IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

HIGH COURT REF NO: 398/2023
REVIEW CASE NO: RCA40/2021

In the matters between:

THE STATE

v

GARTH LAMB **Accused 1**

DAVID TALMAKIES **Accused 2**

JUDGMENT DELIVERED: TUESDAY, 21 NOVEMBER 2023

NZIWENI, J

[1] This matter was referred to this Court as a special review by the Acting Regional Court President. The Acting Regional Court President amongst others requested this Court to make an order for the matter to start *de novo* or any other order as this Court deems fit. The review proceedings stem from a criminal trial that commenced before a Regional Court Magistrate ("the Magistrate"), in Mitchells Plain, on 23 September 2022. In the pending criminal trial, each accused is legally represented, accused one appointed an advocate that was briefed by an attorney. On 23 September 2022, the briefing attorney was also present during the court proceedings.

[2] Both accused are facing one count of Murder, read with the provisions of section 51 (1) of the Criminal Amendment Act, Act 105 of 1997, and one count of Attempted Murder. The review record reveals that the accused pleaded not guilty to the two charges preferred against them by the State. Before this matter was referred to this Court for review, the State only led the testimony of one witness.

Recusal proceedings

[3] On 23 September 2023, the State witness finished his testimony at 16:08 [according to the transcribed record] and was excused. The proceedings were then adjourned. On 24 September 2022, the next date of appearance, before the State could proceed with its case, the Magistrate informed the parties in court about what had transpired the previous day, after the court had adjourned the case.

In so far as to what happened after the adjournment of the case on 23 September 2022, I consider it necessary to recite what the Magistrate told the parties. The record reveals the following:

> "On getting out of the courtroom on my way to the garage for my vehicle an unfortunate event took place. Having exited the stairs and the door towards my motor vehicle, I was approached by a gentleman from behind. It appeared that gentleman was one of the members of the public that was here in court. Immediately upon looking at that gentleman he looked familiar to me. But I am sure because of the change in body appearance . . . that is the reason . . . I did not immediately recognise him or recall who he was. He greeted me warmly as well as (sic) exchanged pleasantries with me.

He tried informing me who he was that he use to work with us here in this court as a senior police officer. Not necessarily as a court orderly, but as part of the police officers that we work with on a daily basis in this court.

He had little conversation with me trying to tell me how he has since advanced in his career. That he is now heading a certain section in the Department of Police, but outside Cape Town.

For fear of appearing rude I restrained myself from asking who exactly he was. As I indicated he appeared familiar to me, but I had no idea who he was. He told me that he was Mr Tamakies. And he told me accused 2 that I am now presiding over his matter is his son. I immediately cut short that conversation. And I did not want us to go further. Imagine an observer who was looking at me with that gentleman having that kind of a conversation that they did not know what was it about. Only myself and that gentleman know what was that conversation about. No one else knows what that conversation was about.

Let alone the family members of the deceased person as to what would they be thinking was happening between myself as well as the father or now that I understand is the father of accused 2.

The law says that the court should always appear to be free of any suspicion of bias. Perhaps let me correct myself. It does not say any suspicion. Any reasonable apprehension on a reasonable person of bias.

As I sit here, I fully believe I was not influenced in any manner by that gentleman, but that is not the test. The test is not whether I believe I was not influenced. The test is to a reasonable observer of the circumstances would there be any reasonable apprehension of bias on the part of the court.

It is the full belief of this court that a reasonable person looking at those circumstances immediately after the proceedings of the court will be pardoned to

believe or entertain a reasonable apprehension of bias on the court's part. The Court should always be viewed not with even a slightest possibility of biasness on its part. The intention is to recuse myself, but I will first give whoever has an interests to address the court on the matter . . .

I must just . . . inform the members of the public the consequences of my recusal would be that the matter would have to start afresh before another magistrate."

Submissions by parties to the Magistrate

" **Mr Schotzel** [accused 1 legal representative]. . .M'Lady, I would like to start out by thanking the court for the candour and openness with which the court has addressed this issue. . . [f]rom my own personal conviction and that of my attorney and from the defence for accused 1's side I want to assure the court that we have absolutely no doubt about the court's integrity and accept that was the extent of any conversation between yourself and this Mr Tamakies. We would prefer the matter to proceed in front of Your Worship as we believe that there is no bias whatsoever by this court.

One of the reasons firstly we believe that there is no bias and it should have no bearing on this case and secondly there is very real to my client who has already paid me for two days. My exorbitant fees . . ."

"**Mr Maralack** [accused 2 legal representative]: . . [o]bviously it is a situation which we did not forsee any of the court officials to find themselves, in particularly (sic) Your worship.

