CASE NO.: CR 62/2012

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

THE STATE

and

TALENI HANGO

HIGH COURT REVIEW CASE NO.: 1267/2012

CORAM: HOFF, J *et* VAN NIEKERK, J

Delivered on: 18 July 2012

SPECIAL REVIEW JUDGMENT

HOFF, J: [1] This is a special review in which the presiding magistrate asked that the unterminated proceedings be set aside and that this Court should order that the matter starts *de novo* before another magistrate.

[2] The accused was charged with the crime of fraud. The allegation in the charge sheet was that the accused fraudulently obtained fuel (valued at N$6 182.52) from Wiemann's Garage in the district of Outjo to the actual or potential loss or prejudice of the Ministry of Health and Social Services.

[3] The accused was employed as a nurse by the Ministry of Health and Social Services and it appears from the evidence led that the accused used fleet fuel cards in order to obtain fuel and cash from afore-mentioned filling station. The accused was represented by a legal practitioner, Mr Titus Ipumbu during the proceedings in the court *a quo*.

[4] The State called four witnesses who gave evidence and who had been cross-examined by the legal representative. The fourth state witnesses was one Vilho Nangolo, an accomplice who implicated the accused and testified in detail what role the accused played in the commission of the said crime of fraud. This witness was thereafter cross-examined, at length, by Mr Ipumbu. The matter was then postponed to 27 June 2011 for the continuation of cross-examination. The bail of the accused was extended. On 27 June 2011 the accused was absent and a warrant was issued for his arrest and the bail was provisionally cancelled. The matter was then postponed until 13 July 2011, Mr Ipumbu having indicated that he would bring an application for the recusal of the magistrate.

[5] It must be mentioned at this stage that Mr Vilho Nangolo, the accomplice, had previously pleaded guilty to the charge of fraud, was questioned by the magistrate in terms of the provisions of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977, convicted of the crime of fraud and sentenced.

[6] On 13 July 2011 the recusal application was heard. The application for the recusal of the magistrate was based on two grounds. Firstly, that there was an application for an inspection *in loco* to be held prior to the evidence in chief or prior to the cross-examination of the witness Vilho Nangolo, on which application the court did not "pronounce itself". Secondly, there was the contention that the right of cross-examination by the legal representative had been curtailed and that the magistrate had descended into the arena. On 7 September 2011 the magistrate before he delivered his ruling on the recusal application aptly remarked that it was "very sad that an application for recusal is made so late in the proceedings of this matter".

[7] The magistrate found that the reasons and grounds relied on by the legal representative were "not sufficient for this Court to recuse itself from this matter".

[8] Nevertheless, the following thereafter *inter alia* appears from the record: (quoted verbatim).

> " … there is a principle that states that Judges must ensure that justice is done and it must be seen to be done and after all that is a fundamental principle and public policy, and this Court is bringing in this matter and the above principle because before this matter was separated, I took the plea of witness Vilho Nangolo and I was the very presiding officer that extensively question Nangolo in terms of section 112(1)(b) of Act 51 of 1977 and I was the one that convicted and sentence him on a charge of fraud, and in his plea he narrated to me how they committed this offence and so forth and he also informed me what the accused (Taleni Hango's) involvement in the offence was, and this should have been most crucial and acceptable ground upon which the application was suppose to be lodge for my recusal, however this Court is raising that itself pertaining to the duty of the Judge as stated in the above matter *of S v Rall supra* that is for justice to be done and seen to be done, it will be in accordance to justice for me to recuse myself from this matter because I as a judicial officer is not

> here to fight and battle with litigants but to see to it that justice is done and seen to be done.
> The application is therefore granted and I therefore recuse myself from this matter and orders that this matter starts *de novo* in front another presiding officer, this is not acquittal."

[9] The matter was hereafter struck from the roll.

[10] The magistrate in his cover letter repeated that the reason why he had granted the application was because he had extensively questioned the witness, that the answers given implicated the accused person which clouded his objectivity. The magistrate concluded his request as follows:

> " … however if the Judge sees no problem with me proceeding with this matter I shall gladly proceed with this matter in which event the Judge may remit the matter to me to proceed with the trial seeing into account that this matter started in 2009."

[11] This matter was sent on special review by the magistrate on 7 June 2012.

[12] In *S v Malindi and Others* 1990 (1) SA 962 AD at 969G – 970A Corbett CJ expressed himself as follows on the issue of recusal:

> "The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v Radebe* 1973 (1) SA 796 (A) and *South African Motor Acceptance Corporation (Edms) v Oberholzer* 1974 (4) SA 808 (T). Broadly speaking 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 a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the

> reasonable perception of the parties as to his impartiality that is important. Normally recusal would follow upon an application (*exceptio recusationis*) therefor by either or both of the parties, but on occasion a judicial officer may recuse himself *mero motu*, i.e. without any prior application …"

[13] Examples of where it was held that there were grounds of recusal are the following:

(a) the fact that the trial magistrate had signed, a search warrant, and had also read the affidavit in support of the warrant (*Silwana and Another v Magistrate for the District of Piketberg and Another* [2003] All SA 350 at 356 E - J);

(b) the presiding officer's expression of disbelief after a section 115 statement setting out the basis of the defence was regarded as a fundamental violation of the right to have a fair trial (*S v Klaas* 2011 (1) SACR 630 ECG at paras [6] – [7]);

(c) a magistrate who had heard a formal bail application which the accused launched, should have recused herself from the trial (*S v Bruinders* 2012 (1) SACR 25 WCC).

[14] I am of the view that the magistrate had for the reason mentioned by him correctly recused himself.

[15] It must however be said that the magistrate having been appraised by the witness Vilho Nangolo, of the role played by the accused should not have taken the plea of the accused and should not have commenced with the trial if it was reasonably foreseeable that there is a likelihood that the co-accused would be called as a state witness against the accused. Such a likelihood exists where *in casu* there was a conviction and sentence after a separation of trials and in circumstances where there is only one magistrate in a particular magistrate's district.

[16] Magistrates must, in my view, in those circumstances refrain from inviting such an accused person during the questioning in terms of section 112(1)(b), to disclose to the court the role of the co-accused, who had stood down, or must stop an accused person where it appears to the Court that he or she is about to provide the Court with information which may implicate such co-accused person.

[17] The request by the magistrate that this Court should order that the proceedings in the Court *a quo* be set aside and that the matter should start *de novo* cannot be granted since this matter is not reviewable.

[18] This Court in the unreported case of *The State v Cornelius Isak Swartbooi* Case No. CR 09/2012 delivered on 15 February 2012 clearly indicated under which circumstances a matter may be forwarded for special review.

[19] The presiding magistrate recused himself and ordered that the matter start *de novo* before another magistrate and this should be the end of the matter. The legal consequences which naturally flow from such a recusal by a presiding officer is that the proceedings are quashed and the trial should start *de novo (S v Malindi (supra)*). There is thus no need for this Court to confirm the order made by the court *a quo*.

[20] In the result the following finding is made:

> The matter is not reviewable and the record of the proceedings is returned to the clerk of the court.

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HOFF, J

I agree

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VAN NIEKERK, J