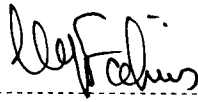


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

4/2/15

Case Number: A834/2014

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(1) REPORTABLE: YES/NO	<input checked="" type="radio"/> YES <input type="radio"/> NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO	<input checked="" type="radio"/> YES <input type="radio"/> NO
(3) REVISED.	<input checked="" type="checkbox"/>
4/2/15	 _____ <small>DATE</small> <small>SIGNATURE</small>

In the matter between:

MALALA GEOPHREY LEDWABA

APPLICANT

And

THE REGIONAL MAGISTRATE,

MR T. P. MUDAU N.O.

FIRST RESPONDENT

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL AFFAIRS

SECOND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS,

GAUTENG NORTH (PRETORIA)

THIRD RESPONDENT

JUDGMENT

Fabricius J,

1.

The Applicant is an accused in a Criminal case and was convicted by the First Respondent, as Regional Magistrate, of two counts fraud and four counts of theft.

The Applicant was prosecuted in October 2006.

2.

Having previously been postponed, the case served again before the First Respondent on 1 August 2014. A postponement to 21 August was asked for, and during these proceedings the Applicant informed the First Respondent of a complaint that he had lodged with the Magistrates' Commission. The case was postponed to 21 August and the First Respondent then informed the Applicant that he intended to

revisit the extension of bail previously granted by him on a certain supposition, essentially being that the Applicant, as an admitted Advocate, had to finalize certain briefs. Bail was cancelled on that day, and after an urgent application before Baqwa J the bail was re-instated. The learned Judge found that the First Respondent had not exercised his discretion judiciously. The record shows that the First Respondent had made an error in the context of the provisions of S. 168 of the *Criminal Procedure Act 51 of 1977* as amended. The record and the judgment do certainly not indicate that the learned Judge had been of the view that the First Respondent had acted capriciously, although Applicant relied in his Heads of Argument on that factor.

3.

On 30 September 2014 Applicant brought an application that First Respondent recuse himself from the proceedings on the grounds that he was biased and that he would not receive a fair trial during the sentencing process which still has to take place. This application was refused, and the review of such refusal is now before us.

The First and Second Respondents did not oppose the application but filed a notice to abide. First Respondent had however provided written reasons dated 30 September 2014 for refusing the application for his recusal. He dealt with certain authorities in this context, and denied that he had been motivated by any extraneous consideration when cancelling the bail. He already knew about the Applicant's complaint about him to the Magistrates' Commission on 1 August 2014, and if he had been motivated by any injudicious consideration he could have cancelled the bail then. The complaint against him was in any event without merit, and it is common cause that the Magistrates' Commission did not deem it fit to deal with it. His conclusion was that the Applicant had been a dishonest witness, and that in any event it was not in the interest of justice that he grants the recusal application. In this context he said the following: "The application for my recusal is a product of a desperate and relentless effort by the accused in avoiding the just conclusion of this matter which is clearly contrived. Not only is it without foundation but it is unreasonable. The fact that I have made credibility findings in this matter against the

accused does not qualify me from concluding this matter. Neither does the fact that I cancelled his bail in the course of my judicial function justify an inference that I am hostile towards him.”

5.

I may just add that Applicant was struck off the roll of Advocates by this Court on grounds of gross misconduct and of not being a fit and proper person to remain on such roll.

6.

Third Respondent opposed the application and also filed Heads of Argument. In them reference was made to a number of well-known authorities, which deal with the topic at hand which emphasize the following relevant considerations:

6.1

In considering an application for recusal the Court as a starting point presumes that judicial officers were impartial in adjudicating disputes;

6.2

An applicant for recusal must bear the onus of rebutting the presumption of judicial impartiality;

6.3

The presumption was not easily dislodged and required “cogent” or “convincing” evidence to be rebutted;

6.4

Not only must a person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable.

See: *South African Commercial Catering and Allied Workers Union and Others vs Irvin and Johnson Ltd (Sea Foods division: Fish processing) 2000 (3) SA 705 (CC) at 713 to 715.*

6.5

It is clear that mere apprehensiveness on the part of a litigant that a Judge or judicial officer would be biased – even a strongly and honestly felt anxiety – is not

good enough. The Court has to scrutinize carefully the apprehension to determine whether it was to be regarded as reasonable.

See also: *S vs Basson 2007 (1) SACR 566 (CC) at par. 42.*

7.

Applicant had previously also brought a review application, after conviction, but before sentence in terms of provisions of Rule 53 of the Uniform Rules of this Court. This application was dismissed by Preller J and Bam J on 22 July 2014. One of the grounds of review relied upon was that the First Respondent had discussed the criminal matter with a third party. It appears from the judgment of this Bench, that these allegations were without foundation. I mention this to indicate that in my view the Applicant is not a "reasonable person" in the present context of the debate before us. The First Respondent, during the sentencing proceedings will have to apply the usual principles that are relevant when a sentence is imposed, as well as the relevant legislation applying to minimum sentences. Contrary to what Mr Geach SC on behalf of Applicant argued, there is in my view no factual basis or reasonable

basis for holding that the First Respondent will not act impartially. Contrary to what Applicant alleged in these proceedings, no Court has found that the First Respondent acted "capriciously". The fact that he erroneously, having regard to the relevant legislation, withdrew the bail of Applicant, is in my view not a sufficient indication that he will not act impartially or be seen to act impartially, or perceived to act impartially during the sentencing proceedings which will obviously be open to scrutiny and, subject to an application for leave to appeal if Applicant is so advised.

8.

It is also in the interest of justice that cases be finalised. It is not only the interest of the Applicant that must be considered but the interest of the administration of justice and the interest of the public at large.

9.

Having regard to all of the above-mentioned ~~it~~ considerations I am of the view that there is no merit in the application before us and accordingly it is dismissed with costs.



JUDGE H.J FABRICIUS**JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA**

I agree



JUDGE W. HUGHES**JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA**