

SOUTH AFRICA / JUDGMENT

Henderson and Others v Regional Magistrate: Northern Cape and Another (1332/2007) [2008] ZANCHC 36 (1 August 2008)

[2008] ZANCHC 36**COURT**

Northern Cape High Court, Kimberley

BEFORE

Majiedt, Olivier

CASE / FILE NUMBER

1332/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case

no: 1332/2007

Date

heard: 2008-06-26

Date

delivered: 2008-08-01

In

the matter of:

ROSS

KIRBY HENDERSON FIRST

APPLICANT

FREDDY VELÉLO WITBOOI SECOND

APPLICANT

ITUMELENG

JACK MOROKA THIRD APPLICANT

versus

REGIONAL

MAGISTRATE : NORTHERN CAPE FIRST RESPONDENT

THE

DIRECTOR: PUBLIC PROSECUTIONS NORTHERN

CAPE SECOND RESPONDENT

Coram: MAJIEDT
J et
OLIVIER
J

JUDGMENT

MAJIEDT J:

A. INTRODUCTION

1. This is an opposed Rule 53 review application, concerning, inter alia, the First Respondent's refusal to recuse himself (recusal applications were brought and dismissed on five separate occasions

during the course of the trial) and allegations of bias on the part of First Respondent, as well as alleged gross irregularities during the trial. While both Respondents had opposed the application, quite surprisingly the Second Respondent withdrew from the proceedings at the commencement of the hearing.

2.1 The criminal trial forming the subject matter of this review has not been finalised – it has been interrupted during the sentencing stage by this review application.

2.2 The three Applicants had been arraigned and convicted on various counts of fraud and theft. The trial was presided over by the First Respondent. The trial started in 1999 and has dragged on at snail's pace until the beginning of this year. It has been characterised by numerous postponements (mostly at the request of the Defence). During the course of the last five years of the trial, the Applicants have changed legal representatives several times.

2.3 The record of the proceedings is, understandably, quite voluminous. A further quite striking feature of the trial, evident from the transcript, is the continuous and rising drone of skirmishes between the defence on the one hand and the First Respondent and, to a lesser extent, the prosecutor on the other hand.

2.4 The trial appears to have taken a turn for the worse once Adv. Isak Nel, who had originally appeared for all three Applicants, had withdrawn due to a potential conflict of interest, during March 2003. Thereafter a noticeable rise in tension can be depicted, particularly between the First Applicant's legal representatives and the First Respondent. Somewhat expectedly, a measure of irritation and impatience began to manifest itself with the First Respondent and this steadily increased over the ensuing years of the proceedings.

2.5 The quite unusual occurrence of no fewer than five recusal applications (all of which were dismissed) resulted – all of these were brought subsequent to Adv. Nel's aforementioned withdrawal.

B.

BACKGROUND

AND ISSUES

3. In their Notice of Motion the Applicants seek the following relief:

3.1 That their convictions by the First Respondent in case number RCO 190/98 be set aside and that the matter be remitted to the Second Respondent for consideration whether to prosecute them de novo.

3.2 Costs against the Respondents jointly and severally in the event that they oppose the application.

4. In support of the application, the First Applicant deposed to the main founding affidavit and the other two Applicants deposed to short supporting affidavits, merely confirming the averments in the First Applicant's founding affidavit which related to them.

In addition, a short supplementary affidavit of the First Applicant was filed. It alluded to certain correspondence and events concerning the First Respondent's appointment as Magistrate (or lack thereof, to be more precise) for certain dates in 2007. More will be said about this later when I deal with this particular aspect.

5.1 A detailed and comprehensive answering affidavit was deposed to by the First Respondent. A much shorter answering affidavit was deposed to by the prosecutor at the trial, Mr. Benjamin September, on behalf of the Second Respondent. This affidavit was filed considerably out of time and was accompanied by a condonation application.

5.2 A replying affidavit was deposed to and filed by the First Applicant as well as an affidavit by his then attorney, Mr. Robertson. These affidavits dealt only with matters raised by Mr. September in his answering affidavit (and, surprisingly, not at all with the substantial averments contained in the First Respondent's much more comprehensive answering affidavit). These replying affidavits contained not only new matter, but highly contentious allegations as well.

Quite understandably, Counsel for the First Respondent, Mr. Van der Walt, moved an application for postponement at the Applicants' costs at the commencement of the hearing, in order to respond to the highly contentious new matter in the replying affidavits. Faced with the stark reality of an unavoidable postponement and concomitant adverse costs order, Counsel for the Applicants, Mr. Van Heerden, sought a short adjournment and thereafter expressly abandoned any reliance on these replying affidavits.

5.3 In summary therefore, as regards the affidavits before us:

- a) A supplementary affidavit of the First Applicant was filed, not in the usual procedural manner and form as contemplated in Rule 53(4) (i.e. to supplement the original affidavit as a consequence of the record of proceedings having become available), but purely in response to allegations contained in Mr. September's (late) answering affidavit.

