



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: A877/11

In the matter between:

RALPH PATRICK NDLEVE

APPLICANT

And

**DIRECTOR OF PUBLIC PROSECUTIONS
NORTH GAUTENG, PRETORIA**

1ST RESPONDENT

THE REGIONAL MAGISTRATE JH WESSELS

2ND RESPONDENT

JUDGMENT

RATSHIBVUMO (AJ):

1. This is a special review wherein Mr. Ralph Patrick Ndleve, herein after referred to as the appellant, seeks the intervention of this court in the proceedings pending before Waterval Regional Court, by reviewing a decision by a regional magistrate in refusing to recuse herself. The order sought is not clear from the heads of argument filed before us. This could be owing to the fact that the appellant being legally qualified and an advocate of this court, opted not only to

conduct his own defence for trial purposes before the Regional Court, but also to prosecute this application in person. Upon reading the proceedings before the Regional Court, it is clear that the appellant seeks an order setting aside the decision to refuse the application for the presiding officer to recuse herself and an order for the trial to start de novo before another presiding officer.

2. Following is the background of the case. The appellant is standing trial on a charge of fraud involving R91 759.98. After numerous postponements for trial which did not materialise owing to various reasons; case was remanded for trial to 22 August 2011 with the magistrate asking everyone including court personnel to be present at 08h30. The appellant was however warned to be in court at 08h00. Neither the appellant nor his attorney, Mr. Mabe was present in court at 8h45. A warrant for the appellant's arrest was authorised and issued immediately. At 9h30, a warrant of arrest had been executed by a court orderly and appellant was before the court coming from the court cells.
3. He informed the court that his attorney would not be coming since he had terminated his mandate and that he would proceed to conduct his own defence for trial purposes. The appellant explanation regarding his failure to be in court at the time warned for was accepted and he was "acquitted." This however did not result in his release on warning as was the case before. The court informed him that his release would be subject of a separate inquiry. The appellant asked that the same be dealt with immediately. It was in the process of this very inquiry that counsel for the State informed the court that the appellant would have to apply for bail since he has a "previous conviction of similar nature," making the offence to be one of those listed in Schedule 5. The tongue lashing

given to the counsel for the State by the presiding officer for divulging this did little to reverse the damage caused.

4. Once this information was divulged, the appellant asked to bring the application for his release before a different presiding officer. The magistrate then addressed counsel for the State saying, “[y]ou will now basically have to get am quite sure Mr. Ndleve will not object to me doing the trial because of the information that you said.” The appellant conceded to this and asked that the inquiry destined for his release from custody be dealt with before the commencement of trial saying this would have a bearing on his emotional state.
5. When the counsel for the State suggested that they start with the trial because the other magistrate would only be available later, the appellant said “[y]es I will succumb to the trial your honour with due respect as if I do not do so we may have problems with the issue of bail also entertained. So we may proceed with trial.” Trial indeed commenced with the appellant pleading Not Guilty to the charge and all the alternatives. Three witnesses gave evidence and were fully cross examined by the appellant. He later appeared before another judicial officer and bail was fixed for him at R5000 which he paid and was released the same day.
6. On the next arranged date, trial could not proceed because the appellant had served the papers with indications that he would be applying for the recusal of the presiding officer. Once the record was transcribed, the application for the recusal of the presiding officer was launched. The reasons for the application were:

- a) Failure by the presiding officer to protect the (unrepresented) accused.
- b) Not affording the accused equal footing with the public prosecutor, resulting in rulings always in favour of the State.
- c) The presiding officer was informed of the accused's previous convictions.

The application for recusal was refused by the regional magistrate.

7. As a general rule, a High Court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a Lower Court.¹ The right of a High Court to interfere in proceedings pending before a lower court was acknowledged in *Ismail and Others v Additional Magistrate, Wynberg and Another*² when Steyn CJ said “although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in untermiated proceedings in a court below and should generally speaking confine the exercise of its powers to ‘rare cases where grave injustice might otherwise result or where justice might not by other means be attained’.
8. Issues for determination are whether there were irregularities in the court a quo and if there were, whether the same could result in grave injustice. The court has to determine if justice might not be attained by other means. Upon perusal of the court proceedings one realises how the

¹ *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119G and *Motata v Nair No and Another* 2009 (2) SA 575 (T)

² 1963 (1) SA (A).

court conspicuously guarded the rights of the appellant, constantly reminding him of all the legal provisions even though he portrayed a picture of a person knowledgeable in law. Though he appeared as an accused, not as an advocate, he was referred to by the title “advocate” to accord him some respect. The appellant branded the counsel for the State a liar,³ something that went unnoticed many times, but when counsel for the State suggested that the appellant was being economic with the truth, the presiding officer cautioned that “they should not get personal.”

9. The portion alluded by the appellant as depicting the presiding officer leaning in favour of the State simply does not appear from the record. The record however shows appellant’s failure to appreciate the role of the public prosecutor as *dominis litis* and the limitations the judicial officer has in dictating what charges he could prefer against the appellant. It would appear that the appellant expected the court to order the State to proceed with the charges that the appellant had been informed in the past and not deviate from them even if it means preferring less charges than initially thought. In circumstances where other judicial officers would have just refused to entertain the concerns by the appellant in this regard, the presiding officer went over board to give a lengthy lecture and discussion with the appellant to make sure he understood the rights of the public prosecutor.⁴ It can therefore be accepted that the appellant’s allegations to the effect that the presiding officer demonstrated bias in favour of the State are baseless and with no merit.

³ See p. 12 line 10, p. 23 line 11, p. 24 line 25 and p. 28 line 16 of the transcribed record.

⁴ See p. 116-117 of the transcribed record.

10. One thorny aspect is the utterances by the counsel for the State just before the trial began to the effect that the appellant had a previous conviction of similar nature. Sections 89, 197, 211 and 271 of the Criminal Procedure Act⁵ are all against the disclosure of previous convictions at any stage before the conviction of an accused person. Section 211 in particular provides,

“Except where otherwise expressly provided by this Act or the Child Justice Act, 2008, or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he or she has been so convicted.”

There can be no doubt as such that for the counsel of the State to inform the presiding officer of the previous conviction that the appellant had was an irregularity. The gravity of such irregularity and whether it vitiates the right to a fair trial that the appellant is entitled to, is for this court to weigh.

11. The guidelines for the recusal of a judicial officer can be found in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.⁶ The Constitutional court said,

“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

⁵ Act 51 of 1977.

⁶ 1999 (4) SA 147 (CC).

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.*” (own emphasis).

12. The Supreme Court of Appeal held in *S v Roberts*⁷ that the vital ingredient of a fair trial is that on hallowed authority, justice be done and be seen to be done. In what is seen to be done, appearances play a varied role in the fulfilment of the need for fairness. The appearance of bias may be enough to vitiate a trial in a whole or in part. In *S v Bruinders*⁸, the fact that the accused knew that the magistrate who presided over the trial knew his previous convictions since he had presided over his application to be released on bail, and decided not to ask for his recusal was not good enough to cure what otherwise is *prima facie* irregular. According to this decision, presiding over a case while a judicial officer is biased is against the constitutional provisions whereby a judicial officer is called upon to apply the law without fear, favour and prejudice. Perception of bias has the same impact as the actual bias since it vitiates the trial proceedings.⁹
13. It is a long standing practice in our courts that for the presiding officer to be informed of the previous convictions before the accused is convicted constitutes an irregularity nullifying the proceedings as a whole. In *S v Mavuso*¹⁰, the Appellate Division set aside the conviction and the sentence because it held that the proceedings were irregular for

⁷ 1999 (2) SACR 243 (SCA) at p. 249

⁸ 2012 (1) SACR 25 (WCC) at 29.

⁹ *S v Bruinders supra*, at p. 29.

¹⁰ 1087 (3) SA 499 (A).

the same reason.¹¹ In *S v Mdletye*¹², the High Court did not attach any weight to the fact that the accused had pleaded guilty to the charge, thereby minimizing the prejudice. Once the previous conviction were known to the magistrate during the questioning in terms of section 112 (1) (b) of the Criminal Procedure Act, it constituted irregularity and thereby nullified everything that followed. In *S v Mofokeng and Others*¹³, although evidence to the effect that the accused were guilty of housebreaking with the intention to steal and theft was overwhelming, the knowledge of previous convictions to the magistrate constituted an irregularity that nullified the proceedings as a whole.

14. Although the accused is obliged to disclose his previous convictions in a bail application, and bail proceedings being part of a trial record; there is an express provision to the effect that previous convictions shall not form part of the trial proceedings.¹⁴ It was because of this exclusion that the Constitutional Court could not find anything unconstitutional in the bail provisions in section 60 of the Criminal Procedure Act.¹⁵
15. I now turn to the facts in this case. Given the above; there is no question about it that for a judicial officer to continue to preside over a criminal trial while he or she has been apprised of the accused's previous convictions constitutes an irregularity. The only question is whether the concession by an accused person that the judicial officer may continue with the trial cures the irregularity. As indicated above, the appellant conceded that the magistrate may continue to preside over the trial

¹¹ In this case the public prosecutor had asked the questions to show that the accused knows the dagga by reminding him of his previous conviction. This was after the accused had claimed he did not know dagga.

¹² [2005] JOL 13933 Tk.

¹³ See unreported judgment, case no. A421/11 by the Gauteng South, Johannesburg delivered on the 12th October 2011.

¹⁴ See section 60 (11B) (c) Act 51 of 1977.

¹⁵ *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* at 1999 (7) BCLR 771 (CC).

before applying for her recusal. It is important to unpack the events that led to the concession by the appellant.

16. Once the appellant's previous convictions were made known to the presiding officer, she said to the appellant, '...am quite sure Mr. Ndleve will not object to me doing the trial because of the information that you said.' The statement by the presiding officer suggests that the accused can heal the irregularity by making concessions. For the reasons that will appear hereunder, I do not deem it appropriate to give an opinion regarding this statement. Presuming that the accused can heal an irregularity by volunteering to ignore them, the following concerns arise in this case.
17. While conscious of the fact that the appellant was not legally represented, was he informed by the presiding officer that that what the prosecutor said constituted an irregularity, that such would disqualify her from presiding over the trial and that such would not happen if he makes an undertaking that he was happy with her irrespective of the disqualification? The answer is no. Her statement suggests an answer for the appellant when she says "I am quite sure..." While mindful of the fact that the appellant is legally qualified, we have no knowledge of his background practice especially in criminal courts; if there is any. The charges he faces did not even take place in the forum of criminal trials but some civil litigation. I am not sure as to why the presiding officer encouraged the appellant not to object. I guess I would be in a position to understand the possible harm if it was in the middle of a trial since the recusal could mean witnesses would have to come give evidence again. At that stage the appellant was yet to plead to the charge.

18. The presiding officer informed the appellant on the day he brought the application for her recusal that she had volunteered not to proceed with the case offering to do the bail application instead. Such an offer is not reflected on record. It is however clear that she may have thought of it but did not put the full statement on record. This shows that she was very conscious of what she should do in the circumstances, but somehow thought she did inform the appellant which unfortunately was not the case. The statement, “[y]ou will now basically have to get am quite sure Mr. Ndleve will not object...” may have been meant to inform the appellant of this, but it is obviously incomplete. It is difficult to guess if she meant to inform the public prosecutor that he would now have to get a new presiding officer for trial or something else. Of importance is that when she informed the appellant of the offer she thought she made, it shows she knew she had to make that offer – to recuse herself for trial and rather attend to the inquiry or bail application only.
19. Now that that the appellant agreed with the presiding officer by “succumbing” to trial with her presiding, does such a concession bar him from raising his request for her recusal later? To examine this aspect, it is necessary to look at the circumstances of his concession. He was in custody after his arrest following his late arrival in court. There was an inquiry into his late arrival and the court accepted his explanation and “acquitted” him. Somehow, that acquittal did not earn him his freedom. The presiding officer told the appellant that “as he knew...” the process for his release would be a separate inquiry. I do not know what she was referring to since it is common practice for the accused to be released on warning again or to have bail reinstated if the

explanation for failure to be in court is accepted. When told that the trial was about to start, the appellant pleaded with the court to deal with the other inquiry meant to earn his freedom because that would have an emotional impact on him as he conducts his defence on trial. Given the fact that he had at that stage been acquitted, I think this was a fair request; but it did not happen. The trial had to start immediately. It is because of this that the appellant conceded to the trial saying if he does not; his request to be released on warning or bail may not be attended to.

20. The appellant concession shows that had he been released before the trial started, he would have objected to her presiding over the trial. The court needs to guard against an abuse by the accused who does not seek a recusal at an appropriate time, but seeks such recusal only when he realises the outcome of the case has gone against him. Can it be said that the appellant could be abusing the system in the circumstances? The evidence lead so far was quick and formal and was led in one day between 10 am and lunch time. They have not implicated the appellant much since they are formal witnesses. If the appellant would be implicated, it will be by the witnesses who are yet to testify. It could be for this reason that the State now argues that the appellant may still be acquitted.
21. The appellant did not wait for the trial to proceed much further. On the very next day set down for trial, the appellant informed the court of his intentions. I am not convinced that that appellant could be abusing the system because he could have waited until the very end before bringing the application for recusal of the presiding officer.

22. I have noted with great concern that the incident referred to in the charge faced by the appellant took place more than 11 years back. Any delay in the matter prejudices the State since witnesses may with time become unavailable. Equally, for the witnesses (all of them attached to Hlanganani Magistrate Office) to come and testify again is prejudicial to them since they have done so already. The greater harm the State could face however is for the trial to run its course only to have the outcome thereof set aside because of the irregularity which could have been remedied at the early stages of the trial. I am of the view that seeing that the majority of the witnesses lined up by the public prosecutors are yet to testify, for the trial to start *de novo* would be less prejudicial to everyone involved.
23. In conclusion, I have noted that this regional magistrate finds herself entangled in in a web she did not design. Like she said, the counsel for the State should have known better. There was just no reason for him to place on record the appellant's previous convictions; especially seeing that the court had already acquitted him of that which led to his arrest. The appellant was not arrested because of his previous convictions but because he was late, and the court was happy with the reasons he furnished. The State was at liberty to apply for an arrest warrant of the appellant if it believed that by virtue of his previous convictions, he was disqualified to be on warning. Whether the same would be granted is another question.
24. It is also worth noting that he informed the court during bail application that the appellant had a previous conviction for an offence committed in 2003. The charge sheet reflects that he faces the charge of fraud committed on the 7th January 2002. This would mean that the appellant

was convicted only after he had committed the offence alleged, unlike he was ‘previously’ convicted as stipulated in Schedule 5.

25. Although the presiding officer was not given the details of the previous conviction, in all likelihood she knows them by now since they form part of the bundle she had to sign off when preparing her reasons for this application. For this reason, and what I stated above, I am of the view that both the State and the appellant would suffer a substantial prejudice unless this court intervenes and I do not see any practical way out of it beside the intervention.

26. I would thus make the following order:

- a) The proceedings pending before the Regional Magistrate Ms. Wessels are hereby set aside.
- b) The matter is remitted back for trial to start *de novo* before another Regional Magistrate.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree,

H. FABRICIUS
JUDGE OF THE HIGH COURT

22 April 2013

APPEARANCES:

Date Heard: 22 April 2013

Judgment Delivered: 22 April 2013

For the Appellant: In Person

For the Respondent: Advocate M.J. Makgwatha