THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 523/07

In the matter between:

BONGANI DUBE **First appellant**
LODRICK ALLEN MKHIZE **Second appellant**
NTOBEKO NDHLOVU **Third appellant**

and

THE STATE **Respondent**

Neutral citation: *Dube v The State* (523/07) [2009] ZASCA 28 (30 March 2009)

Coram: **Mthiyane, Lewis, Cachalia, Snyders *et* Mhlantla JJA**

Heard: **13 March 2009**

Delivered: **30 March 2009**

Summary: Special entry ─ recusal on grounds of appearance of bias.

Test for bias ─ judicial officer's failure to recuse himself tainted the appeal process ─ order set aside ─ appeal remitted for rehearing.

ORDER

On appeal from: Bophuthatswana High Court (Mogoeng JP and Gura J sitting as a court of appeal).

(a) The appeal succeeds to the extent that the special entry is upheld;

(b) The order of the court a quo is set aside and replaced with the following:

'The appeal is remitted to the High Court for re-hearing before a differently constituted Full Bench.'

JUDGMENT

MHLANTLA JA (Mthiyane, Lewis, Cachalia and Snyders JJA concurring)

[1] On 26 March 2002 at approximately 09h15 the First National Bank in Koster was robbed of R119 000 by four armed men. The appellants were subsequently arrested as suspects and charged in the Regional Court, Rustenburg with one count each of robbery with aggravating circumstances. They were convicted and sentenced to 16 years' imprisonment each. Their appeal to the Bophuthatswana High Court, before Mogoeng JP and Gura J against both conviction and sentence was based on several grounds, including alleged irregularities in the

proceedings, and whether the identity of the appellants had been proved. The appeal was dismissed on all bases. Mr Dube, the first appellant has since died. The appeal to this court is with the leave of the court a quo.

[2] This appeal is based on a special entry relating to an alleged irregularity in the court a quo, in terms of s 317 of the Criminal Procedure Act 51 of 1977, as well as on the merits. Only the issue relating to the special entry was argued before us.

[3] Accordingly this judgment deals only with that issue ─ whether the Judge President should have recused himself *mero motu* because his wife, a state advocate, represented the State in the appeal before the court; and if so, whether his failure to recuse himself constituted an irregularity which vitiated the appeal proceedings. In answering these questions it is necessary to sketch briefly the background events leading to the application for a special entry.

[4] According to counsel for the appellants, he and the correspondent attorney learnt on the day of the appeal hearing that the Judge President would be one of the judges presiding over the appeal. At that stage, counsel was aware that Mrs Mogoeng, the Judge President's wife, was arguing the appeal on behalf of the State. The appellants were not in court during the hearing. Their counsel did not foresee any problems and never considered the possibility of asking the Judge President to recuse himself on the basis that his wife was representing the State. He did not, at the time of arguing, believe that it was necessary to request a recusal because he had been involved previously in a full bench appeal presided over by Judge President Mogoeng and at which Mrs Mogoeng represented the State – *S v Baletseng* 2005 (2) SACR 28 (B). That appeal was decided in

favour of the appellants.

[5] After the appeal was dismissed in the present matter counsel met the appellants in prison to discuss the judgment and outcome with them. It was at that stage that the appellants enquired about the similarity of the surnames between that of the Judge President and the state advocate. Counsel thereupon informed them that the two were in fact husband and wife. The appellants were not comfortable with this revelation. This eventually led to the application for a special entry on the basis that the appellants had a perception of bias on the part of the Judge President. The application for a special entry was granted by the full bench.

