IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 21562/2021

In the matter between:

MJ Vermeulen Inc.	**Applicant**
And	
The Honourable Magistrate Engelbrecht	**First Respondent**
Johannes Matthys Pretorius	**Second Respondent**

JUDGMENT ELECTRONICALLY DELIVERED

30 NOVEMBER 2022

Baartman, J

[1] This is an application to review and set aside the first respondent's judgment, dated 27 October 2021 (**the October judgment**), in which he dismissed the applicant's claim against the second respondent. The first respondent only opposes the costs order sought against him, in his personal capacity, not the merits of the review application. The second respondent abides this court's decision.

[2] The applicant, a firm of attorneys, had successfully represented the second respondent in litigation. Thereafter a dispute arose in respect of the applicant's costs, which caused the applicant to institute an action seeking its costs from the second respondent. The first respondent presided over the acrimonious trial and after it had run for 6 days, the first respondent *mero motu* recused himself. The applicant successfully brought that decision on review[1]. Thereafter, the trial resumed and ran intermittently for 9 days. The first respondent dismissed the applicant's claim and made no order as to costs. The applicant seeks to review and set aside the proceedings on the following basis:

> '4.1 The First Respondent committed several gross irregularities in the conduct of the Trial in that, inter alia, he:
>
> 4.1.1 reversed his own decision on the premature issue;
>
> 4.1.2 refused to allow important and admissible evidence;
>
> 4.1.3 refused to give Applicant the opportunity to address the court in argument at the end of the Trial, as required by Magistrates' Court Rule 29(14).
>
> 4.2 First Respondent exceeded his powers;
>
> 4.3 First Respondent was clearly biased against the applicant;
>
> 4.4 First Respondent failed to apply his mind to the matter properly;
>
> Whereby Plaintiff (applicant in the review) was deprived of his right to have a fair trial.'

[3] The grounds for review of magistrates' court proceedings are as follows[2]:

---

[1] MJ Inc. v Engelbrecht No and Another (19257/2019) [2020] ZAWCHC (6 November 2020) Binns-Ward J held:[18] ...The decision of the first respondent, *suo motu*, to recuse himself ...is reviewed and set aside.
2.The first respondent is hereby directed to continue with the hearing of the trial...'

[2] Superior Courts Act, 10 of 2013.

'22 Grounds for review of proceedings of Magistrates' Court [sic]

(1) The grounds upon which the proceedings of any Magistrates' [sic] Court may be brought under review before a court of a Division are –

(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 judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence. ...'

[4] I deal with the applicant's grounds for the review to the extent necessary for this judgment below. In respect of the complaint that the first respondent 'reversed his own decision' (4.1.1 above), the applicant alleged that during pretrial proceedings, the second respondent had alleged that the applicant had issued summons prematurely as the bill of costs had not been taxed. On 7 December 2018, the first respondent decided that issue in the applicant's favour as follows:

'Proceedings digital

Finding – Question of law

In this matter it follows that the taxation can only procced once the dispute is resolved. Plaintiff may proceed with the trial.'

[5] In the October judgment, the first respondent reversed that ruling as follows:

'...once we know the fee structure, the bill can be taxed, and the court can only then establish the reasonableness and fairness thereof.'

[6] The first respondent's inexplicable reversal of the earlier ruling was irregular and there was no basis for it. The trial proceeded on the basis that the applicant had not issued summons prematurely, as the bill of costs would only be taxed after the court had decided the remaining

issues in the trial. The parties endured a lengthy trial to resolve the remaining issues after the first respondent had ruled that summons had not been issued prematurely. The prejudice to the applicant is obvious; it is not in dispute that it is owed its costs of the successful litigation in which it represented the second respondent. The first respondent had to rule on the outstanding issues so that the applicant could collect those costs. Margo J[3] held as follows:

'...However, it is an established principle that the Court will not set aside proceedings on review if it is satisfied that no substantial wrong was done to the applicant, ie that the irregularity was not likely to prejudice the applicant...'

[7] I am persuaded that the irregularity caused the applicant substantial wrong and that the proceedings stand to be reviewed and set aside on this ground.

