



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

**Case No: Special Review CA & R 52/2022
Available on: 02/02/2023**

In the matter between:

THE STATE

APPLICANT

and

TIAAN JULIE

ACCUSED

Coram: Mamosebo J et Chwaro AJ

JUDGMENT ON SPECIAL REVIEW

MAMOSEBO J

[1] Magistrate JC Byleveld, a Magistrate in Calvinia, referred this matter in terms of s 304(4) of the Criminal Procedure Act¹ (the

¹51 of 1977 as amended

CPA) on special review on the basis that, though the case is not subject to automatic review, it was necessary to establish whether the proceedings were in accordance with justice.

- [2] The accused, Mr Tiaan Julies, was charged with Housebreaking with intent to steal and theft and appeared in the Pofadder Magistrates Court in the district of Namakwa. A summons (J175) was issued to the accused on 27 July 2021 and served on him on 29 July 2021 to appear in Court on 23 August 2021.
- [3] The resident Magistrate, Ms V Hess, of Pofadder, had recused herself considering that she had heard several matters concerning the accused and requested Mr Byleveld to preside over the matter, which he did. It appears that between the first appearance on 23 August 2021 and 11 August 2022 when the proceedings finally commenced, the case was postponed at least sixteen times mainly for a substitute Magistrate and to afford the accused an opportunity to obtain legal aid representation but also for an Igbo/Ibo speaking interpreter.
- [4] On 12 September 2022 Magistrate Byleveld addressed this letter to the reviewing Judge:

“REVIEW IN TERMS OF SECTION 303(4) OF ACT 51 OF 1977: S v TIAAN JULIE POFADDER MAGISTRATES COURT CASE NO 241/2021

1. *The accompanying record of proceedings in this case refers.*
2. *This case is not reviewable in the ordinary course for purposes of section 302 of the Criminal Procedure Act, but I directed that it be sent on special review to establish that the proceedings were in accordance with justice. The reasons are set out below (paragraph 7 infra).*

BACKGROUND

3. *The accused elected to conduct his own defence for most of the proceedings at the outset and during the early appearances of the case.*
4. *The appointed Magistrate for Pofadder, Ms V Hess, requested me to preside in the eventual trial. She had recused herself because she had presided over matters of the accused before.*
5. *I availed myself and first sat in the matter during February 2022.*
6. *The record will reflect various reasons for postponements of the case before and after my appearance in the matter. Several remands were to obtain the assistance of an alternative Magistrate prior to my involvement. Subsequent to my involvement, there was a number of remands for the accused inter alia to secure legal representation, because he elected at a very late stage, when the matter was already set down for trial, to apply for legal aid.*

REASONS FOR REFERRAL FOR REVIEW

7. *The Honourable Judge is requested to review the following two aspects of the trial (in addition to any other aspects the Honourable Judge may deem reviewable):*
 - (a) *The accused applied that I recuse myself from the case, as he averred that I was biased against him. I refused his application on 24 June 2022.*
 - (b) *The eventual trial proceeded over two days (11 and 12 August 2022). The accused had legal representation during the trial. The accused, however, was disruptive during the commencement of proceedings on the 11th and refused to remain on the dock. He walked off to the court cells and refused to be part of the proceedings. As he was legally represented, I directed that the trial proceeds in his absence in terms of sections 159 and 160 of the Criminal Procedure Act. On the second day (12 August 2022) he was present during the proceedings.*

Sincerely

JC BYLEVELD
MAGISTRATE: CALVINIA

[5] I highlight what, in my view, are noteworthy during the remands:

On **08 October 2021** Ms Hess recorded the following “**accused still wants to conduct his own defence.**” Remanded to 23 November 2021 for trial (after outcome) of the other case of accused 1. On **14 February 2022** Mr Byleveld was the presiding officer and the accused appeared in person (unrepresented). Mr Byleveld recorded the following: “*Case on roll for trial. Case to be remanded to tomorrow, due to lateness of hour, busy with other part-heard. Accused: no objection. Case remanded for trial 15 February 2022. Accused in custody. The four witnesses are warned for 08:30.*”

