REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 60/2013

In the matter between:

THE STATE

and

REWARDT ARIBEB **ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1209/2013

Neutral citation*:* *State v Aribeb* (CR 60/2013) [2013] NAHCMD 273 (04 October 2013)

Coram: DAMASEB JP and HOFF J

Delivered: **04 October 2013**

Summary: A magistrate who intends *mero motu* to recuse himself or herself may only do so in certain circumstances for instance 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 a likelihood of bias on the part of the judicial officer.

In such an instance the magistrate must afford the parties ie. the prosecutor and the accused (or his or her legal representative) an opportunity to address the court on the issue of the intended recusal by the magistrate.

Where the record of proceedings disappeared before a conviction the magistrate and/or clerk of the court as part of their administrative duties must compile afresh the record of the completed part of the trial in any manner which is fair and reliable as possible – The magistrate may thereafter in terms of s 186 of Act 51 of 1977 recall any witness to give evidence in respect of the correctness of the reconstructed record and such a witness will then be subjected to cross-examination on the correctness of the record and on the contents of his or her evidence against the accused – Thereafter the trial takes its normal course.

A court of review may not in such a case order that proceedings should start *de novo*.

ORDER

(a) To the extent that it is necessary the *mero motu* recusal by the presiding magistrate is set aside.

(b) The matter is referred back to the presiding magistrate to reconstruct the record as well as possible along the lines discussed herein, to hear the accused on the validity of the reconstructed record and thereafter to proceed with the trial.

SPECIAL REVIEW JUDGMENT

HOFF J (DAMASEB JP concurring):

[1] This matter was sent on special review by magistrate L Pretorius attached to Gobabis Magistrates Court in which he pointed out that magistrate Boluwade who was previously attached to that court had *mero motu r*ecused herself from a partly heard case.

[2] It appears from the record that the accused person had pleaded to a charge of contravening the provisions of s 43(1) of the Anti-Corruption Act 8 of 2003 before magistrate Boluwade in Gobabis. A state witness thereafter testified and was cross-examined by Mr Scholtz, the legal representative of the accused, and the matter was then postponed.

[3] When the proceedings resumed on 18 May 2011 it appears that the record of the proceedings had gone missing. The presiding officer, Ms Boluwade, stated in court that she had in the interim been transferred to Rundu, that what had happened must have been an 'inside work', that she would not 'hold fast unto this matter', and thereafter announced that she was recusing herself and that the case must start *de novo* before another magistrate.

[4] Mr Pretorius, in his letter, stated that the presiding magistrate could not have recused herself since there was no enmity between her and any one of the parties, that there is 'no similar case between the magistrate and another person in which judgment has not been pronounced', that the magistrate has not acted as a legal representative for any of the parties in the case, and that the magistrate has not noted that she has an interest in the case or that she would be biased.

A magistrate may only recuse himself or herself *mero motu* in certain circumstances.

[5] In *S v Malindi and Others* 1990 (1) SA 962 (A) Corbett CJ in dealing with the discharge of an assessor in terms of s 147 of Act 51 of 1977 considered the common law principles regarding recusal and remarked as follows on 969G-970I:

'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v Radebe* 1973 (1) SA 796 (A) and *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, 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 a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.

Normally recusal would follow upon an application (*exceptio recusationis*) therefore by either or both of the parties, but on occasion a judicial officer may recuse himself *mero motu*, ie without any such prior application [...]

It would thus seem that at common law the recusal of an assessor is a proceeding in open court and that it is an issue upon which the parties would be afforded an opportunity to be heard. Obviously, this would be so where one of the parties moved for the assessor's recusal; and, in my opinion, it should also be so where the assessor or *the court* acts *mero motu*. A recusal would normally result in the proceedings being quashed and a new trial being directed'.
(Emphasis provided).

[6] It is common cause that the parties (ie the State and the accused or his legal representative) were not given the opportunity to address the presiding magistrate on the issue of her intended recusal. The magistrate should have afforded them the opportunity to address her on this issue.

[7] In any event there is no apparent lawful reason why the presiding officer had to recuse herself, except to state that it appears the presiding magistrate was annoyed when she was informed that the record of the proceedings went missing.

[8] In *S v Haibeb* 1994 (1) SACR 657 (Nm) it was held that it is the duty of the presiding officer to keep an intelligible record of the proceedings.

[9] It appears to me that different procedures apply in respect of the reconstruction of a record where an accused person has been convicted or sentenced and the instance where the accused has not yet been convicted.

[10] In the first instance (ie after conviction or sentence) the clerk of the court would be directed to reconstruct the record with the assistance of state witnesses, the magistrate, the prosecutor, the interpreter or the stenographer. This reconstructed record is then submitted to the accused (or his or her legal representative) to obtain his or her agreement with it. The response of the accused is recorded under oath. (See *S v Gumbi* 1997 (1) SACR 273 (W); *R v Wolmarans* 1942 TPD 279; *S v Makanji en Andere* 1974 (4) SA 113 (T); *S v Whitney* 1975 (3) SA 453 (N); *S v Stevens* 1981 (1) SA 864 (C); *S v Quali* 1989 (2) SA 581 (EC); *S v Joubert* 1991 (1) SA 119 (A). In such a case the clerk of the court endeavours to obtain the best secondary evidence regarding the content of the record and there is no room for a second 'trial'.

[11] The situation is different where the record disappears before conviction. In *S v Catsoulis* 1974 (4) SA 371 TPD the following appears from the headnote:

'Where the record of a part-heard criminal trial in a magistrate's court is lost there is no legal ground upon which a re-trial at this stage can be ordered either by the trial court or by the Supreme Court. In such a case the position is as follows: that the trial was, up to the stage that it had reached, a proper, valid trial and there is neither reason nor jurisdiction to declare the part-heard trial to be a nullity; that it is the administrative task of the magistrate and/or the clerk of the court to compile afresh a record of the completed part of the trial in any manner which is fair and as reliable as possible; that this embraces an administrative enquiry and action and has nothing to do with the trial as such; that at the resumption of the trial, after the record has been restored as well as possible, the magistrate is in terms of section 210 of the Criminal Procedure Act, 56 of 1955, entitled to recall any witness to give evidence, to lay his reconstructed evidence before him and to ask whether it tallies with the evidence which he originally gave at the trial. The witness will then be subject to cross-examination by the defence on his answers to the magistrate's questions on the correctness

of the record and on the contents of his evidence against the accused. Thereafter the trial can take its normal course'.

Section 186 of Act 51 of 1977 is similarly worded as s 210 of Act 55 of 1956.

[12] This procedure was followed in *S v Matthys* 1985 (1) SA 209 CPD where it was also held that a court of review is not empowered to order a re-trial, ie order that the proceedings should start de novo, where the record of the case went astray before conviction in a magistrate's court

(See also *S v Rakgoale* 2001 (2) SACR 317 TPD).

[13] In my view this is also the procedure to be followed in respect of the proceedings in the magistrate's court in Gobabis.

[14] In the result the following orders are made:

(a) To the extent that it is necessary the *mero motu* recusal by the presiding magistrate is set aside.

(b) The matter is referred back to the presiding magistrate to reconstruct the record as well as possible along the lines discussed herein, to hear the accused on the validity of the reconstructed record and thereafter to proceed with the trial.

E P B HOFF

Judge

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P T DAMASEB

Judge-President