A 110/2005

GIDEON JOHANNES DE WAAL –vs- THE PROSECUTOR – GENERAL OF THE REPUBLIC OF NAMIBIA and ANOTHER

HANNAH, J

3/10/2005

SUMMARY

CRIMINAL PRODECURE

Order made that magistrate is recused in a criminal trial despite no application having been made to her for recusal.

CONSTITUTIONAL LAW

Court has the power to order that a public prosecutor be replaced by another. Such power not exercised in the circumstances of the present case.

CASE NO.: A 110/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GIDEON JOHANNES DE WAAL
APPLICANT

and

THE PROSECUTOR-GENERAL OF **1st**
RESPONDENT
THE REPUBLIC OF NAMIBIA

MAGISTRATE HAIKANGO, THE PRESIDING OFFICER
IN THE CRIMINAL TRIAL OF THE ABOVE-MENTIONED
APPLICANT **2nd**
RESPONDENT

CORAM: **HANNAH, J**

Heard on: 19/9/2005
Delivered on: 03/10/2005

JUDGMENT

HANNAH ,J.: On 12th April, 2005 this Court issued a rule *nisi* calling upon the two respondents to show cause why an order should not be made:

"1. That the second respondent be ordered to recuse herself as presiding officer in the criminal trial of the applicant in case number E 2119/2003;
2. That the first respondent be ordered to provide answers to the applicant's request for further particulars to the charge sheet received on 1st April 2005 at 13h35 in the abovementioned case number and annexed to the founding affidavit marked annexure "D 10";
3. That it be ordered that the applicant's criminal trial be commenced *de novo* before another magistrate while the State is represented by another prosecutor;
4. That the second respondent be ordered to pay the costs of this application *de bonis propriis."*

When the rule was issued an order was also made interdicting the respondents from continuing with the criminal trial of the applicant pending the return day of the rule.

Argument was heard on the extended return day and judgment was reserved.

The relief sought is not opposed by the first respondent and the second respondent only opposes the costs order which is sought against her. However Ms Katjipuku-Sibolile, who appeared for both respondents, drew the attention of the Court to certain matters which, in her submission, should affect the decision of the Court whether or not to make the rule final. Before considering these matters I will set out the circumstances which led to the application being made.

The applicant was arrested in September, 2003 on a charge of culpable homicide arising from alleged negligent driving. He instructed the firm of Hennie Barnard and Partners to represent him. By letter dated 3rd October, 2003 Mr Hennie Barnard of that firm wrote to the Control Prosecutor at Windhoek Magistrate's Court requesting a copy of the charge sheet and disclosure of the case docket. Thereafter the trial of the applicant was postponed from time to time and eventually the trial date was set for 15th November, 2004. An order was also made that the charge sheet and the contents of the case docket be served on the applicant's legal representative on or before 10th August, 2004.

On 15th November the public prosecutor applied successfully for a further postponement on the ground that the investigation had not been completed. The charge sheet and the case docket still had not been served. It is alleged by the applicant that in granting a postponement the second respondent was influenced by information from the prosecutor that the deceased in the case was family to a highly placed political figure. This allegation is denied by the second respondent in her answering affidavit and the Court must accept that she was not influenced as alleged.

On 29th November the trial was postponed to 11th April, 2005 and three days were set aside for the hearing. On 2nd February the contents of the case docket were served on the applicant's legal representative but it was not until 1st April that charge sheets were served setting out a charge of culpable homicide and certain driving offences.

The applicant avers that as a result of the foregoing he was not able to prepare for trial properly and Mr Barnard made a request for further particulars of the charges and gave notice of his intention to except to certain of them. Since it was decided that the State must make the

case docket available to an accused I would have thought that further particulars of a criminal charge have, generally – speaking, become redundant. The particulars will, in most cases, be found in the witness statements and other documents provided. But, according to the applicant, he was advised by Mr Barnard that on 11th April he would make an application to compel the State to provide further particulars should they not be forthcoming.

The State did not provide the further particulars. This Court is not in a position to decide whether such a stance was justified or not. It does not have the contents of the case docket before it. Mr Barnard then applied to the magistrate to compel the State to provide further particulars. The applicant states that the public prosecutor, Mr Tjiroze contended that:

> "(a) Mr Barnard is misleading the court; and
> (b) he should be estopped' from applying for further particulars; and
> (c) the Criminal Procedure Act does not make provision for an exception to be raised to the charge sheet…"

According to the applicant, the second respondent then told the parties to sort out their problems and return to court at 2pm or words to similar effect. Mr Barnard and Mr Tjiroze then consulted with the Senior State Prosecutor but could not resolve the issue of further particulars. When they returned to court in the afternoon the second respondent was informed of this impasse and was asked to make an order compelling the State to provide the further particulars which had been requested. The second respondent then ascertained that the request had only been served the previous Friday, the trial commencing on the following Monday, and she refused the application.

