

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: 1404/2023

In the matter between:

RELTON BOOYSEN

Applicant

and

**THE KIMBERLEY REGIONAL COURT
MAGISTRATE FOR THE NORTHERN CAPE REGION**

1st Respondent

**THE DIRECTOR: PUBLIC PROSECUTIONS
NORTHERN CAPE**

2nd Respondent

Neutral citation: *Relton Booysen v The Kimberley Regional Court Magistrate for the Northern Cape Region and Another* (Case no 1404/2023)

Coram: TLALETSI JP, LEVER J and NXUMALO J.

Delivered: 19 November 2025.

Summary: Criminal procedure — Recusal of magistrate — Reasonable apprehension of bias — *Test*: whether a reasonable, objective and informed

person would, on the correct facts, apprehend that the presiding officer will not act impartially — Presumption of judicial impartiality — Onus on applicant to rebut presumption — Applicant failed to discharge onus.— Applicant’s case based on reasonable apprehension, not actual bias — No factual basis for apprehension of bias — Magistrate’s refusal to recuse not irregular — Delay in proceedings — Delay found to be systemic, not attributable solely to the magistrate — s 342A finding based on incomplete facts — Did not render magistrate a party to proceedings — Did not establish reasonable apprehension of bias — Judicial officers must not recuse too readily — Unfounded or flimsy grounds for recusal would undermine judicial process and strain limited resources — No reasonable apprehension of bias established — Refusal to recuse not irregular — Review application dismissed.

ORDER

1. The application is dismissed.
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FULL COURT REVIEW JUDGMENT

Tlaletsi JP (Lever J and Nxumalo J Concurring)

- [1] The applicant seeks this court to review and set aside the decision of the first respondent (“the trial magistrate”) who refused to recuse herself from further presiding in criminal proceedings in which the applicant is the accused.¹

¹ The review application was first heard by two Judges on 24 October 2024. However, the two could not agree on the outcome of the review application. This necessitated the addition of a third Judge to constitute a Full Court to hear the matter. The date of hearing was the first date counsel was available to argue the matter.

- [2] The applicant is facing various counts of *crimen injuria*, sexual assault and attempted rape in the Regional Court, sitting in Kimberley. On 17 April 2023 the applicant, represented by his Counsel, Mr Van Heerden, applied for the trial magistrate to recuse herself from further presiding in the applicant's case. The application was predicated on the grounds that the trial magistrate had caused his trial to be delayed by being unavailable to proceed with the case on several occasions. For this reason, the applicant believes that he will not receive a fair trial if the trial magistrate is allowed to proceed with his criminal trial to its conclusion.
- [3] A brief chronology and factual background will be apposite to place the matter in its correct perspective. This chronology is gleaned from the record filed by the applicant. It is regrettable that the record is not properly prepared. Proceedings of some court sittings are not part of the record. And the fact that the applicant's heads of argument do not make any reference to the record has not been helpful to us.² The founding affidavit, as well as the heads of argument, are replete with generalities, such that we had to trawl through the entire record filed to be able to apprise ourselves of the applicant's grievance and to properly determine the review application.

The Chronology

- [4] The transcript of the criminal trial filed by the applicant starts with the proceedings of 2 July 2018. On this day, one of the witnesses' cross-examination by the applicant's counsel is being continued. There is no record of what transpired before this day. The cross-examination of the witness was not completed, and the proceedings were adjourned to the following day for further trial. On 3 July 2018, the cross-examination continued. It is not clear if it was the same witness who testified the previous

² "Heads of argument" means full heads of argument **with references**, where appropriate, to the record and to the authorities relied upon, together with a list of such authorities. – Northern Cape Division of the High Rule 3(5).

day as the names are different. The case was thereafter postponed to 1 November 2018 for further trial.

