

SOUTH AFRICA / JUDGMENT

S v Regional Court President and Another (M 475/2019) [2020] ZANWHC 80 (22 October 2020)

[2020] ZANWHC 80

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, H Scholtz

CASE / FILE NUMBER

M 475/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

Case

Number: M 475/2019

In

the matter between:

THE
STATE
Applicant
and
THE
REGIONAL COURT PRESIDENT
First
Respondent
JESSY
RAKOMA
Second
Respondent
HENDRICKS
DJP & SCOLTZ AJ
DATE
OF HEARING
:
18 SEPTEMBER 2020
DATE
OF JUDGMENT

:
22 OCTOBER 2020
COUNSEL
FOR APPLICANT
:
ADV. MAEMA
COUNSEL
FOR RESPONDENTS
:
ADV. ADV. SKIBI
ORDER
Consequently,

the following order is
made:

- (i)
The
application is dismissed.
- (ii)
The
recusal of Regional Magistrate Ms Juries, is confirmed.
- (iii)
The
trial should start de
novo
before another Regional Magistrate other than Ms. Juries.

JUDGMENT

HENDRICKS DJP

[1] Ms. Jessy Rakoma, the 2nd respondent, was arraigned before the Regional Court, Mmabatho facing charges of fraud and corruption. The trial commenced on 19th March 2012. She pleaded not guilty and several witnesses testified on behalf of the State. She was legally represented by an attorney, Mr.

Mookeletsi, who has subsequently passed away midway through the trial. After the demise of Mr. Mookeletsi, other legal representatives received instructions from the 2nd respondent to represent her but not much progress was made with the case. Ultimately Adv. Skibi was appointed by Legal Aid South Africa to represent the 2nd respondent.

[2] A transcribed record of the court proceedings thus far was obtained. The record contains certain inaudible parts and the presiding Regional Magistrate deemed it prudent that the record be reconstructed. The assistance of the prosecutor, Adv. Maema, and the 2nd respondent, was sought. The Regional Magistrate, Ms. Juries, herself also assisted with the reconstruction of the record.

[3] On the 09th March 2017, almost five (5) years after the trial commenced, Adv. Skibi placed on record that the 2nd respondent, his client, can't consent to the reconstruction of the record. According to her, the reconstruction is improper and that prompted Adv. Skibi to apply that the matter be referred to the High Court to give guidance with regard to the record, if the Regional Court cannot

order that the matter should start de novo.

[4] In her ruling, the Regional Magistrate stated the following:

"Advocate whilst you were busy I was also busy with research. I got an indication from a case in this division S v Nqema delivered on 26 April, 2012 by Judge Kgweli and Judge Hendricks where it is stated in paragraph 2 and 3 and I will quote: "it is tried law that if a record is missing and an attempt to reconstruction the record of the proceedings, should be made in accordance with the guidelines played down in S v Joubert [1990] ZASCA 113; 1991 (1) SA 119 (A).

Paragraph .3: "It is further expected in our law that a magistrate is a creature of statute accepted in our law that the magistrate is a creature of statute and can only do what is prescribed by the statute. Consequently the District Court Magistrate or a Regional

Court Magistrate is not empowered by any statute to order the matter to start de novo. Only the High Court has such powers which includes the powers to set aside irregular proceedings."

So I cannot say this matter, order that the matter should start de novo. You will have to take this matter to the High Court Advocate Skibi because we have attempt and your client is not satisfied with my notes as well as Advocate Maima's notes.

So if you are not saying, if you are not requesting me for a recusal I cannot order that this matter start do. novo. That is only one thing that the High Court can do So you and the defence will have to take this to the High Court to decide because we are not done with the reconstruction of the record. We were still busy with... I was not busy with. Advocate Kruger, Advocate Kruger. I was only busy with the two state witnesses from the Department that testified and as I have stated earlier on this morning that the inaudibles that we rectified that was according to my notes and Advocate Maima's notes. And your, client was given an opportunity and if she is still not satisfied then that is upon her to show us where she is saying we made a mistake and according to me I cannot make a mistake when it comes to taking down notes because this is for my own records.

So if she feels that I made a mistake then it is upon her to show me where we made a mistake with the record since we did not even get to Captain Kruger's evidence.

Or I did not assist with the reconstruction of the evidence of Captain Kruger, that was between yourself and Advocate Maima. So at this stage I feel that there is no reason for me to adhere to this application.

So the application for me to make this order is, I am bound by the statute of this province and there is case law to this effect So application DISMISSED."

