
SOUTH AFRICA / JUDGMENT

Fisher v Etchell and Another (15938/2020) [2021] ZAGPJHC 765 (1 December 2021) [2021] ZAGPJHC 765

COURT

South Gauteng High Court, Johannesburg

BEFORE

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CASE / FILE NUMBER

15938/2020

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 15938/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

[1 December 2021]

In the matter between:

MARY FISHER

Applicant

and

MAGISTRATE LOUISE ETCHELL

First Respondent

GABBY LOBBAN

Second Respondent

J U D G M E N T:

NEL AJ

INTRODUCTION

- [1] This Application came before me as an unopposed application in the Unopposed Motion Court.
- [2] The Applicant seeks an order setting aside the First Respondent's dismissal of an application launched by the Applicant in the Randburg Magistrate's Court for the recusal of the First Respondent.
- [3] The Applicant is representing herself, and despite ensuring that all relevant documentation was uploaded to the Caselines system, it was unclear to me, at the time of reading the Application Documentation in preparation for the hearing of the Application, precisely what the nature of the relief being sought was, and which documentation was relevant to the Application. I was initially under the impression that the application before me was an application to stay the proceedings in the Randburg Magistrates Court.
- [4] During the hearing of the Application, the Applicant explained the nature of the Application and the sequence of documentation to me, where all of the relevant documentation was filed and under which separate Caselines headings.
- [5] After hearing the Applicant, and reading the documentation I was referred to during the hearing, I reserved Judgment, as it was clear that I would have to re-read all of the application papers, having regard to the relief being sought, and also having regard to the nature of the Application.
- [6] Both the First Respondent and the Second Respondent elected not to oppose the relief sought in this Application. The First and Second Respondents filed Notices to Abide the Judgment of this Court.

BACKGROUND

FACTS

- [7] The Applicant, representing herself, launched a Protection Order Application in terms of the Protection from Harassment Act, No. 17 of 2011, in the Randburg Magistrates Court ("the Protection Order Application"), in respect of which the Second Respondent ("Ms Lobban") was the respondent.
- [8] In the Protection Order Application and in this Application, Ms Lobban is represented by Gordon Aarons of Aarons Attorneys. The First Respondent is represented in this Application by the State Attorney.
- [9] The Protection Order Application was set down for hearing before the First Respondent (Magistrate Etchell) ("the Magistrate"), on 11 March 2020.

- [10] At the end of the day's proceedings on 11 March 2020, the Applicant allegedly requested the Magistrate to recuse herself from the Protection Order Application. This is disputed by the Magistrate.
- [11] The crux of the Applicant's contentions are set out in paragraph 1.3 of her Heads of Argument in this Application as follows:
- "...the Applicant requested that the First Respondent recuse herself from the main matter following numerous remarks, interventions and occurrences during proceedings that gave the Applicant a reasonable apprehension of bias. Furthermore, the proceedings were fraught with irregularities and the First Respondent admitted inadmissible evidence while discarding admissible and competent evidence."*
- [12] The Applicant made a number of attempts to obtain the Record of the proceedings of 11 March 2020, but only obtained a portion of the Record on 16 November 2020.
- [13] The Magistrate records in her Judgment in the Recusal Application in the Magistrate's Court that the Applicant filed an application for her recusal on 23 March 2020. The Application for Recusal filed in the Magistrates Court, and determined by the Magistrate, is identical to the Recusal Application filed in this Court.
- [14] The Recusal Application in the Magistrate's Court was initially set down for hearing on 22 April 2020, and was ultimately heard on either 30 June 2020 or 9 July 2020. The date of the actual hearing is irrelevant for the purpose of this Application. On 30 July 2020, the Magistrate delivered a written Judgment dated 9 July 2020, dismissing the application for her recusal.

