

**REPORTABLE**

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CRI/T/0001/2018**

In the matter between:

**REX**

**APPLICANT**

And

**KENNEDY TLALI KAMOLI  
ACCUSED**

**1<sup>ST</sup>**

**LITEKANYO NYAKANE**

**2<sup>ND</sup> ACCUSED**

**MOTLOHELOA NTSANE**

**3<sup>RD</sup> ACCUSED**

**LEUTSOA MOTSIELOA**

**4<sup>TH</sup> ACCUSED**

**MOTHEJOA METSING**

**5<sup>TH</sup> ACCUSED**

**SELIBE MOCHOBOROANE**

**6<sup>TH</sup> ACCUSED**

Neutral Citation: Rex v. Kamoli and others: In re Recusal application by the Crown [2022] LSHC 1 Crim (26 January 2022)

**CORAM: S.P. SAKOANE CJ**

**HEARD: 20 JANUARY 2022**

**DELIVERED: 26 JANUARY 2022**

## **SUMMARY**

Recusal application – prosecutor absenting himself from court proceedings without leave of court and attends to another case without knowledge of court – application for postponement filed by the DPP because of absence of prosecutor – misleading information placed before court in support of such application – prosecutor being the source of such information – another prosecutor appointed – previous prosecutor disqualified from appearing in the case – remarks disapproving manner in which the Crown counsel conducted himself – whether the disqualification of the prosecutor and remarks made in course of proceedings constitute reasonable apprehension of bias – ethical obligations of prosecutors – Speedy Court Trials Act, 2002, sections 5(1), 9(4) and 12(4)

## **ANNOTATIONS:**

### **CITED CASES:**

#### **LESOTHO**

Crown v. Mochebelele and Another LAC (2009-2010) 114

Karim v. Law Society of Lesotho LAC (1970-79) 421

Lebelo v. Lebelo and Another 1976 LLR 206 (H.C.)

Lekhutle v. Rex (1974) LLR 94 (H.C.)

R v. Manyeli LAC (2007-2008) 377

R v. Sole 2001 (12) BCLR 1305 (Les)

Sole v. Cullinan NO and Others LAC (2000-2004) 572

Spie Batignolles v. I. Nondwele & 334 Others (1985-1990) LLR 243 (H.C.)

#### **CANADA**

R V. Curragh Inc. [1997] 1 S.C.R.

#### **ENGLAND**

Rondel v Worsly [1969]1 AC 191

## SOUTH AFRICA

Booyesen v. Acting National Director of Public Prosecutions and Others 2014 (9) SACR 556 (K2D)

Cape Law Society v. Gihwala [2019]2 A11 SA 84 (SCA)

De Lange v. Smuts NO and Others 1998 (7) BCLR 779 (CC)

President of the RSA v. South African Football Union 1999 (4) SA 147 (CC)

S v. Basson 2007 (3) SA 582 (CC)

SA Commercial Catering & Allied Workers Union v. I&J Ltd 2000 (3) SA 705 (CC)

## UNITED STATES OF AMERICA

Berger v. United States 295 US 78 (1935)

Liteky v. United States 510 US 540 (1994)

United States v. Wilson 149 F.3d 1298 (11<sup>th</sup> Cir. 1998)

## ZIMBABWE

Smyth v. Ushewokauze and Another 1998 (3) SA 1125 (ZSC)

## STATUTES:

Speedy Court Trials Act No.9 of 2002

## BOOKS AND JOURNAL ARTICLES:

Byrne M. "Baseless Pleas: A Mockery of Justice" Fordham Law Review Vo.78 Issue 6 (2010)

Dikgang Moseneke (2016) My Own Liberator (Picador Africa) 235

# RULING

## **I. INTRODUCTION**

[1] This is an application by the Director of Public Prosecutions that the court recuses itself in the criminal trial. The proposition advanced for recusal is that this court is biased against the Crown on account of:

- 1.1 Refusing to entertain an application for postponement until it was withdrawn.
- 1.2 Casting negative aspersions against further particulars provided by Mr. Abrahams to the defense team.
- 1.3 Denying Mr. Shaun Abrahams from appearing to lead the prosecution team following an inquiry under the **Speedy Court Trials Act No.9 of 2002**.
- 1.4 Being dismissive when being informed that a recusal application would be brought and assuring the defense counsel that no further postponements would be acceptable after the hearing of the recusal application.<sup>1</sup>

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<sup>1</sup> See founding affidavit paras 56-85

[2] It is the contention of the learned Director that the foregoing facts have “created serious perceptions that the Honourable Chief Justice is biased against the Crown, and will not bring an impartial mind to bear on the adjudication of the trial of the accused.”

[3] A further contention is that this perception is shared by “victims of crime and society”.