[5] Thereafter, discussions and deliberations took place between the respective legal representatives and the presiding Regional Magistrate. The matter was adjourned. When the court resumed, Adv. Skibi informed the court that he holds instructions to apply that the presiding Regional Magistrate recuse herself from the matter as there was a perception or apprehension of bias. The court was adjourned until the following day, 10th March 2017.

[6] On 10th March 2017, Adv. Skibi informed the court that it was his instructions to abandon the application for recusal. The 2nd respondent said that she will be present during the reconstruction process although she cannot contribute meaningfully thereto. When the reconstruction process was about to resume, Adv. Skibi read into the record the instructions of the 2nd respondent, which reads thus:

“I, Jessy Rakoma give the following instructions to my advocate to present at court.

- 1) request the court to provide me with audible material regarding my case.
- 2) I will not be able to participate with the reconstruction of the inaudible notes as did not take notes of the proceedings.
- 3) My late attorney, Mr Mogaletsi is not present to assist on this matter as he is late.
- 4) I do not have notes of the late Mr Mogaletsi in order to assist the court with reconstruction of the notes.
- 5) I do not have any problem with the honourable magistrate and state advocate to reconstruct the notes but due to the above/or already

stated issues, I will not endorse anything of the proceedings of the notes reconstruction between the honourable magistrate and the state advocate.

- 6) The currently appointed counsel for me will not be able to reconstruct the notes 'to assist with the reconstruction of the notes as he was not part of the previous court sessions.
- 7) I do not stand against any reconstruction of the notes. I do not oppose any correct or incorrect inaudibles on the (indistinct record

jumping) where the honourable magistrate and the state advocate reconstruct the notes but it must be put on court record that; the following paragraph is paragraph 8.

- 8) I will not endorse whatever that comes out of their reconstructed notes.
- 9) This is what I have given my attorney, Advocate Skibi to put on record.

Signed by the signature of the accused 10 March.”

[7] The Regional Magistrate then said the following:

“Now if Ms Rakoma do not want to endorse this reconstructed record, it is a futile exercise for me. And what it also boils down to is a question of that she is saying that either myself or the notes of Mr Maima is not correct.

And with that I have a problem because already yesterday your client brought an application that I should recuse myself and it was going to be formal this morning.

And then she abandoned that application but the perception that was created was indeed one of that I am biased and case law is clear that justice must be seen to be done and if it seems that there is a perception that the magistrate is biased then it is not in the interest of justice for me to proceed with this case.

I have read *S v Le Grange and Others* 2009 (1) SACR or let me give you the 2009 (2) SA 434 (SCA) I just want to read paragraph 13 and I quote:

“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 to continue to preside after recusal should have

occurred renders the further proceedings annulity.”

... And yesterday after I made a ruling that I cannot ask that this matter should start de novo I cannot that order in the Regional Court based on Ngema's case, you applied for me to recuse myself. You were going to bring a recusal because there was a perception of bias and as I have read to you what is very clear in the case of *Le Grange and Others*, I am of the opinion that in the interest of justice that it will be better for me to recuse myself from this matter and that this matter should start de novo before another magistrate.

This court is adjourned and I am recusing myself.”

[8] On the 14th June 2017 the State, as the applicant, filed a review application. The Notice of Motion reads:

“KINDLY TAKE NOTICE that the Applicant will, as soon as the certified copy of the record of proceedings together with such remarks as the presiding officer may wish to append thereto in accordance with Rule 53 of the Rules of Court, is forwarded to the Registrar of this Honourable court, apply to this Honourable court for an order in the following terms:

1. to have the decision of the learned Regional magistrate (first Respondent) to recuse herself and to order that the trial commence de novo before another Regional magistrate taken on 11 March 20.17, be reviewed and set aside; the Respondents are called upon to show cause why such decision by the Regional Magistrate to recuse herself and to order that the trial start de novo before another Regional magistrate should not be reviewed and corrected or set aside.

2. to direct the Regional Magistrate (first Respondent) to continue with the trial of the second Respondent from the date on which the reconstruction of the inaudible parts of the proceedings were stopped, to continue with the reconstruction of the record in

accordance with the law and in the presence of the second Respondent and her legal representative;

3. to direct the Regional Magistrate (first Respondent) to continue with the trial and hear all the evidence to be presented by all the parties until a verdict is returned in terms of section 106 of the Criminal Procedure Act, 51 of 1977;

4. The grounds for review of such decision are as follows:

4.1 that the magistrate court and/or the Regional court is a creature of statute and can only do what is prescribed by the statute.

