REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: SS88/2002

In the matter between:

THE STATE

and

SHAHEEM ISMAIL
FARIED DAVIDS
ALIVIA DAVIDS
ROY VLOTMAN
IKRAM NORTON
ASHRAF LEE
ABDULLAH BRENNER

JUDGMENT DATED 13 MARCH 2003

H.J. ERASMUS, J:

This is an application for my recusal.

After several postponements, the trial in this matter was due to resume on Thursday 6 March 2003. Prior to the resumption of the trial on Thursday morning, Ms Lötter informed me, first in chambers and thereafter in open court, that she had been instructed by the first accused to apply for my recusal. She asked for the matter to stand down to Monday, 10 March 2003

at 10h00. On that day, the preparation of the typing of the record of the proceedings on which the applicant wishes to rely had not been completed and the matter was further postponed to 12 March 2003.

In the Notice of Application for Recusal filed on 7 March 2003, the applicant relies on a variety of grounds in support of the submission that his constitutional right to a fair trial has been infringed or denied, and that he has a reasonable apprehension that I will not bring an impartial mind to bear on the adjudication of the case.

The other accused have not associated themselves with the application. Their attitude, as conveyed to me by their counsel, is as follows: the second, fifth, sixth and seventh accused have adopted a neutral attitude. Mr Johnson, who appears on behalf of the third accused, informed me that his client opposes the application. Mr Philander, who appears on behalf of the fourth accused, stated that his client does not support the application.

The application is opposed by the State.

Recusal

In approaching this application, I bear in mind what was stated by the Appellate Division in *Moch v Nedtravel (Pty) Ltd t/a American Express* 1996 (3) SA 1 (A) at 13H, namely that "a judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront."

The proper approach to an application for recusal has recently been authoritatively laid down by the Constitutional Court in two cases, namely, *President of the RSA and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 ("the *SARFU* case") and *South Afrcan Commercial Catering and Allied Workers Union and Others v*

Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 ("the *SACCAWU* case"). It has also been considered by the Supreme Court of Appeal in *S v Roberts* 1999 (4) SA 915 (SCA), 1999 (2) SACR 243 (SCA); *Sager v Smith* 2001 (3) SA 1004 (SCA) and *S v Shackell* 2001 (4) SA 1 (SCA).

At para [48] of the *SARFU* judgment the full court said the following:

"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 Judge 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 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."

The test is, therefore, an objective one. The test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge would not be impartial. The requirement is described in the *SARFU* and *SACCAWU* cases as one of "double reasonableness". Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. At para [20] in *S v Shackell, supra,* it is further said:

"Moreover, apprehension that the Judge *may* be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial."

Ms Lötter has stressed that the test requires an assessment of the applicant's perception of impartiality. This perception must, however, be objectively reasonable. In this regard reference was made to what was said in *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 694I—695A (and cited with approval in the minority judgment in the *SACCAWU* case at par [55]):

"Provided a suspicion of partiality is one which might reasonably be

entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."

At para [15] of the *SACCAWU* judgment, Cameron AJ pointed out that the twofold emphasis on the aspect of reasonableness serves to underscore the weight of the burden resting upon the applicant for recusal who bears the *onus* of rebutting the weighty presumption of judicial impartiality.

Cameron AJ further points out (at para [17]) that a court considering a recusal application asserting a reasonable apprehension of bias must give consideration to two contending factors:

"On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is 'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'".

(The phrases cited are from the judgment of the Court of Appeal in *Locobail (UK) Ltd v Bayfield Properties Ltd and Another* [2000] 1 All ER 65 (CA) at para [21]).

The background

The applicant is standing trial together with six other accused on a charge of contravention of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 in that they conspired to murder regional magistrate Wilma Van der Merwe. In the alternative, he is charged with attempted murder and, in the further alternative, with contravention of section 18(2)(b) of the Riotous Assemblies Act 17 of 1956. There are also two charges under the Arms and Ammunition Act 75 of 1969. There were initially twenty-one accused. The case was set down for trial on 5 August 2002 but it was, on that date, further postponed to 3 February 2003.

The venue of the trial was originally to be in the magistrate's court at Atlantis where the case was to be tried by a Judge of this Division of the High Court. On 3 February 2003, by which time charges against fourteen of the twenty-one accused had been withdrawn, the trial was transferred to the High Court in Cape Town.

The trial duly started before me in the High Court in Cape Town on 4 February 2003. On that day, the accused all pleaded not guilty to the charges being brought against them. The State then led the evidence of a number of members of the South African Police Service and all the witnesses were duly cross-examined by the legal representatives of the various accused.

The next day, prior to the resumption of the proceedings, Mr Kawalsky, who appeared for the first accused, informed me, first in chambers and thereafter in open court, that the first accused had terminated his mandate.

