

**IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION**

CASE NO : 9163/2002

HENDRIK SILWANA

First Applicant

CAROLINE MTHI

Second

Applicant

and

**THE MAGISTRATE FOR
THE DISTRICT OF PIKETBERG**

First

Respondent

**THE DIRECTOR OF PUBLIC PROSECUTIONS
FOR THE CAPE OF GOOD HOPE**

PROVINCIAL DIVISION

Second

Respondent

JUDGMENT DELIVERED THIS 30TH DAY OF MAY, 2003

FOXCROFT, J : This is a review application brought on Notice of Motion in terms of Rule 53. The two Applicants seek an order reviewing and setting aside the decision of First Respondent, the Magistrate for the

District of Piketberg, given in the court of Piketberg in a matter between the State and First and Second Applicants in case no 138/2002. The Magistrate refused to recuse himself and the Notice of Motion is directed against that refusal.

Mr Reuben Miles Liddell, an attorney of this court and Attorney of Record for both Applicants, appeared on behalf of the Applicants in the criminal case currently pending before the District Court at Piketberg. Those criminal proceedings commenced on 12 July 2002, when Mr Liddell applied for the recusal of the Magistrate.

On 16 September 2002, the Magistrate delivered his judgment, refusing the application for his recusal.

First Respondent, the Magistrate concerned, gave notice that he would abide by the decision of this Court. Second Respondent initially gave notice of opposition. On 8 January 2003, Second Respondent withdrew his Notice of Opposition and also abides the decision of this Court.

In the affidavit supporting the review, Mr Liddell states that the Applicants were arrested and subsequently arraigned on a charge of contravention of the Drugs and Drugs Trafficking Act, No 140 of 1992. They had not yet been asked to plead and are on bail.

When Mr Liddell was preparing for trial, he requested a copy of what he refers to as the 'A' part of the case docket in the criminal trial. He was furnished with those papers. On perusing the docket, it became evident to him that two search warrants had been issued by First Respondent, Mr P L Grundlingh. First Respondent, according to Mr Liddell, was also to be the presiding officer at the criminal trial.

In consultation with Applicants, he showed them the two search warrants, copies of which are annexed to his affidavit as Annexures 'A.1' and 'A.2'. The Applicants asked him to explain how the search warrants had been issued, and he explained the procedure. He also informed the Applicants that First Respondent had signed these warrants and that First Respondent would be the presiding magistrate at the trial.

In para 11 of his affidavit, he goes on as follows :

"I then explained to the Applicants that an informer had deposed to an affidavit and that the First Respondent acting on what was contained in that affidavit signed the search warrant. The Applicants then inquired from me if it was fair for the First Respondent to also, in the current circumstances, preside at the criminal trial."

Mr *Liddell* then showed the Applicants a copy of the informant's affidavit, which had also been made available to him and which appears as Annexure 'B' to his affidavit. The Applicants inquired why certain portions of the affidavit had been deleted, and he explained to them that he had been informed by Second Respondent, the prosecutor concerned, that she had deleted only those parts where it would be possible to identify the informant. The Applicants were, according to Mr Liddell , alarmed at the fact that First Respondent was permitted to see a complete affidavit whilst they were only permitted to see certain parts thereof. They also wanted to know whether it was not irregular for the person who issued the warrant to also preside at the trial. Mr Liddell had told them that he would request First Respondent to recuse himself, which he duly did by letter, Annexure 'C'. Various grounds for the recusal are referred to in para 13 of Mr *Liddell*'s affidavit. In short, these are the following :

- a) *that the First Respondent had authorised the search warrants and would also preside;*
- b) *that the merits of the matter had been placed before First Respondent by way of affidavit and that First Respondent had exercised a discretion in issuing the search warrant thereby "deciding that there was merit in the application for a search warrant";*

- c) *that only certain portions of the search warrants were disclosed to Applicants but that the entire contents thereof were placed before First Respondent; and*
- d) *that the search warrants fell foul of the decision in **SMIT & MARITZ ATTORNEYS AND ANOTHER v LOURENS NO AND OTHERS, 2002[1] SACR 152.***

To my mind, there is no substance in the last ground. The section in the Act which is referred to in the case cited above, is section 21(2) of the Criminal Procedure Act, which provides :

“A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorise such police official to search any person identified in the warrant or to enter and search any person found on or at such premises.”

One of the problems in the case involving SMIT & MARITZ was that the warrants there were addressed “aan alle polisie beamptes”. VAN OOSTEN, J followed the decision of ROUX, J in **NAIDOO AND ANOTHER v MINISTER OF LAW AND OTHER AND ANOTHER, 1990[2] SA 158 [W]**, where ROUX, J had held that the legislature intended that an

identified police officer should be named and he or she should act throughout. VAN OOSTEN, J held that

“Decency and order can only be achieved if a known and named police official or officials are empowered to execute it.”

The search warrants presently under consideration commenced with the words *“Aan die stasiebevelvoerder”*. They are not directed to police officials generally, and although the *‘Stasiebevelvoerder’* is not specifically named, nor the police station, Mr Liddell placed on record [p 22, lines 13-15) that the *‘warrant has been issued and it has been addressed to the Station Commander of the local police station’*. It would be a matter of no difficulty for anyone to ascertain who the Station Commander was on the date when the warrant was signed as indicated on each warrant, namely 2 February 2002. Indeed, it makes more sense to specify a station commander than a named person who might not be available at the very moment when the search needed to be carried out. There had also never, in my view, been any possibility of the magistrate having to testify as to the validity of the warrant. Its validity would have been determined by application of the strict rules of interpretation, and

the magistrate's evidence could not possibly have assisted.

Leaving aside the first ground, namely that the presiding officer should never authorise a search warrant, I move to the more substantial grounds in this matter, namely the exercise of the discretion after being placed in position of information by an informant and the fact that only certain portions of the informant's affidavit were disclosed to Applicants, but that the entire affidavit was placed before First Respondent.

The Constitutional Court in **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS, 1999[4] SA 147 [CC]** decided that an application for the recusal of a judicial officer does raise a constitutional matter within the meaning of section 167 of the Constitution of the Republic of South Africa Act, 108 of 1996. The approach of that Court is therefore decisive where in para 48 of its decision it is stated :

“The question is whether a reasonable, objective and informed person would on correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bare 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 the 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."

Mr *Liddell* submitted before us that First Respondent was shown a complete affidavit, whereas portions of that affidavit were deliberately withheld from the Applicants. It would not be surprising for persons in the position of the Applicants, charged with these offences, to wonder what else was deleted than material allegedly identifying an informant. Mr *Liddell* also submitted that when First Respondent issued the search warrants he must have been satisfied with the averments contained therein and therefore issued the search warrants.

In a comprehensive judgment, the Magistrate shows familiarity with the leading legal principles involved, referring at the outset to the well-known passage from the case of **THE KING v SUSSEX JUSTICES, 1924, 1K.B. 256,**

"A long line of cases shows that is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

The Magistrate makes the point that he had to give serious consideration to the question before him because

"Ek is verantwoordelik vir die verhoor van alle strafsake, siviele sake, kinderhowe, onderhoudsake, gesinsgeweld interdikte en ander kwasie-judisiële funksies soos byvoorbeeld die oorweging van aansoeke om en uitreiking van visiteringslasbriewe. 'n Beslissing in hierdie verband het verreikende gevolge met betrekking tot die wyse hoe ek my funksie in die toekoms sal moet verrig."

Dealing with the merits of the application before him, the Magistrate said that he felt that the allegation that he had been placed in possession of more facts than the Accused was unfounded. He explained the procedure in which applications for search warrants are granted or refused. Affidavits provided for purposes of that request are returned to

the person requesting the search warrant. He adds that it is impossible for him to remember every part of the evidence placed before him. Accordingly he is not, in his view, in a better position than any accused before him. Even if he had had additional information on the merits in this case and even if he had not forgotten it, he remains of the view that this would not be a reasonable ground for recusal. The Magistrate then refers to a number of authorities, which I do not consider to be directly in point.