- b) The replying affidavits are to be regarded as pro non scripto for purposes of the hearing and this judgment, since the Applicants have expressly disavowed reliance on it.

5.4 I have spent some time on the formal pleadings (affidavits) herein, since this will, to my mind, have a critical bearing on the outcome of this review application as I shall show in due course.

Two important initial observations bear emphasis at this early stage:

- a) As this is a Rule 53 review application (a procedure chosen by the Applicants as dominii litii,) the Court is restricted to the record of proceedings (and so too are the litigants); and
- b) Where there are serious, genuine and bona fide disputes of fact on the papers (as is the case here), in the absence of an application for referral to oral evidence, the well-established

approach enunciated authoritatively in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634 H-I will have to be adopted.

6. The issues can be summarized as follows:

6.1 First recusal application

6.1.1 This application was initially mooted during December 2004, moved during March 2005, further heard (for the State's answering affidavits) during April 2005 and a decision taken that the Applicants' application for the disputes of fact to be referred for oral evidence be dismissed, on 13 April 2005.

6.1.2 A conundrum which has arisen is the fact that the First Respondent failed to rule on the recusal application itself – he merely dismissed the application for referral to oral evidence.

The parties before us have, however, agreed that the matter is to be approached on the basis that the First Respondent had dismissed the first recusal application. This is a sensible approach, since:

- a) all the indications are that the First Respondent would have dismissed the application (and he proceeds from this premise in his answering affidavit as well); and
- b) the alternative would have been for this Court to remit the matter to the First Respondent to take a decision – this would surely have amounted to a *fait accompli*.

6.1.3 The grounds for this first recusal application were briefly as follows:

- a) That the First Respondent had been told by another (Acting) Regional Magistrate, one Mr. White, that the First Respondent had told another (District) Magistrate, one Mr Birch, in the Magistrates' tearoom that he (First Respondent) intended to convict the Applicants – this at a time while the trial was still proceeding.

- b) That the same Magistrate White had informed the First Applicant of the existence of a psychiatric report which reportedly established that First Respondent suffered from certain psychiatric illnesses and that the First Respondent “enjoyed sending Black persons to prison”.
- c) That the First Respondent, the prosecutor (Mr. September) and the investigating officer (one Captain Dare) had been seen in conversation together in an office during an adjournment and at a time when Captain Dare was still under cross-examination.
- d) Apart from the abovementioned three grounds, advanced by all three Applicants, the Second Applicant advanced a further ground, namely that during his own testimony the Magistrate created a clear impression that he disbelieved the Second Applicant, *inter alia*, by his manner of questioning.
- e) A further ground advanced by the Third Applicant is the fact that the First Respondent consistently always ruled in favour of the State and against the defence, *inter alia* on the special plea of lack of jurisdiction (s106(1)(f) of the Criminal Procedure Act, 51 of 1977) and on the special plea of *autrefois acquit* (s106(1)(d) of the said Act), which gave rise to a reasonable perception of bias.

6.1.4 A more comprehensive exposition of these grounds will be given when I discuss same *seriatim* in a subsequent chapter.

6.2 Second recusal application

This application was brought on 14 November 2005. The First Applicant averred that he had obtained proof that the First Respondent had presided some years ago in a bail application at which the First Applicant’s previous convictions had been disclosed.

A further related ground was that the First Applicant’s record of previous criminal convictions (the so-called “SAP 69”) had been attached to the J15 charge sheet throughout the trial, that the First Respondent has had sight thereof during the trial, thus leading to a fatal irregularity and/or a reasonable suspicion of bias.

6.3 Third recusal application

On 30 January 2006 the third recusal application was brought by the First Applicant. The ground for this application was that a complaint had been laid by the First Applicant against the First Respondent at the Magistrates’ Commission and that the First Respondent should consequently recuse himself from the trial.

In the complaint itself (an exhibit before the trial Court) the grounds for the complaint relate *inter alia* (but not exclusively) to the grounds advanced in the earlier recusal applications (see *supra*) and that during the apartheid era the First Applicant and First Respondent had a verbal altercation and that the First Respondent is biased against the First Applicant.

6.4 Fourth recusal application

This application was brought after the First Respondent had refused (on 1 February 2007) to send the matter for special review in terms of s304A of the Criminal Procedure Act.

6.5 Fifth recusal application

This application was brought on 25 January 2008 after the First Respondent had again refused an application to refer the matter on special review to the High Court.

The application for referral on special review, in turn, was prompted inter alia by the First Respondent allegedly having reviewed his own proceedings by reason of the fact that he presided during 18/5/2007, 17/8/2007 and 15/10/2007 without having been duly appointed as a Magistrate (a fact which was common cause), but had nonetheless then decided that this did not prejudice the Applicants.

6.6 Generally: whether the First Respondent has been shown to be biased against the Applicants and/or whether they have had an unfair trial

The Applicants aver that the alleged bias is to be extrapolated from the numerous instances of refusal to recuse and that the numerous

irregularities during the trial constituted an unfair trial, thereby vitiating the proceedings.

