

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

19/8/15

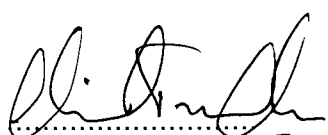
CASE NO: 74070/2012

In the matter between:

NDILEKA NDAMASE

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
17/08/15 DATE		 SIGNATURE

DC VAN GREUNING

First Respondent

MAGISTRATES COMMISSION

Second Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Third Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Fourth Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

Fifth Respondent

JUDGMENT

Tuchten J:

- 1 This is a review application, brought by the applicant to set aside two decisions. The first decision is that of the second respondent (the Commission) to institute disciplinary proceedings against the

applicant. The first respondent was, pursuant to the Commission's decision to institute the disciplinary proceedings, appointed by the Commission to preside at a disciplinary hearing into the applicant's alleged conduct. The second decision under review is that of the first respondent, who convicted the applicant of eleven charges of misconduct. In what follows, I shall set out those facts which are necessary for an adjudication of the arguments addressed to me in the review application.

- 2 The applicant, then a magistrate stationed at the Pretoria magistrate's court, was charged with misconduct as contemplated in reg 25 of Schedule F to the Code of Conduct for Magistrates (the Code) enacted by the Minister of Justice under s 16 of the Magistrates Act, 90 of 1993 (the MA).
- 3 Reg 26(1) of the Code provides:

If a magistrate is accused of misconduct, the Commission may appoint a magistrate or an appropriately qualified person (hereinafter called the investigating officer) to conduct a preliminary investigation and to obtain evidence in order to determine whether there are any grounds for a charge of misconduct against the magistrate: Provided that, if the Commission is of the opinion that there is *prima facie* evidence to support the charge, the Commission may charge

the magistrate concerned in writing with misconduct without the said preliminary investigation.

- 4 After a prolonged period of difficulties between the applicant and the chief magistrate of Pretoria, Mr Nair, the latter approached the Commission with the request that the Commission institute disciplinary proceedings against her. The Commission was established by s 2 of the MA. Under s 3 of the MA, the Commission must consist of a judge of the High Court as its chairperson, the Minister of Justice, a number of persons drawn from the different branches of the legal profession and other persons. At the relevant time, the chairperson of the Commission was Mr Justice Ngoepe, then the judge president of this Division.
- 5 On 4 December 2008, Mr Nair addressed the ethics committee of the Commission. An extract from the minutes of the meeting of the ethic committee of that day reads as follows in relevant part:

Mr Nair, Chief Magistrate Pretoria to discuss matters regarding Magistrates ... and Ndamase

Mr Nair thanks the Committee for having been afforded the opportunity to address the Committee.

Having briefed the Committee on the content thereof, Mr Nair hands in his statements as well as other documents related thereto. The Committee resolved that both magistrates ... are to be charged with misconduct summarily.

- 6 By letter dated 15 December 2008 addressed to Mr Nair and copied to the applicant, the secretary of the Commission informed Mr Nair and the applicant that the ethics committee had resolved to charge the applicant with misconduct. The letter concluded:

A charge sheet will be compiled shortly and served on Ms Ndamase after having been approved by the Commission and signed by the Chairperson.

- 7 The secretary of the Commission wrote a further letter to the applicant dated 27 February 2009. The third paragraph of that letter reads:

In as far as the allegations against you are concerned, kindly be informed that we are in the process of consulting witnesses and of formulating charges of misconduct against you, whereafter a charge sheet has to be submitted to the full Commission for approval.

- 8 A charge sheet was duly formulated and embodied in a document dated 16 November 2009 under the heading of the Commission and signed by Mr Justice Ngoepe as its chairperson. The charge sheet was served on the applicant on the same day, together with a notification that the Commission had appointed the first respondent to preside at the misconduct hearing and that Ms Gail Pretorius had

been appointed to lead evidence at that hearing. The appointments were made under reg 26(4) of the Code.

9 Both the first respondent and Ms Pretorius were at the time senior magistrates, from Roodepoort and Brits respectively. They were also both white people whose home language was Afrikaans. They did not know the applicant before the hearing began.

10 The hearing began on 8 February 2010. The applicant conducted her defence personally. She made an application for the recusal of the first respondent as well as Ms Pretorius. The applicant stated that she was convinced that she

... will not get a fair hearing at all before you.

