



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

DATE

SIGNATURE

Case no.: A245/2019

In the matter between: -

DAVID MALULEKA

Applicant

And

THE STATE

1st Respondent

(THE DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA)

MR P.W NEL

2nd Respondent

THE REGIONAL COURT MAGISTRATE, PRETORIA NORTH

JUDGMENT

NE NKOSI AJ

[1] The Applicant appeared before Magistrate Mr. Nel in the Regional Court for the Regional Division of Gauteng held at Pretoria North on the 29th of January 2019 on a charge of housebreaking with intent to steal and theft. He was represented by Mr. Shandu a legal practitioner from legal Aid South Africa.

[2] He pleaded guilty to the charge and his written plea explanation in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 was read into the record by Mr. Shandu. Mr. Nel asked the applicant whether he confirmed the contents of the statement read by Mr. Shandu into the record. At that stage the applicant had not signed the written statement and it had not been handed up to Mr Nel. He disputed the contents of the statement and stated that some of the facts contained in the statement were incorrect. He also told the Court that he had no knowledge of where Mr. Shandu got these facts from. Mr. Shandu's mandate was consequently terminated.

[3] Mr. Maleho came on record as a legal practitioner representing the applicant. He informed the Court that the applicant did not intend to plead guilty. He brought an application for the recusal of Mr. Nel from the case on the basis that Mr. Nel was privy to the facts of the case. His application was dismissed by Mr. Nel and the said ruling lead to this application.

[4] The applicant seeks an order setting aside Mr. Nel's refusal to recuse himself. He submitted that his trial should be heard by another Magistrate.

[5] I was referred to *S v Robert 1999(2) SACR 243(SCA)* at para [26] where in it is stated:

"It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further "proceedings" a nullity..."

I fully agree with that decision. However, in the present case there are no reasonable grounds to suggest the existence of actual bias and that a reasonable person in the position of the applicant would suspect that the judicial officer would be biased. The suspicion by the applicant is not based on any grounds and his application militates against the spirit and purpose of Section 112(2) and Section 113 of the Criminal Procedure Act. If the applicant's arguments were to be accepted it would mean that in each case where a Presiding Officer is not satisfied with the plea of guilty after a plea explanation and enters a plea of not guilty in terms of Section 113 for the trial to proceed, he would then have to recuse himself because of what he was told during the plea explanation. This situation will be untenable.

[6] In Council of Review, SADF and Others v Monning and Others 1992 (3) SA 482 at F-G Corbet CJ said: *"I agree. If, I have held, the proceedings of the court martial were fatally flawed and constituted a nullity, then it seems to me that this must inevitably enure for the benefit of all the respondents"*

I am not persuaded that this is the position in the present case. The Appellant has not established that Mr Nel ought to have recused himself and that he failed to do so.

[7] The applicant bears the onus of establishing reasonable grounds for the recusal of Mr. Nel. He must also prove that a reasonable, objective and informed person would on the correct facts reasonably apprehend that Mr. Nel will not bring an impartial mind to bear on the adjudication of the case. (see President of the Republic of South Africa & others v South African Rugby Football Union & others 1999(4) SA 147(CC)). The applicant has failed to discharge the onus and his application should fail.

[8] It is ordered that:

8.1 The application is dismissed.

NE NKOSI, AJ
Acting judge of the
High Court

I agree and it is so ordered

SARDIWALLA, J
Judge of the High Court

Date of Hearing	: 6 November 2019
Date of Judgement	: 8 November 2019
For the Applicant	: Advocate MM Aphone
Contact Details	: 083 963 0137
Instructed by	: David Maluleka
For the Respondent	: Advocate A Fourie
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Instructed by	: The State