

**REPUBLIC OF NAMIBIA**

**NOT REPORTABLE**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
SPECIAL REVIEW CASE JUDGMENT**

**CASE NO: CR 57/2016**

**WINDHOEK MAGISTRATE'S COURT**

**(1) REVIEW CASE NO. 92/2016**

**KAT-CRM-2714/2014: THE STATE vs WILLIE STEWE**

**(2) REVIEW CASE NO. 96/2016**

**KAT-CRM-2776/2014: THE STATE vs ALBERTRICO PIETERSEN**

**(3) REVIEW CASE NO. 95/2016**

**KAT-CRM-2711/2014: THE STATE vs FRANSICKUS KAIWINA & OTHER**

**(4) REVIEW CASE NO. 93/2016**

**THE STATE vs RUDY RAUTENBACH & OTHER**

**SPECIAL REVIEW – FOUR PARTLY HEARD REGIONAL COURT CASES  
BEFORE ACTING REGIONAL COURT MAGISTRATES J. SHUUVENI; U. UANIVI**

**Neutral citation:** *S v Stewe* (CR 57-2016) [2016] NAHCMD 275 (19 September 2016)

**Coram:** SIBOLEKA J and USIKU J

**Delivered:** 19 September 2016

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**Flynote:** Criminal law: Uncomfortableness to continue hearing Regional Court cases due to concerns over the required qualifications, merit exists – recusals allowed.

**Summary:** The two Magistrates have been assigned by the Magistrates Commission in terms of section 11(3) of the Act as Magistrates for the Regional Court of Windhoek to preside over Regional Court cases for a number of months. They have recused themselves from continuing to do that work. They say they feel uncomfortable that on one hand they are considered competent to preside over Regional Court cases and therefore assigned to preside, yet on the other hand they are told they cannot be considered for appointments in the Regional Court because they don't have the required LLB qualifications.

Held: The Magistrate's Commission should revisit the practice of assigning none LLB degree holders to do the work for which they are not qualified for. If they are performing well and satisfactorily permanent appointments should then be considered.

Held: The recusals are upheld.

Held: The cases should be started *de novo* before a permanent Regional Court Magistrate.

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### **SPECIAL REVIEW JUDGMENT**

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SIBOLEKA J, (USIKU J concurring)

[1] This matter comes before me on special review from the Divisional Magistrate of Windhoek.

[2] The covering letter briefly states that; two Magistrates who have been assigned by the Magistrates Commission to preside over Regional Court cases have recused themselves from continuing to perform their duties. They have taken this position in the middle of the criminal court cases they were hearing.

[3] The reasons for recusal given by Magistrate Shuuvani – the following:

“The reason is that I reached a decision to recuse myself from this case in order for the case to start *de novo* for regional court magistrate

number 3. So I do not find myself comfortable to proceed in the regional court with the cases because of the manner in which the commission is treating us. One day capable of handling regional court, the other time you are not suitable. This is not only happening to myself but to my other two colleagues, so we have reached a decision to recuse ourselves from all these matter so that they can proceed before the properly constituted regional court magistrate. And that is my decision. I do not find it necessary to invite you to address me because once I recused myself I am *functus officio*".

"Unfortunately I have taken a decision to recuse myself from all regional court matters that are pending before me. I have made this decision known to the commission, the chief magistrate. They approached me this morning, the previous commission chaired by Judge Hoff who is a senior Judge of the High Court they made an error, appointed magistrates to assist in regional courts who do not at the time possess LLB and they decided that those who do not possess LLB are not qualified to preside over regional court matters. Hence that does not go away with that, you cannot be qualified to preside over the court when you are acting law or take decisions we have to look at the repercussion. The commission that was chaired by Judge Mainga Judge of appeal now was also of the view that all magistrates who have necessary expertise or experience can be allowed as long as they are in the system and abide their qualification as we are busy doing. As a result I have no choice but to recuses myself and this case has to be start *de novo*".

Magistrate U. Uanivi's reasons for recusal are the following:

"I do hold a certificate in law and a degree of master of laws in criminal justice. I have thirty-one years on the bench as magistrate. The Commission has assigned me on several occasions to adjudicate in the Regional court cases in Windhoek district and elsewhere in other districts. However, recently I was informed by interview recruiting committee of the Commission that I no longer suitable or eligible to occupy regional court seats. Because I do not hold an LLB degree. The administrative decision puts me in a dichotomy of not proceeding comfortably in the circumstances. I, therefore, am left with no any other

option but to recuse myself. This case is herewith referred to regional court No. 3 to start *de novo*".

