e-MANTSHI

A KZNJETCOM Newsletter

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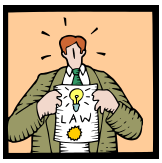
Welcome to the eighty eighth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Health, has in terms of section 68(1)(b) read with section 90(4)(c) of the National Health Act 2003 (Act 61 of 2003) made regulations relating to the management of human remains. These regulations were published in Government Gazette no 36473 dated 22 May 2013. Regulation 26 which is of interest to Magistrates reads as follows:

"EXHUMATION AND REBURIALS OF HUMAN REMAINS
Authorisation for exhumation of human remains
26(1) No exhumations and reburials of human remains shall be done unless:
(a) authorized by the relevant sphere of government and permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place; or
(b) A court order issued by a magistrate and shall be permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place."

2. The Minister of Transport has published draft regulations for comment in terms of section 75(6)) of the National Road Traffic Act, 1996 (Act No. 93 of 1996). The draft regulations were published in Government Gazette no 36479 dated 24 May 2013.
Interested persons are invited to submit written comments on the draft regulations within 30 days from the date of publication hereof to the Director-General, Department of Transport.
Comments may be sent to the following postal or e-mail address, or faxed to the following number:
Mr John Motsatsing
Department of Transport
Private Bag X193
PRETORIA
0001
E-mail: etollsignage.regulations@dot.gov.za
Tel: 012 309 3481
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One of the draft regulations intends amending Regulation 284 as follows:
“Amendment of regulation 284 of the Regulations

2. Regulation 284 of the Regulations is amended by the insertion of the following definitions after the definition of emergency vehicle:
" **'e-road'** means —
(a) a road or a portion of a road which has been declared to be a toll road in terms of section 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998) Act; and
(b) where liability to pay toll for use of the road, referred to in paragraph (a), is recorded at a toll plaza by any electrical or electronic device only;
'e-tag' means an electronic device that is fitted to a specific motor vehicle as contemplated in the Specification Regulations published in terms of section 58(1)(dB) South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998) to identify that motor vehicle when it passes under a gantry; and
'e-toll' means toll that is collected by means of an electronic collection system where a motor vehicle is identified by electronic equipment and the liability to pay toll is incurred when the user of the motor vehicle passes through a toll plaza and must arrange to pay toll as determined in terms of section 27 and 58 of the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998)."

Recent Court Cases

1. S v GABAATLHOLE 2013 (1) SACR 471 (NCK)

When it appears that police investigation is inadequate and the prosecutor incompetent a Magistrate must not act like an umpire in a tennis match.

The appellant had been convicted in a regional court of murder and assault with intent to do grievous bodily harm, and was sentenced to 15 years' imprisonment for the murder and to two years' imprisonment for the assault. The court on appeal upheld the convictions and sentences, but felt constrained to remark on the inadequate investigation of the matter. The appellant had inflicted many stab wounds on the deceased and must have been splattered with blood, but there had been no attempt to obtain the soiled clothes or the murder weapon when the police arrested him or thereafter. There had furthermore been no attempt to ascertain whether, the appellant had disclosed his alibi to the investigating officer at any stage. The court remarked that the prosecutor was equally incompetent and the magistrate, who was not an umpire in a tennis match, ought to have called the investigating officer for further elucidation. The court ordered that its remarks be forwarded to the Director of Public Prosecutions and the Commissioner of Police. (Paragraphs [20] at *477d-e* and [22] at *478a-b.)*

2. S. v MATIWANE 2013(1) SACR 507 (WCC)

When an accused has a long record of convictions for crimes of dishonesty the previous convictions must not be overemphasised when sentencing such an accused. The accused's socio economic circumstances should be taken into account and the principles of Ubuntu applied.

"The test to be applied in an unjust and unfair sentence.

[5] It is trite that the "golden rule" regarding impositioning of a sentence, is that it is a matter which is pre-eminently for the discretion of a trial court. It will only be interfered with where the trial court has not exercised its discretion judicially. The test for interference is (i) whether the discretion of a trial court has been judicially

and properly exercised. If the answer is negative, then interference would be appropriate (ii) whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. If the answer is positive, then interference would be appropriate, see S *v Rabie* 1975 (4) S.A. 855 (A) at 857 D-G see also S *v Muggel* 1998 (2) SACR 414 (C) at 418 e-f. I am of the view that the principles regarding the interference with the sentence in appeal matters is applicable in review cases mutatis mutandis.

Considerations to be taken into account regarding previous convictions by the sentencing court.

[6] An important consideration is to what extent is it permissible to take previous convictions into account when determining the imposition of an appropriate sentence. Ngcobo J in *Muggel* case (supra) at 418 j - 419 j clearly set out the guidelines to be followed. It is important, useful and relevant to set them in full:

"1. In terms of s 271(4) of the Act the court is required to take previous convictions which have been proved against the accused into consideration when imposing a sentence.

