

In the Magistrate's Court for the district of Msukaligwa held at Breyten

In the matter between

Cornelius Johannes van der Walt

1st Applicant

Jan-Spruyt Steenkamp

2nd Applicant

and

The State

Respondent

REASONS FOR JUDGMENT

Introduction

1. During May 2019 this court heard a bail application in respect the current Applicants and three others, which application was refused. Applicants then brought an application for bail on new facts on the 2nd of August 2019. Applicants commenced the proceedings by bringing an application for my recusal. The application was refused because the founding affidavit was not properly commissioned. The matter was then postponed to the 8th of August 2019 for the bail application on new facts. On the 8th of August Applicants repeated the application for my recusal. Mr Spangenberg indicated that should the application be refused, Applicants wanted to proceed with the application for bail on new facts. The matter was dealt with at Ermelo Court due to the fact that the High Court was sitting at Breyten Court. I had already refused the application for my recusal on 8 August 2019, but due to time constraints I was unable to give reasons for that judgment. I am now submitting my reasons for that judgment only.

Principles

2. In **S v Bam**¹ the learned Judge Kotze commented as follows in a matter where a magistrate refused to recuse himself after the accused brought a recusal application:

*“The magistrate’s statement that the accused reflected on his integrity in making an application for recusal is unfortunate. I can find no ground for concluding that the accused impugned the integrity of the magistrate. He did no more than to invoke in his favour the rule basic to our system of jurisprudence that justice must not only be done but should manifestly be seen to be done. Likewise the magistrate, if he submitted to the application, would have acted in recognition of the rule without conceding any preparedness on his part to conduct an unjust trial. The magistrate regrettably showed unnecessary sensitivity in dealing with the application. It should always be borne in mind that an accused, or his representative, who finds it necessary to apply for the recusal of a judicial officer is confronted with an unenviable task and the propriety of his motives should not lightly be questioned.”*²
3. In **Moch v Nedtravel (Pty) Ltd t/ a American Express Travel Service**³ the learned appellate Judge Hefer commented that “(a) judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront”⁴.

¹ 1972(4) SA 41 (E)

² See page 43H – 44A of the record.

³ 1996(3) SA 1 (A)

⁴ See page 13F of the judgment.

4. In **S v Le Grange and Others**⁵ the learned Appellate Judge Ponnann commented as follows:

“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’⁶. The right to a fair trial is now entrenched in our Constitution. As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by s 35(3) of our Constitution⁷. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also to be seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state⁸.”⁹

5. In **President of the Republic of South Africa and others v South African Rugby Football Union and others**¹⁰ the Court set out the test applicable to a recusal application as follows:

“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.”¹¹

6. In **Bernert v Absa Bank Ltd**¹² the learned Chief Justice Ngcobo elaborated further on the presumption of impartiality and the double requirement of reasonableness.

- 6.1. He stated:

“The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law ‘impartially and without fear, favour or prejudice’. Their oath of office requires them to ‘administer justice to all persons alike without

⁵ 2009(1) SACR 125 (SCA)

⁶ S v Roberts 1999(2) SACR 243 para 25.

⁷ Section 35(3) of the Constitution provides that ‘Every accused person has the right to a fair trial’.

⁸ S v Basson 2007(3) SA 582 (CC) para 26.

⁹ @ par. [14] of the judgment.

¹⁰ 1999(4) SA 147 (CC)

¹¹ @ par. 48 of the judgment.

¹² 2011(3) SA 92 (CC).

*fear, favour or prejudice, in accordance with the Constitution and the law*¹³. And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution."¹⁴

6.2. The court also emphasized that the presumption of impartiality “can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias”; that the effect of this presumption is “that a judicial officer will not lightly be presumed to be biased”; that a reasonable litigant would take this presumption into account and that the presumption is “crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased”¹⁵.