THE LEGAL PRINCIPLES

- [15] Prior to considering the aspects and allegations raised both by the Applicant, and in the Magistrate's Explanatory Affidavit and Judgment, it is necessary to consider the applicable test in a recusal application.
- [16] In her Judgment the Magistrate considered the law relating to the test to be applied in an application for recusal in great detail, and referred to a number of relevant authorities in support of her summary of the applicable legal principles. The Magistrate, in my opinion, correctly concluded that the requirements that an applicant seeking the recusal of a Presiding Officer must meet, to show that there is a reasonable apprehension of bias, are those as set out in the matter of *Roberts v Additional Magistrate for the District of Johannesburg*[1] ("the Roberts matter") in which Cameron AJA expressed the requirements as follows:
- "[1] There must be a suspicion that the judicial officer might, not would, be biased."*
- [2] The suspicion must be that of a reasonable person in the position of the accused or litigant.
- [3] The suspicion must be based on reasonable grounds.

[4] The suspicion is one which the reasonable person referred to would, not might, have.”

[17] The test for recusal has been established over time, and both the Supreme Court of Appeal and the Constitutional Court have set out the legal requirements that have to be met by a litigant claiming an apprehension of bias. The test as to whether there is a valid apprehension of bias is referred to as the “double reasonable test”, which test must be based on a consideration of the material and correct facts.

[18] In the matter of President of the Republic of South Africa and Others v South African Rugby Football Union and Others[2] (“the SARFU matter”) the Constitutional Court described the test as follows:[3]

“[48] 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.” [My emphasis]

[19] The description accords with the requirements as formulated by Cameron AJA in the Roberts matter.

[20] In the SARFU matter, it was emphasised that the apprehension of the reasonable person must be considered in the light of the true facts as they

emerge at the hearing, and any incorrect facts must be ignored in applying the double reasonable test as formulated by the Constitutional Court.[4]

[21] In the matter of South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division, Fish Processing)[5] Cameron J explained the double reasonable test as follows:

“Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in S v Roberts, decided shortly after SARFU, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.”

[22] In the matter of Take & Save Trading CC and Others v Standard Bank of South Africa Ltd[6] Harms JA stated that a Judge:

“... is not simply a ‘silent umpire’ ... fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted ...”

[23] A Presiding Officer is accordingly entitled and required to actively participate in the Court proceedings to ensure that the proceedings are controlled and regulated, with the aim of ensuring a just and fair process. The participation by the Presiding Officer must, however, be exercised in an impartial and civil manner.

[24] The test for recusal is clearly an objective test, and the applicant alleging bias or an apprehension of bias bears the onus of proving such bias or apprehension of bias.

[25] The onus is not easily discharged. In the matter of *Bernert v Absa Bank Limited*[7] it was held as follows:

“The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting

upon the litigant who alleges bias or its apprehension.”

[26] In her Judgment, the Magistrate found that the Applicant had failed to “dislodge” the presumption of judicial impartiality and accordingly dismissed the application for recusal.

[27] In terms of Section 34 of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or another independent and impartial tribunal or forum. A Presiding Officer who adjudicates a case in which he or she is disqualified from sitting because, seen objectively, there is a reasonable apprehension that such Presiding Officer might be biased, acts in a manner that is inconsistent with Section 34 of the Constitution.

[28] In the SARFU matter it was stated as follows:

“[35] A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. ... 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.”

[29] It was also held in the SARFU matter as follows[8]:

“... 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.” [My emphasis]

[30] In the matter of *Bernert v Absa Bank Limited*[9] (“the Bernert matter”) it was stated as follows[10]:

“[28] It is, by now, axiomatic that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the constitution. ... the apprehension of bias may arise, ... Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be

independent and impartial.”