C. APPLICABLE LEGAL PRINCIPLES

7. As a general rule, the review by a High Court of untermiated criminal proceedings in a lower court, is an inherent power which is to be sparingly exercised in exceptional circumstances only.

See in this regard: *Wahlhaus and Others v Additional Magistrate Johannesburg and Another* 1959(3) SA 113 (A) at 119 H – 120 A.

The rationale behind this general rule is to avoid the piecemeal finalization of reviews or appeals from lower courts.

See: *Wahlhaus and Others v Additional Magistrate Johannesburg and Another* supra at 120 E;

McIntyre and Others v Pietersen and Another 1998(1) BCLR 18 (T) at 20 F-G;

Moodley and Others v National Director of Public Prosecutions and Others 2008(1) SACR 560 (N).

8. The test to be applied whether interference by way of the review of untermiated proceedings is warranted, is whether the applicant for review has made out a case that it would be unjust and lead to irreparable prejudice to such applicant if the trial is allowed to proceed to a conclusion.

See: *S v Klaasen* 1998(1) SACR 317 (C) at 322;

Levack and Others v Regional Magistrate, Wynberg and Others 1999(4) SA 747 (C) at 754;

Moodley and Others v National Director of Public Prosecutions and Others, *supra*, at 569 a-f.

9. Section 24 of the Supreme Court Act, No. 59 of 1959, sets out the grounds of review of the proceedings of inferior courts. These grounds are:
 - a) Absence of jurisdiction on the part of the Court;
 - b) Interest in the cause, bias, malice or the commission of the offence of corruption on the part of the presiding judicial officer;
 - c) Gross irregularity in the proceedings;
 - d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
10. The impartiality of a judicial officer is an essential requirement of a constitutional democracy and this is closely linked to the independence of the courts, entrenched in s165(2) of the Constitution (Act 108 of 1996).

See: Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening) 2002(5) SA 246 (CC) at 272 B–E (par 32).

S v Basson 2007(3) SA 582 (CC) at 604 F (par 24).

11. The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. This is to instill confidence in the criminal justice system with the public, including those close to the accused.

See: S v Jaipal 2005(4) SA 582 (CC) at 591 D-E (par 29).

12. The test for recusal is objective and the onus of establishing the grounds for recusal rests upon the applicant. The question to be decided for recusal 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 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.” (emphasis supplied)

See: President of the RSA v South African Rugby Football Union 1999(4) SA 147 (CC) at 177 B-D (par 48).

See also: S v Shackell 2001(4) SA 1 (SCA) at 9 F-I (pars 18 & 19).

The requirement of an objective test for recusal has been described as one of “double reasonableness”. This means that:

“Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the judge will not be impartial.”

per Brand AJA (as he then was) in *S v Shackell*, supra at 10 A-B (par 20).

13. There is a general presumption that judicial officers are impartial. The onus rests on a person who avers bias on the part of the judicial officer to rebut this general presumption.

See: *President of the RSA v South African Rugby Football Union and Others*, supra at 172 D – 173 B;

S v Shackell, supra at 10 C;

Sager v Smith 2001(3) SA 1004 (SCA) at 1010 A-B (par 16).

14.1 It is important to bear in mind that a judicial officer is not merely a silent umpire. Fairness of court proceedings requires that a trier of fact be actively involved in the management of the trial in order to control the proceedings and a supine approach towards litigation by judicial officers is not justifiable. What is required is that a judicial officer should exercise a careful balancing act, given the thin dividing line between managing a trial and getting involved in the fray between the parties.

See: *Take and Save Trading CC and Others v Standard Bank of South African Limited* 2004(4) SA 1 (SCA) at 4 E-H (par 3).

14.2 Neutrality of a judicial officer is not required.

See: *S v Basson*, supra at 606 F.

14.3 It is important, furthermore, that when the issue of perceived bias in a trial before a single judicial officer is considered, sensitivity must be shown to the different nuances of such a “live situation in a court of first instance”. The context of the proceedings will therefore be relevant to the determination of the apprehension of a reasonable person with regard to perceived bias.

See: *S v Basson*, supra

at 607 E-F (par 32).

14.4 As a general point of departure, it is far more difficult to establish a reasonable apprehension of bias based on the conduct of a judicial officer hearing a case than where it is based on the relationship between the Judge and one of the parties or witnesses.

See: *S v Basson*, supra at 607 G (par 33).

14.5 In long criminal trials it may be expected that a presiding officer may from time to time pass remarks that are inappropriate or which may display irritation towards Counsel. To establish bias in such instances, a case would have to be made out that the inappropriate remarks or display of irritation were of such a number or quality as to go beyond any suggestion of mere irritation by the presiding officer caused by a long trial and that a pattern of conduct has been established which is of sufficient gravity to rebut the presumption of impartiality and to replace it with a reasonable apprehension of bias.

See: *S v Basson*, supra at 610 C-E (par 42).

