

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No. : A413/2007

In the matter between:-

ARTHUR ITUMELENG MOGAECHO

Applicant

versus

REGIONAL COURT MAGISTRATE:

MRS MEINTJIES

First Respondent

THE DIRECTOR OF PUBLIC

Second Respondent

PROSECUTIONS

EDWARD MONGEZI NDONGA

Third Respondent

JOHANNES TSIETSI RAMETSE

Fourth Respondent

MAURICE NTOZIMBI RENS

Fifth Respondent

CORAM: VAN DER MERWE, J *et* PLOOS VAN AMSTEL, AJ

JUDGMENT BY: VAN DER MERWE, J

HEARD ON: 24 NOVEMBER 2008

DELIVERED ON: 11 DECEMBER 2008

[1] This is an application for the review and setting aside of the refusal of the first respondent to recuse herself from the criminal trial in the regional court in which the applicant is being tried as accused number one. The third, fourth and

fifth respondents are the other accused persons in the case, but they play no role in this application. The first respondent abides the decision of this Court but the application is opposed by the second respondent, that is the prosecuting authority.

[2] The applicant served as a public prosecutor since 4 October 1999. During 2002 he was stationed at Botshabelo. One Mr. Ishmael Motaung was at that stage the control prosecutor at Botshabelo. Two of the magistrates serving at the magistrate's court in Botshabelo at the time were Mr. L.M. Bothma and Ms W.C. le Roux. The applicant and his co-accused were charged with 27 counts of fraud and alternative charges of theft. The essential nature of the allegations against them is that the accused persons conspired to and appropriated traffic fines paid in cash by members of the public, by fraudulently misrepresenting that the fines had been reduced as a result of representations made.

[3] The matter was at all times heard at Botshabelo and has become quite protracted. After the close of the state case,

the attorney for the applicant as well as the attorneys acting for the third, fourth and fifth respondents, applied for the discharge of their respective clients in terms of section 174 of the Criminal Procedure Act, No. 51 of 1977. These applications were opposed by the prosecutor and refused, with the exception of count 17. On this count all the accused were discharged because of lack of any evidence presented in respect thereof.

- [4] Thereafter the applicant was called to testify. The applicant testified and was cross-examined over a number of days. On 9 March 2006, at a stage when according to the prosecutor he was just about to conclude his cross-examination, the attorney for the applicant withdrew from the case with the concurrence of the applicant. The attorney at the time indicated that he withdrew in the interest of justice and to protect his own integrity. The applicant then indicated that he will conduct his own defence and that he intends to bring an application for the recusal of the first respondent. Nevertheless, arrangements were made for the applicant to apply for legal aid and, after it was refused, to appeal against the refusal. On 24 March 2006 the applicant indicated that

he was not proceeding with the appeal against the refusal of legal aid and insisted on carrying on in person. The applicant then presented an extensive application for the recusal of the first respondent on the basis of a written document that he had prepared. The application was opposed by the prosecutor and on 18 May 2006 the first respondent delivered judgment refusing the application for recusal. The trial has subsequently been postponed on many occasions pending the finalisation of the present application.

- [5] The record of the proceedings in the regional court that was placed before us, commences with the closure of the state case and extends far beyond the 18th of May 2006, when the matter was postponed in order to afford the applicant the opportunity to launch the present review proceedings. It appears that some portion of the cross-examination of the applicant does not form part of this record, as the matter was on 22 September 2005 postponed to 24 November 2005, but the record resumes only on 2 March 2006. No party, however, made anything of this at any stage. In the circumstances I believe that we have to accept that what was

placed before us are the portions of the record of proceedings necessary for the purposes of the review as envisaged in rule 53(3). It should be added that we have before us approximately 200 transcribed pages of the evidence of the applicant over a period of more than three days. The first respondent furnished additional reasons in terms of rule 53(1)(b).

- [6] Answering affidavits to the applicant's founding affidavit in this application were deposed to by advocate J.P. Du P. Botha, the prosecutor at the trial, Mr. Ishmael Motaung, Mr. L.M. Bothma and Ms W.C. le Roux. In a brief replying affidavit the applicant said that he denies all allegations contained in the answering affidavits that are inconsistent with his founding affidavit.
- [7] It is a fundamental feature of the proper administration of justice that judicial officers judge impartially. Therefore, even if there is only a reasonable apprehension that the judicial officer will not judge impartially, the judicial officer should recuse himself or herself from the proceedings. If not, the proceedings are vitiated entirely as the judicial officer then

“commits an irregularity in the proceedings every minute he remains on the bench during the trial of the accused.”

The test, however, is objective, namely that of a reasonable person in the position of the particular litigant. There must therefore be shown an apprehension of bias that objectively rests on reasonable grounds and the onus to show that, rests on the particular litigant, here the applicant. See **BTR INDUSTRIES SOUTH AFRICA (PTY) LTD AND OTHERS v METAL AND ALLIED WORKERS' UNION AND ANOTHER** 1992 (3) SA 673 (A) at 690A – 695E; **MOCH v NEDTRAVEL (PTY) LTD t/a AMERICAN EXPRESS TRAVEL SERVICE** 1996 (3) SA 1 (A) at 8H – 9G; **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS** 1999 (4) SA 147 (CC) at 175B – G.

- [8] In support of the allegation that the applicant harboured a reasonable suspicion that the first respondent would not adjudicate impartially, four main aspects were relied upon, namely

- (i) contact between the first respondent and the state witness, Mr. Ishmael Motaung;
- (ii) contact between the first respondent and magistrates Bothma and Le Roux;
- (iii) alleged extra-curial contact between the first respondent and the prosecutor;
- (iv) failure by the first respondent to curtail alleged unfair cross-examination by the prosecutor.

I deal with these aspects in turn.

- [9] Mr. Motaung had since the events that led to the charges against the applicant been transferred to Pretoria. He therefore had to return to Botshabelo in order to testify at the trial. In his founding affidavit in this application the applicant said that when Mr. Motaung came to testify he would during tea and luncheon breaks visit the tearoom at the magistrate's court where the local magistrates as well as the first respondent had tea and lunch. In his address in support of the application for recusal, the applicant stated that he wished to indicate that although he could not say that the first respondent had any contact with Mr. Motaung, he had the

suspicion that the first respondent had such contact. He never said what the source of these allegations were, so that it cannot be judged whether it was reasonable to rely thereon.

- [10] It is obviously undesirable for judicial officers to be seen outside of court in the presence of a witness in a case serving before the judicial officer. What should result therefrom however depends on the particular facts of each case. In this application several witnesses have confirmed under oath what was stated in this regard by the prosecutor in his address in opposition of the application for recusal as well as by the first respondent in her judgment on that application. These facts are that Mr. Motaung went to the relevant tearoom to greet old friends and colleagues, as it was put by Mr. Motaung. The first respondent, who was unknown to Mr. Motuang, was present in the tearoom. Mr. Motaung was introduced to the first respondent and it was then established that she was in fact the presiding officer in the matter in which Mr. Motaung had been called to testify as a witness. Mr. Motaung immediately exited the tearoom and did not return thereto at any time. He had not been in the

tearoom for more than one or two minutes. Counsel for the applicant before us expressly, and correctly in my view, conceded that the matter must be adjudicated upon on these facts. I believe that it is clear that a person in the position of the applicant could not reasonably apprehend bias on the part of the first respondent on these facts.

- [11] It is common cause that during the trial the first respondent at teatime and during luncheon shared the tearoom with *inter alia* the local magistrates Bothma and Le Roux. The complaint of the applicant is directed at the fact that both Mr. Bothma and Ms Le Roux made affidavits in respect of the case to a member of the South African Police Services, although neither testified at the trial. According to the applicant the first respondent therefore had contact with potential state witnesses. The applicant also said that he had serious and bitter arguments with Mr. Bothma and that as a result he entertained a fear that Mr. Bothma could negatively influence the first respondent in respect of the matter.