[31] In the Bernert matter it was also stated as follows:[11]

“But equally true, it is plain from our Constitution that an impartial judge is a fundamental prerequisite for a fair trial. Therefore, a judicial officer should not hesitate to recuse himself or herself if there are reasonable grounds on the part of a litigant for

apprehending that the judicial officer, for whatever reason was not or will not be impartial. In a case of doubt, it will ordinarily be prudent for a judicial officer to recuse himself or herself in order to avoid the inconvenience that could result if, on appeal, the Appeal Court takes a different view on the view of recusal.” [My emphasis]

[32] In the matter of Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited and Others[12] the Supreme Court of Appeal in confirming that an apprehension of bias may arise from the conduct or utterances of a judicial officer

prior to or during proceedings, stated as follows:[13]

“It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have

occurred renders the further proceedings a nullity. The general principles are well established. They are now enshrined in section

165(2) of the Constitution, which provides ‘the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’. Thus, a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, either he or she is either actually biased, or there exists a reasonable apprehension that he or she might be biased, acts in a manner that is inconsistent with the Constitution.”

[33] In the circumstances, it is clear that while the test for recusal is an objective test, which requires the application of the double reasonable test, a Judicial Officer should recuse himself or herself from any legal proceedings, in which there is the appearance of bias.

THE APPLICANT’S APPREHENSION OF BIAS

[34] The Applicant raised three “grounds” for the review of the Magistrate’s decision to refuse to recuse herself in her Heads of Argument, being:

[34.1] That the Magistrate admitted inadmissible and incompetent evidence, and rejected admissible and competent evidence;

[34.2] That there was bias on the part of the Magistrate;

[34.3] That there was gross irregularity in the Magistrate’s Court proceedings.

- [35] Whilst three “grounds” are raised, they all relate to the Applicant’s perception that the Magistrate was biased against her. This is clearly evident from the allegation in the Applicant’s Founding Affidavit that a “number of events ... created a clear apprehension and perception with me that Hon. Magistrate L Etchell was biased against me in favour of the Respondent”
- [36] The real crux of the Application is therefore whether there was a reasonable apprehension on the part of the Applicant of the Magistrate being biased, and whether the manner in which the proceedings were conducted by the Magistrate raised a reasonable apprehension of bias.
- [37] The Applicant raised the following aspects in her Heads of Argument as being indicative of bias on the part of the Magistrate:
- [37.1] The Magistrate allowed inadmissible hearsay evidence from the Second Respondent.
- [37.2] The Magistrate rejected the Applicant’s admissible evidence.
- [37.3] The Magistrate patronised and humiliated the Applicant whilst treating the Second Respondent with dignity and respect.
- [37.4] The Magistrate advised the Second Respondent that the Second Respondent’s attorney could interject and intervene at any stage of the Applicant’s presentation of evidence, whilst the Applicant was told explicitly to listen while the Second Respondent presented her case, and was not allowed to raise any objections.
- [37.5] The Magistrate demonstrated unreasonable impatience with the Applicant, whilst the Second Respondent was treated with patience, dignity and respect.
- [37.6] The Applicant was interrupted when trying to state her case, by the Magistrate, whilst the Second Respondent was not subject to any interruptions.
- [37.7] The Magistrate levelled baseless accusations against the Applicant, and threatened to walk out of the Court proceedings on account of the conduct of the Applicant.
- [37.8] The Magistrate held a pre-conceived view that the Applicant lacked integrity, was untrustworthy and of poor moral character.
- [37.9] The Magistrate caused the Court Orderly and/or member of the Police Services to physically search the Applicant during the Court proceedings.
- [38] A consideration of the available portion of the Record of proceedings shows that whilst certain of the aspects raised are unfounded, some of the aspects appear to have some merit in respect of a perception of bias by a reasonable litigant in the position of the Applicant.

[39] The “examples” of bias relied on by the Applicant, as set out above, cannot be considered or analysed individually in order to determine whether the Applicant’s perception of bias equates to a reasonable apprehension of bias. The proceedings must be considered as a whole, in order to determine whether there was actual bias by the Magistrate, or a reasonable apprehension of bias, on the part of the Magistrate. This is necessary, as it is the conduct of the Magistrate during the proceedings that the Applicant relies on for her allegations of bias by the Magistrate.

[40] In her Judgment, the Magistrate referred to the matter of *Dube and Others v The State*[14] and set out the following quotation from such matter:

“The rule is clear; generally speaking a judicial officer must not sit in a case where he or she is aware of the existence of a factor which might reasonably give rise to an apprehension of bias. The rationale for the rule is that one cannot be judge in one’s own cause. Any doubt must be resolved in favour of recusal. It is imperative that judicial officers be sensitive at all times. They must of their own accord consider if there is anything that could influence them in executing their duties or that could be perceived as bias on their part. It is not possible to define or list factors that may give rise to apprehension of bias – the question of what is proper will depend on the circumstances of each case.” [My emphasis]

[41] In the Founding Affidavit the Applicant stated that a number of events occurred on 11 March 2020 that created a clear apprehension and perception with her that the Magistrate was biased against her and in favour of Ms Lobban. The Applicant also alleged that such apprehension and perception of bias developed during the course of the Court proceedings and was not based on one single incident.

[42] The Applicant submitted that the Magistrate admitted inadmissible and incompetent evidence whilst rejecting admissible and competent evidence.

[43] As already set out above, it is the conduct of the Magistrate during the proceedings of 11 March 2020 that gave rise to the Applicant’s alleged apprehension of bias, and accordingly such conduct must be considered in its entirety.

[44] The Applicant alleged that the Magistrate accepted inadmissible hearsay evidence from Ms Lobban’s attorney, and when the Applicant pointed out inconsistencies in the evidence led by Ms Lobban’s attorney, the Magistrate advised the Applicant’ that the Magistrate was not interested in the Applicant’s facts, that she should present those facts to the South African Police Services and not raise them in Court. The Applicant regarded such conduct as the rejection by the Magistrate of admissible and competent evidence.

[45] Whilst the Record does not specifically show that the Magistrate allowed inadmissible evidence to be led on the part of the Second Respondent, the Magistrate did advise the Applicant that the evidence she was leading was for a Criminal Magistrate to deal with, and that the Court in which the Magistrate was presiding was not a criminal court. Such statement, without a proper explanation from the Magistrate as to the reason for the statement, clearly led the Applicant to perceive that she was being prevented from leading

evidence which she regarded as relevant to the Protection Order Application. There was therefore a perception of bias on the part of the Magistrate.

[46] From the portion of the Record available to me, it appears that the proceedings commenced in an appropriate and proper manner, and then, as a result of frustrations and a lack of understanding of the Court procedure, the manner and conduct of the proceedings deteriorated during the course of the day.

[47] In the Founding Affidavit the Applicant alleged that whilst she was setting up her laptop computer and Bluetooth speaker in preparation to lead evidence, the Magistrate enquired “in a very stern tone” what the Applicant’s equipment was, and before the Applicant was provided with an opportunity to respond, the Magistrate ordered police officials to remove the laptop and Bluetooth speaker.

[48] The Record of the proceedings records the Magistrate enquiring from the Applicant what she is doing, and then an instruction to her to switch off her laptop.

“Court: What are you doing, Ma’am? Put off the computer immediately.”

Ms Fisher: Okay.

Court: Why is your computer there?

Ms Fisher: Ok this ... [intervened]

Court: Are you Mary Fisher.”

[49] There is no indication from the Record that the Magistrate ordered police officials to remove the laptop and Bluetooth speaker.

[50] The Applicant also alleged in the Founding Affidavit that she requested permission to show the camera footage which she regarded as central to the Application, but that the Magistrate stated “in a very abrupt manner” that she was not interested in viewing that evidence. The Applicant alleged that the Magistrate stated that she would not permit the playing of any recordings that were filed as evidence. There is no indication on the Record that the Magistrate refused the playing of any recording or that she stated that she was not interested in viewing evidence which would appear from the camera footage.

[51] Shortly after the Applicant had commenced her explanation of the alleged facts relating to the Application, the following interaction occurred:

“Court: Okay. Is that it?”

Ms Fisher: [no reply]

Court: Ma’am, is that it? Anything else?

Ms Fisher: [no audible reply]

Court: That is the gist of your case?

Ms Fisher: Yes, that is the summary.

Court: Okay, anything else?"

[52] Later during the proceedings, there was the following interaction:

"Court: You must tell me your story.

Court: I mean, you are not here for a week.

Ms Fisher: Yes."

[53] And later:

"Court: Do you have actual proof? Because I want to stop.

Ms Fisher: Yes.

Court: Because you are taking a lot of time."

[54] The comments by the Magistrate can reasonably be interpreted by an unrepresented litigant as an indication of a reluctance on the part of the Magistrate to hear all the evidence. Even a seasoned legal practitioner gets flustered when told by a Presiding Officer to shorten his or her address.

[55] Whilst the attorney for Ms Lobban raised an objection to a transcript being utilised by the Applicant, the Applicant attempted to explain the transcript, and the following interaction occurred:

"Ms Fisher: Okay, I will explain.

Court: No, no. there is nothing to explain.

Ms Fisher: No, the transcript ... [intervened].

Court: No.

Ms Fisher: I will explain what is happening with the transcript. What is happening is the recordings that he has also because they work with the chairperson, and also on that recordings ... [intervened]

Court: Stop. Stop.

Ms Fisher: They have the recordings ... [intervened]

Court: Stop. Must I leave?

Court: Do you want to talk with somebody else? You are more than welcome to."

- [56] The “threat” made by the Magistrate to leave the Courtroom can be reasonably be interpreted by a litigant as a sign of irritation by the Magistrate, and may even be interpreted as an indication that the Magistrate will not be impartial.
- [57] Even in circumstances where the conduct of a litigant may frustrate and anger a Presiding Officer, such Presiding Officer should not express such frustration or anger with a “threat” to leave the proceedings.
- [58] The Applicant alleged that when she referred the Magistrate to a transcript of an annual general meeting, Ms Lobban’s attorney objected and requested a copy of the transcript. The Applicant alleges that the Magistrate “leapt out of her chair and accused me of litigation by ambush”.
- [59] The Record however reflects that the Magistrate explained to the Applicant that all documentation that a party seeks to rely on should be made available to the opposing side, so as to enable such opposing litigant to read the document, consult with their attorney and prepare for the hearing. The Magistrate then stated that “This is ambush by trial. ...That is what that means, is if somebody did not receive...and that is a constitutional right that they have.”
- [60] The Record obviously does not show whether the Magistrate “leapt out of her chair”, but based on the Record, it does not appear that the Magistrate accused the Applicant of “litigation by ambush”, but rather used the phrase to explain the concept of providing all documentation to the opposing party.
- [61] The phrase could however be reasonably interpreted by an unrepresented litigant as being a serious admonition.
- [62] The Applicant alleged that the Magistrate stated that “she was granting Respondent’s attorney permission to interrupt me at any stage when I addressed the Court”.
- [63] It is clear from the Record that the Magistrate advised Ms Lobban’s attorney, in response to a comment from Ms Lobban’s attorney, that the Applicant’s submissions should be based on the contents of the affidavits, that in the event of the Applicant going “outside” the contents of the affidavit, Ms Lobban’s attorney should object so that the Magistrate can make a note of such objection, and then will consider it at a later stage when she is considering the matter, or writing her judgment.
- [64] The Magistrate also explained to the Applicant that she is not allowed to present information to the Court that is not set out in the affidavits, as the proceedings are motion proceedings.
- [65] During an objection by Ms Lobban’s attorney, the Magistrate addressed the Applicant and instructed her to switch off her laptop computer and to put it away:

“Court: Put down your computer.”

Ms Fisher: Okay. The computer ... [intervene]

Court: Please just close that computer.

Ms Fisher: Okay

Court: Put it off. Is that computer on, Ms Mokonyane?

Ms Fisher: No, it is not on. I wanted to switch ... [intervened]

Court: Because it was the same with that phone incident. Just check for me if that thing is recording.

Ms Fisher: Nothing is recording.

Court: Let us see you turn that computer off completely. Shut it down for me. Shut down the computer, please.

Ms Fisher: It is shut.

Registrar: It is shut, Your Worhsip.

Court: It is not on?

Registrar: Yes

Court: Ok, put that computer in your bag as well. Thank you very much. Ok, now the computer is out of the way.”

[66] The Applicant alleges that the Magistrate interrupted her on several occasions, “to the extent that I was not given a fair opportunity to present my case”, and that the Magistrate disregarded her evidence and applied interpretations to the Applicant’s evidence that was “inconsistent with any reasonable understanding of the evidence that was before her”.

[67] The Record reflects the following:

“Court: You are asking ... you are applying your mind and what you feel she has done. This is not proof. This is your inferences.

Ms Fisher: No.

Court: Yes.

Ms Fisher: No. There is proof on the recording which you said you do not want to hear ... [intervened]

Court: Is this not the transcript?

Ms Fisher: What she said with her mouth ... [intervened]

Court: Is this not the transcript of that recording?

[68] In a later interaction, the following is recorded:

“Court: So what does this statement say?

Ms Fisher: The statement ... [intervened].

Court: The statement does not say that she admits to phoning them to come out. They say in the statement that when they arrived there she was outside. Is that correct? Is that my correct understanding of the statement?

Ms Fisher: No. The statement ... [intervened]

Court: Okay, where does the statement say that she phoned them?

Ms Fisher: The statement says ... okay. From the beginning the police do not just come. And when the police came ... [intervened].

Court: No, listen to my question. Just because you do not like, I am asking them for a reason.

Ms Fisher: No, no, no, I listen, I am listening.

Court: Okay, show me where in the statement does it say ... I understand the statement to read that when they got there she was outside the gate.

Ms Fisher: Yes. Okay. ... [intervened]

Court: And they had an interaction with her.

Court: No proof has been established that she phoned them to come.

Ms Fisher: Okay. So she did ... [intervened]

Court: Yes, or no?

Ms Fisher: No. There is a proof because the police do not ... [intervened].

Ms Fisher: No. Your Honour, this is something that is obviously ... [intervened]

Ms Fisher: Common ... [intervened]

Court: No ... [intervened]

Ms Fisher: Police will not come out of the blue, unless they were called. That is what I interpreted it.

Court: Ma'am if I speak and you speak again one more time I am going to stop these proceedings.

Court: Because if you are not respecting me ... how must I deal with this matter if you do not respect the court?

Ms Fisher: I do not know how I am not respecting the court, but I am explaining ... [intervened]

Court: If I speak then you speak over me.

Court: Why do you do that?

Court: Answer my question.

Ms Fisher: Okay, I am sorry Your Honour if you think I do not respect you but I was making a point ... [intervened]

Court: Okay, listen to my question I say ... [intervened]

Ms Fisher: The question is that this statement does not say they were phoned ... [intervened]

Court: Again you are doing it. Stop. I say whenever I speak, you speak over me. My question is why do you keep on doing that? I want to understand.

Court: No, answer me. This is actually a question. Why do you keep on speaking over me?

Ms Fisher: I am sorry Your Honour, I thought I am still talking ... [intervened]

Court: No, no, no. I am asking you for the record. I am placing it on record now.

Court: Why are you keeping ... why are you speaking over me?

Ms Fisher: I am emphasising a point so that when ... [intervened]

Court: To what extent? What are you trying to prove?

Ms Fisher: What I am trying to ... [intervened]

Court: If you are speaking over me ... I am the one who has to adjudicate this matter and I feel that you are rude if you do not respect the court and you speak over me, and you keep on doing it.”

[69] The Record clearly reflects interruptions by the Magistrate, and simultaneous interruptions by the Applicant, as well as questions posed by the Magistrate which could be perceived to be in the nature of cross-examination.

[70] In response to a question as to whether the Applicant’s daughter was a homeowner, the Applicant responded that she was a homeowner. The following interaction then followed between the Magistrate and the Applicant:

“Ms Fisher: She is Ms [interrupted]”

Court: Ma’am, when you are talking stand. You want to say? Stand.

Ms Fisher: Yes, you said I should wait for him, and then I can.

Mr Aarons: Sorry.

Court: Sorry Ma’am, what did you just do now?

Ms Fisher: Ok, what I am [interrupted]

Court: No, no, stop, stop, stop. What did you just do now?

Ms Fisher: I stood up and pushed the chair forward I said oh, I’m sorry.

Court: Did you clap your tongue?

Ms Fisher: No, I said sorry.

Court: Ms Mokonyane did I interpret the situation incorrectly, was she clapping her tongue?

Ms Mokonyane: No.

Court: Okay. Continue.

Ms Fisher: Okay, must I start my defence.

Court: No, sit, it's fine. Sir please."

[71] One of the complaints raised by the Applicant is that the extract of the recording referred to in the Magistrate's Judgment differs from the recording obtained from the official transcribers, Lepelle Scribes, particularly in one important aspect. There was a further transcript filed, prepared by Inlexso, which accords with the transcript prepared by Lepelle Scribes, in respect of the disputed aspect.

[72] In the Judgment, the interaction referred to above, is recorded by the Magistrate as follows:

"Applicant: She's she she's Ms.

Court: Stand ma'am, when you are talking stand. (I am going to say ...) stand.

Applicant: You said I should wait for her for him then I can.

Respondent: Sorry if I can

Applicant: [claps tongue] I don't get it.

Court: Sorry ma'am what did you just do now?

Applicant: Ok, what, what I

Court: No, no, no, stop, stop, stop, stop. What did you just do now?

Applicant: I stood up and pushed the chair forward and said I am sorry."

[73] In the two different transcriptions as prepared by Lepelle Scribes and Inlexso, there is no recordal of the Applicant "clapping" her tongue, but in the Judgment, such recordal is made.

[74] The discrepancy between the versions has not been explained. As already set out, no Answering affidavit was filed disputing the Applicant's version of events.

[75] Despite the absence of an Answering Affidavit, I have considered the Applicant's version whilst having careful regard to the contents of the Record, the Magistrate's Judgment, and the Magistrate's Explanatory Affidavit.

- [76] The recording of the remainder of the afternoon session amounting to approximately 40 minutes of court proceedings appears to have not been recorded, or cannot be found, despite numerous attempts by the Applicant to secure such recording.
- [77] In the Founding Affidavit, the Applicant alleged that the Magistrate ordered her to remain standing throughout the address to the Court by Ms Lobban's attorney.
- [78] The Applicant alleged that while she was standing a police official approached her, and together with an unidentified woman in civilian clothing searched through her handbag and then attempted to conduct a body search of her, whilst the proceedings were ongoing, and the Magistrate was advised by the unidentified woman that the Applicant had been recording the proceedings. The Applicant said no device could be found by either the policewoman or the unidentified woman. Thereafter the Magistrate announced an adjournment of the matter due to technical issues with the Court's recording system. The Applicant alleged that whilst the "search" was being conducted, the Magistrate continued with the proceedings "as though nothing unusual was happening".
- [79] It was only when the attempted body search was conducted, that the Magistrate enquired as to what was happening.
- [80] The Applicant alleged that the Magistrate "proceeded to reprimand me sternly, alleging that I was restless throughout the day", and stated that the Applicant should behave like Ms Lobban whom she allegedly described as "being sweet".
- [81] The Applicant alleged that she was humiliated and disparaged by the Magistrate, and that the Magistrate's bias was very apparent to the Applicant, and that the Magistrate "seemed clearly disposed to" Ms Lobban.
- [82] The Applicant alleged that she was subjected to unreasonable interruptions, and that "adversarial undertones" characterised much of the Magistrate's behaviour towards her, and that the Magistrate cross-examined her as though she was representing Ms Lobban.
- [83] The Applicant also alleged that the manner in which the Magistrate "would dismiss my facts and evidence was patronizing, unjustifiably accusatory and abrasive", whilst Ms Lobban and her attorney "were treated with dignity and respect".
- [84] In her Heads of Argument, it is alleged by the Applicant that the Magistrate "ordered the Applicant to be body searched and for the Applicant's handbag to be searched". Such submission is however not supported by any of the allegations contained in the affidavits deposed to by the Applicant.
- [85] In her Judgment, the Magistrate records that the allegation made by the Applicant in her recusal application is "a gross exaggeration, fabrication and distortion of the actual happenings in court."

- [86] In considering the merits of this Application, I have ignored the allegations made by the Applicant that do not accord with the contents of the Record. It is clear from the Record that the Applicant often places her own interpretation on events, without carefully considering the evidence or what was factually stated. This is also apparent from the submissions made in the Applicant's Heads of Argument. I have disregarded all inconsistencies in determining this Application.
- [87] In an Explanatory Affidavit, the Magistrate recorded that no Recusal Application was brought by the Applicant on 11 March 2020. The Applicant vehemently denies such allegation, and states that the Magistrate is lying.
- [88] The Magistrate did not respond directly to the allegations set out in the Applicant's Founding Affidavit filed in support of the Review Application and I am accordingly only able to determine the accuracy of the allegations made by the Applicant having regard to such portion of the Record that is available to me.
- [89] Insofar as allegations are made in respect of proceedings that were not recorded, I am obliged to accept the Applicant's version in the absence of any response or opposing affidavit. However, as set out above, I considered the Applicant's version whilst having regard to the Record, the Judgment and the Magistrate's Explanatory Affidavit.

CONCLUSION

- [90] It is clear to me that the Applicant has not proven actual bias on the part of the Magistrate as against the Applicant.
- [91] Having regard to the contents of the Record alone, however, it is clear to me that a reasonable person would have a reasonable apprehension of bias on the part of the Magistrate.
- [92] I am accordingly satisfied that the Applicant has met the requirements of the double reasonableness test in showing an apprehension of bias on the part of the Magistrate.

COSTS

- [93] The Applicant did not seek any costs order, against the Respondent.
- [94] In the circumstances, I make the following order:
- [94.1] The Magistrate's Judgment and Order dated 9 July 2020, in which the Applicant's Application for Recusal was dismissed, is set aside in its entirety.
- [94.2] The Application instituted by the Applicant as against the Second Respondent in the Magistrates Court of Johannesburg North (Randburg) under Case Number 1263/2019 is to be heard and commenced de novo by the Senior Magistrate, Civil and Family Court Randburg, Magistrate NM Karikan.

G NEL

[Acting Judge of the High Court,

Gauteng Local Division,

Johannesburg]

Date of Judgment:

1 December 2021

APPEARANCES

For the Applicant:

Appeared in person

For the First Respondent: No appearance

For the Second Respondent: No appearance

[1] [1999] 4 All SA 285 (SCA).

[2] 1999

(4) SA 147 (CC).

[3] At para [48].

[4] At para [45].

[5]

[2000] ZACC 10; 2000

(3) SA 705 (CC). See also *Bennett and Another v The State* 2021 (2) SA 439 (95) at paras [24] to [28].

[6] 2004

(4) SA 1 (SCA) at [3]; See also *S v Basson* 2007

(3) SA 582 (CC) at para [33]; *South African Commercial Catering and Allied Workers Union*, supra, at paras [12] and [13]

[7] 2011

(3) SA 922 (CC) at 102D-E.

[8] At para [48].

[9] 2011

(3) SA 92 (CC).

[10] At para [28].

[11] At para [36].

[12] 2017

(6) SA 90 (SCA).

[13] At para [46].

[14] 2009

(2) SACR 99 (SCA).

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