IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 537/14

In the matter between

THULANI RUDOLF MASEKO	**1ST APPLICANT**
BHEKI MAKHUBU	**2ND APPLICANT**

And

JUSTICE MPENDULO SIMELANE	**1ST RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECTUTIONS	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**

Neutral citation: *Thulani Maseko & Another v Justice Mpendulo Simelane & 2 Others (537/14*) [2014] SZHC 101 (19 May 2014)

Coram: **M. S. SIMELANE J**

Heard: **10 APRIL 2014**

Delivered: **19 MAY 2014**

Summary: Criminal Procedure – Recusal Application – Section 101 of the Criminal Procedure and Evidence Act 67/1938 as amended – reasonable apprehension of bias.

Judgment

SIMELANE J

[1] Serving before this Court are two applications brought by the Applicants simultaneously against the Respondents under a certificate of urgency for similar orders in the following terms:-

(1) Dispensing with the Rules of Court relating to form, time limits and service and hearing this matter as an urgent one.

(2) Directing that the Honourable Justice Mr. M.S. Simelane recuse himself in this matter.

(3) Granting Applicants such further and or alternative relief as this Honourable Court may deem fit.

[2] The Applicants filed founding affidavits wherein they related the issue for decision by this Court. The issues arising from both applications are the same. It is convenient for me to address both applications in one judgment.

[3] The Respondents oppose the granting of the above orders and the requisite opposing affidavit was filed. The opposing affidavit was sworn to by Mr. Macebo Nxumalo, a Senior Crown Counsel in the Director of Public Prosecutions Chambers who is the Prosecuting Counsel in the matter in which the Applicants are charged with Contempt of Court.

[4] The Applicants filed replying affidavits in accordance with the Rules of this Court.

[5] Both sides filed Heads of Argument and tendered oral submissions when the matter was heard.

[6] The gravamen of the Applicant's case is that:

(1) The Judge is a subject of severe criticism in the two newspaper articles complained of in the contempt of court proceedings.

(2) Throughout these proceedings he has exhibited an unusually hostile attitude towards the Applicants and their legal representatives.

(3) Throughout these proceedings he has openly aligned himself with the Crown to such an extent that it would not be unfair to say he has descended to the arena. The following are cited as examples:

(a) He authorized the issuance of warrants of arrests of Applicants without an application by the prosecutor as

required by section 101 of the Criminal Procedure and Evidence Act 67/1938.

(b) He authorized the issuance of the warrants without the Applicants' names having been called three times as required by the section.

(c) He authorized the warrants despite that on the facts of the case there was no need for the Applicants to be in attendance since Dlamini, J's judgment of the 6th April 2014 set aside even the indictment on the basis of which they could have been expected to avail themselves;

(d) He justified such issuance upon a deliberate distortion of the facts in that he knew very well that the noting of the appeal against Dlamini J's judgment could not have suspended the judgment since it was done well after its execution.

(e) He totally ignored the submissions made challenging the propriety of the issuance of the warrants and opportunistically concentrated on the issue of 1st Applicant's conduct in Court.

(f) He remanded the Applicants in custody despite the fact that they had timeously appealed against his order that the warrants be issued against them. In concurring in the Crown's earlier submission he had said the appeal against

Dlamini, J's judgment suspended the latter's execution but that was changed when it was argued that the appeal by the Applicants suspended the execution of his order for the arrest of the Accused persons.

[7] The Accused persons have every reason to suspect that they might not have a fair trial much against the provisions of Section 21 of the Constitution.

[8] The Director of Public Prosecutions, Mr. N.M. Maseko advanced arguments and filed heads of arguments, as follows:-

(a) The 1st Applicant insulted the Judge in open court and cannot turn around and seek to benefit from his deeds.

(b) The Judge took an oath of office to administer justice without fear or favour and has the ability to carry out the oath without allowing provocations and pressures to interfere with his impartiality.

(c) That the Applicants issued a press release critical of the Judge and that the Judge will be biased is not a reasonable ground for recusal.

[9] The Applicants state that there is a **"reasonable apprehension"** that the Judge would be biased against them, and that they might not get a fair trial.

[10] The question of **"reasonable apprehension of bias''** was eruditely articulated by **Moore JA, in African Echo (Pty) Ltd and 2 Others Vs Inkhosatana Gelane Simelane Civil case 48/2013,wherein His Lordship** makes reference to the writings of **Professor Okpalupa** in his paper entitled **THE PROBLEMS OF PROVING ACTUAL OR APPARENT BIAS: AN ANALYSIS OF CONTEMPORARY DEVELOPMENTS IN SOUTH AFRICA** where he says:

> **"[49]The courts…. approach an allegation of apprehension of bias against superior court judges with the presumption of impartiality. This is the first hurdle to surmount in an attempt to show that a judge had conducted the proceedings in a way that raises an apprehension of bias. The courts take the view that given the nature of the judicial office and the oath of office of superior court judges, there is no presumption that such a highly dignified public functionary would discharge his/her important judicial office with favour, prejudice or partiality. On the other hand, the rationale for the presumption is founded on: (a) public confidence in the common law system, which is rooted in the fundamental belief that those who engage in adjudication must always do so without bias or prejudice and must be perceived to do so; (b) impartiality is the fundamental qualification of a judge and the core attribute of the judiciary: it is the key to the common law judicial process and must be presumed on the part of a judge; See e.g R v S (RD) 1997 3 SCR 484 para. 106 Wewaykum para. 58 and 59. See also Canadian Judicial Council Ethical Principals 30 (c) in view of the training and experience; the fact that they are persons of conscience and**

intellectual discipline; and capable of judging a particular controversy fairly on the basis of its own circumstances – US v Morgan 313 US 409 (1941) 421- appellate courts inquiring about apprehension of bias grant considerable deference to judges by the presumption of impartiality on the part of judges; and (d) this presumption carries "considerable weight"- Per L' Heureux_Dube and Mclachlin JJ, R v S (RD) 1997 3 SCR 484 para. 32 – Since the law "will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." See Blackstone Commentaries on the Laws of England III 361.

Restating this ancient rule in R v S, Cory J said:

"Courts have rightly recognized that there is a presumption that judges will carry out their oath of office…. This is one of the reasons why the threshold for a successful allegation of peceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrate that something the judge has done gives rise to a reasonable apprehension of bias."

The persistence of this presumption in Canadian law was recently reiterated by the Supreme Court in these words: "the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. "The effect of this presumption is that "while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified."

South African courts also apply the presumption that judicial officers are impartial in adjudicating disputes. Thus, in adopting the opinion expressed in R v S (RD) as "entirely consistent with the approach of South Africa courts to applications for the recusal of a judicial officer," the Constitutional Court held in SARFU 2 that a presumption in favour of judges' impartiality must be taken into account in deciding whether or not a reasonable litigant would have entertained a reasonable apprehension that the judicial officer was or might be biased. The court emphasized the effect of the presumption to be that the person alleging must go further to prove. It must be recalled that the applicant in this case requested that about half of the Constitutional Court bench should be rescued from sitting in appeal on his matter. It would appear, therefore, that the higher in the judicial hierarchy, the higher is the burden of proof of the apprehension of bias against the judge, especially in a multi-judge panel.

In considering the numerous allegations based on the apprehension of bias in S v Basson 2, the Constitutional Court held that the presumption in favour of the trial judge must apply. This means, first, that the court considering a claim of bias must take into account the presumption of impartiality. Secondly, in order to establish bias, a complainant would have to show that the remarks made by the trial judge were of such a number and quality as to go beyond any suggestion of mere irritation by the judge caused by a long trial. It had to be shown that the trial judge's was a pattern of conduct sufficient to "dislodge the presumption of impartiality and replace it with reasonable apprehension of bias." In

Bernett, the court stressed that both the person who apprehends bias and the apprehension itself must be reasonable. Thus, the two-fold emphasis serves to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. <u>This double-requirement of reasonableness</u> 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 if it is, in all the circumstances, a reasonable one." (Emphasis added.)

[11] In the instant matter, the Applicants allege that the judge is a subject of severe criticism in the two fold newspaper articles complained of;
The Applicants are facing contempt charges before the High Court. *Ex facie* the indictment, the Judge is not a complainant as alleged by the Applicants or at all.

[12] The Applicants allege that the Judge should recuse himself because the articles in the newspapers make reference to him. This is just a blanket statement. It is a bold and bony statement, not substantiated. No pertinent allegations are adduced, hence the test of double reasonableness is not met. No cogent and convincing evidence has been adduced.

[13] In **THE QUEEN VS WATSON, EX PARTE ARMSTRONG (1976) 136 CLR 248 @ 258-263 MC HUGH JA**, made the following apposite remarks.

> **"…in the case of a professional judge whose training, tradition and oath or affirmation require him to discard the irrelevant, the immaterial and the prejudicial, a conclusion that there is a reasonable apprehension that he is biased should not be drawn lightly."**

[14] The Applicants further contend that the Judge has been listed as a witness in the matter and cannot sit as a Judge, prosecutor and complainant in his own matter. A subpoena was adduced as evidence before Court which reflects that one Simeon M. Simelane and the Chief Justice are witnesses. I have had sight of the subpoena referred to. I am of the considered view that this subpoena is defective for non compliance with Rule 54 of the High Court Rules. This is so that in the event there is a default on the appearance of the witness a warrant of arrest could be issued. The witnesses are served by the police. In terms of that rule of court a subpoena is authorized by the Registrar. It is defective because it was not issued by the Registrar.

[15] Further, the subpoena is in a prescribed form and is signed by the Registrar. What is before Court is not a subpoena, It is not in the proper form as prescribed by the rules, hence I disregard same. Consequently, there is no basis for the contention that the Chief Justice and the Judge are witnesses in the contempt of court case. This contention is simply made in an attempt to defeat the ends of justice.

[16] More to the foregoing, **The Supreme Court of Illinois in People Vs Hall, 114 Ill.2d 376,499 N.E.2d 1335,999 102 Ill.Dec.322(1986)**,

upholding a trial Judge's refusal to recuse himself from a case after the defendant had had an outburst in the courtroom and had struck his attorney and the trial judge, stated:

> **"we cannot presume a failure of impartiality of a trial judge even under extreme provocation. Judges are called upon to preside over the trial of onerous causes and persons .By definition, however, a trial Judge is required to ignore provocations and pressures, whether public or from individuals…To hold that the law requires a substitution of Judges under circumstances similar or comparable to those here would invite misconduct toward Judges and lawyers, and a practice would develop that the grosser the misconduct the better the chances to avoid trial with an undesired Judge or lawyer.''**

[17] In the present case, the Applicants seek recusal of the Judge as a result of their own misconduct and to allow this would open doors for any defendant to get rid of an undesired Judge by making outbursts and attacking the Judge in open Court.

[18] In any event, on 10 April 2014, the 1st Applicant berated the Judge in open Court. He states in his papers that there was an altercation between himself and the Judge. It is surprising though that no evidence has been adduced by the 1st Applicant on what was said by the Judge in Court and how he was attacked by the Judge. He does not state in his papers what

was said by the Judge for him to say there was an altercation or that the Judge would be biased.

[19] What is rather clear is that the 1st Applicant attacked the Judge and this was even widely reported in local dailies and carried as a headline on the following day that THULANI LAMBASTS JUDGE MPENDULO by The Times of Swaziland of the 11th April 2014. There is absolutely no evidence of what the Judge said that would show a reasonable apprehension of bias.

[20] I am of the considered view that it would be wrong for the Courts to allow litigants to attack the courts and think that the weapon would be for them to then lodge recusal applications. Litigants and attorneys should know that recusal is a drastic and extraordinary remedy and should be issued only upon a clear showing that the trial court will abuse its powers and exercise same in an arbitrary and capricious manner. These factors are lacking *in casu*.

[21] The Applicants' further contention is that the warrants of arrest were not issued in accordance with Section 101 of the Criminal Procedure and Evidence Act 67 of 1938 as amended. They state that the prosecution had to apply for the issuance of the warrants after the non -appearance of the Applicants before Court after being called three times.

[22] It is a fact that the Applicants were in Court when the Court resumed business for the day. They sat in Court for over an hour whilst the Court

was dealing with other matters which were on the roll. They subsequently disappeared. Their attorneys stated, when the matter was called, that there was no need for them to be in Court as they had been released by another Judge on Sunday 6th April 2014.

[23] It is worth mentioning that an appeal was filed immediately after the judgment of 6th April 2014, which appeal effectively stayed the execution of that judgment.

[24] I am of the view that the Applicants decided to leave because they undermine and disregard the authority of this Court. This is highly contemptuous and courts should not condone this kind of behaviour. As the Court had remanded the Applicants in custody until the return date, they had to appear in Court from custody on that date irrespective of the fact that the warrants of their arrest had been set aside.

[25] The purpose of a warrant of arrest is to bring an accused person to court to answer to the charges preferred against him. It is not a substitute for the indictment. The warrant of arrest falls away once the accused is arraigned before court and is either admitted to bail or remanded in custody. If remanded in custody, it is the remand order issued by the court that holds the accused in custody until the return date and not the warrant of arrest.

[26] The argument that the setting aside of the warrants also set aside the indictment and the court's remand order is seriously flawed. The setting aside of the warrants, which I view as an academic exercise since the warrant had long been overtaken by events, does not in any way

impinge on the indictment and the remand order which remained in force.

[27] Furthermore, if the Applicants were liberated after the setting aside of the warrants, a liberation warrant had to be produced. They failed to produce same and their defence counsel conceded that there was no such liberation warrant authorizing their release from custody. It was incumbent upon this Court to ask for the production of the liberation warrant to ascertain whether they were properly released.

[28] The Court is at liberty to authorize a warrant of arrest *mero motu* in these circumstances. The Court adopts this mechanism in self-protection of the dignity, authority and repute of the Court. The Court cannot be expected to sit back, not protect itself and allow its orders to be flouted just because the prosecutor has not applied for the issuance of the warrant of arrest.

[29] Another question that boggles the mind is who was to be called by the Court three times when upon being asked on the whereabouts of their clients when the matter was called, the Applicants' attorneys stated categorically that they were not around Court because it was not necessary for them to be before Court. This, notwithstanding an order of this Court for them to be in attendance. If it was not necessary for them to be in Court why did they come to Court and subsequently leave without being released by the Court? I reject the submission that this Court should recuse itself from the matter because this Court issued

warrants of arrest. Such a proposition is untenable. It is not a ground for recusal. The Applicants are the architects of their own predicament.

[30] It has further been contended that there is an application by the Law Society of Swaziland where they are challenging the appointment of this Judge. This Court is not aware of that application as I have not even been served with same. In any case, I am a sitting Judge of the High Court of Swaziland seized with the contempt of court case and if there is such a matter, it is for another forum and is irrelevant in the instant matter.

[31] Even the said Law Society has not filed any confirmatory affidavit to this effect in the recusal application nor have they sought to be joined as a party herein. The Applicants are clutching at straws. Their argument that this Court should recuse itself just because of an alleged application by the Law Society does not hold water and is consequently rejected.

[32] It appears to me that the Applicants are clearly forum shopping. This is an undesirable practice and cannot be allowed. Litigants cannot choose their own Judges. A Judge has a duty not to recuse himself where unsustainable applications for his recusal have been made. A party should not be allowed to abuse the recusal process in an effort to "judge shop", delay his case, vent his frustration at an unfavourable ruling, or otherwise attempt to gain some perceived strategy. There is no need for this Court to recuse itself pursuant to this unmeritorious application. Litigants cannot be allowed to choose or discard a judge as and when they want. Litigants should not be allowed to control the courts and

erode the independence of the Judiciary through spurious recusal applications such as this one.

[33] **In Gaetsaloe v Debswana Diamond C. (Pty) Ltd Civil Appeal No. CA CLB-027-08, Ramodibedi JA** writing for the Full Bench of the Court of Appeal of Botswana stated as follows;

> **"[23] As a matter of first principle it is of the utmost importance to recognise that our judicial system is based on independent and impartial tribunals. Essentially for that matter, the courts must also be seen to be independent and impartial in order to instil public confidence. It cannot be overemphasised that public confidence is in turn an indispensable cog in any credible judicial system such as ours. The effectiveness of the system depends upon presumption of impartiality. Indeed, judges are sworn to do justice without fear, favour or prejudice and in accordance with the law. They are sufficiently equipped to do so by virtue of their special training.**
>
> **[24] In our jurisdiction the test for recusal is an objective one, namely whether there is a reasonable suspicion of bias. See, for example Mafeela v The State (1996) BLR 15 (CA) at page20; Popo v The State [2007] 2 blr 696 (CA) at pages 698-699. In South Africa the test as laid down in such cases as President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC) and Bernert v ABSA Bank Ltd CCT 37/10 (2010) is "whether there is a reasonable apprehension of bias ,in the mind of a reasonable litigant in possession of all the relevant facts ,that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court." There is no material difference in the phrases**

"reasonable suspicion of bias" and "reasonable apprehension of bias" and accordingly our law on the subject tallies with that of South Africa. Authorities from that jurisdiction are, therefore, highly persuasive here. I am mainly attracted by the following remarks of Ngcobo CJ in Bernert's case at paragraph 34, 35 and 36 namely;

'34. The other aspect to emphasise is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable. As we pointed out in SACCAWU, "the two-fold emphasis…serve(s) to underscore the weight of the burden resting on a person alleging judicial bias or its appearance'. This double-requirement of reasonableness 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, in all the circumstances, a reasonable one.

35. The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension .The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her .Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer , they will have their case heard by another judicial officer who is likely to decide in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed Judges do not choose their cases; and litigants do not choose their judges. An application for recusal should not

prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias.

36. But equally true, it is plain from our constitution that 'an impartial judge is a fundamental prerequisite for a fair trial. Therefore, a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial. In a case of doubt, it will ordinarily be prudent for a judicial officer to recuse himself or herself in order to avoid the inconvience that could result if, on appeal, the appeal court takes a different view on the issue of recusal. But, as the High court of Australia warns:-

'[i]f the mere making of an unsubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable. ' "

[34] Before I end this task, it is paramount for me to state at this juncture that the manner in which the recusal application was first raised before this Court was highly irregular, unethical, embarrassing and discourteous. The Applicant's attorney raised the issue of the recusal in open Court much to the applause of 1st Applicant's supporters who were in Court. Clearly to me he was playing to the gallery. This was to the horror of this Court. The motive was to intimidate and embarrass this Court. Such conduct coming from an officer of this Court is highly unethical and undesirable to say the least.

[35] In **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA VS SOUTH AFRICAN RUGBY FOOTBALL UNION supra at page 177 H,** the procedure for recusal is outlined as follows:-

> **"The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in Chambers with the Judge or Judge in the presence of her or his opponent. The grounds for recusal are put to the Judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge the applicant would, if so advised, move the application in open Court."**

[36] Eric Morris, in his work entitled, **"Technique in Litigation", Third Edition, Juta & Co, 1985 at page 60** confirms that procedure in the following terms.

> **"Ordinary, as well as professional, courtesy requires that the judicial officer whose rescusal is sought should be informed that such an application will be made. Often an informal approach, made timeously, will avoid embarrassment both to the court and to counsel. The usual procedure is to request the judge or magistrate to receive both your opponent and yourself in chambers, where you indicate tactfully the fact and grounds of your application. It can hardly be doubted that, even if he considers your request to be without real substance, the average judicial officer will try to arrange for the case to be heard by someone else. In all cases however, it will allow time for consideration and the informal approach will obviate an indignant reaction which may result from an unheralded application made in Court."**

[37] The 1st Applicant is a lawyer who is reasonably expected to understand the basic concepts of the presumption that relates to the conduct of Judges. He must understand the impact of judicial impartiality.

[38] In the SARFU judgment at page 193 para. 104

> **"while litigants have a right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of judicial functions involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike, without fear, favour, or prejudice, in accordance with the Constitution and the law.' To this end, they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the Judiciary would be undermined, and in turn, the Constitution."**

[39] The Applicants have clearly resorted to this strategy for recusal in a bid to obstruct the hearing of their case. The application is devoid of merit altogether.

CONCLUSION

[40] For the reasons I have alluded to above, this application fails woefully. It is accordingly dismissed with costs.

M. S. SIMELANE

JUDGE OF THE HIGH COURT

For the 1st Applicant	**:**	**Mr M.Z. Mkhwanazi**
For the 2nd Applicant	**:**	**Advocate L. Maziya**
For the Respondents	**:**	**The Director of Public Prosecutions,**
		Mr. N. M. Maseko