IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/0002/2018**

In the matter between:

TLALI KENNEDY KAMOLI **APPLICANT**

AND

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

IN RE:

REX

V

TLALI KAMOLI

PITSO RAMOEPANA

LITEKANYO NYAKANE

MOHLALEFI SEITLHEKO

HEQOA MALEFANE

Neutral citation: Rex v. Tlali Kamoli and others (No.1) [2022] LSHC CRIM 93 (02 May 2022)

CORAM: **HUNGWE AJ**

HEARD: **24TH MARCH 2022**

DELIVERED: **4TH APRIL 2022**

SUMMARY

Recusal – approach to application for – objective test applied. Application dismissed- no order as to costs.

ANNOTATIONS

Lesotho

Mokhosi & Others v Justice Charles Hungwe & Others (Cons Case No2) [2019] LSCA 9 (02 May 2019)

Fako v Director of Public Prosecutions & Others CRI/T/0004/2018 [2020] LSHC 19 (21January 2019)

Fako v Director of Public Prosecutions (C of A)(CRI) 03/20 [2020] LSCA 49 (30 October 2020)

Director of Public Prosecutions v Ramoepana & Others (C of A) (CIV) 49/20 LSCA 25 (14 May 2021)

Ramoepana & Others v Director of Public Prosecutions (C of A) (CRI) 05/2021 [2021] LSCA (12 November 2021)

Sole v Cullinan [2003] 3 All SA 466 (Les CA).

R v Ramabele Mokhantso & Others CRI/T/95/02.

Lesotho Electrical Corporation v Forrester 1979 LLR 440.

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

South Africa

President of the Republic of South Africa & Others v South African Rugby Football Union & Others 1999 (4) SA 147 (CC)

SACCAWU v Irvin & Johnson 2000 (3) SA 705 (CC).

S v Suliman 1969 (2) SA 385.

Swaziland

Minister of Justice v Sapire (Civ Appl 49/2001) (10 February 2002) (Unreported).

Canada

Committee for Justice and Liberty v National Energy Board 1978 DLR (3d) 716.

Miglin v Miglin 2003 SCC 24.

R v Gager 2020 ONCA 274 [Can LII].

R v S (R.D) (1997) 118 CCC (3d) 353.

R v Valente 1986 24 DLR (4^{th}) 161.

Wewaykum Indian Band v Canada [2003] 2 SCR 259.

Yukon Francophone School Board, Education Area 23 v Yukon (Attorney-General) [2015] 2 SCR 282.

Australia

Gild v R [2017] VSCA 367**.**

Rozenes v Kelly [1996]1 VR 320.

Vakauta v Kelly [1989] HCA 44.

United Kingdom

AWG GROUP Ltd v Morrison 2006 EWCA Civ 6

Giles v Secretary for Works & Pensions 2006 UKHL 2

Lawal v Northern Spirit Ltd 2003 IRLR 538 (HL).

Magill v Porter [2001] UKHL 67.

Meerabux v Attorney-General of Belize 2005 (2) AC 513 (PC).

R v Abdroikov 2008 (1) All ER 315 (HL).

R v Gough 1993 AC 646.

R v Inner West London Coroner, ex parte Dallaglio; R v Same ex parte Lockwood-Croft [1994] 4 All ER 139.

R v Khan 2008 (3) All ER 502 (CA).

HUNGWE AJ

INTRODUCTION

This is an application for recusal. The law distinguishes actual bias from apparent bias. The former is subjective and deals with the judge or judicial officer's state of mind, while the latter is objective and deals with the judge's conduct and the surrounding circumstances. Where the judicial officer is actually biased in a decision, then justice has not been done. Where the decision is tainted with bias, then justice is not seen to be done.

The applicant, who is the first accused in an-ongoing criminal trial with four others, seeks an order that I recuse myself from presiding over his trial in case number CRI/T/0002/2018 on the ground of apprehended bias. The first respondent stridently opposes the application.