- [5] The trial proceeded on 2 November 2018, on which day several witnesses testified. It was then adjourned until 7 March 2019. On this day, the matter was placed before a different magistrate. The Public Prosecutor ("the prosecutor") placed on record that the trial magistrate for the case was absent and was no longer based in Kimberley. She could not be reached telephonically. The matter was postponed to 20, 21 and 23rd of May 2019. On this day, the applicant's counsel warned that should the matter not proceed on those days, *"the defence will bring an application for permanent stay of prosecution due to the long delay in the matter"*. (Sic)
- [6] On 20 May 2019, the case served before the magistrate who previously postponed it to this day. The prosecutor placed on record that the applicant, who was to travel from Cape Town, where he resided, was absent due to his prior arrangement with his counsel. They agreed to postpone the case to 17-20 September 2019 for further trial. The applicant's legal representative placed it on record that the trial magistrate was on this day presiding over cases in the Kathu regional court, and the dates to which the case is to be postponed have been arranged with her.
- [7] Regrettably, we have not been provided with the transcript of the 17th of September 2019. We, however, have the transcripts of 7 July 2021. It is not disclosed what happened in the period between these dates. It is undoubtedly a substantial intervening period that is not accounted for, and unfortunately, this Court remains in the dark as to what may have transpired during that time. On this day, an attorney from the firm instructing Mr Van Heerden appeared. He placed on record that the matter was on the roll to sort out the transcript of the previous proceedings. The magistrate who

presided on this day postponed the matter to 12 July 2021 in the applicant's absence, for the record to be sorted out.

- [8] On 12 July 2021, the applicant's attorney confirmed that they had received the complete record of the proceedings and that a date for the continuation of the trial be arranged. At that time, the prosecutor who had been running the trial had retired, and a replacement was needed. The case was provisionally postponed to 2 August 2021 for the replacement prosecutor to be appointed and to arrange a date for further trial with the presiding officer. The applicant was not present as per the previous arrangements for him to be excused from attending.
- [9] On 2 August 2021, the case was further postponed to 2 November 2021 so that a date for further trial could be arranged with the presiding magistrate. The applicant also did not appear because of the previous arrangement for him not to appear. There is no record of what transpired on 2 November 2021. The record, however, reveals the proceedings of 22 November 2021 presided over by the trial magistrate. The prosecutor requested a postponement provisionally for the applicant's attorney to be provided with a complete record of the proceedings. The case was provisionally postponed to 10 December 2021 for the transcript of the previous proceedings. Again, the applicant was not present as per the standing arrangement between the parties.
- [10] The record of the 10th of December 2021 is not provided to us. The next appearance record is on 17 January 2022. It was indicated to the magistrate presiding on that day that the date had been arranged with the trial magistrate. The applicant was also present. The record reflects that the prosecutor placed on record that the applicant was from Cape Town and has to spend money to travel to Kimberley. On this day, the case was postponed to 27 June until 1 July 2022. On 27 June 2022, the trial

magistrate was not available. The prosecutor informed the court that Mr Van Heerden and the accused had been excused from attending court and that a trial date had been arranged with the trial magistrate for the trial to proceed from 30 November to 2 December 2022. The reason for the postponement is not disclosed. It was also not placed on record whether the trial magistrate had been made aware of that date.

- [11] On 30 November 2022, the presiding officer was Ms De Villiers. The prosecutor for this day, Mr Deetlefs, informed the court that this date was arranged with the trial magistrate in the Regional Court President secretary's office. Mr Van Heerden was also present, and the telephone was placed on speaker mode for all parties to hear. He mentioned that the week preceding this appearance, the acting senior prosecutor contacted the trial magistrate, who indicated she was to confirm the dates given to her and that they coincided with her roll where she was stationed. Attempts for her to get a colleague to take her court roll over failed, and as such, she would not be able to come to Kimberley.
- [12] Mr Van Heerden persuaded the magistrate to hold an enquiry in terms of section 342A of the Criminal Procedure Act 51 of 1977 ("the Act").³ He urged

³ Section 342A of the Act provides:

"Unreasonable delays in trials"

