, further, that the appeal had to be dismissed and the question of law reserved answered in favour of the state. The matter was remitted to the court a quo for it to proceed with the criminal trial. (Paragraph [24] at 545d.)”

- [15] Bearing in mind what was stated in the second respondent's letter quoted above dismissing the application for the recusal of the second respondent, I am not persuaded that the third respondent's bias can be anticipated even before the accused have pleaded. There is therefore no basis for the application for his recusal. The preconceived perception of bias on the applicant's part is too flimsy a ground to form a basis of bias which would justify a recusal on the part of a presiding magistrate.
- [16] Bias ought to be demonstrable on a factual basis. It must not be merely alleged in a manner that could be described as a figment of another's imagination. I am satisfied that in the present case the directive given to the second respondent by the first respondent is sufficient to address the applicant's concerns. In my view, recusal of the third respondent cannot be justified.
- [17] In the circumstances the decision of the third respondent not to recuse himself is confirmed.
- [18] In the result I propose that the application for review be dismissed and that the matter be remitted to the Regional Court 1 for it to proceed with the criminal trial.



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.

A handwritten signature in black ink, consisting of a large, loopy 'S' followed by a stylized 'A' and 'T', enclosed within a large, irregular oval shape.

S. A. THOBANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA