REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: REV 105/2024

LOWER COURT CASE N0: RP 26/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: [redacted]
Signature:
Date : 14/11/2025

In the matter between:

ALFRED MULAUDI **Applicant**

and

THE REGIONAL COURT MAGISTRATE

PHALABORWA **1ST Respondent**

THE DIRECTOR OF PUBLIC PROSECUTIONS, LIMPOPO **2ND Respondent**

JUDGEMENT

STROH AJ

[1] The Applicant first appeared in the Phalaborwa regional court (court *a quo*) together with co-accused on the 17th August 2023 and was charged with one count of the alleged offence of contravening the provisions of Section 5A read with Sections 98(a)(viii)99(1)(a) and 98(g) of the Mineral and Petroleum Resources Development Act 28 of 2002. The Applicant was legally represented and eventually pleaded guilty to the account.

Summary of Events in court *a quo*

[2] The matter was several times postponed in the court *a quo*. On the 28th February 2024 in the court *a quo* the matter was again postponed to the next available court date for the state witnesses to be called to testify.

[3] However before the court *a quo* was adjourned, the First Respondent suggested to the Applicant's legal representative that he does not advise his client appropriately.

[4] The First Respondent suggested that if the Applicant pleaded guilty to the charge, the First Respondent would only give them (Applicant and Co-Accused) five years and suspend the sentence.

[5] Due to the First Respondent's comment in the court *a quo*, the First Respondent decided on the 20th June 2024 to plead guilty together with his co-accused..

[6] However, after the conviction of the Applicant, the First Respondent sentenced the Applicant to 10 years direct imprisonment without the option to pay a fine.

[7] It is important to note, that the co-accused was also convicted, but sentenced to five years wholly suspended.

[8] The Applicant is contending that the First Respondent's improper remarks, induced him to plead the way the First Respondent has suggested, in order for the Applicant to be dealt with the same day and released as he has been in detention for 630 days.

[9] Due to the way the court *a quo* conducted the proceedings; the Applicant brought this review application based on section 22(1)(b) - (d) of the Superior Court Act 10 of 2013.

[10] Section 22 of the Superior Court Act 10 of 2013 states that:

"22. (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."

[11] According to the Applicant, this review application is premised on the following grounds:

11.1 the First Respondent acted with malice, a lack of good faith, and ulterior motive when he made improper remarks to the Applicant and co-accused, by suggesting to them, if they pleaded guilty, he would give then five years wholly suspended.

11.2 By making those improper remarks to the Applicants legal representative, the First Responded committed a gross irregularity.

11.3 the First Respondent was aware of what he wanted to achieve, when he induced the Applicant and co-accused to plead guilty, in order to get a conviction without the state leading evidence.

11.4 To show that the First Responded acted in bad faith and with ulterior motive of getting a conviction, he asked the Applicant's legal representative the following question: "*why do you sometimes advise your clients not appropriately*[1]?". The Applicant's legal representative's response to the question was: "*It was exactly what I was busy with when the Court walked in but they insisted. That is why.*"[2]

11.5 According to the Applicant, the First Respondent's offending remarks: "*Ja, because I can tell you from experience, you now cannot hide.*",[3] made the Applicant extremely uncomfortable and cause the Applicant to doubt his impartiality.

[12] In the Applicant's Heads of Argument, the Applicant is of the opinion that the remark by the First Respondent:" *you cannot hide*" shows that:

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[1] Court Bundle Index and Pagination Volume 1 page 34 line 8-9

[2] Court Bundle Index and Pagination Volume 1 page 34 line 10-11

[3] Court Bundle Index and Pagination Volume 1 page 34 line 12-13

12.1 the First Respondent was not prepared to afford the Applicant and co-accused a fair trial, and it illustrates that he did not presume them as innocent.

12.2 the First Respondent had a reasonable apprehension of bias, and he had made up his mind about the Applicant's guilt even before hearing any evidence from the State.

12.3 the First Respondent did not conduct the trial open-mindedly, impartially and fairly.

[13] The Applicant also submitted in its Heads of Argument that the First Responded influenced him to plead guilty, as the First Respondent promised the Applicant a favorable sentence of 5 years that he, the First respondent, will suspend.

