**REPUBLIC OF SOUTH AFRICA**

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

Case Number: 2023-075664

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

[redacted] [redacted]
DATE SIGNATURE

In the matter between:

**EMEKA IGNATIUS ODUMEGWU** Applicant

and

**THE REGIONAL COURT MAGISTRATE BOOYSENS (MR VELE)** First Respondent

**THE DIRECTOR OF PUBLIC PROSECUTION** Second Respondent

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**JUDGMENT**

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AMM, AJ

***Introduction***

[1] Few sentences in constitutional and commonwealth jurisdictions world-wide, especially amongst litigation and judicial circles, are quoted more often than the aphorism: "Justice must not only be done, but must also be seen to be done".[1]

[2] The first respondent is a Regional Court Magistrate, Booysens; presiding over the applicant's criminal trial. The applicant is the accused in the criminal trial.

[3] This is an application to review and set aside the first respondent's refusal to recuse himself. The recusal application is premised on the applicant's claimed reasonable apprehension that the first respondent is biased against him.

***The appropriateness of the review application being called before me***

[4] There is some uncertainty - having regard to the contents of the existing practice directives, and their predecessors - whether a review application, originating in a criminal court, cane be properly set down on the ordinary opposed civil court motion roll, and whether it was to be heard by two judges.

[5] When the review application was called before me, I was sitting as a single Judge in the ordinary opposed civil motion court dealing with those opposed civil motion court applications matter allocated to me.

[6] When this uncertainty was debated, the parties' legal representatives indicated that notwithstanding the merits of the debate they would nevertheless be satisfied if I, sitting as a single Judge, was to determine the review application in the ordinary civil opposed motion roll. Section 173 of the Constitution allows me to do so.

[7] Section 173 provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and

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[1] Arvind Datar*, The origins of "Justice must be seen to be done"*, www.barandbench.com, 18 April 2020, who also records that Lord Hewart, the then Lord Chief Justice of England, laid down this dictum in the case of *Rex v. Sussex Justices,* [1924] 1 KB 256.

regulate their own process, and to develop the common law, considering the interests of justice.

[8] For the reasons set out below and which motivate my order in this application, I do not believe that it is in the interests of justice for me to have to determine the aforesaid uncertainty, let alone regulate its consequences.

[9] This is ultimately because there is a preliminary question of prematurity that (i) renders my need to decide this uncertainty both nugatory and of academic interest only; and (ii) precludes me from determining the events of the review application. I thus decline, in the interests of justice and in my regulating the process relevant to this matter and this hearing, to determine the uncertainty.

***The status of the opposition to the review application***

[10] Only the second respondent opposed the application and filed an answering affidavit.

[11] The second respondent opposed the review application on the basis that the applicant had failed to show that the first respondent's conduct gave rise to a reasonable apprehension of bias.

[12] The first respondent delivered a notice to abide by the decision of this Court. In the main, the first respondent's reasons for his decision not to recuse himself are stated to be contained in the relevant transcript, as amplified by the following statement: "The delay was occasioned by the defence attorney was either sick in the course of the proceedings or did not come inciting being indisposed."

[13] Subsequently only the applicant and second respondent were represented at the hearing before me.

***The relevant and applicable recusal principals and consideration***

[14] For the reasons traversed later in this judgment, it is inappropriate for me to decide the merits of the review application, also for that matter the recusal application.

[15] Nevertheless, I am of the view that it is still necessary, appropriate, and salutary, within the context of the cautionary tale set out below, that the relevant recusal principles and considerations be succinctly restated.

[16] As an appropriate point of departure, a judicial officer who fails to conduct a trial according to the applicable standards may be the subject matter of an application for recusal.

