

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

SPECIAL REVIEW JUDGMENT

Case Title: The State v Johannes Musongo Charlton Damaseb Stanley Nuchab	Case No: HC Special Review No.:1960/2023 CR 139/2023
	Division of Court: High Court Main Division
Heard before: Honourable Justice Shivute <i>et</i> Honourable Justice Christiaan AJ	Delivered on: 1 December 2023
Neutral citation: <i>S v Musongo and Another</i> (CR 139/2023) [2023] NAHCMD 778 (1 December 2023)	
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 Elishi to proceed from where the proceedings ended and the matter to be brought to its natural conclusion.	
Reasons for order:	

Shivute J (Concurring Christiaan AJ)

[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).

[2] The background to this matter is contained in the covering letter from the principal magistrate and head of the Magistrate's office Grootfontein district requesting for special review and may be summarised as follows:

- (a) The accused persons in this matter appeared in the district court sitting at Grootfontein on a charge of housebreaking with intent to steal and theft. They all pleaded not guilty to the charge before a relief magistrate.
- (b) The State led evidence from one witness, who testified among other things that there has been recent break-ins at their scrap yard, accused 1 and 2 were part of the previous breaking into the container that is used as an office.
- (c) The court a quo made a ruling that evidence of previous breaking into is disregarded as it amounts to character evidence. She then, reminded the State to direct its witness concerning the law regarding previous convictions of accused being brought before court at that stage of the proceedings.
- (d) The State directed its witness to confine itself to the present matter. However, after the court a quo gave its ruling, it decided to recuse itself from hearing the matter and postponed it to another date for review and for the matter to start de novo and to be heard by a different magistrate. She cited the reason that the State led evidence concerning previous convictions of accused 1 and 2.
- (e) The principal magistrate has no qualm that the court a quo disregarded the evidence of previous breaking in because this clearly amounts to evidence of bad character

which is inadmissible, unless certain requirements are met.

- (f) The reason that was stated by the magistrate for her recusal is not valid in law as she had already ruled that the evidence was inadmissible. Furthermore, the State never led evidence regarding previous convictions therefore, the trial magistrate committed an irregularity by recusing herself for no valid reasons. For these reasons, the principal magistrate forwarded the matter for special review in order for the recusal order that the matter should start de novo before another magistrate to be set aside.

[3] 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 to all matters that come before her or him.

[4] In the *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others* 1999 (4) SA 147 (CC) 1999 (7) BCLR 725) SARFU para 48 it was stated that in deciding on an application for recusal:

‘the question 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 that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out the oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in a 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.’

[5] In *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*

2019 (3) NR 605 (SC) para 25 regarding recusal it was stated as follows:

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

[6] This matter will be decided in light of the above legal principles. For a judicial officer to recuse herself or himself, there must be a rebuttal of the presumption of judicial impartiality. The person who is applying for a recusal bears the burden to rebut such presumption. Such presumption is not easily dislodged unless there is cogent or convincing evidence for it to be rebutted. 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 such presumption.

[7] The reasons given by the learned magistrate for recusal did not meet the requirements as set out in the SARFU matter supra. There is no reasonable apprehension of bias shown to warrant the court a quo to recuse itself. 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.

[8] 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 Elishi to proceed from where the proceedings ended and the matter to be brought to its natural conclusion

N N SHIVUTE JUDGE	P CHRISTIAAN A J JUDGE

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