[14] According to the Applicant, the remarks of the First Respondent undermined the most important principles of fairness in the criminal justice system as the Applicant's constitutional right to a fair trial was violated.

[15] In terms of the Constitution of the Republic of South Africa, No108 of 1996 and more specifically section 35(3) of the Constitution states:

"Every accused person has a right to a fair trial, which includes the right-

(h) to be presumed innocent, to remain silent, and not to testify during proceedings."

[16] The Second Respondent filed a Notice of Intention Not to Oppose and asked for the following order:

16.1" Reviewing and setting aside the criminal proceedings held at Phalaborwa Regional Court before the Regional Magistrate on the 20 June 2024;

16.2 Declaring the said proceeding null and void."[4]

[17] Section 98(a)(viii) of the Mineral and Petroleum Resources Development Act 28 of 2002 states that:

"Any person is guilty of an offence if he or she –

[4] 2nd Respondent's Notice of Intention Not to Oppose

(a) contravenes or fails to comply with-

(viii) any other provision of this Act."

[18] Section 99(1)(g) of the Mineral and Petroleum Resources Development Act 28 of 2002 states that:

"(1) Any person convicted of an offence in terms of this Act is liable-

(g) in the case of any conviction of an offence in terms of this Act for which no penalty is expressly determined, to a fine or to imprisonment for a period not exceeding six months or both a fine and such imprisonment;"

[19] In *Roberts v Additional Magistrate for the District of Johannesburg, Mr Van den Berg and Another*[5] , the Supreme Court of Appeal and more specifically the Honourable Judge Howie AJ stated that:

"[25] *Bias in the sense of judicial bias has been said to mean —*

> *"a departure from the standard of even-handed justice which the law requires from those who occupy judicial office."*

See: Franklin v Minister of Town and Country Planning[1948] AC 87 (HL) at 103, [1947] 2 All ER 289 (HL) at 296 B - C.

What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be —

"manifest to all those who are concerned in the trial and its outcome, especially the accused":

see S v Rall, 1982 (1) SA 828 (A) at 831 H - 832 A.

[28] In S v Malindi 1990 (1) SA 962 (A) at 969 G - I it was said that:

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[5] *Roberts v Additional Magistrate for the District of Johannesburg, Mr Van Den Berg and Another* (548/97) [1999] ZASCA 53; [1999] 4 All SA 285 (A) (3 September 1999)para 25 - 36

"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) Bpk v Oberholzer 1974 (4) SA 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."

[34] There can be little doubt that it would detract from the efficacy and decisiveness of the bias test if one were to say that the suspicion concerned is one which the notional reasonable person ***might*** *have. That would be inconclusive. One needs to assess what such person* ***would*** *think, not what such person might possibly think. "Might" in that regard, is no more significant than "might not". And, as pointed out in Wade and Forsyth, Administrative Law, 7th ed, 482 ". . . if there was no real possibility of bias, no reasonable person would suspect it." Equating, as I think one must, "real" with "reasonable", that comment emphasises that if the suspicion of bias is one based on reasonable grounds the reasonable person* ***would*** *have it. If it were not so founded the reasonable person* ***would not*** *have it. "Might" has no place in this portion of the formulation in my opinion. One must therefore add to the requirements of the test:*

(4) The suspicion is one which the reasonable person referred to would, not might, have.

[36] With the greatest respect I venture to say that there is an important distinction between assessing the appearance of

bias through the eyes of a trained and experienced judicial officer and assessing it through the eyes of a reasonable person, even with the latter's possessing all the relevant knowledge. Wade and Forsyth (at 483) consider the real danger test more objective than that which involves determining the impression of a reasonable person. Certainly, in eliminating the reasonable observer the real danger test is more direct and no doubt the reasonable person, although required to have reasonable grounds, would necessarily be judged as viewing the events and circumstances from the subjectivity of being, notionally, litigant or accused. However, the real danger test may well do no more than switch one element of subjectivity for another. The members of the court applying that test are by training and experience as judicial officers themselves, better equipped, it is true, to exercise objective judgment than a lay litigant but it is that very training and experience which also give them a subjective position and knowledge not possessed by the notional reasonable person. They might know that a judicial officer's behaviour and comment unfortunately can, on infrequent occasions, be inappropriate but without any real danger of bias existing. They may more readily, therefore, in a given case regard a danger of bias as not real where the reasonable impression of *bias would nonetheless reasonably lodge in the mind of a reasonable person suitably informed. Essentially, the real danger test depends on the view from the Bench; the reasonable suspicion test depends on the view from the dock. This is perhaps best illustrated by a statement in R v Inner West London Coroner, ex parte Dallaglio [1994] 4 All ER 139 (CA) in which the Court of Appeal analysed Gough's case. At 152 a-b it was said:*

> *"(B)y the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias."*

Given a choice, the reasonable suspicion test accords better, in my opinion, with the provisions and spirit of the Constitution. It is more conducive to acceptance by the accused or the litigants that proceedings will in the end be fair. And the constraining effect on those presiding over trials and tribunals is salutary."

[20] From the caselaw quoted in paragraph 19 of this judgement, this Honourable Court, is clear, that the First Responded was bias and agree with what the Honourable Judge Howie AJ said in paragraph 36 in the judgement of *Roberts v Additional Magistrate for the*

District of Johannesburg which stated that : " *there is an important distinction between assessing the appearance of bias through the eyes of a trained and experienced judicial officer and assessing it through the eyes of a reasonable person, even with the latter's possessing all the relevant knowledge.*"

[21] In *S v Rall* [6] the Learned Judge of Appeal – expressed the following sentiments relating to the conduct of a trial: "*(1) According to the above-quoted dictum of Curlewis JA the Judge must ensure that 'justice was done'. It is equally important I think that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore conduct the trial that his open-mindness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused...*".

[22] This Honourable Court must intervene where the offending question sustains the inference which it indeed does, and that is, that the First Respondent was not open-minded, impartial, or fair during the trial of the Applicant.

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[6] *S v Rall* 1982 (1) SA 828 (A) at 831 H

[23] In the 2nd Respondent's Notice of Intention Not to Oppose and more specifically in paragraph 13 of the founding affidavit, the 2nd Respondent said and this Honourable Court quote:

"13. With regard to the ground of alleged irregularity, this Court should determine whether there was irregularity and if so, whether it was substantial and resulted in grave injustice. The following rules may be stated regarding irregularities:

13.1 The general rule regarding irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.

13.2 In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice.

The court in *S v Xaba* [7]1983 (3) SA 717 (A) at 728 C-D, stated that:

'Generally speaking, an irregularity or illegality in the proceedings at a criminal trial occurs whenever there is a departure from those

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[7] *S v Xaba* 1983 (3) SA 717 (A) t 728 C-D

formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted'.

[24] The following irregularities occurred in the court a quo:

[24.1] the First Respondent acted with malice, a lack of good faith, and ulterior motive when he made improper remarks to the Applicant and co-accused, by suggesting to them, if they pleaded guilty, he would give then five years wholly suspended.

[24.2] By making those improper remarks to the Applicants legal representative, the First Responded committed a gross irregularity.

[24.3] the First Respondent was not prepared to afford the Applicant and co-accused a fair trial, and it illustrates that he did not presume them as innocent.

[24.4] the First Respondent had a reasonable apprehension of bias, and he had made up his mind about the Applicant's guilt even before hearing any evidence from the State.

[25] This Honourable Court is of the view that the Applicant's review application must succeed due to the presiding officer in the court *a quo:*

[25.1] induced the Applicant and co-accused to plead guilty in order to get a conviction without the state leading evidence.

[25.2] had a reasonable apprehension of bias, and he had made up his mind about the Applicant's guilt even before hearing any evidence from the state.

[25.3] did not conduct the trial open-mindedly, impartially and fairly.

Order:

[26] In the result the following order is made:

[26.1] The conviction and sentence imposed by the First Respondent under case number: RP 26/2023 and dated 29th

J une 2024, is reviewed and set aside.

[26.2] The matter is remitted back to the court a quo for a trial de novo before another magistrate should the prosecution still wish to prosecute the accused.

[26.3] There is no order as to cost.

[redacted]

J D STRöH AJ

ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I AGREE:

[redacted]

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicant	**:Adv A Baloyi**
Instructed by	**: MG Mathe Attorneys Inc.**
Counsel for the first respondent	**: In Default**
Date heard:	**: 5th September 2025**
Electronically circulated on	**: ..14. ~~October~~ November 2025**

[redacted]