

SOUTH AFRICA / JUDGMENT

Farmsecure Grains (Pty) Ltd v Du Toit (A9/2013) [2013] ZAFSHC 187 (13 August 2013) [2013] ZAFSHC 187

COURT

Free State High Court, Bloemfontein

BEFORE

RAMPAL

CASE / FILE NUMBER

A9/2013

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IN THE HIGH COURT, REPUBLIC OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No. : A9/2013

In the matter between:-

FARMSECURE GRAINS (PTY) LTD.....Appellant

and

JOHANNES PETRUS CORNELIUS DU TOIT.....Respondent

HEARD ON:.....13 AUGUST 2013

JUDGMENT

BY:.....RAMPAL, J

DELIVERED ON:

- [1] The appellants are three of the five accused who were tried together in the court a quo. Their two co-accused are not before us in these appeal proceedings. The one has since died. The other acquitted at the end of the very long trial. During the trial the accused unsuccessfully applied that trial judge recuses herself. On appeal only the first appellant persisted with such an application. The second and the third appellants no longer pursued such relief. The respondent opposes the application.

- [2] This dimension of the judgment is exclusively devoted to the recusal component of the appeal. The argument pertaining to the application for the separation of trials on the one hand and the substantive merits of the appeal on the other hand will be considered elsewhere.
- [3] The record revealed that the application for the recusal of the trial judge was launched on the 17th November 2008. By then the prosecution case was closed although the first and the second appellants had already testified the defence case was not as yet closed.
- [4] I deem it necessary to profile the role players: Mr Andries Joe Masoanganye, was the first appellant. He was accused number 1 in the court a quo. At the time of his arrest he was die Master of the High Court at Mafikeng. At the time he was convicted he was in the employ of the South African Nursing Council where he worked as a legal advisor. He was initially represented by Adv. Mojuto who was later replaced by Adv. S Booysens SC. He has been in custody since his conviction. Before us Adv. N Skibi appeared on his behalf.
- [5] Mr Abdul Kader Ahmed was accused number two. In the appeal he is second appellant. He an attorney by profession. He privately practised law at Mafikeng at the time of his arrest. Initially he was legally represented by Adv. S Vermeulen SC. He is still out on bail. Before us Adv. T. Nkhahle appeared on his behalf.
- [6] Ms Tlaleng Alina Mhlekwa was accused number 3. Before us she is the third appellant. She was the deputy Master of the High Court at Mafikeng at the time of her arrest. She is currently still employed in the same capacity, but in Bloemfontein. She is still out on bail pending the outcome of this appeal. Adv. Venter appeared on her behalf.
- [7] Ms Keatlaretsi Grace Mooketsi was accused number 4. She is not before us in this appeal. She was found not guilty in respect of all the charges. She was employed as an administrative clerk in the office of the Master of the High Court at Mafikeng. Initially she was legally represented by Adv. Roothman.
- [8] Mr Gaolaolwe Theophilus Mogape was accused number 5. He was a para-legal employed by attorney A. K. Ahmed at Mafikeng. Initially he was also legally represented by Adv. Roothman. He was not before us in this appeal because he was since died.
- [9] Initially Mr Mdabula and with him Adv Basson appeared for the state in the court a quo. Lateron they were replaced by Adv Ndimande. Before us Adv. Carpenter appeared on behalf of the respondent.
- [10] The first appellant was convicted in respect of five counts of theft; 1 count of conspiracy to commit the offence of theft; and 1 count of defeating the ends of justice. The court a quo refused to extend his bail pending the outcome of his appeal. Against such refusal he applied to the SCA without success.

- [11] In his pre-conviction sworn statement which he made at Mmabatho on the 17th November 008 in support of his application that the trial judge recused herself from the proceeding he express concern that the judge was biased in favour of the prosecution and that the judge had already pre-judged his guilt. He complained therefore that the trial judge had thereby infringed his fundamental right to a fair trial.
- [12] The recusal application was initiated by accused number two and supported by accused number one and number three. The application was turned down.
- [13] There were various grounds on which the appellant(s) relied in support of the application that the judge recuses herself. I shall revert to them in due course.
- [14] Mr Skibi, counsel for the first appellant, argued on appeal that the first appellant was, on account of the irregular conduct complained of reasonably apprehensive at the court a quo was biased and that any reasonable member of the public who had witness the trial proceedings were conducted would have reasonably feared that the accused were unlikely to receive a fair trial. Counsel argued that a proper case was made out in the court a quo for the early recusal of the trial judge. Accordingly counsel submitted that the refusal application was incorrectly refused. He also submitted that by continuing with the trial afterwards the court

a quo committed an appealable irregularity.

- [15] But Mr Carpenter, counsel for the respondent, sharply differed. According to counsel, the recusal application was correctly refused. He argued that the appellant(s) apprehension of bias was not reasonable and that the appellant's did not pass the double test of reasonableness. The grounds upon which the recusal applications were based were not founded on any cause whatsoever let alone a reasonable one. So argued counsel for the respondent. Accordingly counsel submitted that no proper case had been made out to justify any appellate interference with the refusal of the court a quo to recuse itself.

- [16] It

M. H. RAMPAL, AJP

On behalf of applicant: Adv. P. J. Heymans

Instructed by:

E G Cooper Majiedt Inc

BLOEMFONTEIN

On behalf of respondent:.....Adv. C. Snyman

Graham Attorneys

/eb

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