

SOUTH AFRICA / JUDGMENT

Makoro v Erasmus and Another (M 133/2019) [2020] ZANWHC 15 (12 March 2020) [2020] ZANWHC 15

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Nonyane

CASE / FILE NUMBER

M 133/2019

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M 133/2019

In

the matter between:

BALASENG
PIENAAR MAKORO
Applicant
and
THE
MAGISTRATE, MR PETRUS ERASMUS
1st
Respondent
THE
DIRECTOR OF PUBLIC PROSECUTIONS
2nd
Respondent

CORUM: HENDRICKS DJP et NONYANE AJ
DATE
OF HEARING
: 28
FEBRUARY 2020
DATE
OF JUDGMENT
: 12
MARCH 2020
FOR
THE APPLICANT
:
MR. MOSES
FOR
THE RESPONDENTS
:
ADV. LEKOMA-CHULU
ORDER
(i)
The proceedings
in the matter of State vs Baleseng Pienaar Makoro, Case No 291/2018,
Delareyville Magistrate Court, before Magistrate
Erasmus is reviewed
and set aside.
(ii)
The trial must
start de novo
before a different Magistrate, other than Magistrate Erasmus.

JUDGMENT

HENDRICKS DJP

- [1] Mr. Baleseng Pienaar Makoro (“accused”) stand trial in the District Court at Delareyville, before Magistrate (Mr.) Erasmus on a charge of housebreaking with intent to steal and theft. The trial commenced on 26th November 2018. Two witnesses namely Gert Jacobus Steyn, the complainant and Teko Phiilemon Molebatsi, the arresting officer testified. On the subsequent appearance on 03rd December 2018, Mr. Gonxeka, the legal representative of the accused applied for the recusal of the presiding Magistrate on the basis of allege bias. An application for the review and setting aside of the refusal of the recusal application was lodged with the Registrar of this Court on 15th March 2019. The review ultimately served before this Court on 28th February 2020.
- [2] The review application is premised on the following grounds:
- “a) The Honourable Magistrate Erasmus committed an irregularity by refusing to recuse himself on the 03rd of December 2018;*

- b) The Honourable Magistrate Erasmus remarked on 26 November 2018 whilst the Defence was still cross-examining one of the state witnesses Teko Phillemon Molebatsi that his evidence was very clear which was premature;
 - c) The Honourable Magistrate Erasmus took over the leading of the evidence of the first state witness Gert Jacobus Steyn
 - d) The Honourable Magistrate Erasmus committed a gross irregularity when he usurped the duties of the court interpreter during the leading of the evidence of the first state witness Gert Jacobus Steyn and
 - e) The Honourable Magistrate Erasmus' conduct in the proceedings showed that he did not approach the matter with a mind open to persuasion by the evidence and submissions of counsel.”
- [3] In the founding affidavit deposed to by the accused, it is stated that the Magistrate exhibited bias in favour of the first state witness Mr. Gert Jacobus Steyn, by the Court usurping the functions of the prosecutor in leading the evidence of this witness. The record with regard to the evidence-in-chief of this witness comprise of just more than seven (7) typed pages, six (6) of which contains questions posed by the presiding Magistrate and the witness's answers thereto. The contention by the accused that the presiding Magistrate usurped the function of the prosecutor in leading the evidence of the complainant, is therefore not unmeritorious. The same applies to the evidence-in-chief of the second state witness, Mr. Molebatsi. Half of his evidence was also led by the presiding Magistrate.
- [4] The accused furthermore states in his affidavit that during the cross-examination of the second state witness, Mr. Molebatsi, the presiding Magistrate was agitated to the extent that he even answered on behalf of the witness. He also said that the evidence of this witness is very clear. This, the accused said is a clear indication that the presiding Magistrate aligned himself with the evidence of this witness. Furthermore, the record exhibit long arguments between

Mr. Gonxeka and the presiding Magistrate during the cross-examination of the second state witness Mr. Molebatsi.

- [5] The following is an extract from the record during cross-examination of Mr. Molebatsi:

“MR GONXEKA: In Court today you have said that the accused said to you he does not remember what happened, he was drunk the previous night. He could not recall what happened. But in your statement you are, you are basically saying no this person admitted to the offence of housebreaking with intent to steal and theft. Do you see those two are different?”

Do you want, do you see that? --- What I see on the statement is what he told me.

Are those not two different things, to say I was drunk I do not recall what happened and to say I was alone, I am giving you the full explanation of how this housebreaking happened. I was even alone, no one assisted me. Are those not two different things? You understand the question? Yes are those not two different things? --- Yes Your Worship they are two different.

