Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	**YES** / NO
Circulate to Regional Magistrates:	**YES** / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: CA&R 13/23

In the matter between:

MICHAEL ITLHONEPENG MGIJIMA Appellant

and

THE STATE Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This is an urgent bail appeal from the Regional Court sitting in Galeshewe. The appellant faces two charges of raping the same minor girl on two consecutive days. The said minor girl was 11 years old at the time of the alleged rape.

2. It appears from the record to have been common cause between the defence, the State and the learned Magistrate that the appellant was seeking bail in circumstances where he was facing charges under Schedule 6. In these circumstances everyone was *ad idem* that the provisions of s60(11) of the Criminal Procedure Act[1] (CPA) would apply.

3. The relevant provisions of the CPA read as follows:

> "60(11) Notwithstanding any provision of this Act, where an accused was charged with an offence referred to in –
>
> (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;"

4. Three grounds of appeal were raised in the Notice of Appeal, dated 22 March 2023, against the finding of the learned Magistrate Mr Roach on the 3rd March 2023 dismissing the appellant's bail application. These three grounds of appeal are: Firstly, the learned Regional Magistrate

[1] Act 51 of 1977.

erred in not recusing himself; Secondly, the decision by the learned Regional Magistrate to dismiss the bail application was wrong; and Thirdly, the learned Regional Magistrate erred in finding that there were no exceptional circumstances which warranted the appellant's release on bail pending the outcome of the trial.

5. The question to be determined on the facts of the present appeal is whether the appellant has indeed been given a reasonable opportunity to adduce the required evidence and have it considered by a dispassionate but engaged legal mind, who would consider the merits without prejudice or bias or prejudging the matter.

6. This must surely be the cornerstone of any credible legal system. It is indeed the system embraced in our Constitution[2]. Section 34 of the Constitution finds application because every court including criminal courts and courts considering bail applications are required to be independent and impartial. It cannot be otherwise and if it were, the system would loose its credibility. The appellant is also afforded, *inter alia*, the rights contained in sections 35(1)(e) and (f) of the Constitution.

7. At the hearing of this appeal the appellant only pursued the first ground being that the learned Magistrate erred in failing to recuse

[2] The Constitution of the Republic of South Africa, Act 108 of 1996.

himself. It was argued that as a consequence of that failure the decision of the learned Magistrate to refuse bail had to be set aside. For reasons that will become apparent hereunder, it was further argued a further consequence of setting aside the decision to refuse bail would be that the bail application would have to be referred back to the Regional Court to commence *de novo* before a different Magistrate.

8. This court in considering this bail appeal is faced with the unusual circumstance where both the State, who is the respondent in this appeal and the appellant both agree that the presiding Magistrate in the examination and cross-examination of the appellant and a witness appellant had brought to court essentially to establish an alternative address for the duration of the bail descended into the arena in his own questioning of the appellant and this witness.

9. This descent into the arena by the presiding judicial officer in this bail application has two potential consequences. Firstly, the dust of combat may have blinded the said judicial officer to the consequences of his own conduct. Secondly, it may have left a justifiable conclusion of bias on the part of the presiding judicial officer in the mind of an independent, objective and properly informed observer.

10. Clearly, given that there was an application for the presiding judicial officer to recuse himself and given the grounds of the present appeal,

the appellant clearly thought that he did not receive an unbiased and fair hearing during his bail application. It is not inconsequential that the State shares this view. Nevertheless, it remains for this court to consider the transcript of the relevant bail application, the transcript of the application for the learned Magistrate's recusal and the judgment in the recusal application together with the grounds of appeal and form its own conclusion.

11. The learned Magistrate in his judgment refusing to recuse himself relied in essence on the inquisitorial nature of a bail enquiry. In the circumstances of this case the reasoning of the learned Magistrate is both self-serving and does not stand up to scrutiny. The authorities referred to herein will show that although there is an inquisitorial element to bail applications, it is still essentially an adversarial process that requires impartial adjudication. Judicial officers at every level that directly hear and adjudicate issues in courts have to be mindful of their conduct and approach to litigants, lest it leads to a justifiable perception of bias. This is especially so in a bail application because both the presumption of innocence and the right to personal liberty is at play.

12. The Constitutional Court in S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat[3] (Schietekat's case), set out the position as follows:

[3] 1999 (2) SACR 51 (CC).