[8] The applicant further alleged that the first respondent had refused 'to allow important and admissible evidence' (4.1.2 above). The applicant alleged as follows:

'7. ...No specific tariff for Applicant's services was agreed between the parties and when Second Respondent refused to pay, Applicant eventually sued him for "fair and reasonable fees" for the work done. ...

9. A pre-trial conference was held...The following disputed issues appear from the minute:

...9.2 Whether the fees and disbursements charged in Applicant's account are fair and reasonable:...

11. As the fact that no specific tariff for Applicant's services was agreed ...the main remaining issue to be decided was therefore whether the Applicant's account for work done – essentially the amount claimed – was "fair and reasonable" '.

---

[3] *Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg, and Another* 1978 (4) SA 790 (T) p 792H–793C.

12. Applicant filed expert witness summaries...for the purpose of assisting First Respondent – who was clearly not an expert on the issue of reasonable legal fees – ...

15. I gave detailed evidence of the work done and the amount charged for each item...

19. after the factual evidence was concluded...Plaintiff then had to close the applicant's case without an opportunity to place expert evidence before Court, due to First Respondent's refusal to allow expert evidence on the aspect of costs. Second Respondent closed his case without adducing any evidence...

31. The First Respondent refused to hear the evidence of two expert witnesses of whom notice were given. They would have given expert opinions on what would constitute fair and reasonable compensation for the work done.'

[9] Neither respondent has opposed the application on the merits, therefore I accept the applicant's version of the events. In the circumstances of this matter, the refusal to hear expert evidence was irregular and the applicant was prejudiced. The evidence was relevant and would have assisted the first respondent. The proceedings stand to be reviewed and set aside on this ground.

[10] The applicant further bemoans the first respondent's refusal to allow the parties to address the court in oral argument (4.1.3 above). The applicant alleged that it had suffered prejudice as follows:

'20. First Respondent in a high-handed manner ruled that he would only receive written heads of argument and that he would not allow the Plaintiff opportunity to address him in oral argument – not in court and not virtually. I objected strongly and insisted that at least Plaintiff should have the opportunity to address the court, but to no avail. ...

35. In the instant case this was particularly prejudicial to the Applicant: the irregularities mentioned...could all have been addressed – and hopefully cleared up – in oral argument if it was raised by the First Respondent and had he not been biased. However, the Applicant was denied that opportunity. ...'

[11] In the circumstances of this matter, denying the applicant's request to address the court in oral argument was irregular and prejudiced the applicant. The first respondent would have benefitted from the oral argument and the applicant would have been afforded the opportunity to influence the court's decision. I find the refusal to hear oral argument, in the circumstances of this matter, inexplicable. The proceedings were tainted by this irregularity, which, in conjunction with the irregularities discussed above, was substantial and prejudiced the applicant. The applicant has satisfied the test for setting aside the proceedings on review.

[12] The applicant further complained that the first respondent had exceeded his powers and that he had failed to apply his mind to the matter (4.2 and 4.4 above). The papers filed in this application confirm the correctness of those allegations. I do not intend to deal with those 2 grounds in more detail. However, it is necessary to deal with the allegation of bias (4.3 above), as that is relevant to the applicant's prayer for costs against the first respondent in his personal capacity. The allegations of bias are made as follows:

> '**Bias**
>
> 38. I submit that the above irregularities and the First Respondent's *mero motu* recusal that had to be set aside on review, also show that the First Respondent was biased against the Applicant and allowed that bias to influence his approach to the matter materially.'

[13] I accept that the cumulative effect of the irregularities dealt with above and the previous review application have caused the applicant to believe that the first respondent was biased against it. The first respondent seems to have been overwhelmed and unable to deal with the issues in dispute – even at pretrial stage, as he seemed not to have understood the import of his ruling. Evidently, that was his reason for his recusal referred to above. That is reprehensible and has caused the parties to incur unnecessary expenses. In my view, the first respondent was simply unable to deal with the action and his

reprehensible conduct was motivated by his own inability. However, that is not the test for bias. In *Roberts*[4], the court cautioned as follows:

'[36]...The members of the court applying that test are by training and experience as judicial officers themselves, better equipped, it is true, to exercise objective judgment than a lay litigant but it is that very training and experience which also give them a subjective position and knowledge not possessed by the notional reasonable person. They might know that a judicial officer's behaviour and comment unfortunately can, on infrequent occasions, be inappropriate but without any real danger of bias existing. They may more readily, therefore, in a given case regard a danger of bias as not real where the reasonable impression of bias would nonetheless reasonably lodge in the mind of a reasonable person suitably informed. Essentially, the real danger test depends on the view from the Bench; the reasonable suspicion test depends on the view from the dock. ...Given a choice, the reasonable suspicion test accords better, in my opinion, with the provisions and spirit of the Constitution. It is more conducive to acceptance by the accused or the litigants that proceedings will in the end be fair. And the constraining effect on those presiding over trials and tribunals is salutary.'

[14] In applying that test to the accepted facts of this matter, I am constrained to accept that although the applicant, a firm of attorneys, is no lay litigant, the incomprehensible refusal to allow oral argument, considering the acrimony in the litigation, the successful review application and the irregularities referred to above, led to the reasonable apprehension of bias on the part of the first respondent. I say this mindful of the following warning given in *Jewish Board*[5]:

'[57] Judicial officers in this Republic are also constitutionally bound to discharge their duties impartially and without bias...

[58] All this to say that the law does not suppose the possibility of bias. If it did, imagine the bedlam that would ensue. There is an assumption that judges are individuals of careful conscience and intellectual discipline, capable of applying their minds to the multiplicity of cases which will seize

---

[4] *S v Roberts* 1999 (2) SACR 243 (SCA).
[5] *South African Human Rights Commission OBO South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC).

them during their term of office, without importing their own views or attempting to achieve ends justified in feebleness by their own personal opinions.

[59] The presumption of impartiality has the effect "that a judicial officer will not lightly be presumed to be biased". ...this is a presumption that is not easily dislodged. ...'(Internal footnotes omitted.)

[15] However, the reasonable apprehension of bias is not to be equated, in the circumstances of this matter, with malice. In the latter case, the judicial officer opens him/herself up for a 'de *bonis propriis'* costs order[6]. This is not such a case. As indicated above, the first respondent only opposed the costs order sought against him in his personal capacity. The cost order was sought whether he opposed the merits or not. Had he opposed the merits, the first respondent would have run the risk of a costs order granted against him[7].

[16] I have found that the first respondent's actions prejudiced the applicant. I am persuaded that the first respondent was overwhelmed in his inability to deal with the trial and did not maliciously attempt to prejudice the applicant. Both parties to the litigation have been prejudiced. The Magistrates' Commission is the statutory body seized with training and disciplinary aspects of presiding officers in the lower courts[8]. A copy of this judgment will be sent to the Commission to undertake the necessary enquiry into the obvious training need and any other disciplinary action required. The need for training is underscored in applicant's heads of argument, as follows:

'8. The review application was served on both respondents...

9. In response First Respondent filed a document...headed "Notice of motion (Review Application)".

---

[6] *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A).
[7] *Magistrate Pangarker v Botha and Another* 2015 (1) SA 503 (SCA).
[8] The Magistrates Act, 90 of 1993.

10. It is not clear from this document if the First Respondent understands the nature of the review, as he states that "the matter is finalised and no appeal was lodged". He also states that he "trust(s) that applicant will submit the entire transcription of the matter to give a full picture of the proceedings". However, it is clear ...that this is the duty of the First Respondent in this case and not the Applicant...

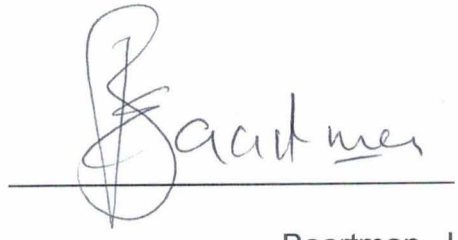
17. The First Respondent has despatched to the Registrar an electronic version of the court file, including...hand-written notes. He has not despatched to the Registrar a transcript of the evidence presented during the trial, as the rule requires.'

Conclusion

[17] I, for the reasons stated above, make the following order with which Slingers J concurred.

(a) The judgment delivered under Riversdal Magistrates' Court number 20/2018 by magistrate S Engelbrecht is reviewed and set aside.

(b) No order as to costs.



Baartman, J

I concur.

Slingers, J