



REPORTABLE

CASE NO: SA 2/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

IN RE: REVIEW JUDGMENT BY SIBOLEKA J *et* USIKU J CR 57/2016

DELIVERED IN RESPECT OF THE FOLLOWING SPECIAL REVIEWS:

- | | |
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| 1. HC REVIEW 1323/2016 | WILLIE STEWE |
| 2. HC REVIEW 1324/2016 | ALBERTICO PIETERSEN |
| 3. HC REVIEW 1325/2016 | FRANCISCUS KAIWINA & 21
OTHERS |
| 4. HC REVIEW 1326/2016 | RUDY RAUTENBACH & 4
OTHERS |

Coram: DAMASEB DCJ, MAINGA JA, and FRANK AJA

Heard: 6 MARCH 2019

Delivered: 15 MARCH 2019

Summary: Two magistrates in the Windhoek District recused themselves *mero motu* from partly heard matters they were seized with in the Regional Court; for the reason that the Magistrates Commission declined to consider them for permanent appointments in the Regional Court; because they did not possess the necessary legal qualifications (LL. B and B. Proc degrees) which are the statutory determined qualifications for the appointment of a person as magistrate in terms of s 14(2) of the Magistrates Act 3 of 2003.

The Divisional Magistrate for the District of Windhoek referred the recusals to the High Court for review. The High Court upheld the recusals, for the reason that if the Commission was satisfied with the performances of the magistrates who are non LL. B holders but presiding in the Regional Court, why not consider them for permanent appointments in that regard, if not why appoint them for the court they hold no qualification for.

On appeal, the court found that the reasons given by the magistrates for their recusal were flawed, they failed to cross the high threshold needed to satisfy the test for recusal, which 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 and that the test is objective and the onus of establishing it rests upon the applicant.

Held further that recusal, whether initiated by an applicant before court or raised by the magistrate *mero motu* should cross the high threshold needed to satisfy the test for recusal.

Held further that recusal cannot be raised in *vacuo* or on the judicial officer's predilections, preconceived unreasonable personal views or ill-informed apprehensions.

Held further that judicial officers have a duty to sit in any case in which they are not obliged to recuse themselves.

Held further that the court *a quo* misdirected itself on the facts and law when it upheld the magistrates' recusals.

Held further that they ought not to have withdrawn from the proceedings under the circumstances they did, as the circumstances lack evidence to sustain their recusals.

The appeal succeeds, the order of the High Court set aside and substituted for an order setting aside the recusals.

APPEAL JUDGMENT

MAINGA JA (Damaseb DCJ and Frank AJA concurring):

Introduction

[1] This matter came before us as an unopposed review, leave having been granted by the court *a quo*. The State became an interested party after the judgment of the High Court issued in chambers on 16 September 2016 was brought to the attention of the Prosecutor-General on 18 October 2016. The notices of set down and appeal of this matter and heads of argument of the appellant have been served on all the accused persons in the cases above but nothing came forth from that quarter.

[2] The issue for determination is whether the two acting Regional Court Magistrates in the Windhoek district could *mero-motu* recuse themselves in the circumstances they did from the four partly heard cases they were appointed to preside over.

[3] The recusals arose in the following circumstances.

[4] The Divisional Magistrate for the Windhoek Magistrate Court who referred the recusals on review to the High Court writes that both magistrates held substantive appointments albeit in an acting capacity or on a temporal basis to preside over the above cases which were partly heard in the Regional Court but that both recused themselves from continuing presiding over the said cases. Magistrate Uanivi in the case of the State versus Fransiscus Kaiwina and others and Mr Shuuvani in the other three cases.

[5] The Divisional Magistrate referred to the Magistrates reasons for the recusals which are in this form:

Magistrate Uanivi

“I do hold a certificate in law and a degree of master of laws in criminal justice. I have thirty-one years on the bench as magistrate. The Commission has assigned me on several occasions to adjudicate in the Regional court cases in Windhoek district and elsewhere in other districts. However, recently I was informed by interview recruiting committee of the Commission that I no longer suitable or eligible to occupy Regional Court seats. Because I do not hold an LLB degree. The administrative decision puts me in a dichotomy of not proceeding comfortably in the circumstances. I, therefore, am left with no any other option but to rescue myself. This case is herewith referred to regional court No. 3 to start *de novo*”.

Magistrate Shuuvani

“The reason is that I reached a decision to recuse myself from this case in order for the case to start *de novo* for Regional Court Magistrate number 3. So I do not find myself comfortable to proceed in the Regional Court with the cases because of the manner in which the Commission is treating us. One day capable of handling Regional Court, the other time you are not suitable. This is not only happening to myself but to my other two colleagues, so we have reached a decision to recuse ourselves from all these matters so that they can proceed before the properly constituted Regional Court Magistrate. And that is my decision. I do not find it necessary to invite you to address me because once I recused myself I am *functius officio*”.

“Unfortunately I have taken a decision to recuse myself from all Regional Court matters that are pending before me. I have made this decision known to the commission, the Chief Magistrate. They approached me this morning, the previous Commission chaired by Judge Hoff who is a Senior Judge of the High Court they made an error, appointed magistrates to assist in Regional Courts who do not at the time possess LLB and they decided that those who do not possess LLB are not qualified to preside over Regional Court matters. Hence that does not go away with that, you cannot be qualified to preside over the court when you are acting law or take decisions we have to look at the repercussion. The commission that was chaired by Judge Mainga, Judge of appeal now was also of the view that all magistrates who have necessary expertise or experience can be allowed as long as they are in the system and abide their qualification as we are busy doing. As a result I have no choice but to recuse myself and this case has to be start *de novo*”.

[6] The Divisional Magistrate continued to state that the requirements to be appointed as a magistrate have since changed, and that a person can only be appointed as a magistrate if he/she is in possession of a Baccalareus Legum (LLB) and/or an equivalent qualification which the Magistrates' Commission determined to be a Baccalareus Procuracion (B. Proc). She relies for this assertion

on s 14 of the Magistrates Amendment Act No 2 of 2014, which section substituted s 14 of Act No 3 of 2003, which reads:

“Substitution of section 14 of Act No. 3 of 2003

11. The principal Act is amended by the substitution for section 14 of the following section:

“Qualifications for appointment as magistrate

14. (1) Subject to section 29(2), a person who immediately before the date of commencement of this section did not hold a substantive appointment as magistrate is not qualified to be appointed as a magistrate under this Act, unless such person obtained a qualification in law referred to in subsection (2).

(2) The Minister, by notice in the *Gazette*, on the recommendation of the Commission in general or in any particular case, may recognise any qualification in law to be a qualification of a satisfactory standard of professional education for the appointment of a person as magistrate.

(3) A person who has been appointed as magistrate before the recognition of any qualification contemplated in subsection (2) his or her appointment is not affected by such qualification so recognised.”

[7] Indeed, in compliance with s 14 (2) above the Minister of Justice, then Dr Albert Kawana, on the recommendation of the Magistrates Commission, in Government Notice No 166 published in Government Gazette of 15 July 2015 recognised degrees or equivalent qualifications in law of various jurisdictions in the world to be qualifications of satisfactory standard of professional education for appointment of a person as magistrate. The degrees or equivalent qualifications in

law recognised by the Minister are mainly LLB and B Proc (peculiar to South African Universities only) and Masters degree in law of three universities in Cuba and Masters and PHD degree in law of the University of Bucharest, Romania. This recognition regrettably excludes the qualification of *Baccalareus Iuris* (B. Iuris) and any diploma in law including *Diploma Legum*.

[8] The learned divisional magistrate finally humbly opined that the two magistrates erred when they recused themselves from the partly heard matters for the reasons they proffered.

[9] The High Court per Siboleka J, Usiku J, concurring, referred to the case of *S v Malindi and others*¹, and laid emphasis where Corbett CJ had stated, ‘. . . but on occasion a judicial officer may recuse himself *mero motu*, i.e. without any . . . prior application’. That court then made reference to s 11(3) of the Magistrates Act 3 of 2003² which the Magistrates Commission relied on to appoint the two magistrates to preside over Regional Court cases. Thereafter the learned judge proceeded to say:

[7] It is my considered view that the use of section 11(3) to assign Magistrates who are none LLB qualification holders to preside over Regional Court cases yet they cannot be considered for permanent Regional Court Magistrate appointments should be urgently and very seriously revisited. This is where in my view any person in the position of the dissatisfied Magistrates would find it difficult to understand. If the Magistrates Commission is satisfied with the work that the assigned none

¹ 1990 (1) SA 962 (AD) at 969G-I.

² Section 11(3) provides that, the Commission must assign a magistrate to a specific regional division, district division, district or sub district to serve as magistrate of the regional division, district division, district or sub district.

LLB degree holding Magistrates are doing on the bench while presiding over cases in the Regional Court, why can they not be considered for permanent appointments in that regard, If this is not possible, why assigning them to do the work they are not qualified to do.

[8] There is merit in the concerns raised by the dissatisfied Magistrates. It is my considered view that should the Magistrates Commission still be interested to assign those Magistrates in the contested positions, a consideration to hear them will be embarked on so that an amicable lasting solution can be found.

[9] In the result I make the following order:

The recusals are upheld.

The cases be started *de novo* before a permanent Regional Court Magistrate.'

[10] The High Court judgment was issued in chambers on 19 September 2016 without the involvement of the prosecuting authority. It was brought to the attention of the Prosecutor-General during the third week, about 18 October 2016. That office hastened to seek condonation and leave to appeal to this court. Leave was granted by Usiku J who concurred in the judgment appealed against but after making reference to the traditional principles of recusal, found that as the reasons for the recusals by the two magistrates were not based on these principles and circumstances, there were reasonable prospects of success on appeal. She as a result granted leave to appeal to this court.

[11] To sum up so far: It is clear from the magistrates' own narratives above that they recused themselves from the partly heard matters before them for the reason that the appointing authority (Magistrates Commission) refused to consider or interview them for permanent appointments as Regional Magistrates,

notwithstanding the stint they acted in the same positions, because they did not possess the qualifications required for appointment as magistrate as provided by s 14(2) of the Magistrates' Act, 2003 and yet the same body still appointed or required them to continue presiding as Regional Magistrates. It is a pure administrative dispute between the magistrates and the appointing authority. In all the four cases, the proceedings are regular and according to law and fair trial is not imperiled in any way.

[12] The test for recusal has been stated and restated in this jurisdiction and elsewhere³ 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.'⁴ The test is 'objective and the onus of establishing it rests upon the applicant.'⁵

[13] 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

[14] The factual ground on which the two learned magistrates recused themselves falls far short of the threshold needed to satisfy the test for recusal. It

³*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.

⁴See *President of the Republic of South Africa and other v South African Rugby Football Union and other*, supra at 177D-G.

⁵See *President of the Republic of South Africa and other v South African Rugby Football Union and other*, supra at 175B-C.

⁶ See footnotes 1; 3 and 4 above.

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.'⁷ 'Embodied in the test above are two further consequences 'on the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted.'⁸

[15] Unfortunately that is precisely what is lacking in the case before us. In fact, the issue of impartiality or the competency of the learned magistrates never arose

⁷ Footnote 4 at 177D-E.

⁸ *South African Commercial Catering & Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at 714.

at all in the reasons they provided for their recusals or in the evidence on record. The State's case in this appeal is to seek to set aside the judgment and order of the court a quo and order the learned magistrates to proceed with the partly heard matters before them. Mr. Wessels of Stern & Barnard one of the most seasoned criminal lawyers in this country, on 14 January 2015 addressed a letter to the Divisional Magistrate of Windhoek (Ms Horn) reminding her to ask Magistrate Uanivi to timeously arrange for his appointment as a Regional Court Magistrate. To sum up, all the parties who appeared before the learned magistrates want them to continue with the partly heard matters. The parties who appeared before the learned magistrates were never informed before going in court (as is required by law)⁹ of the recusal orders the magistrates were going to make or given the opportunity in court to address the court on the said issue. Had they done so the parties would have persuaded them otherwise.

[16] Mr Maronedze who appeared before us for the State argued that the reasons so advanced by the magistrates have nothing to do with the merits of the matters nor the parties thereto. He submits that the decisions by the magistrates to *mero motu* recuse themselves were incorrect in the circumstances and should not be allowed to stand.