Mr Kawalsky was appointed by the Legal Aid Board on 22 November 2001 to act on behalf of the first accused. He thereafter acted for the first accused in matters related to and preliminary to the trial in this matter. Thus he appeared on his behalf in an application by the State that the first accused furnish voice samples for analysis and in an appeal against the magistrate's ruling in this regard. He was also involved in applications brought by the first accused for funding to enable him to employ a voice expert and a handwriting expert. Mr Kawalsky appeared for the first accused at the

postponement of the trial on 5 August 2002 and on the first day of trial on 4 February 2003.

The first accused informed me that he had lost confidence in Mr Kawalsky's ability to represent him adequately and to put his case properly before the Court. The reasons he advanced at that time had nothing to do with the proceedings on the previous day, the first day of the trial. The reasons all went back to the time in 2002 when Mr Kawalsky had acted for him over a period of many months. In a letter dated 11 February 2003 to the Bar Council, which was received as Exhibit "J" in these proceedings, he raised yet further complaints about Mr Kawalsky which also go back to last year. In his evidence in court on 12 March 2003 in support of his application, the applicant alluded for the first time to a complaint he had about Mr Kawalsky's conduct on the first day of the trial.

The first accused gave no reason or explanation for his delay in terminating Mr Kawalsky's mandate. By terminating the mandate on the second day of the trial, the first accused brought inconvenience for everybody involved in the proceedings: for Mr Cilliers, who appears for the State, who has to orchestrate the calling of witnesses, including expert witnesses, who have to be specially brought to Cape Town; for his fellow accused who have to wait so much longer for the completion of their trial; for the legal representatives of the other accused who have undertaken other commitments in the reasonable expectation that this trial would run its course during the first Court term.

The trial was postponed to 10 February and thereafter to 13 February 2003 in order to enable the first accused to bring a renewed application to the Legal Aid Board for the appointment of counsel to represent him. On 13 February 2003 I was informed that the Legal Aid Board had agreed to the appointment of another legal representative for the first accused. I was further informed that Ms Lötter had accepted the brief, and the accused

informed me that he was satisfied with her appointment. The trial was then postponed to 3 March 2003 to enable Ms Lötter to prepare for the trial and to consult with the first accused.

The trial could not proceed on 3 March 2003 by reason of the illness of a state witness and of the fourth accused. The trial was postponed to Thursday 6 March 2003.

In the meantime, on 14 February 2003, I received a letter through the post which purports to emanate from one Alastair Kerridge. The person concerned is mentioned in the summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act 51 of 1977 as, initially at least, a co-conspirator in the alleged conspiracy to murder regional magistrate Van der Merwe. His name also appears on the list of witnesses the State intends to call, furnished to all the accused under the provisions of section 144 (3) of the Criminal Procedure Act 51 of 1977.

By reason of the identity of the purported author of the letter and the contents thereof, I considered it necessary to make copies available to the State advocate and to the legal representatives of all the accused. I accordingly invited them to my chambers on Monday 17 February and handed each one of them a copy of the letter. Mr Petersen, who appears for the sixth accused, was not available on that day but collected his copy in due course.

When the Court re-assembled on 3 March 2003, the day on which the trial could not proceed by reason of the indisposition of a witness and the fourth accused, I placed on record the fact that I had received the letter and that I had made copies available to all the legal representatives. I emphasised that the letter was not part of the evidential material in the case.

The applicant's case for recusal

On Thursday 6 March 2003, as I have already pointed out, Ms Lötter informed me that she had been instructed by the first accused to apply for my recusal. The application for recusal is based upon what transpired in Court during the withdrawal of Mr Kawalsky and the appointment of

counsel to take his place, and upon the letter. The events in Court of which the first accused complains, took place on 5 and 10 February 2003.

The letter

The letter is undated, and typed with a number of corrections in pen. The letter has been received as Exhibit "K". The letter is headed:

"For the urgent attention of: Professor Hennie Erasmus."

The letter contains a series of allegations about corruption on the part of police officers and members of the staff of the Director of Public Prosecutions, and the falsification of tapes by a "voice expert". These allegations are not relevant to the application for my recusal. The issue in the application now before the Court is whether the reasonable, objective and informed person will on the correct facts reasonably apprehend that I will not be impartial in the adjudication of the matter. The letter is relevant to the present proceedings in so far as it deals with or reflects upon the applicant's apprehension that I will not be impartial.

The applicant objects to the fact that I informed counsel that I had received the letter and made copies available to them. The objection seems to be that I had unnecessarily introduced something which is extraneous to the case. The name of the purported author of the letter appears on the list of State witnesses that was furnished to the accused under the provisions of section 144(3) of the Criminal Procedure Act 51 of 1977. If the State were to call him to give evidence, the letter would, on the face of it, be of vital importance to the defence in the cross-examination of Mr Kerridge. In my view, it was the correct and proper thing to do to bring the letter to the notice of counsel.

