IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.1810/2011

In the matter between

SONGELWAKO SIKHONDZE	**1ST APPLICANT**
THULANI MOSE SIKHONDZE	**2ND APPLICANT**
ABEL SAMSON GAMEDZE	**3RD APPLICANT**
WANDILE MXOLISI DLAMINI	**4TH APPLICANT**
BOY SIKHONDZE	**5TH APPLICANT**

and

MAGISTRATE MANDLA MKHALIPHI	**1ST RESPONDENT**
THE ATTORNEY GENERAL	**2ND RESPONDENT**

Neutral citation:	***Songelwako Sikhondze and four others vs Magistrate Mandla Mkhaliphi and another (1810/2011*** **2012 [SZHC] 190**
Coram:	**OTA J.**
Heard:	9th **August 2012**
Delivered:	**4th September 2012**
Summary:	**Review of orders of a Magistrates Court principles thereof: Recusal of a judicial officer on allegations of bias – principles thereof.**

OTA J.

[1] In this application the Applicant contends for the following reliefs:-

1. That the decision of the learned Magistrate, Mandla Mkhaliphi (first Respondent) to allow the complainant under criminal case number 203/07 to testify for the second time be and is hereby reviewed and / or set aside
2. That the decision of the learned Magistrate Mandla Mkhaliphi (first Respondent) on the 14th June 2011 refusing to recuse himself from criminal case number 201/07 be and is hereby reviewed and / or set aside.
3. That the learned Mandla Mkhaliphi be and is hereby ordered to recuse himself from criminal case number 203/07 and the trial ordered to commence de-novo
4. That the Respondent pay costs of this application in the event of unsuccessful opposition.
5. Granting the applicants such further and / or alternative relief.

[2] When this matter served before me for argument on the 9th of August 2012, learned Crown counsel intimated the court that the Respondents have failed to file any processes in opposition of this application, because the 1st Respondent was uncooperative. Crown counsel therefore urged the court to decide the matter based on the papers before it, which the Respondents were in the circumstances relying on.

[3] Learned counsel for the Applicants, Mr. Piliso Simelane, for his part contended, that the absence of opposing papers from the Respondents shows that the Respondents are not opposed to the prayers sought herein. He therefore prayed the court for an order in terms of the reliefs sought in the notice of application, in the circumstance.

[4] I however refused to grant the reliefs sought in this application as urged by the Applicants on the mere grounds that the Respondents failed to file opposing papers. This is because generally speaking, the failure to file a counter or opposing affidavit does not of itself amount to conceding to the application. There is still a duty on the Applicant to convince the court that the application is supported by law and that the facts justify the grant.

Moreover, the Respondents have not expressly indicated that they have no objection to the application, rather they said they were relying on the processes before court. Even if the Respondents said they have no objection to the application, if it is not supported by the law and the facts, a court is not duty bound to grant it.

[5] Having stated the general position, let me now deal with this same issue in the situation as regards applications for recusal of a judicial officer on grounds of the existence of real likelihood of bias, raised in casu.

[6] In this regard, I am firmly convinced that the view of the 1st Respondent is irrelevant in deciding this matter. I say this because, if the facts alleged to form the basis of the fear of bias are not matters on the record of the court, in such a case, the failure of the Respondents to controvert or challenge them, may then if they are logical, consistent and credible, be regarded as establishing the truth of the facts alleged therein, since they are uncontradicted.

[7] In casu, the complaints of the Applicants concern matters that are in the record of the court a quo which forms a part of these proceedings. It is on the basis of this record that this application has been brought. It is therefore understandable why the Respondents are relying on the record. The 1st Respondent could not have done better than the record even if he had deposed to an apposing affidavit. I say this because, it is the record that the court must look at to ascertain if there existed any real likelihood of bias, therefore justifying the grant of this application. In the circumstance, the argument of the Applicants that this application should be granted because the Respondents failed to file opposing papers, is not valid in law, it fails and is accordingly dismissed

[8] Now, having stated as above, I will now consider whether the record shows any legally recognizable reason justifying the grant of this application. Now, the reliefs sought by the Applicants are two told. In the sense that on one hand they ask that the orders of the court a quo be reviewed and set aside, and on the other hand they seek for an order directing the learned Magistrate a quo to recuse himself from criminal case number 203/07. It is imperative for me therefore at this juncture, to detail the fundamental principles that must guide this court in reviewing or setting aside the

decisions of a Magistrates Court, as well as those upon which the impartiality of a judicial officer can be challenged.