. . . I would start by saying that the court has displayed the court's fairness and objectivity in this matter by seeing it necessary to advise not only the court officials but the of the situation or the instance that happened yesterday.

That in itself . . .reiterate that the court is in fact presiding in this matter correctly and fairly in respect of both the state's case as well as the defence case.

The court even went as far as saying what the basis or the nature of the conversation was about which in all fairness the court does not have to if the court had any intention of bias.

. . . [i]n respect of accused 2 I will submit that we would request that this matter proceed before Your Worship.

Both accused. . .will in fact suffer prejudice should this matter start de novo before a different magistrate. It is a very very old matter and in addition not only the accused. . . the family of the deceased and the state's case. . . they will also be frustrated by a further delay in this matter. . .

I do believe that the court's openness and transparency with regard to this issue or situation speaks for itself. . . [t]hefore there is no reason to believe that the matter will not be run in a fair manner."

"**Prosecutor:** . . . [f]irst of all I would just like to say I would, I appreciate the court's . . .and openness about the situation yesterday. I left quite . . . later than what Your Worship did. . . and I also found Mr Tamakies who I also recognised as a police officer with the defence attorney, Mr Maralack at the exit . . . where staff leaves . . . which was kind of odd to me. I greeted Mr Maralack and I proceeded to my car, because that is not usually where public would meet with the attorneys . . . This is not the first instance where there was a complainant against the Tamakies family. I did not address it in court because it is not the forum to do it. . . I would like an opportunity to just get their input before address the court any further on whether we would like the court to recuse itself now after that altercation. We do believe that, Your Worship, what Your Worship, say is only the extent of, as the state and as the prosecutor who works with you every day I do

believe that is the extent of where the conversation went, but I feel it would be unfair of me to further address you without consulting with them. . .

Court: Ja, but they have no input in this.

Prosecutor: . . . On my own I would, I could make the decision, but I would want to have their input before.

Court: No, I am not going to allow you to do that. I want us to deal with this now.

Prosecutor: Your Worship . . .

Court: I do not want anyone to be, I have a duty Miss Adams, and it should not be influenced by any member of the public. It is a matter of law not a matter of the feelings by the members of the public."

Prosecutor: Then I am going to ask that Your Worship to recuse herself . . ."

[4] The Magistrate then recused herself from the matter *suo motu*. It is significant to note in this matter that there was no application lodged to have the Magistrate recuse herself from the trial. However, it is established that a presiding officer may recuse himself or herself, if a ground for recusal exist.

[5] The courts' impartiality and independence are fundamental principles behind the right to a fair trial. The importance of impartiality and its presumption in our judicial system cannot be overstated as they are one of the essential cornerstones that serve to protect the integrity of the court's processes. An impartial hearing generally embodies judicial independence. This in turn entails

that parties would receive a just and fair decision. Thus, there is an inextricable link between judicial independence and judicial impartiality.

A presiding officer is presumed to be impartial unless that presumption is rebutted. In order to render justice, a judicial officer should be truly impartial and independent.

As a matter of fact, though the presiding officer should appear partial to the parties, it is equally important that he or she must appear impartial to the public at large. It is frequently stated that justice must not only be done but must be seen to be done. This maxim also connotes that appearance of impartiality is also important. In this regard, the appearance of impartiality also inspires public confidence that cases will be decided fairly, in accordance with the law and free of any improper influence.

At issue here is the recusal by the magistrate in adjudicating a criminal trial that has already started.

The test

[6] In *President of the Republic of South Africa and other v South African Rugby Football Union and other*, 1999 (4) SA 147 (CC) (1999 (7) BCLR 725) at 177D-G, the test was articulated as follows:

"... 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 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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial".

[7] Plainly, the test is not subjective but objective. The test can also not be based on speculation. Furthermore, the reasonable person test does not refer to the presiding officer. Thus, the test is not viewed through the lenses of the presiding officer; it relates to the general public.

[8] This test is a two-pronged reasonable standard test of a reasonably informed bystander who would reasonably entertain an apprehension that the presiding officer would (not might) be biased towards one party in the case. There is thus a greater burden to show bias that would require recusal.

Should the magistrate have recused herself?

[9] In this case it cannot not be said that there was an apparent bias.

As for the reasons why the Magistrate disqualified herself from continuing with the trial, they [the reasons] do not even come close to satisfying the test for recusal. From what was placed on record by the Magistrate, there is absolutely nothing that occurred

between the Magistrate and the gentleman that suggests that because of the encounter, the Magistrate is no longer free to exercise her judicial powers impartially.

[10] As far as the narration by the Magistrate is concerned, it appears that the conversation between her and the gentleman only involved introduction of the gentleman to the Magistrate. It also seems that the Magistrate did not recognise the gentleman. Even if it is indeed so that the gentleman previously worked at the Mitchells Plain's court, in the context of this case, that does not necessarily imply that the Magistrate could not do the matter.

