SOUTH AFRICA / JUDGMENT

S v Moloi (R159/2019, A3/19) [2019] ZAFSHC 211 (17 October 2019)

[2019] ZAFSHC 211

COURT
Free State High Court, Bloemfontein

BEFORE
Naidoo, Ramlal

CASE / FILE NUMBER
R159/2019, A3/19

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Review No: R159/2019

Magistrates Court Case No: A3/19

In the review between:

THE STATE

versus

BAKILE JUNELL MOLOI

Accused

CORAM:

NAIDOO J et RAMLAL, AJ

JUDGMENT:

NAIDOO, J

DELIVERED ON: 17 OCTOBER 2019

REVIEW JUDGMENT

[1] This matter was referred to us by the Regional Court, Bethlehem, in terms of section 116(3) of the Criminal Procedure Act 51 of 1977 (the CPA), with the request to set aside the conviction imposed on the accused and order that the trial commence de novo before another magistrate. The accused was charged with one count of Assault with Intent to do Grievous Bodily Harm in the Magistrates Court, Lindley. He pleaded not guilty and the trial commenced on 15 April

2019. The accused was found guilty and the trial court thereafter stopped the proceedings on 29 April 2019 and referred the matter to the Regional Court for sentence to be imposed on the accused. The accused was legally represented in the trial court.

[2] After some delay in obtaining the typed record, the matter was finally received by the Regional Court. On 21 August 2019, the Regional Court Magistrate who was assigned to deal with the matter, addressed a letter to the trial magistrate in the District Court, pointing out to him that:

2.1 the transcript of proceedings was not complete in that there was an application for his recusal on 11 March 2019, but such proceedings were not transcribed;

2.2 he previously convicted and sentenced the accused for a similar offence;

2.3 he heard the bail application in this matter, in which the accused made full disclosure of his previous convictions, and that he was, additionally, addressed on the merits of the matter.

The Regional Court Magistrate expressed doubt that the proceedings were in accordance with justice and posed the question whether it was not appropriate for the trial magistrate to have recused himself from the trial.

[3] The trial magistrate responded on 16 September 2019, inter alia, as follows:

3.1 With regard to the missing portion of the transcript, he enquired from the court clerk responsible for operating the court recording machine, but the latter was not able to say why there was no recording. The Magistrate made no notes and has no further information in this regard. He accepts that the reason the accused applied for his recusal is that he had convicted the accused in all the Lindley cases reflected on the accused's SAP 69 form on which the previous convictions are recorded;

3.2 He conceded that the accused's previous convictions were recorded in his affidavit filed in support of his bail application. The magistrate also agreed that it would have been more appropriate if another magistrate conducted the trial (in this matter);

3.3 He indicated that he is aware that he ought not to take into account previous convictions or any address on the merits in a bail application when handing down judgment, and he alleges that he did not do so.

Other matters also referred to by the magistrate include the assertion that he is at a one-man station and deals with all the criminals in the area. As such, he would require another magistrate to preside in his court every day in order to hear trials. He asserts that this is impractical, and he was asked not to lightly recuse himself in respect of trial matters. I intend referring this matter to the Judge President of this Division, to enable him to pursue the matter through the appropriate channels.

[4] It is well established in our law that in deciding a matter where the recusal of the presiding officer has been sought, the test to be applied is an objective one. It requires not only that the person apprehending the bias must be a reasonable person but also that the complaint must be reasonable. See Sager v Smith 2001(3) SA 1004 (SCA), where the court cited with approval the dictum of the Constitutional Court in President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1999] ZACC 9; 1999

(4) SA 147 (CC), where the latter court, at paragraph [48], formulated the correct approach to an application for recusal thus:

"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."

The court in Sager further held, at para [15] that what applies in respect of a Judge applies equally to a magistrate.

[5] Where a formal bail application is heard in accordance with section 60 of the CPA, the presiding officer will ordinarily be disqualified from presiding in the subsequent trial. The reason for this is that in the course of such a bail application, numerous factors, such as the accused person's previous convictions, matters pending against him, as well as the merits of the matter are canvassed and placed on record, as is peremptory in terms of section 60. In that event, the presiding officer would have gained the kind of knowledge that may well be regarded as compromising the accused's constitutionally protected right to a fair trial. [See S v Booysen 2016(1) SACR 521 (ECG); S v Nkuna 2013(2) SACR 541 (GNP) and S v Bruinders 2012(1) SACR 25 (WCC)]

[6] In the present matter, the magistrate presided in the bail application where he was privy not only to the previous convictions of the accused, but also to the merits of the matter. He nevertheless proceeded to preside in the trial. He conceded that there was an application for

his recusal, which he dismissed. The magistrate asserts that the grounds for the application are that he previously convicted the accused on all the offences reflected in the SAP 69 form (being the record of the accused's previous convictions). The accused was sentenced to a term of imprisonment in one of those matters, in respect of which he was released on parole, and committed the current offence whilst on parole. A perusal of the SAP 69 form reveals that the accused was convicted eight times by the same magistrate (who asserts that he has been stationed at the Lindley court since 1991), albeit that some of those matters involved the payment of an admission of guilt fine. The convictions cover the period from June 2006 to August 2018. The magistrate also conceded that it would have been more appropriate for another magistrate to have presided in the trial.

[7] It would appear to me that this is eminently a matter where, objectively, the apprehension of bias on the part of the accused was

reasonable and well grounded. In as much as the magistrate asserts that he did not take the previous convictions or the merits of the matter into account when he convicted the accused, the consideration is whether a reasonable apprehension was created in the mind of the accused that he would not receive a fair trial. The circumstances I have outlined above, in my view, indicated reasonable and acceptable grounds for the magistrate to have been disqualified from hearing the trial of this matter. His concession in this regard fortifies my view. I also find that the magistrate's refusal to recuse himself tainted the proceedings, and vitiated same, necessitating the setting aside of the conviction in this matter. I am of the view that the Prosecuting Authority is at liberty to decide whether it wishes to institute proceedings against the accused again. For this reason, I refrain from ordering that the trial commence de novo.

[8] In the circumstances, the following order is made:

8.1 The conviction in this matter is set aside.

8.2 This judgment together with the following annexures are to be brought to the attention of the Judge President of this Division:

8.2.1 The SAP 69 form

8.2.2 The letter from the Regional Magistrate, Mr Van Niekerk to the Magistrate, Mr Labuschagne, dated 21 August 2019

8.2.3 Mr Labuschagne's response thereto, dated 16 September 2019.

S. NAIDOO, J

I agree.

A RAMLAL, AJ

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://www.saflii.org/za/cases/ZAFSHC/2019/211.html
CASE PAGE	https://chat.esheria.ai/case-law/south-africa/s-v-moloi-unknown-topic-afshc-2019

Prepared on 9 October 2026 · Esheria