[9] Now, in my decision in the case of **Ernest Mazwi Mngomezulu v Lucky Groening N.O and others case no. 2107/2010, pages 11and 12**, I detailed the fundamental principles that must guide this court in review applications as follows:-

"Similarly in **Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 at 114 – 16 Innes CJ declared thus:-**

"If we examine the scope of this word as it occurs in our statute and has been interpreted in our practice, it will be found that the same expression is capable of three separate distinct meanings. In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior Courts of justice, both Civil and Criminal are brought before this court in respect of grave irregularities and illegalities

occurring during the cause of such proceedings -------" see Magano and Another v District Magistrate Johannesburg and others (2) 1994 (4) SA 174 (W) at 175 G-J"

Furthermore, in the Text Civil Practice of the Supreme Court of South African (4th edition) page 929, the learned authors Herbstein and Van Winsen, set out the following as the grounds upon which proceedings can be brought under review namely:-

a) Absence of jurisdiction on the part of the Court.

b) Interest in the cause, bias, malice or corruption on the part of the presiding officer.

c) Gross irregularity in the proceedings.

d) The admission of inadmissible or incomplete evidence or the rejection of admissible or competent evidence".

[10] It is therefore beyond controversy from the foregoing, that the remedy of review is directed at correcting any irregularity or illegality in making a decision.

[11] Furthermore, it is the law as established by a long line of decisions across several jurisdictions, that the only ground upon which the impartiality of a Judge can be challenged is where there exists facts giving rise to a reasonable fear that he is likely to be biased in the conduct of the case.

[12] As I said in my decision in the case of **The King vs Thabo Tebo Kunene and Bhekani Mlotshwa Criminal Case No 649/2010, at paragraphs 14 and 15,**

*"14 The second approach is called the real likelihood or real danger test, which postulates that to disqualify a person from acting in a judicial or quasi judicial capacity, a real likelihood of bias must be shown to exist. A mere suspicion or reasonable suspicion of bias is not enough. See **R V Canborne Justice Ex-parte Pearce (1955) 1 & B 41 DC, R V Justice of county Cock (1910) 21R 271, RV Barnsley Licensing Justice Ex-parte Barnsley and District Licensed Victuallers' Association (1960) 2 414 167 at 187,** where the English court per Devlin Ltd set the seal on this rule. See* **also Rex v Sussex Justices**

Ex-parte McCarthy (1924) 1KB DC and Metropolitan Properties C0 (Gc) Ltd v Lannon and others (1969) QB 557 at 585 – 587.

15) It is worthy of note that the preponderance of judicial decisions in other Commonwealth jurisdictions like Ghana, Nigeria and the Gambia, also favour this test. See The Ghanian Supreme court decision of **Attorney General vs Sallah (1970) CG54, Adaku vs** ***Galenku (Supra) see The Nigerian Supreme Court cases of Odunsi vs Odunsi (1979)) NSCC at 59 and Egiri Vs Uperi (1973) 11SC 299. See also the decision of the court of Appeal of the Gambia, in the case of Halifa Sallah and others vs the State (2002 – 2008 2 LR 304 at 330"***

See **Adaku v Galenku (1974) GLR 198 – 206**

[13] Furthermore, the type of fear that must be demonstrated to establish a real likelihood of bias must be a reasonable fear, not just any fear. Therefore, the facts must show not just some whimsical, capricious or speculative allegations, rather it must show situations that make it reasonable for any independent observer to think that the judicial officer is not likely to be impartial in the treatment of the case. See **The King vs Thabo Tebo**

Kunene and Bhekani Mlotshwa (supra) para 16, Locabail UK Ltd vs Bayfield Properties Ltd (1999) 1CHRL 155, Rec vs Justices of Queens Co (1908) 21r 285 AT 296, Republic vs Constitutional Committee Chairman , Ex-parte Barimah 11 (1968) GBR 1051 at 1053.

[14] The Applicant is therefore not to show that there is bias. What the law requires him to show is that there is likelihood of bias. The measure here is how the public would perceive the judicial officer in these circumstances. As **Lord Denning MR** said in **Metropolitan Properties Co (P.G.C.) Ltd v Lannon (1969) 1QB 577 at 599.**

"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people.

Even if he was as impartial as could be, nevertheless if right minded persons would think, in the circumstances there was a real likelihood of bias on his

part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstance from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think that he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right –minded people go away thinking: The Judge is biased"

[15] Now, having stated the law as it is, I would now proceed to place the peculiar facts of this case upon which this application is predicated, on a slide before a judicial microscope to see if it contains any features that make it imperative that this application be granted.

[16] It is apposite for me to observe at this juncture, that an application for recusal was moved by the Applicants before the court a quo. In his ruling delivered on the 14th of June 2011, the learned trial Magistrate dismissed the

application for recusal and ordered that the case be proceeded with. It is the refusal by the learned Magistrate to recuse himself from trying the Applicants, that has precipitated the application for review instant.

[17] The first ground of complaint I want to address, is the complaint that the Magistrates decision to recall the complainant to testify a second time before the learned trial Magistrate be set aside. The Applicants contend in paragraph 5 of their founding affidavit. **"It is common course and I am duly advised by my attorney and humbly submit that a situation where the complainant is called to give evidence for the second time before the same Magistrate has never been heard of within the courts of the land"** therefore, that decision ought to be set aside. Moreso as the complainant had sat in the public gallery within the court room when the other crown witnesses testified before he was recalled to give evidence. In the circumstances, the recalling of the complainant is prejudicial to the Applicants. The Applicants by the allegations ante, are clearly saying that the decision of the court a quo to recall the complainant to testify in these circumstances, was not only irregular but illegal.

[18] It is on record as also abundantly demonstrated by the Applicants in their papers, that they were arraigned before the Simunye Magistrates Court charged jointly and severally with kidnapping and assault with intent to do grievous bodily harm. Their trial commenced before the court a quo per 1st Respondent, his Worship Mandla Mkhaliphi on the 9th of June 2008, when they all pleaded not guilty to the charges and a full blown trial ensued. After the complainant testified, still in the year 2008, the learned trial Magistrate Mkhaliphi was transferred to the Nhlangano Magistrates Court. This stalled the prosecution of the Applicants, who were then being brought to court to be remanded by another Magistrate P.D. Dlamini, pending when Magistrate Mkhaliphi would be available for the trial to continue. This state of affairs led to the Crown applying for the case to be postponed sine die in the year 2009, due to the uncertainties created by the transfer of Magistrate Mkhaliphi. As shown by the Applicants in paragraphs 4.6 and 4.7 of their affidavit, hearing in this matter resumed 2 years later on the 4th of April 2011, after the Applicants had been duly issued with summons to attend court on that day. It was in the same month of April precisely on the 8th, that Magistrate Mkhaliphi ordered that the complainant be recalled to testify again because his evidence was missing from the court file.

[19] Now, the power of a court to call and recall a witness is statutorily derived from section 199 (1) and (2) of the Criminal Procedure and Evidence Act, 67/1938 (as amended) which states as follows:-

"

1. *The court may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall and re-examine.*
2. *The court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case"*

[20] Therefore, the court a quo has the discretionary power to call or recall a witness at any stage of the proceedings, if his evidence appears to it *"essential to the just decision of the case"*. The phrase *"just decision of the case"* has been judicially interpreted and settled in this jurisdiction. Thus in my decision in the case of **Rex v Zonke Thokozani Tradewell Dlamini and another criminal case no. 165/10 judgment of the 13th February 2012, at paragraphs 4, 5 and 6,** I stated as follows:-

"

(4) *I must also add here that the phrase "just decision of the case" as appears in section 199 (2) has been interpreted by various legal texts, one of which is* ***Swift Law of Procedure 2nd Edition Butterworths, 1969, at page 372*** *which defines this phrase as follows:-*

> *"By the words "Just decision of the case" I understand the legislature to mean to do justice as between the prosecution and the accused"*

(5) *Further, Hoffman and Zefert in the work entitled,* ***The South African Law of Evidence 4th edition 1997 page 473*** *states as follows:-*

> *"The Judge must decide for himself on the information available to him, and if it appears that his evidence is essential there is an unqualified duty to call him"*

(6) *Similarly, the learned authors* **Du Toit Etal, comment on Criminal Procedure Act Juta 1995, at page 23-13** *say the following:-*

> *"It is for the court to decide whether the evidence is essential. If it appears that the evidence was in fact essential to the just*

decision of the case, a failure to call the witness could be an irregularity"

[21] In casu, I am of the firm conviction that it was part of the Magistrate's judicial responsibility to recall the complainant to testify again in these circumstances. It is not disputed by the Applicants that the first evidence led by the complainant before the court a quo is indeed missing as asserted by the learned Magistrate. There is no allegation to this effect in the totality of the evidence serving before court. In my opinion, what the learned Magistrate did was to save the proceedings from being frustrated. The evidence of the complainant, who is the key Crown witness, is paramount to the just decision of the case a quo. It is obvious that if the Magistrate did not take such steps, the circumstances would emasculate the trial process and undermine public confidence in the administration of criminal justice. The magistrate therefore acted responsibly in the interest of administration of justice. That it what every court should do. Failure by the court a quo to recall the complainant to testify in these circumstances, would in my view amount to an irregularity.