She ordered that the case should proceed. Mr Barnard, according to the second respondent, then informed the magistrate that the defence would appeal her decision and the magistrate repeated that the case should proceed. Mr Barnard then withdrew as the applicant's legal representative. There is no suggestion in the papers before Court that this action was taken on the instructions of the applicant or after consultation with him. On the contrary, as I read the papers it was action taken solely on the initiative of Mr Barnard, himself.

I pause here in the narrative of events to make the following comment. Mr Barnard's withdrawal as the applicant's legal representative simply because an application for further particulars was refused seems to me entirely unreasonable. If the refusal resulted in unfairness or prejudice to the applicant in the conduct of his defence this, ultimately, could have been the subject of an appeal. It is not for a legal representative to withdraw simply because a trial court makes an adverse decision. The representative may be piqued at the decision but his principal responsibility is to represent his client. Be that as it may, Mr Barnard withdrew and effectively abandoned the applicant.

Unfortunately, it was at this stage that the conduct of the second respondent must be called in question. She informed Mr Barnard to refrain from discussing what had transpired with the applicant and rejected Mr Barnard's request to address her further. I should have thought that elementary fairness would have dictated that an opportunity be given to the applicant to discuss what had happened with his erstwhile lawyer. In fact, according to the applicant, he then requested the magistrate to stand the matter down so as to enable him to discuss the situation with Mr Barnard but this request was also refused. The second respondent's response to this is as follows:

> " *I then explained to the accused that he has the right to obtain new legal representation but due to the delay occasioned herein already, by his legal representative, the matter would not be postponed but would proceed.*
>
> *I also explained that the applicant may pose questions and put his own version to the state witnesses and that should he fail to do so, the witnesses would not be called back to testify."*

The trial then proceeded with two witnesses testifying. The following day this application was brought as a matter of urgency.

I find the second respondent's conduct quite astonishing. She advised the accused that he had the right to legal representation but in the same breath denied it by saying that his trial will, there and then, proceed. What kind of justice is that? In my view, none at all. Furthermore, the attempt by the magistrate to lay blame for the delay in bringing the applicant to trial at the door of his legal representative seems wholly unfounded. On my reading of the papers it would seem that any delay was due to the sluggish progress of the investigation of the case by the State.

With that introduction I now turn to the matters raised by Ms Katjipuka-Sibolile. She submitted that the prayer in the application for an order that the second respondent recuses herself is irregular because no application for recusal was made to her. Generally – speaking, there would be merit in that submission but in the present case there are, in my opinion, exceptional circumstances. As I have indicated, the magistrate conducted herself in an unfair and irrational manner. The applicant has good cause to believe or perceive that he may not

receive a fair trial. Secondly, the second respondent does not oppose this head of relief. This leads me to the conclusion that if an application for recusal is made at a resumed hearing it will, in all probability, be granted. What, therefore, is the point of placing the applicant in the position of having to make a formal application? It will simply cause further delay to proceedings which have already become unduly protracted. I will therefore confirm that part of the rule that the second respondent recuses herself and that the trial of the applicant commences *de novo* before another magistrate.

Another matter referred to by counsel for the respondents was the power of this Court to order that the prosecutor, Mr Tjiroze, be replaced by another prosecutor. Ms Katjipuka-Sibolile submitted in her written heads of argument that this Court has no such power. She contended that the decision to delegate her powers to a particular prosecutor lies solely in the discretion of the Prosecutor-General. Mr Heathcote, who appeared for the applicant, countered this submission by referring to, and relying upon, *Smyth v Ushewokunze and Another* 1998 (3) SA 1125 (ZSC). In that case the applicant sought, *inter alia,* an interdict restraining the prosecutor from taking any further part in the preparation or presentation at the trial of certain charges laid against the applicant. It was alleged that the prosecutor had involved himself in a personal crusade against the applicant and that he lacked the objectivity, detachment and impartiality necessary to ensure that the State's case was presented fairly. Having assessed the evidence Gubbay CJ said at 1134 B-J:

> *"I have no difficulty in acknowledging the inherent danger of unfairness to the applicant attendant upon the first respondent prosecuting at the trial. Hence the question that arises is whether the applicant's right to a fair hearing by an independent and impartial court established by law, as enshrined in s 18(2) of*

the Constitution, is likely to contravened. To put the enquiry more pertinently, whether the words 'impartial court' are to be construed so as to embrace a requirement that the prosecution exhibit fairness and impartiality in its treatment of the person charged with a criminal offence. In arriving at the proper meaning and content of the right guaranteed by s 18(2), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the Court should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people. See Rattigan and Others v Chief Immigration Officer, Zimbabwe, and others 1995 (2) SA 182 (ZS) (1994 (2) ZLR 54) at 185E-186G (SA) and 57F-58E (ZLR); S v Mhlungu and Others 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793) at para (8); R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 (SCC) at 359-60. Section 18(2) embodies a constitutional value of supreme importance. It must be interpreted therefore in a broad and creative manner so as to include within its scope and ambit not only the impartiality of the decision making body but the absolute impartiality of the prosecutor himself, whose function, as an officer of the court, forms and indispensable part of the judicial process. His conduct must of necessity reflect on the impartiality or otherwise of the court. See, generally, Chaskalson et al Constitutional Law of South Africa at 27-18-27-19.

> *To interpret the phrase 'impartial court' literally and restrictively would result in the applicant being afforded no redress at this stage. It would mean that in spite of prejudicial features in the conduct of the first respondent towards him, the applicant would have to tolerate the first respondent remaining the prosecutor at the trial. I cannot accede to the obvious injustice of such a situation.*
>
> *I am satisfied that the applicant has shown that his right under s 18(2) of the Constitution to a hearing by an independent and impartial court is in jeopardy if the first respondent proceeds as the prosecutor in this matter"*

Article 12 of our Constitution also gives a right to a fair hearing by an independent, impartial and competent court established by law and, in my view, that constitutional right should be interpreted in the same way as in the *Smyth* case (*supra).* Indeed, during the course of oral argument Ms Katjipuka-Sibolile conceded as much. It emerged that her real argument was that an insufficient factual basis had been laid for this Court to order that Mr Tjiroze be replaced by another prosecutor. That, of course, is an entirely different matter.

Mr Heathcote submitted that Mr Tjiroze was guilty of "culpably wrong argument" and that a reasonable accused could understand this to be representative of bias. With all due respect, I find this submission somewhat far-fetched. On an almost daily basis this Court is faced with incorrect or wrong reasoning or argument. What is to blame, more often than not, is ignorance or misunderstanding, not bias. Furthermore, the applicant does not even state that he perceives Mr Tjiroze to be unfair or biased. In my view, no proper factual basis has been laid in the papers before Court for an order requiring that Mr Tjiroze be replaced by another prosecutor.

As for the relief sought in paragraph 2 of the rule, that was not pursued with much vigour by Mr Heathcote. As I have already stated, sufficient particulars of a charge will usually be found in the witness statements and other documents which the State is required to disclose. This Court is not in a position to decide whether the particulars requested by Mr Barnard are necessary or not.

That leaves the question of costs. This Court undoubtedly has the power to make an order for costs in an application such as the present: *Koortzen and others* v *Prosecutor-General* 1997 NR 188. And I will make an order for costs against the second respondent based on her unfair and irrational behaviour which precipitated this application. However, Ms Katjipuku-Sibolile submitted that such costs should not be *de bonis propriis.* Counsel referred to *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849(A) where it was said at 852 H-853 A:

> "*It is a well-recognised general rule that the Courts do not grant costs against a judicial officer in relation to the performance by him of such function solely on the ground that he has acted incorrectly. To do so would hamper him in the proper exercise of his judicial functions*."

In the same case it was emphasized at 853 H that:

> *"it is the existence of mala fides on the part of the judicial officer that introduces the risk of an order of costs de bonis propriis being given against him."*

In the present case there is nothing to establish that the second respondent was actuated by bad faith. Her conduct was, in all

probability, born out of incompetence. In these circumstances, I do not consider an order for payment of costs *de bonis propriis* is appropriate. I will simply order that the second respondent pays the costs of the application.

Accordingly, it is ordered that:

1) The second respondent is recused as presiding officer in the criminal trial of the applicant in case number E 2119/2003;
2) The said criminal trial is to commence *de novo* before another magistrate;

3) The second respondent is to pay the costs of this application.

.....

HANNAH,J

ON BEHALF OF THE APPLICANT: **MR R HEATHCOTE**

INSTRUCTED BY: **HENNIE BARNARD & PARTHERS**

ON BEHALF OF THE RESPONDENT: **MS KATJIPUKU-SIBOLILE**

INSTRUCTED BY: **GOVERNMENT – ATTORNEY**