[12] It is undisputed that each of the said affidavits were very brief and only dealt in general terms with the working of the office administration of magistrate's courts. It is furthermore undisputed that the applicant was in no way implicated in any of these affidavits and that the applicant had access to these affidavits in terms of his right to access to the case docket and witness statements.

[13] I accept for purposes hereof that the applicant reasonably believed that Mr. Bothma disliked him and did not wish him any good. There is no allegation from the applicant that Mr. Bothma knew anything about the case against the applicant.

[14] The real question here, however, is whether the applicant could reasonably believe that the first respondent would allow the case to be discussed in the tearoom in any manner that could influence the decision of the case. The objective facts are that the first respondent is a regional magistrate who was specifically brought to Botshabelo to hear the case because she had little or no knowledge of the personnel and circumstances at the Botshabelo magistrate's court. This would have been appreciated by a reasonable person in the

position of the applicant. In these circumstances I do not believe that objectively there was any ground for a belief that the first respondent could be influenced in respect of the decision of the case by discussions in the tearoom with Mr. Bothma and Ms Le Roux. For the record it should be stated that it was denied by all concerned that the case was ever discussed as alleged and that Mr. Bothma denied the allegations of bad blood between himself and the applicant.

- [15] When the state case was closed, the attorney for the applicant indicated that an application for the discharge of the applicant will be made in terms of section 174 of the Criminal Procedure Act. In the event several months went by before the application was actually made. During that time the applicant met the prosecutor at the offices of the Director of Public Prosecutions in Bloemfontein. On this occasion the prosecutor told the applicant that he could not wait to cross-examine the applicant, to which the applicant replied that before that could happen there will be an application for his discharge. The prosecutor then said that it would be a waste of time because the first respondent will not grant the application. When the application was

eventually argued, the first respondent was not paying any attention, according to the applicant and the application was dismissed immediately after conclusion of argument. This, the applicant says, created a fear in him that the application for discharge was discussed beforehand between the prosecutor and the first respondent. The applicant also says that during the trial the prosecutor used to park his vehicle in front of the building but that during the time of his cross-examination, the prosecutor used the parking area of the magistrate's court.

- [16] A discussion of a case with an accused person by a public prosecutor in this fashion is probably best avoided. However, in this matter the applicant and the prosecutor were in fact colleagues and the conversation reminds one of not uncommon banter between opposing colleagues. In my judgment there was objectively no reason to believe that what was said about the fate of the application for the discharge, was anything other than the opinion of the prosecutor.

[17] As mentioned above, the first respondent was informed of the intention to launch the application for discharge some months before it was actually brought. In the event the application was fully argued by the attorneys for all the accused persons as well as the prosecutor. The statement by the first respondent that she kept herself abreast of the evidence, cannot be rejected and must be accepted. In the result it was quite reasonable to expect that the first respondent could give a ruling on the application for discharge immediately after conclusion thereof. This is not at all uncommon nor is it uncommon, and sometimes even advisable, not to give reasons for dismissal of an application for discharge at the time but to provide such reasons in the main judgment at the end of the case. The statement by the first respondent and the evidence by the prosecutor that the first respondent in fact did pay attention to the arguments, is not only probable but cannot be rejected and must be accepted for purposes of determination of this application. The applicant was in fact discharged on the charge in respect of which there was no evidence placed before the court.

[18] The prosecutor said that he moved from the parking bays in front of the magistrate's court to those in the back as he was intimidated by unknown individuals and this is not denied. In respect of the parking therefore, the case of the applicant amounts to no more than that at some stage the first respondent and the prosecutor made use of the same parking area at the magistrate's court. This happens as a matter of practicality every day at many magistrates' courts all over the country and in my judgment objectively amounts to nothing.

[19] I conclude therefore that the applicant had no reasonable ground for believing that the first respondent had discussed the application for discharge extra-curially with the prosecutor or that she was biased in respect thereof for that reason or any other reason.

[20] It should again for the record be stated that both the first respondent and the prosecutor emphatically denied that they had any discussion about the case other than during the court proceedings.