[22] I notice that the Applicants tenaciously held unto the allegation that the record of proceedings does not reflect the true proceedings as it relates to the application to recall complainant to testify. They allege that they raised complaints on the issue of recalling the complainant and this is not reflected on the record. They also allege that contrary to what is reflected in the record, it was the court a quo that ordered mero motu that the complainant be recalled to testify. That this application was not motivated by the prosecution as demonstrated in the record. The Applicants therefore contended, that since this portion of the record does not reflect the true record of proceedings and since the record is not duly certified as required by law, the court should in the circumstances grant them the orders sought.

[23] I do not however think that the Applicants can validly make these objections at the hearing of this application on the record. This is because they were required prior to the hearing, to move an application by way of motion on notice to the Respondents, raising these issues and seeking an amendment of the record. This sort of situation arose before the Supreme Court in its recent decision in the case of **Army Commander and Another vs Bongani Shabangu Appeal Case No. 42/2011**, judgment of the 31st of

May 2012, and the court said the following at paragraph 21 of that decision, per **Agim JA**:-

"21 The appellants at paragraph 8.6 of their heads of argument contend that the report "was handed in as an exhibit, applicant did not accept it however it's so unfortunate that in the record in (sic) such was not recorded" See page 61 in the book. I understand this submission to mean that the trial court did not record that the appellants objected to the admissibility of the medical report. The appellants cannot validly make this submission at the hearing of this appeal on the record as it stands. A party to an appeal, who upon receipt and perusal of the record of appeal, discovers that the records do not include a certain part of the trial proceedings or that the trial court did not record such proceedings, should bring an application by motion on notice before the appellate court asking for any amendment of the record of appeal so that the omitted part of trial proceedings can be included. The motion must be supported by an affidavit verifying the records and stating what actually happened at the trial. The other party may or may not oppose such application. If he or she chooses to do so, then he or she must file a counter – affidavit of facts

stating the contrary. <u>Until the court makes an order amending the records of appeal or allowing for supplementary records, the records as they stand remain sacrosanct and binding on all parties as well as the court in the appellate proceedings. All submissions and arguments in the appeal can only be validly made on the basis of the record as they stand".</u> (Underline mine)

[24] I see no reason why the view expressed by the supreme court in **Bongani Shabangu (Supra)** should not apply with equal force in these review proceedings.

[25] It follows therefore, that the contention of the Applicants that the record failed to reflect that they raised a complaint to the recall of complainant to testify and that the court a quo recalled the complainant mero motu, not motivated by the crown, has no legs to stand upon. I say this because the record of the 8th of April 2011, when the complainant was recalled to testify shows clearly that it was the prosecutor that moved the application to recall the complainant (see page 24 of the record). It also shows that when this application was made the Applicants as Accused persons, had no objection.

The record of proceedings as I have already stated is binding upon this court. Therefore, the learned trial Magistrate was well within his rights to recall the complainant to testify in these circumstances.

[26] In any case, even if I were to accept the Applicants position that it was the court a quo that mero motu recalled the complainant, this would still not amount to an irregularity capable of vitiating the proceedings a quo. I say this because, a judicial officer seized with a criminal trial has the jurisdiction, which I must add here must be exercised with the greatest of trepidation, to mero motu call or recall a witness, if his evidence appears to him to be essential to the just decision of the case. In casu, the complainant had already testified before the court a quo as Crown witness, there was nothing therefore precluding the court from recalling him to testify in the circumstances of this case.

[27] Furthermore, the Applicants contend that they are prejudiced by the recall of the complainant to tender evidence because he was in court when the other crown witnesses testified and heard their evidence.

[28] I hold the view that this contention by the Applicants is of no moment. This is because it tends to the weight to be attached to the complainant's evidence not its admissibility. It is for the trial court to weigh the evidence tendered by the complainant to ascertain whether his presence in court when the other witnesses testified in fact influenced his evidence.

[29] Finally, the Applicants contend that they were denied the right to legal representation by the court a quo. They allege that the trial proceeded in the absence of their counsel.

