

SOUTH AFRICA / JUDGMENT

Rolf v Cupido and Another (714/2024; SH 61/2021) [2025] ZAMPMHC 18 (27 January 2025) [2025] ZAMPMHC 18

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

714/2024; SH 61/2021

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FLYNOTES:

PROFESSION – Magistrate – Recusal –
Criminal
trial for alleged sexual offences where victim a minor –
Postponement refused – Sought for preparation
of expert
witness and to obtain transcribed record – Such refusal an
irregularity and set aside – Alleged pressure
on magistrate
to conclude part-heard matters not leading to conclusion of bias –
That magistrate also practising as
attorney cannot alone cannot
disqualify magistrate – Application to review magistrate's
refusal to recuse himself
dismissed.
IN
THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA
DIVISION (MIDDELBURG LOCAL SEAT)
Case number: 714/2024
Court case number: SH 61/2021
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED
DATE
27 January 2025

SIGNATURE

In

the matter between:

JACOBUS

ADRIAAN ROLF

APPLICANT

AND

MR

GRAHAM CUPIDO, ACTING REGIONAL

FIRST RESPONDENT

COURT

MAGISTRATE, SECUNDA

THE

DIRECTOR OF PROSECUTIONS

SECOND RESPONDENT

JUDGMENT

CORAM: LANGA J

Introduction

[1] This is an application for the review of the Magistrates decision to refuse an application for his recusal from the Applicant's criminal trial held in the Secunda Regional Court under Case number SH61/2021. Part A of the application was heard on 21 February 2024 and the court made an order that the criminal proceedings in Case SH61/2021 Secunda Regional Court be postponed to 5 October 2024 pending the finalisation of Part B of the application. This present application before court is the Part B.

[2] The relief sought in Part B is that the First Respondent's decision to refuse an application for his recusal from the Applicant's criminal trial in the Regional Court held at Secunda under case number SH61/2021 be reviewed and corrected, alternatively set aside, and that it be ordered that the criminal trial start de novo. The First Respondent is the Acting Regional Magistrate Mr Graham Cupido, and the Second Respondent is the Director of Public Prosecutions,

Mbombela. For ease of reference the Applicant and Second Respondent will be referred to as cited while the First Respondent will be referred to interchangeably as the Magistrate or Presiding Magistrate.

Brief Facts

[3] This Applicant is charged with several counts under Criminal Law Amendment Act, 32 of 2007, colloquially known as the Sexual Offences Act. The charges involve a minor child who for the sake of privacy and protection I will only refer JM vd M born on 22/01/2009. All the charges were allegedly committed on 20 October 2019 when the victim was about 10 years of age. The accused (Applicant) pleaded not guilty to all the charges and alternatives thereto.

The State led evidence and closed its case. Before the accused could testify and call witnesses, he requested a postponement of the case, ostensibly for the preparation of the expert witness and to obtain the transcribed record for that purpose. The application for postponement was refused by the presiding Magistrate. The refusal to postpone eventually led to the application for the recusal of the presiding Magistrate which was also refused. The Applicant then brought an urgent application for the review of the Magistrate's refusal to recuse himself. As stated above the relief in terms of Part A of the application was granted in terms of which the matter was postponed to 5 September 2024 pending the outcome of the relief sought in Part B thereof.

Condonation application re the supplementary answering affidavit

- [4] In the application concerning Part B the Second Respondent brought an application for condonation of the late filing of the supplementary affidavit. It is common cause that after the order of 21 February 2024 in respect of Part A was made, the parties also completed the Form B in terms of the Practice Directives in terms of which they agreed that they shall file supplementary affidavits. The Applicant was to file the supplementary founding affidavit by not later than 29 March 2024 and the Second Respondent by not later than 19 April 2024.
- [5] The Applicant duly filed the supplementary affidavit before the due date whereas the Second Respondent did not comply with the Case Management order and only filed the supplementary answering affidavit on 15 May
2024. Having filed the affidavit late, the Second Respondent brought a substantive application for the condonation of the late filing of the supplementary answering affidavit around 14 May 2024. The Applicant opposed the condonation application. In the founding affidavit to the condonation application the Second Respondent explained the reasons for the delay as inter alia the short staffing office of the Director of Public Prosecutions and the consequent absence of the advocate assigned the matter.
- [6] Senior Advocate Maoke explained that she only became aware of the order to file the supplementary affidavit on 10 May 2024 and requested Advocate Horak to prepare the affidavit. Advocate Maoke further explained that the matter had initially been assigned to Advocate Lusenga who was also assigned other criminal court duties at the same time and was at the time out of office on circuit because the office was short staffed. He could therefore not attend to the filing of the affidavit in time. The supplementary answering affidavit and the transcribed record was as a result only made available on 14 May 2024. Advocate Maoke further requested that the late filing of the affidavit be condoned as it will enable the court to have a full picture for the determination of the matter.

- [7] In opposing the condonation application, the Applicant argued that the application be dismissed as the Second Respondent did not give a full explanation for the delay from 26 March 2024 when the Applicant's supplementary application was filed and the 15 May 2024 when the Respondent's supplementary affidavit was filed. The Applicant argued that the Respondent's supplementary answering affidavit was filed 25 days out of time as it was supposed to be filed on or before 19 April 2024.
- [8] The Applicant argued further that the application for condonation says nothing about the requirement of good cause and the prospects of success in the main application. The Applicant contends therefore that the Second Respondent has failed to comply with the requirements relating to condonation. Relying on *inter alia* the MEC for Health, Eastern Cape v Kirkland Investments t/a Eye Lazer Institute 2014
- (3) SA 481 (CC) the Applicant submitted that the Second Respondent has failed to make out a case for condonation.
- [9] It is trite that in order to succeed with a condonation application, a party must give a full and detailed explanation of the causes of the delay and their effects so as to enable a Court to understand clearly the reasons and to assess the responsibility. As stated in *Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)*, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must
- be spelled out.
- [10] In *Kirland, supra*, the court held that there is a (higher) duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. It held that as the Constitution's primary agent, Government must do right, and it must do it properly.
- [11] As stated above the gist of the condonation application is that Advocate Lusenga, to whom the matter had been allocated, was out of the office from 15 April to 17 May 2024. It is further stated that the matter could not be dealt with by anyone as the office of the DPP is understaffed. Advocate Keen-Horak who eventually filed the Supplementary Answering Affidavit stated that she had to first obtain the transcribed record in order to respond properly to the application hence it became necessary for the parties to file supplementary affidavits. It was only after she received the transcribed record that she was able to attend to and file the affidavit on 13 May 2024.
- [12] Although the Applicant contended that no explanation was advanced by the Second Respondent regarding what happened from the filing of the supplementary founding affidavit until 15 April 2024, this is not entirely correct as the Second Respondent did explain the cause of the delay as stated above. The question should be whether the explanation is satisfactory in the circumstances.

- [13] Ms Maoke's explanation that the cause of the delay is that the Advocate who was assigned the matter was out of office dealing with trials enrolled for 15 April 2024 to 17 May 2024 could not be disputed. Likewise, it was not disputed that the office of the DPP is understaffed. The understaffing of some crucial State departments is a reality. Further Advocate Maoke's explanation that as the responsible Senior Advocate she only became aware that the Supplementary Answering Affidavit was due on 10 May 2024 was uncontested. I accept her explanation that upon becoming aware thereof she immediately requested Advocate Keen-Horak to attend to the matter and this was done. The affidavit in question and the transcribed record were received by her office on 13 and 14 May 2024 respectively.
- [14] Concerning good cause she submitted that considering that the matter involves a minor child and that the office of the DPP is understaffed, it will be in the interest of justice for the condonation to be granted.
- [15] It is trite that in determining whether good cause has been established a court retains a wide discretion. In the exercise of this discretion the court will ordinarily consider various factors inter alia the non-compliance and the reasons therefore, the merits or demerits of the parties' cases etc. While it is evident that the Second Respondent could have dealt with the matter of condonation in a much more adept manner than it did, it cannot in my opinion be concluded that the circumstances justify the dismissal of the application for condonation. While the Applicant opposed the application for condonation, the Applicant however also recognised that it may be in the interest of justice that the issues pertaining to the merits be fully ventilated.
- [16] In my view there is merit in the reasons raised by the Second Respondent which if considered in the prism of the interest of justice, justify the granting of the application for condonation. Although it was not pertinently so stated in the Second Respondent's papers, it is nevertheless clear from the reading thereof that the Second Respondent has prospects of succeeding in its opposition of the application for recusal. In the premise the application for condonation is granted.

Recusal: The applicable legal principles

- [17] I must start by reference to the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999(4) SA 147 (CC) in which the Constitutional Court formulated the test for 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. It held further that the reasonableness must be assessed in the light of the oath of office taken by the judges to administer justice without fear 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 rescue 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 rescue 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 and will not be impartial.