Background to the Application for Recusal.

[1] The applicant and others challenged their appointment of foreign judges to preside over this and other cases in the constitutional court. See **Mokhosi & 5 others v Justice Charles Hungwe and 5 Others (Cons Case No 2 [2019] LSCA 9 (02 May 2019).**

Applicant is accused 9 in the case of **Rex v Nyakane & Others CRI/T/0004/2018**, a partly heard matter before me. On 6 January 2020 whilst the court was waiting to convene and commence trial in CRI/T/0004/2018 defense counsel in that matter asked crown counsel to approach the then acting Chief Justice in chambers. Whilst in chambers, defense counsels collectively implored then acting Chief Justice to remove the criminal trials from foreign judges and allocate them to local judges. They

expressed that they and their clients would not get a fair trial before foreign judges. The honorable acting Chief Justice advised them to file their application before the appropriate court.

Trial in CRI/T/0004/2018 Commenced without a hitch on that day. However, later in the day some of the accused in that matter filed an application for my recusal in **Fako v Director of Public Prosecutions and others CRI/T/0004/2018 [2020] LSHC 19 (21 January 2019).**

[2] In his founding affidavit, the first applicant in **Fako v DPP** claimed that I was angry with the present applicant at some point when they appeared before me.

Applicant did not seek my recusal based on this claim then but merely chose to "align" himself with the contents of that affidavit by Fako. I dismissed that application for my recusal in **Fako v DPP CRI/T/0004/2018 [2019] LSHC 19 (21 January 2019)**. They appealed. In **Fako v DPP (C of A) (CRI) 03/20 [2020] LSCA 49) 30 October 2020)** that appeal was dismissed.

[3] The accused mounted another constitutional challenge to the appointment of foreign judges. When the matter was dismissed in this court, they appealed. The Court of Appeal dismissed this appeal in **DPP V Ramoepana & Others (C of A) (CIV) 49/20 LSCA 25 (14 May 2021).** On 21 March 2021 at pretrial conference was held after which the applicant and his co-accused's matter was set down for trial from 10 May 2021. Applicant and his co accused filed a notice in terms of section 160 (1) as read with section 162 (2) (e) of the Criminal Procedure and Evidence Act, 9 of 1981. The plea to jurisdiction was dismissed. Again, they took this dismissal to the Court of Appeal. In **Ramoepana & Others v DPP (C of A) (CRI) 05/2021 [2021] LSCA (12 November 2021)** court of appeal dismissed the appeal against this court's ruling on their plea to the jurisdiction of this court. After the dismissal of that appeal trial in this matter as scheduled to continue from 14 to 25 March 2022. The applicant premised this application on the events that occurred not only previously but also between the period between 14 March 2022 and 16 March 2022.

Applicant's Case

[4] In his founding affidavit applicant makes the following averments. he alleges that his first meeting with me was not harmonious as, according to him, I indicated that I had either been told or heard about him. The record, he alleges, is replete with evidence and facts that show that his meeting was not harmonious. He claims further that on 16 March 2022 his counsel was sick hence he was unable to attend court. When it was realized that his counsel was not in attendance the court decided to proceed without his legal representative. In taking that decision the court brought matters from one case into the present one as a basis to deny him his fundamental right to legal representation under the wrong assumption that he had previously refused legal representation provided under the legal aid scheme. Because the court ordered proceedings to continue in his legal representative's absence, this was an indication that the court was biased.

[5] Applicant states that the adverse ruling against an application for a postponement made on behalf of accused 5's new counsel constitutes another ground for recusal. The description of that counsel as incompetent indicated bias on the part of the presiding judge. Applicant further avers that this matter was due to be relocated to another judge. He contends that I had preferred that the matter remains before me. According to the applicant, my refusal to have the matter reallocated constitutes bias on my part. Applicant further states that the next available dates for these matters to be heard would be in November 2022. This case will therefore be heard sometime in 2023 when my contract of employment would have run its course. Therefore, he contends that I should recuse myself on that basis.