6.3. The court also elaborated on the double requirement of reasonableness and stated as follows:

“Both the person who apprehends bias and the apprehension itself must be reasonable. As we pointed out in SACCAWU¹⁶, 'the two-fold emphasis ... serve[s] to underscore the weight of the burden resting on a person alleging judicial bias or its appearance'¹⁷. This double requirement of reasonableness also 'highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough'¹⁸. The court must carefully scrutinise the apprehension to determine whether it is, in all the circumstances, a reasonable one.”¹⁹

6.4. The learned Chief Justice Ngcobo also commented—

“The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant

¹³ Section 174(8) of the Constitution of the Republic of South Africa, 1996 reads:

“Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.”

The oath of office of judges is set out in item 6(1) of Schedule 2. In terms of item 6(3) “Judicial officers, and acting judicial officers, other than judges, must swear/ affirm in terms of national legislation.”

The oath of office of magistrates are prescribed by section 9(2)(a) of the Magistrates’ Courts Act, 1944 and reads as follows:

“I, _____ (full name) do hereby swear/ solemnly affirm that in my capacity as a judicial officer I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.”

¹⁴ @ par. [31] on page 101 of the judgment.

¹⁵ @ par. [33] on page 101-102 of the judgment.

¹⁶ South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC) (SACCAWU)

¹⁷ @ par. [15] on page 715A of SACCAWU.

¹⁸ @ par. [16] on page 715C of SACCAWU.

¹⁹ @ par. [34] on page 102 of the judgment.

to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'²⁰. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias.'²¹

6.5. The court reached the conclusion that—

“a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court, and, on the other hand, the pre-eminent value of public confidence in the impartial adjudication of disputes. ... (I)n striking the balance, a court must bear in mind that it is 'as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance'²². This balancing process must, in the main, be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires.”²³

7. In the current matter, the first hurdle Applicants have to muster is to provide cogent evidence that demonstrates something that I have done which gives rise to a reasonable apprehension of bias. The word cogent is defined by Oxford English Dictionary as “clear, logical, and convincing”.

I will now deal with the grounds advanced by Applicants for my recusal.

8. The first ground advanced for my recusal is that the prosecutor and I had surreptitious discussions about the case. What actually occurred was that the prosecutor told me that Applicants wanted to bring an application for bail on new facts. I admit that I told the prosecutor that I wanted a list of the new facts that Applicants intended to place before the court. The reason therefore was that, it is my experience that applicants often apply for bail on new facts whereas during the trial it appears that the facts are not new or even when it

²⁰ Ebner v Official Trustee (2001) 205 CLR 337 (HCA) in paragraph 19.

²¹ See paragraph [35] on page 102 of the judgment.

²² Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65 (CA) at paragraph 21.

²³ @ par. [37] on page 103B-D of the judgment

is new it is not relevant.²⁴ In hind sight I realise that I have erred in this regard.²⁵ I wish to state, however, that there were no surreptitious discussions between the prosecutor and myself as what I had said to the prosecutor was to be conveyed to Applicants. The discussion also took place in the presence of my colleague, Mrs Hugo. I never tried to elicit any evidence from Applicants. The prosecutor conveyed my request to Applicants. Applicants rightly refused to produce a list of the new facts they wanted to place before the court.

9. Applicants relied on the following statement by the learned appellate Judge Howie in **Roberts v Additional Magistrate for the District of Johannesburg, Mr Van Den Berg and Another**²⁶ (**Roberts**).

*“That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other...”*²⁷

However, the mere fact that a magistrate or judge communicated with one of the parties in the absence of the other or even with a witness in the case is not in itself sufficient to give rise to a reasonable apprehension of bias on the part of the absent party.