[6] The test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of a reasonable apprehension of bias was enunciated in *President of the Republic of South Africa and others v South African Rugby Football Union and others.*[1] In that case the Constitutional Court said:

'It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the *onus* of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. 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. At the same time, it must never be forgotten that an impartial

[1] 1999 (4) SA 147 (CC) para 48. This test was considered with approval in *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing*) 2000 (3) SA 705 (CC), and in *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [2000] 1 All ER 65 (CA) at 76F to 77A.

judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[7] Where the claimed disqualification is based on a reasonable apprehension, the court has to make a normative evaluation of the facts to determine whether a reasonable person faced with the same facts would entertain the apprehension. The enquiry involves a value judgement of the court applying prevailing morality and common sense.[2] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused.[3]

[8] It is settled law that not only actual bias but also the reasonable perception of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. Once this is established the disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity.[4] This dual aspect is captured in the oft repeated words that justice must not only be done, but must manifestly be seen to be done.[5]

[9] The Bangalore Principles of Judicial Conduct[6] are a comprehensive

---

[2] *S v Basson* 2004 (6) BCLR 620 (CC) para 53.
[3] *S v Roberts* 1999 (4) SA 915 (SCA) para 25.
[4] *Take and Save Trading CC and others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 5.
[5] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Hewart CJ.
[6] The Bangalore Principles were adopted by the Judicial Group on Strengthening Judicial Integrity, at a meeting of Chief Justices held in The Hague, Netherlands on 25-27 November 2002. The principles are intended to establish standards for ethical conduct of judges and are designed to afford the judiciary a framework for regulating judicial conduct.

statement of ethical principles. The second value identified by these principles is that of 'impartiality'. The principle is articulated as follows: 'Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made'.

[10] 'Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. It must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of unease, grievance and of injustice having been done, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest; by the judge's behaviour on the bench, or by the judge's out-of-court associations and activities. A judge must therefore avoid all activity that suggests that the judge's decision may be influenced by external factors such as the judge's personal relationship with a party or interest in the outcome.'[7]

[11] It is helpful to refer to other jurisdictions to ascertain how the rule is applied. In some states of the United States of America, the rule is mandatory when a judge's spouse or relative to the third degree is a party. The Code of Judicial Conduct in Arkansas for example provides that a judge should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including but not limited to instances where: he or she has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding, where he or she or his or her spouse, or a person within the third degree or relationship to either of them, or the spouse of such person is acting as a lawyer in the proceeding. A judge disqualified in terms of the Code, may, instead of withdrawing, disclose on the record

[7] Section 52 of the Commentary on the Bangalore Principles.

the basis of his disqualification. If based on such disclosure and if the parties and lawyers independently of the judge's participation all agree in writing that the judge's relationship is immaterial or that his financial interest is not substantial, the judge may participate in the proceeding. The agreement has to be incorporated in the record of the proceedings.

[12] In this country a judicial officer was held to be disqualified in a case where his wife was called as a witness. In *S v Sharp*[8] the complainant was the magistrate's wife. He presided in a trial where his wife testified. The court on review held that the magistrate had a direct personal interest in the outcome of the proceedings and that it was difficult to conceive of a more obvious example necessitating recusal.

[13] The rule is clear: generally speaking a judicial officer must not sit in a case where he or she is aware of the existence of a factor which might reasonably give rise to an apprehension of bias. The rationale for the rule is that one cannot be a judge in one's own cause. Any doubt must be resolved in favour of recusal. It is imperative that judicial officers be sensitive at all times. They must of their own accord consider if there is anything that could influence them in executing their duties or that could be perceived as bias on their part. It is not possible to define or list factors that may give rise to apprehension of bias – the question of what is proper will depend on the circumstances of each case.

[14] In situations where the judge has a relationship with a party or a legal representative appearing before him or her, it is always appropriate for the judge to consider the degree of intimacy between him or herself and the person concerned. The more intimate the relationship, the greater

[8] 2002 (1) SACR 360 (Ck) para 21.

the need for recusal. In the case such as the present, where there is a close relationship between the presiding officer and one of the legal representatives, it appears to be undesirable if not improper for such judicial officer to sit in the matter. No general rule as to the kinds of relationship that should require recusal need be laid down, however, given the clarity of the test in *SARFU*.

[15] There may, of course, be instances where it is difficult to avoid closely connected people working in a matter. The preferred route would then be to bring in other judicial officers or legal representatives from different jurisdictions. If it is not feasible then the relationship must be brought to the attention of the parties and their consent canvassed before the commencement of the hearing. If such consent is given it must be entered into the record.

