

SOUTH AFRICA / JUDGMENT

Morake v Van Schalkwyk and Another (A765/2014) [2018] ZAGPJHC 611 (29 October 2018) [2018] ZAGPJHC 611

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala, Matsemela

CASE / FILE NUMBER

A765/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: A765/2014

In

the matter between:

MORAKE

DANIEL

PHENYA APPLICANT

AND

THE

MAGISTRATE MR VAN SCHALKWYK FIRST

RESPONDENT

THE

DIRECTOR OF PUBLIC

PROSECUTIONS SECOND

RESPONDENT

JUDGMENT

TWALA J

- [1] This is an application to review and set aside the decision of the Magistrate, Mr Van Schalkwyk (first respondent), for refusing to recuse himself as the presiding officer in the matter involving the State and the applicant. Further, the applicant seeks an order setting aside his conviction of rape in the hands of the first respondent for he has an apprehension of bias on the part of the first respondent.
- [2] Since the first respondent was not in attendance at Court, counsel for the second respondent contended that there will be no prejudice if the matter were to be proceeded with in his absence. The first respondent has filed a comprehensive affidavit and no prejudice would be suffered in this regard.
- [3] It is a trite principle of our law that justice delayed is justice denied. This matter has been outstanding for almost 10 years now and it is my respectful view that it is in the interest of justice that the matter be proceeded with and brought to finality.
- [4] At the commencement of the hearing of this appeal, the applicant brought an application to file a further affidavit as further

evidence which he could not file with his founding affidavit for the information was not known to him at the time. There was no opposition to this application and the first respondent had already filed its answering affidavit explaining its position on the new evidence tendered by the applicant. Therefore, there being no prejudice to be suffered by the other parties, the further filing of the affidavit was allowed.

- [5] It is common cause that the applicant was and is still employed as a senior interpreter in the Pretoria Magistrates Court. On the 2nd of March 2010 the applicant was charged with the offence of rape in contravention of section 3 read with sections 1, 56, 57, 58, 59, 60 and 61 Act 32 of 2007. The trial of the matter was held before the first respondent in the Pretoria North Magistrate Court and the applicant was convicted of rape on the 20th of August 2013.
- [6] The applicant testified in his founding affidavit that, in the first instance, after his case was postponed for sentencing and whilst awaiting the transcript of the record for his new counsel, he obtained a photograph of the first respondent reading through a police docket. He was not comfortable to see this and instructed his counsel to bring the application for the recusal of the first respondent which application was refused. Secondly, that the crime with which he was charge is alleged to have been committed in the Pretoria Magistrate Office and as a well-known figure in that court, the matter was to be heard in the Pretoria North Magistrate Court. This is untenable because the first respondent started in Pretoria as a prosecutor, a district court magistrate and regional court magistrate. The first respondent knew him when he acted in these capacities. Thirdly, that the oath was not administered properly and in accordance with the provisions of section 162 of the Criminal Procedure

Act, 51 of 1977 rendering the evidence tendered before the court as hearsay and inadmissible.

- [7] Further, in support of its case, the applicant filed the affidavit of Advocate Petrus Frederik Pistorius which testified that the first respondent agreed to recuse himself in another matter wherein Advocate Pistorius was involved for being found in possession of photographs of the docket and discussing a police docket with the prosecutor in the prosecutor's office.
- [8] The first respondent admitted in his testimony that the photograph depicts him looking at a police docket in the tea room but denied that he was reading it. He stated that the docket had nothing to do with the applicant or its case. It was irrelevant to the case of the applicant. He was approached by one of the prosecutors to assist him with the assessment of a number of dockets which were in relation to dagga charges. He only read the first page of one of those dockets and the charges were later withdrawn in those matters. The junior prosecutor approached him for they know each other as they attend the same church. He did recuse himself in the case of Advocate Pistorius who found him in the office of the prosecutor. However, he stated that he went to the office of the prosecutor because they were not answering the phone when he called. He was then given the photographs by the prosecutor and at that moment Adv Pistorius entered the office.
- [9] It is a trite principle of our law that courts must be independent and subject only to the Constitution and to the law, which judges must apply impartially and without fear, favour or prejudice. It is an accepted principle of our law that where the judge is actually biased or has a clear conflict of interest or where a reasonable person, in possession of the facts, would harbour a reasonable apprehension that the judge is biased, the judge is disqualified to preside over that matter.
- [10] Section 34 of the Constitution of the Republic of South Africa Act, 108 of 1996 provides the following:

“Access to courts

Everyone 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, where appropriate, another independent and impartial tribunal or forum.”

- [11] The test to be applied in an application for the recusal of the judge or presiding officer on the grounds of apprehension of bias was laid in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* [1999] ZACC 9; 1999 (4) SA 147 (CC) where the Constitutional Court stated the following:

“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.”

[12] In *Dube & Others v The State* (523/07) [2009] ZSCA 28; 2009 (2) SACR 99 (SCA) the Supreme Court of Appeal stated the following:

‘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 time. 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 of apprehension of bias – the question of what is proper will depend on the circumstances of each case.’