Consequently the District court or a Regional court is not empowered by any statute to order that the trial must start de nova. Only the High court has such powers which include the powers to set aside irregular proceedings. The Regional magistrate should have referred the matter to the High court, instead of usurping the powers of the High court by ordering

the trial de novo by herself.

4.2 the Regional magistrate committed an irregularity by recusing herself mero motu when there existed no sound reasons for any apprehension of any bias from any of the parties, it will be argued that the Regional magistrate was influenced by her own transfer to Cape Town and utilized the second Respondent aborted application for recusal as a measure to find a quicker method to have the case finalized.

5. to grant the applicant further and or alternative relief,

[9] The matter was enrolled for 13th December 2019. It was postponed until 13th March 2020 for the filing of heads of argument by both parties. On 13th March 2020 it was postponed to 16th April 2020 for a joinder application to join the Regional Magistrate, Ms Juries. Heads of argument were filed by both parties and the matter was enrolled for 18th September 2020 for hearing. The parties agreed that the matter be decided on the papers, in terms of the Directives issued by the Judge President of this division.

[10] Central to the issues to be decided is whether or not the Regional Magistrate was correct in her ruling that she recuse herself from the case and that the matter should start de novo in front of a different Regional Magistrate. Starting with the last issue first. In her ruling on the 09th March 2017, the Regional Magistrate referred to a judgment of this division in the case of Maxwell Ngema v The State, case no's SOC 117/10 and SOC 124/04, penned by Kgoele J with whom Hendricks J, (as he then was) concurred. It was decided on 12 April 2012. In paragraph [3] of the judgment it is stated:

“[3] It is further accepted in our law that a magistrate is a creature of statute and can only do what is prescribed by the statute. Consequently a district court magistrate or a Regional Court magistrate is not empowered by any statute to order the matter to start de novo. Only the High Court has such powers which includes the powers to set aside irregular proceedings.”

- [11] This judgment was not appealed against and it still stands. It is also trite law that a Magistrate Court (District and Regional) is a creature of statute and as such can only do what is prescribed by the statute. They are not empowered by the statute to order that a matter should start de novo before another Magistrate, either in the District or Regional Court. In as far as this is concerned, the Regional Magistrate was correct to dismiss the application that it be ordered by her (as a Regional Magistrate), that the trial should start de novo before another Regional Magistrate.
- [12] Insofar as the second aspect the recusal is concerned, the Regional Magistrate stated: “... I am of the opinion that in the interest of justice that it will be better for me to recuse myself from this matter and that this matter should start de novo before another Magistrate. This court is adjourned and I am recusing myself.” This illicit much debate from the prosecutor, Adv. Maema.
- [13] It was contended by Adv. Maema that it was improper for the Regional Magistrate to rule on the 09th March 2017 that she cannot order that the matter should start de novo before another Regional Magistrate and then on the very next day, she granted a conflicting order. Emphasis was placed on the following

words of the Regional Magistrate “...that it will be better for me to recuse myself from this matter and that this matter should start de novo before another magistrate.”

- [14] A reading of these words in the proper context that the Regional Magistrate used it, indicate that it was more explanatory in nature than it was meant to be the actual order. The learned Regional Magistrate did not order that the trial should start de novo before another magistrate but rather amplify the rationale why she deemed it prudent and in the interest of justice, to recuse herself. Put differently, the learned Regional Magistrate recused

herself from the matter so that the matter should start de novo before another Regional Magistrate. It is not that she ordered that the matter should start de novo before another magistrate. This merely serve as an explanation. The actual decision is the recusal.

- [15] In her ruling the learned Regional Magistrate quoted from paragraph

- [13] of the judgment of *S v Le Grange and Others* 2009 (2) SA 434 (SCA), in which it 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.¹ 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."

[16] In President of the Republic of South Africa vs South African Rugby Football (SARFU)

[1999] ZACC 9; 1999 (4) SA 147 (CC) at paragraph [48], the following is stated:

"[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."

- [17] Adv. Maema contended that it should be ordered that the Regional Magistrate's recusal is unlawful and must be set aside. Furthermore, that it must be ordered that she continue with the trial. The bases for this submission, so it was submitted, is the prejudice that will be suffered by the State, if the trial should start de novo. Witnesses that have testified will not

be easily traced and might not be eager to testify all over again. The case for the State is at an advanced stage and it will not be in the interest of justice to allow the Regional Magistrate's recusal and to order a trial de novo.