2. In terms of s 271A previous convictions automatically fall away as previous convictions after the expiration of a period of ten years from the date of conviction unless the conviction relates to an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine or the person has been convicted of an offence for which punishment may be a period of six months' imprisonment without the option of fine during that period. This section does not merely provide that such previous convictions should not be taken into consideration when sentence is imposed, but it specifically provides that they fall away as previous convictions. S *v Zondi* 1995 (1) SACR 18 *(A) at 23g-j.* In terms of s 271A the sentencing court has no discretion. It cannot take into consideration any previous convictions which fall within the purview of the section. S *v Zondi* (supra).

3. Although s 271(4) requires the sentencing court to take previous convictions into account when determining the appropriate sentence, it does not take away the discretion of the sentencing court. The court is enjoined to exercise its discretion judicially when taking into consideration previous convictions.

4. In the exercise of its discretion, the sentencing court is required to have regard to the nature, the number and extent of similar previous convictions and the passage of time between them and the present offence. The relevance and importance of those convictions depends upon the element they have in common with the offence in question. *SvJ* 1989 (1) SA 669 *(A) at 675C- D.*

5. Previous convictions, which bear no relationship whatsoever to the crime, are relevant in a limited sense only and simply with a view to determining to what extent,

if any, the forms of punishment imposed for those crimes served as effective deterrents for the person in his or her career of crime and also to indicate the extent to which the person has an uncontrollable urge to lawlessness which reduces the chances of reform. S v J (supra at 675).

6. The tendency of taking everything that appears on the form SAP69 into consideration, regardless of the passage of time, must be avoided. It must also be borne in mind that even a criminal is entitled to ask that the lid on the distant should be kept tightly closed. S *v Mqwathi* 1985 (4) SA 22(T).

7. The degree of emphasis to be placed upon previous convictions is a matter which is within the discretion of the trial court. Where the degree of emphasis is disturbingly inappropriate, in that it cannot be said that the sentencing court exercised its discretion judicially, the Court of appeal will interfere."

Guidelines to be considered and applied (generally) when thinking of an appropriate sentence to impose. The "Ubuntu" principle is applicable.

[10] In arriving at an appropriate sentence Holmes JA (Rabie case para 5 above) provided simple, easy to follow guidelines for general application at 861A - 862F. It is useful to set them in full:

(a)"Let the punishment fit the crime-the punishment fit the crime", sang the Mikado in 1885, echoing the British judicial sentiment of those days. (W.S. Gilbert was a barrister, who retained his interest, though not his practice, in the Courts). The couplet is still quoted in Britain, at any rate in relation to the retributive aspect of punishment; see *Criminal Law of Scotland,* G.H. Gordon (1967), p. 50, line 3.

(b) That used to be the approach in this country, too; see, e.g., *R. v. Motsepe* 1923T.P.D. 380 in fin.: "*The punishment must be made to fit the crime*".

However, in 1959 this Court pointed out that the punishment should fit "the criminal as well as the crime"; see *R. v. Zonele and Others***,** 1959 (3) SA 319 (A.D.) at p. 330E.

(c) *The interests of society in punishment were noted* in *R. v. Karg,* 1961 (1) S.A. 231 (A.D.) at p. 236A-B, and S. *v. Zinn,* 1969 (2) S.A. 537 (A.D.) at p. 540G.

(d) *Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused*. While recognising that fair punishment may sometimes have to be robust, *mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society;* see S. *v. Narker and Another***,** 1975 (1) S.A. 583 (A.D.) at p. 586D. That

decision also pointed out that "*it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it for mercy's sake*". This was also recognised in S. *v. Roux,* 1975 (3) S.A. 190 (A.D.).

(e) This quality of mercy or compassion is not something that has judicially cropped up recently. It was first mentioned in this Court some 40 years ago, by Beyers, J.A., in *Ex parte Minister of Justice: In re R. v. Berger and Another,* 1936 A.D. 334 at p. 341:

"Tereg word gesê dat na skuldigbevinding die Regter in 'n ander sfeer verkeer waar die oplê van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval".

