

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO.13/ 2011

In the matter between:

'MAHOLOMO MPALI

APPELLANT

AND

THE LEARNED MAGISTRATE
– MRS M. NTHUNYA

FIRST RESPONDENT

CLERK OF COURT – MOKHOTLONG
MAGISTRATE'S COURT

SECOND RESPONDENT

THE ATTORNEY GENERAL

THIRD RESPONDENT

CORAM: RAMODIBEDI, P
SMALBERGER JA
HOWIE, JA

HEARD: 12 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Review – Of decision of a Magistrate's Court – Presiding Magistrate sitting despite her prior knowledge of the facts of the case in her administrative capacity and also despite the fact that her own subordinate magistrate was not only a witness but also the investigator in the matter – Allegations of a reasonable suspicion or apprehension of bias on the part of the Presiding Magistrate unrefuted – Appeal upheld and the case remitted to the trial court to be tried de novo before a different Magistrate who is not attached to any office under the jurisdiction of the first respondent or the Chief Magistrate in the Northern Region.

JUDGMENT

RAMODIBEDI P

[1] The circumstances giving rise to this appeal are somewhat of a bizarre nature as will become apparent shortly. The bedrock of the appellant's case, as I understand it, is that she had a reasonable apprehension of bias on the part of the first respondent who presided over her case in the court of first instance at Mokhotlong

Magistrate's Court. This was a criminal case in which the appellant was charged with theft of Government money amounting to a sum of M186,597.00. The theft was alleged to have taken place during the period between 2006 and 2010.

[2] On 28 April 2011, the first respondent found the appellant guilty as charged. She sentenced her to 15 years imprisonment. Thereafter, the appellant lodged a review application by way of a notice of motion in the High Court. She sought an order reviewing, correcting and setting aside the proceedings in question. She further prayed that these proceedings should start de novo before a different magistrate.

[3] When the matter came before her, the learned High Court Judge dismissed the appellant's review application.

She held the view that the appellant should have proceeded by way of appeal and not review. The appellant challenges the correctness of that decision.

[4] The background facts show that the appellant, who was employed as a clerk in the Mokhotlong Magistrate's Court, was charged with theft of the sum of M186,597.00 belonging to the Lesotho Government. As pointed out earlier, the theft was alleged to have taken place during the period between 2006 and 2010.

[5] It is an unusual feature of the case that at the trial, which commenced on 21 September 2010, Mr. Motanyane, the Magistrate for the district of Mokhotlong (hereinafter referred to as PW1), gave evidence against the appellant in his capacity as the investigator in the case. As if that unusual feature was not enough the trial proceeded before

the first respondent who is the Chief Magistrate of the Northern region and is a such PW1's administrative head. Furthermore, it is common cause that the first respondent had had prior knowledge of the facts pertaining to the case by virtue of her position as Chief Magistrate.

[6] It is not disputed that at the commencement of the trial, the appellant's counsel applied for the first respondent's recusal on the basis that there was a likelihood of bias on her part and that she would not be able to judge PW1's evidence impartially. The first respondent dismissed the application. In fairness to her, however, it must be stated that she did say that she had made an attempt to find another judicial officer to preside in the matter. She was, as she said, unsuccessful due to financial constraints. In my view this is no excuse in a matter such as the present. Be that as it may she then

decided to appeal to her own conscience and proceeded to preside in the matter. But she went further, as appears from the appellant's uncontested averment contained in paragraph 7 of her founding affidavit. She stated that she held PW1 "*in high esteem and she [respected] his judgment and authority.*" That, as it seems to me, was an unfortunate statement. It might lead to a reasonable suspicion or apprehension of bias on the part of the first respondent. As matters stand this is precisely the appellant's case.

[8] It is well settled in this jurisdiction that the test for recusal is the existence of a reasonable suspicion or apprehension of bias. It shall suffice merely to refer to the latest decision of this Court in R v Manyeli 2007 – 2008 LAC 377. That case followed with approval the case of S v Roberts 1999 (4) SA 915 (SCA) at 924 in which Howie JA

(as he then was) highlighted the following requirements of the test for recusal at para [32] of his judgment:-

- “(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.”*

The learned Judge added an important rider at para [34] of the judgment that the suspicion is one which the reasonable person referred to would, not might, have.

[9] Applying these principles to the present case I conclude that the appellant’s application for the recusal of the first respondent was well founded. I respectfully adopt the following remarks of Corbett CJ in Council of Review, South African Defence Force and Others v Mönnig and Others 1992 (3) SA 482 (A) at 495 B-C:-

“...it means that the trial ...should never have taken place at all. What occurred was a nullity. It was not, as in many of the cases quoted to us, an irregularity or series of irregularities committed by an otherwise competent tribunal. It was a tribunal that lacked competence from the start. The irregularity committed by proceeding with the trial was fundamental and irreparable.”

[10] It follows from the foregoing that the learned Judge a quo misdirected herself in dismissing the appellant’s review application on the ground that she should have proceeded by way of appeal and not review. The uncontroverted allegations of a reasonable suspicion or apprehension of bias against the first respondent in effect raised lack of jurisdiction on her part to sit.

[11] In the result the appeal is upheld and the following order is made:-

- (1) The order of the court a quo dismissing the appellant’s application for review is set aside.

- (2) The matter is remitted to the Mokhotlong Magistrate's Court to start de novo before a different Magistrate who is not attached to any office under the jurisdiction of the first respondent or the Chief Magistrate in the Northern Region.

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

C.T. HOWIE
JUSTICE OF APPEAL

For the Appellant: Mr. K.J. Nthontho

For the Respondents: Adv. M. G. Thabane