[17] Mr Marandedze continued to say:

'13. In addition to the above stated legal position it should also be noted that all the cases involved are partly heard matters. It's clear from the supporting affidavits of Simba Nduna and Menencia Chetlin

⁹ See footnote 1 above at 967B-C

Hinda (. . .) that some of the accused were legally represented. It doesn't matter whether it was private briefs or on the instructions of Legal Aid because in both scenarios there are legal costs involved. If it were private briefs, then the accused persons are likely not to be in a position to pay the same lawyers twice for the same services on the same matters. If it were on the instructions of Legal Aid, we all know the cash flow crunch which the government is experiencing. Either way there would be prejudice to the accused persons and the State. Furthermore it is clear from the affidavits afore-mentioned that some of the trials were at an advanced stage when the trials were aborted. Whatever way one looks at the scenario, the State stand to be prejudiced because of 'witnesses expenses and the accused' also stand to be irreparably prejudiced as indicated above. Furthermore the matters have to be re-enrolled and thereby inflating the backlog which is already a problem at our courts. And all this because some magistrates want to use inappropriately the legal principle of recusal as a weapon to challenge the promotional system!

14. In the light of all the foregoing it is humbly submitted that the Honourable Court a quo misdirected itself when it upheld the decisions of the Acting Regional Court Magistrates to recuse themselves from the cases which were before them. All the above factors and cases referred to above shows that the recusals have no legal basis and the behavior of the Acting Regional Court Magistrates involved is extraordinarily and disturbingly improper and this warrants interference by this Honourable Court of appeal. This case demands a consistent and resolute response from this Honourable Court which, the respondent humbly submits, would eventually stem the tide of behaviours of this nature from the lower courts.'

[18] I agree. The conduct of the learned magistrates cannot be countenanced in any way. It was wrong and it is condemned. No judicial officer should attempt to do something of that sort. It is sheer insubordination of great magnitude. They are

very lucky they escaped without misconduct charges. From the time (about 8 August 2016) since the magistrates recused themselves from the partly heard matters, come August this year it will be a good three years. In the matter of Pietersen, accused first appeared in court in 2009 and five witnesses have been called. Only one witness needs to be called and the State's case will be closed. The matter of Rautenbach originates from January 2011, and four witnesses have already testified and ten more are still to be called. That of *Stewe and Kaiwina* have their origins in 2010. In the Steve case a minor complainant had already testified and it would be unthinkable and inhumane if that child is re-called to come and testify afresh and subjected to cross-examination again if the matter were to be heard *de novo*. By the time the magistrates recused themselves these matters were six-seven years in our courts. How unfortunate that is. The concept of fair trial was already imperiled by then and thereafter aggravated by the unreasonable recusals. The administration of justice is the concern of the public at large, the victims would want to know the outcome of the complaints they registered in a reasonable time and the accused to learn speedily which way the sword of justice lands.

[19] I have sympathy with the learned magistrates. I understand their frustrations. Given the decision of the Magistrates Commission they are good enough because of their experience to preside in the Regional Court but not good enough to be appointed in permanent capacities in the same court because of the recognition of only certain qualifications in law. This however, as pointed out above, cannot be a reason for them to recuse themselves *mero motu*. They cannot use their personal grievances to recuse themselves. The learned

magistrates were appointed to preside in the Regional Court and notwithstanding the decision they considered unjustified, they had to continue presiding as per their appointments.

[20] Consequently the court a quo misdirected itself on the facts and law when it upheld the magistrates' recusals. The answer to the question for determination is that they ought not to have withdrawn from the proceedings under the circumstances they did. The circumstances lack evidence to sustain their recusals. 'The nature of the judicial function involves the performance of difficult and at times unpleasant tasks To this end they must resist all manner of pressure, regardless of where it comes from.'¹⁰

[21] In the result I make the following order:

The judgment and order of the High Court are set aside and substituted as follows:

'The recusals of Magistrates Uanivi and Shuuveni from the four cases above and any other case they might have recused themselves from on the same grounds is set aside. They are both ordered to proceed with the said matters with deliberate speed given the availability of all the parties involved.'

MAINGA JA

¹⁰ See note 4 above at 194A-B

DAMASEB DCJ

FRANK AJA

APPEARANCES:

Appellant:

E Marondedze

Of Office of the Prosecutor-General,

Windhoek