15. With regard to alleged irregularities in proceedings it is important to glean from the trial record the conduct of a litigant or his legal representative during the proceedings with knowledge of the alleged irregularity. If circumstances existed which would have justified an application for recusal, but no application had been made, an unavoidable inference is justified that there was in fact no reasonable apprehension of bias on the part of the litigant.

See: *S v Jaipal*, supra at 600 G-I (par 48).

16. Lastly, with regard to the general legal principles applicable in this matter, it is important to draw a distinction between an appeal and a review. Whereas an appeal is directed against the outcome of proceedings, a review is concerned with the procedural nature and method of the proceedings.

See in this regard: *Bester v Easigas (Pty) Ltd and Another* 1993(1) SA 30 (C) at 42 J – 43 B.

Refusal to recuse can, of course, constitute a ground of appeal by itself at the conclusion of the trial.

See: *President RSA & Others v SA Rugby Football Union & Others* supra at 169 D;

SA Commercial Catering & Allied Workers Union & Others v Irvin & Johnson Ltd 2000(3) SA 705 (CC) at 711 E-712A.

D. EVALUATION AND FINDINGS

17. The method which I intend employing in this chapter, is to deal with the various grounds advanced by the Applicants seriatim and to make findings on each and every one of them. Before doing so, I deem it necessary to make a few general observations which would be of some importance in the subsequent evaluations and findings to be made herein.

18.1 Mr. Van der Walt for the First Respondent has correctly drawn our attention to the fact that all three Applicants were represented by very seasoned and experienced legal practitioners throughout the trial.

Mr. Nel, who initially appeared for all the Applicants until he was compelled to withdraw due to a potential conflict of interest, was a Regional Court Magistrate for many years and now practises as Counsel at the so-called Independent Bar and he has been doing so for a number of years.

The attorney, Mr. Robertson, who took over from Mr. Nel on behalf of the First Applicant, was previously a member of the staff of the then Attorney General (i.e. a State Advocate) and thereafter practised for many years as an attorney until fairly recently. He too has many years of experience in practice.

Mr. Van Heerden, who at various stages acted for certain of the Applicants at the trial and appeared before us on behalf of all three Applicants, was also previously attached to the staff of the then Attorney General as a State Advocate and now also practises, like Mr. Nel, as Counsel and member of the so-called Independent Bar and he has been doing so for a number of years.

Mr. Fourie, who for a brief period appeared for the Third Applicant, is attached to the local Justice Centre where he only does criminal trials. He had been a member of the Bar previously and has vast criminal law experience.

Mr. Morton, an attorney who at some stage acted for the Second Applicant, was also a practising attorney of a local firm.

18.2 From the foregoing it is clear that all the legal representatives who appeared for the Applicants at various stages during this long trial, were very well versed in criminal law and criminal procedure. Moreover, and importantly, the First Applicant himself is a man with formal legal training – during his evidence he testified that he holds B.Comm and LLB degrees. Although he has never practised as a lawyer, he too would be well versed in criminal law and criminal procedure based on his academic qualifications.

19. A further important contention correctly advanced by Mr. Van der Walt for the First Respondent, is that the record amply demonstrates that the First Respondent had exhibited a great deal of patience with the Applicants and that he had extended to them a great deal of latitude, particularly when it came to applications for postponement at their behest. There are numerous occasions on the record where the Applicants' then legal representatives had moved an application for postponement for some or other reason, which was opposed by the prosecutor (sometimes fiercely so), and yet the First Respondent had granted such applications. On a number of such occasions, the First Respondent made it abundantly clear that he was granting the postponement, notwithstanding the prosecutor's fierce opposition, in the interests of justice, so that the Applicants could be afforded all reasonable opportunity to present their case to the Court.
20. Another general observation is, as I have stated at the introduction of this judgment and which is supported by case law cited in the preceding chapter of the judgment, that it is to be expected that a presiding officer, as an ordinary human being, would display a measure of irritation and impatience in the course of a very long and difficult trial such as the present one. It is also an important general observation to consider that the First Respondent in the present matter could not be expected to silently observe proceedings as a "neutral umpire", but was entitled and obliged to get involved in the management of this very long and somewhat complex criminal trial.

21. Last, but not least, it bears consideration that the Applicants were acquitted on some of the charges brought against them.

22. The first recusal application

22.1 This application concerned the following grounds for recusal:

a) That, based on information received from Acting Regional Magistrate White, the First Applicant had a reasonable apprehension of bias on the part of the First Respondent

based on the fact that, according to Mr. White, the First Respondent had said in the tearoom that he intended convicting the Applicants,

at a time while the trial was still proceeding.

b) Further information received was that, according to Mr. White, there existed a psychiatric file on the First Respondent which showed that he had certain psychiatric problems and that he enjoyed sending Black persons to jail.

c) The allegation that the First Respondent had been seen in conversation in an office with the prosecutor and the investigating officer during an adjournment during the trial.

d) Two further grounds were that the Second Applicant contended that the First Respondent created a clear impression during the Second Applicant's testimony that he disbelieved the Second Applicant through his manner of questioning.

e) The Third Applicant in addition contended that the fact of the First Respondent always ruling against the defence and in favour of the State, had created a reasonable apprehension of bias.