Yes. Not (intervene).

COURT: Did he tell, did he tell both to, you or not? --- The thing is when I asked him Your Worship why he was breaking in is when he explained to me that to be honest he cannot remember he was drunk Your Worship.

But he did tell you that he, that he broke? And when you asked him why he said he cannot remember because he was drunk? --- Yes Your Worship.

Thank you

MR GONXEKA: Thank you. Is there, the Court has just given you the answer. Is there any reason why you did not tell us in your evidence in chief that this accused person actually admitted to having committed this offence. Because the prosecutor asked you what did he say about the recovery of this properties? --- He admitted Your Worship that he was alone and, and the way Your Worship he said it I believe him that he was alone Your Worship.

COURT: Ja.”

There is a clear exhibit of bias in the suggested answer contained in the question by the presiding Magistrate. Hence, the remark by Mr. Gonxeka “the Court has just given you the answer.”

[6] On paginated pages 47-48 of the record, the following appears:

“COURT: Mr. Gonxeka, Mr. Gonxeka I am sorry to interrupt you but the evidence is clear. In, the evidence of the witness is very clear. He said initially the guy denied. That is when he said, and then if you do not admit to this, if you deny knowledge of this we are going to have to take you to police station. He said and on, along the way the guy banged against the window or the, the, and got their attention.

MR GONXEKA: Yes.

COURT:

And when they stopped and asked him what the problem is he said no I want to go show you where I hid it.

COURT:

Which is a confession. That is his evidence.

MR GONXEKA: And then according to him the accused said he does not know what happened.

COURT:

Because he was drunk.

COURT:

He cannot remember (intervene).

MR GONXEKA: He, he only took out the (intervene).

COURT:

When asked why did you break in he said I cannot remember I was drunk (intervene)."

[7] In the evidence-in-chief, Mr. Molebatsi was just asked by the prosecutor whether it was correct that he is a police officer stationed at Delareyville Police Station which he confirmed. His rank is not stated on record. It was only stated that he was the arresting officer. Without stating or knowing the rank of Mr. Molebatsi, the presiding Magistrate already concluded that what the accused Told Mr. Molebatsi amounts to a confession. This is a misdirection on the part

of the presiding Magistrate.

[8] The record furthermore exhibit countless interruptions by the presiding Magistrate during the cross-examination by Mr. Gonxeka of the second state witness, Mr. Molebatsi. These interruptions led to long arguments and exchange of words between Mr. Gonxeka, the defence attorney and the presiding Magistrate. The following is also apparent from the record:

"COURT: But

that is why you have the privilege to proceed until Kingdom come if that is (intervene).

MR GONXEKA: I was still proceeding and the Court is the one that is stopping me from proceeding.

COURT:

No I am not saying, I, I believe (intervene).

MR. GONXEKA: Because the evidence is clear according to the Court.

COURT:

Yes it is.

MR GONXEKA: That is my problem, how (intervene).

COURT:

I have a duty also (intervene).

MR GONXEKA: Yes.

COURT:

Not to have the witness being badgered.

MR GONXEKA: I am not badgering the witness Your Worship.

COURT:

I am saying that is why I am saying the answers of the witness is very clear. When he was asked he, he said the accused also said he cannot remember because he was drunk.

MR GONXEKA: The Court should remember that I have not even yet put the accuses version and already the Court is saying this evidence is clear.

I am worried now what does this mean to the defence case?

COURT: No do not be worried, do not be worried. There was no, there was, there is no conclusions reached yet. And you should know it by now as well.

All I am saying is evidence is clear, I have not made any findings regarding anything at all.

COURT:

And I want to make it very clear at this stage. And no, do not make any allegations that I have already done it. Because I have not.

MR GONXEKA: Yes Your Worship that is why I am saying we are still trying to find out (intervene).

COURT:

As you rightly pointed out.

MR GONXEKA: From his evidence.

COURT:

You have not even give us one inclination of what the accuses version will be. So how can I in anyway make any conclusions at the stage, early stage?

MR GONXEKA: That is the apprehension now that I am having that the Court (intervene).

COURT:

No you do not need to have any apprehension at all. I can guarantee that.

You may proceed thank you.

MR GONXEKA: Yes sir before the (intervene).

COURT:

Interruption.

MR GONXEKA: Court took over (intervene).