## II. MERITS

### A. The law

[4] The right to be tried by an impartial judge is of fundamental importance in our system of justice. This right is imperilled by words and actions of a judicial officer which creates or demonstrate a reasonable apprehension or perception of bias.<sup>2</sup> The reasons for a litigant’s entitlement to a trial by an impartial judicial officer is well put in **De Lange v. Smuts NO and others**<sup>3</sup> as follows:

“Everyone is entitled to an impartial judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in

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<sup>2</sup> R v. Curragh Inc. [1997]1 S.C.R. 573 para 7 (Supreme Court of Canada)

<sup>3</sup> 1998(7) BCLR 779 (CC) para 131

evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than a chance.”

[5] The legal test for recusal is propounded by the Court of Appeal in **R v.**

**Manyeli**<sup>4</sup> as follows:

“[9] The generally accepted test for recusal is the existence of a reasonable suspicion or apprehension of bias (*BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers’ Union and Another* 1992 (3) SA 673(A) at 6931I-J). Bias in the sense of judicial bias has been said to mean:

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

See *Franklin and Others v Minister of Town and Country Planning* [1948] AC 87(HL) at 103, quoted with approval by Howie JA in *S v Roberts* 1999 (4) SA 915(SCA) at 922I-J.

[10] The requirements of the test were elaborated upon as follows in *S v Roberts (supra)* at paras [32] and [33] (pp 924E-925C).

- ‘(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 .....
- (4) The suspicion is one which the reasonable person referred to would, not might, have.’

In the above regard, as warned in the *BTR Industries* case (*supra*) at 695D-E:

‘It is important .....to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies or the superstition or the intelligence of particular litigants.’

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<sup>4</sup> LAC (2007-2008) 377

[11] In *Solé v Cullinan and Others* LAC (2000-2004) 572 at 586 this court quoted with approval the following passage from *President of the Republic of S A and Others v S A Rugby Football Union and Others* 1999 (4) SA 147 (CC) at 177B-D:

‘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. 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.’

Regard must also be had to the fact that there exists a presumption against partiality of a judicial officer. *S v Basson* 2007 (3) SA 582(CC) at 606E-F.”

[6] From the foregoing dicta, it is clear that regard must be had to the following breakdown of factors when determining an application for recusal:

- 6.1 The presumption against partiality of a judicial officer.
- 6.2 The apprehended bias or its perception must be based on correct facts.
- 6.3 The suspicion of bias must be that of a reasonable person in the position of the litigant and it must also be based on reasonable grounds.
- 6.4 The notion of a reasonable person does not vary according to idiosyncrasies, superstitions and intelligence of particular litigants.

[7] The standards of reasonable person and reasonable ground, called “double-reasonableness”, emphasise the weight of the burden that rests on the litigant seeking recusal.<sup>5</sup> As said by *Cameron AJ*:

“[15] It is no doubt possible to compact the ‘double’ aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

‘Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.’

[16] The ‘double’ unreasonableness requirement 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. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant’s anxieties. It attributes to the litigant’s apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.”<sup>6</sup>

[8] Where a reasonable suspicion of bias is alleged, a judicial officer is primarily concerned with the perceptions of the applicant.<sup>7</sup> Thus:

“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

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<sup>5</sup> *Solé v Cullinan NO And Others LAC (2000-2004) 572 para [22]*

<sup>6</sup> *SA Commercial Catering & Allied Workers Union v. I & J Ltd. 2000 (3) SA 705 (CC) paras [15]-[16]*

<sup>7</sup> Footnote 5 para [31] letter H



follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.”<sup>8</sup>

## **B. The facts**

[9] The correct facts are a matter of record and not what the learned Director says she has personal knowledge of by virtue of been told by counsel prosecuting the case. This is what transpired in court:

9.1 13 December 2021 was the second day after the arraignment of the accused on 6 December. This is day on which King’s Counsel for accused number 6 requested further particulars to the indictment. The rest of the accused were ready to enter their pleas. Pleas were not taken because the request for particulars hinge on clarification of common purpose according to which all accused would be affected by any amendment of the indictment arising from the particulars.

9.2 Faced with the legal requirement to provide the Crown with reasonable notice to comply with the request coupled with the period of two days to go before the Christmas vacation, it became inevitable to find fresh dates.

8.3 Counsel had no nearer dates in February 2022 because some of the accused are in court in respect of other criminal trials. The court

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<sup>8</sup> President of the RSA v. South African Football Union 1999(4) SA 147 (CC) para [45] letters F-G

indicated that it was prepared to sit during vacation in view of the inordinately long time the accused are in custody.