[11] It is worth bearing in mind that, though what the gentleman in question did was clearly highly inappropriate and shocking, particularly if one considers that he also identified himself as a father to one of the accused in the trial; the conversation did not taint the impartiality of the Magistrate. For instance, if a presiding officer is adjudicating a trial and in the middle of the trial, he or she receives threats that he or she should acquit an accused person, that communication does bear on the impartiality of the presiding officer. In such circumstances, such communications only speak to interference and safety of the presiding officer. If someone approaches a presiding officer to intimidate or for an unwelcomed preferment, that does not cast doubt on the impartiality of the presiding officer. Accordingly, a mere hint of impropriety by someone in the presence of a presiding officer, does not lead to a recusal, as it is not the standard to assail the impartiality of a presiding officer.

[12] In addition, the information regarding the contents of the conversation that was relayed by the Magistrate reveals that nothing was said about the facts of the matter. Ms Adams, the prosecutor of the case, simply requested the magistrate to recused herself merely because the Magistrate refused her an opportunity to get the views of the deceased's family, about what the Magistrate had revealed.

Ms Adams did not express a feeling of reasonable apprehension of bias on her part.

[13] Inasmuch as appearance of impartiality is important, appearance should not be divorced from reality. The overall context of this matter reveals that the way the Magistrate handled the situation, and what was said to the Magistrate by the gentleman, makes it plain that she cannot be suspected of being influenced. In this matter, the reality and the appearance of an impartial magistrate was not affected at all. She did not lose her appearance of impartiality. The Magistrate did not even create an impression that she might be reasonably biased.

[14] With regard to the way in which the encounter took place between the Magistrate and the gentleman, it is a significant factor in the determination as to whether or not a reasonable apprehension of bias existed. During the relevant encounter and in court, in my mind, the record reveals that the Magistrate acted in a way that dispels any reasonable doubt in the minds of individuals as to her impartiality. There is no question about that.

I find what was said in *S v Stewe* (SA 2 of 2018) [2019] NASC 3 (15 March 2019), apposite in this case, when the court stated the following:

"The factual ground on which the two learned magistrates recused themselves falls far short of the threshold needed to satisfy the test for recusal. It is indeed correct that on occasion a judicial officer may recuse himself or herself mero motu without any prior application and it happens in practice now and again. But whenever it occurs the applicant or the judicial officer who raises recusal should cross the high threshold needed to satisfy the test for recusal. The application for recusal or where it is raised mero motu by a judicial officer, cannot be done in vacuo or on the judicial officer's predilections, preconceived, unreasonable personal views or ill-informed apprehensions. To do so would be to cast the administration of justice in anarchy where judicial officers would be at liberty to make choices of which cases to preside over and which not/or applicants to go on a judge forum shopping hoping to get the one who might be favourable to their cases. Judicial officers 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.' 'Embodied in the test above are two further consequences 'on the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted.

Unfortunately that is precisely what is lacking in the case before us. In fact, the issue of impartiality or the competency of the learned magistrates never arose at all in the reasons they provided for their recusals or in the evidence on record. The State's case in this appeal is to seek to set aside the judgment and order of the court a quo and order the learned magistrates to proceed with the

> partly heard matters before them. Mr. Wessels of Stern & Barnard one of the most seasoned criminal lawyers in this country, on 14 January 2015 addressed a letter to the Divisional Magistrate of Windhoek (Ms Horn) reminding her to ask Magistrate Uanivi to timeously arrange for his appointment as a Regional Court Magistrate. To sum up, all the parties who appeared before the learned magistrates want them to continue with the partly heard matters. The parties who appeared before the learned magistrates were never informed before going in court (as is required by law) of the recusal orders the magistrates were going to make or given the opportunity in court to address the court on the said issue. Had they done so the parties would have persuaded them otherwise" Foot notes omitted

[15] Thus, in the circumstances of this case, it cannot be successfully argued that, after the unfortunate incident, the magistrate cannot appear to be independent and impartial to a reasonable, well-informed observer. This encounter between the Magistrate and the gentleman did not engender an atmosphere for recusal but instead created a need for the Magistrate to disclose what had happened and invite parties for their submissions as she did. This is not even the case where it could be said that the balance tipped in favour of a recusal. Unfortunately, in this case it seems as if that was not even considered.

[16] Notwithstanding this, the learned Magistrate recused herself from the proceedings. As a consequence, this matter was referred to this Court to determine whether the proceedings should start *de novo* before another magistrate. The circumstances of this case should not have led the Magistrate to recuse herself. This

is even more the case, where there were no allegations of impartiality or bias in this matter.

