

REPUBLIC OF NAMIBIA

Special interest: Clerks of Court

CASE NO: CA 52/09

IN THE HIGH COURT OF NAMIBIA

In the application of:

PETRUS J COETZEE APPELLANT

and

THE STATE RESPONDENT

CORAM: DAMASEB, JP et UNENGU, AJ

Heard on: 11 March 2011

Delivered on: 11 March 2011

JUDGMENT

DAMASEB, JP: [1] This appeal was set down for hearing today. The unrepresented Appellant is serving a long term of imprisonment for stock theft. He appeals to this court against conviction and sentence. The record was compiled by the Clerk of Court. The record in this matter does not contain the handwritten record in respect of any of the proceedings in the District Court. The parts of the record we are able to make sense of suggest the

appellant was found guilty by the district court while the sentence was imposed by the Regional Court. The events are not presented in any chronological sequence and we cannot tell why things happened in the way they did. The entire thing involves guesswork! What if our guess is wrong? Because officials in the Magistrate's Court fail to do their work justice must now depend on guesswork. I make this comment because the present is not the first of its kind as many appeals get enrolled in the High Court, only to be removed because appeal records are not properly prepared. This state of affairs deserves the attention of the Permanent Secretary for Justice for the reasons that I set out below.

[2] To state that the record is in a shambolic state is an understatement. We are unable to make out what constitutes the record of the proceedings in the court below. A record of proceedings in the Magistrate's Court is to be prepared in accordance with, and must comply with, '*Chapter X111 of the Codified Instructions: Clerk of the Criminal Court*' issued by the Permanent Secretary for Justice.¹ No doubt, these administrative directives are intended to ensure that criminal case records are prepared in a way that creates certainty about proceedings in the Magistrate's Court so that appeals therefrom are conducted in a manner that is fair to both the accused and the State - and to avoid the appeal Court from guessing what is before it. In the present case there was a total non-compliance with the instructions resulting in the shambolic state of the record. It is important to point out that although the Codified Instructions stipulate that the Clerk of Court prepares the

record, the ultimate responsibility rests on the Magistrate to ensure that the record is an accurate reflection of the proceedings that took place before him or her.

[3] Chapter XIII deals with appeals. As far as it is relevant to the present appeal, the

¹Permanent Secretary's Administrative Circular dated 12 May 2008 re "Amendment of Codified Jurisdictions Justice Code: Clerk of Criminal Court", updated March 19, 2008.

following sections of the chapter are relevant:

'180. Submission of original case record and notice of appeal to the presiding magistrate

1. The clerk of the court must submit the notice of appeal with a typed copy of the original case record, or if the proceedings were mechanically recorded, a transcription of the record, to the magistrate who tried the case for his or her reasons for conviction and sentence.
2. ...

181. Record to be certified

(a) Case recorded by hand

Before the clerk of the court hands the original case record and notice of appeal to the magistrate for reasons for conviction and sentence, he or she must complete the following certificate on the last page of the record for the signature of the magistrate who gave the verdict and imposed the sentence:

" I certify that the foregoing notes are the true record of
the (full name) proceedings in this case which was tried by
me from to (date started) to (date
completed)

Magistrate Date

(b) Case recorded mechanically

(i) The transcript of the record recorded by mechanical means must be certified as correct by the transcriber and such certificate must accompany the typed record when it is handed to the magistrate for reasons.

(c) That part of the record prepared by the magistrate by hand must still be certified by the magistrate as provided for in subparagraph (a).

183. Preparation of copies if the case was recorded by hand

Copies typed must be prepared as follows:

- (i) Type in double spacing;
- (ii) Leave a margin of 40 mm on the left hand side of the paper;
- (iii) Do not type on the reverse side of the paper;
- (iv) Pages must be numbered from the first page;
- (v) Every 10th line must be numbered on the right hand side e.g. 10, 20, 30, etc.

.....

187. Index of witnesses, exhibits and documentary evidence

The original and each copy of the case record must be provided with an index. The index must contain lists of witnesses, exhibits (in number sequence) and documents e.g. charge sheet, summons, annexure to charge sheet, notice of appeal, reasons for sentence, etc. The list must indicate on which page of the record the evidence of each witness appears, the numbers allotted to exhibits or a description thereof as well as to documentary evidence.

188. Arrangement of case record

The original case record and each copy thereof must be arranged as follows - except where indicated otherwise:

- (a) Original covering sheet J 111;
- (b) Index of witnesses, exhibits and documents;
- (c) Charge sheet with annexures, if any, on which the name of the police station, the CR number and, if available, the fingerprint number of the accused, appear;
- (d) Evidence with certificate of true record of proceedings on the last page thereof;
- (e) Documentary evidence and a short description of other exhibits of which no copies were made;
- (f) List of previous convictions on form 12 - 0/0090 or Pol. 81 (a);

(g) Reasons for conviction and sentence;

(h) Notice of appeal and power of attorney, where applicable; and

(i) Other notices, if any.

Formal documents, if any (like subpoenas) and bail receipt (12 - 0/0027) or copy of guarantee on form J 162 must be attached to the original case record only.'

[4] All of the above was not complied with and therefore we are unable to make out just what is the proper record of the proceedings in the court below. The proceedings in the Regional Court with regard to sentencing are not typed; there is no certificate certifying that the magistrates hand-written notes are a true record of the proceedings with specific reference to the date of proceedings; the certificate attached to the record, signed by Regional Court Magistrate, Siboleka, is only in respect of his reasons for sentence and not the proceedings leading to sentence; the record is not typed in double spacing; the numbering of pages is not from the first page to the last; the lines are not numbered; the record is not typed and bound in the sequence of events: i.e. starting with the charge sheet and ending with the handwritten notes of the proceedings.

[5] When the matter was called, counsel for the appellant informed the Court that the appellant wishes to have the appeal postponed to a date to be arranged with the registrar for the filing of a condonation application to prosecute an appeal against sentence out of time. The State did not object thereto. Considering that we were not going to hear the appeal in any event in view of the shortcomings in the record, we have no difficulty granting the order sought.

[6] Accordingly, we make the following order:

(i) The appeal is postponed to a date to be arranged with the registrar - and in any event not later than the second term of the High Court for the year 2011.

(ii) The record is returned to the Clerk of Court, Keetmanshoop, for preparation in compliance with the Codified Instructions issued by the Permanent secretary for Justice (updated as on 19 March 2008) and transmission to the Registrar of the High Court on or before 15 April 2011.

(iii) The Registrar is directed upon receipt of the record to assign a date for the hearing of the appeal after consultation with the parties;

(iv) The Registrar is directed to bring to the attention of all Clerks of the Criminal Court, Magistrates and the Permanent Secretary for Justice, the contents of this judgment.

DAMASEB, JP

I agree

UNENGU, AJ

ON BEHALF OF THE APPELLANT: Mr S F Maritz

Instructed By: Dr Weder, Kauta & Hoveka Inc.

ON BEHALF OF THE RESPONDENT: Mrs K Esterhuizen

Instructed By: Prosecutor-General