

IN THE HIGH COURT OF LESOTHO

CIV/T/53/15

HELD AT MASERU

In the Matter Between:-

SHABE TSELA	1st APPLICANT
MOLEFI THATO	2ND APPLICANT
PHEELLO SEHLABAKA	3RD APPLICANT
MATSITA ROSE TSITA	4TH APPLICANT
MASUPING MOTSOARI	5TH APPLICANT
REFILOE KOLOBE	6TH APPLICANT
NTHABISENG MATSOSO	7TH APPLICANT
PABALLO TILO	8TH APPLICANT
MAKENEUOE MOKHORO	9TH APPLICANT
VS	
PRINCIPAL SECRETARY MINISTRY OF JUSTICE	1ST DEFENDANT
MINISTRY OF PUBLIC SERVICE	2ND DEFENDANT
ATTORNEY GENERAL	3RD DEFENDANT

JUDGMENT ON RECUSAL

CORAM	:	HON. M. MOKHESI AJ
DATE OF HEARING	:	18 MAY 2018
DATE OF JUDGMENT	:	28 JUNE 2018

CASE SUMMARY:

Application for recusal – Dismissed for failure to rebut the presumption against partiality – application dismissed with no order as to costs.

ANNOTATIONS:**CASES:**

President of the Republic of South Africa and Others v SARFU (CCT 16/1998) [1999]
ZACC 9

SACCAWU and Others v Irvin and Johnson Limited Seafoods Division, Fish Processing (CCT 2/00) [2000] ZACC 10

Sonwabiso Maxwell Ndimeni v Meeg Bank (Bank of Transkei) (629/09) [2010]
ZASCA 165

As per Mokhesi AJ

[1] The plaintiffs had issued summons, on the 27 January 2015 against the Principal Secretary Ministry of Justice (1st defendant) and the Ministry of Public Service (2nd defendant). In the summons the plaintiffs had sought relief, *inter alia*, that they be upgraded to the salary scale of grade I. It is common cause that the plaintiffs are the High Court Interpreters. It is also common cause that at the request of the plaintiffs' counsel, all the Honourable Judges recused themselves from hearing this matter. It would appear that at some stage, the plaintiffs were promised that a foreign judge would be sourced to preside over their case. One major reason why they sought recusal of my colleagues is that, the Judges supposedly, in one of their meetings, had remarked or "resolved that registrars are like interpreters in their delinquent behavior, raising serious doubts about their qualifications and/or competence and commitment."

It would seem that this case had been languishing in this court without any progress primarily due to the unavailability of a judge to preside over it. When I was engaged on an acting role from the beginning of February 2018, this is one of the matters which were allocated to me to deal with. Immediately I made arrangements for this matter to be set down for hearing. After sometime, Mr. Molati and Advocate Tau came to my chambers where Mr. Molati indicated that he had instructions to seek my recusal in this matter. After making oral submissions, quite tactically I must admit, Mr. Molati was directed to file a substantive application for my recusal. That application was duly filed on the 29th March 2018. The matter was scheduled to be heard on 16 April 2018. On 16th April both counsel were before court, and it was at that point where I sought clarity as to the identity of one of the plaintiffs. I indicated that if Mrs. Mahloko was the person I know, then I would recuse myself as I have a close relationship with her after working with her as my interpreter in Mafeteng for over a period of ten years. I tasked Mr. Molati with finding out if she was still interested in this matter as I know that she holds a substantive position as Councilor with the office of the Master of the High Court. Mr. Molati promised to come with full information after two hours. Hardly after five minutes the court had stood down the matter until the issue of Mrs Mahloko had been clarified, Mr. Molati came back to tell the court that Mrs Mahloko was still interested in this matter.

[2] In view of this revelation I then recused myself. After both counsel had left I had a conversation with Mrs Mahloko where I asked her why she was still interested in this case when I knew she has a job which was commensurate with her qualifications as a counsellor. It then emerged from our conversation that she had not been contacted as Mr. Molati had intimated to the court and that she was not interested in the case as indicated at all. I then summoned both counsel to appear before me on the 18 April 2018 where I sought Mr. Molati's reaction to this revelation. Mr. Molati apologized for the misleading information and informed this court that he had relied on what he was told by his clients. On the basis of this misleading information I rescinded my decision to recuse myself and directed that Heads of Arguments be filed. Mr. Molati was directed to file his Heads of Arguments on or before 23 April 2018. That did happen as those Heads of Arguments were only filed on the 18th May 2018.

[3] Mr. Molefi Thatho deposed to the founding affidavit and in it he raised the following issues which he says disqualify me from presiding over their case for salary upgrades. It is apposite to quote directly from his founding affidavit to fully grasp the gist of his contentions:

Ad para. 34

"While his Lordship was acting, and in the recent past, the Magistrates (through Judicial Officers Association of Lesotho) wrote a letter in terms of which they said interpreters and recorders have filed proceedings to stop the implementation of the new salary structure."

Ad para. 35

"His Lordship was one of the affected Magistrates".

Ad para. 36

"We fear that he should not preside over our battle that is similar to the one he was fighting personally and in which he was within a group of people who held a view that we are obstructionist."

Ad para. 40

“I submit that it is on record that their Lordships and Ladyships have had an occasion to express their views and attitude towards us, Principal Interpreters of the High Court of Lesotho...”