[17] As such, our law requires that a judicial officer must conduct a trial open-mindedly, impartially and fairly; but also, equally importantly, that this conduct must be "manifest to all those who are concerned in the trial and its outcome, especially the accused".[2] This is because not only must justice be done but justice must also be seen to be done.[3]

[18] The legal principles applicable to a recusal application are, in the main, trite.[4] Our recusal principles are neatly collected, restated, and referenced by the Supreme Court of Appeal in *Maritz v S*[5]. For example: (a) fairness during a trial is a central requirement of the Constitution. In this regard (i) in section 34 entrenches the right to a fair trial[6], (ii) so do sections 35(3)[7] and 165(2)[8] of our Constitution, as well as (iii) the oath of judicial office prescribed by Schedule 2 of the Constitution[9]

[19] The Constitutional Court decision in *SARFU*[10] sets out the authoritative test for recusal as being whether "a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judicial officer has not

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2 *S v Rall*, 1982 (1) SA 828 (A) at 831 H - 832 A

3 *S v Rall* supra

4 See inter-alia *SARFU infra*, *South African Commercial Catering and Allied Workers Union infra and also S v Roberts* 1999 (4) SA 915 (SCA); *Sager v Smith* 2001 (3) SA 1004 (SCA); and *S v Shackell* 2001 (4) SA 1 (SCA)

5 (81/2023) [2024] ZASCA 72 (8 May 2024) para 8 to 11

6 Everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator. This common law right is now constitutionally entrenched. Section 34 of the constitution provides:

> "Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

7 Section 35(3) of the Constitution guarantees every accused person "a right to a fair trial."

8 Section 165(2) of the Constitution, dealing with the judicial authority re-iterates the courts' independence and requires courts to apply the law "impartially and without fear, favour and prejudice", and see *Maritz v S supra* para 9

9 The oath requires each judge to swear that they "will uphold and protect the Constitution … and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law".

10 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* [1999 (4) SA 147 para 48 (SARFU)

brought or will not bring an impartial mind to bear on the adjudication of the case."[11] As such, not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding.[12]

[20] In its simple terms, our test for recusal, including the SARFU double reasonableness test, involves the following three threshold considerations / requirements:[13] (i) there must be a suspicion that the judicial officer might, not would, be biased; (ii) the suspicion must be that of a reasonable person in the position of the accused or litigant, and (iii) the suspicion must be based on reasonable grounds.

***The facts informing the recusal application***

[21] The adjourned hearing of criminal trial had re-commenced on 16 May 2023, the state had closed its case and the applicant was out on bail. The criminal trial had been adjourned to 16 May 2023 for purposes of the applicant's cross-examination.

[22] When the matter was called on 16 May 2023 The applicant was present in court. The prosecutor however informed the first respondent that the applicant's attorney was ill, and an adjournment of the criminal trial to 23 May 2023 was requested. The prosecutor did not take issue with the requested adjournment.

[23] In a clear demonstration of inappropriate judicial agitation, the first respondent stated and/or insinuated, inter-alia, as follows vis-à-vis the applicant, the illness caused absence of his attorney and the requested adjournment; namely: (i) that the applicant was playing a "game", (ii) that the applicant risked the first respondent "cancelling [the applicant's] bail", (iii) that the applicant was holding the court "to ransom".

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11 See also *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd* (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC)

12 See also *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) 495 B/ C; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) 9G both as quoted in *Roberts v Additional Magistrate for the District of Johannesburg, Mr Van Den Berg and Another* [1999] 4 All SA 285 (A)

13 As per inter alia *S v Roberts supra*

[24] None of the aforesaid statements were correct, let alone necessary and warranted. Moreover, threatening an accused with the summary revocation of bail for circumstances entirely beyond the accused's control is a constitutional aberration.

[25] Equally concerning is the following opening exchange when the applicant's attorney, Ms Matlala, commenced with the recusal application on the resumption of the criminal trial on 23 May 2023:

> "Ms Matlala: Your Worship, before the accused move [sic] the witness stand Your Worship, my instruction Your Worship is that I must bring the application for the Court to recuse herself from this case.
>
> The Court: Any good reasons?
>
> Ms Matlala: I do have reasons Your Worship to bring the application.
>
> The Court: Then the application is refused."