[16] I turn now to consider the circumstances relating to the special entry in this appeal. Counsel for the respondent submitted that the perception of bias could not be established because counsel for the appellants had been aware of the relationship between the Judge President and the state advocate. This argument in my view is without merit. The test set out in *SARFU* does not relate to counsel but to the litigant. It is the litigant who must entertain a reasonable apprehension of bias for the disqualification to be sustained. Although counsel was aware of the relationship concerned before the hearing, it is common cause that he had not discussed the issue with the appellants. The appellants learnt for the first time about the relationship when the judgment on appeal was shown to them. Consequently the fact that their counsel, on the basis of what had occurred in *Baletseng*, did not object to the sitting of the Judge President, is irrelevant to the present enquiry. In that case the relationship

of the Judge President and his wife was not raised. It is not clear what would have happened if it had been.

[17] In making the special entry, the learned Judge President was alive to this issue: He said:

'Be that as it may, we are inclined to allow the special entry irrespective of whether it is the applicants or Mr Shapiro or both who have the perception that the Presiding Judge or both judges are biased against the applicants. We do so because we believe that a perception by a layperson that a husband and wife may, in the secrecy of their bedroom, inadvertently or deliberately find themselves talking about the case in which they are involved cannot be said to be frivolous or ridiculous. An application for the recusal of a presiding officer in the position of the Presiding Judge in this matter cannot be said to be absurd or an abuse of process and an average right-thinking person would, in all likelihood, sympathise with a person in the position of the applicants in this matter.'

[18] Counsel for respondent contended that the appellants' submissions would be persuasive if the Judge President had been sitting alone. I do not agree with this submission. In *R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (no 2)*[9] a majority of the court, including Lord Hoffman, had issued an order against Senator Pinochet. He subsequently brought a petition to set aside the order on the basis that Amnesty International (AI) was a party to the appeal; that AI was joined in order to argue a particular result and that Lord Hoffman, a member of the Appellate Committee that had heard the appeal, was a director of a charity closely allied to AI. Lord Nolan held that in any case where the impartiality of a judge was in question, the appearance of the matter was just as important as the reality. The House of Lords held that Lord Hoffman's links were such as to give the appearance that he might have been biased against the applicant; that he had an interest in the outcome

[9] [1999] 1 All ER 577; [1999] 2 WLR 272.

of the proceedings and was accordingly disqualified from sitting as a judge in those proceedings. The previous order of the House of Lords was set aside. Similarly in this case, the proceedings are tainted regardless of the fact that the Judge President heard the matter with another judge and irrespective of the fact that the Judge President did not conduct himself at the hearing in a manner that gave rise to a reasonable suspicion of bias.

[19] It seems to me that a reasonable litigant would have been justified in entertaining a reasonable perception of bias on the part of the Judge President given that he is married to counsel for the State. This does not of course mean that bias on the part of the Judge President was established. Nor does this judgment seek to lay down a rule that in every case in which a judge is related to a legal representative he or she will be disqualified from presiding or sitting. It is as I have said, a question that will have to be evaluated from case to case with due regard to the principles laid down in *SARFU* and other pertinent cases.

[20] For the above reasons the failure of the Judge President to recuse himself when his wife presented argument for the State in the court below constituted an irregularity which vitiated the appeal proceedings. In the result the appeal succeeds to the extent that the special entry must be upheld. The order of the court a quo must be set aside and the appeal referred back for re-hearing before a differently constituted bench.

[21] In the result the following order is made:

(a) The appeal succeeds to the extent that the special entry is upheld.

(b) The order of the court a quo is set aside and replaced with the following:

'The appeal is remitted to the High Court for re-hearing before a

differently constituted Full Bench.'

_____
N Z MHLANTLA
JUDGE OF APPEAL

Appearances:

For Appellant: P I Shapiro

Instructed by:
Ms Ester Resnik, Observatory, Johannesburg
Giorgi & Gerber Attorneys, Bloemfontein

For Respondent: G S Maema

Deputy Director of Public Prosecutions, Mafikeng