Ad para. 42

“We fear that His Lordship, while he is still an acting Judge, may not be able to divorce his views from those of the majority Judges who are all his seniors.”

Ad para. 43

“I submit that for the fact that His Lordship, not yet a Judge when the above resolution was made, does not alter the position.”

Ad Para. 47

“I submit again even the Chief Magistrates who were immediate superiors to of His Lordship Acting, in particular the three Chief Magistrates from North, South and Central appeared in the High Court and expressed negative views that is related to the very issue which His Lordship Acting is to determine. When the Chief Magistrates were making adverse remarks, they did so on behalf of their fellow Magistrates like his Lordship acting...”

Ad para. 51

“I submit in the last analysis that we would not have a problem proceeding before his Lordship if his position had been confirmed as permanent. Rather than now when it is an acting position.”

[4] The test for recusal or a proper approach to dealing with a recusal was articulated in the **President of the Republic of South Africa and Others v SARFU**

(judgment on recusal application) (CCT16/1998) [1999] ZACC 9: 1999(4) SA 147 at para. 48, where it was said:

“....The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that a 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. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that a judicial officer, for whatever reasons, was not or will not be impartial.”

[5] Two considerations are built into the test articulated in SARFU (above) (see SACCAWU and Others v Irvin and Johnson Limited Seafoods Division Fish Processing (CCT 2/00) [2000] ZACC 10, 2000 (3) SA 705 at para. 13 and those are:

- (i) There is a presumption that judicial officers are impartial in adjudicating the cases brought before them.
- (ii) The consequences that flow from this presumption are two-fold, and that is, that the applicant for recusal bears the onus of rebutting the presumption that judicial officers are presumed to act impartially.
- (iii) The above presumption “is not easily dislodged. It requires ‘cogent’ or ‘convincing’ evidence” to be rebutted.
- (iv) The second in-built aspect is that “absolute neutrality is something of a chimera in the judicial context. This is because

judges are human. They are unavoidably the product of their own life experiences, and the perspective thus informs each judges' performance of his or her judicial duties. But colorless neutrality stands in contrast to judicial impartiality...

Impartiality is that quality of open-minded readiness to persuasion without unfitting ad hence to either party, or to the judge's own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication.

Impartiality requires in short 'a mind open to persuasion by the evidence and submissions of counsel', and in contrast to neutrality, this an absolute requirement in every proceeding."

[6] A judge or judicial officer will only be disqualified if there exist a reasonable apprehension that he or she will not act impartially in adjudicating the matter before her or him and not that he will decide the case adversely to a party seeking his or her recusal (**SARFU case at para 40 quoting with approval a passage in RE JRL EX PARTE JL (1986) 161 CLR 342 (HCA) AT 352**).

The rule disqualifying a judicial officer does not apply only where such judicial officer has a pecuniary interest in the outcome of the proceedings, but also where non-pecuniary interest that a particular outcome is reached (**see: Sonwabiso Maxwell Ndimeni v Meeg Bank (Bank of Transkei) (629/09) [2010] ZASCA 165**).

[7] It is clear that my recusal is being sought on the basis of the statements made by persons other than myself, viz, the negative utterances which the Learned Judges are alleged to have made in their meeting. What is undeniable regarding this incident is that I was not part of it as at the time I was still a Magistrate. In the same vein the remarks made by the Chief Magistrates cannot be attributable to me, in any event their remarks were made in relation to a matter which is not related to this one, even if they were my supervisors.

It is the applicants' further contention that for the fact that I was a Magistrate when this Court's Recorders and Interpreters stopped the implementation of the revised Judiciary salary structure on its tracks, by means of an order of court, that is reason enough to disqualify me from presiding over their case. In my considered view this assertion and the Chief Magistrates' utterances is not "cogent" or "convincing evidence" to rebut the presumption that I will bring an impartial mind to the

adjudication of this matter. It is my considered view that the fact that the applicants are aware (in any event it is not the basis of their case for my recusal) that I do not have either a pecuniary interest or non-pecuniary interest that a particular outcome is reached in this matter is buttressed by what Mr. Molefi Thatho, (a deponent to the founding affidavit) (at para. 51 thereof) says. He says:

“I submit in the last analysis that we would not have a problem proceeding before his Lordship if his position had been confirmed as permanent. Rather than now when it is an acting position.”

Quite frankly, I do not see how my acting role makes me less impartial than if I was permanent. My considered view as already said is that the applicants have failed to discharge the onus placed on them to rebut the presumption that as a judicial officer who has sworn to impartiality, that I will not discharge my duties in accordance with that oath.

[8] ***Functus Officio:***

The applicants have raised an issue that because I had already pronounced that I had recused myself on account of Mrs Mahloko still being interested in this matter, then on that score I could not change that decision. In my view this point is without merit as it was clear that my recusal was induced by undeniable falsehood. Even Mr. Molati could not deny this, only contending himself that he relied on the information which was given to him by his clients. Consequently I invoked my common law powers to vary the decision to recuse myself. I was therefore not *functus officio* as alleged. In the result this application is dismissed for want of merit. There is no order as to costs.

MR. M. MOKHESI AJ

FOR APPLICANTS : ADV. MOLATI

FOR DEFENDANTS : ADV. TAU