9.4 Mr. *Molati*, for accused number 1 indicated that he already had an appointment to undergo a medical procedure in January 2022. The court indicated that if he would not be available, he should pass the brief to another lawyer. Mr. *Abrahams* also indicated that he already had another case set for January in South Africa. The court said he had to make choice in the matter. Eventually, all counsel agreed that the trial should proceed from 10-21 January 2022.

9.5 On 10 January, Miss *Nku* appeared for the Crown with Mr. *Hopolang Nathane* KC. Mr. *Abrahams* did not appear, and no explanation was provided for his absence. Mr. *Nathane* rose to move an application by the DPP for postponement. When asked whether his brief was not to prosecute the case, he answered that his brief was only to move the application for a postponement. On being made aware of the implications in terms of the **Speedy Court Trials Act, 2002**, he backed off.

9.6 Having abandoned the application, Miss. *Nku* rose to inform the court that she also could not proceed to prosecute the case because she had not been appointed as the lead prosecutor. She did not know anything about the application of postponement. In the

circumstances, the court adjourned for a few minutes for her to consult the DPP and come back to address the Court why the case would not be dismissed for want of prosecution if the Crown did not proceed to prosecute. Upon her return, Miss *Nku* informed the court that she had just been appointed to lead the prosecution but was yet to get the docket. The docket was brought to her in court. She was later joined by Mr. *Rafoneke* as her assistant.

9.7 From there the matter of further particulars was raised and King's Counsel for accused number 6 applying for a postponement to bring a motion to quash the indictment. Since King's counsel had to file the motion on notice for the Crown to respond, the defence and the Crown were put to terms as to the preparation and filing of the motion and response to it. The matter was then adjourned to 14 January. Unfortunately, argument on that day was not heard because of the absence of two defence lawyers Mr. *Mafaesa* and Mr. *Letuka*, who had been tortured and threatened respectively by the police. The case was then adjourned to 17 January.

9.8 On 17 January, in the presence of all defence counsel and the prosecution team of Miss *Nku* and Mr. *Rafoneke*, Mr. *Shaun Abrahams* rose up from the Bar and said he wanted to put himself on record that he was back on record to lead the prosecution. The

court brought to his attention that Miss *Nku* was now the lead prosecutor and that the DPP had, in her affidavit filed of record to have the case postponed and fresh dates given, averred that he (Mr. *Abrahams*) was not available to prosecute for reasons of his engagement in a case in South Africa. The reaction of Mr. *Abrahams* was a surprise.

9.9 It is at this stage that the court adjourned briefly for the DPP to appear before court and explain the presence of Mr. *Abrahams* in the light the DPP's affidavit that he was no more available to prosecute, the appointment of Mr. *Nathane* and then of Miss *Nku* to lead the prosecution team. The *locus* of the opportunity to explain all this was by embarking on an inquiry in terms of section 12(4) of the **Speedy Court Trials Act, 2002**.

9.10 The DPP testified that on 13 December 2021 she learned from Mr. *Abrahams* that the trial had been adjourned to 10-21 January 2022 but he would not be available to prosecute the case during that period because of his engagement in South Africa.

9.11 Because of Mr. *Abrahams*' unavailability, she retained the services of Mr. *Nathane* and instructed him to file an application for postponement for the reasons mentioned in her affidavit. The

application was only filed in court on 10 January despite being dated 7 January.

9.12 The DPP testified further that the brief of Mr. *Nathane* was not confined to applying for postponement but extended to him prosecuting the matter because of the unavailability of Mr. *Abrahams*. Upon being informed that Mr. *Nathane* was not going to go that far, she appointed Miss *Nku* as lead prosecutor. Mr. *Abrahams* gave evidence and was referred to the DPP's affidavit filed in the application for postponement. He had seen the affidavit after it had been filed in court. It was e-mailed to him by Mr. *Nathane*. He was not happy about some of its contents and told both the DPP and Mr. *Nathane* so. He testified that what appears in paragraph 9 thereof is exactly what he told the DPP.

9.13 In regard to paragraph 10, regarding the unavailability of Mr. *Molati*, he said he informed the DPP that Mr. *Molati* had to undergo a medical procedure and may be called any time from January onwards. He never said to her that it would be impossible for Mr. *Molati* to attend court.

9.14 His testimony on paragraph 11 of the affidavit that talks about the pending execution of the arrest warrant of *Mothejoa Metsing (A5)*, was that he partially agreed that the warrant of arrest had been

issued. He did not agree with the sentence in that paragraph that the police had brought to the attention of the court that they were doing everything to execute the warrant of arrest.

9.15 With regard to paragraph 13, he disagreed with the part which suggests that he had agreed with the DPP to withdraw from the case in South Africa. He had said he would refer the matter to his attorney. He told the DPP in the last week of December 2021 that despite his efforts to talk to his attorney about withdrawing from the case in South Africa, he was unable to do so.

9.16 Mr. *Abrahams* further testified that the DPP had not informed him that she had appointed Miss *Nku* as the lead prosecutor. The DPP only knew about his availability on the night of 16 January and he flew back into Lesotho on the morning of 17<sup>th</sup>.

### **III. DISCUSSION**

[10] The trial dates of 10-21 January 2022 were identified and agreed to by the court and all counsel. This was after it being realized that there were no suitable dates after the opening of the High Court in February. There has always been a pressing need to give priority to this trial because the

accused have been in custody for the last five. This is the reason why the court found it imperative to sit during vacation in the interests of justice.

[11] When the trial resumed on 10 January, Mr. *Abrahams* was not in court and no explanation was proffered for his absence by the Crown. Mr. *Nathane* KC appeared with Miss *Nku*. The latter had, hitherto, been assisting Mr. *Abrahams* since the filing of the indictment in 2018 and subsequent proceedings.

[12] Mr. *Nathane* informed the court that his brief was not to lead the prosecution but to apply for a postponement for reasons provided by the DPP in her after affidavit for postponement. Indeed Mr. *Nathane* attempted to have the matter postponed but he withdrew on being fully aware of what might befall him in terms of the **Speedy Court Trials Act, 2002** if the application for postponement was rejected.

[13] Miss *Nku*, who is counsel of more than 40 years of prosecution experience, informed the court that she could not proceed to prosecute the case absent an instruction by the DPP to proceed. It is at this point that she was afforded the opportunity to consult the DPP. The directive was

given to her to do this on the clear understanding that the court would otherwise have to be addressed why the case would not have to be dismissed for want of prosecution if the Crown was not going ahead to prosecute.

[14] On her return, this is what transpired in court:

“HL: Now what does the DPP say then you said you wanted to talk to her about an issue but let’s do the right thing.

PC: She sent the docket because I talked to her and told her in no uncertain terms that when we adjourned this case the last time the court has said that with or without the lead counsel the case is going to proceed because I have been there along with Mr. Lephuthing.

HL: You were just passengers or spectators

PC: I don’t know what to call myself.

HL: Choose for yourself and speak for yourself.

PC: Mr. Lephuthing came in here and then I think the passenger is me. Mr. Lephuthing came not all the time. I am the one who is a passenger my Lord.

HL: You are the passenger?

PC: Yes my Lord.

HL: You will be now be the driver?

PC: Now I am going to drive because

HL: Yes

PC: I am gong to drive my Lord.”

[15] This was said in the context of establishing whether the Crown was proceeding with the trial in the absence of Mr. *Abrahams*. This exchange in court repudiates the DPP’s contention that Miss *Nku* had no mandate to lead the prosecution from that moment. Both Mr. *Abrahams* and Mr.



*Nathane* were out of the prosecution team. On 13 December after the court adjourned, Mr. *Abrahams* had, in no uncertain terms told the DPP, but not the Court, that he would be unavailable during the two weeks of the trial in January 2022. Mr. *Nathane* had not been appointed to lead the prosecution either. So, the only reasonable thing for the DPP to do was to get the trial going by Miss *Nku*. And in this regard, the DPP even retained the services of Mr. *Rafoneke* to assist Miss *Nku*.

[16] At no stage before 10 January did Mr. *Abrahams* and the DPP communicate with the defence team about his unavailability. The court only became aware of his unavailability on the 10<sup>th</sup> when Mr. *Nathane* appeared to move the application for postponement.

[17] The reasons given by the DPP in the two sets of affidavits, one in support of the application for postponement and the one in this recusal application are peppered with hearsay, distortions and misinformation.

[18] Firstly, Mr. *Abrahams* disagrees with the DPP's suggestions in her postponement affidavit that the trial would not proceed on account of Mr. *Molati* being absent. Mr. *Molati* only raised the matter as a consideration

of the dates not being suitable. The court made it clear that he must consider passing on the brief to another counsel. Mr. *Molati* assured the court that he would rather not because of the long time he had been in the brief. There was no doubt about his availability for the two weeks of the trial. Mr. *Abrahams* committed to the trial dates on the realisation that double-booking is a sanctionable professional misconduct.

[20] There is then no basis for the DPP's contention that she and Mr. *Abrahams* agreed that the trial would proceed in his absence but only from "10<sup>th</sup> January 2022 and subsequent days up to and including the 17<sup>th</sup>". Such an agreement if any, was based on misinformation. Its purpose was to let Mr. *Abrahams* leave the case for a week and thereafter re-appear in this court under the pretext that he never left the brief.

[21] On 17 January when Mr. *Abrahams* appeared in court, he told the court, matter of factly, that he was putting himself on record. He did bother to explain his absence without leave of court. He was surprised that Miss *Nku* was on record as the lead prosecutor. The DPP had not brought this fact to his attention.

[22] This behaviour of both Mr. *Abrahams* and the DPP shows the cavalier manner in which they treat this court. They want this court to accept what they told it in the application for postponement and the appointment of Miss *Nku* as lead prosecutor. Their behaviour as officers of the court is completely unacceptable.

[23] It is the DPP's duty to see to it that Crown counsel and retained counsel exercise her delegated powers properly, conscientiously and efficiently by attending court at all times and not at their convenience. The Constitution provides a template for the DPP's exercise of power by her delegates and retained counsel. Section 6(5) enjoins them to prosecute cases with due expedition. Section 12 obligates them to respect fair trial rights of accused persons. Such rights include avoiding to bring frivolous applications for postponements by reliance on false information. Another context is the ethical duties of all lawyers as officers of the court. As said by *Sher J* in **Cape Law Society v Gihwala**<sup>9</sup>:

“[74] In *General Council of the Bar of SA v Geach* [2013] (2) SA 52 (SCA) *Ponnan JA* pointed out that as members of a “distinguished and venerable” profession lawyers occupy a very important place in our society. As officers of the Courts they play a vital role in upholding the Constitution and ensuring that our justice system is efficient and effective, and as a result ‘absolute personal integrity and scrupulous honesty’ are required of them. In addition, the law expects the ‘highest possible degree of good faith’ from practitioners

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<sup>9</sup> [2019]2 A11 SA 84 (WCC)

in their dealings with those for whom the act, and in their dealings with the Courts.

[75] Without these fundamental qualities neither members of the public whom they turn for help and advice in times of need, nor the Courts before whom they appear to plead their cases, can trust and therefore rely on them, and in such circumstances the edifice on which the system is built may come tumbling down. Because of this, the Courts must be vigilant in seeking to uphold these values.

[76] Although many practitioners often lose sight of this in the hurly-burly professional practice and the pursuit of their careers and financial well-being, ultimately their single most important and only real asset-in-trade is their personal reputation. A lawyer who is willing to sacrifice the values of integrity and honesty at the altar of personal enrichment will often find that he has lost his reputation in the process, and has thereby lost the only currency he had.”

[24] Any lawyer found wanting in upholding the ethical standards of the legal profession is liable to disciplinary action. A lawyer who deliberately places before court misleading information or makes a contention which he knows to be false is not fit to remain a member of the profession<sup>10</sup>. In representing clients, lawyers do not lose their independence because:

“the nature of the advocate’s office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of the client, so long as his mandate is unrecalled, and what he does *bona fide* according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client’s interests are thereby prejudiced. These legal powers of counsel are seldom, if ever, exercised to the full extent, because counsel are restrained by consideration of propriety and expediency from doing so.”<sup>11</sup>

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<sup>10</sup> Incorporated Law Society v. Bevan 1908 TS 724 at 731-732; Van der Berg v. General Council of the Bar of South Africa [2007]2 A11 499 (SCA) paras [16]-[17].

<sup>11</sup> Rondel v Worsly [1969]1 AC 191 at 241, 259-60 and 282

[25] It behoves the DPP and other counsel for the Crown in criminal matters to protect the integrity of the criminal justice system by being honest, candid and truthful at all times. This is what society expect from those who the law sees as “ministers of justice”. As said by **Byrne**<sup>12</sup>:

“As ministers of justice, prosecutors have a ‘special duty not to impede the truth’ and furthermore to ensure ‘fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice.’ Lawyers in general have a preeminent obligation to truthfulness’ that prohibits intentionally dishonest conduct, but beyond this, prosecutors have a unique ‘legal and ethical duty to truth’ and the responsibility to facilitate the truth-finding function of the courts.’ This duty requires prosecutors to ‘be forthright, honest, sincere, and unreserved’ towards the court and not to make misrepresentations to third parties, including ‘downstream users’ – persons that are not involved in the current criminal proceeding but who may nonetheless be affected by the conduct, representations, or decisions from the current proceeding.”

[26] Judicial officers rely on lawyers for proper dispensation of justice. The lawyers’ fidelity to the truth should be unquestionable. It is for this reason that judicial officers put high premium on what they are told from the Bar. As *Dikgang Moseneke*, retired Deputy Chief Justice of South Africa says in his memoir:<sup>13</sup>

“I quickly learned that ethical conduct was central to the success of my task as counsel. A judge must always trust what counsel conveys in court. I took seriously the cardinal rule that I should never knowingly convey an untruth to a court. My duty was to convey my client’s version of events to the best of my ability. But once I came to know that my client’s version was false, I would not perpetuate or repeat the lie to court. While I was not required to judge my client’s truthfulness, I never knowingly became a conduit of an accused person’s lies. I

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<sup>12</sup> Byrne M. “Baseless Pleas: A Mockery of Justice” *Fordham Law Review* Vo.78 Issue 6 (2010)

<sup>13</sup> *Dikgang Moseneke* (2016) *My Own Liberator* (Picador Africa) 235

would never help my client fabricate a version or convey to court what I knew to be false. At that point my duty was to withdraw from representing a mendacious client without pronouncing him or her a liar from the rooftops. This was because the communication between a client and a lawyer is privileged and may not be disclosed without the client's permission. In addition, should a withdrawing counsel spread the erstwhile client's untruthfulness, the disclosure is likely to imperil the fairness of the pending court hearing."

These remarks apply *mutatis mutandis* to counsel retained by the DPP.

[27] Prosecutors have behavioural standards. Principles foundational to the code of conduct for prosecutors emerge from case laws and international standards. Some of these principles are the following:

1. Prosecutors must at all times maintain the honour and dignity of their profession by conducting themselves professionally in accordance with the law and the rules and ethics of their profession.
2. They must at all times exercise the highest standards of integrity and care.
3. Like Caesar's wife, prosecutors must be above any track of suspicion.
4. As 'ministers of justice' they have a special duty to ensure that truth emerges in court by disclosing evidence favourable to the accused and drawing the

court's attention to discrepancies or contradictions in the testimony of prosecution witnesses.

5. Prosecutors must always protect an accused person's right to a fair trial.
6. They must carry out their functions impartially and not be affected by individual and sectional interests or political, public and media pressures.

### **Denial of right of appearance**

[28] The DPP concedes that the Court is entitled to conduct an inquiry if a prosecutor seeks to postpone a matter on the basis of falsehoods and to impose sanctions. She, however, contends that "expelling my lawyer from this case is not one of the contemplated sanctions". This contention exposes the DPP's ignorance about the powers of the courts over errant prosecutors.

[29] Judicial officers have inherent powers to discipline practising lawyers – be they in private practice or in the employ of the Crown. The lawyers' right of audience is subject to this jurisdiction. The jurisdiction to discipline lawyers pre-dates the disciplinary regime provided for by the

**Speedy Court Trials Act, 2002.** It is an institutional jurisdiction which no branch of Government can take away or whittle down. Thus, even without the **Speedy Court Trials, Act**, courts have always had the powers to exercise disciplinary control over legal practitioners.<sup>14</sup> Examples of such powers are suspension, removal from the roll and disqualification from a case.<sup>15</sup> Therefore, the **Speedy Court Trials Act** does not confer the courts with disciplinary control over lawyers but merely affirms it.

[30] The **Speedy Court Trials Act, 2002** obliges lawyers to be in attendance at all times during the duration of criminal trials. Only sickness and withdrawals excuse their unattendance. Parliament has decreed that a prosecutor who seeks to postpone a criminal trial by providing false and misleading information or double-booking should be sanctioned. One of the stipulated sanctions is to deny the prosecutor the right to practice or appear before courts for a period not exceeding 90 days.<sup>16</sup> Denial of appearance is, therefore, not an “expulsion” as the DPP suggests. Neither is it a denial of the Crown’s right to a prosecutor of its choice. But even if the DPP is right in her contention that she is denied counsel of choice, the right to counsel is not absolute. It is subject to limitations imposed by

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<sup>14</sup> Karim v. Law Society of Lesotho LAC (1970-79)

<sup>15</sup> United States v. Wilson 149 F.3d 1298 (11<sup>th</sup> Cir.1998)

<sup>16</sup> Sections 5(1), 9(4) and 12(4). It would not be right nor sensible for a criminal trial not to continue during the period of the sanction



the law. Unethical conduct by a lawyer as well as unavailability to prosecute are some of the limitations.<sup>17</sup>

[31] A prosecutor can be denied the right of appearance if he files a frivolous application for the purpose of delaying a trial or seeks a postponement on the basis of a statement which he knows to be false and material.

[32] *In casu*, the DPP filed a postponement application on the strength of information supplied by Mr. *Abrahams*. Mr. *Abrahams* says the first time he saw the affidavit was on the 10<sup>th</sup> when he requested Mr. *Nathane* to provide him with a copy. Although he was not happy that the DPP had used his name in the affidavit and had expressed same to the DPP and Mr. *Nathane*, they never really discussed the matter.

[33] I do not find any reason for him to let the matter to rest at an expression of unhappiness and not seek the withdrawal of the affidavit which forms part of the record in this trial. The DPP used the information supplied by Mr. *Abrahams* in settling that affidavit and yet he now distances himself from some of the things said about him. I find it startling, to put it at its lowest, that an officer of the Court, whose integrity is being put into

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<sup>17</sup> *Lekhutle v. Rex* (1974-75) LLR 94 (H.C); *Crown v. Mochebelele And Another* LAC (2009-2010) 114

question by some of the false things said about him by the DPP, should continue to do business with her.