11 The grounds for the application were stated by the applicant as follows:

I have to make it clear that I have got nothing personal with you, both of you in this matter but my problem is you are white people and you are Afrikaans speaking.

Second, the Magistrate Commission is well aware that on 4 December those who took the decision to charge me were white people. This time I did not expect the Magistrate Commission to appoint white people to preside and prosecute in this matter. I honestly believe that there are

competent black African magistrates who can preside over these proceedings.

- 12 The first respondent proceeded forthwith to rule on the applications for recusal. In relation to the evidence leader (referred to as the prosecutor) Ms Pretorius, the first respondent pointed out that he did not think it would be competent for him to rule on such an application. The view of the first respondent was that it was for Ms Pretorius herself to evaluate her position as evidence leader in the light of the applicant's stated position. In regard to his own situation, the first respondent ruled as follows:

I am not going to say that I am sorry because I am white or Afrikaans speaking and that we are white people does not mean that we will at any stage harm you or do not make sure that you will get a fair trial in this whole hearing and, therefore, your application is dismissed.

- 13 The first respondent then immediately added:

If you want to take this on review at this stage, it s your choice. I have no problem in this regard.

- 14 To which the applicant responded:

I do not want to take this matter to the High Court. It will be costly and a waste of time especially this thing has been dragging from 4 December 2008 and we are now in February 2009. I have got a point *in limine* to raise. Are you ready?

- 15 The applicant proceeded to outline her point *in limine*. The point was diffusely argued by the applicant but within the submissions she put up to the first respondent was a contention that the ethics committee had resolved on 4 December 2008 to charge her and there was no formal resolution after that date to cover charges of misconduct said to have been committed after that date. She identified the “new” charges as nos 4 to 23, 26-30 and 40-41. The applicant argued that because there was no further such resolution, the new charges were unauthorised and thus incompetent.

- 16 The first respondent ruled on the point *in limine* on 9 February 2010. He dismissed the point *in limine*, observing that nothing prescribed what evidence had to be placed before the Commission to justify a charge and that the regulation only referred to *prima facie* evidence. It was for the evidence leader, the first respondent said, to prove the allegations of misconduct against the applicant. He added:

If you want to challenge the decision of the Magistrates Commission who charged you with misconduct then this is not the forum for this. Then you must, as I have already indicated take the decision on review to the High Court.

- 17 The first respondent then ruled on and dismissed certain other submissions argued by the applicant within the framework of her point *in limine* and the hearing continued. The procedure adopted by the first respondent, with the concurrence of both the evidence leader and the applicant was essentially that applicable to a trial in a court of law. At the end of the case for the Commission, the first respondent discharged the applicant on counts 1, 8, 9, 12, 13, 18, 20 and 26.
- 18 The applicant testified and was cross-examined by the evidence leader. Argument was presented, during which the applicant reiterated her application that the first respondent recuse himself on the ground of perceived racial bias. The first respondent proceeded to deliver a written judgment dated 17 April 2012. He once again refused to recuse himself and found the applicant guilty on 8 counts of refusal to execute lawful orders¹ as contemplated in reg 25(j) and 3 counts of failing to execute her official duties objectively, competently and with dignity, courtesy and self-control as contemplated in reg 25(c) read

¹ Counts 3, 5, 6, 10, 11, 17, 19 and 23. On count 10 he found there had been a splitting of charges and recorded the "guilty period" as 16 February 2009 to 18 March 2009.

with paragraphs 2 and/or 3 of the Code. He found the applicant not guilty on all the other remaining counts.

19 The first respondent was then required under reg 26(19) of the Code to convey to the Commission his finding in relation to the aggravating or mitigating factors presented at the hearing before him and impose one of the relatively minor sanctions prescribed in reg 26(17)(a) or recommend to the Commission under reg 26(17)(b) that the applicant be removed from office as contemplated in s 13 of the MA.

20 The first respondent listed the aggravating and mitigating circumstances found by him and elected to recommend removal from office.

21 Subsections 13(2) and (4) of the MA read, in relevant part:

(1) ...

(2) A magistrate shall not be suspended or removed from office except in accordance with the provisions of subsections (1), (3), (4) and (5).

(3)...

(4)(a) If the Commission recommends that a magistrate be removed from office-

(i) on the ground of misconduct;

(ii) ...