(In passing, Beyers, J.A., pioneered the use of Afrikaans in the judgments of this Court; see *Souter v. Norris,* 1933 A.D. 41 at p. 48 (dated 27 October 1932); followed by Wessels, C.J., in *R.v. Gertenbach,* 1933 A.D. 119 (8 March 1933). For an early judgment in Afrikaans by Van den Heever, J. (subsequently a pillar of this Court), see *Ex parte Pieterse,* N.O., 1933 S.W.A. 4 (6 March 1933)). Since then, the approach of mercy has been recognised in several decisions in this Court, with a number of Judges, in all, concurring; see S. *v. Harrison,* 1970 (3) S.A. 684 (A.D.) at p. 686A: "*Justice must be done, but mercy, not a sledgehammer is its concomitant*";

S. *v. Sparks and Another,* 1972 (3) S.A. 396 (A.D.) at p. 410G; *S.v. V.,* 1972 (3) S.A. 611 (A.D.) at p. 614H; S. *v. Kumalo* 1973 (3) S.A. 697 **(**A.D.) at p. 698A; S. *v De Maura,* 1974 (4) S.A. 204 (A.D.) at p. 208H; S. *v. Narker and Another* 1975 (1) S.A. 583 (A.D.) at p. 586. And does not Portia refer to the unstrained quality of mercy "which seasons justice", in a memorable passage worthy of judicial study? (The Merchant of Venice, Act IV, Scene 1-a court of justice).

(f) The main purposes of punishment are deterrent, preventive, reformative and retributive; see *R. v. Swanepoel,* 1945 A.D. 444 at p. 455. As pointed out in Gordon, *Criminal Law of Scotland,* (1967) at p. 50:

"The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation ...The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment". It is therefore not surprising that in *R. v. Karg,* 1961 (1) S.A. 231 (A.D.) at p. 236A, Schreiner, J.A., observed that, while the deterrent effect of punishment has remained as important as ever, "the retributive aspect has tended to yield ground to the aspects of prevention and correction".

(g) It remains only to add that, *while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness*. Judge Jeffreys ended his days in the Tower London.

(h) To sum up, *with particular reference to the concept of mercy-*

(i) It is a balanced and humane state of thought.

(ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.

(iii) It has nothing in common with maudlin sympathy for the accused.

(iv) It recognises that fair punishment may sometimes have to be robust

(v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.

(vi) The measure of the scope of mercy depends upon the circumstances of each case", (my own emphasis)

These guidelines are important and relevant in our legal system to-day as they were in the early nineteenth century.

[11] The correct approach regarding considerations to be taken into account before passing sentence was correctly stated by Corbett J.A. at 866 A-C (Rabie para 5 above) where he emphasised that:

"A judicial officer *should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity.* While not flinching from firmness, where firmness is called for, *he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.* It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case" see also Muggel (supra) where the above was referred to with approval, (my own emphasis)

The above relates in particular to the element of mercy when judicial officers are handing down their sentences."

3. S v MUSIKER 2013(1) SACR 517 (SCA)

A Magistrate must assist a clearly inexperienced legal representative otherwise it may lead to an irregularity in the proceedings.

The appellant was convicted in a magistrates' court of assault with intent to do grievous bodily harm and was fined and given a suspended sentence. His appeal to the high court against both conviction and sentence was dismissed. The court on appeal examined the record and held that the magistrate had made a number of errors in evaluating the evidence, including that the appellant's alibi had to be rejected, and that therefore the conviction could not stand. The court, however, found it necessary to comment on certain aspects of the conduct of the case.

Firstly, the magistrate had failed to guide the clearly inexperienced defence counsel. He had offered a convoluted plea statement on behalf of the appellant, during which he informed the court that he had not consulted with his client and was not able to state his version with precision, and the court had merely proceeded to conduct the trial after counsel made that admission. During the conduct of the trial there were again several instances that showed that counsel was not able to deal with issues that were pertinent to the defence case, but the presiding magistrate failed to assist. (Paragraph [17] at *523f-524b.)*

Secondly, during the cross-examination of the complainant the defence counsel attempted to question the complainant on what appeared to have been a previous inconsistent statement. The court interjected and ordered him to lay a basis therefor. Counsel, clearly because of his inexperience, abandoned that line of questioning, thereby missing an opportunity to deal with the credibility of a state witness. When counsel attempted to ask the second state witness about his statement, the court again interjected and asked counsel to lay a basis for the question. It became clear from the exchange between the court and counsel that counsel was confused about what exactly to do. Instead of giving guidance on a very important aspect concerning credibility of a witness, the magistrate got agitated and in the process also misled counsel. (Paragraph [20] at *524f-h.)*

The court held that, had it not been for the conclusion that the appellant's alibi had been wrongly rejected, the magistrate's handling of the case may well have justified a conclusion that the appellant had not had a fair trial. The appeal was upheld. (Paragraph [26] at 527 *d.)*

From The Legal Journals

Terblanche, S S

"The *Child Justice Act*: procedural sentencing issues"

Potchefstroom Electronic Law Journal 2013 (1)

Ngema, N M

"The enforcement of the payment of *Lobolo* and its impact on children's rights in South Africa"

Potchefstroom Electronic Law Journal 2013 (1)

Goosen, S

"Battered women and the requirement of imminence in self-defence"

Potchefstroom Electronic Law Journal 2013 (1)

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Impartiality and Recusal of Judicial Officers

Background

It is trite that all judicial officers are required to be impartial (Van Rooyen v The State 2002 SA 246 CC at para 31). This is an element of natural justice, and is also required by various provisions in the constitution. Every individual has the right to equality before the law, and equal protection of the law (section 8, The Constitution

of the RSA Act) and to have justiciable disputes settled by a court of law or another independent and impartial forum (section 34 of the Constitution of the RSA Act). In criminal cases, the right to a fair trial is also relevant. The question of whether a presiding officer should recuse himself is thus a constitutional issue within the meaning of section 167(3) of the Constitution of the RSA Act.

