

SOUTH AFRICA / JUDGMENT

Sekgobela and Another v NG Pretorius N.O and Another (15/2021) [2021] ZALMPPHC 38 (28 July 2021) [2021] ZALMPPHC 38

COURT

Limpopo High Court, Polokwane

BEFORE

EM Makgoba, LGP Ledwaba

CASE / FILE NUMBER

15/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION,

POLOKWANE)

CASE

NO: REV

15/2021

REGIONAL

COURT CASE NUMBER: 05/2021

REPORTABLE:

YES

OF

INTEREST TO THE JUDGES: YES

REVISED

28/07/2021

In

the matter between: JOY
MOKGALE SEKGOBELA
1st
APPLICANT
METSE
STANLEY MOKOELE
2ND
APPLICANT
and
N.G.
PRETORIUS N.O
1st
RESPONDENT
THE
DIRECTOR OF PUBLIC PROSECUTIONS
2ND
RESPONDENT
(LIMPOPO)

JUDGMENT

MAKGOBA JP

- [1] This is a review application brought by the Applicants wherein this Court is asked to set aside the decision by the First Respondent not to recuse himself from presiding in a criminal trial in which the

Applicants appear as accused before the First Respondent in the Regional Court sitting at Mokopane under case number SH05/2021.

- [2] The application is opposed by the First Respondent. The Second Respondent filed a notice to abide the decision of the Court.
- [3] The First Respondent in this matter is the Regional Court Magistrate, Mokopane, who is seized with the trial of the two Applicants. The Applicants, as accused before the First Respondent are both legally represented by Attorney Oupa Thabethe who is also the attorney for the Applicants in the present review application.
- [4] The crux of the complaint and/or ground advanced for the recusal of the First Respondent is that the Applicants have a well-grounded apprehension that the First Respondent may have been aware of the facts of the case before plea proceedings. This, according to the Applicants, was premised not only on the fact of the intimate relationship between the prosecutor and the First Respondent, but also on a remark made by the First Respondent when he questioned why a co-accused was still in the dock.

- [5] It is common cause that the First Respondent, a Regional Court Magistrate at Mokopane, is married to a Public Prosecutor at Mahwelereng Magistrate Court. The said public prosecutor apparently processed the docket containing the allegations against the Applicants. The question is whether that marital relationship grounds in the Applicants a reasonable apprehension of bias.
- [6] It should be noted that the First Respondent's wife is not the prosecutor who is to conduct the trial proceedings against the Applicants. Her role as a control prosecutor in Mahwelereng was to process the case docket to another prosecutor in the Regional Court, Mokopane.

Furthermore it is to be noted that the decision to prosecute the Applicants on a charge of murder and defeating the course of justice was made by the Director of Public Prosecutions, Limpopo in Polokwane. The prosecutor at Mahwelereng (First Respondent's wife) upon receipt of instructions processed the case docket to the Regional Court Prosecutor in Mokopane for trial before the First Respondent.

- [7] The Applicants aver that the First Respondent's remark in court "questioning why a co-accused was before court when he ought not to have been there" ousted the First Respondent as having been informed of their case prior to their appearing in court. This issue, as a basis for bias, needs to be mentioned only to be rejected. It is so nebulous that we need not detain ourselves on it. I shall therefore proceed to deal with the issue of whether the marital relationship between the First Respondent and his wife gives rise to a reasonable apprehension of bias.
- [8] The test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of a reasonable apprehension of bias was enunciated in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.^[1] In that case the Constitutional Court said:

"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."

- [9] Where the claimed disqualification is based on a reasonable apprehension, the court has to make a normative evaluation of the facts to determine whether a reasonable person faced with the same facts would entertain the apprehension. The enquiry involves a value judgment of the court applying prevailing morality and common sense.[2] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open- mindedly, impartially and fairly but that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused.[3]
- [10] In *S v Roberts*[4], the requirements of the test for the appearance of judicial bias are as follows as applied in judicial proceedings:
1. There must be a suspicion that the judicial officer might, not would, be biased.
 2. The suspicion must be that of a reasonable person in the position of the accused or litigant.
 3. The suspicion must be based on reasonable grounds.
 4. The suspicion is one which the reasonable person referred to would, not might have.
- [11] The test in *SARFU* judgment does not relate to counsel, but to the litigant, that is the accused in the present case. It is the litigant or accused who must entertain a reasonable apprehension of bias for the disqualification to be sustained. Referring to the present case, it must be the two Applicants and not their legal representative (Attorney Thabethe) who must entertain a reasonable apprehension of bias that the First Respondent will not be objective in their trial.
- [12] 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 a 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 times. 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 to an apprehension of bias - the question of what is proper will depend on the circumstances of each case.

See *S v Dube and Others* 2009

(2) SACR 99 (SCA).

[13] Counsel for the Applicants relied on *Dube*, supra, and submitted that the case is almost on all fours with the present case because it relates to a marital relationship between a prosecutor and a presiding officer involved in one criminal matter. I disagree. In *Dube*, the prosecutor who was married to the presiding officer was actually the prosecutor/state advocate who conducted the hearing in which her husband was the presiding officer. In the present case the First Respondent's wife did not conduct the criminal proceedings in Court but merely passed over the case docket from the Director of Public Prosecutions

to the other state prosecutor who actually appeared in Court before the First Respondent. It cannot be said, without more, that she was conversant with the contents of the docket which she passed over to the First Respondent. The present case is therefore distinguishable from that of Dube and Others.

[14] In his answering affidavit the First Respondent stated:

"I certainly have no desire nor the time to spend my free time discussing cases with my wife and she equally knows and has no desire to discuss dockets with me. She deals with thousands of dockets and I deal with hundreds of cases. If I were to discuss each other's cases, we would have no time for anything else. I am a Regional Magistrate, she is a prosecutor. That is as far as it goes."

In short, the First Respondent denies knowledge of the contents of the docket relating to the Applicant's case. The First Respondent's wife filed a supporting affidavit to this effect. On the other hand the Applicants did not file any replying affidavit to counter what is said by the First Respondent.

[15] The version of the First Respondent has to be accepted and that of the Applicants rejected in so far as it may clash with the version of the First Respondent.[5]

[16] Having regard to the Opposing Affidavits filed by both the First Respondent as well as his wife, I make a finding that the First Respondent did not and does not have any knowledge of the case of the Applicants other than what appeared before him on the charge sheet. That being the case, the contentions of the Applicant cannot hold water.

[17] In the result the application is dismissed. There shall be no order as to costs.

EM MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT,

LIMPOPO DIVISION,

I agree

LGP LEDWABA

ACTING JUDGE OF THE HIGH

COURT, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES Heard on :23 July 2021

Judgment

delivered on :28 July 2021 For the Applicants : Adv. NC Mathabatha Instructed by : Oupa Thabethe Inc c/o Ntene Attorneys For the 1st Respondent : Adv. CFJ Brand SC Instructed by : Thomas Grobler Attorneys

[1] 1994

(4) SA 147 (CC); 1 999

(7) BCLR72 5.

[2] Sv Bosso n 2004 (1) SACR 285 (CC) (2005 (1) SA 1 71; 200 4 (6) BCLR 6 20) para 53.

[3] S v Robert s 1999

(2) SACR 24 3 (SCA) (1 999 (4) SA 915) para 25.

[4] 1 999

(2) SACR 243 (SCA); 1999 (4) SA 915 para 25.

[5] See P/ascon-Evons Paints Ltd v Van Riebeek Paints {Pty} Ltd 1 984

(3) SA 623 (A).

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