In his oral evidence, the applicant relied on two points made in the letter as evidence to support his perception that I was biased against him. In the letter, the author says that he had been told by Ms Van der Merwe and Mr Cilliers that I was Van der Merwe's lecturer at Stellenbosch and that I knew her personally. The applicant says that he was "shocked" when the letter was shown to him and he saw that I was a former professor and that regional magistrate Van der Merwe is a former student of mine.

The allegations in the letter regarding myself are hearsay and not on oath. Nevertheless, and especially since one is in an application for recusal dealing with perceptions, this kind of allegation places a Judge in an invidious position. In the SARFU case, the Judges of the Constitutional Court responded to allegations on oath in support of an application for their recusal, by issuing a "statement of facts" which was accepted "unhesitatingly" by the applicants for recusal (para [23] and [24]). All I can do, is to say is that Ms Van der Merwe might have been a student of mine, but she is certainly not known to me personally and we are not friends.

Perhaps I should place Ms van der Merwe's position as (possibly) a former student of mine in proper perspective. I have no recollection that she had been a student of mine. But she may well have been. I was attached to Stellenbosch University for a period of about twenty years. During those years I was responsible, each year, for an undergraduate course with a class exceeding two-hundred students, a pre-final year LL.B course with a class of one-hundred to one-hundred and thirty students, and one or two smaller, final-year LL.B groups doing an optional course. In addition, I lectured from time to time at the University of Cape Town and the University of the Western Cape. It will be apparent that during those years literally thousands of students passed through my lectures. Some of them I remember; others I do not. Sometimes I recognise a face without being able to put a name to it. Should regional magistrate Van der Merwe be called to give evidence, I may, or I may not, recognise her. I fail to understand why I will be biased against the first accused simply because regional magistrate Van der Merwe happened years ago to have been a student of mine – if she had been a student of mine, it must have been years ago because, as far as I know, only people with judicial experience are elevated to the rank of regional magistrate.

In the *SARFU* case, the recusal of Chaskalson P (now CJ) was sought on the ground of a "longstanding relationship of advocate and client" between him and President Mandela. The Court said (at para [79]):

"We have never heard of a recusal application founded upon such a relationship prior to a judge's appointment to the bench in South Africa."

While, as the Court pointed out, the relationship of advocate and client is not as close as that of attorney and client, a working relationship inevitably develops between advocate and client during the course of the case handled by the advocate. In this regard, the Court adds (at para [79]):

"There have been countless cases in our history where judges have adjudicated disputes in which a party had been a client prior to their appointment."

The relationship of a university lecturer and a student may take various forms. A student engaged upon the preparation of a thesis for a master's or doctor's degree may, over a period of several years, develop a close working relationship with his or her supervisor. At the other end of the spectrum, a student may be an anonymous face in a large class and may have direct personal contact with an individual lecturer but once or twice during his or her years as a student. In such a case, the

relationship between a student and the lecturer is far more tenuous than that of advocate and client. In the *SARFU* case it was pointed out that the relationship of advocate and client between the President and Chaskalson P ended some 35 years ago. In the result, it was concluded –

"That such a relationship provides any ground for the recusal of Chaskalson P is fanciful and devoid of merit."

I can only echo these words and say that the assertion that in this case, the relationship of lecturer and student provides any ground for my recusal "is fanciful and devoid of merit".

The conduct of the proceedings

The applicant in his evidence referred to several incidents which occurred on the 4th, 5th, 10th and 13th of February.

a) The applicant complains that during the afternoon of the first day of the trial on 4 February 2003, I "reluctantly" acceded to Mr Kawalsky's request for a brief adjournment to consult with his client before cross-examining Superintendent Deetlefs – the applicant also says that Mr Kawalsky required the adjournment because he had not properly consulted with him in preparation of the cross-examination. The relevant part of the record reads as follows:

GEEN VERDERE VRAE DEUR MNR CILLIERS:

COURT: Mr Kavalsky?

MR KAVALSKY: M'Lord this witness has come down from Pretoria. I may have some questions for him, but I do not wish to hold him overnight. I wish to take instructions briefly to establish if there is anything that the accused number 1 instructs me to put to this witness. May we have five minutes.

COURT: Yes Mr Kavalsky, I am quite prepared to give you five

minutes.

I fail to discern the alleged reluctance on my part. According to the record, the moment Mr Kawalsky put his request to me, my immediate reaction was –

"Yes Mr Kawalsky, I am quite prepared to give you five minutes."

b) The applicant says that I infringed his constitutional rights by telling him that should the Legal Aid Board refuse his (new) application for legal assistance, he would have to act for himself. Mr Johnson, who appears on behalf of the third accused, rightly pointed out that the remark I made should be seen in context. The remark was made while the applicant's renewed application to the Legal Aid Board was being considered. The following was said:

COURT: If I understand you correctly, you would prefer to have senior counsel.

ACCUSED 1: Yes

COURT: Now, that's up to the Legal Aid Board to decide whether they will grant it.

I then dealt with the question of the delay occasioned by the application and proceeded –

> But the implications are a long further delay or if one reaches a point, of course I am not saying that we have reached that point today, I'll first listen to other people, one might say well, **if you're not satisfied with the legal representation** (my emphasis), you run your own case. That I would prefer not to do if it can possibly be avoided. But let's leave that for later consideration.

The remark I made occurred within the context of the applicant's desire that senior counsel be appointed to assist him, and was intended to bring to his attention that a recipient of legal aid cannot demand that the State assign to him counsel of his choice – though I did not spell it out, I had in mind the remarks of Harms JA in *S v Halgryn* 2002 (2) SACR 211 (SCA) at 216e).

The applicant's perception that I was denying him legal representation should his application to the Legal Aid Board fail, is not borne out by the record of the proceedings. The record makes it clear that I merely spelled out an envisaged possibility under certain circumstances, and made it clear that should that eventuality arise, the matter will then be dealt with.

According to the record, the objective facts are that the trial was stood down for several days to enable Dr Ismail to put his application before the Legal Aid Board; after the appointment of (new) counsel had been confirmed, the trial was postponed for two weeks to enable her to familiarise herself with the case and to consult with the applicant; I requested Mr Cilliers to arrange that Ms Lötter get the opportunity to view the video that had been shown in court on the first day of trial; I requested Mr Cilliers to assist Ms Lötter with the arrangement of sufficient opportunity to consult with her client, and I ordered a transcript of the evidence of the first day of trial to be typed.

The perception that I displayed a lack of impartiality on this score has no

reasonable foundation.

(c) On Monday 10 February 2003 the applicant placed the following on record:

> ACCUSED 1: When I was transported to prison on I think it was Wednesday, the intervention unit, the way they drove, I was shackled and I'm full of bruise marks and my neck, I've got a neck problem, spinal problem. I fell around in the van the way they drove and I would like to see a district surgeon, if possible. And on Wednesday, Your Honour, I'm seeing my psychiatrist at the prison, because I'm suffering from port-traumatic stress as well, Your Honour. And the way I've been treated for this last past days coming to court, I've never been treated like this in my life, Your Honour. I'm in prison six years, I've never been brought to court in this manner, like a caged animal,. Your Honour. I'm shackled, I've got no ventilation and the person driving this, is a maniac driver. A caged animal on its way to a slaughter house is not even treated like that, Your Honour. I mean, it's disgusting, Your Honour, we're living in the new South Africa and I've got to go through all these things, and I come from a respectable family, Your Honour.
>
> COURT: Are you being transported in a police van at the back?
>
> ACCUSED 1: Yes, and another van in front. But today it was a bit comfortable, because we came with this Nella [*sic* –the reference is

probably to vehicle known as the Njala] – I mean, it's not as bad as the - the other van, Your Honour. And I just need some treatment, Your Honour.

COURT: Dr Ismail, I think that's again something I can put onto the shoulders of Mr Cilliers. Will you please attend to this, Mr Cilliers? And if necessary, see to it that, if the allegations are correct that the accused is transported at least in a reasonable fashion.

On reading the record, it has become clear to me that in my concern for the manner in which the applicant was being transported to Court, I overlooked his request to see the district surgeon. I fail to see how that oversight can give rise to a reasonable apprehension that I will not be impartial in the adjudication of the case. After all, I overlooked his request because of my focus on another of his complaints.

d) The applicant said in evidence that a further example of the disdain with which I treat the accused, is the manner in which I dealt with Mr Roy Vlotman, the fourth accused, when the court proceedings were delayed on 6 March 2003 because of his late arrival at court. In view of the attitude adopted by Mr Philander, who appears on behalf of the fourth accused, I need not deal with the details of this complaint. In his cross-examination of the applicant, Mr Philander made it clear that the applicant had no brief to speak on behalf of the fourth accused, that the fourth accused was in constant contact with his legal representative, and that the fourth accused does not support the applicant's application for my recusal.

e) The applicant's final complaint is that the Police have labelled him as a member of PAGAD and were treating him as if he were a dangerous criminal. The applicant says that the presence of armed Police in Court is calculated to poison my mind against him and that, as a result, I shall not be able to bring an impartial mind to bear on the case against him. Of this complaint I can only say that it is devoid of merit

The application is dismissed

HJ ERASMUS, J