Although the independence of the courts and the impartiality of presiding officers are closely related, this article does not deal with the doctrine of separation of powers. Public perception of the impartiality of the judicial process is also influenced by the perceived independence (or not) of the National Prosecuting Authority. This article does not deal with this aspect either.

Impartiality requires the display of an open minded willingness to consider each case on its own merits, without any predisposition for or against either party, and independent of any external influences, whether they be corruptive, intimidatory, unconscious or of any other sort.

Where a judicial officer has an interest in or bias regarding a matter before him, he may not adjudicate the matter. He may recuse himself mero motu (S v Malindi 1990 1 SA 962 A at 969 I), or an application for his recusal may be made. A lack of impartiality is also a ground of review.

There are no provisions in the Criminal Procedure Act regarding recusal. Accordingly, common law principles are applicable. There has been some confusion as to whether the common law principles are rooted in English or Roman law, but this is largely a matter of academic interest only since the governing principles regarding recusals have largely been settled in three constitutional court cases (per Wallis J in Ndlovu v Minister of Home Affairs 2011 2 SA 621 at paras 20, 35, 38).

The trilogy comprises the following cases: President of the RSA v SARFU 1999 (4) SA 147 CC; SACCAWU v I and J Ltd 2000 (3) SA 705 (CC), and Bernert v ABSA Bank Ltd 2011 (3) SA 92 CC.

Effect of Recusal on proceedings

If a presiding officer recuses himself, and the accused is subsequently found guilty by another presiding officer, the facts surrounding the recusal will generally be irrelevant to an assessment of the fairness of the accused's trial. In other words, the accused will not be able to use the recusal as a ground on which to challenge the fairness of his subsequent trial (S v Suliman 1969 (2) SA 385 (A)).

If a presiding officer fails to recuse himself where proper grounds exist, this will constitute grounds for the setting aside of his decision.

Application for recusal

Wherever possible, an application for recusal should be made at the start of the trial (ab initio litis), to minimise the possibility of delays and wasted resources. This is because the proceedings of the trial become void on the recusal of the presiding officer, who becomes *functus officio* at that point. The accused will be tried *de novo*,

and cannot claim the defence of autrefois acquit or convict (Magubane v Van Der Merwe 1969 (2) SA 417 (N)).

If unavoidable, an application for recusal may be made during the course of the trial (R v Silber 1952 (2) SA 475 (A)). The application must be made in respectful and courteous terms and must not be deliberately insulting to the presiding officer (for an example of wild allegations of bias couched in vehemently aggressive language, see De Lacy v SAPO 2011 ZACC 17 24 May 2011) at paras 5,7,57).

Delays in complaining about an appearance of impartiality will weaken the applicant's case. Where the applicant has been notified of the circumstances which form the basis of the applicant's allegation of impartiality, and the applicant does not make an application for recusal, this may be regarded as a waiver of the right to complain later about it.

An application for recusal may be made orally, but the presiding officer may require that the application be made in writing. In either event, the other side must be given an opportunity to respond to the application, in accordance with the principles of *audi alterem partem* (S v Suliman 1969 (2) SA 385 (A); S v Bidi 1969 (2) SA 55 (R); S v Zuma 1996 (3) ALL SA 334 (N)).

Applications for recusal must be taken seriously and dealt with carefully, because the adjudicative integrity of the entire legal system is at stake, not only that of the presiding officer against whom the allegation of bias is made. This is especially so since the presiding officer who is the subject of the review application is the one required to decide the application for recusal. Each ground for the recusal application should ordinarily be considered on its own merits (S v Ishmail 2003 (2) SACR 479 C). However, in the SARFU case, the court adopted a 'basket' approach and dealt with the cumulative effect of the allegations of impartiality which were directed at 5 of the members of the constitutional court. In any event, it is not sufficient for the presiding officer to dismiss an application for recusal simply by asserting that he is in fact impartial and will abide by his oath of office and conduct proceedings fairly. The allegations must be addressed specifically, and the perception of the applicant taken into account.

Fanciful and outlandish claims should not be successful. In the SARFU case, the court warned that judicial officers should guard against being unduly critical of themselves, and should not accede too readily to applications for recusal since this would hamper the administration of justice by encouraging 'judge-shopping' (para 46). The Court added that presiding officers have a duty to hear cases that they are not obliged to recuse themselves from, which is just as strong as the duty to recuse when the required grounds have been established (para 47).

In the SACCAWU case the court held that it was vital to the integrity of the judicial system that ill-founded and misdirected applications for recusal be discouraged. Recusal applications which are merely a pretext for 'judge-shopping' are to be deplored. However, the court added that there was a preeminent value to be placed on public confidence in impartial adjudication – which was especially relevant given

South Africa's judicial history. The court warned that striking the correct balance was essential, and that it would be as wrong to yield to 'atenuous or frivolous objections' as it would be 'to ignore an objection of substance'. I would add that not only should South Africa's apartheid experience of the judicial system be taken into account, but also the recent political attacks on the integrity of the courts.

Judicial officers should not be oversensitive, nor should they take applications for recusal personally, lest this clouds their judgement (Moch v Nedtravel Pty Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at p 13 H-I).

Any incorrect facts that were taken into account by the applicant must be ignored (SARFU para 45). Only the true facts as they emerge at the application hearing are relevant (SARFU at para 45).The minority judgement in the SARFU case (para 48-9) however take the view that it would be wrong to impute all that was eventually known to the court to the hypothetical reasonable person, since what is relevant is the overarching principle that justice must not only be done but must be manifestly and undoubtedly be seen to be done.

Unconscious Bias

The presiding officer must be mindful of the fact that bias may exert an unconscious influence – even on a presiding officer who is acting in good faith (R v Gough 1993 AC 646 HL 665). In the SACCAWU case, the court acknowledged that requiring absolute neutrality from presiding officers was unrealistic, since presiding officers too are human, and are inevitably shaped by their personal life experiences.

Prof Venter opines that the dangers of unconscious bias are especially great when a presiding officer denies the possibility of bias, on the pretext that adjudication is merely an abstract, neutral activity. He writes that "…A judge suppressing or ostensibly disowning his or her political inclinations in the belief, or on the pretext that, adjudication is merely an abstract, neutral activity, is prone to produce findings consciously or subconsciously tainted by those same inclinations."

However, if potential bias is acknowledged and understood, it can be managed, and steps taken to mitigate against its improper influence on the judicial process.

In SARFU (at para 42), the court held that a reasonable person would expect that judicial decision makers would be influenced by their individual perspectives on the world, and that presiding officers must necessarily rely on background knowledge to properly fulfil their adjudicative function.

Thus, bias cannot be shown to exist simply because the presiding officer has different personal characteristics to the parties appearing before him, or holds different views to them. So, for example, the fact that the presiding officer was a different race to the applicant was held to be irrelevant in S v Collier 1995 2 SACR 648 C at 650F-G. A similar view was expressed in Shackell v S 2001 (4) ALL SA 279 (A). The same principle would apply in relation to gender, religion or sexual orientation.

Presumption of impartiality

There is a presumption against the existence of bias and partiality on the part of the presiding officer (SARFU at para 40-41; SACCAWU at para 12). This is because of the nature of judicial office. Impartiality is the foundational characteristic of the judicial system, and a prerequisite for its integrity. Judicial officers are required to be 'fit and proper' and are trained to be objective. They take an oath of office committing to impartiality.

The presumption of impartiality is thus a strong one, and requires cogent and compelling evidence to rebut it (S v Basson 2007(3) SA 582 CC at para 30 onwards; SACCAWU para 12, SARFU 2). The presumption applies to all judicial officers, but it has been suggested that the presumption becomes stronger the higher the court is, and the greater the number of presiding officers (SARFU, Basson at para 30). In SACCAWU the court held that the presumption of judicial impartiality will apply with added force in an appellate court, where the law rightly supposes that the reasonable litigant will have knowledge of the institutional aspects that operate to guarantee a fair appreciation of his or her appeal (at para 43). These are that the presiding officers have extensive experience and have demonstrated their suitability for such high office. In addition, their findings are made on the basis of the written record of the proceedings of the lower courts.

Test for Recusal

The test for the existence of bias is objective. There is a so-called double requirement of reasonableness. In the first place, the applicant must show that a reasonable person would (not might) apprehend that the presiding officer might (not would) be biased in the case (S v Roberts at para 32, but compare S v Shackell at para 20). Secondly, the apprehension must be based on reasonable grounds. An unsupported apprehension – even if strongly and honestly held- is not sufficient (Bernert para 34, De Lacy para 70). On the other hand an apprehension that is founded on reasonable grounds will necessarily be one which a reasonable person would hold.