[6] Finally, applicant avers that I would not be able to divorce my mind from impressions made by witnesses in the other cases when the same witnesses testify on the same evidence that would have been given in another matter. He argues that subconscious bias towards the impressions formed in those other cases might create bias against himself such that it is appropriate that I recuse myself before such apprehended bias occurs.

Respondent's case

[7] In respect of the facts that give rise to the present application, the first respondent details the events of the 14th of March 2022 as follows:

On 14 March 2022, after counsels had placed themselves on record I inquired as to who was representing the applicant. Applicant remained silent. Instead, Mr. Mafaesa, who appears for third and fourth accused rose and stated he had communicated with Mr Molati who indicated that he was on his way. At that time the crown announced that it was ready to proceed with the trial. However, I stood down the matter to allow Mafaesa to again contact Molati.

[8] Before resuming in open court, the crown and defence teams retired to my chambers at the request of counsel representing 5th accused. Mr Molati had not arrived. No reason for his absence was furnished Besides what Mr Mafaesa had placed on record. In chambers, Mr. Nathane, fifth accused's counsel, indicated that due to his pending elevation to the High Court bench it was necessary that he withdraws from the matter. Mr Ntsiki would be taking over his brief. He was present. He indicated that he would be ready to proceed with the trial on Wednesday 16 March 2022. Mr Mafaesa undertook to engage with Mr Molati. The matter was postponed for continuation of trial to the 16 March 2022

[9] On 16 March 2022 counsels present placed themselves on record. Mr Molati was again not present. Upon inquiry as to who represented the applicant, the applicant remained silent again. Mr Mafaesa again rose and confirmed that he had passed the message to Mr Molati and that the matter was proceeding. I asked Mr Mafaesa what Mr. Molati's reaction was. Mafaesa explained that it was "positive".

[10] Mr Ntsiki applied for a postponement on the basis that he was not ready to proceed. He was only able to peruse 10 of them 50 witness statements he needed to go through before consulting his client, 5th accused. I found that this application for the postponement was occasioned by incompetence and dismissed the application for postponement. I directed 5th accused to contact his wife from prison in order to arrange for alternative legal representation. At the same time, I directed Crown counsel to assist with his communication needs in this regard. Separately, I directed that the Registrar of this court assists in the appointment of appropriate pro deo counsel for the 5th accused should his wife fail to secure one. I also directed that the applicant represents himself until his legal representative re-joins the proceedings. The matter was then postponed to 16 March 2022.

[11] At that stage applicant requested to address the court. In a lengthy speech the applicant indicated that his legal practitioner was in fact ill. He also indicated that he

had never refused legal representation offered by court as he had always been represented by Mr Molati. He stated that this mistaken view expressed by the court indicated that the court was biased against him as the court has shown some hostility in its first encounter with him when it said that it had heard about his attitude. At the end of his address, I corrected the record to reflect that in fact the applicant had never refused any free legal representation. This was the first time anyone had learned that Mr Molati was ill and was unable to attend court due to his indisposition.

[12] On 18 March 2022 Mr Molati was in attendance. He requested the court to retire to chambers. In chambers, Mr Molati apologized for his absence from court since 14 March 2022. He explained that he had informed Mr Mafaesa the preceding Saturday end had requested him to inform the court. This was the very first time that the court or anyone else learned of the engagement between Mr Mafaesa and Mr Molati the preceding Saturday. It is important to note that at no time did Mr Mafaesa explain to the court or to anyone that Mr Molati's absence from court was due to his illness or that Mr. Molati had engaged him the previous Saturday. Had there been this communication quite clearly the question around the applicant's legal representation would not have arisen. Therefore, the directive that applicant will self-represent until his legal practitioner re-joined the proceedings ought to be seen in this light.

