THE STATE

Versus

KHOLISANI NYATHI

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Mabandla and Mr Mashingaidze
BULAWAYO 20 February 2024

Criminal trial – recusal

Ms. *T.C. Mujokoro* for the State
Ms. *N. Nyathi* for the accused

DUBE-BANDA J:

[1] This matter was placed before me for trial in the criminal court. The accused is facing two counts, *viz* murder and attempted murder. The trial was set down for today 20 February 2024. On 19 February 2024 State counsel and defence counsel sought audience with me in my chambers. Counsel brought it to my attention that on 20 May 2022 I presided over a criminal matter involving this accused and a co-accused who is not part of this trial. I was shown a copy of the judgment in *The State v Kholisani Nyathi & Anor* HB 138/22. I perused the judgment and noted that in that case the accused and his co-accused where charged with two counts of murder. I further noted that the murders were committed in the course of robbery, and that in this case the allegations are that these crimes were committed in the course of robbery as well. In HB 138/22 the accused and his co-accused were convicted of the two counts of murder and sentenced to life imprisonment for each count.

[2] At the commencement of the trial I *mero motu* raised the issue of my recusal from hearing this criminal trial. I requested counsel to address the court on whether it was in the interests of justice for me to hear this trial. Both counsel indicated that it would not be in the interests of justice for me to hear this case because there might be a perception of bias.

[3] In *S v Chipande* HB 238-20 it was held that it is trite in this jurisdiction that a judicial officer may recuse himself or herself *mero motu*, i.e. without any prior application, and this happens in practice now and again. But whenever it occurs, the judicial officer who raises recusal should cross the high threshold needed to satisfy the test for recusal. The application for recusal or where it is raised *mero motu* by a judicial officer, cannot be done in *vacuo* or on the judicial

officer's predilections, preconceived, unreasonable personal views or ill-informed apprehensions. To do so would be to cast the administration of justice in anarchy where judicial officers would be at liberty to make choices of which cases to preside over. Judicial officers have a duty to sit in any case in which they are not obliged to recuse themselves. See *Sikunda v Government of the Republic of Namibia* (1) 2001 NR 67 HC at 83I-J; *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008(2) NR 753 SC at 769H-770A. *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725) at 173.

[4] 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*) *Bpk* v *Oberholzer* 1974 (4) SA 808 (T). 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. After all, in considering the issue of recusal, the judicial officer should always take into account the circumstances of the case and above all ascertain what impression they would create upon a reasonable citizen and in the eyes of the public. In short, any condition of things which, reasonably regarded, is liable to destroy his impartiality should disqualify him. See *Head and Fourtuin v Woolaston N.O and De Villiers, N. O* 1926 TPD 549; *Sladie v The Pretoria Rent Board* 1943 TPD246.

[5] On these facts there could be some reasonable ground for believing that there is a likelihood of bias on my part and that I will not adjudicate impartially. I say so because I now know that the accused is the same person, I presided over his criminal trial in HC 138/22. I now know that the accused has a previous conviction. Not only a previous conviction, but a relevant one. There must be no hint reaching the judge, before conviction that the accused has a previous conviction. The fact that this information came to my attention outside the trial process is inconsequential. It is of no moment. The point is that I now know that the accused has a previous conviction. A reasonable, objective and informed person would on these facts reasonably apprehend that I will not bring an impartial mind to bear on the adjudication of this case, that is a mind open to persuasion by the evidence and the submissions of counsel. *See*

President of the Republic of South Africa and other v South African Rugby Football Union and other, supra at 177D-G. This is because Judges are human.

[6] The accused has a right to a fair trial. This means that the entire process of bringing an accused person to trial and the trial itself needs to be tested against the standard of a fair trial. It must never be forgotten that an impartial judicial officer is a fundamental prerequisite for a fair trial. This is the reason s 323 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act) says:

> Except where the fact of a previous conviction is an essential element of the offence with which a person is charged, it shall not be lawful in any indictment, summons or charge against any person for any offence to allege that such person had been previously convicted of any offence, whether in Zimbabwe or elsewhere.

See also s 324 of the CP & A Act.

[8] This provision is to protect the accused so that the trial court or the judicial officer, would not before conviction know that the accused has a previous conviction. Knowledge of a previous conviction before conviction is prejudicial to the accused. At the heart of the right to a fair criminal trial and what infuses its purpose is that justice must be done and must also be seen to be done. Justice must be manifestly done to all, even those suspected of conduct which would put them beyond the pale.

[9] I am of the view that whatever my decision is going to be in this case justice would not be seen to be done and yet justice must not only be done but it must be seen to be done. I therefore completely disqualified from presiding over this trial.

I accordingly recuse myself and withdraw from presiding over this case.

National Prosecuting Authority, State's legal practitioners
Sandi & Matshakaile Attorneys, accused's legal practitioners