REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 35208/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

12 SEPTEMBER 2017 **FHD VAN OOSTEN**

In the matter between

PHILLIP MMAPITSI SEKOBELO **APPLICANT**

and

THE MAGISTRATE: MR NEMAVHIDI **FIRST RESPONDENT**

THE STATE: AS REPRESENTRED BY
THE DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an application for the review and setting aside of the refusal of the first respondent to recuse himself as the presiding officer in a part heard criminal trial which is pending in the Johannesburg Regional Court. The first respondent has filed an answering affidavit and both respondents oppose the application.

Background

[2] The applicant was admitted as an attorney on 20 March 2006 and he thereafter practised under the name and style of Sekobelo Attorney. On 9 May 2012 and by order of the Gauteng High Court, the applicant was struck from the roll of attorneys. The applicant is the accused in the criminal matter which is the subject matter of this application. The applicant is charged with 4 counts of theft of trust funds held in the name of erstwhile clients of the firm, in the total sum of R150 875.00. The trial of the matter commenced on 8 July 2015, before the first respondent as presiding officer. The applicant, who was at that stage legally represented by a Legal Aid attorney, pleaded not guilty to the charges. The State called 6 witnesses to testify. Before the commencement of the cross-examination of the third state witness on a resumed date of hearing, the applicant's attorney informed the court that she held instructions to withdraw as his attorney of record. After an exchange between the applicant and the first respondent, to which I shall revert, leave to withdraw was granted and the applicant proceeded to conduct his own defence.

[3] At the close of the State's case the applicant applied for his discharge under the provisions of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA). The application was opposed by the State. The first respondent refused the application but did not deliver a judgment setting out the reasons for the refusal.

[4] The matter was postponed and at the resumed hearing, on 21 June 2016, the applicant applied for the recusal of the first respondent as the presiding officer in the matter. In support of the application the applicant re-argued the merits of the State's case which the first respondent reminded him of, was inappropriate at that stage of the proceedings. The applicant then proceeded to accuse the first respondent of having interfered with him at the time his erstwhile legal representative's mandate was terminated and further having failed to reprimand counsel for the State for making the submission that the first respondent should not allow the applicant to terminate his legal representative's mandate from which the applicant sought to draw the inference that the first respondent was 'not impartial'. In closing his argument, the applicant forewarned the first respondent that 'If you do not recuse yourself, I will apply for a review of this matter. Your worship, to have it starting over…' The first respondent dismissed the application for his recusal and in an *ex tempore* judgment

furnished reasons for the refusal. The applicant, as foreshadowed, indeed took the next step which is the application presently before this court.

The applicant's grounds for review

[4] The first ground of review concerns the proceedings when the court was informed that the applicant would be conducting his own defence. The first respondent very properly enquired from the applicant whether he, who it must be remembered was an erstwhile attorney by profession, was alive to the inherent dangers of conducting his own defence. In response the applicant alleged that his attorney was 'doing her best...but the best is not good enough'. The first respondent took issue with what he referred to as the applicant 'casting some aspersions on the competency' of the attorney and having referred to her respected reputation in that court, asked the applicant to withdraw the assertion, which the applicant did and in respect of which he tendered an apology to the attorney.

[5] There is nothing in the exchange to support the applicant's far-reaching and unfounded accusations of bias or partiality. The first respondent at all times commendably maintained judicial impartiality and indeed, not only ensured that the applicant was fully apprised of his decision to conduct his own defence and the possible consequences thereof, but also guarded against an unjustified attack on the reputation of a well-respected legal representative.

[6] The applicant's main attack, once again, is directed at the unsuccessful application to be discharged at the end of the State's case. He now, before this court, bemoans the absence of reasons by the first respondent, which he submitted should have been delivered at that stage of the proceedings. The contention, as rightly pointed out by the first respondent, is legally untenable. The practice having developed over many years in our courts is for reasons for a refusal of an application under s 174 of the CPA, to be given at the end of the matter as part of the judgment on the merits of the matter. In any event, the applicant has no grounds for review on the refusal of the application, unless there is proof of irregularity in the conduct of the trial (*Ebrahim v Minister of Justice* 2000 (2) SACR 173 (W)) of which there are none. If the applicant is dissatisfied with the ruling, this is a matter for appeal at the end of the case, not review at this stage. The arguments advanced by the applicant on the

merits of the State's case, at this stage, accordingly, are irrelevant.

[7] Lastly, the applicant has raised a complaint regarding an alleged inaction by the State to assist him to subpoena three defence witnesses, a bank official and two police officers. Both the prosecutor and the first respondent noted the applicant's request and counsel for the State on record offered the necessary assistance. The applicant alleges that the first respondent at a subsequent hearing, when the defence witnesses were still not present at court, remarked that the applicant should not have a problem himself in securing the attendance of one of the police witnesses. The applicant once again sought to draw unjustified inferences against the first respondent. The first respondent was not under any duty to subpoena defence witnesses: the applicant is at liberty to avail himself of the procedures and mechanisms available in securing the attendance of the defence witnesses he intends to call. The complaint in any event, flies in the face of the applicant's stated intention during argument in the recusal application, not to 'call any witnesses or to take the stand'. Be that as it may, there is no substance in the complaint and it is rejected.

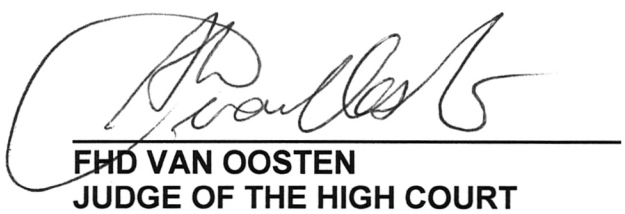
Conclusion

[8] There is nothing before this court, applying an objective test, either in the conduct or verbal utterances of the first respondent, to justify an inference or reasonable apprehension of bias against the applicant or any indication of partiality, at any stage during the proceedings (see *S v Schackell* 2001 (2) SACR 185 (SAC) 191h-192b; *Sager v Smith* 2001 (3) SA 1004 (SCA) para 15-17). It follows that the application must fail.

Order

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

1. The application is dismissed.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

BL MAKOLA
ACTING JUDGE OF THE HIGH COURT

APPLICANT IN PERSON

COUNSEL FOR 1ST RESPONDENT	***ADV A RAMLAAL***
COUNSEL FOR 2ND RESPONDENT	***ADV A MORTON***
ATTORNEYS FOR RESPONDENTS	***THE STATE ATTORNEY***
DATE OF HEARING	***12 SEPTEMBER 2017***
DATE OF JUDGMENT	***12 SEPTEMBER 2017***