Cases which are more directly in point begin with **R v CAH KOO, 1919 TPD 311**. That case concerned the refusal of a magistrate to recuse himself. When the trial before the magistrate commenced, he had been asked to recuse himself on the ground that in a previous case in which one Abel,

with whom CAH KOO had been connected in the unlawful sale of liquor, was tried, the magistrate had at the conclusion of that trial stated that there was a strong *prima facie* case against CAH KOO. On that remark by the magistrate at the former trial, the public prosecutor had requested and been granted a warrant for the appellant, CAH KOO's, arrest. The magistrate had decided on the authority of **SCHONKEN v A.R.M.**

PRETORIA, 1916 TPD 256, that since he had not expressed an opinion '*outside of his ordinary duties*, he was not disqualified from sitting in the case. In the case of CAH KOO, CURLEWIS J held that the expression of opinion which the magistrate uttered about the strong *prima facie* case was made in the course of the trial and whilst giving judgment, and was not an expression of opinion outside of his functions, or in reference to something he had heard in his private capacity; it was in the course of his duty as a magistrate.

The matter came up for consideration in this court in the matter of **MILLER AND ANOTHER v MAGENNIS, 1924 CPD 295**. There an application was made for an order restraining a certain magistrate from presiding at the trial of certain applicants who were charged with offences against the liquor laws on the grounds that in a previous prosecution against a third party before the same magistrate, the applicants had given evidence and had been compelled to answer questions which tended to incriminate them. It was also alleged that in the course of the same trial the magistrate had expressed disbelief in regard to their evidence and that subsequently he had issued a search warrant to search premises where the applicants carried on business. GARDINER, J, at p297 of the report commented that the legislature had

chosen to lay down that a search warrant has to be issued by a Judge, Magistrate or Justice of the Peace, because *“it is thought right that such warrant should not be issued unless a judicial officer sanctions it”*. There can, with respect, be no quarrel with that statement. He went on as follows :

“I do not see that by issuing a search warrant on some probably not very detailed information, possibly only information as to grounds of suspicion, a magistrate should be in any way prejudiced. I cannot conceive if I were asked as a Judge to issue a search warrant that it would influence me if afterwards I were to sit as the Judge to decide a case in which the person concerned was before me.”

The passage, with respect, illustrates the danger of being the judge of one's own impartiality. The reasonable apprehension by the person facing the Judge is all important. GARDINER, J took comfort in the decision of R v CAH KOO (*supra*).

In decisions in recent years Judges have been reminded that one should not be unduly sensitive about applications for recusal. As HOWIE, JA (as he then was) said in **S v ROBERTS, 1999[4] SA 915 [SCA] at 923,**

“It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing

to preside after recusal should have occurred renders the further 'proceeding' a nullity."

MöNNIG's case, **1992[3] SA [AD] 482 [AD]** is referred to, and also the remarks in **S v MALINDI, 1990[1] SA 692 [AD] at 969 G-I**, where CORBETT, CJ said that

"The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of S v RADEBE, 1973[1] SA 796 [A] and SOUTH AFRICAN MOTOR ACCEPTANCE CORPORATION [EDMS] BEPERK v OBERHOLZER, 1974[4] 808 [T].

Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."

In **SAGAR v SMITH, 2001[3] SA 1004 [SCA] at 1009**, MTHIYANE, AJA (as he then was) said the following :

"What is said in respect of a Judge applies equally to a Magistrate. In SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION AND OTHERS v IRVIN & JOHNSON LTD SEAFOODS DIVISION FISH PROCESSING, 2000[3] SA 705 [CC] ... The Constitutional Court further elaborated on that test. It follows that the test of 'a reasonable apprehension of bias' replaces that of 'a reasonable suspicion of bias' previously favoured by this court. ... The difference would appear to be

one of semantics rather than substance."