"[11] Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note about the bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regards to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance."[4] (references omitted)

13. The approach of the Supreme Court of Appeal (SCA) in the matter of S v Mabena[5], is also apposite to the facts of the present appeal. In Mabena's case, the SCA stated:

"[7] The legislative scheme for the grant of bail, whether generally or in relation to Schedule 6 offences, necessarily requires a court to enquire what the circumstances are in a particular case and then to evaluate them against the standard provided for in the Act. The form that such an enquiry and evaluation should take is not prescribed in the Act, but a court ought not to require instruction on the essential form of a judicially conducted enquiry. It requires at least that the interested parties – the prosecution and the accused – are given an adequate opportunity to be heard on the issue. For although a bail inquiry is less formal than a trial, it remains a formal court procedure that is essentially adversarial in nature. A court is afforded greater inquisitorial powers in such an inquiry, but those powers are afforded so as to ensure that all material

[4] Schietekat's case above at para [11]., pp 63 to 64.
[5] 2007 (1) SACR 482 (SCA).

factors are brought into account, even when they are not presented by the parties, and not to enable a court to disregard them. And while a judicial officer is entitled to invite an application for bail, and in some cases is even obliged to do so, that does not make him or her a protagonist. A bail inquiry, in other words, is an ordinary judicial process, adapted as far as need be to take account of its peculiarities, that is **to be conducted impartially and judicially** and in accordance with the relevant statutory prescripts." (my emphasis) (references removed)

14. There are two important aspects of our law that were considered and restated by the Constitutional Court that will necessarily need to be considered as part of the law that must be applied to the facts of this appeal, as disclosed in the transcript of proceedings in the Regional Court. The two aspects referred to are: Firstly, the necessity for impartial adjudication of disputes by courts; and Secondly, the test to be applied to determine if there is a reasonable perception of bias on the part of the presiding judicial officer. In this regard I refer to the decision of the Constitutional Court in the matter of PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION & OTHERS[6] (the SARFU case).

15. The Constitutional Court in the said SARFU case, at paragraph 35 set out the position as follows:

"[35] A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in

[6] 1999 (4) SA 147 (CC).

such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."[7]

16. Naturally, the starting point for determining bias on the part of any judicial officer is the presumption that the judicial officer is not biased. This presumption can be rebutted by the facts of a particular case. In the said SARFA case the Constitutional Court described the test for bias and its application in the following terms:

"[45] From all of the authorities to which we have been referred by Counsel and which we have consulted, it appears that the test for apprehended bias is objective and the *onus* of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in a dissenting judgment by De Grandpré J in *Committee for Justice and Liberty et al v National Energy Board:*

'… the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information… [The] test is "what would an informed person viewing the matter realistically and practically – and having thought the matter through – conclude".'

In R v S (RD) Cory J, after referring to that passage, pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in *Pinochet:*

'Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough*, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Judge was not impartial.'

[7] SARFU., above at pp 170 to 171.

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 follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test."[8] (footnotes omitted)

17. The approach of the SCA in the matter of S v Le Grange and Others[9] has application on the facts of the present appeal. The SCA set out the position in the following terms:

"[14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the rial open-mindedly, impartially and fairly, but that such conduct must be '"manifest to all those who are concerned in the trial and its outcome, especially the accused'". The right to a fair trial is now entrenched in our Constitution. As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by s35(3) of our Constitution. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done but must be seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State."[10] (footnotes omitted)

18. Finally, on the question of how a presiding judicial officer should question a witness or the accused in proceedings was restated by the SCA in the Le Grange case, as follows:

[8] SARFU above at p 175.
[9] 2009 (2) SA 434 (SCA).
[10] Le Grange., above at para [14] p449.

"[19] The *locus classicus* in respect of the questioning, by a presiding officer, of a witness, including an accused, is *S v Rall* 1982 (1) SA 828 (A), in which Trollip AJA laid down three principles of proper judicial behaviour, namely:

(i) A judicial officer must ensure not only that justice is done but in addition that it is seen to be done. He must therefore so conduct the trial that his open-mindedness, impartiality and fairness are manifest to all concerned with the trial and its outcome, especially the accused.

(ii) A judicial officer should refrain from questioning witnesses or the accused in such a way or to such an extent that it may preclude him/her from detachedly or objectively appreciating and adjudicating on the issues.