[21] It is alleged by the applicant that the first respondent failed to curb unfair cross-examination of the applicant by the prosecutor. In this regard he particularly relied upon cross-examination regarding the evidence of the state witnesses, Mr. Ramoepane and Mr. Sepoko respectively, which will be examined in more detail below. The applicant also said that the prosecutor made use of “bullying tactics” and that on occasion during cross-examination the prosecutor shouted at him. He added that several objections during his cross-examination by his attorney were overruled by the first respondent without justification. All of these allegations are of course to no avail as basis for an apprehension of bias, if they are factually incorrect. The acceptability of these allegations of the applicant must therefore firstly be considered.

[22] The applicant during cross-examination admitted that his signature appeared on the summons in respect of the traffic fine issued to Mr. Ramoepane as well as on the control document thereof kept at the magistrate’s court offices. He admitted that he reduced the fine of Mr. Ramoepane to an amount of R50,00. The prosecutor then put to the applicant

that according to the evidence of Mr. Ramoepane he actually paid an amount of R150,00 by leaving it on a table as instructed. The implication hereof was that only the amount of R50,00 was paid at the clerk of the court and that the balance was appropriated. In answer hereto the applicant pointed out that Mr. Ramoepane had testified that he left the money on the table in the building in which the magistrate's court was previously housed, in other words not at the building where the applicant worked as a prosecutor at the time. In response hereto the prosecutor put to the applicant that Mr. Ramoepane possibly erred when he made reference to the previous building, as it was common cause that the signature of the applicant appeared on the summons that was issued to Mr. Ramoepane. On another occasion the prosecutor put it to the applicant that he thinks that Mr. Ramoepane erred in respect of the building. To both questions the applicant in effect answered that he had no knowledge of an arrangement with Mr. Ramoepane to put money on any table. No objection was made hereto by the applicant's attorney and clearly none was justified.

[23] The complaint in respect of the cross-examination in respect of the evidence of Mr. Sepoko is similarly without merit. Again the applicant admitted that the fine of Mr. Sepoko was reduced on the summons, exhibit "N", by the applicant, to a sum of R50,00. During cross-examination on this point the applicant pointed out that Mr. Sepoko had testified that the applicant had reduced the fine in his presence to the amount of R200,00. The prosecutor responded by putting to the applicant that it is clear from the objective evidence, namely exhibit "N", that Mr. Sepoko made a mistake in respect of the amount to which the fine was reduced. To this the attorney of the applicant objected but the objection was overruled by the first respondent. In my judgment the ruling of the first respondent was correct. This did not amount to unfair cross-examination at all, on the contrary, the prosecutor had given the applicant an opportunity to respond to what he would argue in respect of the evidence of Mr. Sepoko. The applicant answered that Mr. Sepoko did not make a mistake.

[24] I found no evidence on the record of any bullying tactics employed by the prosecutor. The statement of the first respondent that the prosecutor had never shouted at the

applicant, must be accepted for purposes hereof. I also found no objections made by the applicant's attorney that were overruled without objective justification.

[25] Finally, the applicant said in his founding affidavit that he made a formal application in court for legal representation to be provided to him by the Legal Aid Board, which application was turned down. The applicant says that he then enquired from the first respondent whether he had the right to appeal against the decision and the first respondent responded by saying that she was not there to provide the applicant with legal advice. In fact, according to the record, the applicant requested the first respondent to perhaps try to find out whether there was a possibility of appealing against the refusal. To this the first respondent responded by saying she is not going to find that out and that she was not there to provide the applicant with legal advice. It is unnecessary to go into this any further, nor into the comprehensive factual background against which this took place, as this took place on 15 September 2006, long after the application for recusal was refused on 18 May 2006.

[26] For these reasons the application cannot succeed and is dismissed with costs.

C.H.G. VAN DER MERWE, J

I concur.

C. PLOOS VAN AMSTEL, AJ

On behalf of the applicant:

Adv. N.R. Rathidili
Instructed by:
Moroka Attorneys
BLOEMFONTEIN

On behalf of the second respondent:

Adv. P.U. Fischer
Instructed by:
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