REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: A 353/2013

TOBIA AUPINDI	**FIRST APPLICANT**
ANTONIO DI SAVINO	**SECOND APPLICANT**

And

MAGISTRATE HELVI SHILEMBA	**FIRST RESPONDENT**
ARIE HUSSELMAN	**SECOND RESPONDENT**
MINISTER OF JUSTICE	**THIRD RESPONDENT**
CHAIRPERSON OF THE MAGISTRATE'S COMMISSION	**FOURTH RESPONDENT**
PROSECUTOR-GENERAL OF NAMIBIA	**FIFTH RESPONDENT**
ANTI CORRUPTION COMMISSION OF NAMIBIA	**SIXTH RESPONDENT**
DIRECTOR OF THE ANTI-CORRUPTION COMMISSION OF NAMIBIA	**SEVENTH RESPONDENT**
INSPECTOR GENERAL OF THE NAMIBIAN POLICE	**EIGHTH RESPONDENT**
ATTORNEY-GENERAL OF NAMIBIA	**NINTH RESPONDENT**

Neutral citation: *Aupindi v Magistrate Shilemba (A 353/2013)*[2015] NAHCMD 21 (12 February 2016)

Coram: MILLER AJ
Heard: **21 September 2015**
Delivered: **12 February 2016**

Flynote: Review – Review of pending Criminal Proceedings – Role of Appeal court not to interfere with unterminated course of proceedings in a court below – Court will only do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained – Court will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available – Review application dismissed, matter referred back for continuation of trial.

ORDER

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1. The review application is dismissed with costs.
2. The matter is referred back to the Magistrate's court to proceed with the criminal trial against the applicants.

JUDGMENT

MILLER AJ:

[1] The applicants in this matter brought a review application in terms of the old rule 53 of the Rules of the High Court calling upon the respondents to show cause why an order in the following terms should not be granted:

> '1. That the criminal proceedings conducted before the first respondent under case number WHK-CRIM 26731/11, in the Magistrate's Court for the District of

Windhoek, held at Windhoek ('the proceedings) should not be set aside or reviewed and set aside with immediate effect, and with the effect that the applicants are acquitted on all the charges proffered against them in the proceedings.

2. In the alternative to prayer 1 above, that the applicants shall be released from the proceedings and any prosecution in terms thereof and to the effect that:

2.1 They are acquitted on all charges proffered against them in and under the proceedings; or

2.2 A permanent stay of prosecution be granted in respect if the charges against the applicants in and under the proceedings.

3. In the further alternative to prayers 1 and 2 *supra*:

3.1 That the first respondent's decision not to recuse herself as the presiding magistrate in and over the proceedings, be reviewed and set aside by the above Honourable Court, alternatively that such decision be declared null and void as being in conflict with the Namibian constitution and be set aside on that basis;

3.2 That the above Honourable court decides that the first respondent recuses herself from presiding in and over the proceedings and that any decision taken by her not to recuse herself as presiding magistrate in the proceedings, be substituted by the aforementioned decision taken by this Honourable Court;

3.3 Alternative to prayers 3.1 and 3.2 above (and only in the event that it be found that the first respondent has not yet taken a decision in respect of the application made in the proceedings for her recusal), that the first respondent be directed to recuse herself as presiding magistrate in the proceedings.

4. That costs of this application be awarded against those respondents electing to oppose same, which shall include the costs of one instructing and two instructed

counsel. In the event of more than one respondent opposing the application, such costs are sought against all such respondents electing to oppose the application, jointly and severally, the one paying, the other to be absolved.'

[2] The review application stems from criminal proceedings that are pending before the first respondent in which the applicants are charged by the 6th respondent in terms of the Anti-Corruption Act, 2003 on charges of Providing false information to an authorised officer in contravention of s 29 (1)(d) read with s 1,3,22,23,24,25,26,27,28,29 (3) and 51; and Attempting to defeat or obstruct the course of justice. The applicants pleaded not guilty to the charges and a trial commenced in the Magistrates' Court. After the closing of the State's case, the defence brought an application in terms of s 174, to be discharged at the close of the State's case, which was dismissed by the first respondent on 24 February 2012. Thereafter, the applicants brought an application for the recusal of the presiding officer on the basis that there is a likelihood of bias from the presiding officer towards the applicants, to which the magistrate then refused to recuse herself.