22.2 In support of these grounds, affidavits were filed of the First Applicant, of one Mr. Glen Chase and also of the Second and Third

Applicants. The affidavits of the First Applicant and Mr. Chase dealt with the information received from Mr. White. The allegation

was that Mr. White had approached the First Applicant and had furnished the aforementioned information as a possible quid pro quo for the First Applicant's assistance in resolving a prickly problem which apparently involved the implication of Mr White in fraudulent activity.

The allegation further was that Mr. Chase, who was in an adjoining room at the time, had overheard this conversation.

At the trial, an affidavit was handed in by the Prosecutor in which Mr. White denied that he had said anything of the kind averred by the First Applicant to him. No psychiatric report was ever produced, even until today. There was therefore a genuine dispute of fact on the papers before the First Respondent, but he nevertheless refused to refer the matter for oral evidence and, as I have state hereinbefore, is regarded to have dismissed the recusal application.

22.3 I deal firstly with the information gathered from Mr. White.

Firstly of course, this is nothing other than hearsay and no grounds were advanced either before the First Respondent during the trial or before us, why this hearsay should have been admitted as evidence. Moreover, the allegations are pertinently denied by Mr. White, who is alleged to have been the source thereof. Mr. Van Heerden for the Respondents argued before us that it was to be expected that Mr. White would not confirm these averments on oath, so as to protect his own position. I do not understand this submission. If, as the First Applicant and Mr. Chase alleged, the information was made available by Mr. White as a quid pro quo for the First Applicant to assist Mr. White with his fraud matter, Mr. White would surely have been quite keen to confirm same on oath as an encouragement for the First Applicant to keep his side of the bargain. The question also arises: How reliable could this information from Mr. White have been at the time when this application for review was brought in this Court? On the First Applicant's case, Mr. White was a self-confessed fraudster and, three years hence, no psychiatric report had ever seen the light of day. There are to my mind in any event the following inherent improbabilities in the version of the First Applicant and Mr. Chase:

- a) The First Applicant, being legally trained as I have stated, became aware (on his own version) of the alleged conversation in the Magistrates' tearoom and the alleged psychiatric report already during September 2003 and yet he waited until December 2004 to instruct his legal representative to apply for the First Respondent's recusal on these grounds.
- b) Apart from the fact that this constitutes an inherent improbability in the First Applicant's version, the ineluctable conclusion is that if the First Applicant had already been aware since September 2003 of this information from Mr. White, he clearly had no apprehension that the First Respondent is biased, given the lengthy delay (of more than a year) in applying for recusal. This may well be because the First Applicant (on his own version) already had serious reservations about Mr. White's credibility as a source in view thereof that, according to him, Mr. White was a self-confessed fraudster. The lack of a psychiatric report by December 2004 or March 2005 (when the first recusal application was heard), must surely have discredited Mr. White's information completely (assuming that such a conversation had in fact occurred). It must be borne in mind that the evidence before us presently is exactly the same evidence that was before the First Respondent when this ground was advanced for his recusal, namely the information received from Mr. White. The only evidence which has been added (and which further controverts the First Applicant's case) is the affidavit from the First Respondent himself, vehemently denying the allegations. In the circumstances therefore, bearing in mind that the test for recusal is objective, that an applicant bears the onus and that the matter is to be decided on the correct facts, I am of the view that there was absolutely no substance whatsoever in this ground before the First Respondent. If proved, I have little doubt that this would have constituted a ground for recusal, particularly the averment that the First Respondent had prejudged

the matter as evidenced by his conversation in the tearoom. These facts have, however, not been proved at all. In fact, I take a serious view of the matter, inasmuch as to this very day no psychiatric report has ever been produced. These are extremely serious allegations to make against a senior judicial officer and directly impugn his integrity.

22.4 With regard to the alleged conversation between the First Respondent, the prosecutor and the investigating officer, it was alleged in the founding affidavit of the First Applicant that he had seen the First Respondent in conversation with these two gentlemen during an adjournment and while Captain Dare was under cross-examination.