- [6] Magistrate Byleveld continued with the matter on 15 February 2022 by explaining the competent verdicts to the accused and the right to legal representation. The accused elected to conduct his own defence. He was provided with copies of the docket on 23 November 2021 and again on 14 February 2022 as appears on record. The accused informed the Magistrate that he is ready to proceed with the trial. The prosecutor put charges to the accused. He pleaded not guilty and denied breaking into the premises that evening and being in possession of the stolen items (wine crates).² No admissions were recorded. The Magistrate, Mr Byleveld, explained to the accused that since he was busy with another part-heard this matter would be postponed to 10 March 2022 for trial. The accused informed the court that he needed to apply for legal aid. The Magistrate directed that the accused be requisitioned for the following day, 16 February 2022, to apply for legal aid. Witnesses were warned for 10 March 2022 and the Ibo interpreter was to be arranged for that date.

²Die aand het ek geensins die perseel betree of enige van die wyn kratte in my hande gehad nie

- [7] On 16 February 2022 the accused was brought before Magistrate Hess. She recorded that the accused refused to sign the *judicare* application forms on 16 February 2022 and postponed the case to 10 March 2022, putting two question marks next to the remand date.
- [8] Magistrate Byleveld presided over the matter on 10 March 2022 and recorded that the case could not proceed because the prosecutor was off-sick and the stand-in prosecutor avoided to pick up a part heard due to the number of witnesses. The case was remanded for trial to 19 May 2022. On that day the witnesses and the Ibo speaking interpreter were present. The accused applied that the presiding officer, Mr Byleveld, should recuse himself. It was provisionally postponed to 30 May 2022 for the legal representative to consult with the accused. On 30 May 2022 the case was postponed by Ms Hess to 07 June 2022 for the outcome of the legal aid application.
- [9] On 07 June 2022 and before Ms Hess the following was recorded:

“Accused not feeling well – No consultation done. Accused does not want Mr Byleveld to proceed. He already presided in his case previously. Remanded to 14 June 2022 arrange another Magistrate.”

Mr Van der Merwe’s name appears on the composition of the Court as the accused’s legal representative on 07 June 2022. On 14 June 2022 the matter was remanded to 24 June 2022 for the

recusal application to be argued and Mr Van der Merwe is still on record. The application for the recusal of Mr Byleveld was argued by Mr van der Merwe on 24 June 2022 but the application was unsuccessful. The case was postponed for trial to 11 and 12 August 2022. The Magistrate directed that the accused be requisitioned for 12 July 2022 for Mr Van der Merwe to consult with him and the date of 11 August 2022 was confirmed with the Igbo-speaking interpreter.

[10] On 11 August 2022 Mr Van der Merwe was on record and informed the Court that the defence was ready for trial. His instructions were that the accused felt that his constitutional rights were infringed because of the Magistrate's refusal to recuse himself. He requested that the proceedings be suspended until a decision could be made by a competent court. The Magistrate ordered that the matter be proceeded with and suggested to the legal representative to explain to his client that the accused had recourse should he be aggrieved at the end of the trial. The accused informed the Court that he wished not to be in the proceedings and is terminating the services of his legal representative.

[11] The Magistrate explained the provisions of s 159 (1) of the CPA to the accused which stipulates:

"159 Circumstances in which criminal proceedings may take place in absence of accused

(1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence

impracticable, the court may direct that he be removed and that the proceedings continue in his absence.”

- [12] The accused elected not to be present during the proceedings and returned to the court cells. The Magistrate records that at the end of the evidence-in-chief the accused will be brought in and his legal representative will give him feedback on the evidence and take instructions. The State led the evidence of four witnesses and Mr Van der Merwe cross-examined all of them. At the end of the evidence, the State closed its case. The Court afforded Mr Van der Merwe opportunity to obtain further instructions. The accused did not testify or call any witnesses to testify on his defence and closed the defence case. The parties made their closing arguments where after the Magistrate returned a verdict of guilty. The State proved previous convictions which were admitted by the accused who was present in court on the second day, 12 August 2022.
- [13] Mr Van der Merwe called the accused to the witness box to testify in mitigation of his sentence. In addition, Mr Van der Merwe addressed the Court on the triad and pleaded with the Court to show mercy. The State addressed the Court in aggravation of sentence and asked for a custodial sentence. The Court delivered its judgment *ex tempore*. Since the accused was convicted only of Housebreaking with intent to steal and not theft, he was sentenced to three (3) years imprisonment of which one (1) year was suspended for five (5) years on condition that he is not convicted of housebreaking with intent to commit any offence or any of the competent verdicts in terms of s 262 or 263 of the

Criminal Procedure Act committed during the period of suspension.

