THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 81/2023

In the matter between:

JAN GYSBERT MARITZ **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Maritz v The State* (81/2023) [2024] ZASCA 72 (8 May 2024)

Coram: MOKGOHLOA, MABINDLA-BOQWANA and MOLEFE JJA

Heard: 26 February 2024

Delivered: 8 May 2024

Summary: Recusal application – refusal by a judge to recuse herself before sentencing in a criminal trial – onus rests on the appellant to discharge, on objective facts, that the judge displayed reasonable apprehension of bias against him.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Naidoo J, sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Molefe JA (Mokgohloa and Mabindla-Boqwana JJA concurring):

[1] This appeal is against the judgment of the Free State Division of the High Court, Bloemfontein (the high court), where the presiding judge in that matter (Naidoo J) refused to recuse herself from the pending criminal trial. The appeal is with the leave of this Court.

[2] The facts in this case are largely common cause and can be briefly stated. The appellant, Mr Jan Gysbert Maritz, a practising attorney, was charged with 18 counts of sexual assault and statutory rape. On 17 May 2021, the trial commenced in the high court. The appellant was represented by two senior counsel and he pleaded not guilty to all charges. On 21 May 2021, whilst the first state witness was testifying, the appellant advised the court that he wished to change his plea of not guilty to a guilty plea, and made numerous admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (the Act) which were accepted by the respondent. Based on these admissions the appellant was convicted on counts 1 to 16 after the respondent stopped prosecution in respect of counts 17 and 18.

[3] He was convicted on his guilty plea and released on bail with certain conditions, pending sentencing proceedings which were to be held from 14 to 17 September 2021. The respondent applied for variation of the appellant's bail conditions, and the matter was set down for hearing on 4 June 2021. Due to a bereavement in her family, Naidoo J was not available to hear the application, and Daniso J adjudicated the variation of the bail conditions application.

[4] A week before the commencement of the scheduled sentencing proceedings, the appellant's legal representatives indicated to Naidoo J that they would be terminating their services due to ethical reasons and that the appellant would apply for the withdrawal of the s 220 admissions. Naidoo J informed them that she was *functus officio* as she had already convicted the appellant.

[5] On 14 September 2021, counsel for the appellant at the time, formally withdrew their services along with the then instructing attorneys. Subsequently, new legal representatives placed themselves on record. The newly appointed counsel for the appellant was not ready to proceed with sentencing on that day. The parties were afforded an opportunity to argue whether the appellant's bail should be revoked. Ultimately, Naidoo J revoked the bail and remanded the appellant in custody. She refused the appellant's application for leave to appeal the revocation of bail. Leave to appeal was granted by this Court to the full court of the Free State Division of the High Court, Bloemfontein (the full court). On 5 November 2021, the full court reinstated the appellant's bail and he was released from prison.

[6] On 29 November 2021, the appellant brought an application for the recusal of Naidoo J on the basis that she was biased and that he had a

reasonable apprehension that he will not be accorded a fair trial. The appellant's recusal application was based on the following allegations and complaints against Naidoo J:

(a) The judge irrationally and unilaterally revoked his bail;

(b) The judge is a Gender Based Violence Activist (GBV Activist);

(c) The judge requested a victim impact report before the revocation of the appellant's bail; and

(d) Prior to the hearing of the variation of the appellant's bail conditions, the judge spoke to her colleague, Daniso J about the case.

The high court dismissed the application for recusal. Dissatisfied with the high court order, the appellant petitioned this Court and leave to appeal was granted to this Court on 8 June 2022.

[7] A litigant who finds it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of his motive should not be lightly questioned.[1] His or her application must be dealt with in accordance with the prevailing legal principles.

The legal principles

[8] The law relating to recusal has become settled. The right to a fair trial is entrenched in our Constitution. Section 35(3) of the Constitution deals with criminal proceedings and provides that '[e]very accused person has a right to a fair trial'. Section 34, which addresses the right of access to courts in the general sense, states as follows:

'Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

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[1] *S v Bam* 1972 (4) SA 41 (E) at 43H-44A.

[9] Section 165(2) of the Constitution, dealing with the judicial authority re-iterates the courts' independence and requires courts to apply the law 'impartially and without fear, favour and prejudice', and the oath of office prescribed by Schedule 2 of the Constitution requires each judge to swear that he or she 'will uphold and protect the Constitution. . . and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.

[10] Judicial officers are required to perform their adjudicative functions independently and impartially, without bias or prejudice in favour of any party.[2] The concept of impartiality of the judiciary refers to the state of mind or attitude of judicial officers in relation to the issues and parties in a particular case, and to the fact that the courts must apply the law 'without fear or prejudice'. An important consequence of impartiality is that a judicial officer must recuse himself or herself if there is a reasonable apprehension that he or she is biased.

[11] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application (SARFU),* the Constitutional Court held that the test for bias was whether 'a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judicial officer has not brought or will not bring an impartial mind to bear on the adjudication of the case. . .'.[3] Although it is the apprehension of bias and not actual bias which is prohibited, the test for bias is difficult to satisfy. This is because, first, the starting point is that judicial officers are presumed to be impartial, and, second, judicial officers are human. It is appropriate for judicial officers to bring their own life experiences into the

[2] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 para 31.

[3] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 para 48.

judicial process.[4] The *SARFU* judgment reaffirmed that we must assume the independence and impartiality of judicial officers based on the recognition of their legal training and experience.

[12] Crucially, the following was said about the test in *SARFU*:

'The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.'[5]

[13] The Constitutional Court, in *South Africa Human Rights Commission obo South Africa Jewish Board of Deputies v Masuku and Another,* held that:

'The impartiality and independence of Judicial Officers are essential requirements of a constitutional democracy and are core components of a constitutional right of access to courts. It is these requirements that constitute the source of public trust in the Judiciary and in the administration of justice in general. And because impartiality of Judicial Officers and the impartial adjudication of disputes of law constitutes the bedrock upon which the rule of law exists, there must, in any sound legal system, exist a general presumption of impartiality on the part of the Judicial Officers.'[6]

Revocation of bail

[14] The appellant based his case for the apprehension of bias on the cumulative effect of the grounds for recusal, and I set out below the details of these allegations. It is common cause that on 14 September 2021, the appellant's newly appointed legal representatives requested the postponement of the sentencing proceedings until 29 November 2021. The high court granted

[4] Ibid para 40-44.
[5] Ibid para 48.
[6] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5: 2022 (7) BCLR (CC); 2022 (7) BCLR 850 (CC) (*Masuku*)para 56.

the postponement and allowed the parties to argue the revocation of appellant's bail. After both parties' argument, the high court revoked the appellant's bail on 15 September 2021. Counsel for the appellant submitted that the high court unilaterally and irrationally revoked the appellant's bail and dismissed the application for leave to appeal the revocation. Special leave was granted by this Court to the full court which reinstated appellant's bail on 5 November 2021.

[15] The appellant's counsel further submitted that no provision or authority is contained in s 58 of the Act allowing a judicial officer to unilaterally revoke bail. He, therefore, argued that this is an objective indication that Naidoo J is biased towards the appellant and he would not be afforded a fair hearing in the pending criminal trial.

[16] If a litigant is for some sound reason, not satisfied with a judicial officer's judgment or decision, the aggrieved litigant has a right to approach a higher court for the appeal or review of the judgment (as the case may be) to adjudicate on its correctness. The reason why we have the appeal court system is inter alia, a recognition of the fact that judges may sometimes err in the exercise of their discretion or misapply the law in the process of adjudicating. Naidoo J may have wrongly revoked the appellant's bail. Her mistake in the application of the law, or on the facts did not by itself mean she was biased. The relevant connection must call into question her ability to apply her mind in an impartial manner to the case before her.[7] The appellant alleged that the judge mentioned in chambers that she would revoke his bail. This allegation is not supported by any of the affidavits filed by those who were present in chambers on that day, including by his erstwhile counsel. The allegation of

[7] See *Ex Parte Goosen and Others* [2019] ZAGPJHC 154; [2019] 3 ALL SA 161; 2020 (1) SA 569 (GJ) para 13 which cited the authority of the Constitutional Court in *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (4) BCLR 329 (CC); 2011 (3) SA 92 (CC) para 31-33.

bias must therefore be rejected as being without any merit and not capable of grounding a reasonable apprehension of bias.