- (1) A court before which criminal proceedings are pending shall investigate any delays in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness: Provided that when the court requires information pertaining to an infrastructure related or operational matter that arose at the court which falls within the responsibility of the Department of Justice and Constitutional Development, the court manager of that court must be subpoenaed to give evidence for this purpose and if he or she is unavailable or unable to respond or provide a satisfactory response, the following officials of the Department of Justice and Constitutional Development may be subpoenaed:
 - (a). The provincial Head of the province in which the court is situated;
 - (b). the Deputy Director-General responsible for court administration; or
 - (c). the Director-General.
- (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
 - (a). The duration of the delay;
 - (b). the reasons advanced for the delay;
 - (c). whether any person can be blamed for the delay;
 - (d). the effect of the delay on the personal circumstances of the accused and witnesses;

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- (e). the seriousness, extent or complexity of the charge or charges;
 - (f). actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
 - (g). the effect of the delay on the administration of justice;
 - (h). the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
 - (i). any other factor which in the opinion of the court ought to be taken into account.
- (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
- (a). refusing further postponement of the proceedings;
 - (b). granting a postponement subject to any such conditions as the court may determine;
 - (c). where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general;
 - (d). where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
 - (e). that-
 - (i). the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
 - (ii). the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
 [Date of commencement of para.(e): to be proclaimed.]
 - (f). that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.
- (4)(a) An order contemplated in subsection (3) (a), where the accused has pleaded to the charge, and an order contemplated in subsection (3) (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.
- (b). The attorney-general and the accused may appeal against an order contemplated in subsection (3) (d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply *mutatis mutandis*.
- (5) Where the court has made an order contemplated in subsection (3) (e)-
- (a). the costs shall be taxed according to the scale the court deems fit; and
 - (b). the order shall have the effect of a civil judgment of that court.
- [Date of commencement of sub-s. (5): to be proclaimed.]
- (6) If, on notice of motion, it appears to a superior court that the institution or continuance of criminal proceedings is being delayed unreasonably in a lower court which is seized with a case but does not have jurisdiction to try the case, that superior court may, with regard to such proceedings, institute the investigation contemplated in subsections (1) and (2) and issue any order contemplated in subsection (3) to the extent that it is applicable.
- (7)(a) The National Director of Public Prosecutions must, within 14 days after the end of January and of July of each year, submit a report to the Cabinet member responsible for the administration of justice, containing the particulars indicated in the Table of Awaiting Trial Accused in respect of each accused whose trial has not yet commenced in respect of the

the magistrate to make findings that the applicant's criminal trial had been unreasonably delayed; that the trial magistrate was responsible for the delay; and that the trial magistrate be ordered to report at Kimberley magistrate court that very Friday for them to launch an application for her recusal from the applicant's criminal case. He referred to several alleged instances when the matter could not proceed and had to be postponed because of the "unavailability" of the trial magistrate.

- [13] In her ruling, the magistrate found that the unreasonable delay in the finalisation of the case was due to the unavailability of the trial magistrate. She ordered that the trial magistrate should avail herself for the postponement of the case to avoid any further confusion regarding the arranged dates. She further ordered that the Regional Court President of the Northern Cape should liaise with his counterpart in the Eastern Cape for the trial magistrate to be released for her to personally postpone the case for the hearing of the matter. The case was provisionally postponed to 7 December 2022, a date which was not arranged with the trial magistrate.
- [14] On 7 December 2022, the prosecutor informed the court that the case was postponed to this day to arrange a date for further trial with the trial magistrate. The dates he mentioned as agreed to were 17 and 18 April 2023. The reason for the postponement is recorded as being for the recusal application to be brought on behalf of the applicant. On this day, the applicant was not present as per the previous arrangement that he should not attend.

leading of evidence, as contemplated in section 150 and who, by the end of the month in question, has been in custody for a continuous period exceeding-

- (i) 18 months from date of arrest, where the trial is to be conducted in a High Court;
 - (ii) 12 months from date of arrest, where the trial is to be conducted in a regional court;
 - and
 - (iii) six months from date of arrest, where the trial is to be conducted in a magistrate's court.
- (b) The Cabinet member responsible for the administration of justice must, within 14 days of receipt of a report contemplated in paragraph (a), table such report in Parliament.
- ...

- [15] On 17 April 2023, the trial magistrate was available. When the public prosecutor informed the court in his opening address that the proceedings for that day were intended for an application for her recusal, the trial magistrate replied that she was not aware of the intended application for her recusal and that the handwritten charge sheet on which the presiding officers recorded a summary of what transpired on the day and the reason for the postponement, did not reflect that. She however allowed the application for her recusal to proceed.
- [16] The basis for the application for recusal of the trial magistrate is set out in the founding affidavit by the applicant filed in the Regional Court. It is important to set out these grounds in full for a proper understanding of the issues before us. The applicant contended that the trial magistrate had caused a delay in having his matter finalised. He mentioned that he was arraigned to appear in court in 2015 and his trial proceeded until 2018, and the trial magistrate was thereafter never available to attend court after her transfer to the Eastern Cape Province. He further contended that on 30 November 2022, when the trial magistrate failed to attend court, another magistrate held an enquiry in terms of section 342A of the Act and found that the trial magistrate was responsible for the unreasonable delay in the applicant's matter.
- [17] The applicant contended that the fact that another magistrate has found that the first respondent is responsible for the delay is an indication of bias on the part of the trial magistrate, and as such, he will not be afforded a fair trial. Furthermore, the assertion by the trial magistrate that the dates were not arranged with her is an indication of bias on her part, because the other magistrate had found that she caused the delay after hearing the prosecutor and his legal representative that the dates were indeed arranged with her. For this reason, the applicant concluded, he has no doubt that the trial magistrate is prejudiced in his matter and that justice will not be administered in his case.

- [18] In her consideration of the application for recusal, the trial magistrate mentioned that for her to avail herself for the 17 and 18 April 2023, it was because she was contacted telephonically to arrange the dates for further trial, which she did. That she was not told of the section 342A enquiry and what the outcome thereof was. That she only became aware of those proceedings when she studied the record on 17 April 2023 in preparation of the trial upon her arrival in Kimberley.

The Review

- [19] The main relief sought by the applicant in terms of the Notice of Motion is that:

- “1. *The decision of the First Respondent, Kimberley Regional Court Magistrate, [---], not to recuse herself is hereby reviewed and set aside and replaced by an order that she recuse herself as the presiding Officer in Kimberley Case no: RCZ178/2015, wherein the applicant is an accused, and*
2. *The matter is referred back to the Regional Court, Kimberley where the trial shall start de novo before another Magistrate.*

The applicant is seeking an order for costs only if the application is opposed.”

- [20] The founding affidavit in support of the review application sets out a brief background to the case and the applicant's view that the trial magistrate caused an unreasonable delay to his case being finalised; the allegation that the trial magistrate is not telling the truth when she indicated that the dates of 30 November 2022 to 3 December 2022 were not arranged with her and that he believes his legal representative and the public prosecutor when they say the dates were arranged with her; that the presiding officer is now a party in his trial because an adverse finding had been made against her by the magistrate who conducted a section 342A enquiry, that because of the above reasons, the trial magistrate will not adjudicate his case impartially.

[21] As to what appears to be the real ground for the review of the trial magistrate's decision, the applicant states that: *"I am advised, which advice I accept, that the Honourable Regional Magistrate committed a gross irregularity in not recusing herself in the circumstances and that this irregularity is likely to severely prejudice me"*.

[22] The basis of the application for the recusal of the trial magistrate is a reasonable apprehension of bias, not actual bias. The test for judicial recusal was authoritatively articulated by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others ("SARFU")*.⁴ The Constitutional Court opined thus:

"A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes".⁵

After reviewing several authorities relating to the formulation and application of the test for recusal, the Constitutional Court held:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The

⁴ 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) .