(iii) on account of incapacity to carry out the duties of his or her office efficiently,

the Minister must suspend that magistrate from office or, if the magistrate is at that stage provisionally suspended in terms of subsection (1)(a), confirm the suspension.

(b) A report in which the suspension in terms of paragraph (a) of a magistrate and the reason therefor are made known, must be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament must, as soon as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended.

(d) After a resolution has been passed by Parliament as contemplated in paragraph (c), the Minister shall restore the magistrate concerned to his or her office or remove him or her from office, as the case may be.

22 Following the conclusion of the hearing before and the recommendation of the first respondent, the parliamentary portfolio committee on justice and constitutional development considered the applicant's case under s 13(4)(c) of the MA. On 18 September 2012, the portfolio committee recommended that the National Assembly confirm the applicant's removal from office as a magistrate. On 20 September 2012, the National Assembly passed a resolution pursuant to s 13(4)(c) of the MA not to restore the applicant to her office.

- 23 On 20 December 2012, before the National Council of Provinces considered the recommendation of the portfolio committee regarding the applicant, the applicant launched the present proceedings.
- 24 On 19 February 2013, the National Council of Provinces passed a resolution pursuant to s 13(4)(d) of the MA not to restore the applicant to her office. By letter dated 27 February 2013, the third respondent (the Minister) wrote to the Commission, recording that he had removed the applicant from office in terms of s 13(4)(d) of the MA.
- 25 The Commission and the Minister appeared through the same counsel to oppose the application for review. The other respondents filed formal notices to abide.
- 26 The grounds of review advanced by the applicant in her founding affidavit are contained in paragraph 9 of that document. Before I consider the grounds of review raised before me in argument, I shall reproduce this paragraph in full, exactly as framed, omitting only subparagraph numbers.

I am therefore, entitled to the relief sought on the grounds that the second respondent committed an irregularity by charging me with misconduct without investigation or affording me a right to be heard in terms of the common law

and section 15 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The first respondent failure to recuse himself constituted a gross irregularity As he based his reasons on the test of actual bias and not reasonable apprehension of bias. I have set out a reasonable basis why I had a reasonable apprehension of bias and the reasons I have set out are not far fetched considering the history of the Pretoria Magistrates Court. What further concerned me was that the first respondent knowing that the matter had racial connotation proceeded to appoint a white only team to conduct the hearing. The prosecution was either not conversant with English or deliberately proceeded to conduct the proceeding in Afrikaans. We had to resort to using an interpreter for my convenience in circumstances where a prosecutor who was conversant with English could have been appointed as I do not speak Afrikaans at all. The only reasonable inference I can draw from the conduct of the second respondent was to ensure at all cost that things are made difficult for me in the conduct of my defence. The first respondent on the other hand forced himself onto the case despite having accepted or being conscious that the matter had inclinations of racism and I was uncomfortable with his appointment and the further conduct of the proceedings.

It is apparent that the third, fourth and fifth respondent had relied on the recommendations of the second respondent without having applied their minds to the legal implications of the first respondent's refusal to recuse himself and the failure by the second respondent to investigate the allegations against me prior to an investigation or affording me a right to be heard.

- 27 Three issues were argued before me. I shall deal with them below. Before I do that, I need to make clear that no reliance was placed on the grounds in paragraph 9 of the founding affidavit except as I describe below. The other grounds in paragraph 9 were not argued, for good reason. They are baseless.
- 28 Counsel for the applicant advanced two grounds of review in argument. The first ground of review is that the first respondent had no power to consider the “new” charges, ie those presented as counts nos 4 to 23, 26-30 and 40-41. This was the subject of the applicant's point *in limine* taken at the hearing before the first respondent and referred to in paragraph 15 above. The argument made by counsel, as best I can reproduce it, is that the Commission was bound in law only to formulate charges, the gravamen of which arose before 4 December 2008, the date on which the ethics committee of the Commission resolved to prosecute the applicant.
- 29 There are a number of difficulties with this contention. The first is that the ground of review is not raised in the applicant's founding affidavit at all, having regard to paragraph 9 of her founding affidavit which I have just quoted.