The current matter is distinguishable from **Roberts**. In **Roberts** the magistrate committed a number of serious irregularities during the trial proceedings before his discussion with the prosecutor. This discussion took place in the corridor where the accused could see but not hear them. The accused rightly formed the opinion the magistrate was discussing the case with the prosecutor. The prosecutor also confirmed this. The defence responded by applying for the magistrate’s recusal. The magistrate denied counsel the opportunity to argue the application and refused it without reasons. The learned appellate Judge Howey further commented as follows:

*“Here, of course, the irregular discussion does not stand alone. It prompted an immediate recusal application and that application brought to the fore the question whether the **magistrate’s conduct**²⁸ bore the appearance of bias.”*²⁹

and

²⁴ In this regard it should be noted that Applicants did not disclose their defence at the initial bail application but attempted to do so at the bail application on new facts. In **S v Le Roux and others** 1995 (2) SACR 613 (W) the learned Judge Claassen commented as follows:

“`n Beskuldigde kan nie getuienis broksgewyse lê voor opvolgende howe wat oor die vraag van borgverlening moet beslis nie. Waar getuienis beskikbaar was by `n vorige borgaansoek maar verswyg is, kan dit nie later by `n verdere borgaansoek voorgelê word as ‘nuwe getuienis’ nie. As so `n prosedure toelaatbaar sou wees, sou dit neerkom op misbruik van hofprosedure aangesien dit tot onnodige en herhalende hofaansoeke om borg sou lei.

Dit bly steeds `n belangrike beginsel by opeenvolgende borgaansoeke dat die latere borgaansoek gefundeer moet word op ‘nuwe getuienis’.” (on page 622 A-B)

²⁵ See Petersen v S [2008] JOL 21655 (C).

²⁶ [1999] 4 All SA 285 (A)

²⁷ @ par. [23] of the judgment.

²⁸ My emphasis.

²⁹ @ par. [24] of the judgment.

“Bias in the sense of judicial bias has been said to mean —

‘departure from the standard of even-handed justice which the law requires from those who occupy judicial office.’³⁰

The learned appellate Judge Howie also commented as follows regarding the way in which the magistrate conducted the trial:

“Turning to the application of the reasonable suspicion test to the facts and circumstances of the present case, there can be no doubt that the magistrate’s conduct, bearing and utterances from beginning to end of the post-conviction proceedings would have provided the reasonable person in the appellant’s position with eminently reasonable grounds to think that the court might be biased. Even by the time the recusal application was made sufficient had occurred to create such impression. That application was therefore wrongly refused and the “proceedings” which followed constituted a nullity.”³¹

In **Winterbreeze Trading 158 (Pty) Ltd and another v Thomas Butler Smith and another**³² the learned Judge presiding in the matter, Judge Van der Byl, had a telephonic conversation with Applicants’ attorney regarding the arrangement of a date for the hearing of an application for leave to appeal. The learned Judge commented as follows:

I had no objection him having approached me directly and, being under the impression that he sought a date for the hearing of the Application for Leave to Appeal, indicated to him that I would be available on Wednesday, 10 June 2010 at 9h30 or Thursday, 11 June 2010 at 9h30.³³

On the basis of this discussion Respondents brought an application for the recusal of the learned Judge. 1st Respondent stated in his affidavit:

“With shock and dismay I took notice of the fact that the attorney for the Applicants had a personal discussion with the learned Judge Van der Byl about the merits of the case, without our attorney and/ or counsel present and with no invitation from the learned Judge to attend such discussion. I have instructed our attorney of record to apply that the learned Judge should recuse himself from this case on the grounds of perceived bias, which application will be launched prior to the hearing of this application.”

The learned Judge dealt with the requirement in recusal applications namely the question 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 as set out in **President of the RSA v SA Rugby Football Union**³⁴ (SARFU). The learned Judge commented as follows:

³⁰ See: *Franklin v Minister of Town and Country Planning* [1948] AC 87 (HL) at 103...” (@ par. 25 of the judgment.)

³¹ @ par. [37] of the judgment.

³² North Gauteng High Court, Pretoria; Case No.15266/ 2010

³³ @ par. 5 of the judgment

³⁴ 1999(4) SA 147 (CC) at 177B, para [48].

*“In applying this test to the facts in hand, there is in my view not the remotest possibility that any ‘reasonable, objective and informed person’ on the facts set out in the attorney of record of the Applicant would reasonably apprehend that I discussed the merits with the attorney and that I will, true to the oath of my office, not administer justice in this matter ‘without fear or favour’”.*³⁵

The learned Judge further commented as follows:

*“I accordingly dismissed the application for my recusal and wish to add that I regard, having regard to the true facts, the actions of the Respondents’ counsel and attorney of record as highly irresponsible, reprehensible, unprofessional and unethical and a gross insult to my integrity. As I have already indicated, the application was not only based on wrong legal principles, but also on obviously wrong and unsubstantiated factual averments. I have no doubt that the representatives should have realized and, perhaps, most probably did realize that there is no legal or factual basis for an application of this nature and should have advised the Respondents’ accordingly. In failing to do so they merely created unrealistic expectations with the Respondents...”*³⁶

In **Djuma and Others v The State**³⁷ an application for the recusal of the trial judge was brought on the basis, amongst others, that he was approached by a witness in the case who expressed the hope that the case would be finalised without further delay. The trial judge refused to recuse himself. On appeal the learned judge Kollapen commented as follows:

*“With regard to the other two legs on which the challenge is advanced they both in a sense relate to the desire of the trial judge to manage and finalise the trial, without undue delay as well as the expressed wish of a witness. Given the role of the judge in managing the trial to which reference has been made, it can hardly serve as a foundation for bias when such a view is expressed. On the contrary such a stance is consistent with what should be expected of judges in ensuring the proper management of a trial. Finally the views of the witness with regard to her desire to finalise the trial may well have coincided with those of the judge but that is hardly remarkable or noteworthy. All things being equal, most witnesses wish to have an efficient trial just as most accused do and just as all judges do. I can accordingly find nothing untoward in these assertions and in my view they do not serve to advance the case for the Appellants.”*³⁸

It is my respectful submission that there could never have been any “appearance that justice is being administered in secret” in the current matter. My request to the prosecutor to obtain a list of the new facts, taken individually, obviously did not raise in Applicants’ minds a reasonable apprehension that I will not bring an impartial mind to bear on the

³⁵ @ par. [18] of the judgment.

³⁶ @ par. [19] of the judgment.

³⁷ A423/ 2015) [2017] ZAGPPHC 309

³⁸ @ par. 20 of the judgment.

adjudication of the bail application on new facts. Therefore, they also reeled in two incidents that occurred in the initial bail application which I will now deal with below.