⁵ Ibid para 35.

reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”⁶

- [23] The test for recusal is now trite. The question is whether, seen objectively, the judicial officer is either factually biased or whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the presiding officer has not or will not bring an impartial mind to bear on the adjudication of the case.⁷ Regarding the application of the test for “apprehended bias”, the Constitutional Court made the following observations in *SARFU*:

“... it appears that the test for apprehended bias is objective and that the *onus* of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in a dissenting judgment by De Grandpré, J in *Committee for Justice and Liberty et al v National Energy Board*:

‘... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is “what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude”.’

In *R v S (RD) Cory J*, after referring to that passage, pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable

⁶ Ibid para 48; see also *S v Basson* 2007 (1) SACR 566 (CC) para 25.

⁷ See *Ncube and Another v Health and Hygiene (Pty) Ltd (Application for Recusal)* [2022] JOL 57016 (GJ) para 17 (with reference to “*SARFU*”) para 48.

in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in Pinochet:

‘Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough*, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Judge was not impartial.’

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.”⁸

- [24] It is well-established that in applying the test for recusal, our courts have consistently recognised a presumption that judicial officers are impartial in adjudicating disputes. Thus, the presumption in favour of judicial impartiality must be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer concerned was or might be biased.⁹ The above notwithstanding, the presumption of judicial impartiality “can be displaced by *cogent evidence* that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias”.¹⁰ Thus, the effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. It is thus expected of a reasonable litigant to take into account the presumption of judicial impartiality. The said presumption is also “crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased”.¹¹ Accordingly, the presumption in favour of judicial impartiality must always be taken into

⁸ Ibid para 45.

⁹ See *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* (“Masuku”) [2022] ZACC 5 (CC); 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) paras 56- 62.

¹⁰ See *Bernert v Absa Bank Ltd* [2010] ZACC 28 (CC); 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) para 33.

¹¹ Ibid

account when conducting the enquiry into whether a reasonable apprehension of bias exists.¹²

- [25] Magistrates are Judicial Officers, and the above principles enunciated by the Constitutional Court in *SARFU* and other authorities apply equally to them.¹³ Magistrates are also required to take an oath of office or affirmation by Item 6(3) of Schedule 2 to the Constitution on assumption of the office of magistracy. Item 6(3) of Schedule 2 to the Constitution provides that: "Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation". Accordingly, a person appointed as a judicial officer in terms of the Magistrates' Courts Act 32 of 1944, shall "before commencing with his or her functions in terms of this Act for the first time, take an oath or make an affirmation subscribed by him or her . . ."¹⁴ Consequently, Magistrates takes an oath or solemn affirmation to the effect that, in their respective capacities as judicial officers, they will be "faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law".¹⁵
- [26] In *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*¹⁶, the Constitutional Court emphasised that in general piecemeal appeals remained undesirable, but the overriding consideration was that of convenience. The court opined that whether a court that had dismissed a recusal application would permit the unsuccessful applicant to bring appeal proceedings first would depend on a range of factors. Such factors would

¹² *Masuku* above fn 8, para 62.

¹³ *Masuku (supra)* para 60; see also Item 6(3) of Schedule 2 to the Constitution of the Republic of South Africa, 1996.

¹⁴ Section 9(2)(a) of the Magistrates' Courts Act 32 of 1944.

¹⁵ *Ibid.*

¹⁶ 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC).

include the nature of the matter, the nature of the objection to the court's composition, the prospects of success in the appeal, and, in the case of an appellate court, the length of the record. The decision on these factors lay with the court itself, and that an appeal against the dismissal of a recusal application did not lie as of right.¹⁷ It is against these principles that the grounds advanced by the applicant for the recusal of the trial magistrate must be evaluated.

- [27] The applicant's application is pinned on his apprehension of bias should the trial magistrate continue to preside over his case. For him to succeed, he must present circumstances that create a reasonable apprehension of bias in the eyes of a reasonable observer. His apprehension should be related to the conduct of the trial magistrate in the conduct of the proceedings or any matter related to the way his case is conducted by the trial magistrate.
- [28] As pointed out above, the applicant's factual basis for his alleged apprehension of bias is anchored on three aspects. First, that his case has been unreasonably delayed by the trial magistrate, as found by Ms De Villiers in the section 342A enquiry. Secondly, on the fact that the trial magistrate disputed that the dates for further trial scheduled for 30 November 2022 to 3 December 2022 were not arranged with her. Thirdly, that the trial magistrate is a party in his case in that an adverse finding has been made against her. I now proceed to consider these grounds.
- [29] It is indeed so that there had been systemic delays in having the trial of the applicant concluded. Section 35(3) of the Constitution guarantees every accused person a right to a fair trial, which includes *inter alia*, the right to have their trial begin and conclude without unreasonable delay.¹⁸ This constitutional right must at all times be respected by everyone involved in the criminal justice system. It is, however, important to investigate what the

¹⁷ Ibid para 5.

¹⁸ Section 35(3)(d) of the Constitution of the Republic of South Africa, 1996.

actual cause of the delay is, whether the delay is unreasonable and the effect it has on the parties to the trial.

- [30] It is perspicuous that not all the delays in this case can be attributed to the conduct of the trial magistrate. As shown in the chronology above, the dates of 7 March 2019, the trial magistrate was transferred to the Eastern Cape province and could not be traced. She was also alleged to have been on leave. The subsequent dates of 21 to 23 May 2019 were not arranged with the trial magistrate. The dates of 17 to 20 September 2019, the trial magistrate was presiding over cases in the Kathu regional court. What caused the trial not to proceed on the dates 7 July, 17 July 2021 was the need to sort out the transcript of previous proceedings, which was required by the applicant's attorney. These were provisional dates. Similarly, the date of 2 August 2021 was provisional because a replacement prosecutor had to be found. The matter was provisionally postponed to 2 November 2021 to arrange a trial date with the trial magistrate. It can therefore not be said that these delays were the sole responsibility of the trial magistrate.
- [31] On 22 November 2021, the trial magistrate was available. The trial could not proceed because the applicant's legal representative did not have the transcript of the previous proceedings. The matter was provisionally postponed to 10 December 2021 for the transcript. On 17 January 2022, the matter was postponed to 27 June until 1 July 2022. It is not indicated that the dates of 17 January 2022 were arranged with the trial magistrate. It is the dates of 27 June until 1 July 2022, on which it is indicated that they had been arranged with the trial magistrate. However, on 27 June 2022, the trial magistrate was not present. What is significant though is that the new prosecutor in the case for that day, did not confirm that the date had been arranged with the trial magistrate. He placed on record that the applicant and his legal representative had been previously excused by the court from appearing on this day. The matter was postponed to 30 November until 2

December 2022 as arranged with the trial magistrate and the applicant's legal representative.

- [32] The next appearance, according to the record, was on 7 December 2022. We are not privy to what transpired on 30 November 2022 and the days thereafter. However, the prosecutor indicated to the court that the 7th December was intended to be utilised to arrange a date suitable to all parties for the applicant to bring an application for the recusal of the trial magistrate from the case.
- [33] As indicated, although the delays are regrettable, the trial magistrate is according to the record not solely responsible for the delays. It is therefore difficult to find that, because of the delays, the trial magistrate's conduct can be said to create an apprehension of bias or that the applicant will not receive a fair trial. There is no rational connection between the conduct of the trial magistrate and the perceived bias.¹⁹ The rational connection alluded to must be such that calls into question the ability of the judicial officer to apply his or her mind in an impartial manner to the case before him or her.²⁰ It is, of course, self-evident that the outcome of any recusal application must be determined with reference to the totality of the relevant facts.²¹ This Court notes that on the day when the application for recusal was launched, the trial magistrate was available to proceed with the trial. Regrettably, it is the application for recusal that caused the trial of the case not to proceed from this day forward.
- [34] The trial magistrate cannot be faulted for saying that she was not aware that there was a decision to apply for her recusal. There is no indication that she

¹⁹ See *Ex parte Goosen and Others (Legal Practice Council and Others as Amici Curiae)* [2019] 3 All SA 161 (GJ) paras 25 and 29; see also *South African Human Rights Commission Obo South African Jewish Board of Deputies v Masuku and Another*, *ibid* fn 8 para 69.