COURT:

No I never took over. I am in control of this Court room. And I will stay in control of it. I never took over, I am over. I am in control here. So what I am saying is I interrupted you.

MR GONXEKA: I was, I would not, I was, I was, yes. I was avoiding that word.

Yes Your Worship okay before (intervene).

COURT:

Okay but do not make allegations again. Please.

MR GONXEKA: Yes I wanted to see my last question if the Court can assist me with the, with the notes there. What was my last question Your Worship?

COURT:

No I do not know what your last question is, you should know what your last question is.

You want the tape to be (intervene).

MR GONXEKA: No, no, no. No I do not want a break Your Worship.”

[9] Section 22 of the Superior Court Act 10 of 2013 provides:

“Grounds for review of proceedings of Magistrates’ Court

22.

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review

before a court of a Division are-

- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates’ Courts.”

(emphasis added)

Sub-sections

- (b) and (c) are relevant to this case at hand. The grounds upon which the proceedings of a Magistrate's Court may be brought under review, are also grounds upon which a magistrate may be required to recuse himself/herself from a case.

See: Erasmus, Superior Court Practice, Volume 1, Part A- Commentary on the Superior Courts Act, Act 10 of 2013.

If a judicial officer in a Magistrate's Court refuses to recuse himself/herself from the matter under circumstances where one or more of these grounds are present, proceedings to review the judicial officer's decision can be brought. The refusal of a judicial officer to recuse himself/herself from a matter may also constitute a ground of appeal.

- [10] The test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of bias was enunciated in the matter of President of the Republic of South Africa v South African Rugby Football Union

[1999] ZACC 9; 1999 (4) SA 147 (CC), in which the following is stated:

"[45] From all of the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the onus of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in a dissenting judgment by de Grandpré J in Committee for Justice and Liberty et al v National Energy Board:

". . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the

question and obtaining thereon the required information. . . . [The] test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through

- conclude.'" In R. v. S. (R.D.) Cory J, after referring to that passage pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in Pinochet:

"Decisions in Canada, Australia and New Zealand have either refused to apply the test in Reg v Gough, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial." An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.

[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.”

[11] In *SACCAWU v Irvin & Johnson Ltd* [2000] ZACC 10; 2000

(3) SA 705 (CC) the following is stated in paragraphs [11] to [17].

“[11] Although the events that led to the present proceedings took place before those in Nomoyi, the dismissed workers came to trial some five weeks later. The industrial court refused their application for unfair labour practice relief in its entirety. Their appeal was set down for hearing in the Labour Appeal Court on 31 August 1999 before Conradie and Nicholson JJA and Mogoeng AJA. The application for the recusal of Conradie and Nicholson JJA was based on the Labour Appeal Court’s judgment in Nomoyi. Before considering the grounds of that application in more detail, it is necessary to set out the basis on which the law requires that they be assessed.

The Test For Recusal

[12] In *Sarfu*, this Court formulated the proper approach to recusal as follows:

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

- [13] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the Sarfu judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires “cogent” or “convincing” evidence to be rebutted.
- [14] The second in-built aspect of the test is that “absolute neutrality” is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge’s performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality - a distinction the Sarfu decision

itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to

either party, or to the judge’s own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires in short “a mind open to persuasion by the evidence and the submissions of counsel”; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that –

“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before 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.”

- [15] The Court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. 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.
- [16] It is no doubt possible to compact the “double” aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

“Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.”

[17] The “double” unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant’s anxieties. It attributes to the litigant’s apprehension a legal value, and thereby decides whether it is such that it should be countenanced in law.”

See also: *S v Dube and Others* 2009 (2) SACR 99 (SCA).

[12] The question whether or not a presiding officer should recuse himself/herself, is objective. In evaluation of the actions of the presiding officer the question is firstly whether a reasonable, objective and informed person would on the facts reasonably apprehend that the presiding officer has not or will not bring an impartial mind to bear on the adjudication of the case. Secondly, the requirement of reasonableness which simply means that both the person who apprehends the bias and the apprehension of the bias itself, must be reasonable.

Conclusion

[13] I am of the view that there was a display of bias by the Magistrate in favour of the state witnesses and against the legal representative of the accused. The proceedings should therefore be reviewed and set aside. The trial should start de novo before a differently constituted court.

Order

[14] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

B R NONYANE

ACTING JUDGE OF THE HIGH COURT,

APPEARANCES:

DATE OF HEARING

: 28 FEBRUARY 2020

DATE OF JUDGMENT

: 12 MARCH 2020

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