[3] These occurrences were then followed by the review application before this court which in actual fact is aimed at reviewing the decision of the first respondent not to recuse herself from the criminal proceedings. The grounds for review are summed up in paragraph 63 of the founding affidavit as follows:

a) That the first respondent failed to properly apply her mind to the recusal application and failed to properly consider and apply the legal principles applicable to such an application;

b) That the first respondent failed to take into account relevant considerations in deciding the recusal application, and took into account irrelevant considerations;

c) That there is a reasonable apprehension of bias on the part of the first respondent. In light of information conveyed to the applicants, the first

respondent also has an interest in the outcome of the criminal trial in respect of which she is presiding; and

d) That gross irregularities occurred in the proceedings.'

[4] As a ground to sustain the recusal of the first respondent is that the due process is tainted with irregularities that are contrary to article 12, 18 and 25 of the Namibian Constitution. It is on these grounds that the applicants seek the setting aside of the criminal proceedings or in the alternative, that they may be acquitted on all charges preferred against them. Such a request was denied by the 5th respondent, hence the review application. Secondly, the applicants' review application is based on alleged conduct by the first respondent, i.e. her posture during the s 174 application perceived by the applicant to sustain a determination that the prosecution against the applicants proceeds; that the first respondent has potentially become personally involved in the matter in that statements were made in public and in front of staff members of the 3rd respondent to the effect that the first respondent would make sure that the first applicant 'will go to jail'. It is further alleged by the applicants that the first respondent is supported by a 'group of powerful people that wants to 'fix' the first applicant and will make sure that he goes to jail. Allegations were also brought forth that the first respondent was seen to be conversing with key witnesses in the case. No witnesses, nor affidavits were however handed up in support of such allegations.

[5] The applicants are therefore of the opinion that the first respondent would not be impartial in handling the case and many not make credibility findings in respect of witnesses that may implicate her. It is on these grounds that the applicants hold a reasonable apprehension of bias on the part of the first respondent.

The answering papers

[6] The second respondent, who is the prosecutor in the criminal case, deposes to an affidavit and states that after the s 174 application was dismissed, the applicants, defence in the criminal case opened their case and in fact called two witnesses to testify

on behalf of the applicants. Accordingly, statements were also handed in as evidence but lacks evidential value since the authors did not testify orally as required by s 213 of the CPA and in the absence of such evidence, the first respondent could not make a decision on whether to recuse herself or not. The deponent states that what the applicants did was not in compliance with the CPA and that the decision not to recuse herself was justified in the circumstances where there was no evidence before court to prove the necessary allegations.

[7] Second respondent further objected to the application on the basis that no notice was given to the State to consider its position and that the affidavits before court in support of the application were not properly commissioned, and did not amount to any evidence before court. Second respondent further submitted that the applicants acted recklessly in preparing witness statements that has defamatory statements against both the first and second respondent and not allowing the witnesses to testified when subpoenaed on instructions of the first respondent. The withdrawal of counsel representing the applicants just before the witnesses could testify and being on record again for the review application does not support a desperate applicant who is prejudiced in the circumstances. The allegations by the applicants as to the public statements made by the first respondent were denied by the typist, one Rosina Shikalepo.

[8] The fifth respondent also deposed to an affidavit in support of what has been stated by the second respondent. Additionally, the first respondent states that the applicants did not prove reasonable suspicious of bias on a balance of probabilities and that none of the applicants has a reasonable perception of bias and mere allegations should not be a ground for recusal but should be based on concrete evidence, which the applicants did not provide. Accordingly, the normal remedy would be to appeal against the decision at the end of trial and not to load superior court with interlocutory proceedings pending the criminal trial. Fifth respondent states that the applicants did not show that grave injustice would result if this court does not interfere or that gross

irregularity exist which is likely to cause prejudice to the applicants. Fifth respondent clarifies that a wrong judgment does not amount to an irregularity and remedies such as appeal and reviews at the end of the case are always available to the applicants. Furthermore, it is stated that the applicants did not clarify their position as to what exactly is being reviewed and in any event did not comply with s 302 and 304 of the CPA and the grounds for review do not fall under any of the grounds provided by s 20 of the High court Act.

[9] As regards the relief for stay in prosecution, the fifth respondent states that an application should have been brought before a competent court which can be granted if the applicants can prove that the trial has not taken place within a reasonable time and that there is irreparable trial prejudice as a result or other exceptional remedy justifying such a remedy. Such application has not been brought before any court.

[10] An officer on behalf of the Anti-corruption commission deposed to an affidavit on behalf of the sixth and seventh respondent as regards the investigations and the charging of the applicants and denies that the charges are meritless and that since the applicants have not closed their defence case, they are not entitled to judgment. The deponent states that the investigation was done properly, fairly and impartially and that the matter was referred to the fifth respondent for a decision to prosecute or not. Accordingly, the applicants' rights in terms of article 12 of the Namibian Constitution were not affected by the investigation and if the contrary is proven, such would be dealt with by a trial court in a trial-within-a-trial.

Review of pending proceedings of inferior courts

[11] From the papers, the applicants are asking this court to review the criminal proceedings that has since commenced before the lower court and the first respondents decision not to recuse herself, alternatively for the high court to order that the first respondent recuse herself.

[12] The High Court does have its inherent jurisdiction to interfere with the proceedings still pending in a magistrate's court. Apart from its general, overriding jurisdiction to prevent abuse of its process, the court has inherent power to make orders furthering the administration of justice only when a statute or rule of court is silent.[1] The High court is however very reluctant to interfere with uncompleted proceedings in an inferior court and it will do so only in exceptional instances, where serious injustice would otherwise occur or where justice cannot be attained by other means.[2] Intervention on review will be justified in the case of gross irregularity which has caused, or is likely to cause, prejudice to the applicant.[3] It is therefore trite that, a superior court will hesitate to intervene, especially having regard to the effect of such a review procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available after a decision is made.

[13] The court in *Wahlhaus and others v Additional Magistrate, Johannesburg and Another*[4] observed that the prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the High Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the High Court in granting relief before conviction. Accordingly, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals/reviews are not entertained piecemeal. The court further observed in the case of *The State v Bailey and Others*[5] that the decision whether or not to exercise the power to review will depend upon the facts of the case, and particularly the question of prejudice if it is not exercised. The type of irregularity relied on will also be relevant. In that case, the court set aside a magistrates' decision not to

[1]Cillers, AC *et al*. 2014. *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa.* Cape Town: Juta, p 1270.
[2] Van der Berg v Chairman of the Disciplinary Committee (Oranjemund of C D M (Pty) Ltd) and Others 1991 NR 417 (HC). See also Van Tonder v Kilian NO en Andere 1992 (1) SA 67 at 74E-F.
[3]Katjivikua v The Magistrate: Magisterial District of Gobabis and Another 2012 (1) NR 150 (HC) at 59, para 24. See also Van Tonder v Kilian NO en Andere 1992 (1) SA 67 at
[4] 1959 (3) SA 113 (A) at 120C-E.
[5] 1962 (4) SA 514 (E) at 516A.

recuse himself from a pending criminal trial after it was established that the judicial officer had personal knowledge of many of the important facts in issue in a case in which he will be presiding.[6]

[14] As in the present case, interference is therefore desirable if the application for recusal is well founded since an order that a magistrate recuse himself midway through a criminal trial intrudes on the trial court in the most radical fashion imaginable by terminating the presiding officer's warrant to preside. Yet if the circumstances oblige, such an abrogation of judicial functioning would be justified. The test to be applied is not actual bias but whether there is, by reason of the allegations made by the applicants, a real likelihood of bias, or whether a reasonable man may form the impression that the trial will not be a fair one.

[15] The applicants allege that there is a reasonable apprehension of bias on the part of the first respondent. The first respondent obviously did not accept that and refused to recuse herself. She considers that she will preside over the matter impartially and in keeping with the office she holds. On the facts before me, I cannot conclude that her conclusions are unjustified. Moreover it may be that the applicants will be acquitted. Given the fact that the kind of relief sought is given in rare cases, this case does not strike me as one of those.

[16] It is further sufficient to say that nothing was put before the court in argument to show that any grave injustice or failure of justice is likely to ensue if the criminal trial against appellants proceeds before the first respondent. An application was not brought for the stay in prosecution as required by law and if prejudice, both financially, socially and reputational and emphasised by the second applicant in his affidavit is the pillar for this review application, it would be prudent for the applicants to present their case and have the matter finalised. Remedies of appeal and review would in that event be available to the applicants.

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[6] 1962 (4) SA 514 (E) at 517.

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[17] It is thus justified to remit the matter back to the magistrate's court for the criminal trial to be finalised and it is so ordered.

Order

1. The review application is dismissed, with costs.
2. The matter is referred back to the Magistrate's court to proceed with the criminal trial against the applicants.

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PJ Miller

Acting

APPEARANCES

1st APPLICANT:	R Metcalfe
Of	Metcalfe Attorneys, Windhoek
2nd APPLICANT	LH Du Pisani
Of	Du Pisani Legal Practitioners, Windhoek
1st RESPONDENT:	O Sibeya
Of	Sibeya & Partners, Windhoek
2ND -9TH RESPONDENTS	G Boonzaier
OF	Government Attorney, Windhoek