[18] In the earlier case of *S v Roberts* 1999 (2) SACR 243 (SCA) the Supreme Court of Appeal held the following to be the requirements for the test of judicial bias:

- (1) there must be suspicion that judicial officer might, not would, be biased;
- (2) the suspicion must be that of reasonable person in position of accused or litigant;
- (3) the suspicion must be based on reasonable grounds;
- (4) the suspicion is one which a reasonable person referred to would, not might, have.

[19] Taking the cue from the SARFU case above, the Supreme Court of Appeal in *S v Shackell* 2001 (4) SA 1 (SCA), made the following holding in respect of the test at paragraphs 19 – 22.

[19] The approach thus formulated in the SARFU-case was refined in the SACCAWU-case. I do not propose to restate all the principles that were articulated by the Constitutional Court in those two cases. I will only highlight those that are of particular relevance in this matter. First, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge will not be impartial.

[20] Secondly, the test is an objective one. The requirement is described in the SARFU and SACCAWU cases as one of “double reasonableness”. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal, but the applicant 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.

[21] Thirdly, there is a built in presumption that, particularly since judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus to rebut the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ in the SACCAWU-case (par 15) the purpose of formulating the test as one of “double-reasonableness” is to emphasise the weight of the burden resting on the appellant for recusal.

[22] Fourthly, what is required of a judge is judicial impartiality and not complete neutrality. It is accepted that judges are human and that they bring their life experiences to the bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.

[20] In *Sager v Smith* 2001 (3) SA 1004 (SCA) the Supreme Court of Appeal held as follows regarding the test for bias. ‘

“The test to be applied is an objective one, requiring not only that the person apprehending the bias must be a reasonable person but also that the complaint must be reasonable. See S v Roberts loc cit. This two-fold feature of the required objective standard has been described in SARFU and SACCAWU as the double requirement of reasonableness. In SACCAWU it was said the double reasonableness requirement highlights the fact that mere apprehension on the part of a litigant that a judge will be biased

- even a strongly and honestly felt anxiety - is not enough. See paras

[14] and [16]. The statement in the judgment of the court a quo that “[t]he existence of such suspicion is a matter of subjective perception by the complainant party” is accordingly contrary to the principles laid down in the above cases, requiring that the apprehension must be that of a reasonable person.

[21] In *Bernert v Absa Bank Ltd* (CCT 37/10) [2010] ZACC 28 the Constitutional Court also dealt with the test for recusal and stated the following:

30. “What must be stressed here is that which this Court has stressed before: the presumption of impartiality and the double-requirement of reasonableness. The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This

presumption must be understood in the context of the oath of office that judicial officers are required to take as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law “impartially

and without fear, favour or prejudice.” Their oath of office requires them to “administer justice to all persons

alike without fear, favour or prejudice, in accordance with the Constitution and the law.” And the requirement of impartiality is also implicit, if not explicit, in section 34 of the Constitution which guarantees the right to have disputes decided “in

a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” This presumption

therefore flows directly from the Constitution.

31. As is apparent from the Constitution, the very nature of the judicial function requires judicial officers to be impartial. Therefore, the authority of the judicial process depends upon the presumption of impartiality. As Blackstone aptly observed, “[t]he law will not suppose a possibility of bias or favour in a judge, who [has] already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.” And as this Court observed in *SARFU II*, judicial officers, through their training and experience, have the ability to carry out their oath of office and it “must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions.” Hence

the presumption of impartiality.

32. But as this Court pointed out in both SARFU II and SACCAWU, this presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased.
33. The other aspect to emphasise is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable. As we pointed out in SACCAWU, “the two-fold emphasis . . . serve[s] to underscore the weight of the burden resting on a person alleging judicial bias or its appearance.” This double-requirement of reasonableness 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, in all the circumstances, a reasonable one.
35. The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, “[j]udges do not choose their cases; and litigants do not choose their judges.” An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias.
36. But equally true, it is plain from our Constitution that “an impartial Judge is a fundamental prerequisite for a fair trial”. Therefore, a judicial officer should not hesitate to recuse himself or herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial. In a case of doubt, it will ordinarily be prudent for a judicial officer to recuse himself or herself in order to avoid the inconvenience that could result if, on appeal, the appeal court takes a different view on the issue of recusal. But, as the High Court of Australia warns:

“[I]f the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.”

37. Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court and, on the other hand, the pre-eminent value of public confidence in the impartial adjudication of disputes. As we said in SACCWU, in striking the balance, a court must bear in mind that it is “as wrong to yield to a tenuous or frivolous objection’ as it is ‘to ignore an objection of substance’.” This balancing process must, in the main, be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires.

[22] It is trite that the independence and impartiality of a judicial officer is crucial in the administration of justice. As in the case of bias the test for impartiality is objective and involves the reasonable man. The applicant in a recusal application bears the onus of establishing bias and/or reasonable apprehension of bias. Based on the above it is clear that the test is an objective one and involves an enquiry whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge will not be impartial. Furthermore, the apprehension that the judge will not be impartial must be that of a reasonable person in the position of the litigant and must be based on reasonable grounds. See *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Limited Seafoods Division Fish Processing* 2003 (3) SA 705 (CC). The suspicion itself must be one which a reasonable person would, and not might, have.

Discussion and analysis. Application for recusal

[23] Having dealt with the relevant principles, I now turn to the facts of the present matter. Although in the heads of argument the argument is structured differently, it is however clear from the founding affidavit what the grounds relied on by the Applicant are. These can be categorised as follows:

1. Conduct of the Magistrate in court;
2. Conduct of the Magistrate outside court;

Conduct of the Magistrate in court

[24] Under this heading the Applicant first takes issues with the events of the 29 November 2023 when he requested a postponement in order to obtain the transcript of the record for the purposes of consultation with the expert witness. It is common cause that the State did not address court on the application or object thereto. The Magistrate was, however, not happy with the postponement and also questioned why the defence wanted to start with the evidence of the expert and not that of the accused as is common practice. He then postponed the matter to 06 February 2024.

[25] On 06 February 2024 the Applicant had not yet obtained the transcript and consequently not yet consulted with the expert. He again requested a postponement of the matter. The Magistrate this time refused the postponement because he was of the view that the matter

had been delayed on many occasions previously by postponements. This resulted in the withdrawal by the Applicant's attorney of record who was of the view that he could not properly represent the Applicant unless provided with the transcript. As a result of the withdrawal the Applicant requested a postponement in order to engage the services of another attorney and the matter was consequently postponed to 12 February 2024. He appointed a new attorney and on 7 February 2024 the transcript in the meantime was received. The Applicant consulted with the new attorneys on 9 February 2024 and instructed them to bring an application for the recusal of the Magistrate. That application was heard on 13 February 2024 and the application for recusal was dismissed.

[26] Although the Applicant relies on a number of grounds, in the main he contends that that undue pressure was placed on the presiding Magistrate by the Department and his superiors to finalise all the part heard matters by 29 February 2024. The Applicant contends that it is this pressure that caused the Magistrate to commit certain irregularities which showed bias by the Magistrate towards the Applicant. The Applicant alleges further that this pressure unduly influenced the decisions by the Magistrate to the detriment and prejudice of the Applicant.

[27] However the main trigger event relied on by the Applicant seems to be the refusal by the Magistrate of the Applicant's application for postponement of the matter for the purposes of obtaining transcripts in order to prepare for the expert witness. The Applicant contends that it because of this bias on the part of the presiding Magistrate, that even though the State did not object to the request for the postponement, the postponement was still refused.

[28] The Applicant refers to and relies in this regard on a passage from the Magistrate's decision where he states the following:

"Firstly, that I have stressed much time that this matter must all efforts or all possible must be done to finalise this matter because it cost the state tens of thousands of rands to have me here in order to finalise the matter.

And also, when I indicated to the powers that be that is the regional court president who then has to report to the Deputy Minister of Justice in order to decide whether or not they will approve travel to here or my accommodation I was informed that this my part heard matters is too much and I need to consider, or they wanted me to stay here at my own cost. And so much so that I had to give an undertaking to the powers that be that I will finalise my partly heard matters during the course of this month."

[29] The Applicant contends that it became clear from the above that the Magistrate intended to finalise the matter by 29 February 2024, irrespective of the merits or demerits of any application because of the threat that the Magistrate would have to pay for his travelling and accommodation costs. The Applicant contends therefore that inappropriate pressure was exerted on the Magistrate to finalise the case and that it is this pressure which caused the Magistrate to give an undertaking to the Department to finalise all part-heard cases by no later than 29 February 2024. The Applicant alleges that this became the main reason for the

refusal of postponement of the matter for the record to be typed or for giving the Applicant unreasonable time frames to

obtain legal representation. The Applicant therefore asserts that from that point the proceedings were irretrievably poisoned by the gross irregularity and the consequent prejudicial bias towards the Applicant.

