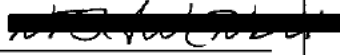


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: A2024/070314

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: NO	
OF INTEREST TO OTHER JUDGES: NO	
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<u>27.01.2025</u>	
DATE	SIGNATURE

IN THE MATTER BETWEEN:

ZELDA STEENKAMP

APPELLANT

AND

HEIN RUDOLPH LOUW

RESPONDENT

JUDGMENT

SIWENDU J

Introduction

[1] This is an appeal against the dismissal of an application for the recusal of Magistrate, Mr T.G Netshiozwi (the Magistrate). The appellant launched the application on 12 day of February 2024, after the Magistrate refused an application to postpone the trial in an action instituted by the respondent against the appellant.

[2] The appellant, Ms Zelda Steenkamp (Ms Steenkamp) is the defendant in the main action. The respondent, Mr Louw (Mr Louw), who is a Regional Magistrate based in Krugersdorp, is the plaintiff. Both Mr Louw and Ms Steenkamp reside in Krugersdorp. Apart from serving as a Regional Magistrate, Mr Louw is a member and a Trustee of several body corporates in Krugersdorp. The appeal is unopposed.

[3] The main action and the genesis for the recusal application has a protracted history. It was instituted by Mr Louw against Ms Steenkamp on 11 July 2019. He alleged that Ms Steenkamp uttered and published defamatory statements which injured his reputation as a well-known member of the community, a trustees of body corporates and a regional magistrate. The offending statements were allegedly made during 18 July 2017, March 2019, May 2019 and July 2019.

[4] Ms Steenkamp defended the action. She appointed Albasini Attorneys as her attorneys on 9 November 2023. They instructed Adv Brandon Smith (Adv Smith), to appear on the first day of the hearing and seek a postponement of the trial. Mr Louw was represented by Mr Looock from the inception of the action.

[5] In support of the application for recusal, Ms Steenkamp attached an email dated 27 October 2023 to the Chief Magistrate requesting a Magistrate from outside the area to preside over the trial. In her email she explained her difficulty in obtaining an attorney to represent her because attorneys “don’t want to take the case as they say they appear in front of [Mr Louw] on a weekly basis”. She

advised the Chief Magistrate that if she did not find an attorney before the 21 of November 2023, the attorney might not be available for the trial. She asked the court to read the contents in conjunction with her founding affidavit.

[7] A Magistrate was called in from outside Krugersdorp to preside over the trial at Ms Steenkamp's request. At commencement of the trial on the 21 November 2023, Adv Smith requested a postponement of the trial. The Magistrate dismissed the application for postponement. The expectation was for the trial to commence but Adv Smith withdrew from the case, informing court his mandate was limited to the application for postponement.

[8] It appears that "an incident" occurred in court when the Magistrate called Ms Steenkamp to the witness stand after accepting the withdrawal of Counsel. She fell or fainted after being sworn in. In the recusal application she takes issue with the remarks by the Magistrate that he was "unsure" whether Ms Steenkamp had a medical issue, "or it was an act." The trial proceedings were adjourned to 14th to 16th February 2024, and Ms Steenkamp was ordered to consult with a medical practitioner and provide "a comprehensive report" about her condition. The Magistrate reserved the determination of costs.

[9] Instead on 12 February 2024, Ms Steenkamp launched an application for the recusal application (the application) of the Magistrate to stop the resumption of the proceedings on 14 February 2024. She claimed she endured bias based on the remarks by the Magistrate after she fell or fainted. She says she had a reasonable apprehension of bias in the future conduct of the trial. The Magistrate dismissed the recusal application on 23 April 2024, pursuant to which Ms Steenkamp approached this Court on appeal.

[10] Before addressing the merits of the appeal, it bears mentioning that the trial has been held in abeyance pending this judgment, resulting in piecemeal litigation which is generally eschewed by the courts. As the Supreme Court of Appeal held

in *Take and Save Trading CC and Others v The Standard Bank of SA Ltd*¹ (*Take & Save Trading CC*)

“...an appeal *in medias res* in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed.”

[11] In addition, two procedural issues arise in respect of the appeal. The Magistrate was not cited as a respondent. However, both Mr Louw and the Magistrate were notified of the appeal. Mr Louw was present at the hearing and confirmed he abides the decision of the court. We note further that this is not a review but an appeal.

[12] A second concern is that the application for recusal determined by the Magistrate was premised on the events of 21 November 2023, but the breadth of the notice of appeal to the *court a quo* expanded the ambit of the appeal to include the conduct of subsequent the proceedings on the 14 February 2024 and 23 April 2024. On appeal to us, Adv Smit (a different counsel from Adv Smith) submitted we should consider the conduct of the Magistrate over the whole period of Ms Steenkamp’s appearance before the court below.

[13] An application for the recusal of a judicial officer implicates the provisions of the Constitution under section 34.² Ms Steenkamp’s complaint is linked inextricably with her right to a fair trial guaranteed in the Constitution and a Court is enjoined to protect the rights conferred. The spectre of a fear of misuse of the power of judicial office, and allegations of withdrawal of attorneys coupled with a reluctance to represent Ms Steenkamp by attorneys may threaten to undermine the right to legal representation and administration of justice if proved.

¹ 2004 (4) SA 1 (SCA) para 4.

² The Constitution of the Republic of South Africa, 1996: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[14] A charge of bias or apprehension of bias of a judicial officer undermines public confidence in the administration of justice, the rule of law and the Constitution. The role of the court is to be vigilant and to jealously safeguard constitutionally protected rights. There is no basis to limit the appeal to the 21 November 2024. The issues raised compel us to exercise our discretion to entertain it.³

Proceedings of in the Court a quo

On 21 November 2023

[15] As already stated, on 21 November 2023, the first day of hearing, Adv Smith informed the Magistrate that Ms Steenkamp seeks a postponement of the trial. The grounds for postponement were that Ms Steenkamp:

- i. only received legal representation “a few days ago”. She experienced “difficulties in the past” and required more time to prepare for the trial.
- ii. A special plea filed on her behalf “had not been addressed by the Plaintiff, and the matter was not trial ready.
- iii. The pre-trial held in the matter “was not satisfactory to the defendant” because she did not have legal representation and “was asked to attend something she did not entirely understand... It would be preferable that it be reconvened with her legal representation assisting her...”

[16] Mr Looock opposed the postponement because the action proceedings commenced in 2019. The Magistrate questioned Adv Smith about the failure to prepare for the trial during the intervening period from the date of instructions on 9 November 2023. Observing the volume of documents already exchanged between the parties, he stated that “it seems something was happening before I had even [sic] come into the picture.” He wanted to know whether Ms Steenkamp

³ Under Section 173 of the Constitution the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, considering the interests of justice.

had been represented before Mr Albasini accepted the mandate, and whether there was communication about the postponement sought.

[17] Adv Smith response was he “assumed” that the consultation was short, not longer than an hour, to which, the Magistrate stated:

“Your application for postponement should have a foundation...That this is premised on this foundation. But to say I do not know what happened or my instructions are not clear, it may suggest that some other things. Should I perhaps have a short adjournment for 10 to 15 minutes and you will call me.”

[18] On reconvening, Adv Smith informed the court that Ms Steenkamp was unrepresented until Mr Albasini came on record. She required Legal Aid, and local attorneys were reluctant to take her case, compelling her to look further afield. She had a brief consultation with Mr Albasini who informed her he would not be available on 21 November 2023, as he was on a trial that week. He would request for a postponement of the trial.

[19] I pause to mention that on the 13 November 2023, preceding the trial, Albasini Attorneys served a Rule 60 Notice for an order to strike out a replication delivered by Mr Louw to Ms Steenkamp’s Special Plea on the grounds that it was out of time. The belatedly challenged replication was delivered the previous year.

[20] Adv Smith relied on the Rule 60 Notice, contending that the trial was not ready to proceed had to be addressed first. He also submitted based on the special plea filed the previous year, that realised the case “cannot properly proceed on 21st and therefore might make more sense for a postponement”. Some emails which were not read into the record were handed from the bar.

[21] Mr Looock opposed the postponement on several grounds. He submitted Ms Steenkamp had five different attorneys representing her resulting in continuous postponements. Two pre- trial conferences were already held. The first pre-trial conference was held on 24 February 2023. A pre-trial conference

minute filed as part of the appeal record confirms the submission. Ms Steenkamp was represented by Mr Marele. A second pre-trial conference was held on 5 October 2023, although the conference minute was not filed. The Magistrate dismissed the application for postponement.

[22] After a short adjournment, the Magistrate called Mr Louw to commence with his case but first gave Adv Smith an opportunity to address the costs of the application for application for postponement since they were not determined in the ruling refusing the postponement. Adv Smith informed the court that:

“Your Worship I have to place on record that my instructions today were only to deal with the postponement of this matter and to address your Worship on the Rule 60 issue. Now naturally this was dealt with. I have not been instructed to prepare for trial at all. And therefore, I am not in a position as a result of those instructions to proceed today.

In the event that Your Worship still wishes to do so, I have been instructed that the proceedings can be taken on a review situation. But I am afraid I am [not] in position to further assist the Court pertaining to this matter.”

[23] Adv Smith pressed on the postponement, which he cast as “an alternative submission” with a tender to pay the costs. The Magistrate was not persuaded, accepted Adv Smith’s withdrawal from the case and called Ms Steenkamp to take the witness stand, stating:

“Perhaps it will be prudent to call the Defendant herself into the witness stand before Mr Loock can proceed calling his first witness. Seeing that Mr Smith has now withdrawn as attorney of record if the matter is proceeding. Who is the Defendant here, I do not know the Defendant.”

[24] Ms Steenkamp presented herself and the Magistrate administered the Oath. At first, she was reluctant to take the oath, advising the court that she had no legal representation, and she did not know what was going to happen. Once the purpose of the oath was explained to her, she agreed to the administration.

[25] The Magistrate explained the refusal of the postponement, and that the consequences of the withdrawal of Adv Smith were that her she would represent

herself. Ms Steenkamp sought an indulgence from the court to call someone who has the knowledge of the law to assist her. The Magistrate granted the requested and adjourned the hearing for fifteen minutes. He requested that the parties to advise him in chambers.

[26] When the proceedings resumed, it appears that Ms Steenkamp either fell or fainted in the witness box. She states that she was “escorted from the Courtroom “due to me not feeling well.” The record refers to an “incident” which required time for Ms Steenkamp to “recuperate.” The court adjourned. The Magistrate stated that he was not aware of the reason for the fall, commented that:

“Now seeing that the application for postponement has been refused and this eventual incident starts to occur. This Court is not so sure if this is indeed a medical condition or that it was an act, seeing that the matter will proceed in the circumstances.”

[27] Nevertheless, he called Ms Steenkamp to the witness stand “to finalise the communication with her.” Aspects of the record were not audible and were not transcribed. Although Adv Smith had withdrawn as Ms Steenkamp’s legal representative, he entered the fray and made representations to the court on the basis that he has “a duty to the court” and sought to prevent a “miscarriage of justice” because Ms Steenkamp lacked legal representation.

[28] The Magistrate disagreed, pointing out that the proceedings had not commenced. He was merely explaining the process to be followed to “guide the direction forward” following the refusal of the postponement. He had informed her that “counsel for the Plaintiff Mr Looock would like to proceed in leading the evidence of the first witness in this regard. So for that purpose if you will be representing yourself it would be more better for you to sit closer. Because after such witness has testified you may well cross -examine such a witness”. Ms Steenkamp expressed a wish not to proceed as she was not in her right frame of mind. The Magistrate invited submissions on the issue.

[29] Mr Loock submitted that Ms Steenkamp understands and can follow the proceedings but left it to the court to decide the issue. The court decided to adjourn the case to 14 to 16th February 2024 and reserve costs after forming an opinion that she lacked the capacity to listen and to actively participate the matter.

[30] The Magistrate ordered Ms Steenkamp to provide medical evidence by way of “a comprehensive report” about her condition so that the Court can also be appraised of what happened. He sought assurance that Ms Steenkamp would proceed on those dates. Ms Steenkamp was not audible, and he stated:

“I need to hear it loud from you. Are you going to proceed, because I do not expect a situation that when we resume here come the 14th you have fired that attorney and then you are looking for another attorney.”

He warned her that if she decided to change attorneys and appoint a new attorney, the case would proceed regardless of the change.

On 14 February 2024

[31] When the hearing resumed, Mr Louw was represented by Ms Hilson and Ms Steenkamp by Advocate Smit. The Magistrate followed up on his previous order which required Ms Steenkamp to present a comprehensive medical certificate about what occurred. Adv Smit presented a doctor’s note which states that Ms Steenkamp:

“Het flou geword as gevolg van lae bloeddruk”⁴

[32] Ms Hilson objected to its admission contending the medical certificate was not submitted by agreement. She was not provided with the original but had sight of the copy at the same time as the court. The contention was Ms Steenkamp had not discharged the burden of proof, and the validity of the medical certificate was placed in issue. The medical certificate had to be proved in the normal course,

⁴ Loosely translated as “fainted because of low blood pressure”

which meant the doctor responsible for issuing it had to be called to testify about the medical condition.

[33] Adv Smit opposed calling the doctor, contending Ms Steenkamp had complied with the court order and was not required to do more. The objection resulted in a contempt of court on the part of Ms Steenkamp. An extract of the exchange between Adv Smit and the Magistrate went thus:

COURT: Remember, the purpose for the medical certificate was that the way the defendant collapsed inside the courtroom on the third date, the court gained a wrong impression, that it was a way to make sure that the matter should not proceed on that day.

MS SMIT: Yes, as if it was an act.

COURT: So the court gained an impression that it was an act by the defendant. So for the doctor to further clarify whether such a condition can have any ... do you have any reservation for a doctor to come? And if it is within reach to come on the next postponed date to clarify about the content of the medical certificate?

MS SMIT: Well, Your Worship, one, if the court is not satisfied with the certificate, then the court can subpoena the doctor. Two, if the plaintiff is not satisfied with the content, then they can subpoena the doctor. We did what the court ordered. That is what we did. If anything else needs to be done, then the court must subpoena the doctor or the plaintiff. It is not for us to prove. The proof is in the order. We submitted this. That is what was suspected of us. That is all. Nothing else. If the court wants something else, then unfortunately they have to subpoena the doctor."

[34] There were other skirmishes between the legal representatives, concerning whether Mr Louw should sit in the public gallery or next to his legal representative and the exchange went as follows:

COURT: Advocate Smith, I would not like you to throw a brawl with this court. This court has nothing to ... it knows no parties here. But what I am trying to say is that, is there any rule that says authority? When I say authority, you cannot just say, as well, you cannot sit here, they must give me a rule. I say it is you who moved the application, Advocate Smith.

MS SMIT: There is no application before court, Your Worship. So do not put words in my mouth. There is no application. And there is a reason why I am bringing a recusal also, Your Worship.

COURT: Yes, but on the basis, on the basis ...[intervenes]

MS SMIT: And the fact that we are addressing you when there is a recusal application before court is also uncalled for. We should not be addressing you because there is a recusal application before court based on certain aspects and statements made by the court, Your Worship.

COURT: But Advocate Smith, we are not talking of the application. We have not started with the recusal application. We are talking of the proceedings that took place on the ...[intervenes]

MS SMIT: 21st November.

COURT: On 21st November, 2023.

MS SMIT: Yes Your Worship

COURT: We are talking about a medical certificate here.

MS SMIT: Which we handed up Your Worship.

COURT: Yes, the issue of recusal or whatever, this court will still entertain it when it reaches there. I am still on the issue of a medical certificate.

MS SMIT: Your Worship, we did what the court ordered. If this court wants anything else from us, they need to do what they need to do. But unfortunately, Your Worship, I cannot address you further because there is a recusal application due to certain conduct of this court. So if I address you any further, there is no basis for the recusal application.

COURT: No, I would not like to deal with a recusal application now. We are just dealing with a medical certificate.

MS SMIT: Your Worship, the medical certificate ...[Intervenes]

COURT: You have nothing else to add?

MS SMIT: Your Worship, the medical certificate forms part of that recusal and your words saying: 'It is an act'

So bias is already there. I do not need to address you further, Your Worship. We did what we were supposed to do. We complied with the court order.

[35] The Magistrate was not satisfied with the details provided in the medical certificate. It subpoenaed Dr Louw who has issued the certificate to clarify the medical condition. He considered an explanation of the condition relevant to the legal costs occasioned by the adjournment, stating that:

“.... However, the court seemed to gain an impression that there is a reluctance on the part of the defence counsel to the defendant to take this matter any further.

On 23rd day of April 2024

[36] When the court reconvened on 23rd day of April 2024, Mr Looock appeared for Mr Louw and Mr Albasini for Ms Steenkamp. Dr Louw gave evidence and confirmed that he consulted with Ms Steenkamp on 21st November 2023. He was not aware that she fell or fainted that morning. He found small traces of blood in her urine which he attributed to just a bladder infection. Her blood pressure was low at “100” when it should have been within the 130 to 140 range.

[37] Dr Louw believed the incident was a once-off occurrence and could happen if someone had not had breakfast that morning. The condition was not dangerous but would have been had it been accompanied by loss of blood. Dr Louw did not believe that placing a person with low blood pressure in a stressful environment, would make the person “pass out.”

[38] Although Dr Louw was acquainted with Ms Steenkamp’s family as their family doctor, he had not seen Ms Steenkamp regularly. He had no knowledge of her blood pressure prior to the incident. When questioned whether Ms Steenkamp had put on an act, Dr Louw opined that although she did not fall in front of him, it was possible that she could fall and faint because of the low blood pressure. It would not be an act.

[39] Ultimately, the Magistrate was not persuaded and rejected the medical evidence as lacking in explanation on why she fainted. Instead, he found that she had no intention to proceed with the trial on the date and awarded costs for 21st November 2023 and 14th February 2024 in favour of the plaintiff on attorney and client scale, which costs were to include the cost of preparations.

Grounds for Appeal

[40] Ms Steenkamp takes issues with the remarks made by the Magistrate during the conduct of the proceedings on the 21 November 2023 when she fainted at the witness stand. She challenges being called to the witness stand and compelled to take an Oath and the decision to proceed with the trial while she was unrepresented. According to Ms Steenkamp, this should not have occurred since the duty to begin as well as the onus to prove his case rested on Mr Louw.

[41] A further grievance is that although she had launched the application for his recusal, the Magistrate proceeded to deal with the medical certificate and the question of costs relating to her appearance of the 21st of November 2023. She complains that the Magistrate showed irritation and a one sided approach towards her counsel and failed to take a balanced view which treated her and Mr Louw even handedly. He demonstrated more sympathy towards Mr Louw than the appellant who was unrepresented, because he is a Regional Magistrate.

[42] As an indication of the uneven handed approach and a direct result of his conduct, during the appearance of the 23 of April 2024, the Magistrate cross-examined her medical doctor and found against his opinion that the Appellant was acting when she fainted on the 21 of November 2023.

[43] She appeals against the cost order against her for the appearance of the 21 of November 2023, and for 14 February 2024 which were immediately taxable and payable when costs were reserved for determination at the trial.

Applicable principles

[44] The principles for determining a recusal of a Judicial Officer were settled by the Constitutional Court in *President of the Republic of South Africa and others v South African Rugby Football Union and others (SARFU)*⁵ and the

⁵ (1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725;

Supreme Court of Appeal in *S v Roberts*.⁶ There (a) must be a suspicion that the judicial officer *might* be biased not would be biased; (b) The suspicion must be that of a reasonable person in the position of the accused or litigant; (c) It must be based on reasonable grounds.

[45] In *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (Masuku)*⁷, the Constitutional Court emphasised that:

“The question is whether they can bring their mind to bear on a case with impartiality.”⁸

The test is objective and cogent evidence demonstrating bias or a reasonable apprehension of it is required.

[46] The issue is whether Ms Steenkamp as a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Magistrate 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.

[47] The complaints centre on (1) remarks made; (2) obliging Ms Steenkamp to take an oath while she was not legally represented; (3) allegations of one side engagement and hostility towards her Counsel (4) and the cost order granted in respect of the appearance on those dates which was immediately taxable.

[48] Although the Chief Magistrate procured an external Magistrate to preside, the overarching nuance of the complaint about the apprehension of bias is that the differential treatment stems from Mr Louw’s role as the Regional Magistrate. It also impeded her ability to procure legal representation.

⁶ 1999(4) SA 915(SCA) paras 32 and 34.

⁷ [2022] ZACC 5; 2022(4) SA 1 (CC); 2022 (7) BCLR 850 (CC).

⁸ At para 66.

[49] In *Masuku* the court stressed that there is a presumption of impartiality that: a judge will not lightly be presumed to be biased; this presumption is not easily dislodged.⁹ Another relevant consideration is the nature of the adjudicative role of the Magistrate.

[50] In *S v Basson*¹⁰ (*Basson*), the Constitutional Court affirmed that the role adjudicative role entails (a) participation in trial proceedings, (b) asking questions, (c) ensuring the proper conduct of the parties, and (d) make rulings. It is not that of a silent umpire. A Judge cannot be supine but must direct and control the proceedings according to recognised rules of procedure to see that justice is done¹¹. A robust exchange with Counsel is an inherent part of the role.

[51] It is not inappropriate for the presiding officer to express views about certain aspects of the evidence in the conduct of the proceedings. The Court in *Basson* made it clear that litigants complaining of bias should not succeed simply because a Judge has ruled against them or has been impatient with the way in which they have conducted their case. By implication the dictum includes views about unmeritorious procedural points taken including deleterious conduct by parties.

[52] In *Take & Save Trading CC and Others v The Standard Bank of SA Ltd*¹² the Supreme Court of Appeal observed that:

“One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a

⁹ *Masuku* as above n 8.

¹⁰ ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC) para 34.

¹¹ *R v Hepworth* 1928 AD 265.

¹² [2004] ZASCA 1; 2004 (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) para 3.

practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.”

[53] Importantly -

“A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court’s aberration.”¹³

[54] Lastly is the question of compliance with Rules of Court expressed in *Venter v Du Plessis*¹⁴ which held that:

“It is true that it has often been said that litigants in the magistrate’s court cannot be expected to comply with the Rules as scrupulously as is expected in the High Court, but that does not mean that those Rules may be disregarded. The Rules are there to achieve order in the proceedings and to protect the rights of the parties. Non-compliance can lead to disorder and to prejudice to one or both of the parties.”

Analysis

[55] The remarks by the Magistrate must be viewed in the proper context of the litigation. An evaluation of the proceedings and the engagement between the Magistrate and the Counsel for Ms Steenkamp are necessary to establish whether the suspicion that the Magistrate might be biased is reasonable and based on reasonable grounds. Several observations must be made on this score.

[56] It is trite that the adjournment or postponement Ms Steenkamp sought is not for the asking or taking if not obtained by consent between the parties.¹⁵ She sought an indulgence from the court. She was required to show good cause, and strong reasons for the court to grant the postponement.

¹³ Ibid at para 4.

¹⁴ 1980(3) SA 151 (T) 152A–B.

¹⁵ Rule 31 of the Magistrates Court Rules.

[57] Ms Steenkamp sought a postponement from the bar, and the reasons and the full explanation for seeking the postponement were not on affidavit. Matters for which application procedure applies are specifically laid down by the Magistrates Act and the Rules promulgated thereunder.¹⁶ Rule 31 of the Magistrates Court Rules regulates the procedure.¹⁷

[58] In so far as trial - readiness, the application for a postponement should have been made timeously and not on the day of the hearing. As already alluded to, Ms Steenkamp's attorneys delivered a Rule 60 Notice on 13 November 2023, less than a week before the commencement of the trial. On the facts before us, the basis for the fresh interlocutory dispute was denied by Mr Looek. The replication had been agreed with Ms Steenkamp's previous attorneys. Although I make no finding on the issue, a reasonable impression could be that the Rule 60 Notice was a stratagem to engineer a dispute to justify a postponement and delay the hearing.

[59] Moreover, the submissions that the case was not trial ready contradicted assertions made by Ms Steenkamp in correspondence placed before the court in the application for recusal. When she wrote to request a Magistrate from outside the region, she had attached an email dated 18 May 2023, in which she advised that:

"The matter is now trial ready. I heard from my attorney yesterday that pretrial is on 30 May 2023."

[60] The Magistrate rightly took a dim view that Ms Steenkamp's attorneys accepted her mandate and "double-booked." An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately

¹⁶ *Mokoena v Minister of Law & Order* 1991 (3) SA 187 (T)194H-I; and *Ntshingila and Others v Minister of Police* 2012 (1) SA 392 (WCC) para 36.

¹⁷ Rule 31(1) (a) states that a trial of an action or the hearing of an application or matter may be adjourned or postponed by consent of the parties or by the court, either on application or request or of its own motion.

entitled.¹⁸ Despite the above, the Magistrate entertained the submissions from the bar. He adjourned the hearing to allow Adv Smith to obtain instructions from Ms Steenkamp. The questions posed to Adv Smith were legitimate and consistent with the role of the court as articulated in *Basson*.¹⁹ There is nothing to indicate that the Magistrate strayed the bounds of his role.

[61] That Ms Steenkamp had difficulty obtaining legal representation because she was litigating against a Magistrate is not put up in evidence. Given the serious nature of the allegations, the duty attorneys owe to the public and the court as officers of the court, details of the attorneys and circumstances of their withdrawal should have been set out chapter and verse in an affidavit. While Mr Looock submitted that, Ms Steenkamp had been represented by at least five attorneys, we were not provided with their details and particulars of their withdrawal. The record before us shows that after she represented herself and filed her plea, she appointed Mr L Marele who represented her for a substantial period. The onus rested on her to place these facts as evidence before the court.

[62] Which brings me to the complaint that Ms Steenkamp was required to take an oath while she was unrepresented and should not have been required to do so. It is noteworthy that her plea in defence of the claim, dated 3 September 2019 nominates her residential address an address for service of all legal processes. The plea is professionally and adequately prepared. It accords with the rules applicable to pleadings. It raises important triable issues and questions of the law of delict and the Sectional Titles Act.²⁰ The issues raised are consonant with those that would be raised by skilled legal mind. At that stage, Ms Steenkamp was a self-representing litigant in terms of the rules of court.

¹⁸ *S.Y v A.D* (24406/2016) [2024] ZAWCHC 28 (6 February 2024).

¹⁹ Above n 11 paras 41 - 43.

²⁰ Act 95 of 1986.

[63] As *Take and Save CC* points out, the significance of the timing of the withdrawal of the attorney of record cannot be taken lightly as it is often used as a strategy for delay. I accept that despite the withdrawal of Adv Smith who submitted he was given limited instructions, Albasini Attorneys remained her attorneys of record. It was unnecessary to require Ms Steenkamp to take an oath, merely to explain the reasons for the refusal of the postponement and the consequences of the withdrawal of her counsel. The record nevertheless reveals that:

- i. Adv Smith pre-empted and interrupted the engagement, threatening to take the Magistrate on “a review.”
- ii. Ms Steenkamp was reluctant to take the oath
- iii She requested time to contact someone to obtain assistance. The Court granted her an adjournment to do so.

[64] While the administration of the oath may be tainted by an irregularity, and not required, objectively viewed, the Magistrate’s impressions and observations about Ms Steenkamp were not conclusions of fact on the issue, hence why he ordered proper medical evidence. Prior to the incident, the Magistrate observed that she appeared in “good health, very active, and engaging with everyone including her defence counsel.” The approach by Adv Smit during the debate about the admission, authenticity, validity and adequacy of the medical certificate, is revealing. It shows she resisted ventilating the issue, which was in any event a misconstruction of the burden of proof which Ms Steenkamp had to discharge. Council adopted a belligerent approach, interjecting and exasperating the court, which it considered to be “a brawl with it.”

[65] In the absence of admissible proof by way of a “comprehensive report” ordered by the court, only the author, Dr Louw could provide the court with best evidence on the issue. This could have been obviated. There is nothing to indicate

the engagement was not in the normal course. Even so, a court is not obliged to accept the expert evidence if it is not founded on a plausible foundation.²¹ There is nothing in the exchange which evinces that the Magistrate would not have been persuaded if Dr Louw provided the court with a reliable opinion on the condition and its cause.

Conclusion

[66] The perception apprehension of bias including the “one-sided” or uneven handed treatment is not borne out by the facts or the conduct of the proceedings. What stands out is a persistent disregard of the rules and decorum of the court which can lead to disorder and prejudice to one or both parties. The impression is that the rules of the court were arbitrated for the purpose of delay. Contrary to the complaint about bias or apprehension of bias, here the Magistrate was cautious and indulged Ms Steenkamp in circumstances where its court processes were not complied with and were repeatedly undermined.

[67] Viewed in context, the impression created is that Ms Steenkamp and Adv Smith were obstructive, and intent on creating hurdles to prevent the trial from proceeding. The Magistrate cannot be faulted for expressing scepticism about Ms Steenkamp’s condition.

[68] What unfolded after she was sworn in was not congruent with earlier observations. The trial court was best placed to observe her demeanour and the inconsistencies. There is no basis for this appeal court to doubt or disturb the observation or findings, justifying the Magistrate to call for medical evidence. The utterances made and scepticism expressed cannot reasonably form a foundation for suspicion of bias or grounds for recusal of the Magistrate without more.

²¹ *Twine v Naidoo* 2017 JDR 1732 (GJ).

[69] As to the interlocutory disputes, even if they required a discrete consideration, it can hardly be argued that the way the Magistrate dealt with the interlocutory issue creates an apprehension of bias and a ground for recusal. Again, a remedy to review and set aside the steps taken on grounds of irregularity in the proceedings or a misdirection, if any, is available to Ms Steenkamp.

[70] For the above reasons, I am unable to agree that the scope of Ms Steenkamp's right to a fair trial and legal representation was compromised by placing her under oath or by the decision to proceed with the trial. Unrepresented litigants are not unheard of in our courts. Even if the court had proceeded with the trial in the absence of legal representation, it would have been entitled to do so in the present matter, after placing the necessary safeguards.

[71] If the trial had commenced, the evidence of the plaintiff would have been transcribed for her attorneys to follow the proceedings. The rules of court provide a litigant in her position with a right to recall witnesses. The trial did not proceed, and she was not prejudiced. The complaint lacks merit and is not a valid ground for recusal in this instance

[72] That there was an "extremely hostile approach" towards her legal representatives is not borne out by the record. Given the unfounded resistance and ill-conceived approach to the discharge of that evidentiary burden placed on Ms Steenkamp, the Magistrate's observation that there was a reluctance to proceed with the trial is not misplaced nor is it an indication of a bias.

[73] To the extent that it is contended the Magistrate disposed of the dispute about the medical certificate (which Adv Smit sought to prevent) before dealing with the application for recusal, that too goes to the regularity of the proceedings and has its distinct legal remedy. It is not a valid ground for recusal.

[74] The above considerations drive home the point made in *Take and Save CC*, that a recusal application though permissible is not the appropriate route. The trial

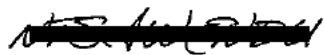
should have been concluded before the Magistrate and thereafter taken on appeal or review, which would include the appropriateness of the cost order granted. For the reasons stated above, objectively viewed, the test for recusal has not been met.

[75] It follows that the matter is remitted to the Magistrate for the continuation of the trial. Since the application is not opposed. There is no order as to costs

In the result, the following order is made:

- a. the appeal is dismissed with no order as to costs

I agree


T SIWENDU
JUDGE OF THE HIGH COURT
JOHANNESBURG


S LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment is handed down electronically by circulation to the Applicants' Legal Representative and the Respondent by email, publication on Case Lines. The date for the handing down is deemed 27 January 2025

Date of appearance: 21 November 2024

Date Judgment delivered: 27 January 2025

Appearances:

For the Appellant: Advocate N Smit

Instructed by: Albasini Attorneys