(iii) A judicial officer should refrain from questioning a witness or the accused in a way that may intimidate or disconcert him/her or unduly influence the quality or nature of his/her replies and thus affect his/her demeanour or impair his/her credibility."[11]

19. Having regard to the grounds of the appeal it is imperative to at least quote extracts of the questioning to illustrate the conduct complained of naturally the entire questioning of the appellant and his witness, Mr Bosvark will be considered in its proper context to determine whether the learned Magistrate overstepped the mark both in respect of legitimate questioning and whether he showed actual bias or if his behaviour would justify a legitimate fear of bias on his part.

20. The first such interchange quoted verbatim:

"Accused: Your worship that is also what I do not understand why she would open a case for me. But what I know is that

[11] Le Grange., above at para [19] at p458.

she knows me and all other people know what type of person I am.

Court: And what type of person are you Sir?

Accused: Your Worship I am just an okay normal person who is not rude to anyone and who also does not provoke anyone.

Court: Yet you hang out with friends that are not good for you.
Accused: Yes but it has been years since I cancelled it with them.

Court: Have you ever heard of the saying, birds of a feather flock together Sir?

Accused: No your Worship.

Court: In Afrikaans *soort soek soort.*

Interpreter: Your Worship?

Court: In Afrikaans *soort soek soort. Did you ever hear it?*

Accused: No your Worship.

Court: Really Sir? You are from Kimbeley and you have never heard such a saying?

Accused: Your Worship I have not heard such words in Afrikaans or Setswana. I do not even know what does it mean.

Court: Do you understand Afrikaans?

Accused: I just hear it your Worship I do not understand it.

Court: If you hear it what does it mean, you understand it?

Accused: Your Worship I can hear and understand Afrikaans but I do not fluently speak in Afrikaans.

Court: Now you can understand? So when the court says *soort soek soort* you understand exactly what the court is saying.

Accused: Your worship I hear the court but I do not understand what that means.

Court: Conveniently so. …"[12]

21. The next interchange between the court and the accused related to the accused's personal safety and his prior criminal record. The verbatim text of this exchange in the transcript reads as follows:

"Court: Do you think you will be safe outside?

Accused: Yes I am sure.

Court: How are you going to be, why are you so sure about?

Accused: People know me they know what type of person I am and that I am (sic) rude or naughty.

Court: Not rude and naughty? Yet when you were 18 years old you were sentenced for robbery. Sir, you were sentenced to a housebreaking and theft. Not only one count apparently. And the corrections give you a leeway and say go out on parole but sign every time and then you run away. Are you not naughty?

Accused: Your Worship that was in the past but now I have (sic) changed life.

Court: You have changed your life all of a sudden when you apply to go out on bail. Is that when you come to the realisation that you should change your lifestyle?

Accused: No your Worship it is not like that."[13]

22. The next interchange reads as follows:

[12] Transcribed record pp 42 line 18 to p44 line 7.
[13] Transcript of the record p 45 line 8 to line 25.

"Court: How did you change your life Sir?

Accused: Everything that I was doing that disappoint your Worship I am no longer doing.

Court: When did it start?

Accused: I think in 2020.

Court: Why in 2020?

Accused: Because your Worship it was then when I saw that I was following a lot of friends and some were dying, some were being killed and I realised that life is not easy.

Court: Before the court adjourned the court asked you a question in relation to your maintenance that you are paying towards your child and you said you are not contributing anything.

Accused: Yes.

Court: Does that sound like a responsible person Sir?

Accused: Not.

Court: Yet you changed your ways in 2020."[14]

23. The appellant called Mr Bosvark to testify on his behalf in his bail application. The reason that the appellant called Mr Bosvark was to show that he had a stable alternative address should he be granted bail. The relevant portions of the transcript are instructive. The first important interchange between the learned Magistrate and Mr Bosvark reads as follows:

"Court: You yourself Mr Bosvark have you ever been in trouble with the law?

Mr Bosvark: Yes your Worship I was involved in an accident a car accident.

Court: Is that the only thing?

[14] Transcript of the record p46 line 3 to line 19.

Mr Bosvark: Your Worship there is another instance where I was chased because I was in the taxi industry and then I left the car there your Worship. And then the police officers when they impounded the car when I went to go an fetch the car and then they said to me they found drugs inside my car.

Court: So you were arrested for the drugs?

Mr Bosvark: Yes I was arrested and then I came to court and then the matter was withdrawn.