[34] But in another sense, it is perhaps not so startling in that unbeknown to the court and the defence team, Mr. *Abrahams* and the DPP had an agreement that he can come back to the case anytime his business was finished in South Africa. Hence the misleading averment in paragraph 9 “that this trial was postponed to 10<sup>th</sup> January 2022 and subsequent days up and including the 17<sup>th</sup>”. This averment suggests that the trial dates ran from 10 to 17 January only. Both the DPP and Mr. *Abrahams* knew as early as 13 December last year that the trial was set to continue up to 21 January and not up to the 17<sup>th</sup>.

[35] In my judgment, Mr. *Abrahams* supplied information to the DPP to prepare and file an application whose purpose was to seek a postponement to delay the trial. Both of them knew that the trial was set to continue from 10-21 January and yet they helped each other in an effort to have it postponed to new dates that would suit Mr. *Abrahams*’ come back to the detriment of a speedy trial. No regard was had to the court and the plight of accused persons who have been in custody waiting for their day in court.

[36] No reasonable bystander in possession of all the above information on record would apprehend or perceive bias when the court denied Mr. *Abrahams* the right to appear and prosecute the case. By not distancing himself from the DPP for what she said about him in the affidavit for postponement, Mr. *Abrahams*, by association, failed in his legal and ethical obligations.

[37] In similar vein, the DPP has failed in her legal and ethical duty to the truth.<sup>18</sup> As a high law officer of the Crown, the Constitution clothes her with awesome powers central to the preservation of the rule of law. In exercising her powers to retain outside counsel, the DPP is constrained not to retain counsel who engages in double-booking, is unavailable through but the trial dates and feeds her with false information. The DPP:

“...is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [s]he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, or innocence suffer...”<sup>19</sup>

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<sup>18</sup> *Booyesen v. Acting National Director of Public Prosecutions and others* 2014(9) SACR 556 (KZD) para [34]

<sup>19</sup> *Berger v. United States* 295 US 78 (1935)

## **Remarks and interventions**

[38] The DPP's other complaints are about the remarks made by the court.

The first remark is about the court "casting negative aspersions against further particulars provided by the Crown to the defence team". The remark is not particularised. The second remark is that the court was dismissive when counsel for the DPP informed it of its intention to apply for its recusal. It is said the court gave assurances to the defence team that no further postponements would be entertained after the recusal application and the application to quash the charges would be heard. It is contended that this exhibited a pre-conceived decision to dismiss the recusal application.

[39] The source of all the information founding the alleged remarks is counsel whom the DPP says represented her in court on 14 January. As earlier said, there is no context and particularisation provided for the alleged remarks. Neither is there a supporting affidavit from counsel who represented the DPP in court.

[40] The DPP was not present in court on 14 January. She does not have first-hand knowledge of what was precisely said and in what context. Her assertions are, therefore, hearsay. The general rule is that hearsay

evidence is not permitted in evidence. Hence it is usually necessary to file an affidavit from the person who is the source of the information. This is still necessary even if the applicant states that “he is informed and verily believes” what he has been told.<sup>20</sup>

[41] The DPP avers that she deposes to facts within her personal knowledge. Her assertions are not supported by counsel who appeared in court on the 14<sup>th</sup> nor 17<sup>th</sup> when the alleged remarks were made. In the opposition affidavit by the defence, the DPP’s assertions are denied. The denial by the defence is borne out by the transcripts of the proceedings. The remarks alleged to support a predisposition to dismiss the recusal application is taken out of context. The court merely warned counsel to be ready to argue the motion to quash in the event of the recusal application not succeeding. It did not mean that the recusal application would not be dealt with on its merits.

[42] Remarks and conduct of judicial officers in the course of court proceedings do not in general, constitute bias unless they display deep-seated favouritism or antagonism that would make fair judgment

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<sup>20</sup> Lebelo v. Lebelo And Another 1976 LLR 206 (H.C); Spie Batignolles v. I. Nondwele & 334 Ors (1985-1990) LLR 243

impossible.<sup>21</sup> Much more must be shown before remarks or conduct can rise to the level of apprehension of bias. The rationale for this proposition are stated by the Constitutional Court of South Africa as follows:<sup>22</sup>

“[35] These considerations need to be borne in mind in the assessment of the State’s argument that it is the conduct of the Judge during the trial that has given rise to the complaint of bias. As Schreiner JA pointed out in his remarks in the passage from *Silber* just quoted, it is difficult for a litigant to establish bias simply on the basis of the conduct of a Judge during a trial. Judges are not silent umpires but may and should participate in the trial proceedings by asking questions, ensuring that litigants conduct themselves properly and making rulings on the admissibility of evidence and other matters as the trial progresses. Inevitably litigants will from time to time be aggrieved about both the content of the rulings made by the Judge and the manner in which a Judge may ask questions or intervene. Such grievances need to be construed in the realisation that trials are often emotional and heated as a result of the disputes between the parties. A Court considering a claim of bias should be wary of permitting a disgruntled litigant to complain of bias successfully simply because the Judge has ruled against them, or been impatient with the manner in which they conduct their case.