10. Before dealing with the remaining grounds for my recusal it is necessary to summarise the history of the matter. Applicants appeared in Ermelo Court on the 9th of May 2019. They wanted to proceed with the bail application forthwith. However, my colleague, Mrs Hugo, could not deal with the bail application immediately as she had two other bail applications to deal with on that day. The matter was then transferred to Breyten Court for the next day, the 10th of May 2019. Mr Jardim, counsel for the applicants, and their instructing attorney approached me in my office at Ermelo Court in order to introduce themselves to me. The prosecutor was not present. I did not think much of this. They only greeted me and indicated to me that they will appear before me in Breyten court for the bail application. They then left my office.
11. On the 10th of May the Applicants appeared before me together with 3 other co-accused. Applicants were represented by Mr Jardim, whereas their co-accused were unrepresented at that stage. The prosecutor sought a postponement of the matter to verify the addresses of Applicants. He also stated that the travel documents of Applicants had not been submitted to the investigating officer. Mr Jardim objected to such postponement. The court then explained to accused 3-5 their rights at first appearance. After explaining their rights to legal representation and to apply for legal aid, they elected to apply for legal aid. The legal aid attorney was not available. Consequently, their applications for legal aid could not be dealt with forthwith. I then explained to them their right to be released on bail and enquired from them whether they wanted the court to consider the question of their possible release on bail. All of them replied in the affirmative. I then enquired from them whether they wanted to wait for their legal aid application to be finalised or whether they wanted to continue with the bail application without an attorney. They all indicated that they wanted to proceed with the bail application on their own. Thereafter I explained to all applicants their rights and duties pertaining to bail applications. Thereafter I proceeded to place on record the information regarding previous convictions and pending charges of all applicants. It was agreed between the parties that the offence charged was listed in Schedule 5 of the Criminal Procedure Act, 1977. After dealing with all the preliminary matters Mr Jardim indicated that the evidence in the bail application of Applicants 1 & 2 will be adduced by way of affidavit. He was then allowed to read into the record the affidavits of Applicants 1 & 2 and handed it in as exhibits A & B respectively. The court then noticed that the affidavit of one of the Applicants was not properly commissioned in that it was not signed by the commissioner of oaths. I brought this to the attention of Mr Jardim. At this stage I felt it was appropriate to postpone the bail application for 7 days to give an opportunity for the rectification of the affidavit and for the legal aid attorney to be present on behalf of the other applicants. The matter was postponed to 17 May 2019.
12. On the 17th of May 2019 Mr Maritz came on record on behalf of Applicants 3-5. He then read the affidavits of Applicants 3-5 into the record and handed it in as exhibits. Mr Maritz also led the *viva voce* evidence of a witness on behalf of 5th Applicant. Mr Jardim also submitted further affidavits on behalf of Applicants 1 & 2. The prosecutor submitted an affidavit of the investigating officer as well as a petition by the community. The court then

allowed the parties to address the court. The court then postponed the matter for seven days, to 24 May 2019, in terms of section 60(3) for further information regarding the allegations that Applicants are also being investigated for similar cases in Hendrina.

13. On the 24th of May 2019 Mr Maritz led *viva voce* evidence of a witness on behalf of 3rd Applicant. The prosecutor also submitted a further affidavit by the investigating officer. Judgment in the matter was then postponed to 31 May 2019. On the 31st of May 2019 I gave judgment in the bail application refusing bail in respect of all Applicants.
14. I respectfully submit that it is evident from the record that I administered justice to all applicants alike and impartially without fear, favour or prejudice as required by my oath of office. It is also evident from the record that I did my utmost to finalise the bail application without any unnecessary delay.
15. I will deal with the specifics of Applicants' second and third grounds for my recusal below. It suffices to note at this stage that these grounds stem from the initial bail application. In this regard it should be noted that from the court's point of view Adv. Jardim was both counsel and spokesperson for Applicants during the initial bail application. If Applicants or their instructing attorney or even Mr Jardim himself noticed any wrongdoing on my part which could have led to reasonable suspicion that I will not bring an impartial mind to bear in the adjudication of the case, Mr Jardim was obliged to bring it to my attention. In this regard it is important to note the comment of the learned Chief Justice Ngcobo in **Bernert v Absa Bank Ltd** (above):

*"In my view it is fundamental to our judicial system that judicial officers are not only independent and impartial, but that they are also seen to be independent and impartial. Civility and courtesy should always prevail in our courts. Litigants should leave our courts with a sense that they were given a fair opportunity to present their case. This is crucial if public confidence in the judicial system is to be maintained. And public confidence in the judicial system is essential to the preservation of the rule of law, which is so vital to our constitutional democracy. Therefore, legal representatives should not stand by as spectators over what may convey an impression of bias. They should raise any objection as soon as reasonably practicable. This will allow the judicial officer to explain his or her behaviour and, if necessary, correct that behaviour. Judicial officers, it must be remembered, are only human. This will make our courts vigilant of their behaviour and ensure that they prevent behaviour that may create an apprehension of bias."*³⁹

No objections relating to the manner in which I conducted these aspects of the initial bail application were brought to my attention and none were raised shortly thereafter. As I will indicate fully below there were indeed no wrongdoings on my part which could have led to reasonable suspicion of bias.

