THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 736/2007
No precedential significance

MARTHINUS JOHANNES BOTHA **Appellant**

and

REGIONAL MAGISTRATE COX N.O. **First Respondent**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Second Respondent**

Neutral citation:	*Botha v NDPP* (736/2007) [2009] ZASCA 42 (31 March 2009)
Coram:	STREICHER, MTHIYANE, CACHALIA, SNYDERS JJA and HURT AJA
Heard:	6 MARCH 2009
Delivered:	31 MARCH 2009
Summary:	**Application for recusal - alleged bias on part of magistrate ─ test for recusal not met ─ application to lead further evidence dismissed ─ evidence wilfully withheld.**

ORDER

On appeal from: Transvaal Provincial Division (Hartzenberg J & Nthai AJ sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

STREICHER JA (MTHIYANE, CACHALIA, SNYDERS JJA and HURT AJA concurring):

[1] This is an appeal against the dismissal by the High Court, Pretoria (per Hartzenberg J with whom Nthai AJ concurred) of an application to review the refusal by a magistrate, the first respondent, to recuse himself during a criminal case. The appeal is with the leave of the court below.

[2] The appellant is a schoolteacher. During 1985 he taught at a school in Vanderbijlpark and in 1991 he was the deputy headmaster of a school in Potchefstroom. In the criminal case referred to he is charged with the rape of a schoolgirl during 1985 and the indecent assault, during 1991, of a schoolgirl who was in matric at the time.

[3] One of the witnesses called by the state was the husband of the complainant in respect of the indecent assault charge, Mr Smit, who was a teacher at the Potchefstroom school where the appellant was the deputy

headmaster and the complainant a pupil. During his cross-examination it was put to him that rumours of an affair between him and the complainant came to the knowledge of the appellant and that the appellant confronted him and the complainant with such rumours. Smit denied these allegations as also an allegation that he asked the headmaster for permission to accompany the complainant to the school's matric dance. The purpose of the questions was presumably to show that Smit had an axe to grind with the appellant. Shortly thereafter the first respondent asked Smit what the name of the headmaster was, to which he replied that it was Mr Awie van Rensburg. Van Rensburg was subsequently called as a witness. He denied that he was aware of any of the alleged rumours.

[4] After Van Rensburg had started giving evidence the appellant's attorney noticed an entry in the case docket of the state which read:

'Mnr Awie van Rensburg is woonagtig te Hermanus en LDS het opdrag gegee that OB self met getuies konsulteer.'

The appellant's attorney asked the investigating officer, Captain Potgieter, what 'LDS' stood for, to which she replied 'die landdros'.

[5] During an adjournment of the criminal trial and in front of the first respondent's office, the first respondent had a discussion with a colleague, Ms Schutte and an attorney, Dr De Kock. De Kock is a member of the governing body of the Hoër Volkskool Heidelberg and had previously been involved in a disciplinary enquiry against the appellant who is the headmaster of the school and who had been accused of sexual misdemeanours. It is common cause that De Kock, whose children attend the school, regard the appellant as '`n remmende invloed' at the school.

[6] The entry in the docket and the admission by the first respondent during the criminal trial of the evidence of Dr Irma Labuschagne formed the basis of an application by the appellant, at the end of the state case, for the recusal of the first respondent. The admission of the evidence of Dr Labuschagne is, however, no longer relied upon as a ground for the recusal of the first respondent consequently nothing further need be said in respect thereof.

[7] Both the appellant and the state tendered evidence in respect of the application for recusal. But, before the evidence was tendered, the first respondent stated in open court that he denied that he ever communicated with the investigating officer. He stated that he did not know how it came about that the entry was made in the docket. The appellant thereafter tendered evidence in support of his application and it was only during the course of the hearing of such evidence that the discussion between the first respondent and De Kock came to be relied upon as an additional ground for the recusal of the first respondent. Mr Minnaar gave evidence in respect of the discussion. According to him the first respondent joined a discussion between Schutte and De Kock. The discussion took place openly in front of the first appellant's office and, except for a short while, when Schutte visited the bathroom, she was present during the whole of the discussion. According to Schutte there were people in close proximity. She went to the bathroom to wash her hands and could not have been away for more than a minute. The discussion was about a prosecutor and when she returned she did not get the impression that something else had been discussed in her absence.

[8] The state called the prosecutor and the investigating officer to testify about the entry in the docket. The investigating officer admitted that she told the appellant's attorney that 'LDS' stood for 'landdros' but stated that she used it as an abbreviation for the state, the prosecutor or the court. She stated that she never spoke to the first respondent and that she had not received an instruction from a magistrate. The request that she should personally obtain a statement from Van Rensburg came from the prosecutor. The prosecutor testified that she could possibly have given the instruction to the investigating officer. It was never suggested to her that she received the instruction from the first respondent.

[9] The first respondent dismissed the application for his recusal whereupon the appellant applied to the court below for his decision to be reviewed. In his founding affidavit the appellant alleged that the admission of Dr Labuscagne's evidence and the entry in the docket indicated unequivocally that the first respondent was biased against him. He alleged furthermore that the evidence of Captain Potgieter during the hearing by the first respondent of the recusal application and the discussion between De Kock and the first respondent created the impression that the first respondent was biased against him.

[10] The first respondent, in his answering affidavit, denied that he was biased against the appellant. In respect of the entry in the docket he referred to the evidence led in respect of the recusal application and stated that the investigating officer never received the instruction from a magistrate. In respect of the conversation with De Kock he stated that the conversation was not about the appellant's criminal case and annexed a supporting affidavit by De Kock confirming that that was the case.

[11] The court below held that it was clear on the evidence that the first respondent had not given an instruction to the investigating officer to consult with Van Rensburg and also that the first respondent had not discussed the appellant's case with De Kock. He held that any suspicion of bias on the part of the first respondent was not based on reasonable grounds.

[12] On appeal before us the appellant applied for leave to introduce new evidence. The evidence he wished to introduce was that of his attorney. It was to the effect that another attorney, Mr Okes, informed him 'off the record', during the time that the application for recusal was being heard, that the first respondent had told him that he had given the instruction that the investigating officer should personally obtain a statement from a state witness. Okes told him that the first respondent sought his advice in this regard. Because the appellant's attorney thought that there was sufficient evidence for a recusal he did not disclose his conversation with Okes to the appellant until after the dismissal of the recusal application. The first respondent filed an answering affidavit and also an affidavit by Okes in which these allegations are denied.

[13] We dismissed the application to lead further evidence. In terms of s 22 of the Supreme Court Act 59 of 1959 this court has the power on the hearing of an appeal to receive further evidence. However, in the interests of finality the power that this court has will only be exercised if it is satisfied that the interests of justice would be best served by receiving the evidence. It is generally accepted that the following test should be applied:

'(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.'

(See *S v De Jager* 1965 (2) SA 612 (A) at 613C-E)

[14] The appellant failed to satisfy us of requirements (a) and (b). The evidence of the appellant's attorney is hearsay evidence that will not be confirmed by Okes and is therefore inadmissible. In any event, if it is true that Okes told the appellant's attorney what he is alleged to have told him, he is a thoroughly unreliable witness as he is now denying under oath that he did so. Yet another reason why it is unlikely that the evidence will be accepted as true is the improbability that the first respondent, while an application for his recusal was pending, would have told Okes, an attorney, with whom he had no special relationship, that he had given the instruction. More so in the light of the fact that he had denied, in open court, that he had given the instruction. The appellant's explanation for not having tendered 'the evidence' in the review application is also unacceptable. His attorney was aware of the evidence and deliberately decided not to make use thereof. A party cannot be allowed to wilfully withhold evidence, wait to see whether the outcome is favourable and then, when it is not, have the case reopened.

[15] In my view there is no basis upon which it can be held that the instruction to obtain a statement from Van Rensburg emanated from the first respondent. Although the investigating officer's note says that the instruction came from a magistrate it did, according to her, not come from a magistrate. The appellant criticised her evidence but even a rejection of her evidence does not assist the appellant. The position remains that there is no evidence that the instruction came from the first respondent while there is the denial by the first respondent that he gave the instruction. The

appellant submitted that in the light of the fact that the first respondent elicited the name of Van Rensburg he probably gave the instruction. There is no merit in this contention. It is common cause that once the identity of the headmaster concerned had been established the prosecutor instructed the investigation officer to obtain a statement from him. A finding that it was the first respondent and not the prosecutor who gave the instruction that the investigating officer should personally obtain the statement, is therefore wholly unjustified. There is no reason to disbelieve the first respondent's evidence that he never gave the instruction.

[16] In respect of the conversation between the first respondent and De Kock there is likewise no basis upon which it can be held that the first respondent discussed the appellant's case with De Kock. On the evidence presented he did not do so.

[17] It follows that there is no basis upon which it can be held that the first respondent was actually biased against the appellant. The question remains whether objectively there existed a reasonable apprehension that the first respondent may be biased. The test for recusal on that basis was formulated as follows in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA (CC) 147 at para 48:

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has 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 onus rests on the appellant. On the evidence presented the correct facts are that the first respondent did not give the relevant instruction to the investigating officer and that he had a conversation with De Kock, in

public, about a prosecutor and not about the appellant's criminal case. On those facts there can be no question of a reasonable, objective person apprehending that the first respondent would not bring an impartial mind to bear on the adjudication of the case.

[18] In the result the appeal is dismissed with costs.

PE STREICHER
JUDGE OF APPEAL

Appearances:

For Appellant:	HP West
	Instructed by:
	Locketts Attorneys, Nigel
	Naudes, Bloemfontein
For 1st Respondent:	S M Lebala
For 2nd Respondent:	L Pienaar
	Instructed by:
	State Attorney, Pretoria
	State Attorney, Bloemfontein