30 It is trite that a founding affidavit must contain both the grounds on which the applicant seeks relief, as would be contained in particulars of claim in an action, and the essential evidence in support of those grounds. The purpose of this rule is to apprise the respondents of the case they may be expected to meet. One reference to authority will suffice to make this point. In *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* 1 1978 1 SA 173 W at 177G-178A the following was held:

It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits or the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out. ... This is not however an absolute rule. It is not the law of the Medes and Persians. The court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits.

31 In the present case, the point was said to have been raised in reply. In paragraph 10 of her replying affidavit, the applicant says the following:

It is the whole process, including the decision to charge and prosecute that is being sought to set aside. Findings were made in respect of charges which were not investigated in

terms of the legislation. *These extra charges were also not authorised by the decision of 4 December 2008.* [my emphasis]

32 There is another passage in the record on which the applicant relies in this regard. I need to put this passage in context. The refusal of the first respondent to recuse himself was a ground of review relied upon by the applicant in her founding affidavit and persisted in on appeal. The applicant proceeded on about 24 March 2015 to deliver a supplementary affidavit. This was not the supplementary affidavit contemplated in rule 53(4). It contains a number of paragraphs preceded by the heading "THE PURPOSE OF THIS SUPPLEMENTARY AFFIDAVIT". But the material in these paragraphs does not identify any such purpose; it contains a rather rambling repetition of allegations and assertions made by the applicant at the hearing before the first respondent and in her founding and replying affidavits.

33 Be that as it may, in paragraph 4(i) of this supplementary affidavit, the applicant says the following:

When I made an application that the first respondent should recuse himself from hearing the matter, I also requested among other things that all new/additional matters that were not covered by the resolution of the Magistrates Commission

dated the 04th December 2008 should be struck off the charge sheet (see pp71-148 of Bundle 1 of the record of the proceedings). I likened these additional matters to other counts in the charge sheet that are covered by the resolution saying that all the complaints against me were never investigated before a decision to charge me was taken. I mentioned these additional matters individually in para 10 of page 93 of Bundle 1. The first respondent dismissed all the points *in limine* I raised and thereby made the whole process to be irregular as he and the prosecutor were not authorised to prosecute me for such matters.

- 34 In heads of argument dated July 2015 prepared by counsel who argued the review for the applicant, the submission is made, if I understand the argument correctly, that the “new” charges were not authorised by the Commission.
- 35 I was invited to treat this as a special case justifying the consideration of the new ground. But there is no basis, in my view, for the exercise of a discretion in this regard in favour of the applicant. I do not think that the respondents were adequately forewarned of the applicant’s intention to rely on a ground of review not covered by the founding affidavit. The written argument to which I have referred was submitted a short time before the two days allocated by the Deputy Judge President on special application for the hearing of the case. I was not invited to postpone the hearing of the case to afford the respondents

an opportunity to deal with the factual material which underpinned the new ground. The contents of the letters mentioned in paragraphs 6 and 7 show that the Commission appreciated that a decision to prefer a charge against a magistrate had to be made by the full Commission rather than a committee of the Commission. I have little doubt that if a ground of review of lack of authorisation by the Commission had been raised, the Commission would have dealt with the facts relevant to the point. In all the circumstances, it would not be fair to allow the applicant to rely on this ground of review.

- 36 It bears repeating that this attack is levelled at the decision of the Commission to charge the applicant as it did. In this regard, I think the applicant has misunderstood the facts. The decision made on 4 December 2008 was a decision of the Commission's ethics committee, an organ to which the Commission delegated certain functions. But the decision to prosecute the applicant on the specific charges was made on 16 November 2009 *by the Commission* when Mr Justice Ngoepe signed the charge sheet on behalf of the Commission. Counsel for the applicant expressly disavowed any assertion that Mr Justice Ngoepe had been on a frolic of his own. It follows, therefore, that the character of the "new" charges is at this level no different from the character of the other charges contained in the charge sheet. The Commission itself (in contradistinction to the

ethics committee of the Commission) decided to bring each of the charges in the charge sheet against the applicant. If any charge other than those which the Commission had decided to bring against the applicant had found its way into the charge sheet, Mr Justice Ngoepe would not have signed the charge sheet.