[26] Whilst the first respondent subsequently permitted Ms Matlala to present argument in support of the recusal application, the first respondent's quoted statement is inexplicable, improper and disquieting. The recusal application was subsequently argued and refused; hence the review application.

[27] That said, I am not required to decide on the merits of the recusal application for the reasons that follow under the Topic labelled as "The prematurity question", to which I shortly turn.

[28] I follow the next two topics with the cautionary tale that consumes a substantial portion of the reasons for this judgment. I do so because the recusal application might ultimately not be required to be determined in the event that the applicant is acquitted.

***The prematurity question***

[29] Having disposed of the aforesaid uncertainty, at the commencement of the argument in the application, I thereafter asked both parties to address me on the question of whether or not the recusal application is "premature". I indicated that,

as I understood the position, recusal applications during the course of criminal proceedings (that is *in medias res*[14]) are rare.

[30] I addressed the question within the context of the applicant potentially being found innocent in the criminal trial. If the applicant was convicted, then the Magistrate's alleged bias (as perceived by the applicant) could possibly, if appropriate, form a ground of appeal against the conviction.

[31] After hearing argument, I allowed the parties' representatives an opportunity to present brief written submissions on the prematurity question because I had raised it *mero motu*. They asked to be permitted to do so by 18 October 2024, yet for reasons unexplained the further submissions were not forthcoming.

[32] I did however advise the parties' representatives at the time that should the written submissions not be forthcoming, I would proceed to consider and hand down judgment in this application notwithstanding. I accordingly do so.

***Considering the prematurity question***

[33] Not only is our law on the need for, the requirements of, and test for, a recusal applications trite, so too by all accounts is that pertinent to the timing of a recusal application.

[34] By way of introduction, absent exceptional circumstances, our courts are understandably inclined for a panoply of sage reasons to ensure that matters are not unduly interrupted, but left to run to completion.[15]

[35] As such, the Constitutional Court In *SACCAWU v Irvin & Johnson Ltd*[16] held that the dismissal of a recusal application while proceedings are continuing, does not, as of right, entitle an unsuccessful party to appeal the dismissal immediately.

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14 The phrase *in medias res* is a Latin phrase meaning "in the middle of things"

15 *S v Western Areas Ltd & Others* 2005(50 SA214 (SCA) at para 26, cited with approval in in *Public Protector of South Africa v Chairperson: Section 194(1) Committee and Others* [2023] 2 All SA 818 (WCC) para 41

16 *SACCAWU v Irvin & Johnson Ltd* 2000(3) SA 705(CC) at para [4]

[36] Within the context of civil trial matters, Harms states as follows in *Take & Save Trading CC and Others v The Standard Bank of SA Ltd*[17] (footnotes omitted):

> "… an appeal *in medias res* in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed."

[37] Turning to *in medias res* recusal applications within the context of criminal trials, the following dicta in *S v Khala*[18]*,* quoting the decision of Schreiner JA in *R v Silber*[19], is appropriate and applicable:

> "Neither counsel has been able to find any reported case in which an application for recusal has been made in the course of a trial on the ground that the judicial officer has shown bias by his conduct of the proceedings. And this is not surprising, since the ordinary way of meeting any apparent bias shown by the court in its conduct of the proceedings would be by challenging his eventual decision in an appeal or review."

