



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: CC 19/2013

In the Recusal Application of:

MARCUS THOMAS

In Re:

THE STATE

and

MARCUS THOMAS

ACCUSED NO 1

KEVIN DONNEL TOWNSEND

ACCUSED NO 2

Neutral citation: *S v Thomas* (CC 19/2016) [2017] NAHCMD 181 (03 July 2017)

Coram: LIEBENBERG J

Heard: 05 June 2017

Delivered: 03 July 2017

Flynote: Criminal procedure – Recusal application – Applicant has reasonable apprehension of bias – Apprehension based on order of court –

Onus – Applicant’s apprehension must be reasonable and based on reasonable grounds.

Summary: Applicant was evaluated in terms of s 77 and 78 of the Criminal Procedure Act 51 of 1977 and found to have been criminally responsible. In its ruling the court found, in respect of the offences charged, applicant to have been capable of appreciating the wrongfulness of his actions and to have acted in accordance with such appreciation. On the strength of the court’s finding applicant applied for the recusal of the presiding judge claiming that the court had prejudged an issue which was still live and significant in the matter. It is common cause that at the time of the ruling no evidence had been adduced about applicant having acted in relation to the offences charged. When reading the order made in context with the judgement, it is evident that the court at no stage made any finding on the alleged commission of the offences charged and that same still had to be proved during the trial. Court was accordingly satisfied that, based on the correct facts, applicant failed to show reasonable apprehension that the presiding judge will not bring an impartial mind to bear when adjudicating the matter. Application dismissed.

ORDER

The application for recusal is dismissed.

RULING: RECUSAL APPLICATION

LIEBENBERG J:

Introduction

[1] This is an application for the recusal of the presiding judge from hearing the case, for the reasons set out in the applicant's¹ founding affidavit. Though accused no 2 is no party to the application, he equally filed an affidavit in which he shares applicant's sentiments in support of the application. The State (respondent) opposes the application.

[2] Applicant in the founding affidavit states that he, together with accused no 2, have been arraigned on multiple charges as set out in the indictment and to which they have pleaded not guilty. Furthermore, that until now, the State has not yet established any factual proof that he committed any of the offences (acts or omissions) of the offences charged. The crux of the application is directed at the court's ruling on 19 October 2016 as regards applicant's criminal responsibility which, in applicant's view, constituted an irregularity vitiating the fairness of the proceedings. In addition, applicant contends that the court committed a further irregularity by proceeding in terms of s 78 of the Criminal Procedure Act (the Act)² on *mero motu* basis, in the light of the peremptory provisions of s 77(5) of the Act.

Background

[3] For a better understanding of the present proceedings, it seems to me necessary to give a brief exposition of events leading up to the application under consideration. In order to do so, would inevitably require paraphrasing from two earlier judgements delivered on the issue of the criminal responsibility of the applicant.

[4] It seems common cause that on 03 November 2014 and whilst in custody at the Windhoek Correctional Facility, applicant attempted to escape and in the process sustained some injuries. On 07 November 2014 applicant and his co-accused pleaded not guilty on all counts where after the trial commenced. During the testimony of the second State witness proceedings were

¹ Accused No 1 in the main trial.

² Act 51 of 1977.

interrupted by an application by applicant's erstwhile legal representative to have applicant, for the reasons stated, referred for psychiatric evaluation. The court granted the order in terms of s 77(1) and directed that applicant be examined and reported on as provided for in s 79 of the Act. For reasons set out in the judgment³ it had been found that the conclusion reached by the psychiatrist was premature and could not have been reached without a proper assessment by either a neuro-psychiatrist or neuro-psychologist. In view thereof the court on 03 August 2015 ordered a re-evaluation in terms of s 79(1)(b) of the Act, this time to be conducted by two psychiatrists of which one is not in full-time service of the State.

[5] As reflected in para 25 of the judgment the court, for reasons stated, decided to also refer applicant for evaluation in terms of s 78 to enquire into his criminal responsibility at the time of the alleged offences being committed. Briefly, the need for invoking the provisions of this section arose from evidence presented about the applicant's long-term memory loss which suggested to the court that he might have suffered from a mental defect rendering him incapable of appreciating the wrongfulness of his actions, or an inability to act in accordance therewith.

[6] Section 78(1) and (2) of the Act provides as follows:

'(1) A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable-

- (a) of appreciating the wrongfulness of his act; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his act,

shall not be criminally responsible for such act.