It was also averred by him that one Mr. Brian Boltman had, upon enquiry from the First Applicant, confirmed that he had also seen this. Quite significantly, Mr. Boltman, who deposed to an affidavit which was handed in as exhibit “PP” to the First Respondent during this recusal application, makes mention of the fact that the First Applicant is his uncle. Of some further significance is the fact that, although the First Applicant himself had deposed to an affidavit which was handed in as exhibit “MM” in the first recusal application, that affidavit merely dealt with the alleged information from Mr. White and said nothing at all about the alleged conversation in the office between the First Respondent, the prosecutor and the investigating officer. This is a peculiar and very important omission. No explanation for it has been advanced before us. The First Applicant’s attorney, Mr. Robertson, during his oral submission before the First Respondent in the first recusal application, made mention of the fact that Mr. Boltman was the one who had first approached the First Applicant with regard to this incident, whereafter the First Applicant then confirmed that he had also seen this. Boltman himself in his affidavit, handed in as an exhibit, propounded a conflicting version, namely that it was the First Applicant who had approached him (Boltman) to ascertain whether he had also observed this incident. The First Applicant’s version in his founding affidavit before us now agrees as regards the sequence of events with the one advanced by Boltman. Captain Dare, the investigating officer, had also deposed to an affidavit handed in

by the State in the first recusal application wherein he had stated that he has no recollection of such an event. In addition to this aforementioned affidavit, we now also have before us the First Respondent’s denial that this had ever occurred, as well as a denial on oath from the prosecutor. Captain Dare has also deposed to a further affidavit pertinently denying that such an incident had ever occurred.

In this regard therefore there is a material dispute of fact on the papers and we have not been asked to refer the matter for oral evidence.

Since the Applicants move for final relief, the matter is to be decided on the basis of the First Respondent’s version, as supported by affidavits.

See: *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* and *Another supra*, at 634 H-I.

In adopting that approach, this ground has to fail. The probabilities are, in any event, overwhelmingly against the Applicants.

22.5 I turn now to Second Applicant's allegations with regard to the First Respondent's conduct during the Second Applicant's

testimony at the trial. At the outset it is noted that this alleged conduct occurred already on 8 February 2001. If this conduct had created a reasonable apprehension of bias with the Second Applicant, the question inevitably arises why he waited until 7 December 2004 to depose to an affidavit in that regard and to take steps about it. The inescapable conclusion is that in fact no such apprehension had been created. A perusal of the passages in the record where the First Respondent questions the Second Applicant certainly does not strike me as exhibiting any bias on his side or of being irregular. A presiding officer is perfectly entitled to question an accused person for purposes of clarification. I am of the view that the questions were entirely within the realm of amplification and clarification and that there was nothing irregular whatsoever about it.

This ground too has no merit whatsoever.

22.6 The Third Applicant averred that the First Respondent's repeated rulings in favour of the State and against the defence, caused him to reasonably apprehend bias on the part of the First Respondent.

The fact that the First Respondent had ruled as he did in dismissing firstly the special plea of lack of jurisdiction and secondly the special plea of autrefois acquit, can obviously never per se be regarded as exhibiting bias. If the contention is that the First Respondent was wrong in his findings, that would constitute a ground of appeal, but it most certainly cannot, objectively considered, give rise to a reasonable apprehension of bias on the part of the First Respondent. This ground advanced by the Third Applicant is also devoid of any merit and the First Respondent would have been fully justified in rejecting it.

22.7 To summarize: I am of the view that the grounds for the first recusal application advanced before the First Respondent were devoid of any merit. There is therefore no basis for finding that the First Respondent should have recused himself on this first occasion.

23. The second recusal application

23.1 It will be recalled that this application concerned the fact of First Respondent having presided in a bail application where the First Applicant's previous convictions had been disclosed and also the fact that the First Applicant's record of previous

convictions had been attached to the J15 charge sheet throughout the present trial, it being averred that the First Respondent has had sight of it.

23.2 At the outset it strikes one that on his own version the First Applicant had knowledge of the fact that the First Respondent had conducted his bail application previously, already at the commencement of the trial. On this version, the First Applicant was from the very beginning of the trial aware that the First Respondent had knowledge of his previous convictions. The fact, therefore, that it was discovered afterwards that the record of previous criminal convictions (SAP 69) had been attached to the charge sheet, could not have disclosed any new facts to the First

Respondent which he had not already known on the version of the First Applicant. Exhibit “SS” before the trial court is a copy of an extract from the relevant court book showing that the First Applicant had appeared before the First Respondent on 19 August 1997 when bail in the amount of R5000.00 was fixed.

23.3 If, as the First Applicant avers, he possessed this knowledge at the commencement of the trial, it was a very simple matter for his counsel (Mr. Nel at the time) to place this fact on record at that very early stage. The allegation by the First Applicant that he was advised by Counsel and his attorney that he first had to obtain proof of this particular fact, does not pass scrutiny. Quite clearly, if this had been of such major concern to him, the method to employ would have been to place the matter on record and to then gather evidence of that fact. Quite peculiarly though, the First Applicant does not complain of the First Respondent’s alleged knowledge of his previous convictions until 14 November 2005! On that date the second recusal application was brought on the basis that the First Respondent was aware of the First Applicant’s previous convictions through the 1997 bail application and through the SAP 69-record attached to the charge sheet. This enormous lapse of time from the commencement of the proceedings in 1999 until 14 November 2005 again leads to the ineluctable conclusion that the First Applicant and his very experienced legal representatives continued with the trial with full knowledge and acceptance of the fact that the First Respondent was aware of the First Applicant’s previous convictions. The lack of objection in such circumstances warrants the irresistible inference that the First Applicant had no apprehension of bias whatsoever on the part of the First Respondent.

