

SOUTH AFRICA / JUDGMENT

K.D.P v Mtebele (KPM 10/2018) [2020] ZANWHC 86 (6 November 2020)

[2020] ZANWHC 86**COURT**

North West High Court, Mafikeng

BEFORE

R.D. Hendricks, F.M.M. Snyman

CASE / FILE NUMBER

KPM 10/2018

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****Case****Number: KPM 10/2018****In**

the matter between:

K[...]
D[...] P[...]
Applicant
and
MAGISTRATE
MTEBELE BEN
Respondent
HENDRICKS
DJP & SNYMAN AJ
DATE
OF HEARING
:
23 OCTOBER 2020
DATE
OF JUDGMENT

:
06 NOVEMBER 2020
COUNSEL
FOR APPLICANT

:
ADV. VIVIERS
ORDER
Consequently,

the following order is
made:

- (i)
The
application for review succeed.
- (ii)
The
First Respondent's decision to refuse to recuse himself from
the proceedings in case number RC 4/23/2011, Klerksdorp,
is reviewed
and set aside.
- (iii)
A
copy of this judgment must be send to the Director of Public
Prosecutions, North West Province.

JUDGMENT

HENDRICKS DJP

[1] This is an application for the review and setting aside of the decision of a Regional Magistrate's refusal to recuse himself from a matter. This matter had a very long protracted history. The incidents are alleged to have occurred on the 03rd October 2004. The applicant (accused) was arraigned before the Regional Court, Klerksdorp and pleaded to the charges of assault with the intend to do grievous bodily harm and rape on the 01st September 2011, almost seven (7) years after the incidents allegedly occurred. This inordinately long delay is unexplained.

[2] The trial progressed and the applicant was represented by Mr. Burger. During cross-examination of the complainant S[...] K[...], she was asked why did she get married to the applicant who was abusive towards her and even brutally raped her. The presiding

Regional Magistrate interjected and stated that it does happen that people are staying in abusive marriage relationships. The presiding

Regional Magistrate remarked:

"yes there are people who are sitting in their homes being abused but married. I am doing divorce case here people who stay for years under the abuse."

- [3] When Mr. Burger asked the complainant to repeat what she said, the presiding Regional Magistrate intervened and practically prevented Mr. Burger from continuing with his cross-examination. A long discussion occurred between the Regional Magistrate and Mr. Burger. Mr. Burger then asked for a five (5) minute adjournment to obtain instructions to which the Magistrate reacted negatively and said that the matter should be postponed to another date, although it was 12H40. When Mr. Burger said that he is not asking for a postponement but merely for a few minutes, the answer was 'I am refusing!' The short adjournment ultimately happened.
- [4] When the court resumed, Mr. Burger applied for the recusal of the presiding Regional Magistrate. The recusal application was premised on the comment by the Regional Magistrate that he is dealing with divorce cases on a daily basis and women stay in abusive marriages for long as well as the interference with cross-examination by the presiding Regional Magistrate. The application for recusal was summarily dismissed. Mr. Burger's mandate was at some stage thereafter terminated.
- [5] Mr. Heppel took over as the legal representative of the applicant. The record of proceedings thus far was transcribed. After a long delay, the trial resumed. The intended review of the decision to refuse the recusal, was abandoned. The trial ultimately resumed on 13 March 2017, thirteen (13) years after the incidents allegedly occurred. On 04 August 2017 Mr. Heppel brought a second application for recusal. This application was based on the fact that the presiding Regional Magistrate and the complainant worked together at Potchefstroom Magistrate Court and that they are very familiar with one another. Based on this, the applicant is of the view that he will not enjoy a fair trial. Once again, this application for recusal was summarily dismissed. This prompted the applicant to launch the present application for review. To put it mildly, this application is not without problems. However, the application was finally enrolled for 23rd October 2020. It is now sixteen (16) years since the incidents allegedly occurred.
- [6] It will be remiss of me not to express my disquiet about the inordinate long delay in bringing this matter to finality. For whatever reason(s) that may be advanced, this is an unacceptable state of affairs. It behoves no argument that the delay in finalising this matter is inexcusable and totally unacceptable.
- [7] In *President of the Republic of South AFRICA V South African Rugby Football Union*
- [1999] ZACC 9; 1999 (4) SA 147 (CC), the following is stated with regard to an application for recusal:

"[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice

without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that

they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

[8] In *S v Le Grange and Others* 2009 (2) SA 434 (SCA), the following is stated:

*“[13] The recusal application brought to the fore the question whether the learned Judge President’s conduct bore the appearance of bias. 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. It is not necessary in this case to determine whether the presiding officer’s conduct, bearing and utterances would have provided a reasonable person in the appellants’ position with reasonable grounds to think that the court might be biased or whether, by the time the recusal application was made, sufficient had occurred to create that impression. That is so because by the time the appeal came to be argued before us the main contention advanced on behalf of the appellants ranged beyond the simple fact that the recusal application had been wrongly refused and that the proceedings which followed constituted a nullity. The principal thrust of the argument on appeal was that having regard to the manner in which the learned Judge President had conducted himself, the appellants had not had a fair trial. As it was put by Milne JA in *S v Tyebela* 1989 (2) SA 22 (A) at 29G, ‘[i]t is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial. ... This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires.’ Where the offending questioning sustains the inference that in fact the presiding judge was not open-minded, impartial, or fair during the trial, this court will intervene and grant appropriate relief. (See *S v Rall* 1982 (1) SA 828 (A) at 833B, *S v Meyer* 1972 (3) SA 480 (A) at 484D). In such a case the court will declare the proceedings invalid without considering the merits.”*

[9] In *S v Tyebela* 1989

(2) SA 22 (AD), the following is stated at page 29 G – H:

*“It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial. *S v Alexander and Others* (1) 19 65 (2) SA 796 (A) at 809 C – D; *S v Mushimba en Andere* 1977 (2) SA 829 (A) at 842B and 844H. This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires.*

[10] In *S v Basson* 2007 (1) SACR 566 (CC), the following is stated on page 590 – B:

“23. The impartiality of judicial officers is an essential requirement of a constitutional democracy and is closely linked to the independence of courts. Section 165 (2) of the Constitution states:

“The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)* this Court held that a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with section 34 of the Constitution and in breach of the requirements of section 165 (2) and the prescribed oath of office. It went on to lay down the following test for recusal:

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

25. As far as criminal trials are concerned, the requirement of impartiality is also closely linked to the right of an accused person to a fair trial, which is guaranteed in section 35(3) of the Constitution. This right has been analysed by this Court in a number of cases. The Court has stated that criminal trials have to be conducted in accordance with notions of basic fairness and justice. The nature of the right to a fair trial as a comprehensive and integrated right has been emphasised. The fairness of a trial is clearly under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state.<http://www.saflii.org.za/za/cases/ZACC/2005/10.html>

- sdfootnote28sym

26. The impartiality of a judicial officer is crucial to the administration of justice. So too is the perception of his or her impartiality.

These principles are recognised in many foreign democracies. Thus, in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*<http://www.saflii.org.za/za/cases/ZACC/2005/10.html>

- sdfootnote29sym this Court cited with approval the following reasoning of Le Dain J in the Canadian Supreme Court in the case of *Valente v The Queen*:

“Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual

and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.”

28. Similar concerns were expressed by this Court in *S v Jaipal* as follows:

“It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those

distressed by the audacity and horror of crime.”

29. In *SARFU*, the Court identified two different approaches for determining “the appearance of bias”. The focus of the one is “real likelihood of bias” and of the other “a reasonable suspicion or apprehension of bias”. The Court accepted, relying on earlier authority of the Appellate Division (as the SCA then was) that it was not necessary for a litigant who complained of bias to establish that there was a real likelihood of bias. The Court then went on to consider the distinction between “suspicion” and “apprehension” and, to avoid the potentially inappropriate connotations that the word “suspicion” might engender, preferred the phrase “reasonable apprehension of bias” to “reasonable suspicion of bias”.

- [11] Apart from what appears on record as far as the recusal application is concerned, the applicant also deposed to an affidavit and a supplementary affidavit in support of his application for a review of the decision of the Regional Magistrate who refused to recuse himself. It is quite apparent from these affidavits that he and the complainant were involved in a relationship over a considerable period of time. By then he was residing in Klerksdorp. The complainant would spend weekends with him in Klerksdorp and he would drop her off on Monday mornings alongside the Klerksdorp/ Potchefstroom road. The presiding Regional Magistrate would then give her a lift to Potchefstroom, where they worked together at the court. She is an interpreter. This happened on at least 12 occasions.
- [11] Furthermore, the presiding Regional Magistrate would also buy lunch for the complainant and they would enjoy lunch together on numerous occasions. The presiding Regional Magistrate chose not to oppose the application for review nor did he depose to an affidavit in order to refute these allegations. The perception or apprehension of bias is quite obvious in this case. Not only through the conduct in court but also based on the uncontested and unrefuted contentions contained in the affidavits deposed to by the applicant. Justice must not only be done but must be seen to be done.

- [12] It is indeed regrettable that this matter was dragging on for such a very long time and must now after the passage or more then sixteen
- (16) years since the incidents occurred, be set aside. However, justice must be done! Due to the passage of time, I consciously decided not to order that the trial start de novo before another Regional Magistrate, but to leave it to the Director of Public Prosecutions, North West Province, to take a decision in this regard.

Order

[13] Consequently, the following order is made:

R. D. HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree.

F. M. M. SNYMAN

ACTING JUDGE OF THE HIGH COURT

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