Given that the first meaning of '*apprehension*' in the latest addition of the Concise Oxford English Dictionary is '*anxious or fearful anticipation*' as opposed to the second meaning of '*understanding*', I would agree with respect with the last comment on p 1009 of *SAGAR v SMITH*. One reasonably fears, or is anxious about something, in a situation like this, because one has a reasonable suspicion that something is untoward.

See also **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v SARFU** [*supra*] **at p 171 at paras [37] and [38]**, which show that the words '*real danger*' or '*reasonable apprehension*' or '*suspicion*' have all been used to convey the same idea.

Turning to **SLADE v THE PRETORIA RENT BOARD, 1943 T.P.D. 246 at 252**, one finds the remark, strange to modern ears, that

"Judges who are recused, and submit to be recused, do not necessarily admit that if they had to go on with the trial, they would do an injustice."

This, to borrow some words of HOWIE, JA in *S v ROBERTS*, is really a view from the bench rather than a view from the dock.

See *S v ROBERTS* [*supra*] at 926D.

BARRY, J in *SLADE's* case [*supra*] went on at p255 to say that whether the impression was reasonably created in the mind of the applicant that he

would not have a fair trial was what had to be considered by the Court.

On the facts of the present matter, there are two principle areas of concern. The Applicants do not know what the Magistrate read. They only know that the Prosecutor told the Court that only material which might have identified the informant had been removed. The affidavit in its original form is not before this Court. Quite simply, there is no objective way of testing whether it was correct that nothing further had been shown to the Magistrate than what the Prosecutor says. This, in my view, illustrates a situation where the Applicants would be entitled to form a reasonable apprehension that the Magistrate may have been provided with more information than appeared from these papers. This would be sufficient to establish a proper basis for recusal.

My second difficulty is that the informant may have testified at the trial and may have contradicted something which he had said in his affidavit, and which the Magistrate might remember as being contradictory. Courts do not normally see witnesses' statements and, in a sense, the Court was provided with a witness's statement in this case.

The situation is more perilous if the witness should not testify. A

reasonable apprehension could certainly exist that the information which was important for the search warrant to be issued, would also be important for conviction. If, at the trial, there were to have been no information connecting the accused - the present Applicants - with drug dealing, other than the information in the affidavit which led to the search warrant, it would be unfair, in the absence of a witness, for that information to play any part in a finding of guilt. An accused person in the position of Applicants would

certainly have reason to fear that a magistrate might well remember what was said in the affidavit, when the witness who testified in advance of the search warrant does not testify at the trial.

Dealing with the practical difficulties raised by the Magistrate, it is, in my view, necessary for a magistrate in a different town to sign search warrants in situations like the present one. Alternatively, if a local magistrate has signed a search warrant after seeing an affidavit of this kind, he or she should not sit in a case, and a magistrate should be brought from a neighbouring jurisdiction.

In my view, there is merit in the review brought to this court and there will be an order in terms of para 1 of the Notice of Motion.

J G FOXCROFT

DLODLO, AJ : I agree.

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IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

In the matter between :

CASE NO : 9163/2002

HENDRIK SILWANA
CAROLINE MTHI

First Applicant
Second Applicant

SILWANA & ANOTHER / MAGISTRATE PIKETBERG

/

and

**THE MAGISTRATE FOR THE DISTRICT OF
PIKETBERG, MR P L GRUNDLINGH**

Respondent

First

**THE DIRECTOR OF PUBLIC PROSECUTIONS FOR
THE CAPE OF GOOD HOPE PROVINCIAL DIVISION**
Respondent

Second

COUNSEL FOR APPELLANT : Attorney R M Liddell

ATTORNEYS FOR APPELLANT : Liddell & Weeber Inc
WYNBERG

COUNSEL FOR FIRST RESPONDENTS : NONE

ATTORNEYS FOR RESPONDENTS : STATE ATTORNEY

DATE[S] OF HEARING : 30.06.2003

DATE OF JUDGMENT : 30.06.2003