- 37 Section 26(1) of the MA empowers the Commission, if it is of the opinion that there is *prima facie* evidence to support the charge, to charge the magistrate concerned with misconduct. Once it is not in dispute (as it could hardly be) that Mr Justice Ngoepe was authorised by the Commission to sign the charge sheet on its behalf, then there is no room for an argument that authority was lacking. The resolution of the ethics committee of 4 December 2008 is simply irrelevant to this enquiry.
- 38 A further difficulty facing the applicant is whether this review ground is competent at all, having regard to the time that elapsed between the date of the second respondent's decision (16 November 2009) and the date upon which the review was brought (at the earliest 20 December 2012).

39 The second issue which I must decide arises from the point taken in the answering affidavit delivered on behalf of the Minister that the review of the Commission's decision to charge the applicant was time barred by the provisions of s 7(1)(b) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Section 7(1) reads as follows:

- (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
 - (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
 - (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

40 The difficulty facing the applicant is that it is clear, as the argument made by the applicant herself to the first respondent on 9 February 2010 as described above shows, that she had by that date been informed and became aware of all the information contemplated in s 7(1)(b) of PAJA. Counsel for the applicant was constrained to concede that this was so. That being the case, the maximum period of 180 days had long elapsed when the applicant launched her review application on 20 December 2012. There was no agreement under

s 9(1)(b) of PAJA to extend the period of 180 days and the court was not approached under s 9(2) for an extension of time.

41 Counsel for the applicant submitted that administrative action of which the applicant complained had only been completed by the decision of the Minister to remove her from office under s 13(4)(d) of the MA.

42 I do not agree. Section 1 of PAJA defines an administrative action to include, subject to certain exclusions, a decision by an organ of state exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect. It is only an administrative action which is justiciable under PAJA. By deciding to charge the applicant in the manner that it did, the power conferred on the Commission under the proviso to reg 26(1) of the Code was fully exercised when the charge was signed on behalf of the Commission. The administrative function assigned by the legislature to the Commission in such circumstances was thus completed. Thereafter other administrative actions were contemplated by the legislation and indeed performed as part of the administrative process that led to the applicant's being charged found guilty and ultimately dismissed from office. But that does not alter the fact. It was not disputed that the decision to formulate the charge sheet in the manner described

adversely affected the rights of the applicant and had a direct, external legal effect.

43 It follows that the review of the decision of the Commission was not brought within the time prescribed by PAJA and is in the circumstances not justiciable by the court. For this reason too, the second issue in the review must be decided against the applicant.

44 The final issue to be decided arises from the submission on behalf of the applicant that because the first respondent is a white, Afrikaans speaking person, the applicant had a reasonable perception that he would be biased against her in the hearing and ought, on the application of the applicant, to have recused himself from the hearing.

45 I have the strongest doubts whether the applicant had any such perception at all. She asserted that all the complainants against her were white persons. That was manifestly not true. She suggested that people who decided to charge her were all white people. That is also manifestly untrue. She said that for historic reasons she did not trust white people. But she retained the services of a white, Afrikaans speaking advocate to argue her case in this court and made no objection to the composition of the court hearing the review. I suspect that she advanced this preposterous contention to embarrass the first

respondent and the evidence leader. Perhaps she believed, misguidedly, that this argument would have resonance when Parliament came to consider the matter. I need make no conclusive finding at this level of the case.

- 46 For the cases make it perfectly clear that the fact that a magistrate is a white person does not disqualify him from presiding in a case involving an accused belonging to a different race. In *S v Collier* 1995 2 SACR 648 C it was held:

[Th]e apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision. ... Professor Baxter gives a commonly cited example, namely the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or Judge could ever administer justice fairly and evenhandedly in a matter involving white accused.

For the reasons set out above, the argument that the white magistrate erred in refusing to recuse himself upon being asked to do so at the appellant's trial is both unfortunate and untenable. The fact that he is a white person, does not disqualify him from presiding in a case involving an accused belonging to a different race.

- 47 This passage was cited with approval by the highest court in the land in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 CC (“Sarf”) para 43. The *Collier* case was extensively referred to by the first respondent in his written judgment. It is remarkable that the applicant chose to persist with this argument after, if she had not known of the *Collier* principle before, the first respondent brought it pertinently to her attention in his judgment.
- 48 The Constitutional Court had occasion to consider the test to be applied in applications for the recusal of judicial officers in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 CC paras 11 to 17. I shall quote these paragraphs in full, omitting only the footnotes:

[11] In *Sarf*, this Court formulated the proper approach to recusal as follows:
‘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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

- [12] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. 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. As later emerges from the *Sarfu* judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted.
- [13] The second in-built aspect of the test is that 'absolute neutrality' is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his

or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality - a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, 'a mind open to persuasion by the evidence and the submissions of counsel'; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. ... Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'

[14] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.