Gender based violence activist

[17] As regards this issue, the appellant alleged that Naidoo J is a GBV Activist because he had been informed by his erstwhile legal team that Naidoo J had a 'teddy bear' on her couch in her chambers which represented her support as a GBV Activist. Further that he was told by his attorney that his wife had indicated over the phone to someone that the state prosecutor said that the judge is a GBV Activist and 'will put the appellant away for a long time'.

[18] Counsel for the appellant submitted that the presence of the 'teddy bear' in Naidoo J's chambers is relevant to the reasonable perception that she is biased, as an independent and impartial judge does not need to be reminded of the gender-based violence campaign. He argued that it is indicative of a reasonable apprehension of bias in relation to the appellant and the charges faced by him. Counsel correctly did not press the issue of the telephone conversation allegedly overhead by the appellant's wife as that constituted inadmissible hearsay evidence.

[19] Naidoo J explained the presence of the 'teddy bear' in her office in the following manner. Since 2005, she has been a member of the South African Chapter of the International Association of Women Judges (SCA-IAWJ), an organisation which gets involved in the 16 days of activism against gender-based violence against women and children. In 2005, she participated in talks regarding the protection afforded to abused persons. The 'teddy bear' was given to her as a token of appreciation.

[20] A reasonable apprehension of bias cannot merely be based upon the association of the judge with SAC-IAWJ, without more. It has been stated that a judge's holding of particular views on social matters is not an indication that she will necessarily be biased in respect of certain matters, nor does it naturally follow that, where a judge is known to hold certain views, she will not be capable of applying her mind to a particular matter.[8] This ground of recusal must similarly be rejected as being without merit.

Request for a victim impact report

[21] The appellant's other ground for the apprehension and perception of bias was that Naidoo J requested her stand-in registrar, Mr Bantam, to obtain a victim impact and/or pre-sentence report from his then counsel 'as she wants to read it before sentencing starts on 14 September 2021'. In support of this allegation the appellant relies on his erstwhile counsel's affidavit that in September 2021, he received a telephone call from Mr Bantam 'looking for a report on the Maritz matter.' Mr Bantam 'could not exactly tell me what report/s he was looking for.'

[22] Counsel for the appellant submitted that Naidoo J incorrectly stated that she did not make such a request. It was argued that there was no basis for the appellant's erstwhile counsel to have fabricated that he received a telephone call from Mr Bantam.

[23] Mr Bantam denied that he received an instruction from Naidoo J to request a report. He stated that the only time he spoke to the appellant's erstwhile counsel on the phone was when counsel wanted to see the judge to withdraw from the matter.

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[8] *Masuku* para 66.

[24] The high court dismissed this ground for recusal on the basis that pre-sentence and/or victim impact reports are usually requested by the prosecutor and that it would have been absurd for the judge to have requested the reports from the appellant's legal representative. Furthermore, on 7 September 2021, the judge's registrar informed her that the appellant's new legal team would not be ready to proceed at the sentencing proceedings scheduled for 14 September 2021. The issue of the reports, therefore, would have been irrelevant to the proceedings on that day.

[25] While the appellant's erstwhile counsel stated that he was phoned by the judge's stand-in registrar, he also stated that the registrar could not tell him what report he was exactly looking for. Counsel was the one who advised the registrar about one report not being finalised and about the victim's report being with new attorneys. Counsel also stated that he was confused about the call as he was no longer in the matter.

[26] Much was made of a second affidavit in which Mr Bantam stated that the only time he spoke to counsel was as stated above but then also stating that he could not recall the content of a conversation relating to an outgoing telephone call, when confronted with a phone log.

[27] The inferences sought to be drawn by the appellant on these affidavits are unjustifiable. His erstwhile counsel had informed the judge of his withdrawal. So, it would make no sense for the judge to ask her registrar to call him for any documentation. Secondly, at no point did counsel state that the registrar specifically asked for a victim impact report. He was the one who deduced it as the report that was probably being requested. Thirdly, the judge was informed that the appellant's new legal team would not be ready to proceed with the sentencing proceedings on the date scheduled, therefore, the

issue of a report being sought to be read before that day, would be illogical. This ground for recusal is unfounded and was properly rejected by the high court.

Contact between Naidoo J and Daniso J

[28] I now turn to the complaint that Naidoo J telephonically spoke to a colleague Daniso J to inform her of the background to the case on 4 June 2021, the morning before Daniso J heard the application for the variation of the appellant's bail conditions. Counsel for the appellant submitted that there was no reason or justification for Naidoo J to call Daniso J. According to him, this was indicative of the judge's display of a personal and direct interest in the appellant's trial, and therefore gave rise to a reasonable apprehension of bias.

[29] In her judgment, Naidoo J set out the circumstances surrounding that telephone call. She stated that she had to travel to KwaZulu-Natal to attend a funeral, of a family member and could not hear the variation application which was brought by the respondent. The application was then re-allocated to Daniso J. Naidoo J was asked by her Judge President to telephone Daniso J on the morning of 4 June 2021, and put her up to speed with the matter. As courtesy, Naidoo J had an opportunity to speak to Daniso J to thank her for hearing the application. During the telephonic conversation, Daniso J wanted to know about the matter and she explained briefly that she had set bail pending sentence and that the application was for variation of the bail conditions. She indicated to her that she had no further information about what sort of variation was sought by the respondent.

[30] The circumstances surrounding the contact between the two judges is in no way a display of personal interest in the appellant's trial, as suggested by the appellant. It is common cause that the order for the variation of the bail

condition before Daniso J was by agreement between the appellant and the prosecution and was not influenced by Naidoo J. This ground of recusal must also fail.

[31] There is a presumption that judges are individuals of careful conscience and intellectual discipline, capable of applying their minds to multiplicity of cases which will come before them, without importing their own views or attempting to achieve ends justified in feebleness by their own personal opinions.[9] Accordingly, the presumption in favour of impartiality must always be taken into account when conducting the enquiry into whether a reasonable apprehension of bias exists.[10]

[32] It is incumbent on the appellant to show on the correct facts that there was reasonable apprehension that the judge will not bring an impartial mind to bear in the matter. The appellant failed to do so.

[33] At face value, the sheer number of complaints may seem to raise an eyebrow. However, before any cumulative effect of the grounds is considered, individual scrutiny of each must be undertaken. There is no basis to argue that a reasonable apprehension of bias, from an informed person's perspective has been shown on any of these grounds. The test for reasonable apprehension has not been satisfied. Curiously, the appellant asked for the matter to begin afresh should he succeed on appeal, despite his complaints having arisen at the sentencing stage and after he had been convicted following his plea of guilty. This against the backdrop of his alleged intention to change his plea. In light of what has been found above, an inference that the complaints against the judge were contrived so as to result in a trial *de novo* is irresistible. As demonstrated

[9] *Masuku* para 58.
[10] Ibid para 62.

above, there is no need to set aside the proceedings currently pending in the high court and thus the question of a trial *de novo* does not arise. In the circumstances, the interference with the decision of the high court is unwarranted. Accordingly, the appeal must fail.

[34] In the result, the following order is made:
The appeal is dismissed.

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D S MOLEFE
JUDGE OF APPEAL

Appearances

For the appellant:	A J Joubert SC
Instructed by	BDK Attorneys, Johannesburg
	Symington & De Kok Attorneys, Bloemfontein
For the respondent:	J W Roothman
Instructed by:	The Director of Public Prosecutions, Bloemfontein.