

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

SPECIAL REVIEW JUDGMENT

Case Title: The State v Fan Jia and 13 Others	Case No: HC Special Review No.:411/2024 CR 29/2024
	Division of Court: High Court Main Division
Heard before: Honourable Justice Shivute <i>et</i> Honourable Justice Christiaan J	Delivered on: 04 April 2024
Neutral citation: <i>S v Jia</i> (CR 29/2024) [2024] NAHCMD 149 (04 April 2024)	
Order: <ol style="list-style-type: none">1. The recusal order made by the magistrate is set aside.2. The matter is remitted to the court a quo with the direction for magistrate Nembia to proceed from where the bail proceedings ended and the matter to be brought to its natural conclusion.3. It is further ordered that the bail ruling be delivered within 5 (five) days from the date of this order.	
Reasons for order:	

Christiaan J (Concurring Shivute J)

[1] This matter comes before me pursuant to special review proceedings in terms of section 20(c) of the High Court Act 16 of 1990 (the Act). The case was referred by the divisional magistrate for the District of Windhoek, Mrs Molefe. She proposed that this court set aside the order of recusal made by the presiding magistrate on 6 March 2024. Further, to make an order directing the presiding magistrate to proceed and bring the bail application to its natural conclusion.

[2] The background to this matter is contained in the covering letter from the divisional magistrate and head of the Windhoek division requesting for special review and may be summarised as follows:

- (a) Accused no.2 and her co-accused persons appeared in the Magistrate's Court for the district of Windhoek charged with various counts as follows: one count each with respect to accused 4, 5, 6, 8, 9, 10 and 11 of contravening s 29(1) remaining in Namibia after expiration of visitors permit of the Immigration Control Act 7 of 1993 (the Act), one count each with respect to accused 2, 4, 5, 6, 8, 9, 10, 11, 12 and 13 of contravening s 29 (5) read with s 1 and 8 of the Act - working in Namibia without a work permit, 1 count each with respect to accused 12 and 13 of contravening s 34(3) read with s 34(1) of the Act - entry into Namibia without a valid permit and failing to report to an immigration officer and 2 counts with respect to all accused of contravening s 56(a) read with s 1 and 8 of the Act - aiding and abetting any prohibited person to remain in Namibia: 98 counts with respect to all accused, of contravening s 3(1)read with s 1 and 29 - trafficking in persons, two counts in

respect of accused 1 : contravening s 6(1) read with s 6(2) , 1 and 29 – possession and confiscation of identification documents and travel documents, 97 counts with respect to all accused of contravening s 8(1) read with s 8(2) , 1 and 29 – using services of victims of trafficking, of the Combating of Trafficking in Persons Act 1 of 2018; one count of fraud with respect to all accused persons, one count with respect to all accused persons of contravening s 4 read with s 1,7,8 and 11 of the Prevention of Organised Crime Act 29 of 2004;1 count with respect to all accused persons of contravening s 2(1) (a), (b) and (c) as read with sections 1,2 (2) (a) and (b), 38 and 11 of the Prevention of Organised Crime Act 29 of 2004 and further as read with s 94 and 332 (5) of the Criminal Procedure Act 51 of 1977 – racketeering: one count of contravening s 65(1)(a) read with s 12(1), 15(1), 25(a), 55, 56, 59, 60, 65, 66, 83, 87 and 97 of the Income Tax Act 24 of 1981 as amended and further read with s 94 and 332 (5) of the Criminal Procedure Act 51 of 1977 – Failure to pay tax.

(b) Accused no.2, was the applicant in a bail application that commenced before Magistrate Nembia on 29 February 2024, which lasted until 1 March 2024. The matter was postponed to 8 March 2024 for the bail ruling. On 6 March 2024, the learned magistrate reinstated the matter on the court roll, summoned the parties, and recused herself *mero motu* from the proceedings.

(c) On 6 March 2024, the following was placed on record:

'I called all parties here today as I received information that I have interfered with the duties of the magistrates stationed here at JP as well as interfered with the divisional magistrate, acting chief magistrate duties by attending to this prolonged bail application being one of the many set down for bail application. I acted in my domain as the deputy chief magistrate: court administration (still a judicial officer) to arrest the situation on the availability of magistrate for the bail application. I don't understand the basis on which they are saying that I have interfered after proper consultation to find a magistrate was done, the acting chief magistrate was informed of my reasons to attend to his bail application, in the interest of effective administration of justice, crucial speedily operation of courts as especially when faced with urgent application like this formal bail application. I did not want this to go back and forth to the high court again on basis of unavailability of magistrates.

All I tried to do was to arrest the situation as I was available at court and to hear the bail application

myself after finding that there was no other magistrate available and also relying on section 11 of the Magistrate's Act 3 of 2003 and as amended by the Magistrates Amendment Act 5 of 2009. Reasonable grounds - placed before magistrate on record prior to the hearing of the bail application, proper consultation was done.

I intend to recuse myself from this matter. I am alive to the grounds of recusal and its test.

The test for recusal the Supreme Court in the matter of the *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*, said the following regarding the point of departure in deciding any recusal application:

“The departure point is that a judicial officer is presumed to be impartial in adjudicating disputes and that the presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption.”

A judicial officer is to administer justice free without favour. As already alluded to before, I got information that I have interfered with the duties of the magistrate, divisional magistrate and acting chief magistrate. I never intended to interfere and I am still of the view that I did not interfere, but this is the information on hand and therefore I am therefore uncomfortable to continue to deliver a ruling on this matter, I recuse myself so that this bail application proceeds de novo before a different magistrate.’

[3] 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 further investigations.

[4] 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

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.

[5] 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 officer, that is, that he will not adjudicate impartially.

[6] In the matter of *S v Stewe*⁴, 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. ' (Our emphasis)

[7] In considering the matter at hand, though the recusal order was scant, the presiding magistrate received information that she interfered with the administrative duties of the magistrates at JP Karuaihe Street court, including the Divisional Magistrate and Acting Chief Magistrate. As a result, she is hesitant to continue delivering the ruling in this matter.

[8] In the present matter, the magistrate out of her own accord decided to recuse herself for flimsy reasons and failed to give convincing reasons to rebut the presumption of judicial impartiality.

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

⁴ *S v Stewe* (SA 2 of 2018) [2019] NASC 3 (15 March 2019).

[9] A judicial officer is under obligation to hear each and every case that is placed before her or him and a further duty to administer justice impartially without fear, favour, affection or ill will. A judicial officer should not be unduly sensitive when deciding whether to recuse himself or herself, and ought not to regard a recusal as a personal affront.

[10] The court a quo by recusing itself failed to exercise its discretion judiciously and misdirected itself in this regard. Therefore, the order made by the learned magistrate cannot be allowed to stand as it amounts to serious irregularity.

[11] In the result, the following order is made:

1. The recusal order made by the magistrate is set aside.
2. The matter is remitted to the court a quo with the direction for magistrate Nembia to proceed from where the bail proceedings ended and the matter to be brought to its natural conclusion.
3. It is further ordered that the bail ruling be delivered within 5 (five) days from the date of this order.

P CHRISTIAAN JUDGE	N N SHIVUTE JUDGE