Furthermore, Applicants' unexplained delay of more than two months after the initial bail application had been finalised to raise the issue of bias pertaining to the last two grounds, is unacceptable. In **Bernert v Absa Bank Ltd** (above) the appellant (Bernert)

³⁹ @ par. [98] on page 118I to 119B of the judgment.

delayed for 39 days to raise the issue of bias. By that time judgment had already been granted against him. The learned Chief Justice Ngcobo stated:

“It was not open to the applicant to wait for the outcome of the appeal before pursuing his complaint of bias. It is highly desirable, if extra costs, delay and inconvenience are to be avoided, that complaints of this nature be raised at the earliest possible stage. A litigant should not wait for the outcome of the appeal before raising a complaint based on recusal, where all the facts giving rise to the recusal complaint were known to the litigant. The conduct of the applicant is simply inconsistent with a reasonable apprehension of bias. If he had any apprehension, it must have been of the kind that he thought could be cured by a judgment in his favour. But that can hardly be said to be a reasonable apprehension of bias that is reasonably entertained.”⁴⁰

16. The 2nd ground for my recusal is contained in par. 37 of 2nd Applicant’s affidavit in support of the application for recusal which reads as follows:

“A further aspect which is of concern to us is that we are being accused of stock theft in the Breyten district where our application(s) for bail are being heard. The State at the application for bail, handed in a petition with the names of 79 (seventy Nine [sic]) farmers and member of the community of Breyten, wherein they oppose bail being granted to our clients. They have done this without knowing what our clients’ defence and version is - this constitutes what could be described as “lynch justice”. We fear that Magistrate Grabe, who is a member of this community may be influenced. His conduct certainly does not displace this fear.”

It should be noted that the prosecutor applied for the petition to be handed in and Applicants raised no objections thereto. The court is therefore of the view that the petition was properly handed in. It is respectfully submitted that even if I was a member of Breyten community I was obliged to take notice of the contents of the petition. However, I am not a member of the community of Breyten as I reside in Ermelo. I visit Breyten for the purpose of attending to my official duties. I work at Ermelo 3-4 days a week and at Breyten 1-2 days a week. I conduct my personal business in Ermelo and I am involved in the community in Ermelo. Applicants’ statement that I am a member of Breyten community is therefore incorrect. Furthermore, Applicants’ concern that I may be influenced by the petition is also based on the wrong legal principles.

In **S v Van Huysteen**⁴¹ the learned Judge Traverso commented as follows:

Daar rus `n plig op die aanklaer om te verseker dat al die tersaaklike inligting voor `n voorsittende beampte geplaas word en dit moet nie aan die beskuldigde oorgelaat word om dit te doen nie. Die plig om toe te sien dat reg en geregtigheid tydens enige hofverrigtinge geskied, rus op al die beamptes van die hof. Dit is nie `n plig wat tot die voorsittende beampte beperk is nie. As die Staat nie alle feite voor die landdros plaas nie, kan reg en geregtigheid nooit geskied nie.⁴²

⁴⁰ @ par. [71] on page 112l to page 113 of the judgment.

⁴¹ 2004(2) SACR 478 (C)

⁴² @ par. 11 of the judgment

In **Sithole & others v S**⁴³ the learned Judge Steyn commented as follows:

*“A close scrutiny of the Carmichele judgment shows that there is a duty on prosecutors to be pro-active in taking steps to protect the community against any criminal conduct and hence they should actively participate in the bail process.”*⁴⁴

In the light of these authorities it is my respectful view that the prosecutor was obliged to produce the petition by the community and unless due objection to the admission thereof was upheld the court was obliged to accept the petition. No objection to the admission thereof was raised, thus it was handed in.