Application for recusal

[14] The Constitutional Court laid down the test for recusal in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*³(SARFU). There, the Constitutional Court unanimously dismissed an application brought by Dr Louis Luyt for the recusal of four of the Court's Judges. The court not only established that the question of judicial recusal is a constitutional matter but also formulated the proper approach to recusal in these terms:

*“[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. **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 that 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 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*

³1999 (7) BCLR 725 (CC)

apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

[15] On 24 June 2022 the case having been postponed fourteen times already, the accused lodged an application for recusal in which it was submitted by Mr Van der Merwe, his legal representative on his behalf, that he had a reasonable apprehension of bias that since Mr Byleveld has presided over his other matters in the past he would be biased against him and as a result he might not get a fair trial.

[16] It is necessary at this stage to refer to the pertinent remarks by the Constitutional Court in the *SARFU*⁴, quoting with approval from the judgment by Hefer JA in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel*⁵, where the Court remarked:

“[10] At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront.”

[17] As early as 14 February 2022 the accused informed My Byleveld that he is ready to proceed with the trial. Unfortunately, because the presiding officer was engaged in another part heard matter, the accused's matter was adjourned until the following day. On 15 February 2022 he tendered his plea of a bare denial but for the

⁴Ibid at para 10

⁵1996 (3) SA 1 (A) at 13H

Court's scheduling of cases, this matter would have proceeded before Mr Byleveld on 14 and 15 February 2022. It is common cause that he had, however, pleaded before Mr Byleveld on 15 February 2022. It is only during this postponement to 10 March 2022 that the accused expressed his wish to apply for legal aid, which is within his right. It was also commendable of the presiding officer to direct that the accused be requisitioned to the following day, 16 February 2022 to enable him to lodge the legal aid application. What is not apparent is the date upon which he refused to complete the legal aid forms for judicare. It is unclear what transpired and what informed this decision as the record does not really reveal much. What is known, however, is that on 10 March 2022 the matter did not proceed due to the absence of a prosecutor. On 19 May 2022 the accused started asking for the recusal of Mr Byleveld.

- [18] The following were submissions made by Mr Van der Merwe on 24 June 2022 in support of the application for the recusal of Mr Byleveld. The accused gave Mr van der Merwe written instructions to be read into the record and for the attorney to follow up oral submissions. This is what he wrote:

"Mnr Byleveld tydens die verhoor waar Mnr Julie aangekla is vir huisbraak en diefstal, sy grondwetlike regte geskend het deurdat die landros Byleveld sonder enige grondige rede die reg van die beskuldigde, ek vul dit aan daar, om te konsulteer met 'n regspraktisyn of as jy sou verkies om deur die staat deur regshulp voorsien te word. Dat daardie reg van die beskuldigde in die distriktshof te Kenhardt, Pofadder, deur die landros Mnr Byleveld geskend is in die regverdige hof en Mnr Van der Merwe om dit nou die Strafproseswet, die wet van Legal Aid of enige ander wetgewing is. Daar is geen wet verhewe bo die konstitusie

van die Republiek van Suid-Afrika nie. En ek is verseker daarvan dat alles op record is. Ek is van voorneme om te kom getuig. Ek het geensins vir Mnr Byleveld toestemming gegee om my grondwetlike reg in die regverdige hof te skend nie. Die Grondwet sit dit uiteen dat as bevind word dat jou konstitusionele regte in 'n hofgeding geskend word of geskend is, dat so 'n persoon as korrup, ongrondwetlik of as onbevoeg in die regverdige hof of in die Strafproseswet aanskou kan word. Die Wet maak dit ook duidelik dat as jy bevind dat jou regte geskend word, dat daar nie 'n hof is wat ongrondwetlike aangeleenthede ondersoek of daarvoor beslis nie en dat verder alleenlik die konstitusionele hof die magtiging het om 'n ongrondwetlike aangeleentheid te ondersoek of om daarvoor te kan beslis.”