[13] It is apposite at this stage to refer to the first page of the record of the proceedings in the criminal court on the 10th of December 2009 when the case was postponed for hearing on the 2nd of March 2010:

“The Prosecutor: there is just one aspect your worship that the state would like the or request the court to inquire from the accused I have also taken it up with Advocate Coetzee this morning when I have contacted him telephonically whether accused before court has any objection to the Presiding Officer in this matter as well as the prosecutor or any other court personnel that will be assisting us on that day with this trial.

It is placed in front of Regional Court 3 as we are trying to accommodate Mr Phenya to finalise this matter as soon as possible. He also expressed that he would like this matter to be finalised as soon as possible. we can accommodate him in March but that is my request your worship that we just formally inquire from Mr Phenya as to whether he has got an objection as the court pleases.

Mr Phenya: Thank you worship. First and foremost I have no objection with the constitution of the personnel of this court as mentioned by the prosecutor and secondly I also have no objection to the postponement of this case, however I need make mention that today is my tenth appearance.”

[14] In terms of the record, the applicant was given an opportunity to object to the constitution of the Court at the beginning of the trial and he did not have any objection at that time. Although a point was raised that the applicant is well known in the Pretoria Magistrate Court and that a neutral magistrate should have been brought from outside Pretoria to hear his

matter, it is my respectful view that there is no merit in this argument for the applicant was given an opportunity to object to the constitution of the court but emphatically stated that he has no objection. It is absurd to raise this point at this stage when it was dealt with in the beginning.

[15] I find myself in disagreement with counsel for the applicant that once a litigant has the apprehension of bias on the part of the presiding officer, he is disqualified to hear the matter. The authorities are clear that the apprehension of bias must be based on reasonable grounds and on correct facts. The applicant did not disclose who took the photograph of the first respondent reading the docket and when was it taken. He did not know which docket was being read by the first respondent on the photograph.

[16] I am unable to disagree with counsel for the applicant that the applicant is a senior interpreter who knows very well if the

magistrate conducts himself unethically. The applicant does not raise an issue of bias on the part of the first respondent with regard to his trial up to his conviction. It only refers to a photograph depicting the first respondent reading a docket which it discovered after its trial on the merits was concluded. He does not say that the first respondent was reading his docket. It is the testimony of the first respondent and the prosecutor Mr Buchling (Buchling), that the docket related to a dagga case which was brought before the district magistrate. There were 17 of such cases and Mr Buchling requested advice from the first respondent as to whether there was any merit in those cases. Nothing turns on the testimony of Advocate Pistorius since the facts in that case are not similar to the present case.

[17] If one has regard to the principles and criteria set out in *Stellenbosch Farmers' Winery Group Ltd and another v Martel et Cie & others* 2003 (1) SA 11 (SCA) para 5, and especially the unchallenged evidence of the first respondent and Buchling, and the record of events that the first respondent was in possession or read a docket during July 2013 when the trial on the merits of the matter was concluded on the 31st of October 2012 when it was postponed for argument, the probabilities are that, indeed that docket was of no relevance to case of the applicant. It is my considered view therefore that the apprehension of bias in this instance is unreasonable and not based on any objective and correct facts but is just illusory.

[18] As stated in the President's case referred to above that 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 applicant has dismally failed to establish any reasonable ground for his apprehension of bias on the part of the first respondent. Put differently, the applicant has failed to pass the muster as set out in the President's case referred to above. It is my respectful view that a reasonable senior interpreter in the position of the applicant would not have formed the apprehension of bias under the circumstances of this case and therefore the application for

review and the ancillary orders sought falls to be dismissed.

[19] It is disturbing to note that the applicant has been released on warning after having been convicted on such a serious offence for which the legislature has deemed it fit to promulgate a minimum sentence. It is equally disturbing to note that it took the applicant over five (5) years to enrol the review application for hearing when at the beginning of trial he was eager to have this matter finalised as soon as possible. This is unacceptable when one considers not only the rights of the applicant to equal treatment before the law but most importantly the rights of the victim of the crime and the society at large. The victim has been waiting for justice for the past ten (10) years and to her justice has not been seen to be done. This makes a mockery of the justice system and creates the impression in the minds of ordinary people that some are more equal than others before the law and that cannot be correct.

[20] As state above, it is a principle of our law that justice delayed is justice denied. I am of the view therefore that this judgment must be brought to the attention of the National Director of Public Prosecutions who should consider urgently enrolling the matter to reconsider the issue of releasing the applicant on warning. Further, to enrol this matter urgently in the magistrate court to commence sentencing proceedings.

[21] In the circumstances, I make the following order:

I. The application for review is dismissed;

II. The matter is to be referred to the National Director of Public Prosecutions for reconsideration of the release of the applicant on warning, within 14 days from the date of this order;

III. The National Director of Public Prosecutions to urgently enrol the matter for sentencing proceedings.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree

MATSEMELA AJ

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, GAUTENG LOCAL DIVISION

Date of hearing: 11 October 2018

Date of Judgment: 29 October 2018

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