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a

³ *State v Thomas* (CC 19/2013) [2015] NAHCMD 177 (03 August 2015).

reason not be so responsible, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'

(Emphasis provided)

[7] Consequential to the order, two psychiatric reports issued by Prof Zabow and Dr Sieberhagen, respectively, were filed. The admissibility of these reports were however contested on various grounds but, after evidence was heard, the court dismissed the objections raised and admitted the reports into evidence. The court on the strength of the psychiatric reports came to the conclusion that the applicant was fit to stand trial and gave an order in the following terms:

'1. Mr Marcus Thomas does not suffer from any mental illness or mental defect and is accordingly capable of understanding the proceedings so as to make a proper defence.

2. Mr Marcus Thomas was capable of appreciating the wrongfulness of his acts in respect of the offences charged, and acted in accordance with an appreciation of the wrongfulness of his actions.'

[8] The formulation of the order was aligned with findings made by the two psychiatrists who reported as follows in respect of the enquiry in terms of s 78:

'It is the opinion of the undersigned that at the time of the alleged criminal act Mr Thomas had the capacity to understand the wrongfulness of his actions and had the capacity to act upon such understanding.'

(Dr Sieberhagen)

And:

'In terms of Section 78(2), he had the ability to act according to an appreciation of the wrongfulness of the act in question and to act accordingly at the time of the alleged offence according to the information at present available.'

(Prof Zabow)

Application for recusal

[9] This application is solely based on the formulation of the court order issued at the conclusion of proceedings conducted in terms of sections 77(4) and 78(4) of the Act. The specific words complained of as set out in the order, it is said, has the effect that the court had (already) found applicant to have acted in circumstances where, at that stage of the proceedings, no evidence to that end had been presented to court.

[10] In the founding affidavit applicant states that he understands the court's finding, as per the court order, to convey the following:

- (a) That he is capable of appreciating the wrongfulness of the acts in respect of the charges preferred against him;
- (b) That he acted;
- (c) That his intention was in accordance with an appreciation of the wrongfulness of his actions; and
- (d) That because he has been found to have acted (*actus reus*), the State need only proceed with establishing intention (*mens rea*).

[11] It is further contended that the court, without having heard evidence about applicant having acted wrongfully, misdirected itself by giving the above order and prejudged issues in dispute. For that reason applicant asserts that he has a reasonable apprehension of bias on the part of the presiding judge and has no choice but to apply for his recusal.

[12] What is evident from the application itself is that applicant fully appreciates that, up to the commencement of proceedings directed in terms of s 77 and 78 of the CPA, no evidence had been led to the effect that he had committed any act (*actus reus*). The only evidence presented at that stage concerns the police officer who transported the deceased's body from the scene to the police mortuary and him later on attending the post mortem.

[13] Applicant's appreciation about no incriminating evidence having been presented to court at this stage, is indeed correct. This is borne out by excerpts taken from the judgment and highlighted during argument by Ms *Verhoef*, appearing for the respondent. Dr Sieberhagen during his testimony explained the purpose of his evaluation and said it was very specific, namely, to establish whether the accused had the mental capacity to appreciate the wrongfulness of his actions when committing the alleged offences, and to act in accordance with such appreciation; also to determine whether he was fit to stand trial. The court in its judgement referred to the psychiatric report and said it would rely thereon insofar as it enables the court to reach a conclusion 'as to whether or not the accused is triable'. During cross-examination by Mr *Diedericks*, applicant's erstwhile legal representative, it was specifically put to Dr Sieberhagen that '[t]he probative value of what you are saying there, it depends upon the facts or the allegations in the case file that you refer to being proven at the trial one day' which was answered in the affirmative. (Emphasis provided)

[14] Applicant, notwithstanding, maintains that the court, as per its finding set out in the order, had already found applicant to have acted in respect of the offence(s) charged.

The law

[15] It is settled law that the test for recusal is objective and the onus is on the applicant to establish on a balance of probabilities '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'.⁴ (Emphasis provided). It was stated in *S v Munuma and Others*⁵ that the requirement of reasonableness is two-pronged and that an applicant will have to show that the apprehension is not only that of a reasonable person, but also that it is based on reasonable grounds. It

⁴ *Christian v Metropolitan Life Namibia retirement Annuity Fund and Others* 2008(2) NR 753 (SC) 769 at para [32]; *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.

⁵ 2013 (4) NR 1156 (SC).

was also said that the presiding judge should not recuse him/herself where the reasons for recusal are frivolous.