[13] In chambers, Mr Molati indicated that he has instructions to move an application for my recusal on the basis that he had information that I had been directed to reallocate the matter to another judge. He had no further information but undertook to provide further information in verification of this ground.

A further ground advanced by the applicant for my recusal was that I would not be able to divorce my mind from impressions made of witnesses in the other cases when those witnesses come to testify on the same evidence that I had already heard in a prior case.

[14] The respondent avers that the applicant has known well before the commencement of proceedings in **R v Nyakane & Others** on 6 January 2020 and since before filing his plea to jurisdiction in early May 2021 in the present matter of the issues he now places reliance on in seeking my recusal. The only new issue relates to his counsel's absence from 14 to 16 March 2022, which matter lies squarely at the feet of the applicant and that of his legal practitioner.

Considering these facts, the respondent urges the court to dismiss the application as an abuse of processes of court and a stratagem conceived by the applicant to avoid the continuation of his trial. The respondent also asked for an order of costs and sanctions in terms of section 12(4) (b) and (c)(ii) of the Speedy Court Trials Act No 9 of 2002.

Test for Bias

[15] The test for bias is on an objective standard. The focus of consideration should not be on whether the accused was prejudiced, but whether he would reasonably consider that he did not have a fair trial or whether reasonable-minded people who watched the trial would have believed the trial was not fair.

The test for reasonable apprehension of bias requires the reviewing court to consider whether a reasonable person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that ... judges swear to uphold" would apprehend that there was bias.[9] It has also been phrased as requiring that "a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias."

When the judge's conduct is at play, it must not be considered in isolation. It must be considered in context, including in light of the whole proceeding.

[16] The proper approach to an application for recusal was authoritatively laid down by the Constitutional Court of South Africa in **President of the Republic of South Africa & Others v South African Rugby Football Union & Others 1999 (4) SA 147 (CC) ("the SARFU case")**

"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 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 that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact they have a duty to sit in any case which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial judge is a 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 litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

[17] In formulating the test, the Constitutional Court relied on the decision of the Canadian Supreme Court in **R v S (R.D) (1997) 118 CCC (3d) 353**. The test has been adopted in Lesotho in **Sole v Cullinan [2003] 3 All SA 466 (Les CA).** It has also been followed in Swaziland in **Minister of Justice v Sapire (Civ Appl 49/2001) (10 February 2002) (Unreported)**. The test was further explained by the same court in **SACCAWU v Irvin & Johnson 2000 (3) SA 705 (CC**) where the court said:

"In formulating the test in the terms quoted above, the Court observed that true considerations are built into the test itself. The first is that in considering the application for recusal, the Court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the SARFU judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires "cogent" or "convincing" evidence to be rebutted.

The second in-built aspect of the test 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 derived inevitably and distinctively informs each judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality - a distinction the SARFU decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion without unfitting adherence to either party or to the judge's own predilections, preconceptions and personal views - that is the keystone of a civilized system of adjudication. Impartiality requires in short, a mind open to persuasion by the evidence and the submissions of counsel; and in contrast to neutrality, this is an absolute requirement in every judicial proceeding."

Analysis

[18] The applicant submitted that the present application was based on new facts. These new facts, as I understood the applicant, are confined to the events between 14 and 16 March 2022. Those events include the unexplained absence from court of counsel for the applicant on 14 March 2022. The events include the report from Mr Mafaesa that he had spoken with Mr Molati some 30 minutes prior to his address wherein Molati assured him that he was on his way. Mafaesa, on this day stood in for Molati throughout the processes that followed. These processes include the deliberations in chambers where Ntsiki undertook to be ready to take over a brief and

proceed with the conduct of 5th accused's defence in two days. Mafaesa undertook to brief Molati on what had occurred at court so that he appears fully aware on the next hearing date 16 March 2022. It is important to record that throughout this day, no reason for Molati's absence had been proffered.

[19] On 16 March 2022, when Molati again made no appearance, I asked again who was appearing for the applicant. Applicant did not respond. Mr Mafaesa rose to confirm that he had indeed passed on the message and that was as far as he could go. I specifically asked of him what Molati's reaction was. Mafaesa confirmed that Molati's reaction was "positive." Ntsiki, on his part, was not ready to proceed with the trial despite his undertaking of 14 March 2022. His application for a postponement was denied on the basis that it was occasioned by incompetence. Arrangements for 5th accused's legal representation were instituted. This necessitated a postponement of the matter. At that point, as the presiding judicial officer I decided, considering the unexplained absence of his chosen counsel, to give the directive that applicant self-represents until his legal practitioner re-joined the proceedings. I remarked that applicant had previously declined free legal representation. Soon afterwards, applicant requested to address the court. Applicant's counsel raised three further grounds; that I had declined to reallocate the matter to another judge; that I would not be able to complete the trial as my contract of employment was coming to an end and that I would not be able to divorce my mind from predispositions and impressions made by witnesses in another case who come to testify for the second time on the same evidence. In his oral argument Molati did not persist with two of these three grounds, and advisedly so.

[20] I deal with the ground that this matter has been reallocated to another judge and that I refused to accede to the demand that it be reallocated. First, there is no written directive to me that a decision to re-allocate the matter to another judge has been made. Second, since the accused have pleaded to the charges in this matter it is a partly heard matter before me. Therefore, any attempt to re-allocate it would constitute an egregious affront to judicial independence and the rule of law as practiced in civilized jurisdictions. Third, none of the well-known grounds for an order of trial de novo applicable to partly heard cases exist in the present matter. If a discussion occurred on this subject, clearly it would have been on some other basis than legal one.

[21]I can only imagine that a mistake of fact might have induced a belief that the matter was not partly heard otherwise it is a matter for conjecture what could have motivated such a clearly unprocedural step. Generally, a partly heard criminal trial can only be ordered to commence afresh if the original presiding judicial officer is incapacitated due to ill-health or mental health; or has passed on; has become unavailable by virtue of a legal incapacity. A retired or retiring judicial officer is generally obliged by law to avail himself or herself to complete his or her partly heard cases. No authority is required for this proposition.

[22] As for the submission that the expiration of my contract would necessitate my recusal, I am unable to follow this argument. How my contract with the Judicial Service Commission of Lesotho could, by any stretch of imagination serve as a possible ground of recusal beggars belief. Unsurprisingly, this ground was not persisted with in oral argument.

[23] Applicant urged the court to grant the relief of recusal on the ground that it is highly likely that I will not be able to divorce my mind from dispositions and impressions made by witnesses in another case who come to testify before me for the second time on the same evidence. The first point to make is that applicant has known since 6 January 2020 when the Maparankoe Mahao murder trial commenced and since before filing his plea to jurisdiction in May 2021 that I will preside over two of his trials. He did not seek my recusal on this ground at the time he became aware of his predicament. He only raises it now. The general rule is that a party that intends to raise issues of actual or apparent bias should do so as soon as possible in the proceedings. It is not appropriate to raise submissions on other matters of law with an application for recusal held “in reserve” pending the decision on those other matters. See **Gild v R [2017] VSCA 367 @ [33].**

[24] This court expressed the same view in **R v Ramabele Mokhantso & Others CRI/T/95/02** where, dismissing an application for recusal, it held that a recusal brought at an early stage of a trial may be favourably considered, if good grounds for recusal, exist than one brought late in the trial where disruptions to the trial are more damaging to the interests of justice. See also **S v Suliman 1969 (2) SA 385**; **Lesotho Electrical Corporation v Forrester 1979 LLR 440** (per Schultz AJA at p445)

The second point to make on this argument is that there is no bar to a judge presiding over an accused person who appears in several different cases. This position is

acknowledged in numerous jurisdictions worldwide. A judge is generally competent to sit on cases involving the same accused in multiple trials. The key however is that the judge must not make assumptions about the course of the evidence, or the credibility of lay witnesses based on previous trials. **Rozenes v Kelly [1996]1 VR 320.**

[25] In this jurisdiction the same point was made in **Sole v Cullinan NO & Others LAC (2000 - 2004) 572 @ 588** where the court observed thus;

"the fact that certain factual matters may overlap between two or more matters in contention adds little. As was said in an analogous situation;

'… there is no rule in South Africa which lays down that a judge in cases other than appeals from his judgments is disqualified from sitting in a case merely because in the course of his judicial duties he expressed an opinion in that case. There would be as little justification for such a rule as to a rule which laid down that a judge who in a judgment expressed an opinion as to the correct interpretation of an Act of Parliament could not sit in a subsequent case between the different parties where the same question of interpretation was involved.' "

[26] This takes me to the other ground for recusal advanced by the applicant. He argues that he fears that because there will be witnesses who will appear before me in between the cases over which I preside, I may not be able to divorce my mind from the predispositions and impressions made by witnesses in another case when they appear before me for the second time on the same evidence. Beside failing to specifically identify the witnesses who fall into this category, counsel for the applicant did not make any distinction between lay and expert witnesses. As I have already pointed out, nothing precludes a judge from sitting in multiple trials involving the same accused. As for expert witnesses, a judge may carry perceptions of expert witnesses with him or herself between trials. The principle of apprehension of bias is applied in the real world of criminal trials where experts commonly appear in multiple cases. It is inevitable that judges will form an opinion on the expertise or reliability of those experts. Case law abounds of such instances and how the courts have handled the same. **Vakauta v Kelly [1989] HCA 44.**

Impartiality is the fundamental qualification of a judge. As an attribute of the judiciary, it is key to the common law judicial process and must be presumed on the part of the judge. **R v S (R.D) 1997 (3) SCR 484** para **106**; **Wewaykum Indian Band v Canada**

[2003] 2 SCR 259. This is one of the reasons why the threshold for a successful allegation of perceived bias is high. “Cogent evidence" is required to overcome the presumption. **Magill v Porter [2001] UKHL 67**.

[27] Of the remaining two grounds for recusal advanced by the applicant I proceed to deal with the trigger for the application, namely the real basis for the application.

As I pointed out at the outset, applicant sought and obtained an opportunity to address the court in the absence of his legal practitioner, Mr. Molati. In his speech, he raised the tired mantra of bias on my part. He cited the so-called unharmonious first encounter that he had with me. He expressed his fear that a fair trial will not be forthcoming as I appear to him to be biased. In short, he ploughed the same ground on this subject over and over. He however corrected my incorrect statement that he had previously declined free legal aid. I had stated this as part of the reason why I would not direct that, as with 5th accused, pro deo counsel be assigned to him. At the end of his address, I thanked him for the correction and recorded that correction.

[28] The respondent dealt with this ground based on mootness. This in my view, prompted Mr Molati to abandon the ground altogether. He was however hard pressed to make a case for his client where the facts did not support him. He turned to the statement that I made in respect of applicant and legal representation. Taken out of its context, Mr Molati’s argument sounds persuasive. Once context is given, his argument loses force. But that is not the approach in this type of application. Mr Molati relied on the propositions set out **in R v Inner West London Coroner, ex parte Dallaglio; R v Same ex parte Lockwood-Croft [1994] 4 All ER 139.** This case appears in an academic paper posted on the website Academia.edu**.** As the author acknowledges in his article, these propositions were distilled from **R v Gough 1993 AC 646** where the real danger test was coined.

Had counsel for the applicant gone beyond this article he would have encountered the devolution that the test for bias in England underwent since Gough and Inner West London Coroner cases. He would have realized that the modifications to the test in Gough are to be found in **In Re Medicaments and Related Cases of Goods (No 2) 2002 (1) WLR 700 para 85.** There were unanimous endorsements of these adjustments to the then existing test in **Lawal v Northern Spirit Ltd 2003 IRLR 538 (HL) para 14; Meerabux v Attorney-General of Belize 2005 (2) AC 513 (PC); Giles v Secretary for Works & Pensions 2006 UKHL 2; R v Abdroikov 2008 (1) All ER**

315. (HL); AWG GROUP Ltd v Morrison 2006 EWCA Civ 6; R v Khan 2008 (3) All ER 502 (CA).

[29] The test for establishing bias in Canada can similarly be traced from the Supreme Court case of **Committee for Justice and Liberty v National Energy Board 1978 DLR (3d) 716 @ 735** where Grandpre J laid down what has become the trademark of public adjudication in modern Canada when he stated that:

" ..the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question obtaining thereon the required information ….. That test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.' Would he think that it is more likely than not that [the decision-maker] whether consciously or unconsciously, would not decide fairly."

See also: **R v Valente 1986 24 DLR (4th) 161 @p 172; R v S (R.D)** (supra); **Miglin v Miglin 2003 SCC 24.**

[30] A reading of the Canadian cases up to **R v S (R.D)** traces the journey traveled by the test for bias culminating in the current double reasonableness test espoused firstly by the Canadian Supreme Court, presently recognized by the English courts and adopted by both the Australian and South African courts. Applicant clearly misconceived the test for bias. He relied on an approach that excludes the double reasonableness approach. Put in another way, the test for bias is a double reasonableness test. It so called because it involves a two-stage requirement of reasonableness. The first stage is that there must be an apprehension that is reasonably entertained. In the second stage, the reasonable apprehension must be held by a reasonable person, by which is meant a person who has no interest in the outcome of the matter in court other than the general interest by the public in the fair administration of justice. The fulfilment of this general interest is mainly a pre-occupation with a fair administration of justice.

In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.

[31] The test for reasonable apprehension therefore requires the court to consider whether a reasonable person with the knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that judges swear to uphold, would

apprehend that there was bias. Put in another way, the test can be paraphrased as requiring that

"a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias."
(per Basterache and Arbour JJ in **Miglin v Miglin 2003 SCC 24; 2003 1 SCR @ p303**

[32] The impugned directive that applicant will self-represent until his counsel re-joined the proceedings must be assessed in the context of the circumstances where counsel chose to absent himself without cause. His chosen correspondent Mr Mafaesa did not help matters as he never at any stage took the court or anyone else into his confidence about the reasons behind counsel's absence. What aggravated this situation was the fact that even when Mr. Molati eventually appeared, he gave an explanation which contradicted Mr Mafaesa. They both could not possibly be truthful in this regard. If Mr Molati did indeed contact Mafaesa on the preceding Saturday regarding his doctor's appointment how does anyone explain the fact that Mafaesa did not advise the court of this very important information? Why would an officer of the court mislead the court and inform it that Mr Molati was on his way to court on 14 March 2022 when in fact he was somewhere else? Clearly someone or other or both learned gentlemen chose to be economic with the truth on this issue. It will be recalled that any application must be grounded on facts not half-truths or wholly inaccurate premises. See **Fako v The Director of Public Prosecutions (CRI/T/0004/2018) [2020] LSHC 19 (21 January 202).**

[33] Despite the glaring contradiction in the facts relied upon in the application, neither applicant, his counsel or Mafaesa, attempted to explain this feature of their case which continued to rear its ugly head throughout the hearing of argument in this application. Not even submissions by Crown counsel could nudge applicant to clear the musty air in his case. It is trite that when a judge's conduct is in issue, such as here, it must not be considered in isolation. It must be considered in context including in light of the whole proceeding.

In **R v Gager 2020 ONCA 274 [Can LII]** at para 144 the court stated that

"…..a judge's individual comments or interventions must not be seen in isolation. Rather, the impugned conduct must be considered in the context of the circumstances and in the light of the whole proceeding."

See also **Yukon Francophone School Board, Education Area 23 v Yukon (Attorney-General) [2015] 2 SCR 282.**

[34] The hypothetical fair-minded lay observer understands that judges must make decisions in accordance with the law and are usually capable of ignoring the consequential effects of their decisions. While the hypothetical lay observer does not have a detailed knowledge of the law, he or she understands the judicial processes and the issues to be determined, he or she knows that judges are under strong professional pressure to act with integrity and impartiality. **Johnson v Johnson (2000) 201 CLR 448 [1].** The hypothetical lay observer has a broad knowledge of the material facts of the case and the circumstances that led to the commencement of the proceedings. He or she does not rely on inaccurate or incomplete information or rely solely on the facts known to one of the parties only.

[35] Therefore, in applying the above test in respect of each of the grounds advanced by the applicant, the relevant circumstances upon which the application is based will be taken into account.

The question to ask ultimately is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct on 14 March 2022, 16 March 2022 gives rise to a reasonable apprehension of bias?

I am unable to answer the question in the affirmative.

Costs

[36] Counsel for the Crown prayed for costs and sanctions against the applicant on the basis that counsel for the applicant knew or ought to have known that the application filed was frivolous, vexatious and devoid of any merit from the outset. As pointed out by the Court of Appeal in the Ramoepana case, the matters raised by the applicant were matters that "have either been litigated upon or are properly matters to be decided by the trial court." (para 52).

Counsel also prayed that this court invokes the provisions of section 12(4)(b) and (c)(ii) of the Speedy Court Trials Act No. 9 of 2002 in respect of Counsel representing the Applicant. This prayer is grounded on the conduct of Molati and the Applicant as well as the conflicting versions given by Molati and Mafaesa which leaves one with the

distinct perception that neither timeously took the Court into confidence and that a stratagem was at play to frustrate the continuation of the trial.

[37] The conduct of counsel for the applicant exposes him to the sanctions set out in s12 of the Act. I make this observation on the following basis. He absented himself without a lawful excuse from 14 to 16 March 2022. When he eventually appeared, the explanation he proffered for his absence contradicted what the court had been advised by Mafaesa. The submission by Crown counsel that the absence from court without explanation and the groundless application subsequently filed by the same counsel is nothing but a stratagem conceived to delay the resumption of trial. It does not need rocket science to arrive at that conclusion. The exhortation by the court of appeal to levy costs in such situations brought about by counsel who owes the court a professional duty is quite persuasive.

[38] In response to this prayer, Molati submitted that this court cannot levy costs against his client and sanctions against him without first inquiring into the issue of his conduct. I disagree. Although the Act refers to inquiry in s12(4)(d), in the same section a summary procedure is envisaged. What this means is that if upon the impugned conduct is set out to counsel either verbally or in writing, (as here) the court may make a finding on whether the conduct merits the sanction provided in the Act. Molati's conduct was the very basis of the opposition by the respondent. This much is clear upon perusal of the opposing affidavit. There is no need for a further inquiry into such conduct as Molati had the opportunity to rebut it on the papers in answer to the respondent. He did not explain why there was a contradiction to the explanation for his absence at court. Clearly, in my view, this application is frivolous, vexatious and devoid of any merit whatsoever. A possible inference to be drawn from this is that it was launched purely for the purposes of delaying the continuation of trial.

However, ultimately, the question of costs remains in the discretion of the court. In the present matter, in spite of the findings set out above, I reserve the question of costs for consideration at an appropriate time. This ruling must be taken as a warning to all concerned that in future such conduct may attract the appropriate sanctions.

Consequently, I make the following order:

"The application for my recusal is dismissed. There will be no order as to costs."

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C HUNGWE AJ

For the applicant: **L MOLATI**

For the Crown: **S. K. ABRAHAMS with M. RAFONEKE**