[38] Courts are thus understandably hesitant to entertain a review of ongoing proceedings, including of recusal decisions, brought *in medias res* because: [20]

> "Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course."[21]

[39] At the risk of stating the obvious, and my apologies for possibly mixing metaphors, if applications to review or challenge the refusal of a judicial officer to recuse themselves in criminal proceedings were immediately available as of right to the aggrieved accused, a proverbial avalanche of these types of

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17 2004 (4) SA 1 (SCA) para 4
18 1995 (1) SACR 246 (A) 252c-253b as quoted in *Take & Save Trading CC supra* para 5
19 1952 (2) SA 475 (A) at 481C-H
20 *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) at para [25], cited with approval in *Maswanganyi v Road Accident Fund (Maswanganyi)* 2019 (5) SA 407 (SCA) at para [21]
21 As quoted in *Public Protector supra* para 38

applications would flood our courts. This, in turn, would open *"sluice-gates that could render the functioning of the courts … throughout the land untenable*"[22] and would, at least, potentially bring the criminal justice system to a halt.

[40] I accept, however, without demure that in a particular matter there may be certain fact dependent "exceptional circumstances"[23] that justify, let alone cry out for, an *in medias res* intervention[24]. The reasons that inform such exceptional circumstances must, at the very least, centre on the suffering of irreparable or irremediable *"material and irreversible harm*" should such intervention not take place.[25]

[41] It is therefore understandably that it is only in rare cases where a grave injustice might otherwise result, or where justice might not be attained by other means, that a court will entertain, for example a recusal application, before the conclusion of proceedings.[26] Otherwise cast, the intervention of the review of recusal applications in a pending proceeding is only appropriate if an applicant can show that there would be no effective remedy available once the process is complete (i.e., exceptional circumstances).[27]

[42] I am, however, unable to find the presence of any exceptional circumstances, let alone the existence of "*material and irreversible harm*", in this review application. The applicant is out on bail. The hearing in the criminal trial is, on the face of it, well past halfway.

[43] That said, had the applicant's bail been summarily revoked (as the first respondent had needlessly threatened), and had the applicant's personal liberty been infringed upon, such would indubitably have comprised exceptional circumstances for the hearing of the recusal application mid-way through the criminal trial.

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22 *Hlophe v Judicial Service Commission and Others* [2009] ZAGPJHC 19; [2009] 4 All SA 67 (GSJ) at para [12] as quoted in *Public Protector* at para 41

23 *Glenister v President of the Republic of South Africa* and Others 2009 (1) SA 287 (CC) para 37

24 *Glenister supra* para 48

25 *Glenister supra* para 48

26 Cf *Wahlhaus v Additional Magistrate,* Johannesburg (*Wahlhaus*) 1959 (3) SA 113 (A) at 120B.

27 See *Glenister supra* para 43

[44] Therefore, in the specific circumstances of this application, and more specifically absent the existence of any exceptional circumstances, the review application must fail because it is brought prematurely. Because the review application is dismissed because it is premature, I make no pronouncement on the merits of the review application.

***Cautionary tale: The first respondent's statements are unwarranted***

[45] Despite my aforesaid findings, I cannot ignore the transcript of the proceeds in issue, nor certain of the first respondent's statements. I reiterate the sentiment set out at the commencement of the judgment and elsewhere herein: Justice must not only be done, but it must also be seen to be done.

[46] A presiding officer should, at all times, both objectively and subjectively, be fair and impartial to all the parties, lawyers, registrars, court ushers, witnesses and person appearing before them. And equally importantly, they must endeavour at all times to be even-tempered; notwithstanding that presiding officers are obviously not super humans. Entrenching the aforesaid is the following statement: "[I]t seems to me that temperament is the key to everything else that one does on the bench."[28]

[47] A judicial officer's conduct is vitally important to maintaining perceived and actual fairness within their courtroom. South Africa's presiding officers are ultimately the custodians and defenders of our Constitution generally, and, within the context of this judgement, the rights afforded therein to an accused specifically. Our presiding officers thus hold, and exercise, tremendous power.