Precisely who the notional reasonable person is has been the subject of some debate. However, it is generally accepted that a reasonable person is one who is objective, fair-minded, informed and in possession of the true facts (Sager v Smith 2001 3 SA 1004 SCA; S v Roberts 1999 (4) SA 915 SCA). In the case of Sole v Cullinan 2003 (8) BCLR 935 (LesCA) at para 48, the court held that the reasonable person is not someone who is hyper-sensitive, cynical or suspicious.

The notional reasonable person need not have a direct interest in the outcome of the trial, other than to see that justice is done.

In the BTR case at 695 C-E, the court held that although the notional reasonable person must be envisaged in the circumstances of the litigant who raises the issue, the standard of the reasonable person is an objective legal standard. It thus "cannot vary according to the individual idiosyncrasies or the superstitions or the intelligence

of the particular litigant." This stands in contrast to the minority view in the SACCAWU case (at para 57) which emphasised the relevance of the applicant's subjective context.

In the Canadian case of R v S (RD), which the SA CC quoted with approval, it was held that the reasonable person would have knowledge of all the relevant circumstances, including the traditions on integrity and impartiality of the legal system. In South Africa, it may be argued that a person's knowledge of the role of the legal system under apartheid (and an awareness of the recent attacks on the integrity of the courts) would warrant an increased apprehension of bias, and thus justify a lower threshold of proof to justify recusal to build public confidence in the institutions of law. The counter argument is that this would only exacerbate any crisis regarding the perceived legitimacy of the court. It is a vexed question.

Actual vs apprehended bias

The question of whether the presiding officer displayed actual bias is irrelevant. The issue is whether there was a reasonable perception of bias which a reasonable person would have apprehended from the circumstances surrounding the trial (S v Maseko 1990 (1) SACR 107 (A); Sager v Smith (2001) 3 ALL SA 401 (A);S v Shackell 2001 (2) SACR 185 (A)). This is because of the principle that justice must not only be done, but be seen to be done.

Examples of facts held to be sufficient to warrant recusal

Where the presiding officer communicates with one of the parties in the absence of the other, or with a witness in the absence of the parties this may result in a reasonable apprehension of bias (S v Roberts 1999 (2) SACR 243 (SCA). The presiding judicial officer should have no communication of any kind with either party except in the presence of the other (R v Maharaj 1960 4 SA 256 (N) 258B-C, S v Roberts at para 23).

Where the presiding officer has a relationship with one of the parties, or a witness this will invariably be sufficient to create a reasonable suspicion of bias (Head and Fortuin v Wollaston 1026 TPD 549; S v Bam 1972 (4) SA 41 (E)). The relationship may be personal or professional.

Likewise where the presiding officer has an interest in the outcome of the case, whether pecuniary or not. This will ordinarily be the case where the presiding officer has shares in a litigant party.

Where the presiding officer inappropriately questions or addresses a witness. The presiding officer should address the parties respectfully, by title and surname (eg: Mr Khumalo, not 'witness''or 'accused', nor first name where the person is an adult)(S v Gqulagha 1990 (1) SACR 101 (A); S v T 1990 (1) SACR 57 (T); S v Kuse 1990 (1) SACR 191 (E)). The presiding officer should not cross examine the accused (S v Omar 1982 (2) SA 357 (N)). The mere fact that the presiding officer has

inappropriately questioned or addressed a witness will not always be sufficient to establish grounds for recusal (S v Dawid 1991 (1) SACR 375 (NM)).
Where the presiding officer has taken a confession from an accused, he should not preside over the bail proceedings, nor any subsequent trial (S v Sibeko 1990 (1) SACR 206 (T)).
Where the presiding officer has previously presided over a matter involving the accused, this will not necessarily in itself constitute an automatic ground for recusal. However, where the presiding officer has made strong credibility findings against the accused, and this has created a reasonable fear of bias in the accused's mind, the presiding officer should recuse himself (S v Dawid 1991 (1) SACR 375 (Nm). See also S v Mukama 1934 TPD 134.). The mere fact that the presiding officer has knowledge of the accused's previous convictions will not automatically disqualify the presiding officer from trying the case (Khan v Kocj NO 1970 (2) SA 403 (R)), nor will the fact that the presiding officer has acquired knowledge of the facts of a criminal case from civil proceedings (S v Mampie 1980 (3) SA 777 (NC).See also S v Essa 1964 (2) SA 13 (N).). However, in SACCAWU (para 38,63), the court held that there may be a reasonable apprehension of bias where the court has previously expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such question of fact. The court doubted whether the case of R v T 1953 (2) SA 479 (A) was good law. In this case, the AD had held that "there was 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 has previously expressed an opinion in that case". The court rejected the contention that R v T had been endorsed in SARFU (SACCAWU at para 38).