[16] Applicant, for purposes of this application, confined himself to the wording of the court order without making any reference to the evidence adduced during the s 78(4) proceedings. From the latter it is clear that neither of the two psychiatrists testified about applicant having acted in any way, except for finding 'that at the time of the alleged criminal act Mr Thomas had the capacity to understand the wrongfulness of his actions', and 'had the ability to act according to an appreciation of the wrongfulness of the act in question and to act accordingly at the time of the alleged offence'. As shown above, applicant is well aware that no incriminating evidence had as yet been presented, and there is no basis from which a court would be able to find that the applicant had acted in respect of the offences charged. To come to a different conclusion would require a reading of the court's order with a closed mind and out of context with the evidence adduced during the enquiry proceedings or the ruling set out in the judgment. The meaning accorded by applicant to the words 'acts' and 'acted' as reflected in the order is clearly not consistent with the facts as discussed in the judgment; clearly referring to the offences charged, not committed.

[17] From a reading of s 78(2) it is clear that during criminal proceedings it does not require any form of evidence first to be presented to court to have the provisions invoked. All that is required is (a) that it be alleged that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged; or (b) if it appears to the court that the accused might for such a reason not be so responsible. The section does not specify at what stage of the proceedings the court may direct an enquiry. In this regard the Appellate Division of South Africa in *S v Mogorosi*⁶ at 942D-E stated:

'As to the stage at which an application should be made in terms of s 78 (2), it may be desirable for a trial court to apply its mind as to whether the mental condition

⁶ 1979(2) SA 938 (AD).

of the accused should be inquired into before evidence is led so as to be able to judge of the conduct of the accused at the time of the commission of the offence as disclosed by the evidence in the light of the report contemplated by s 79 (1), but although desirable it is not obligatory for the Court to do so. It may make an order in terms of s 78 (2) at any stage during the proceedings.'

[18] It is not uncommon during pre-trial proceedings that application is made (usually by the defence) to have the accused referred for psychiatric evaluation before any evidence of the alleged offence is presented. In such instance the psychiatrist(s) is/are required to evaluate the mental state of the person, regard being had to the charge preferred by the State and any other background information from various sources concerning past behaviour. This is done to determine the accused's understanding and appreciation of the concept of wrongfulness at the time the alleged offence was committed. The psychiatrist is accordingly in terms of s 79(4)(d) required to make a finding on such information (s 78(3)), even before the commencement of the trial and evidence led pertaining to the commission of the offence charged.

[19] Similarly, the presiding judge or magistrate, before evidence on the merits is presented, is required to determine the matter on the psychiatric report(s) when same is not disputed⁷ or, when the finding is not unanimous or disputed, to do so after the hearing of evidence pertaining to the enquiry into the mental condition of the accused.⁸

[20] Neither the psychiatrist nor the court at this stage is required to determine whether the accused committed any unlawful act. What must be determined is whether, at the time the alleged act took place, the accused appreciated the wrongfulness of the act and acted in accordance with such appreciation i.e. the accused's mental state at the time, and not whether he/she committed the prohibited act. This is not an instance as provided for in s 78(6) where evidence first has to be presented that the accused committed the act (*actus reus*) before directing that he/she be detained pending the signification of the decision of the State President.

⁷ Section 78(3).

⁸ Section 78(4).

[21] The case of *State v Booï Pedro*⁹ referred to by applicant's counsel is therefore distinguishable from the present facts in that it relates to the provisions of s 78(6) of the Act (as amended in South Africa), where the court is required to (first) find, on evidence presented, that the accused committed the act in question and that he/she at the time of such commission was by reason of mental illness or mental defect not criminally responsible, before pronouncing a finding of not guilty. In the present instance the applicant was found to be criminally responsible, hence s 78(6) finds no application.

Reasonableness of the application

[22] Applicant at all stages of the proceedings has had legal representation and his present counsel confirmed having advised applicant on the law and principles applicable to the application at hand. In the absence of evidence to the contrary, it then must be assumed that he was equally informed by his erstwhile legal representatives of the provisions of section 78 of the Act, as set out above, and why the court was required to bring out a finding on his criminal responsibility prior to the hearing of evidence on the commission of the alleged offence. An appreciation of the law contained in this section would, for purposes of the applicable test, reflect the correct facts. In the present circumstances it may therefore be inferred that applicant was privy to the correct facts, prior to bringing the present application.

[23] The Constitutional Court of South Africa in *SACCAWU v I & J Ltd*¹⁰ at para 13 held that the principle of judicial impartiality entailed two consequences: that an applicant seeking recusal bears the onus of rebutting the presumption of judicial impartiality; and that the presumption is not easily dislodged and requires cogent and convincing reasons. It is trite that a judge has a duty to sit unless required to recuse him/herself.

⁹ Western Cape Division High Court Ref No 14228 (Unreported) delivered on 09.07.2014.

¹⁰ 2000(3) SA 705 (CC).

[24] What remains to be decided is whether, in the present circumstances, these requirements have been met and whether applicant's apprehension of bias is reasonable and objective i.e. that of a reasonable observer having reasonable apprehensions, referred to as the 'double reasonable requirement'. This test ensures that 'mere apprehensiveness' on the part of a litigant is not sufficient, even when it is genuine. A court faced with an application of this nature must determine, objectively viewed, that a reasonable litigant would entertain an apprehension which, on the facts, is reasonable.

[25] Applicant in support of his application mainly relies on the authority of the *Manuma* case (*supra*) with specific reference to para 43 which reads:

[43] The principle which was established in the South African Commercial Catering case as well as in the *S v Somciza* case is that a judge should recuse himself if he had previously expressed himself in regard to an issue or the credibility of a witness which was still live and which was of real or significant importance in the matter now before him. (See also *Take & Save Trading (CC) and Others v Standard Bank of South Africa Ltd* *supra* para 17 and *S v Dawid*.)

(Emphasis provided)

[26] It was argued that, though the court did not make a finding on credibility, it had found 'on a pertinent factual issue on whether or not the accused person committed an act', at the stage where the issue still had to be decided in the trial. Based thereon, it is submitted, there is a reasonable perception of bias based on reasonable grounds i.e. the finding that the applicant was found to have acted in this matter. Furthermore, referring to *S v Somciza*¹¹ it was said that irreparable damage has already been done to the extent that it vitiates the entire proceedings.

[27] Unlike the present circumstances, in both the *Manuma* and *Somciza* cases the presiding officers made credibility findings against the appellant(s) prior to the actual hearing of the case, effectively disqualifying them of

¹¹ 1990 (1) SA 361 (A).

weighing up afresh the evidence of the appellant when he testifies at the trial. As stated and understandably so, the appellants in those cases were unlikely to feel complacent about the fairness of the trial they were to receive before the same presiding officer.

[28] This court at no stage of the proceedings made credibility findings on evidence presented thus far, neither during pre-trial proceedings nor in the trial itself. The question whether the presiding judge has already expressed himself in regard to an issue which 'was still live and which was of real or significant importance in the matter before him'¹² must, for the aforesaid reasons, be adjudged on the correct facts, and should not be limited to the wording of the court order given in the end. Had the applicant familiarised himself with the findings made by the court as set out in the judgment – as he was required to do before lodging this application – he would likely have had a proper appreciation of the formulation of the court's finding set out in the order. Therefore, it is my considered opinion that the objective reasonable observer in possession of the facts as set out in the judgment, would have no basis for harbouring any reasonable apprehension that the presiding judge is biased.

[29] In an article published by *H P Lee: Judiciaries in Comparative Perspective*¹³ styled *Judges, Bias and Recusal in South Africa*¹⁴ the court's approach to recusal, require the following considerations:

'In applying the test of reasonable apprehension of bias, a court must take into account the following considerations: absolute neutrality is chimera; the judicial oath of office coupled with the professional expertise of a judge imply that an applicant seeking recusal of a judge must produce clear and cogent evidence; judicial officers have a duty to sit in matters that come before them and should not lightly recuse themselves; the question whether a reasonable apprehension exists must be determined on the facts as they appear to the court; and the double

¹² *S v Manuma and Others (supra)*.

¹³ Cambridge University Law Press p. 346 – 360.

¹⁴ Authors: Justices O'Regan and Cameron of the Constitutional Court of South Africa.

reasonableness requirement of the test which emphasizes its objective, not subjective, character.’

Conclusion

[30] After due consideration of the reasons on which applicant has based his application calling for the presiding judge’s recusal and, having applied the legal principles discussed hereinbefore, I have come to the conclusion that the applicant failed to show on a balance of probabilities that there exists a reasonable apprehension that the presiding judge will not bring an impartial mind to bear on the adjudication of the case. The reasons advanced for bringing the application of recusal, in my view, are insignificant and unmeritorious, falling short of meeting established requirements. Hence, for the presiding judge to recuse himself in these circumstances and without sound reason, would not be in the interest of the administration of justice.

[31] In the result, the application for recusal is dismissed.

JC LIEBENBERG
JUDGE

APPEARANCES

APPLICANT	K Amoomo Kadhila Amoomo Legal Practitioners, Windhoek.
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RESPONDENT

A Verhoef
Of the Office of the Prosecutor-General,
Windhoek.