[48] Whilst certainly not exhaustive of judicial unfitness, a demonstrably ill-tempered presiding officer, particularly towards one of the parties, erodes public confidence in the specific presiding officer, the judiciary generally, and with it possibly also public confidence in our Constitutional guarantees

[28] Hon. Jeremy Fogel, nominee for the U.S. District Court for the Northern District of California, *Confirmation Hearings on Federal Appointments,* 105th Congress, No. 41 (1997) as quoted in Terry A. Maroney, *Judicial Temperament, Explained,* Judicature, Vol. 105 No. 2 (2021), Bolch Judicial Institute: Duke Law School

[49] There may well however be occasions where the expressing of judicial ire or frustration may not be misplaced, nor unwarranted, but in fact indubitably necessary (for example, at counsel who filibuster or avoid answering questions or who are not conversant in the authorities relevant to their arguments, or engage in recalcitrant or unruly behaviour in court). I am however unable to find that such was the case in the relevant proceedings before the first respondent.

[50] I emphasise that whether the first respondent's conduct justifies his recusal is not for me determine; and I make no such determination. A reading of the record however leaves me with disquiet that the first respondent's conduct has the potential to undermine the necessity "that justice must be seen to be done". I therefore trust that should the first respondent read this judgement, he will measure and moderate his judicial conduct accordingly.

[51] Equally importantly, to slightly amend the judicial sentiments expressed in *Moch v Nedtravel (Pty) Ltd t/a American Express*[29] for purposes of this judgment: The first respondent should not be unduly sensitive and should not regard the sentiments I express herein as a personal affront.

[52] In closing this topic and whilst intentional, my choice and use of words and phrases such as "deplorable", "aberration", "concerning", "inappropriate judicial agitation", *et cetera* and my expressed sentiments in this judgment, are not intended to bind, or in any way influence, the Court that may subsequently be called upon to determine the recusal questions.

[53] For the avoidance of any possible doubt, neither my choice and use of words, nor the expression of my sentiments, constitute a finding by me for purposes of this judgement or any other that may ensue, that (i) the first respondent ought to have recused himself, or (ii) the applicant ought to have succeed in his application. The Court determining the recusal questions will bring its own mind to bear on the merits of the recusal questions, and make its own determination in respect thereof.

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[29] 1996 (3) SA 1 (A) at 13H

[54] Th purpose of that canvassed under this Topic is intended to serve only as a cautionary tale; no more, no less.

***Costs: No order as to costs***

[55] Turning to the question of costs, it is trite that costs ordinarily follow the result subject to the court's discretion.[30]

[56] Nevertheless, upon enquiry, counsel appearing for the parties agreed that if I was to find that the recusal application was premature, then no order should be made as to costs because the application was decided on what is termed "a judges point".

[57] Given the circumstances, I am inclined, in the exercise my discretion, to make no order as to costs.

***Conclusion and Order***

[58] No exceptional circumstances exist that warrant the bringing of this review application *in medias res* (i.e., in the middle of the pending criminal trial), and, as such, this review application falls to be dismissed.

[59] For the avoidance of any doubt, my dismissal of the application is not definitive, nor determinative, nor dispositive, in any way whatsoever of the merits of (i) the applicant's concerns that underlie the bringing of the recusal application, and (ii) this review application. As indicated above, another Court may at the proper time be called upon to determine these merits, and will make its own findings and determinations in these regards.

[60] As stated above, my sentiments expressed above regarding the *in curia* (in open court) statements of the first respondent serve only as a cautionary tale; no more, no less.

[61] In the above circumstances, the following orders are made:

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[30] *Vassen v Cape Town Council* 1918 CPD 360 and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) para 3

1. The recusal application dated 31 July 2023 under the above case number is dismissed with no order as to costs.

2. A copy of this judgment is to be provided to the first respondent.

**AMM AJ**

**ACTING JUDGE OF THE HIGH COURT**

**JOHANNESBURG**

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| For the Applicant: | LTC Magampa<br>Instructed by KG Matlala Attorneys |
| For the First Respondent: | State Attorney |
| For the Second Respondent: | National Director of Public Prosecution<br>c/o State Attorney |
| Date of Hearing: | 07 October 2024 |
| Date of Judgment: | 22 October 2024 |