[15] It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain

unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'

[16] The 'double' unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from 'the evils and immorality of the old order' remains vulnerable to attacks on its legitimacy and integrity.

Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is 'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'.

- 49 I wish in this context to make two observations. Firstly, the test propounded by the Constitutional Court, binding on all courts and tribunals in this country, is expressly made applicable to benches both of judges and magistrates. Counsel for the applicant argued that a distinction should be drawn in the present context between a magistrate acting as presiding officer in a judicial capacity and a magistrate acting as presiding officer in an administrative capacity. I see no justification for this distinction. The magistrate who presides in administrative proceedings carries with him the same values and training as he does when he ascends the bench in court. Secondly, as the applicant herself was a magistrate, the reasonableness or otherwise of her alleged perception must be tested from the perspective of a reasonable magistrate.

50 The perception of a lay person of racial bias on the present facts would therefore not be a reasonable perception. All the more so in the case of a magistrate. The claim that the first respondent committed a reviewable irregularity when he refused to recuse himself when asked to do so on 8 February 2010 must accordingly fail. However, counsel argued that during the hearing itself, certain things happened that justified the applicant's perception that the first respondent was, on racial grounds, biased against her. I proceed to deal with counsel's submissions.

51 During the hearing before him, the first respondent asked an attorney who testified about a complaint she had lodged against the applicant to describe the racial group to which she belonged.² The witness answered that she was a coloured person. The applicant complained that this constituted a descent into the arena by the first respondent.

52 In my view, it did not. The issue of the race of the complainants had been raised by the applicant herself when she asserted, falsely as it turned out, that all the persons who made complaints against her were white. The question of the first respondent was, in the deplorable circumstances created by the applicant herself, relevant. This single line of questioning by the first respondent was not a descent into the

² Or, more accurately, to which in the pre-democratic era she would have been adjudged by the legislation then in force to have belonged.

arena. It was a legitimate attempt to get to the truth. A judicial officer presiding in a trial is not precluded from asking questions of witnesses. That principle applies with even greater force in administrative proceedings. And even were the questioning a descent into the arena (which it was not) it would not show racial bias on the part of the first respondent.

53 Then there was an incident in which, during an adjournment, the evidence leader sat with a (white) witness who was under cross-examination at the time while the witness listened to previous testimony through the recording machine . There was no suggestion that the evidence leader made any remarks during this process that might have influenced the way the witness would testify. The sole complaint at this level was that the applicant ought to have been invited to be present while the witness listened to the recording. I need say no more about this complaint that whatever its merits, it did not show racial bias on the part of anybody.

54 The applicant alleged that during the hearing she had found the first respondent in conference with the evidence leader while the latter was interviewing a witness. This incident was raised by the applicant when the hearing resumed. The first respondent's additional reasons show that the first respondent experienced difficulties in finding a place to

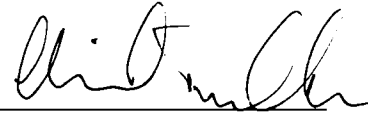
have his tea during the adjournments. He found himself obliged to take his tea in the conference room in which the hearing was being conducted. In this situation the first respondent was from time to time during adjournments alone in the conference room with the evidence leader. But the first respondent denies having participated in any conference with the evidence leader while she was interviewing a witness. And even if the first respondent had participated in such a conference (which he did not) that fact would not indicate or even suggest racial bias.

55 The third issue, whether the first respondent ought on the ground of a perception of racial bias on his part against the applicant to have recused himself, must therefore be determined against the applicant. I may say that the record bears out the first respondent's own assessment in his judgment that he bent over backwards to be fair to the applicant.

56 Costs, in the circumstances of this case, must follow the result. Certain interlocutory costs issues were reserved for determination by the court hearing the review. It is appropriate that those costs should similarly follow the result.

57 I make the following order:

- 1 The application is dismissed with costs, including all those costs which were reserved for the decision of the court hearing the review.
- 2 The costs orders in the previous paragraph will include the costs consequent upon the employment, where applicable, of both senior and junior counsel.



NB Tuchten
Judge of the High Court
17 August 2015