The fact that the judicial officer has been threatened by the accused is not in itself sufficient to justify recusal (S v Radebe 1973 (1) SA 796 (A)).
The mere fact that the presiding officer has engaged in discussion with the parties (or their legal representatives) and expressed views on the merits will not suffice as long as the presiding officer remains of an open mind such that he is open to persuasion. Even if the presiding officer has made a 'deadly legal point' (Take and Save Trading v Standard Bank 2004 4 SA 1 (SCA) at para 17); or expressed a prima facie view on an issue (R v Silber at 481 g-h, Sager v Smith at para 16;SACCAWU at para 13;S v Khala 1995 1 SACR 246 A at 252 G-I.) In the Take and Save case, the court held that the fairness of court proceedings requires that presiding officers actively manage and control the process, to ensure that public and private resources are not wasted. This entails that the court should point out why evidence may be considered irrelevant, and should refuse to listen to irrelevant evidence (Take and Save at para 3; Sager v Smith at para 21).

The AD explained that bias is not simply the expression of a "state of inclination towards one side in the litigation caused by evidence and argument" and that the expression of a provisional view could not be held by a reasonable person as showing bias (R V Silber 1952 2 SA 475 A at para 7).

In Coop v SABC 2006 2 SA 212 W at 217 A-D, the court held that "it is the duty of every judicial officer to be an active participant in the trial. It is the duty of counsel and attorneys to explain this to their clients who may not be experienced in the rough and tumble of court litigation."

In Sager v Smith (at para 21) it was established that a judicial officer is entitled to warn a legal representative that his client could face an adverse costs order as a result of his futile and obstructive objections, without this being regarded as displaying bias.

Mere expressions of irritation by the presiding officer (even if directed to one of the parties or their legal representative) is not sufficient in itself to establish bias (Basson at para 42); SACCAWU paras 13-14). The applicant must prove that there was a pattern of behaviour displayed by the presiding officer which is sufficient to displace the presumption of impartiality (Stainbank v SA Apartheid Museum at Freedom Park 2011 ZACC 20 (9/6/11) at para 45). In the Coop case, the court held that the fact that the presiding officer's body language displayed irritation or impatience was because of the manner in which the proceedings were being conducted, and could not be construed as bias.
Generally, bias or impartiality cannot be founded upon adjudicative errors of interpretation or application of law to the facts (Commissioner, Competition Commission v General Council of the Bar 2002 6 SA 606 SCA at para 16). Even mistakes of fact will not usually be sufficient. The errors would have to be so manifestly unreasonable that they were inexplicable other than on the basis of the existence of bias (De Lacy para 76).

Conclusion

What becomes clear from a reading of the case law regarding recusal applications and related issues, is that no hard and fast rules can be drawn. There can be no fixed, finite list of the grounds for recusal, since the overall consideration is the reasonable perception of the reasonable person, and this can only be assessed on the facts and circumstances of each case. For example, the personal characteristic of a presiding officer cannot ordinarily be a ground for recusal. However, were a presiding officer to convey the impression that he would be unduly influenced in his decision by this fact, the application for recusal would be justified.

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Matters of Interest to Magistrates

Chief Justice Mogoeng seeks judicial independence

In April Chief Justice Mogoeng Mogoeng gave the 2013 Annual Human Rights Lecture at the University of Stellenbosch's law faculty. He spoke on 'the implications of the Office of the Chief Justice for constitutional democracy in South Africa'.

Chief Justice Mogoeng said that South Africa needed a 'truly independent body of judges' to safeguard its constitutional democracy.

He noted that the executive and legislature –

- had their own vote account;
- were free to decide on administrative support, job descriptions and salaries; and
- could decide which projects to prioritise.

'But the same cannot be said of the South African judiciary,' he said.

Challenges

The Chief Justice highlighted several challenges for the judiciary, such as –

- court budgets being determined without consultation with the judiciary;
- inadequately trained administrative staff;
- a shortage of court rooms and chambers for judges and magistrates; and
- substandard interpretation services.

'It is for these reasons that the judiciary has been calling for a radical paradigm shift from the current executive administration system to one that is led by the judiciary,' he said.

Institutional independence

Referring to ‘institutional independence’, the Chief Justice said that this ensured that the courts were ‘not directly or indirectly controlled or seen to be controlled by other arms of government’.

In this regard, Chief Justice Mogoeng noted: ‘The placement of court administration in the hands of the ministry has given rise to an unfortunate public perception that the Minister for Justice and Constitutional Development is the head of the judiciary’ and that this ‘underscores the critical importance of the debates that have been going on between the judiciary and the executive about judicial self-governance over the years’.

