

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Auanga Olavi	Case No: CR 129/2023
High Court MD Review No: 995/2023	Division of Court: Main Division
Heard before: January et J Christiaan AJ	Delivered on: 16 November 2023
Neutral citation: <i>S v Olavi</i> (CR 129/2023) [2023] NAHCMD 746 (16 November 2023)	
The order: a) The court order of 09 June 2020 of the magistrate to recuse herself is confirmed. b) It is ordered that the trial proceeds before a different magistrate.	
Reasons for order:	
Christiaan AJ (concurring January J) [1] This is a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 as amended (the CPA). The case was referred by the presiding magistrate for the District of Rundu, Mrs Olaiya. She proposed that this court confirm the order she	

made on 09 June 2020 to recuse herself because the magistrates in Rundu are reluctant to proceed with the trial, as they are not satisfied with the ground of recusal noted on the record of proceedings.

[2] I proceed to explain the issue at hand. On 23 September 2021 the accused appeared before the district court of Rundu on a charge of Theft by false pretense. The accused is represented. Over the course of two years, the matter was postponed for plea and trial, the accused pleaded not guilty on 22 February 2022 and admissions were placed on record in terms of s 115 of the CPA and were recorded as such in terms of s 220 of the CPA. The matter was postponed for trial on 14 June 2022 and three witnesses were warned for court. In the meantime, the accused was warned for court.

[3] The matter was expected to commence with trial on 14 June 2022. On this date the matter was postponed to 28 October 2022 for continuation of trial. The following was placed on record on that date:

'PP: The lawyer of the accused is at the high court. The court recorded admissions in terms of section 220 of Act 51/1977.

D. Boois: I confirm my appearance on behalf of Mr Apolus. He is at high court. At this stage I cannot proceed as I was not given any instructions to proceed. He has indicated that since he made the admissions it will not be prejudicial to his client if the matter proceeds before another magistrate.

Court: There is one witness among the witnesses who will not make this court to be object. Hence I recuse myself from trying this matter.

PP: To the 15/11/2022 for FTD

Ms. D. Boois

I confirm the date

See court order. ' *sic*

[4] That was the entire reason for the recusal of the magistrate. At the end of that day's court proceedings, the magistrate recused herself from hearing the matter. She postponed the case to a subsequent date for fixing of a new trial date.

[5] On 15 November 2022 the presiding magistrate made an order that the reasons provided by magistrate Olaiya are not ones she can use to recuse herself from the matter and that the matter will be forwarded to the Acting Divisional Magistrate to make a decision. The matter was remanded to 24 January 2023. On 24 January 2023 a decision was made by the Divisional Magistrate that the matter start de novo before another magistrate, but the presiding magistrate was not satisfied, since Ms Olaiya did not place her reasons for recusal properly on record.

[6] On 29 May 2023 Mrs Olaiya addressed a letter to this court wherein she explains the reasons why she recused herself. This letter is annexed to the special review. The magistrate re-iterated that there is a witness, amongst the listed witnesses that will be called by the state to testify, with which she had a prior court encounter and in her opinion, she as magistrate will be biased because of what transpired, without giving full details of the encounter she had with the witness. The magistrate recused herself *mero motu*.

[7] The test for recusal has been stated and restated in this jurisdiction and elsewhere¹ and that test 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.'² The test is 'objective and . . .the onus of establishing it rests upon the applicant.'³

[8] It is now settled law that in certain circumstances, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is likelihood of bias on the part of the judicial

¹ *Sikunda v Government of the Republic of Namibia* (1) 2001 NR 67 HC at 831-J; *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008(2) NR 753 SC at 769H-770A. *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725) at 173; *S v Malindi and others* supra at 969 G-I.

² See *President of the Republic of South Africa and other v South African Rugby Football Union and other*, supra at 177D-G.

³ See *President of the Republic of South Africa and other v South African Rugby Football Union and other*, supra at 175B-C.

officer, that is, that he will not adjudicate impartially.⁴

[9] In the matter of *S v Stewe*⁵, the Supreme Court made the following remarks regarding *mero motu* recusals by judicial officers:

‘It is indeed correct that on occasion a judicial officer may recuse himself or herself *mero motu* without any prior application and it happens in practice now and again. But whenever it occurs the applicant or the judicial officer who raises recusal should cross the high threshold needed to satisfy the test for recusal. The application for recusal or where it is raised *mero motu* by a judicial officer, cannot be done in vacuo or on the judicial officer’s predilections, preconceived, unreasonable personal views or ill-informed apprehensions. To do so would be to cast the administration of justice in anarchy where judicial officers would be at liberty to make choices of which cases to preside over and which not/or applicants to go on a judge forum shopping hoping to get the one who might be favourable to their cases. Judicial officers 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.⁶ (Our emphasis)

[10] In considering the matter at hand, though the recusal order was scant, the basis thereof was that there is some reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer, and that is that she will not adjudicate impartially. This is amplified by the magistrate’s recollection of the encounter that she had with one of the state witnesses in this matter.

[11] It is clear from the facts as disclosed in the magistrate’s letter that there was a court history between her and one of the state witnesses, as she stated that she had a previous encounter with one of the state witnesses and will not bring an impartial mind to the matter. It is not clear what the basis of the encounter is, as the magistrate is of the view that she is not duty bound to disclose the previous encounter with one of the parties to the hearing. She clearly indicated that she is not comfortable to hear the matter at

⁴ See footnotes 1; 2 and 3 above.

⁵ *S v Stewe* (SA 2 of 2018) [2019] NASC 3 (15 March 2019).

⁶ Footnote 2 at 177D-E.

hand and noted her genuine excuse for the recusal based on ethical reasons.

[12] Undoubtedly, it was procedurally incorrect not to have disclosed the full reasons for the recusal. In this case, the fact of the matter is that the presiding officer has adjudicated criminal cases wherein the particular witness appeared before her, a fact that clearly unsettled the magistrate. Despite the omission by the magistrate, it appears *prima facie* on the facts of this matter that it will not be in the interest of justice to remit the matter, merely for a second proper recusal order to be made, which will then further delay the commencement of the trial.

[13] For the above reasons, the following order is made:

- a) The court order of 28 October 2022 of the magistrate to recuse herself is confirmed.
- b) It is ordered that the trial proceeds before a different magistrate.

P CHRISTIAAN ACTING JUDGE	HC JANUARY JUDGE