[17] The magistrate found herself in a very difficult position which was not created by her. The heightened vigilance by the Magistrate and the openness with which she handled the situation is commendable. The magistrate played open cards with everyone, by laying bare and revealing what the conversation with the person she spoke to was about.

[18] While the Magistrate handled the situation with the gentleman very ably and well, as far as the applicable test is concerned, her ruling is far removed from the test. It bears remembering that in the instant case, the impartiality of the learned Magistrate was never questioned. Similarly, as I previously mentioned, from what was revealed by the Magistrate there was no reason as to why the impartiality of the Magistrate might reasonably be questioned. Hence, there was no reasonable factual basis for the Magistrate to recuse herself. See *J Vermeulen Inc. v Engelbrecht No and Another* (19257/2019) [2020] ZAWCHC 148 (6 November 2020), where Binns-Ward J, with Baartman J concurring, succinctly expressed that subjective discomfiture about continuing with the trial does not afford a proper basis for presiding officer to recuse himself or herself, and such decision to do so for purely personal reason is arbitrary and objectively unreasonable.

[19] A reasonable person would consider the circumstances the Magistrate got to be in the presence of the gentleman who identified himself as the father of one of the accused. Inasmuch as I understand that presiding officers have a role to play in

protection of the integrity of the courts, that does not mean that they should be overly willing to recuse themselves from a hearing or be overly cautious. The test for recusal is there as a benchmark or a yard stick.

[20] Interestingly enough, there is as much obligation upon a presiding officer not to recuse himself or herself when there is no reason for him or her to do so. In a similar vein, a presiding officer should not recuse themselves from hearings for flimsy reasons. The Magistrates Oath as set out in Section 9 (2) (a) of *the Magistrates' Courts Act*, Act 32 of 1944 ("the Oath"), is instructive. The Oath informs the Magistrate as a judicial officer to be faithful to the Republic of South Africa, to uphold and protect the Constitution and the human rights entrenched in it, and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. Thus, in terms of the Oath, even before the commencement of the trial, a magistrate had already been sworn in to administer impartial justice.

[21] Moreover, the Oath lays a foundation about the standards which the magistrates need to always uphold. It is also a moral compass and a safety valve that also guides the magistrate in situations when he or she is in a dilemma and does not know what to do.

[22] I get the distinct impression that the learned Magistrate felt uncomfortable to continue to do the matter after her unfortunate encounter with the gentleman. Of course, when a presiding officer feels uncomfortable about something related to a case he or she is doing, it is prudent to do as the Magistrate did in this case, to disclose to the parties the reason as to why she feels uncomfortable about a situation and invite

submissions from the parties. And it may so happen as in this case, that the parties would not find the situation as warranting a recusal of the Magistrate.

[23] In such a situation, one must remind oneself that a presiding officer should always be guided and grounded by her Oath of office; that expressly delineates the conduct and obligations of a presiding officer.

[24] In any case, it must always be remembered that recusal is not meant to create an atmosphere that would afford presiding officers a free rein to select only those cases that they prefer and avoid those that appear burdensome, uninteresting and complicated. It needs to be restated that it is absolutely untenable that a presiding officer can recuse himself or herself at any time, and for any reason whatsoever. If this could be allowed, the wheels of justice would be brought to a grinding halt, and this can be very costly for the parties. In the circumstances, it cannot realistically be held that Magistrate was correct in recusing herself from the matter.

[] For the reason set out above, it is evident that the decision by the Magistrate to recuse herself was irregular as contemplated in section 22(c) of the Superior Courts Act, Act 10 of 2013, thus stands to be reviewed and set aside.

Safety and accessibility of presiding officers at the court in question.

[25] I would be remiss if I did not mention that what happened here suggests a serious breach of security. An unauthorised member of the public was able to easily access a magistrate. This situation which the Magistrate was confronted with should

never have happened in the first place. Clearly, presiding officers should never be placed in a position that would compromise their safety and security.

[26] It is undeniable that the breach of security really placed the Magistrate in a very precarious position. One can only imagine the risks that are associated with such breaches. One of which is what happened in this case, which is unnecessary delay in the administration of justice.

[27] Such reckless breaches of security should always be avoided by court management. The Mitchells Plain court management should take corrective measures to address this particular security breach.

[28] From the aforegoing, I propose the following order:

1. The ruling by the magistrate to recuse herself from the adjudication of Case number RCA 40/2021, is hereby reviewed and set aside.
2. The Regional Court Magistrate is hereby directed to prioritise and finalise this matter on an expedited basis.
3. A copy of this judgment should be forwarded to the Regional Court President and to the Mitchells Plain Court Manager.

[redacted]

NZIWENI, J

I agree, and it is so ordered

[redacted]

SLINGERS, J