[30] I cannot however on the record agree with the Applicants that they were denied the right to legal representation. This is because the Applicants by their own showing in paragraphs 4.4, 4,5 and 4.6 of their affidavit agreed that summons were duly issued to them informing them of the dates slated for the hearing of this matter but they failed to communicate same to their attorney. For the avoidance of doubts, the Applicants allege as follows in those paragraphs:-

4.4

On the 7th November 2008 together with my attorney Mr Dumisa Khumalo we attended court at Simunye but the learned Magistrate Mkhaliphi was not available and my attorney was advised by the crown that summons shall be issued and he shall be duly advise (sic) of the date of continuation of trial. Indeed summons was issued and I together with other accused attended court on the 14th November 2008 and on that date we were told to come back on the 5th December 2008. I did not inform my attorney of this date as I was under the impression that the prosecutor will communicate with him as per the previous arrangement.

4.5

On the 5th December 2009 without the court enquiring whether I had terminated the services of my attorney proceeded with the matter as if I was to conduct my own defence and indeed the crown proceeded to lead the evidence of Nomsa Nkentjane the second crown witness.

Being a layman myself and not noticing this anomaly and that my attorney had to be present throughout the trial, I remained silent throughout her evidence. Infact subsequent to her evidence other witnesses were led in the

absence of my attorney being Fana Majahencwala Mamba on the 28th January 2009 and Detective Inspector A Mkhabela on the 4th April 2011. It is worth mentioning that after the matter had beem postponed sine die in the year 2009, we were then issued summons about 2 years later to attend court on the 4th April 2011 and on the very same day the evidence of Detective Inspector A Mkhabela was led by the crown and the medical report was handed in and the crown close (sic) its case and the court postponed the matter to make a ruling whether we had to adduce evidence in our defence" (underline mine)

[31] It is thus an obvious fact from the foregoing, that the Applicants were notified of the dates for continuation of the hearing, but they failed to communicate same to their counsel. On the whole, I am firmly convinced that the Applicants have failed to show any irregularity or illegality in the proceedings before the court a quo, to warrant this court setting aside the orders of that court as sought.

[32] Furthermore, I find the complaints raised by the Applicants in this application, issues that ought properly to lie in an appeal to an appellate court at the end of the trial a quo and are not sufficient to found bias. These

are not issues that can impinge on the impartiality of the court. Therefore, the correctness or otherwise of the recall of the complainant to testify a quo in the circumstances alleged, and whether or not the Applicants were denied the right of legal representation, are all matters for an appellate court. This is because recusal deals with partiality or impartiality of a judicial officer and has nothing to do with the rightness or wrongness of the decision. The correctness of the decision in law and fact is a matter for appeal and does not fall within the supervisory jurisdiction of this court over lower courts see **The King v Thabo Tebo Kunene and another (supra).**

[33] It remains for me to state here, that I find this whole case spurious, disingenuous and a calculated attempt by the Applicants to stultify the criminal proceedings a quo. This is because the Applicants are clearly engaged in forum shopping and are attempting to drag the court along with them. If this sort of complaints are allowed to keep interfering with due criminal process, it will render judicial officers timorous and cause them to lose their judicial integrity. This is because if this kind of application is allowed, a time will come when the judicial officers will refuse to act when faced with situations like in casu, when the recall of complainant to testify was purely to prevent a fait accompli. The judicial officer having been

rendered helpless by such unpalatable and unmeritorious applications will simply refuse to act, raise his hands up in surrender and say to the administration of justice "*there is nothing I can do about it*". Thus, the need to discourage this sort of application because it has the dangerous potentials of rendering the entire justice system vulnerable to the antiques of unscrupulous litigants.

[34] It is by reason of the totality of the foregoing, that I hold that the learned Magistrate a quo, was right to refuse to recuse himself from trying criminal Case No.203/07. On these premises, I make the following orders:-

1. That this application be and is hereby dismissed.
2. That the trial of the Applicants as Accused persons in criminal case no 203/07 a quo, be and is hereby ordered to resume forthwith and continue before Magistrate Mkhaliphi (1st Respondent)
3. That the Registrar of the High Court be and is hereby ordered to serve this judgment forthwith, upon the following persons:-

(a) The Presiding Magistrate in criminal case no. 203/07 His Worship Magistrate Mandla Mkhaliphi.

(b) All the Applicants.

(c) The Prosecutor in criminal case no. 203/07.

For the Applicants P. Simelane

For the Respondents G. Simelane

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE ……………………. DAY OF ………………….2012

OTA J.

JUDGE OF THE HIGH COURT