

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

Review No. : 693/2005

In the review between:

THE STATE

versus

CECIL MOEKETSI LISEBO AND ANOTHER

CORAM: HANCKE J *et* C. J. MUSI J

JUDGMENT: HANCKE J

DELIVERED ON: 23 JUNE 2005

This is a partly heard matter in the magistrate's court of Ficksburg.

The two accused are charged with assault with intent to cause grievous bodily harm. After the accused pleaded not guilty, but before any witnesses were called to testify, the magistrate sent the matter on review with the following remarks:

“Before proceedings were initiated accused no 2 legal

representative objected averring that I am biased against his clients and thus not in the interest of Justice that I preside over the matter.

In response to this objection, I insisted that I have no interest in the matter. The parties involved are not known to me including the two accused persons.

Furthermore I had only nine days in the district of Ficksburg at that time.

Since I cannot rule on my credibility as the presiding officer in this matter, I found it being in the interest of Justice that the matter be referred to the Honourable Judges for a special review.

Both accused have already pleaded and the state has not yet led evidence to prove its case.....”

After receiving the review, I sought the views of the Director of Public Prosecutions. I have now been furnished with a comprehensive and well researched opinion of Adv Claassens of his staff. I agree with the contents of the opinion and wish to thank her for her valuable assistance.

The objections raised by the defence attorney were mechanically recorded which record has not been submitted as part of the review record. It is therefore not clear on what grounds the application for recusal was made. Without this information it is not possible to determine whether the magistrate should recuse

herself or not. It is in any event not for a review court to make this decision. The presiding officer must hear the objections in an application for recusal and the following guidelines have been laid down to assist a presiding officer in making a decision:

- “1. There must be a suspicion that the judicial officer might, not would, be biased.
2. The suspicion must be that of a reasonable person in the position of the accused or litigant.
3. The suspicion must be based on reasonable grounds.
4. The suspicion is one which the reasonable person referred to would, not might, have. (**S v ROBERTS** 1999 (4) SA 915 (SCA) at 924E – 925D.)”

The test for recusal was discussed *in extenso* in **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN FOOTBALL UNION AND OTHERS** 1999 (4) SA 147 (CC), where the following was stated on 177 [48]:

“[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective

and the onus of establishing it rests upon the applicant. 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 a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

(My underlining)

It is clear from the foregoing that the presiding officer was premature in her referral of this matter for special review. It was

her duty, after hearing and considering the objections in the application for her recusal, to decide, with reference to the relevant authorities, to grant or refuse the application. If the application has been ruled upon and the circumstances justify the referral thereof for review, then the full record should be submitted by the magistrate after the conclusion of the trial.

In the circumstances the matter is remitted to the magistrate to deal with the case according to the guidelines discussed in this judgment.

S.P.B. HANCKE, J

I agree.

C.J. MUSI, J

/sp