Court: Is that the only two incidents?"[15]

24. The next significant interchange between the court and Mr Bosvark reads as follows:

"Court: You are portraying that you are very close to your cousin correct?

Mr Bosvark: Yes.

Court: In fact you are portraying that you sort of like his big brother.

Mr Bosvark: Yes.

Court: Mm. Now this is where I do not understand. If you have heard your little brother in [indistinct] terms has raped a child and you heard it's Tima's child did you ask the question is it the child he has with Tima or is it the other child of Tima? Whose child which child of Tima? Whose child? Did you ask this question?

Mr Bosvark: Your Worship I did not ask those questions because after hearing that Michael did this I was shocked that Michael did this.

Court: Mm what is Michael's child's name?
Mr Bosvark: I do not remember the child's name but by sight I know.

[15] Transcript of the record p84 line 4 to line 17.

Court: So you do not even know the child's name? Maar jy stel mos maar min belang in jou klein broers se kinders huh? You know what he also said to court? You do not maintain this child?

Mr Bosvark: Come against (sic) your Worship.

Court: You do not maintain this child.

Mr Bosvark: Your Worship when I usually gave him money and then he will say he is going to make a turn at the child's place.

Court: Is it huh? The money you give him he go and buy clothes (f)or himself."[16]

25. The next significant interchange between the court and Mr Bosvark reads as follows:

"Court: Now I want you to think now objectively speaking. What if (sic) is his daughter that there is alleged to have been raped by him?

Mr Bosvark: It is for that reason your Worship when I first heard the news I was shocked knowing him Michael the person he is.

Court: What I it is his daughter that he raped? You have that knowledge now. What if it is?

Mr Bosvark: Your worship let me say I do not believe that Michael could do such a thing.

Court: Now you do not work every day with Michael are you?

Mr Bosvark: Yes your Worship.

Court: You are also not every night with him are you?
Mr Bosvark: Yes your worship.

Court: You also do not know about the wrong friends he was keeping?

[16] Transcript of the record p86 line 15 to p87 line 18.

Mr Bosvark: Yes your Worship.

Court: So how well do you know your cousin?"[17]

26. The next significant interchange between the learned Magistrate and Mr Bosvark, reads as follows:

"Court: Out of his own mouth sir he indicated that he now wants to mend his ways that the wrong friends he was keeping he know (sic) it was wrong and so forth. I am surprised that you say you know your cousin because it does not seem as if you know him sir.

Mr Bosvark: Your Worship as I have said your Worship I know this person we grew up together your Worship. It is for that reason I was shocked when I heard that the things that is being alleged that he did your Worship because of I know this person and when we grew up your Worship. Or there are things that he does in my absence.

Court: Mm that is why I am saying Mr Bosvark either you are birds of the same feather or you do not know your cousin."[18]

27. The next significant interchange between the learned Magistrate and Mr Bosvark reads as follows:

"Court: Right let us hear. What type of person is he according to you?

Mr Bosvark: He is a hard worker your Worship. If you request something from him he should assist with something. And he is a person that I grew up with your worship. Our grandmother raised us. He is a person who has got respect manners.

[17] Transcript of the record p88 line 9 to p89 line 1.
[18] Transcript of the record p89 line 14 to p 90 line 1.

Court: A person that has respect respects some (sic) else's property correct? If you are found guilty of housebreaking, stealing someone else's property is that respect?

Mr Bosvark: No that is not respect.

Court: So now I do not understand your testimony sir. You just said now this is a man that is respectful and hard working. He will not steal other people's property he works for his money."[19]

28. The next significant interchange between the learned Magistrate and Mr Bosvark reads as follows:

"Court: …And now if it is indeed his child that he raped allegedly what stops him from raping your child?

Mr Bosvark: Your Worship for me to say that I do not believe that Michael committed the alleged offences that it is being said he committed because of I know him. As I know him he raised my children.

Court: He raised his own child also sir. I am asking you sir if that allegation is true would you take the risk of exposing your flesh and blood your children your daughter with the possibility that just one day he will snap and then he targets one of your daughters and then? You will entertain that chance?

Mr Bosvark: Your Worship I would say I would risk or I would risk your Worship but the person that I know and what type of person is Michael.

Court: You will risk? You will risk taking him in with the knowledge of perhaps he can rape your own daughter. You will take that risk?