- [30] The Applicant further submitted that the delay in the finalisation of the typed record was not his fault but was caused as a result of the delays by the internal court administration. He contends therefore that the Magistrate committed an irregularity by imposing an unreasonably high 'test' in considering the postponement by asking whether there is a 'necessity for the transcripts and by concluding that the lack of the transcripts does not imply that the expert witness of the defence cannot prepare. The Applicant asserts that this unreasonable approach by the Magistrate amounted to the patent interference with both the Applicant's decision to call its expert witness first and also to ensure that its expert witness is properly prepared to testify.
- [31] In addition to this ground, the Applicant further alleges that the Magistrate attempted to interfere with the sequence in which the Applicant intended presenting his evidence. He further links the fact that the Magistrate conducted private practice as an attorney and his taking of instructions post 29 February 2024.
- [32] Upon considering these facts, there can be no doubt that the request by the legal representative to have the matter postponed for the transcribed record was not unreasonable. Given the history and seriousness of the matter it would have been unreasonable to expect the notes written by someone else, which may sometimes be cryptic, to be sufficient for the purpose of preparing for trial with a new attorney. Considering that it is also not disputed that the Applicant's expert witness indicated that she required the transcribed record of the cross-examination of the State's expert witness, it would not have been reasonable to expect her and the accused to prepare for trial on the basis of these notes.
- [33] Consequently, considering the facts of the case, the request for a postponement was not unreasonable. Although one can understand the frustration that can be caused by such delays in a trial, however considering the circumstances of this particular case, the requests are not enough to justify the refusal of the application for postponement. The refusal of the postponement in my view constitutes an irregularity on the part of the Magistrate.
- [34] Having made this determination I turn to the issue whether this irregularity constitutes bias the part of the presiding Magistrate. Considering the above, I am not satisfied that this irregularity constitutes bias on the part of the of the Magistrate. Although the Applicant contends that the Magistrate lost all impartiality as a result of the threat that he would have to pay for his expenses beyond 29 February 2024, I am however not satisfied that this is supportive of a conclusion of

bias.

- [35] The fact is that the administrative issues relating to the Magistrate's costs were, as correctly contended by the Applicant, irregularly considered by the Magistrate when the issue of postponement was dealt with. This however did not amount to bias, actual or perceived, justifying the recusal of the Magistrate. Therefore, the assertion that undue pressure exerted on the Magistrate vitiated his independence which rendered the conduct of the trial unfair cannot be sustained. What can be sustained though is that the refusal of the postponement is a wrong decision which should be tempered with.

Conduct of the Magistrate outside court

- [36] Under this heading the Applicant apparently takes issue with the fact that that the Magistrate practices as an attorney, accepts instructions from and consults with the members of the public while he is acting as a Magistrate. He alleges further that on 6 February 2024 the Magistrate accepted instructions from one Mr Johnstone in a matter between the said Mr Johnstone and his attorneys of record, Jordan Coetzer Attorneys. In addition, the Applicant avers that the Magistrate also represented one Mr Steyn in a matter involving another client of his attorneys of record, one Ms Sindy van der Merwe. He states that he is therefore "concerned about the First Respondent's personal interest in matters, bias, prejudice or a conflict of interest as the First Respondent became indirectly a party to proceedings where my attorneys are representing themselves and other clients." The Applicant states that he is of the view that the Magistrate's involvement in these matters involving his attorneys of record is a matter of concern.

- [37] Paragraph 7.7 of his founding affidavit is telling and reveals the real purpose of this review application. It states the following:

"The purpose of this review application is to ensure that, although being brought before the finalization of the trial, I am given a fair and objective trial, free from bias, and that this Honourable Court orders the First Respondent to rescues himself from my trial. It is evident that the First Respondent did not take kind my attorney referring to the First Respondent's actions and behaviour as biased." (my underlining).

- [38] He further states that the Magistrate may be contravening the South African Legal Practice's Code of Conduct as he is practicing as an attorney whilst also acting as a Regional Magistrate. The Applicant contends that for this reason as well, the Magistrate should have recused himself. Further the Applicant complains that the Magistrate consults as an attorney with the members of the public at coffee shop and not the address where he purports to practice from as indicated in his letter head.
- [39] It is not clear to me on what basis the alleged Magistrate's conduct out of court could have given rise to bias or a perception of bias. Firstly, the fact that the Magistrate acted as such while he also had an attorney's practice does not per se disqualify him from acting as a Magistrate. It is needless to say that many attorneys and advocates act as magistrates and

judges for that matter whilst still practicing as legal representatives. Unless there is a conflict of interest, this fact alone cannot disqualify the Magistrate from hearing the Applicant's case. This complaint therefore has no merit and ought to be dismissed.

- [40] Likewise, the complaint that the Magistrate consults as attorney with clients in coffee shops and not the offices he purports to work from is also meritless and should be dismissed. The Applicant did not establish how this could give rise to bias on the part of the Magistrate. Similarly, the purported concern by the Applicant concerning the fact that the Magistrate was representing clients in matters involving his attorneys of record, there appears to be no reason to find that this could have resulted in a conflict of interest or bias on the part of the Magistrate in dealing with the Applicant's case. Other than saying the Magistrate was involved in these cases the Applicant does not give reasons why he believes that the Magistrate is biased or would be biased and not give him a fair trial. To simply allege that the Magistrate "did not take kindly to my attorney referring to the First Respondent's actions and behaviour as biased." is not sufficient to justify a conclusion that there is bias on the part of the Magistrate simply because of his involvement in these

cases. There is no allegation that these cases are in any manner interlinked with that of the Applicant. I am accordingly not satisfied on this score that the Applicant has made out any case for bias in respect of this ground or complaint.

- [41] I am accordingly not satisfied that any case has been made out regarding the Magistrate's conduct out of court and the allegations in this respect are also dismissed. There is simply no substance in these allegations.
- [42] The Applicant makes a bizarre but telling statement that because the charges against him are very serious, should he be convicted, the Magistrate will withdraw his bail pending his sentencing and will refuse him bail pending appeal. All these assertions are apparently based on the Applicant's belief that the Magistrate will incarcerate him for not accepting "his behaviour and biased actions."
- [43] It is clear from the above that the Applicant is making allegations which are not based on any facts. To anticipate what the outcome of the trial would be and to predict that the Magistrate will convict him, revoke his bail and refuse bail pending appeal is, with due respect, a wild and baseless speculation. These claims are hyperbolic and not based on facts. This hyperboly is apparently meant to persuade the court to sympathise with the Applicant in his cause to get an order that the Magistrate's decision not

to recuse himself be reviewed and set aside.

[44] However what the statement reveals is the reason behind the application for the recusal of the Magistrate. These fears are the driving force behind the application for recusal. The Applicant fears that he may be kept in custody in the case of conviction which is not an unreasonable fear. It is one of the possibilities upon his conviction that he may be incarcerated. These fears however cannot be used to support the application for the recusal of the Magistrate in the context of this case.

Conclusion

[45] In the light of the above I am not satisfied that both inside and outside court the Magistrate's conduct justified an order that he recuse himself. However, although the refusal to postpone the matter was incorrect and cannot be confirmed, the facts and circumstances do not justify the recusal of the Magistrate. In the circumstances the Magistrate ought to proceed with the matter which is already at an advanced stage.

Costs

[46] As regards the costs, although the main application is unsuccessful, it is however clear that the Presiding Magistrate's irregular conduct precipitated the application. As stated above the refusal of the application for a postponement was irregular. The Applicant has therefore partially succeeded. On the basis of this partial success, I am satisfied that the Applicant is entitled to the costs of the application.

Order

[47] In the result the following order is made:

1. The application to review and set aside the Magistrate's refusal to recuse himself is dismissed;
2. The decision by the Magistrate refusing the postponement of the matter for the purposes of obtaining the transcribed record and for consultation by the defence is hereby set aside;
3. It is ordered that the criminal trial in Case SH61/2021 shall proceed before the Magistrate (First Respondent);
4. The party and party costs of the application are awarded to the applicant on Scale A in terms of Rule 67A.

MBG LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG

Appearances

For the Applicant: Advocate R Groenewald For the First Respondent: No Appearance For the Second Respondent: Advocate JJ Lusenga Date of hearing: 05 September 2024 Date of judgment: 27 January 2025

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rolf-v-cupido-and-others-unknown-topic-ampmhc-2025--6a3ea51f3b1caa9129815911>

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