See in this regard: *S v Jaipal*, supra at 600 G.

23.4 The First Respondent indicated in his answering affidavit that he had no recollection of the bail application in 1997. This averment was attacked by Counsel for the Applicants, Mr. Van Heerden. Such attack is unwarranted in my view. In any event, even if the First Respondent had been aware of the bail application and of the previous convictions, that per se did not warrant a recusal on his part. It has been held in a number of decisions of our Courts that, while it is advisable for a presiding officer who has knowledge of an accused’s previous convictions not to continue to preside in a trial, it does not constitute a fatal irregularity per se. There is nothing in the evidence before us to indicate that this has clouded the mind of First Respondent to the extent that he was biased against the First Applicant.

23.5 With regard to the SAP 69-record attached to the charge sheet, the First Respondent indicated that the charge sheet and exhibits were bound separately during the trial (as is the case in the record before us now). Mr. Van Heerden submitted, on the strength of the First Applicant’s averments in his founding affidavit, that the First Respondent unavoidably must have had sight of the SAP 69-record during the course of the long trial. Again, even if that is the case, for the reasons advanced before, I am not persuaded that this had negatively affected the First Respondent in his eventual judgment in the matter. No ground for review has been made out in this regard, particularly given the fact that for a period of more than six years, neither the First Applicant nor his experienced legal representatives had objected to the First Respondent presiding in the matter due to his prior knowledge and they therefore must be taken to have

acquiesced in the state of affairs. There is therefore no merit in the second recusal application.

24. The third recusal application

This application was brought on the ground that a complaint had been laid by the First Applicant against the First Respondent at the Magistrates' Commission. In the complaint the grounds advanced in the previous recusal applications were repeated and mention was also made of a verbal altercation during the apartheid era between the First Applicant and the First Respondent.

The First Applicant did not refer to this aspect at all in his founding affidavit. This aspect was also not canvassed at all in Mr. Van Heerden's heads of argument, nor did he refer to it during oral argument.

I accept therefore that the Applicants are not proceeding with this ground, understandably so, since to my mind there is absolutely no merit whatsoever in this ground. The First Respondent cannot be faulted for dismissing this application.

25. The fourth recusal application

25.1 After the First Respondent had refused to refer the matter for special review to this Court in terms of s304A of the Criminal Procedure Act, a fourth recusal application was brought. The application for referral of special review was based on the fact that, as the Applicants averred, certain important information had been withheld from them which would have had a critical bearing on the outcome of the criminal trial. This information was said to be contained in a police docket at Mmabatho and it was also alleged that Captain Dare, the investigating officer, was responsible for withholding this crucial information.

25.2 An important aspect to bear in mind is that at the stage when this aspect was raised, the Applicants had already been convicted.

Captain Dare had deposed to an affidavit, dated 22 June 2006, in proceedings instituted by the State (after conviction) to have

certain assets of the Applicants forfeited to the State. The information regarding the contents of the Mmabatho docket was contained in that affidavit. During an early stage of the trial Mr. Nel applied for this particular docket to be made available to him and it was in fact placed in his possession. This occurred even before the Applicants had formally pleaded to the charges against them. It is therefore important to bear in mind that the docket itself was never withheld from the Defence. What seems to have

happened is that subsequently information had been added to the docket, which was never disclosed to the Applicants. It does not appear on the record, however, when this additional information had been placed in the Mmabatho docket. Furthermore, no request had ever formally been directed to the State or to Captain Dare in this regard. I am of the view that this matter is a red herring and that no prejudice ensued to the Applicants due to the non-disclosure of the information in the docket. In any event, as I have stated, no formal request had ever been

directed to the State to have the contents of this docket made available. The information therein only became apparent after conviction, in the forfeiture proceedings which followed.

25.3 It was also averred that the First Respondent had exhibited clear bias by virtue of the fact that he had dismissed the application for referral on special review without having proper regard to the various documents handed in as exhibits at that stage.

Firstly, this submission is not borne out by the record. It appears that the First Respondent did in fact have regard to the documents before him, although he did not take an adjournment to peruse the documents and to consider judgment. No mention is made in the founding affidavit of the First Applicant that the First Respondent did not in fact have proper regard to the documents. Understandably therefore, the First Respondent also did not deal with this aspect at all in his answering affidavit, because it was not raised as an issue by the First Applicant.

I am not persuaded, given the dearth of evidence in this regard, that there is any merit in this ground. The First Respondent did in fact in his ruling discuss in some detail the “new” evidence which was potentially contained in the Mmabatho document. He gave consideration to the impact which it may have on the case. This particular aspect in any event seems to me to be much better suited to an appeal and an accompanying application for leave to adduce further evidence, rather than review.

26. The fifth recusal application

26.1 It is common cause that the First Respondent, who had retired on 28 February 2007, had not been properly appointed when he presided in the matter on 18 May 2007, 17 August 2007 and 15 October 2007. This appears to have been as a consequence of an administrative oversight. It was not suggested, nor could it be, that the First Respondent was mala fide when he indicated to the legal representatives of the Applicants, upon enquiry, that he was duly appointed by the Minister to preside as a Regional Magistrate on those dates.

Of considerable importance is that, during the aforementioned dates, the proceedings dealt with an inquiry initiated by the First Respondent concerning a delay in previous proceedings. This was therefore a collateral issue and by then the Applicants had already been convicted. It did not impact at all on the subsequent proceedings. The First Respondent’s lack of appointment simply meant that the proceedings before him are a nullity and any referral on special review to this Court would have resulted in that

conclusion.

See in this regard: *S v Hanekom* 2004(1) SACR 490 (C).

No prejudice have been proved by the Applicants in this regard. There is therefore no ground on which this particular decision can be reviewed.

27. Generally: bias of the First Respondent against the Applicants and an unfair trial

27.1 This general ground is to be considered in view of the submissions advanced with regard to the First Respondent's refusal to recuse himself on the five occasions mentioned in this judgment. I have already dealt fully with those aspects and no repetition is necessary. While it has been alleged that there have been a number of gross irregularities, I have already decided that this has not been the case. Overall, and generally speaking, I am of the view that, while the trial had over time deteriorated into acrimony and while the First Respondent on occasion appeared impatient and irritated, it cannot be said that the Applicants have not had a fair trial.

27.2 When one reads the lengthy record of the proceedings, it is apparent that the First Respondent became quite annoyed by the many postponements foisted upon him by the defence. In many instances the First Respondent's annoyance was justifiable. It is to be expected that in a long criminal trial of some complexity, a presiding officer would become impatient and irritated. This is however not sufficient ground for recusal or for a review of the proceedings.

27.3 It has been submitted that the many instances forming the grounds of review, assessed cumulatively and in totality, establish a pattern of bias on the part of the First Respondent and constitute an unfair trial. I have given very careful consideration to this aspect, because it is not without merit. I have considered carefully whether a reasonable litigant would have been caused a reasonable apprehension of bias by the numerous incidents already mentioned in this judgment. While it is true that all the preliminary points, the five recusal applications (and concomitant referral applications in some instances) as well as the merits (conviction), had gone against the Applicants, it is counter balanced by the considerable patience and latitude extended to the Applicants whenever they had sought a postponement (which was quite frequent). And it should be remembered that the First Respondent had acquitted the Applicants on some of the charges.

27.4 It is also noteworthy that the trial had proceeded along fairly smoothly while Mr Nel was acting for the Applicants. I ascribe no malice or mala fides to the subsequent legal representatives, but one cannot resist observing this particular fact.

27.5 It quite frequently happens, particularly in a long trial (civil or criminal), that virtually all the rulings go against one party. This is not per se indicative of bias on the part of the presiding officer. An excellent case in point is the *S v Basson*

matter cited earlier. The judgment of the Constitutional Court in that matter is particularly apposite to the present case.

27.6 I have, after serious reflection and consideration, come to the conclusion that the Applicants have failed to prove bias or gross irregularities vitiating the proceedings or that they have had an unfair trial.

E. CONCLUSION

28.. For the reasons aforementioned I am of the view that the Applicants have not made out a case to have the proceedings before the First Respondent reviewed and set aside.

I have come to this conclusion based on the legal principles to be applied, in particular the following:

- a) Neutrality on the part of the First Respondent was not a requirement. Furthermore, the fact that the First Respondent became impatient and irritated and annoyed at some stages does not warrant a finding that grounds for recusal had been established.
 - b) A presumption of objectivity and impartiality on the part of the First Respondent has not been rebutted by the Applicants in the affidavits before us or on the trial record.
 - c) Incorrect decisions and rulings which may have been given by the First Respondent (and I consciously and purposely express no opinion thereon) do not warrant interference on review and may well constitute grounds of appeal.
 - d) In a considerable number of instances, there are genuine dispute of facts on the papers and, in the absence of an application for referral for oral evidence, the matter has been decided on the First Respondent's version, as amplified by supporting affidavits and by the record before us.
29. In the result I am of the view that the Applicants have failed to establish a case for review and the application must consequently be dismissed and costs should follow the outcome.

30. I issue the following order:

30.1 THE APPLICATION IS DISMISSED.

30.2 THE APPLICANTS ARE ORDERED TO PAY THE COSTS OF THE APPLICATION JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHERS TO BE ABSOLVED PRO TANTO.

SA MAJIEDT

JUDGE

I CONCUR.

CJ OLIVIER

FOR THE APPLICANTS : ADV F VAN HEERDEN

INSTRUCTED BY : VAN DE WALL ATTORNEYS

FOR THE RESPONDENTS : ADV DJ VAN DER WALT

INSTRUCTED BY : DUNCAN AND ROTHMAN ATTORNEYS

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