

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: REV 120/23

COURT A *QUO* CASE NO: B21/2018

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED: <u>YES/NO</u>
DATE <u>4/12/2024</u> SIGNATURE <u>[Redacted]</u>	

In the matter between:

MASEKGOTHE REGINAH KGATUKE

FIRST APPLICANT

FORTUNATE NONHLANHLA SIBIYA

SECOND APPLICANT

And

ADDITIONAL MAGISTRATE

FIRST RESPONDENT

C VAN NIEKERK (LANGLEY)

DIRECTOR OF PUBLIC PROSECUTIONS

SECOND RESPONDENT

(LIMPOPO PROVINCE)

Heard: 01 November 2024

Delevered: 04 December 2024 by circulation to the legal representatives.

Coram: Kganyago J et Pillay AJ.

JUDGEMENT

Pillay AJ

Introduction:

- [1] The Applicants have both brought two separate applications for Review under Review number 120/23 and Review Number 119/23. Both applications stem from one criminal proceeding where the Applicants are Co Accused in the Mokopane Magistrates Court, appearing on a charge of contravening Section 4(1)(a)(iii) read with Section 1,2,4(2),24,25,26(1)(a) of the Prevention and Combatting of Corrupt Activities Act¹, Corruption: Accepting a Benefit.
- [2] The Review applications were sought in terms of Rule 53 of the Uniform Rules of Court read with Section 21 and Section 22 of the Superior Courts Act². The Second Applicant Ms Sibiya also sought condonation for the late filing of her application, which was granted by this Court.
- [3] Both Applicants seek the Review and setting aside of the Court order dated the 8 May 2023, by the Presiding Magistrate C Van Niekerk (Langley) the First Respondent, in ordering the State to proceed and lead evidence of video and audio

¹ Act 12 of 2004

² Act 10 of 2013

footage, which was previously ordered as being inadmissible by the Presiding Magistrate on the 8 March 2021.

[4] The First Applicant sought further;

[4.1] An order that this Court direct the First Respondent to refrain from reviewing her own ruling.

[4.2] An order directing the First Respondent to deliver Judgment and finalise the matter before her, with the evidence and arguments which were already before the Court *a quo*.

[4.3] Further and alternative relief

[4.4] Costs of the application against any Respondent who opposed the application.

[5] The Second Applicant also sought the following;

[5.1] That this Court order the First Respondent to recuse herself from the case on the ground of bias.

[5.2] That this Court order that those Respondents opposing this application are held liable to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

[5.3] Granting the Applicant further and or alternative relief.

[6] When Council for the Applicants appeared in this Court, both applications were unopposed. It was agreed that both applications be argued together in light of the

fact that the relief sought flowed from the same criminal trial, and due to the interwoven facts and prayers, sought by the Applicants against the First Respondent. The parties further agree that the appropriate relief will be to review, set aside the order of the first respondent and refer the matter to the court *a quo* to start *de novo* before another Magistrate. This Court ordered that the two reviews applications be consolidated under case number Rev 120/2023.

Brief Background:

- [7] The two Applicants, were employed as Traffic Officers, when the alleged incident occurred resulting in them being charged with the offence of contravening Section 4 of the Corrupt Activities Act. The allegations being that they accepted a benefit, whilst on duty, from a motorist who had committed a traffic offence. They pleaded Not Guilty before the First Respondent on the 20 October 2020. The State led evidence of the allegations and sought, during the trial, to lead audio and video footage to augment same, in proving the guilt of the Applicants. This application was opposed by the Applicants for various reasons and after hearing argument on the 8 March 2021, the First Respondent ruled that this evidence was inadmissible.
- [8] The trial continued with evidence from the state witnesses, and the State subsequently closed its case. The two Applicants testified in their defence and closed their case. Both sides argued for and against the conviction of the two Applicants and the case was postponed to the 8 May 2023 for Judgment on the merits. On appearing in Court that morning, both Applicants and Court Officials were surprised that instead of Judgment being delivered, they were all informed by the First Respondent that the audio and video footage, was admissible and the State

was instructed to proceed and lead that evidence. Both Applicants objected to this ruling, but the First Respondent was clear that the previous ruling could be reconsidered. The case was postponed so that the necessary witnesses could be arranged to testify.

- [9] On the return date the Applicants informed the Court *a quo* that they intended approaching the High Court to have this decision reviewed. They also sought the recusal of the First Respondent, which was refused. This briefly was the background in respect of the proceedings that culminated in these two review applications before this Court.

The Grounds of Review:

- [10] Section 22 of the Superior Courts Act³ highlights the following as being grounds for review of the proceedings of the Magistrates' Court;

- [1] *The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—*
- (a) Absence of jurisdiction on the part of the Court;*
 - (b) Interest in the cause, bias, malice or corruption on the part of the Presiding Judicial Officer;*
 - (c) Gross irregularity in the proceedings; and*
 - (d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*
- [2] *This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.*

³ See footnote 2 above

- [11] The Applicants indicated that the First Respondent's decision to review her initial order of refusing the admission of the video and audio footage, placed the proceedings within the ambit of Section 22.
- [12] The Applicants highlighted that the First Respondent motivated that such decision was permissible prior to Judgment, relying on the case of *S v Mkhwanazi*⁴. This reasoning by the First Respondent was flawed, as the case on which the First Respondent relied was a High Court case, wherein the High Court, having inherent jurisdiction, reconsidered its interlocutory ruling. The two Applicants argued that the Magistrate's Court, being a creature of Statute, was not capable of making such a decision.
- [13] The Applicants noted that if the First Respondent was of the view, that there was a misdirection, in ruling the audio and video footage as inadmissible, the First Respondent should have stopped the proceedings and sent the case on special review.
- [14] The Second Applicant indicated that the First Respondent was bias against the Applicants when the recusal application which they sought was refused. The purpose for seeking the First Respondent's recusal was based on the apparent bias, towards the Applicants, in the decision to have the State's case reopened for the evidence which was ruled inadmissible, to be presented before Court.

⁴ 1996(1)SA736(A)

- [15] It was on account of the abovementioned reasons that the Applicants sought relief by this application. The First Applicant sought that this Court order that the First Respondent proceed and pronounce Judgment without the video and audio footage.
- [16] The Second Applicant indicated that there was a perceived bias on the part of the First Respondent, and should the matter be referred, to the First Respondent, the Applicant's right to a fair trial, would be infringed. However, the applicants have found common grounds and are in agreements that the proper remedy was to remit back to the court a *quo* for a trial *de novo*.

The Legal Principles:

- [17] The High Court has inherent jurisdiction to review proceedings in Lower Courts before the conclusion thereof in that Court. This is in instances where an injustice might result or where justice may appear unattainable in the proceedings. The High Court is always reluctant to interfere when applications are brought in the middle of the proceedings in the Lower Courts. This is referred to as "in medias res" where this Court is called upon to intervene "in the middle" of the proceedings which is disruptive to the proceedings and results in piecemeal adjudication of the trial. This Court took cognisance of the allegations by the Applicants that they would suffer irreparable prejudice, if the proceedings were to continue in the Court a *quo* and that Section 22 of the Superior Courts Act⁵ was applicable. The Applicants both argued

⁵ See footnote 2 above

for this Court to interfere as the irregularity complained about, if persisted, would cause real prejudice to the Applicants.

- [18] In *Motata vs Nair NO and Another*⁶ the Court noted the following in respect of "in medias res" proceedings;

"[9] It is trite that as a general rule a High Court will not by way of entertaining an application for review interfere with incomplete proceedings in a lower court. As stated in Wahlhaus & others v Additional Magistrate, Johannesburg & another_1959 (3) SA 113 (ADJ at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point decided against the accused by a magistrate is fundamental to the accused's guilt. At 119H-120A Ogilvie Thompson JA (as he then was) stated as follows:

'It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or mandamus - against the decision of a magistrate's court given before conviction. (See Ellis v Visser and Another 1956 (2) SA 117 (W) and R v Marais 1959 (1) SA 98 (T), where most of the decisions are collated.) This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansdown (6th Ed., vol. I p.750) state:

'While a Superior Court having jurisdiction in review or appeal will be slower to exercise any power, whether by mandamus or otherwise, upon the uninterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where

⁶ [2008] ZAGPHC 215; 2009 (1) SACR 263 (TPD) at paragraph 9

grave injustice might otherwise result or where justice might not by other means be attained ... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available

[19] In *Adonis v Additional Magistrate, Bellville and Others*⁷ the Court noted:

*"[21] It is generally accepted that this Court will not readily intervene in lower court proceedings which have not yet terminated, unless grave injustice may otherwise result or where justice may not be obtained by other means. See Wahlhaus and Others v Additional Magistrate, Johannesburg and Another **1959 (3) SA 113** (A) at 119H - 120C; Ismail and Others v Additional Magistrate, Wynberg, and Another **1963 (1) SA 1** (A) at 5G - 6A; Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg, and Another **1978 (4) SA 790** (T) at 793F - G; Levack and Others v Regional Magistrate, Wynberg, and Another **1999 (4) SA 747** (C) **(1999 (2) SACR 151; [1999] 3 All SA 374)** at 754A - F (SA).*

*[22] Intervention on review will be justified in the case of a gross irregularity which has caused, or is likely to cause, prejudice to the applicant. See the Building Improvements case (supra) at 792H - 793C. In Rynders v Bankorp Ltd t/a Trust Bank and Others **1995 (2) SA 494** (W) it was held that a magistrate's court did not have the power to grant an ex parte application for the provisional liquidation of a close corporation. According to MacArthur J (at 497B -D) the grant of such an order constituted an irregularity which caused the applicant 'substantial wrong' in that he was confronted with all the consequences of a provisional liquidation order. This entitled the applicant to*

⁷ 2007 (2) SA 147 (C) at paragraphs [21] and [22]

take the magistrate's decision on review, despite the fact that he might have failed to exhaust his remedies in the magistrate's court."

[20] The Applicants also raised the issue of the refusal by the First Respondent, to recuse herself from the proceedings, which according to the Applicants were an indication of bias, on the part of the First Respondent which was prejudicial to the two Applicants.

[21] This Court noted the approach by the Constitutional Court in *President of the Republic of South Africa & others v South African Rugby Football Union & others*⁸ where the relevant principles to be considered when recusal applications are sought was highlighted as follows:

...'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by 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 so 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.'

[22] In *Bennett & another v S: In re S v Porritt & another*⁹ Spilg J stated:

⁸ 1999 (4) SA 147 (CC) at [28]

⁹ 2021 (1) SACR 195 (GJ) at [113]

'The recusal of a presiding officer, whether it be a magistrate or a judge, should not become standard equipment in a litigant's arsenal, but should be exercised for its true intended objective, which is to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people whom they serve.'

[23] In *S v Ramabele & others*¹⁰ Mhlantla J, writing for a unanimous Court, gave the following description of the concept 'impartiality' for purposes of recusal,

"Turning to the judicial-bias challenge, impartiality is essential to the proper discharge of the duties of the judicial office and is central to the administration of justice. It applies not only to the decision itself but also to the process by which the decision is made. The word 'impartial' connotes absence of bias, actual or perceived. Impartiality must exist as a matter of fact and as a matter of reasonable perception. If a judicial officer is perceived to be partial, that perception is likely to aggrieve some persons and leave a sense of injustice to the affected parties and society at large, thereby diminishing confidence in the judicial system."

[24] In *S v Djuma & others*¹¹ an unreported, GP case, Kollapen J identified three 'core principles'

- 'a) There was a presumption in our law against partiality of a judicial officer and this was largely based on the recognition that legal training and experience prepare Judges to determine where the truth may lie in the face of contradictory evidence;*
- b) The presumption of impartiality is not easily dislodged and cogent and convincing evidence was necessary in order to do so;*
- c) That fairness required a judge to be actively involved in the management of the trial, to control proceedings and to ensure the proper utilisation of resources and thus a supine approach was not justifiable.'*

¹⁰ 2020 (2) SACR 604 (CC) at [51]

¹¹ Case no A423/2015, 12 April 2017 at [14]

The Applicability of the Law:

- [25] In considering whether the two Applicants were justified in approaching this Court, regard was had to the arguments raised in the Court *a quo* concerning the recusal and review applications. From the reading of the record the trial was postponed for Judgment purposes after both the State and Defence had closed their cases. Both sides had argued, and it was for determination of the guilt or innocence of the two Accused, with all the evidence placed before the Court. This distinguishes this case from other cases where evidence was still to be led during the trial. At this point the Court *a quo* was equipped to make a finding on the evidence led. If there was any need for further evidence, this should have been canvassed, before adjourning for Judgment purposes.
- [26] On the return date being the 8 May 2023, it was clear that the First Respondent changed her mind, regarding the previous ruling of inadmissibility of certain evidence. This sudden and new decision was taken to include this evidence, without any input from either the State or the Defence, concerning the subject matter, to the detriment of both sides. The Court *a quo* in its ruling, acknowledged that there was a misdirection, in respect of the earlier ruling, of the inadmissibility of the evidence of the video and audio. The Court then ordered it admissible and instructed that evidence in this regard was to be led by the State. The First Respondent displayed a lack of insight of the role and purpose of the litigants before her and the impact of this ruling on the right to "fair trial procedure", provided for in our Constitution.
- [27] Had this decision been made prior to the State and Defence closing their cases, the likelihood of the issue of prejudice, relied upon by the two Applicants would have been addressed and ventilated. The fact that the First Respondent sought this evidence to be led at the stage when Judgment was to be delivered, is a clear indication that the First Respondent now viewed this evidence relevant, to the benefit of the State, in its attempt to secure a conviction against the Applicants, based on this evidence.

- [28] Once the Court *a quo* realized that this ruling of the inadmissible evidence was incorrect and that this evidence was relevant to a just decision, the Court *a quo*, was obliged to refer the case to the High Court for direction on how to proceed, especially as the case was postponed for the delivery of Judgment by the First Respondent.
- [29] The situation was exacerbated by the *mero moto* order for the reopening of the State's case, without any input from either side, followed by the decision to refuse the recusal application. Surely at this stage in the proceedings, the First Respondent should have realized that the perception created by this decision, whether real or imagined, appeared to be bias, in favour of the State. The First Respondent justified this decision by motivating that her original decision was interlocutory and same could be reconsidered at any stage prior to Judgment. The case cited as highlighted by the two Applicants, is of no assistance to the First Respondent. It is important to note that the context in which this review by the First Respondent of her original ruling occurred, was as per her address in Court, at time Judgment was being considered. The First Respondent indicated that the interest of justice warranted the evidence being admitted, without weighing up the prejudice to be suffered by the two Applicants based on this decision, at this very late stage in the proceedings. The conduct of the First Respondent falls squarely within the ambit of subsection (2) and (3), of the provisions of Section 22 of the Superior Court Act.
- [30] The recusal application was a second opportunity for the Court *a quo* to seriously grapple with the question of whether a reasonable, objective and informed person, would in these circumstances and seized with the current facts, reasonably apprehend that the Court, will not bring an impartial mind to bear on the adjudication of the case, considering the allegation of bias. The Applicants claimed, that based on the irregularity of the proceedings, the Court *a quo* was entering into the arena, aiding the State, in obtaining a conviction, against the two Applicants.
- [31] From the record of proceedings, there was sufficient motivation for the First Respondent, to have acceded to the recusal application. These circumstances

differed materially, from the scenario where there was further evidence to be led and the perception of bias based on the decision by the First Respondent, could not be ignored. It is for the above reasons that this Court is of the view that the irregularities complained of by the two Applicants were present and required the intervention by this Court.

- [32] The Applicants sought that the matter be referred to the Court *a quo* with the instruction that the decision to admit the video and audio evidence, was reviewed and set aside and that the Judgment was to be delivered without same. The concern raised by this Court was that due to the perceived bias on the part of the First Respondent, any decision delivered was susceptible to criticism from both the State and Defence which was not in the interest of justice and would not bring this case to finality. That led to the parties finding common ground on how this matter should be disposed.

Ruling:

- [33] It is for the above reasons that the application for review sought by the Applicants in terms of Section 22 of the Superior Court Act are granted to the extent that the decision by the First Respondent to reopen the State's case and have the inadmissible evidence led is reviewed and set aside.

Order:

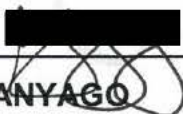
- [34] In the result the following order is made:-
- [34.1] The two applications under **Review Case numbers 119/23 and Review Case number 120/23** are consolidated for purpose of this Judgment under Review Case number R120/2023.
- [34.2] The applications for review of the decision by the Presiding Magistrate C Van Niekerk (Langley) the First Respondent, dated the 8 May 2023, at the Mokopane Magistrates Court is reviewed and set aside.
- [34.3] The matter is referred back to the Magistrate Court for purpose of trial to start de novo before another Presiding Judicial Officer, should the State elect to

prosecute the two Applicants in respect of the aforementioned offence in the future.



KL PILLAY
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I AGREE:



MF KGANYAGO
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR THE FIRST APPLICANT	: Nandu Cross Malumbete
INSTRUCTED BY	: Malumbete & Makhubele Attorneys INC
FOR THE SECOND APPLICANT	: Adv Mamabolo
INSTRUCTED BY	: Mokwape Attorneys
FOR THE FIRST and SECOND RESPONDENT : NO APPEARENCE	
DATE OF HEARING	: 1 November 2024
DATE OF JUDGEMENT	: 4 December 2024