[19] Paginated transcript of the record p90 line 5 to line 18.

Mr Bosvark: Your Worship I will risk taking him in so that he could come and stay with me because I know the person what type of person is Michael.

Court: You do not know your cousin. I have just put it to you know Mr Bosvark you do not know your cousin and I think it is highly irresponsible of you right to even if the allegations are untrue. Remember the matter must still be adjudicated by a court but what if the allegations is (sic) true?"[20]

The transcript then proceeded:

"Mr Bosvark: Your Worship as now the court has posed the question and nor for me as a father are (sic) listening to the courts questions my taking would be I would love that my wife should also come or I should have a discussion with her first after the courts questions posed to me.

Court: So you are having second thoughts now"[21]

29. The transcript then proceeds:

"Court: So you are still willing to accommodate your cousin?"[22]

30. The transcript then proceeds:

"Court: So do I get it you are not willing? I want to hear it out of your own mouth. You are not willing to have your cousing stay at you place?"[23]

31. The transcript then proceeds:

"Court: Right the court had a further question Ms Olivier?

[20] Transcript of the record p91 to p92 line 19.
[21] Transcript of the record p93 line 10 to line 15.
[22] Transcript of the record p93 line 22.
[23] Transcript of the record p94 line 12 to line 14.

Prosecutor: Your Worship the court took over from me."[24]

32. The record also reflects that after e learned Magistrate had dissuaded Mr Bosvark from providing his home as an alternative address for the appellant pending the outcome of the trial on the relevant charges of rape, Mr Bosvark provided a further alternative address at his younger brother where the appellant could be accommodated and no minor children would be put at risk. This is where the learned Magistrate should in fact have exercised the inquisitorial powers that he does indeed have. Either he should have allowed time to bring Mr Bosvark's younger brother to court to establish his willingness to accommodate the appellant and allow the appellant a proper opportunity to show that he will be safe and that the community would also be safe. In these circumstances, the appellant has not had a fair opportunity to establish the exceptional circumstances required to establish that the interests of justice allow him to be admitted to bail.

33. Further, as can be seen from the extensive transcripts of the record quoted above, the learned Magistrate clearly became a protagonist in the bail application being the subject of this appeal. Applying the test accepted in the SARFU case quoted above. In my view the transcripts quoted above sufficiently satisfy the double objective test contemplated in the SARFU matter. In my view the transcripts show that a reasonable, independent objective observer would form the view

[24] Transcript of the record p98 line 4 to line 5.

that there was in the said transcripts evidence of a reasonable apprehension of bias on the part of the learned Magistrate and even in some instances evidence of actual bias on the part of the said Magistrate.

34. In these circumstances, the refusal of the learned Magistrate to recuse himself cannot stand. Also, the refusal of the bail application cannot stand. They will both be set aside. This is not an appropriate case for me to substitute the order of the court *a quo* with the order it should have made. In effect and in substance the appellant has been deprived of his reasonable opportunity to establish the grounds needed to show that it is in the interests of justice to admit him to bail even though the charges fall within the ambit of Schedule 6. This is what the appellant is entitled to and that is what he will get.

35. The bail application is referred back to the Regional Court to commence *de novo* before a different Magistrate.

36. As already stated, the representative of the DPP is to be commended for the pragmatic and just stand taken. In fact, I owe both Counsel a debt of gratitude for their respective contributions to this matter. I would further impose on the office of the Provincial DPP to use its best endeavours in conjunction with the Kimberley office of the Legal Aid Board to expedite the new bail application that is contemplated in the order.

In the circumstances the following Order is made.

1) The decision of the Magistrate in the court *a quo* to refuse to recuse himself is set aside.

2) The decision of the Magistrate in the court *a quo* to refuse to admit the appellant to bail is set aside.

3) The appellant's bail application is to commence *de novo* in the Regional Court before a different Magistrate.

4) The Provincial office of the DPP is requested to use its best endeavours in conjunction with the legal aid office and the court concerned to expedite the bail application contemplated in Order 3 above.

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Lawrence Lever
Judge
Northern Cape High Court, Kimberley

Date of hearing: 26 April 2023
Date of Judgment: 28 April 2023

Counsel for the appellant: Mr Stenberg oio Legal Aid SA, Kimberley Office
Counsel for the respondent Ms E Kruger Office of the DPP, Northern Cape.