²⁰ *Ibid*

²¹ *Ex parte Goosen and Others (Legal Practice Council and Others as Amici Curiae)*, above fn 18, para 14.

was ever informed of the intended application until, on the day preceding that hearing, when she read about same on the record in preparation for the trial. There is no evidence that the Regional Court presidents discussed the matter as ordered by Ms De Villiers. The reasonable inference is that they did not, hence the contention by the applicant's counsel that the Regional Court president is in contempt of the order of Ms De Villiers. Factually, the trial magistrate was not aware of the intention to apply for her recusal. The assertion by the trial magistrate that she was only required to arrange the trial date and that she was not forced by the court order is plausible. In any case, the request by counsel that an order be made to compel the trial magistrate to come to court in Kimberley that Friday was not granted by the magistrate who held the inquiry. The order was for her to be available to arrange a postponement to clear up any misunderstanding and for further postponement dates. I find it difficult to conclude that, objectively speaking, the remark by the trial magistrate that she was not aware that there had been an intention to apply for her recusal would lead to a reasonable perception of bias.

- [35] Regarding the section 342A enquiry itself, it is evident from the record that Ms De Villiers was reluctant to hold an enquiry. Her proposal, that was not accepted by the applicant's legal representative, was that they approach the Regional Court president for direction, which may include a stay of prosecution or the recusal of the trial magistrate. The enquiry was held on the insistence of the applicant's legal representative. The unsuccessful attempt to make the trial magistrate a party to the proceedings was at the instance of the applicant. The ruling of Ms De Villiers was based on the *ex parte* address made by the applicant's legal representative from the bar, which was mainly to the effect that most, if not all postponements, were occasioned by the unavailability of the trial magistrate. I have in the chronology set out in detail what transpired on the days the matter was postponed based on the record filed by the applicant. This submission was

in general terms and was not entirely accurate. Not all the facts relating to the delays were placed before the Magistrate.

- [36] It is common cause that on the dates when the trial was not likely to proceed, the applicant was accommodated. The arrangements that he should not travel to Kimberley from Cape Town were intended to minimise the financial burden that he would have been exposed to. Common sense dictates that he indeed benefited from this arrangement.
- [37] Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judicial officer, they will have their case tried by someone thought to be more likely to decide the case in their favour.²² The ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he or she will decide the case adversely to one party.²³ A recusal of the presiding judicial officer is not there for the taking. Such an application must be grounded on credible grounds that would raise an apprehension of bias. Expecting presiding judicial officers to recuse themselves on flimsy or unfounded grounds would open floodgates for these applications in the lower court judiciary which have to deal with many cases that are enrolled in their courts. The limited judicial resources that we have should rather be reserved for the many deserving cases that these courts have to deal with. A refusal of an application for recusal cannot, in the context of the present case, by itself be an irregularity on the part of the trial magistrate as it is contended by the applicant.

²² See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* ("SARFU"), above fn 3, para 46.

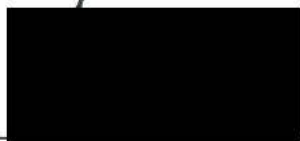
²³ Ibid

[38] In conclusion, the applicant has a fundamental right to have his criminal trial concluded without unreasonable delay. That right must be balanced against the right of the complainants in the cases he is facing, as well as the interests of society. In determining the unreasonableness of the delay, all relevant factors must be considered and including whether the applicant would not receive a fair trial. On the facts of this case, it cannot be found that the accused would not receive a fair trial. He still has an opportunity to approach an appropriate forum should he be dissatisfied with the outcome of his trial. It is not in the interests of justice to interfere with an incomplete trial in the circumstances of this case.

[39] For the above reasons, the application for review of the trial magistrate's refusal to recuse herself should be dismissed.

[40] In the result, the following order is made:

1. The application is dismissed.



LP TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur



LG LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur

A large black rectangular box redacting the signature of the judge.

APS NXUMALO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the applicant:

Adv. F Van Heerden

Instructed by:

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