Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 19257/2019

Before: The Hon. Ms Justice Baartman
The Hon. Mr Justice Binns-Ward

Hearing set down: 6 November 2020
Judgment: 6 November 2020

In the matter between:

M J VERMEULEN INC. Applicant

and

MAGISTRATE S. ENGELBRECHT N.O. First Respondent
JOHANNES MATTHYS PRETORIUS Second Respondent

JUDGMENT

BINNS-WARD J (**BAARTMAN J** concurring)**:**

[1] This is an unusual case. It concerns an application by the plaintiff, an attorney suing for payment of his fees, to review and set aside the decision, *suo motu*, by the magistrate seized of the trial of the action to recuse himself.

[2] The magistrate, who is the first respondent in the review application, abides the judgment of the court. The defendant in the action, who is the second respondent before us, purported not to oppose the review application, but nevertheless filed written submissions in which he argued, with reference to his view of the merits of the special defence he had taken in the action, that it would be purposeless to review and set aside the magistrate's decision to recuse himself.

[3] The second respondent's argument can be disposed of shortly. We are not concerned in these proceedings with the merits of the case before the magistrate, only with the legal propriety of his recusation from the trial of the action. It would be quite improper for this court, in the context of determining a challenge to the magistrate's recusal at his own instance, to say anything that might anticipate or influence the determination of a matter pending between the parties before the magistrate's court. That much should be axiomatic when it is appreciated that, depending on the determination of the question brought on review, which has nothing to do with the merits of the action, the trial might need to resume before the first respondent.

[4] We were not referred to any precedent directly in point,[1] and the only previous judgment that I have been able to find dealing with a similar situation in the Southern African jurisprudence is the Namibian High Court's decision in *S v Boois* 2016 JDR 0118 (Nm), in which Masuku AJ (Shivute J concurring) reviewed and set aside a magistrate's decision to recuse himself from a criminal trial. In *Boois*, the magistrate, having convicted the accused,

[1] The applicant's counsel referred us to the judgment in *Newell v Cronje and Another* 1985 (4) SA 692 (E) (per Mullins J, Zietsman J concurring), in which a magistrate's decision, *mero motu*, to recuse himself was reviewed and set aside, but the magistrate's reasons in that matter were concerned with his understanding of the complicating effects of an evidential principle rather than an issue of personal sensitivity, and the case is therefore distinguishable.

who were legally represented, on their pleas of guilt later bethought himself of the correctness of the convictions and when the accused came up for sentencing after a postponement altered the pleas to pleas of not guilty, in terms of s 113 of the Criminal Procedure Act, stating '. . . *the court shall records (sic) a plea of not guilty i.t.o. S113 of the CPA 51/1977 as amended in respect of all 5 accused persons and their convictions lapses. The court further directs that the prosecution to follow the ordinary course. In addition I subjectively feel that I will not be able to disabuse my mind from the inside information I have about this case, hence I mero motu recuse myself from and direct further that this matter to start de novo before another magistrate.*'

[5] It appears that the magistrate's doubts in *Boois*' case were the product of his own ruminations and not based on anything put before him in the hearing. The High Court described the objectively assessed position as follows at para 14-16:

> '… all the accused persons pleaded guilty to the offence based on advice of their legal practitioners, who confirmed that the respective pleas were in accordance with their instructions. In this regard, there was nothing wrong or anomalous with the pleas and consequently, the conviction. It is possible that the accused were found all partaking from the contents of the bottle at a specified place as people are wont to do in some of the places of merriment. There is therefore nothing unusual or queer with the plea in my view. Had some of the accused persons not participated, they would have clearly distanced themselves from the charge by pleading not guilty.
>
> [15] I am of the considered opinion that having allowed the above section to be invoked, having satisfied him or herself that the jurisdictional facts applicable to the above section were extant, it was not open to the learned magistrate to start embarking upon the enquiry that he or she did, resulting in the court entering the plea of not guilty. To that extent, I am of the opinion that the learned magistrate erred. The court was not at liberty, having convicted the accused persons on an informed basis,

> provided by their legal practitioners, to reopen the issue of the propriety of the convictions. The court was in this particular regard functus officio [and] could not, in the circumstances, properly change the plea.
>
> [16] It is important to note that there were no facts which came to the attention of the learned magistrate, properly or otherwise that may have served to belatedly question the correctness of the plea. In this regard, the accused did not adduce any evidence in mitigation of sentence and during which process new facts may have come to light and which would have properly served to imperil the correctness or appropriateness of the plea of guilty. In point of fact, it is apparent from the record of proceedings that only oral submission from the bar were made by the legal representatives of the accused persons and there is nothing said therein that would have served to impeach the correctness of the guilty pleas tendered on legal advice, it must be mentioned.

[6] The court considered that the magistrate had been misdirected in the circumstances in altering the accused's pleas. Importantly, and of pertinence to the current case, it also pointed out that even if the pleas had been appropriately altered in terms of s 113, that would not, of itself, afford any reason for the magistrate to recuse himself. It would not give rise to any reasonable apprehension that he would be unable to impartially try the case.

[7] In my respectful opinion, the court in *Boois* summed up the pertinent principles correctly when, with reference to the Constitutional Court's judgment in *The President of the Republic of South Africa v South African Rugby Union and Others* 1999 (4) SA 147 (CC) at para 48, it held (at para 28-30):

> [28] Viewed in its entirety, there is, in my view, no sound reason in law why the learned magistrate found himself unfit to continue sitting in the matter, assuming that his decision to enter a plea of not guilty had been correct in the first place. Whilst the decision to recuse oneself, especially mero motu is one of judicial conscience, and must ordinarily be respected, it should, however, have a reasonable basis in law and judicial officers should not be allowed to shirk their duty to sit in matters by unilaterally

recusing themselves when there is, objectively speaking, no sound basis in law for doing so. And importantly, the decision to recuse oneself mero motu, must not only be viewed from the subjective position of the judicial officer concerned. There is an important objective assessment that must be carried out and the test in this regard appears to some extent to be a tapestry of both objective and subjective elements.

[29] In this regard, the court, in the ***SARFU*** judgment said the following at page 177 D:

> 'At the same time, it must never be forgotten that than 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.'

It would appear to me that the same applies in cases where judicial officers decide suo motu to recuse themselves. There must be an objectively reasonable basis in law for doing so, quite apart from the judicial officer's subjective and sometimes parochial views and feelings.

[30] If it were otherwise, judicial officers would recuse themselves from hearing matters in respect of which they have some personal aversion, fear or foreboding, under the ruse of subjective reasons which may not be subjected to objective standards of scrutiny and this may yield the administration of justice and the esteem and dignity of the courts a shattering blow in the minds of the public. In that way, judicial officers may circumvent their duty to sit even in appropriate cases by employing the simple stratagem of recusing themselves suo motu for personal reasons when no objective or reasonable basis for so doing exists in law, logic or even common sense. Willy-nilly recusal on mero motu bases is therefore a practice that we should, as judicial officers, steer clear from like a plague, understanding as we should, that in light of our judicial oaths of office, we have a duty to sit, unless a proper case for recusal is evident or justly apprehended.[2]

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2 My only reservation about the passage quoted from the judgment in *Boois* is that I consider that the learned judge should have employed the term '*suo motu*' (of his own accord) where he used the expression '*mero motu*' (according to the merits of the case).

[8] With respect, the expression of the principles rehearsed in *Boois* case might have been assisted by a fuller quotation from paragraph 48 of the *SARFU* judgment, for immediately before the passage from *SARFU* quoted in para 29 of *Boois*, the Constitutional Court stated:

> '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.[3]

The underlined sentence neatly expresses the point that is applicable in the current matter. The Constitutional Court's judgment in *SARFU* was concerned with the circumstances in which judges of that court might recuse themselves, but the principles enunciated in para 48 of the judgment are applicable to judicial officers at every level of the judiciary; they have a duty to try the cases allocated to them unless there is some principled basis for them to decline to do so.