Another aspect to this ground is that Applicants had an opportunity to place their defence before the court. However, they elected not to do so. During the bail application on new facts that followed the application for my recusal, Applicants stated that their erstwhile legal team did not follow their instructions. They indicated to their erstwhile legal team that they wished to disclose their defence in the bail application. They even had written statements with them regarding their defences. However, their erstwhile legal team failed to comply with their instructions to disclose their defence. These statements were in possession of their new legal team at the time of the hearing of the application for bail on new facts. After the application to be released on bail was refused, they terminated the services of their erstwhile legal team.

The court is of the view that Applicants failed to recognise—

- that they had an opportunity to disclose their defence which they failed to do;
- that they appeared before a commissioner of oaths when their affidavits were commissioned; that if they had given the commissioner the slightest indication that they are unwilling to make the sworn statements that was handed in in support of the bail application the commissioner would not have been able to commission their statements⁴⁵; that they confirmed before the commissioner that they know and understand the contents of the declaration and that they have also sworn before the commissioner that the contents of their statements are the truth; and
- that no objections were raised to the admission of the petition by the prosecutor.

The court is furthermore of the view that Applicants had two weeks, from the date on which their affidavits were handed in to the date on which the matter was postponed for judgment to reconsider their position and to terminate the services of their legal team. 2nd Applicant is an attorney by profession and is certainly aware of the fact that an attorney is obliged to follow his client’s instructions in conducting the case. On the date of judgment, a week later, a correspondent attorney, Mr Cilliers, appeared on behalf of Applicants. Even on that day they could have informed Mr Cilliers that they want an opportunity to disclose their defence. The court is therefore of the view that Applicants had ample opportunity to

⁴³ [2011] JOL 27644 (KZD)

⁴⁴ @ par. 5 of the judgment.

⁴⁵ Section 7 of the Justices of the Peace and Commissioners of Oaths Act, 1963 stipulates that a commissioner of oaths shall not administer an oath or affirmation or take a solemn or attested declaration if he has reason to believe that the declarant is unwilling to make an oath or affirmation or such a declaration.

rectify the situation they are now complaining of. Consequently, the court is respectfully of the view that Applicants acquiescence in the manner in which counsel conducted their case. In any event, it is trite law that litigants are bound by the actions of their counsel.⁴⁶

The court is therefore of the view that Applicants apprehension of bias in this regard does not rest on the true facts of the matter and is unfounded, unreasonable and unjustifiable.

In **SARFU** (above) the Constitutional Court remarked as follows:

“An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.”⁴⁷

For these reasons I am respectfully of the view that this ground for my recusal should be ignored *in toto*.

17. The 3rd ground for my recusal is that I postponed the matter in order to prepare for judgment instead of giving judgment *ex tempore*.

In **Matshikwe, Magistrate-Stutterheim v Mashiya**; Case number 102/02; SCA (**Matshikwe**) Respondent applied for bail before Appellant. After the close of the cases for the State and Respondent and apparently prior to the parties having addressed the court, Appellant postponed the matter for 9 days for “judgment”. The respondent’s attorney objected. The magistrate then told him that the earliest date available was a day earlier, thus eight days hence. The respondent was to remain in custody.

After seeking the advice of senior counsel, the attorney for Respondent approached Appellant in chambers requesting him to re-call the matter. This request was refused. Appellant’s attorney then brought an urgent application in the High Court in Grahamstown for an order to compel the magistrate to hear argument and give judgment in the bail application. The application came before the learned Judge Pillay who issued a rule *nisi* calling on Appellant to show cause by 12h00 the next day why the order sought should not be granted. The order was faxed to the magistrates’ offices, Stutterheim. There was no response and at about noon on the next day the learned judge Pillay granted the following order:

- “1. That the District Magistrate Stutterheim, Mr Matshikwe, be directed to hear the addresses [of the prosecutor and the defence attorney] by not later than 15h00 on 6 July 2001.
2. That the District Magistrate of Stutterheim, Mr Matshikwe, be directed to give judgment [in the bail application] by not later than 16h00 [on 6] July 2001.”

The magistrate then heard both parties’ arguments, as the order directed. But he declined to comply with its second part stating:

⁴⁶ **W H Britz and others v E T Matloga and others** Case No: 21653/2011 Gauteng Division: Pretoria

⁴⁷ Page 54 of the record

“I want to evaluate the evidence and your submissions carefully and apply my mind to the matter.”

Emphasising *“that finalising an application for bail is always a matter of urgency”* and that an applicant *“is certainly entitled at first instance to a prompt decision one way or the other”* the court per the learned appellate Judge Cameron commented as follows:

“Nevertheless, it is equally obvious that conscientious determination of bail applications – applying the ‘good judgment’ they require – might demand reflection: overnight, or conceivably even longer. It is not desirable to try to lay down any general rule. Nor does the case require us to do so. It is not necessary to decide whether, given the proactive duties imposed on magistrates during bail hearings, an eight- or nine-day postponement could ever find justification, particularly when a postponement under s 50(6)(d) of the Criminal Procedure Act has already been refused, and when evidence and argument are complete. Nor is it necessary to decide whether in this case – which Pillay J described as ‘straightforward’, and which the full bench, endorsing the attitude of the DPP, disposed of as such – a postponement of that length could possibly have been warranted.”⁴⁸

At the end the Court came to the following conclusion:

“To summarise: even if the magistrate’s postponement of the bail proceedings was unjustified and unreasonable, and the respondent was therefore entitled to a prompt decision on bail, no case was made out before Pillay J for subjecting the magistrate’s conduct of the proceedings to the time specifications the order contained. These were in the circumstances unwarrantably constricting and demeaning to the magistrate, and the order must therefore be set aside.”⁴⁹

The appeal succeeded and the order of the learned Judge Pillay has been set aside by a unanimous decision of the court.

The current matter is distinguishable from **Matshikwe**. In **Matshikwe** there was only one applicant for bail. The evidence in bail application in **Matshikwe** was finalised on the same day it commenced. The magistrate then postponed judgment in the bail application for 8 days notwithstanding the defence’s objection to such postponement.

In the current matter there are 5 applicants. The first 2 Applicants submitted two affidavits each. The remaining 3 Applicants submitted one affidavit each in support of the application for bail. 4th Applicant also gave *viva voce* evidence in support of the bail application. The bail hearing took 3 court days to complete. The Public Prosecutor also submitted 2 affidavits by the investigating officer in opposing the application. At the end of the hearing on the third day I wanted to postpone the matter for judgment. A date suitable to the State, counsel for the Applicants 1 & 2 and the attorney for Applicants 3-5 had to be arranged. All agreed to a postponement of the matter to the next Friday, 7 days hence. The court is therefore of the view that a postponement for judgment in the current bail application was even more justified than a postponement in **Matshikwe**.

⁴⁸ @ par. [17] of the judgment.

⁴⁹ @ par. [27] of the judgment.

In his argument that the court should have given judgment *ex tempore*, Mr Spangenberg clearly failed to recognise that there were 5 applicants. The court is respectfully of the view that from the commencement of the initial bail application right to the finalization thereof there were no unnecessary delays. Every postponement date was properly arranged and agreed to by the parties.

In the light of the above-mentioned considerations and the Supreme Court of Appeal decision in **Matshikwe** (above) it is clear that Applicants apprehension of bias on this ground is based on the wrong facts as well as on the wrong legal principles. Therefore, their apprehension of bias in this regard cannot be said to be that of a reasonable person.

18. The court is of the view that Applicants failed to discharge the onus resting upon them to provide cogent evidence that a reasonable, objective and informed person would on the correct facts reasonably have apprehended that I would not have brought an impartial mind to bear on the adjudication of the bail application on new facts. Consequently, the application for my recusal was dismissed.

Dated at Ermelo Magistrate's Court on the 11th day of September 2019.

S.A. Gräbe
Additional Magistrate Ermelo