- [18] The interest of justice in this matter require a very delicate balancing act between two competing interests. On the one hand is the constitutional entrenched right to a fair trial of the accused (2nd respondent) and on the other hand the fairness to the State witnesses, who have already testified in a trial that started more

than eight (8) years ago. For these state witnesses to be subjected to a fresh trial may well be unfair, but I am inclined to lean more in the favour of the right to a fair trial of the accused (2nd respondent).

- [19] The Regional Magistrate quite correctly stated that justice must not only be done but must be seen to be done. There was the perception or apprehension of bias although the intended application for recusal based on such apprehension of bias was abandoned by the 2nd respondent (accused). The mere fact that it was raised and even placed on record, clearly indicate that there is a perception by the 2nd respondent (accused) that the Regional Magistrate will not bring an impartial mind to bear on the adjudication of this matter. So much more reason for her to recuse herself.

See: *President v SARFU*, supra.

- [20] There are some other aspects that need to be mentioned. Adv. Skibi submitted that it is improper for the prosecutor, Adv. Maema, to bring this application personally. He submitted that it would have been more desirable if someone else in the Office of the Director of Public Prosecutions, North West Province (DPP), would have launched the application. Adv. Maema could then, as he did, depose to the founding affidavit. This, so it was insinuated, create the impression of Adv. Maema being a persecutor rather than a prosecutor. Perhaps it may have been more appropriate if it was done in that way, but it is not at all prohibited that Adv. Maema, as the prosecutor, launched the present review application himself and also depose to the founding affidavit in support thereof.

Although it is undesirable to do it this way, Adv. Maema might have thought that because he has first-hand knowledge of the case, it is in order for him to do it that way.

- [21] Adv. Skibi furthermore allege that Adv. Maema's behaviour is highly unethical to refer in his affidavit to the contents of the discussions and deliberations he had with the presiding Regional Magistrate, which was held in camera and off the record. Allegedly it was intimated by the Regional Magistrate that she took a transfer from Mahikeng in the North West Province to the Western Cape Province and that the Regional Court President of the Western Cape would not be available to let her come back to Mahikeng to finish this case.

- [22] The following is stated by Adv. Maema, in his affidavit:

“11. On 8 March 2017 before the proceedings commenced, the first Respondent had indicated to both Adv Skibi and I in chambers that she has secured a transfer to Cape Town and her new Regional Court President indicated that she must work hard on finalizing her partly heard matters as they may impact on her work at the new station. Travel from the Western Cape to the North West is very far and will involve a number of days away from her new station.

12. It is unusual for reference to be made to in-Chamber discussions with the presiding officer and as the NPA we strive to separate these discussions from our work as much as possible, but the influence of this transfer on the case is just unavoidable, It is my respectful view that this fact influenced the first Respondent in her decision to recuse herself, despite there being no tangible reason advanced for the suspicion of perception of bias. The first Respondent's decision to recuse herself is irrational and without sound foundation and must thus be set aside. The first Respondent went out of her way

to ensure that the second Respondent has a fair trial in assisting her to secure Legal Aid despite all odds, when the legal representatives referred to in paragraph 3 of this affidavit had withdrawn from the proceedings. There exists no legal basis for any possible perception of any kind of bias from the Regional Magistrate.”

[23] Much as Adv. Skibi and the Regional Magistrate did not depose to affidavits to refute these allegations by Adv. Maema, there is merit in the contention of Adv. Skibi. Discussions between presiding officers and legal representatives off the record and in camera should not and be used in subsequent court proceedings. They are said in confidence and are privileged. It is highly unethical to use the contents of such discussions to advance a case for either party. Perhaps presiding officers should be more cautious about what they say and discuss with legal representatives outside court.

[24] I am of the view that the Regional Magistrate was correct in her ruling on the 09th March 2012 that she, as a Regional Magistrate, is not empowered to order that the trial should start de novo. Furthermore, that the ruling on the 10th March 2012 was that she recused herself from presiding further over the trial. As a consequence, the trial should start de novo before another Regional Magistrate. Although this was what she said, it was not that she ordered that the trial should start de novo before another Regional Magistrate, but merely in explanation of what the consequence of her recusal would entail.

Order

[25] Consequently, the following order is made:

- (i) The application is dismissed

R. D. HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree.

H SCHOLTZ

ACTING JUDGE OF THE HIGH COURT

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