[9] In the current matter, the magistrate's decision to recuse himself *suo motu* followed on a request by both the plaintiff and the defendant on the sixth day of the trial for clarity as to the court's position on a matter that had been identified, in terms of magistrates' court rule 29(4), for determination as preliminary point, viz. whether it was competent, when the client had requested taxation thereof, for an action claiming payment of an attorneys' fees to be instituted before such taxation had occurred. Both parties felt that the point had not yet been

[3] My underlining for emphasis.

decided, whereas the magistrate, evidently perplexed by the parties' request, appeared to consider that it had. The magistrate adopted the attitude that if the parties were not satisfied with his finding, their remedy was to appeal. That was hardly a satisfactory position to adopt when neither of the adversaries was able to determine from what he had said what the finding on the preliminary point was. What were they to appeal against? And which of them was to be the appellant?

[10] We have not been provided with a transcript of the magistrate's finding on the preliminary point, but one would imagine that if he had upheld the point taken by the defendant, he would not have permitted the trial to continue, for that would have been futile if the action should not have been instituted until after the fees and disbursements that were claimed in it had been taxed. Whatever the magistrate had found, there could be no difficulty with him clarifying his decision in circumstances in which both adversaries professed not to have grasped what it actually was. That is what he should have done in the circumstances. He could not alter his determination, but the jointly held view of the protagonists that its effect was not determinable is, on the face of it, indicative that clarification was required.

[11] As events transpired, the parties to the action continued with the trial before the magistrate without having obtained clarity on the court's finding on the preliminary point. The proceedings were acrimonious, and it is clear that the magistrate perceived that both parties, who were self-represented attorneys, were also treating him with disrespect. He has confirmed as much in a statement filed in this review application. After a luncheon adjournment at the close of a tense session in court, the magistrate returned to court and announced, without prior warning, that he considered that he should recuse himself.

[12] The magistrate's announcement was made in the following terms:

> Na middag – tydens middagete moet die Hof eerder sê , het die hof bietjie nagedink oor die verrigtinge soos tot dusver, en die Hof oorweeg dit om te onttrek in die saak. So, julle kan nou in die Hof sê of julle saamstem of nie, en julle kan die Hof toespreek daaroor. Ek kan die saak uitstel vir julle, laat julle die Hof volledig daaroor toespreek, maar op hierdie stadium voel ek, en dit is my persoonlike mening, dat ek my moet onttrek in die saak. So julle moet maar net vir my sê wat is julle gevoel, as julle met my saamstem, dan doen ons dit so. As julle nie saamstem nie, dan gaan ek die saak uitstel, dan kan julle julleself voorberei en die Hof toespreek oor die aangeleentheid, maar ek is nou ongelukkig nou by daardie punt. En die rede hoekom die Hof dit sê is die hele saak in hierdie laaste drie dae, u weet, is dit vir my baie duidelik dat die hof word ook nou persoonlik ingetrek by julle twee se saak. Dit raak nou vir my 'n moeilike situasie, u weet. Gaan ek nou onafhanklik, sonder enige voorveroordele staan aan die einde van die dag omdat ek juis persoonlik ingetrek word hier. So dit is hoekom ek dit sê ek gee elkeen die geleentheid, julle kan maar net vir my sê wat sê julle daarop.

[13] The plaintiff thereupon immediately assured the magistrate that he did not consider that there were any valid grounds for the magistrate to recuse himself. He assured the first respondent that he did not consider that he was in any manner prejudiced or partial in his conduct of the proceedings. The plaintiff highlighted that the costs run up thus far in the conduct of the action were substantial and that the magistrate's recusal would therefore have a substantial financial impact on the parties. He said it would be 'a grave disappointment' (Afrik. *groot teleurstelling*) if the magistrate recused himself.

[14] The defendant echoed the plaintiff's assurance that the parties had no concerns about the propriety of the magistrate presiding in the action. He acknowledged that the trial was a difficult one. He called it a 'distasteful street fight' (Afrik. *onsmaaklike straatgeveg*) between the parties. He adopted the position that whilst he had no reason to object to the magistrate

continuing to preside over the trial, he understood the magistrate's discomfiture and therefore would understand if the magistrate withdrew himself from the case. He added that 'ten to one' he would have felt the same as the magistrate had he been in the magistrate's position. The defendant's remarks must be understood as coming from someone who considered that the trial should not have been running in any event because of the preliminary point he had taken about taxation. Significantly, however, the defendant offered no objectively plausible reason in law or principle in support of the magistrate's suggestion that he should *suo motu* recuse himself. All he offered was empathy with the magistrate's personal desire to escape from a messy trial.

[15] The plaintiff then indicated that he did not wish to make any further submissions on the question of the magistrate's possible recusal. He stated that if the magistrate decided to recuse himself he would take the decision on review; adding (inappropriately, but in keeping with the atmosphere in which the proceedings appear to have been conducted) that the issue might perhaps not end there, which the magistrate might quite reasonably have interpreted as a veiled threat of an extrajudicial complaint about the magistrate's conduct. The magistrate treated of the plaintiff's intimation in appropriate terms in the following exchange:

> HOF: U staan die oorweging van die Hof teen, maar het niks verder te sê op hierdie stadium nie?
> MNR VERMEULEN: Soos die Hof behaag, dit is so, Edelagbare.
> HOF: Oor wat u later met die saak gaan doen, is seer sekerlik u goeie reg.
> MNR VERMEULEN: Soos dit die Hof behaag.
> HOF: Om vir die Hof op hierdie stadium alreeds dit te sê, is volgens my disrespekvol.
> MNR VERMEULEN: Soos dit die Hof behaag, Edelagbare.
> HOF: Baie dankie.:

[16] The magistrate then proceeded immediately to deliver himself of the following decision:

> Aangesien daar geen verdere betoë in hierdie aangeleentheid is nie, is die Hof van oordeel, soos ek reeds gesê het, na – gedurende die middagete, het ek die aangeleentheid oorweeg, nie net die verrigtinge van vandag nie, maar vandat hierdie saak begin het en is hierdie Hof van oordeel op hierdie stadium, sy onafhanklikheid as 't ware aangetas is.
>
> En dit is dan hierdie Hof se bevinding dat die Hof op hierdie stadium onttrek van hierdie verrigtinge.

In the reasons for his decision filed by the first respondent in the current proceedings, he indicated that he had followed the approach adopted by a judge in the Gauteng Division in case no. SS126/18, which was not made available to us, but appears to me to be the matter reported in the law reports as *S v Serame* 2019 (2) SACR 407 (GJ) – a judgment of Grant AJ. In that matter there was actually an application for the judge's recusal. The learned acting judge refused the application, but recused himself nevertheless for his own personal reasons. It appears from para 55-61 of the judgment that the judge recused himself on account of what he perceived to be the disrespectful and unethical conduct of the legal representatives appearing before him. At para 59 of *Serame*, the acting judge said '*These concerns — as they apply to the prosecution and the defence — have made it impossible for me to continue to preside over the matter. The trust I am required and indeed must be able to have in everything said by counsel is irreparably damaged, and, on that basis, I have to recuse myself*'. In my respectful opinion, the judge's concerns did not constitute a proper reason for him to recuse himself, and he was wrong to have done so. It is a presiding officer's duty to exercise effective control over the proceedings and that includes, if necessary, appropriately dealing with misconduct by anyone appearing in them. It is noteworthy that Grant AJ made no reference in his judgment to the principles rehearsed in *SARFU*, and more particularly the sentence in para 48 thereof that I highlighted above.

[17] Applying the principles summarised in the introduction to this judgment, there was no basis in law or principle for the magistrate's recusal. His subjective discomfiture about continuing with the trial did not afford a proper basis for him to recuse himself, and his decision to do so for purely personal reasons was arbitrary and objectively unreasonable. It constituted a 'gross irregularity' within the meaning of s 22(c) of the Superior Courts Act 10 of 2013 and is accordingly susceptible to being set aside by this court on review.

[18] The following order will issue accordingly:

1. The decision of the first respondent, *suo motu*, to recuse himself from presiding in the trial of the action in Riversdale magistrate's court case no. 311/2014 is reviewed and set aside.

2. The first respondent is hereby directed to continue with the hearing of the trial on a date to be arranged by the parties, failing which, to be determined by the clerk of civil court at Riversdale.

3. No order as to costs is made in this application.

A.G. BINNS-WARD
Judge of the High Court

E.D. BAARTMAN
Judge of the High Court