[19] Mr Van der Merwe wrapped up his submissions by reiterating that it is clear that the accused's dissatisfaction to further appear before Mr Byleveld is based on the perception of bias in that he violated his right to legal representation on 19 May 2022.

[20] This argument that the accused's right to legal representation was violated on 19 May 2022 is not supported by the objective facts. The record clearly shows that the accused was afforded an opportunity to put his grievance across and was even requisitioned solely for purposes of seeking legal representation and to consult on more than one occasion. On this score, I can find no misdirection or any irregularity on the part of Magistrate Byleveld when he refused to recuse himself on 24 June 2022. The accusation is without merit.

Proceedings in terms of s 159 of the CPA

[21] The second leg to this review pertains to the accused's absence in Court and the proceedings in terms of s 159 and 160 of the CPA. The questions to be answered in the determination of

whether the proceedings were in accordance with justice in this regard are the following:

21.1 Was the accused legally represented on 11 August 2022 when the trial commenced before Mr Byleveld?

21.2 Does his absence in the courtroom when the State led evidence of four witnesses amount to a violation of a fair trial in terms of s 35 of the Constitution of the Republic of South Africa⁶?

[22] On 11 August 2022 the accused persisted with his objection that Mr Byleveld not continue to preside over his case. He demanded to address the Court directly bypassing Mr Van der Merwe. But it appears from the record that the Magistrate reminded the accused that the Court regards Mr Van der Merwe as his legal representative and that the Court will listen to Mr Van der Merwe. Mr Van der Merwe asked the Court for permission to obtain instructions from the accused. Having done so he relayed to Court the following:

*“Dit is nou herhaal, toe ek gevra vir ‘n instruksie wat gebeur indien die Agbare hof bevind dat ons moet voortgaan. Waar is ek nou in daai prentjie toe het die beskuldigde gesê in daardie geval gaan hy vir die hof versoek om hom te verskoon in terme van die betrokke artikel wat reeds in die verlede aan hom genome is dat hy nie in die hof teenwoordig hoef te wees tydens sy verhoor nie. Toe sê ek goed, **indien die hof dit toestaan of hy nie teenwoordig is vir welke rede ook al nie wat is my posisie? Moet ek dan voortgaan met die verhoor in sy afwesigheid wat mos nou uiteraard vir my baie moeilik sal wees, en toe was my instruksie dat hy voel in daardie geval ontslaan hy ook vir my.** Met ander woorde toe het ek net vir hom verduidelik*

⁶Act 108 of 1996 as amended

dat indien so verhoor voortgaan in sy afwesigheid en sonder regsvertegenwoordiging en hy word skuldig bevind wat mos een van die moontlikhede is dan sal hy van voor af moet aansoek doen vir regshulp dan kan ek nie weer instap en appel namens hom maak nie. Ek dink dit is die Judicare waarna hy dalk nou reeds verwys hy kan dan nou vir u sê of ons mekaar regverstaan.”

The accused confirmed the submission by Mr Van der Merwe.

[23] The Magistrate gave a short judgment to this effect:

“My judgment is that the trial will proceed firstly, secondly, I am not excusing you. The trial will commence and if at the end of the trial like I have already explained to you, then at the end of the trial as was explained to you in terms of your right to appeal my refusal to recuse myself and whatever the verdict in this case may be, it may be taken on appeal.”

[24] Mr Byleveld invoked the provisions of s 159(1) of the Criminal Procedure Act, which provides:

“159 Circumstances in which criminal proceedings may take place in absence of accused

(1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.”

[25] Sec 159(1) provisions must be considered in the context of the circumstances prevailing on 11 August 2022 when it comes to the position of Mr Van der Merwe vis-à-vis the accused's behaviour and his instructions to his legal representative.