[4] The crux of the matter regarding the recusals of the two Magistrates is that the Magistrates Commission found competency in them and proceeded to assign them to preside over regional Court matters. The same Commission in their view should have seen the same competency in them and proceeded to consider them for permanent Regional Court Magistrate positions by virtue of their experience.

[5] In the normal flow of a trial a litigant through her counsel appearing before the Court would file an application for the recusal of the presiding officer. They would detail the reasons for the request in order for him to look at and decide accordingly.

In *S v Malindi and Others*<sup>1</sup> Corbett J, expressed 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*<sup>2</sup> and *South African Motor Acceptance Corporation (Edms) v Oberholzer*<sup>3</sup>. 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 the impartiality that is important. Normally recusal would follow upon an application ... therefore by either or both of the parties, but on occasion a judicial officer may recuse himself *mero motu*, ie without prior application".  
My own underlining.

[6] The requirements for appointment as a Magistrate are set out in section 14 of the Magistrate's Act 3 of 2003 and it reads as follows:

"Qualifications for appointment as Magistrate

14 Subject to section 29(2) a person who immediately before the date of commence-

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<sup>1</sup> *S v Malindi and Others* 1990 (1) SA 962 AD at 969 G-970 Corbett J.

<sup>2</sup> *S v Radebe* 1973(1) SA 796 (A).

<sup>3</sup> *SA Motor Acceptance Corporation (Edms) v Oberholzer* 1974(4).

ment of this section did not hold a substantive appointment as Magistrate is not qualified to be appointed as a Magistrate under this Act, unless –

- (a) such a person –
  - (i) is a legal practitioner who has practiced as such for at least two years;
    - or
  - (ii) has passed in Namibia any examination in law declared by the Commission in general or in any particular case to be a qualification of a satisfactory standard of professional education for the appointment of a person as Magistrate.
- (b) Such person has outside Namibia in a country which is a member of the Common Wealth passed any examination in law which is of a standard not lower than the minimum qualification required by that country for the appointment of a person as Magistrate or
- (c) ...
- (d) such person has outside Namibia or any other country which is a member of the Common Wealth passed any examination in law which is considered by the Commission to be a qualification of a satisfactory standard of professional education for the appointment of a person as Magistrate”.

[6.1] Section 14 as amended by Act 2 of 2014 relating to the appointments of Magistrate reads:

The Magistrates’ Act, Act 3 of 2003 as amended by Act 2 of 2014, Section 14 reads:

- “14.(1) Subject to section 29(2), a person who immediately before the date of commencement of this section did not hold a substantive appointment as magistrate is not qualified to be appointed as a magistrate under this Act, unless such person has obtained a qualification in law referred to in subsection (2).
- (2) The Minister, by notice in the Gazette, on the recommendation of the Commission in general or in any particular case, may recognize any qualification in law to be a qualification of a satisfactory standard of professional education for the appointment of a person as magistrate.
- (3) A person who has been appointed as magistrate before the recognition of any qualification contemplated in subsection (2) his or her appointment is not affected by such qualification so recognized”.

[6.2] Section 11(3) of the Magistrate's Act 3 of 2003 which was used by the Magistrates Commission to assign them to preside over Regional Court cases provides the following:

“Composition of Magistracy 11(3)

The Commission must assign a Magistrate to a specific Regional Division; district division; district or subdistrict to serve as a Magistrate of that regional division; district division; district or subdistrict.

[7] It is my considered view that the use of section 11(3) to assign Magistrates who are none LLB qualification holders to preside over Regional Court cases yet they cannot be considered for permanent Regional Court Magistrate appointments should be urgently and very seriously revisited. This is where in my view any person in the position of the dissatisfied Magistrates would find it difficult to understand. If the Magistrates Commission is satisfied with the work that the assigned none LLB degree holding Magistrates are doing on the bench while presiding over cases in the Regional Court, why can they not be considered for permanent appointments in that regard. If this is not possible, why assigning them to do the work they are not qualified to do.

[8] There is merit in the concerns raised by the dissatisfied Magistrates. It is my considered view that should the Magistrates Commission still be interested to assign those Magistrates in the contested positions, a consideration to hear them will be embarked on so that an amicable lasting solution can be found.

[9] In the result I make the following order:

The recusals are upheld.

The cases be started *de novo* before a permanent Regional Court Magistrate.

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A M SIBOLEKA

Judge

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D N USIKU

Judge