[37] On the other hand, it is important to emphasise that Judges should at all times seek to be measured and courteous to those who appear before them. Even where litigants or lawyers conduct themselves inappropriately and judicial censure is required, that should be done in a manner befitting the judicial office. Nothing said in this judgment should be understood as condoning discourteous or inappropriate remarks by judicial officers. Inappropriate behaviour by a Judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities, but it will not ordinarily give rise to a reasonable apprehension of bias. It will only do so where it is of such a quality that it becomes clear that it arises not from irritation or impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias.

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[41] The State complains effectively of nine interventions by the trial Judge as cumulatively suggesting that the Judge was either

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<sup>21</sup> *Liteky v. Unites States* 510 US 540 (1994) at 555

<sup>22</sup> *S v. Basson* 2007(3) SA 582

subconsciously biased or that the conduct gave rise to a reasonable apprehension of bias. These interventions, which will be described below, can broadly be divided into two categories: those that, the State argues, suggest that the Judge was hostile towards the State; and, secondly, those that the State argues show that the Judge had prejudged certain issues.

[42] As far as the first category is concerned, this Court should bear in mind that in long criminal trials a Judge may at times make remarks that are inappropriate, or display irritation towards counsel. At times such interventions may arise from attempts at humour. In considering the question of whether such remarks give rise to a reasonable apprehension of bias, a court should not hold a Judge to an ideal standard which would be difficult to achieve. Moreover, a court considering a claim of bias must take into account the presumption of impartiality, mentioned by this in *SARFU*. To establish bias, therefore, a complainant would have to show that the remarks were of such a number or quality as to go beyond any suggestion of mere irritation by the Judge caused by a long trial, and establish a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with a reasonable apprehension of bias.

[43] As far as the second category is concerned, that the Judge has prejudged an issue in the case, the remarks of the Courts in *Silber and Take and Save Trading* are of assistance. Both make it clear that it is rare that a Court will uphold a complaint of bias arising from a Judge's conduct during a trial and affirm that it is not inappropriate for a court to express views about certain aspects of the evidence. They make it clear, as well, that the fact that a Judge may express incorrect views is not sufficient to ground a claim of bias."

#### **IV. CONCLUSION**

[43] *In casu*, none of the remarks and conduct complained about together with denying Mr. Abrahams audience in this trial give rise to a reasonable apprehension of bias or its perception. It is axiomatic that a trial in which accused persons are in custody for a long time must be expedited. The Crown has under its command all the human and financial resources to have this trial expedited. Any fair-minded person, who knows that the DPP has in-house counsel and the lee-way to retain available outside

counsel, understands that a trial such as this, which has taken close to five years to commence, cannot be stalled by the type of behaviour of the DPP and retained counsel. Delaying prosecution of the case is without doubt to the prejudice of the accused and a waste of court's time.

[44] The loss of one counsel for the Crown out of three, for reasons of enforcement of the **Speedy Court Trials**, does not constitute bias. The DPP has appointed Miss *Nku* to lead the prosecution. She is eminently qualified to lead by virtue of her long experience of 43 years and her involvement in this case since 2018. All in all, the DPP's apprehension of bias fails the double-reasonableness test. There is, therefore, no warrant for the court to recuse itself.

[45] A criminal court cannot not be at the mercy of prosecutors who abandon criminal case without leave of the court. If they want to re-join a prosecution at the pleasure of the DPP, a truthful explanation must be given to the court. . As said by the Supreme Court of Canada:

“We cannot be tolerant of abusive conduct and dispose of due process, however serious the crimes charged. High profile trials by their nature, attract strong public emotions. In our society the Crown is charged with the duty to ensure that every accused person is treated with fairness. It is especially in high profile cases, where the justice will be



on display, that counsel must do their utmost to ensure that any resultant convictions are based on facts and not on emotions.”<sup>23</sup>

## **Order**

[46] In the result, the following order is made:

1. The application for recusal is dismissed.

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**S.P. SAKOANE**  
**CHIEF JUSTICE**

**For the Crown:** Mr. M. Rafoneke

**For the Accused:** Messrs M.E. Teele KC  
L. Molapo, L. Molati, K. Letuka and N. Mafaesa

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<sup>23</sup> Footnote 2 at para 120