The Office of the Chief Justice

Speaking on the creation of the Office of the Chief Justice, Chief Justice Mogoeng outlined the three phases that established the office. Phase one saw the formation of the office as a ‘national department located in the public service to support the Chief Justice as head of the judiciary and head of the Constitutional Court’. Phase two established it as an ‘independent entity’ and stage three saw the establishment of a ‘structure to provide judicially-based court administration’.

As the head of the judiciary, Chief Justice Mogoeng stated that the Chief Justice was responsible for developing policies, norms and standards for case management and to monitor and evaluate performance of the courts.

He noted that the Office of the Chief Justice was also responsible for information technology and knowledge management, which were important for improving access to justice.

‘We continue to grapple with issues relating to the achievement of a truly independent judiciary,’ he said.

Chief Justice Mogoeng made note of both the Constitution Seventeenth Amendment Act of 2012 and the Superior Courts Bill (B7 of 2011), which will ‘vest additional powers and functions in the Chief Justice’.

The Chief Justice referred to the judicial leadership retreat that took place last year, which allowed for a ‘brutal self and institutional introspection’. He said that ideas and strategies were discussed on how to achieve an ‘independent and single judiciary’.

Modernisation

Chief Justice Mogoeng also spoke on court modernisation and automation, specifically electronic filing and record keeping, which would ‘facilitate the efficient

management of cases and their speedy finalisation'. This would also help alleviate the disappearance of records of proceedings, he said.

Chief Justice Mogoeng said that the judiciary had decided to begin a 'massive project' that would see the overhauling of all the rules of the High Court and magistrates' courts.

He said that this would 'inject flexibility', allowing for the implementation of electronic filing, electronic record keeping and video conferencing.

He added that this would also allow for greater access to justice.

Administration model

Chief Justice Mogoeng spoke on a preferred court administration model. He said that the model should be one led by a judicial council made up of members of the judiciary, constituted by the heads of court and guided by an advisory board.

Chief Justice Mogoeng added: 'Eventually, the entire Court Services Unit of the Justice Department, regional offices, rule-making authorities, library services, information technology and facilities components of Justice would have to be transferred to the Office of the Chief Justice or the new entity created by legislation, together with the concomitant budget and personnel.'

As in parliament, there should be no cabinet member responsible for the court administration structure led by the judiciary, said Chief Justice Mogoeng.

He added that there had been engagements with other jurisdictions, including the United States of America, the Russian Federation, Singapore, Ghana and Qatar, to find a model that would fit South Africa's constitutional democracy.

Chief Justice Mogoeng said that senior officials in the Office of the Chief Justice, guided by Justice Kenneth Mthiyane, the Deputy President of the Supreme Court of Appeal, and his committee of judges had begun working on this model and drafting a Bill, which they hoped to finish this year.

He said that former Chief Justice Sandile Ncgobo had appointed a committee on institutional models, with the purpose to 'propose a court administration system that would best serve the needs of the courts'.

It had produced a report titled: 'Capacitating the Office of the Chief Justice and laying foundations for judicial independence: The next frontier in our constitutional democracy: Judicial independence', which proposes a self-governance structure created by legislation that would perform the functions to be transferred to the Office of the Chief Justice.

The Office of the Chief Justice had made amendments to the report and had passed it on to the executive and a response is awaited, the Chief Justice said.

He added that the Office of the Chief Justice had managed to lay a ‘solid foundation’ for self-governance, which was the ‘only remaining barrier to the attainment of complete judicial independence’.

Conclusion

In conclusion, Chief Justice Mogoeng said: ‘The courts will be able to determine their policy and strategic priorities and how best to meet them, decide on projects to embark upon to help the courts take their rightful place as guardians of our constitutional democracy, and serve the nation more effectively and efficiently.’

Kevin O’Reilly

(The above article appeared in the *De Rebus* magazine of June 2013)

A Last Thought

” It is nonetheless important to acknowledge that judicial officers, both in the District and Regional Courts are a vital part of the Judiciary and the administration of justice. The criminal and civil jurisdiction of both Courts has been increased substantially over the last few years. For instance, until recently, Regional Courts had no civil jurisdiction and were confined to hearing criminal cases. In 2010 Regional Court’s civil jurisdiction in designated areas increased to range between R100 000 and R300 000 in terms of the Jurisdiction of Regional Courts Amendment Act. The effect of Regional Courts’ expanded jurisdiction is that the workload, responsibilities and expertise of Regional Magistrates and Regional Court Presidents have increased significantly. In exercising civil jurisdiction the Regional Courts are absorbing a significant portion of the workload of both District Courts and High Courts. It is accordingly important that their conditions of service including remuneration are adequate and consistent with the scheme envisaged by the Constitution and the relevant legislation under it.” (Para 63).
As per Nkabinde, J in *Association of Regional Magistrates of South Africa v President of the Republic of South Africa and others* [2013] ZACC 13