[26] Immediately after the Court made its ruling for the matter to proceed, the accused was adamant that he does not want to remain in Court and tentatively terminated Mr Van der Merwe's mandate or at the very least excused him. This is what the accused said:

“Ek het nie met Mr Van der Merwe gekonsulteer nie en ek voel nie Mr Van der Merwe moet my verdedig nie Mr Byleveld so u kan maar aangaan met die verhoor sonder my teenwoordigheid.”

[27] Mr Van der Merwe said the following when asked whether he had consulted with the accused:

“I did consult, your worship, I did not take [instructions] this morning because of the other aspects but we did consult at the police station.”

[28] The accused persisted:

“Ek sê ek het nie Regshulp Raad, ek het vir Mnr Van der Merwe weggejaag aangesien ons nog nooit 'n behoorlike konsultasie gehad het nie en dan kan die hof maar aangaan met sy procedure, Mr Byleveld.”

The Court responded in this fashion:

“Thank you, I take note of your address, but I refuse his recusal, his withdrawal from the case. He will proceed on your behalf. Thank you.”

[29] It must be borne in mind that the relationship between an attorney and his client emanates from the mandate given by the client (the accused in this instance). The mandate relationship exists for as long as the mandate is in place. Once the client terminates the mandate, the legal practitioner has no option but to withdraw as

attorney of record and cannot take the matter further on a terminated mandate. Section 34(1) of the Legal Practice Act⁷ (LPA) provides that an attorney may render legal services in expectation of any fee, commission, gain or reward as contemplated in this Act or any other applicable law, upon receipt of a request directly from the public for that service.

[30] Para 3.7 of the Code of Conduct for all legal practitioners stipulates that legal practitioners, candidate legal practitioners and juristic entities shall respect the freedom of clients to be represented by a legal practitioner of their choice. Should the client terminate the authority of his or her legal practitioner, he or she may act in person or appoint another attorney to act on his or her behalf. The accused terminated the services of Mr Van der Merwe on 11 August 2022 and was in the court cells following the proceedings from there. He was unequivocally stating: “*ek het vir Mnr Van der Merwe weggejaag.*” Literally: I chased Mr Van der Merwe away.

[31] In the Magistrates Court, the provisions of the Act must be read with Rule 52 and 52A of the Magistrates Court Rules⁸. Rule 52 (1)(a) provides that a party may institute or defend and may carry to completion any legal proceedings either in person or by a practitioner.

[32] Although the accused had seemingly terminated the services of Mr Van der Merwe he clearly later had a change of heart and

⁷28 of 2014

⁸Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa Supplementary Volume: Magistrates' Courts Rules & Related Materials DE van Loggerenberg SC

reconciled with him. Mr Van der Merwe, at the behest of the Court participated throughout in the proceedings even when the accused banished himself to the cells on 11 August 2022. When he emerged from the self-imposed banishment on 12 August 2022 Van der Merwe familiarised him with what transpired in court. The evidence was mechanically recorded. He should have been furnished with a transcript of the recordings and same interpreted to him. In my view it is only then that he could make an informed decision on how to proceed, what instructions to give Van der Merwe to recall some witnesses for cross-examination and whether to testify and/or to call witnesses. Sight should not be lost of the fact that whilst the accused was in the cells Van der Merwe suffered the disadvantage of not taking instructions contemporaneously. In my view the accused's disruptive behaviour is not set clearly as conduct that is untenable when weighed against the backdrop of whether Mr van der Merwe was imposed on him by the Magistrate or not.

[33] On this aspect only the proceedings have been visited by an irregularity which vitiates its fairness and renders it reviewable and be set aside.

[34] There remains one other matter which is irksome. If Magistrate Byleveld convicted the accused on other matters prior to the current case and it is brought to the Magistrate's attention before the commencement of his trial or during the course thereof it may constitute a good ground for the Magistrate's recusal. This is so because a reasonable apprehension of bias may arise in the mind of the accused that he is unlikely to receive a fair trial. A

prosecutor can be helpful in establishing this fact by having regard to the record of previous convictions, which a legal representative is entitled to in any event.

[35] In all the circumstances I have serious misgivings that the proceedings were in accordance with justice or that the accused was afforded a fair trial. I therefore find that the conviction and the sentence are not in order and stand to be reviewed and set aside.

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur

OK CHWARO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION