CASE NO.: CR 63/2012

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

THE STATE

and

CHRIS BENHARDUS HOABEB

HIGH COURT REVIEW CASE NO.: 1305/2012

CORAM: HOFF, J *et* MILLER, AJ

Delivered on: 18 July 2012

SPECIAL REVIEW JUDGMENT

HOFF, J: [1] This unterminated matter was sent on special review in terms of the provisions of section 304(4) of the Criminal Procedure Act, 51 of 1977 by the control magistrate, Windhoek.

[2] The accused first appeared in the magistrate's court for the district of Windhoek on 16 July 2003. The matter was postponed no less than ten times when the accused appeared in court represented by his legal representative, Mr Von Wielligh, his third legal representative. On 5 June 2006 the accused pleaded guilty to a contravention of the provisions of section 21(1)(c) of the Legal Practitioners Act, 15 of 1995. This section stipulates that a person who is not enrolled as a legal practitioner shall not issue out any summons or process or commence, carry on, or defend any action, suit or other proceedings in any court of law in the name of or on behalf of any other person except in so far as it is authorised by any other law. The accused admitted that he had wrongfully and unlawfully issued out process and carried on with an action in the High Court of Namibia on behalf of another person by drafting and signing an application for rescission of judgment and the accompanying affidavit and thereafter served the documentation on the Registrar of the High Court and on opposing counsel. The accused acknowledged knowledge of the wrongfulness of his actions at the relevant times. The accused was hereafter convicted of contravening section 21(1)(c) of Act 15 of 1995. After the court had heard arguments in mitigation of sentence the matter was postponed to 30 June 2006 by the magistrate in order to consider an appropriate sentence.

[3] On 30 June 2006 the accused appeared in person due to the fact that Mr Von Wielligh had filed a notice of withdrawal. The accused informed the court that he had obtained the services of another legal practitioner Mr A Louw. The case was remanded until 24 August 2006 for purpose of sentencing. On 24 August 2006 the accused was absent. The presiding magistrate was Mr Kanime. The case was remanded to 13 October 2006 in the presence of Mr A Louw. On 13 October 2006 both the accused and Mr Louw were absent. A warrant of arrest was issued for the accused to be held over until 15 November 2006. On

15 November 2006 both the accused and Mr Louw were present. The presiding magistrate was Mr Jacobs.

The matter was remanded until 16 February 2007. On 16 February 2007 the accused appeared before magistrate Ms C Claasen. The matter was postponed to 10 April 2007. The accused appeared in person. On 10 April 2007 Mr Louw was present and the case was postponed to 8 May 2007. The record reflects that the presiding magistrate was Mr Jacobs. On 8 May 2007 magistrate Jacobs presided. The matter was postponed to 28 May 2007. On 28 May 2007 magistrate Mahalie presided. The record reflects that Mr Louw was busy in A-court. The case was postponed to 30 May 2007 for purpose of sentencing. On 30 May 2007 Mr Louw informed the court that he received instructions to ask that the conviction of the accused be set aside in terms of the provisions of section 113 of Act 51 of 1977. Mr Louw informed the magistrate that he had read the record of the proceedings when Mr Von Wielligh appeared on behalf of the accused person. Mr Louw stated that on that date Mr Von Wielligh requested a postponement "for a second opinion" which postponement was refused by the court. Mr Louw stated further that the only inference to be drawn from the fact that the accused asked for a postponement and a second opinion was that there was in fact at that stage a difference of opinion between the accused and his legal representative. Mr Louw submitted that the magistrate "ought to have granted a postponement so as to enable the accused to make sure that he is satisfied with the advice of his lawyer". Mr Louw informed the magistrate that she may set aside "the plea of guilty" and order that the case start *de novo.*

[4] I have perused the record of the proceedings on 5 June 2006 but was unable to detect any portion in which Mr Von Wielligh had requested a postponement in order to obtain a second opinion.

[5] It appears from the record that on that particular day the prosecutor informed the court that there were four charges against the accused and that the State was withdrawing three of those charges. The record further reflects that a statement in terms of section 112(2) of Act 51 of 1977 which was signed by the accused person was read into the record. The accused confirmed the correctness of the contents of the statement and that he signed it. In the second paragraph of the statement the accused stated the following:

> "I make the statement out of my own free will without being forced or persuaded by any person to do so."

[6] The following finding of the magistrate appears from the record:

> "I am satisfied that accused person admitted all the elements of contravening section 21(1)(c) read with section 21(2) of the Legal Practitioner's act (Act 15 of 1995). That is that he wrongfully and unlawfully issued out processes and carried on with actions in the High Court of Namibia on behalf of another person and find him guilty and convict him accordingly."

[7] Having regard to the record of the proceedings I must confess that I am at a loss on what basis Mr Louw could have submitted that the only inference to be drawn was in fact that there was a difference of opinion between the accused and his lawyer.

[8] Nevertheless, the magistrate agreed that she had refused a postponement on the basis that a second opinion had been sought by the accused person. The magistrate stated that the request for a postponement had at that stage been refused because there had been several requests for postponement by the accused person. The record reflects that the magistrate stated the following:

> "I can see that there was a problem between the accused person and his previous legal representative. I, therefore in the interest of justice change the plea and acceptance of this plea and enter a plea of not guilty in terms of section 113 of Act 51 of 1997, the Criminal Procedure Act."

[9] Section 113 of the Criminal Procedure Act, 51 of 1977 reads as follows:

> "If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused *is in law* guilty of the offence to which he has pleaded guilty or is *satisfied* that the accused does not admit an allegation in the charge or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation."
> (Emphasis provided).

[10] In my view the unspecified "problem between the accused and his previous legal representative" could certainly not, in the light of the provisions of section 113, have been a ground for entering a plea of not guilty by the presiding officer. The presiding officer could not have been *satisfied*, at any time, that the accused did not admit to an allegation in the charge; could not have been *satisfied* that the accused has incorrectly admitted any allegation in the charge; and could not have been *satisfied* that the accused has a valid defence to the charge.

[11] In my view the magistrate has correctly refused a further postponement in order to obtain a "second opinion". The accused at that stage had the benefit of the legal opinion of at least three experienced legal practitioners. The court was also not informed why a "second opinion" was necessary in those circumstances. The magistrate herself also did not

elaborate on the nature and extent of the "problem" observed by her. It is apparent from the record that in spite of the perceived "problem" the accused person unequivocally pleaded guilty to the charge put to him.

[12] Section 113(1) refers to the situations which may form the basis upon which a court may enter a plea of not guilty. Common law grounds (i.e. duress, undue influence, fear or fraud) for setting aside a plea of guilty are not excluded by the provisions of section 113(1). These common law grounds may or may not be apparent from the questioning of the court in terms of the provisions of section 112(1)(b) would normally be present or in existence prior to questioning by the court in terms of section 112(1)(b) or prior to the making of a statement by the accused in terms of section 112(2).
(See *Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A)).

[13] Smallberger JA in *Botha (supra)* stated (at 592 g – h) that the words "in doubt" in section 113(1)" presuppose a reasonable doubt in relation, e.g. to whether an accused falls within the terms of a particular statutory prohibition or his conduct constitutes the offence charged. Such doubt can either arise in response to questioning by the court in terms of s. 112(1)(b), or from information volunteered by the accused or because the court *mero motu* entertains doubt on the law".

and continues at 593 g as follows:

> "The correction of a plea in terms of s. 113(1) will in many instances involve the retraction of an admission. Such correction should normally follow when the accused indicates that he no longer admits the charge or an allegation in the charge. At that stage of the proceedings the question whether the retraction of the admission may later be proved to be false is irrelevant. The court is still involved in pre-trial

> procedure. All that is needed is a reasonable explanation from the accused why he seeks to withdraw the admission or change his plea."

[14] The reason, advanced by Mr Louw why the court ought to enter a plea of not guilty in terms of section 113(1) falls far short of a retraction of an admission or an allegation in the charge sheet, amounts to no reasonable explanation why the accused sought to change his plea, and did not allude to any common law ground which could have been present at that stage upon which the magistrate could have entered a plea of not guilty.

[15] Insofar as the magistrate has entered a plea of not guilty, I have indicated *(supra)* that for the reason reflected on the record, she misdirected herself and erred in law by entering a plea of not guilty in terms of section 113(1).

[16] It is necessary to refer to the course of the proceedings after the magistrate had entered a plea of not guilty.

[17] Mr Louw informed the court that he was withdrawing as the legal representative of the accused person. The matter was postponed until 18 July 2007 for plea and trial and to enable the accused to obtain the services of another legal representative.

[18] It is not apparent from the record what occurred on 18 July 2007. Ms H J Horn the control magistrate for Windhoek Division who had sent this matter on special review, mentioned in her letter that this case had over the years been accorded different case numbers. It was originally marked as case number A 1532/2003,, then renumbered to case number C 227/2005. The matter was later converted into the Namcis case number WHK-CRM 1070/2006. This case was struck from the roll on 20 June 2008 and the same criminal

matter was restarted under case number WHK-CRM 17353/2008. Nevertheless the record is silent as to what occurred between 17July 2007 and 20 June 2008.

[19] On 20 June 2008 magistrate C Claasen was presiding. The accused was represented by Mr Liswaniso. The matter was postponed to 24 October 2008 for plea and trial.

[20] On 24 October 2005 magistrate Claasen presided. The name of the legal representative does not appear from the record. The prosecutor informed the court that due to a misunderstanding disclosure of witness statements were only made that morning. The case was postponed to 13, 14 April 2009 on request of the defence. The state witnesses Mr Jacob Steyn and Mrs Margaretha Steinmann (Director of the Namibian Law Society) were warned to appear in court.

[21] On 14 April 2009 magistrate Shilemba presided. The matter was postponed as agreed with the legal practitioner, Mr Ueitele, for plea and trial, until 17 August 2009.

[22] On 17 August 2009 magistrate Muchali presided. Mr Ueitele was absent and the matter was remanded as agreed between the State and the defence until 13 January 2010 for plea and trial.

[23] On 13 January 2010 the accused arrived late after a warrant for his arrest had already been issued. After an enquiry for failure to appear to court the bail of the accused person was reinstated. The case was then postponed to 27 January 2010 for the fixing of a trial date.

[24] On 27January 2010 magistrate Asino presided. Mr Liswaniso appeared on behalf of the accused person. The case was postponed to 16 August 2010 for plea and trial.

[25] On 16 August 2010 magistrate Asino presided. The prosecutor informed the court that the State was ready to proceed with the trial. Mr Liswaniso informed the court that he was withdrawing as legal representative. The accused informed the court that Mr Ueitele was his legal representative but was an acting judge at that stage. He stated that Mr Ueitele had informed him that Mr Liswaniso would be appearing on his behalf. The accused stated that he had insufficient time to consult with Mr Liswaniso but that he would obtain the services of another legal representative. Mr Liswaniso stated that the reason for his withdrawal was that he received conflicting instructions from the accused person. The matter was postponed to 10 September 2010 to enable the accused person to obtain the services of another legal representative.

[26] On 10 September 2010 magistrate Asino presided. The accused informed the court that the Department of Legal Aid was suppose to provide him with the services of a legal representative and that he was informed that he would be provided with legal representation witihn three weeks. The court postponed the matter until 21 October 2010 and ordered the accused to provide proof in writing from Legal Aid to support his allegations.

[27] On 21 October 2010 magistrate V Stanley presided. The accused was absent. A warrant of arrest was issued. The accused arrived later that day, explaining that his son was hospitalized and that he had only observed in his diary when he had returned home that he had to appear in court. When questioned by the presiding magistrate regarding the proof from Legal Aid the accused stated that he was informed by Legal Aid that the file had

disappeared. The matter was remanded until 6 December 2010 to enable the accused to obtain the services of a legal representative.

[28] On 6 December 2010 magistrate Stanley presided. The accused informed the court that his application for Legal Aid had been approved and that one Mr Uanivi had been appointed. The accused informed the court that Legal Aid had informed him that he would receive confirmation of this appointment by post. The matter was postponed to 27 January 2011, the prosecutor complaining about the accused deliberately delaying the case.

[29] On 27 January 2011 magistrate Stanley presided. Mr Uanivi confirmed that he had been appointed by the Directorate of Legal Aid to represent the accused person and the case was postponed to 19 April 2011 for plea and trial.

[30] On 19 April 2011 magistrate Muchali presided. The State was ready to proceed with the trial. Mr Uanivi informed the court that he was withdrawing as legal representative due to a conflict of interest. The State prosecutor strongly objected to a further postponement. The accused citing his constitutional rights and right to a fair trial, demanded a further postponement in order to obtain the services of a legal representative of his choice. The accused also contended that the magistrate's court had no jurisdiction to hear the case and asked that the case be referred to the High Court of Namibia. The court granted a further postponement until 30 May 2011 stating that it would be a final remand.

[31] On 30 May 2011 magistrate Stanley presided. Mr Mbaeva appeared for the accused. He informed the court that he was standing in for Mr Murorua and that it was a Legal Aid instruction. The case was postponed to 5 and 6 September 2011 for plea and trial.

[32] On 5 September 2011 magistrate Stanley presided. The State was ready to proceed with the trial. The accused informed the court that Mr Murorua had given him a letter to say that he was not available for that day. The accused informed the court that he had not been able to consult with Mr Murorua due to Mr Murorua's other High Court engagements and requested a final postponement stating that if Mr Murorua is not available on the trial date the matter may proceed nonetheless. The matter then stood down until 12h00 to enable the accused person to consult with his legal representative. When the case resumed at 12h40 the prosecutor informed the court that the accused was able to get into touch with his legal representative, who had indicated that he would be available the next day. Unfortunately the two State witnesses would not be available the next day but only on 7 September, the day thereafter. The case was postponed to 7 September 2011 for plea and trial. The record indicating this to be a final remand.

[33] On 7 September 2011 magistrate Stanley presided. Mr Murorua stating that he was present out of "courtesy to the court", and informed the magistrate that he had been appointed by the Directorate of Legal Aid but was unable to represent the accused person since he had not consulted with the accused due to other commitments. He informed the court that he had "only learnt about the case the day before yesterday" and that he was withdrawing as legal representative of the accused. The accused person requested the court to grant him a further two weeks in order to approach the Department of Legal Aid for the appointment of another legal representative. The prosecutor remarked that the State witnesses being "professional people" were "fed up with the delays in the case". The magistrate postponed the case until 23 September 2011.

[34] On 23 September 2011 magistrate Stanley presided. The prosecutor informed the court that a certain lady had approached him seeking another remand since Mr Murorua was

out of the country. The prosecutor expressed his surprise given the previous withdrawal of Mr Murorua. The accused informed the court that Mr Murorua would be back “after 2 weeks”. The case was postponed to 20 October 201 for the purposes of fixing a trial date.

[35] On 20 October 2011 magistrate Shilemba presided. The prosecutor informed the court that he had received a letter from Mr Murorua stating that he was attending a meeting. The case was postponed to 25 October 2011 for the purpose of fixing a trial date.

[36] On 25 October 2011 magistrate Shilemba presided. The matter was postponed to 1 February 2012 for plea and trial. Mr Muroroa who was present in court confirmed that the date was “in order”.

[37] On 25 October 2011 magistrate Shilemba presided. Mr Mbaeva appeared on behalf of the accused. The prosecutor informed the court that the State was ready to proceed but due to “two other matters before the same magistrate” the parties had agreed that the matter be postponed to 10 February 2012. Mr Mbaeva informed the court that Mr Murorua will no longer take up that criminal matter but that the defence would consult with the accused prior to the trial date and confirmed that the trial date was in order.

[38] On 10 February 2012 magistrate Shilemba presided. The State was ready to put the charge to the accused person. Defence counsel was absent. The matter stood down. At 11h00 defence counsel Mr Mbaeva appeared. He informed the court that due to a conflict between himself and the accused he was going to withdraw as legal representative of the accused person. The accused remarked that due to the fact that Mr Mbaeva is a member of the Law Society he would not “get a fair trial”. He repeated his previous request that the case should be referred to the High Court and that a legal representative from outside Namibia be

appointed. The accused also requested that the prosecutor Mr Tholiso "recuse himself from the case". Mr Tholiso then postponed the matter to 28 February 2012 in order for the accused to provide proof that a legal representative from outside Namibia could be appointed.

[39] On 28 February 2012 magistrate Stanley presided. The accused informed the court that he was unable to consult with the Director of Legal Aid due to the fact that the Director was sick and that the Director would be able to see him on that day i.e. 28 February 2012. The case was postponed to 29 February 2012.

[40] On 29 February 2012 magistrate Stanley presided. The accused informed the court that he visited the offices of the Directorate of Legal Aid and to his disappointment he was informed that a local lawyer, Mr Chris Brandt, had been appointed as his legal representative. The accused informed the court that he had approached Mr Brandt who had given a letter and wished to hand up the letter. The content of the letter was not disclosed. The accused then requested the case be postponed in order for him to see the Prosecutor-General or to see the Minister to assist him and to instruct the Director of Legal Aid to appoint a legal practitioner from outside Namibia. The matter was postponed to 5 March 2012.

[41] On 5 March 2012 magistrate Stanley presided. Advocate Hinda informed the court that he has received instructions from the Directorate of Legal Aid to represent the accused in this case. He informed the court that he had only received disclosure "on Friday" and requested the matter to be postponed for plea and trial. The matter was postponed to 29 March 2012, a date confirmed by Advocate Hinda. The accused informed the court that he did not have any objection to Advocate Hinda being appointed as his legal representative, indicating that Advocate Hinda had been appointed on his request.

[42] On 29 May 2012 magistrate Stanley presided. Advocate Hinda informed the court that after he had consulted with the accused, the accused had terminated his mandate to act on his behalf, the previous day. He therefore had no option but to withdraw as the legal representative of the accused. The accused then informed the magistrate of a High Court case number A 108/2012 in which he challenged "the constitutionality" of the case against him. The accused requested a final postponement in order for him to approach the Directorate of Legal Aid with the aim of appointing another legal practitioner to appear on his behalf in this matter. The State strongly objected to a further postponement. The matter stood down. When the court resumed at 12h00 Mr Karuaihe informed the court that he had received instructions that very morning to represent the accused. The record does not reflect from whom he had received such instructions. He informed the court that the accused has "challenged the constitutionality of the provisions under which he has been charged". He requested a further remand since it would be premature "to remand this matter for plea and trial at this stage as the very provisions under which the accused is charged are challenged". He suggested the matter be remanded to a date after the High Court hearing. The prosecutor did not object to this application for postponement. The case was hereafter postponed to 20 September 2012 for plea and trial.

[43] Mrs Horn, the control magistrate who forwarded this matter on special review *inter alia* stated that the magistrate could not have entered a plea of not guilty on the basis of the reason provided by the magistrate and requested that such an entry by the magistrate be set aside by this court as being "wrong and irregular".

[44] I have already expressed my views in respect of the legality of the decision by the magistrate to enter a plea of not guilty (*supra)*.

[45] What should be considered is whether this Court may at this stage intervene in the unterminated proceedings in the court *a quo* by setting aside the decision of the magistrate, to enter a plea of not guilty.

[46] It is trite law that the provisions of section 304(4) of Act 51 of 1977 presently make provision for review proceedings only after sentence. (See *S v Immanuel* 2007 (1) NR 327 HC).

[47] Although the High Court has an inherent power to curb irregularities in magistrate's courts, it will only exercise that power in rare instances of material irregularities where grave injustice might otherwise result, or where justice might not be attained by any other means. (See *Immanuel (supra); S v Cornelius Isak Swartbooi,* unreported judgment in case no. CR 09/2012 delivered on 15 February 2012).

[48] In *S v Lubisi* 1980 (1) SA 187 (TPD) the Court held that the Supreme Court has an inherent power to correct the proceedings of an inferior court at any stage if it appears to be in the interest of justice. In this case the *acquittal* of an accused was set aside and it was ordered that the part heard case should continue where it was interrupted.

[49] In *S v Makriel* 1986 (3) SA 932 CPD, due to an administrative error the magistrate acquitted the accused persons in pursuance of a decision by the Attorney-General not to prosecute them. The Supreme Court held that that acquittal had occurred *per incuriam* and declined to set aside the acquittals, holding that the invocation and exercise of the Court's inherent powers of review without any notice whatsoever to vitally interested parties such as the accused would be fundamentally irregular and a breach of the rules of natural justice. The decision in *Lubisi* was not followed.

[50] In *S v Makopu* 1989 (2) SA 577 (ECD) the accused pleaded not guilty on a charge of housebreaking with intent to commit an offence unknown to the State. Another magistrate, not realising the matter was part-heard refused a postponement and acquitted the accused as the State witnesses were not available. The magistrate submitted the matter on review as he considered that the acquittal was a gross irregularity. The Court held as follows on p. 578 A – C:

> "While it is correct that the interests of justice include justice to the prosecutor as well as the accused, there are a number of policy considerations which underlie our criminal law which may be raised to support an argument that, even if the Court has inherent power to make this sort of order, it should not do so. I refer, for example, to the policy considerations which require certainty and finality in criminal cases, or which limit the State's right to appeal, or which preclude a second prosecution where fresh evidence is found. Be that as it may, I am quite satisfied that I should not exercise an inherent jurisdiction to set aside an acquittal without first hearing the accused. He is not presently before me. If the Attorney-General so wishes he is at liberty to institute review proceedings against the accused in order to have the irregularity corrected."
>
> (*S v Lubisi* was not approved and not followed).

[51] In *S v Bushebi* 1996 (2) SACR 448 NmS, the Supreme Court of Namibia (Highest Court of Appeal) referred with approval to the passage in *Makopu (supra)* and refused to set aside an acquittal in the magistrate's court where there was no irregularity but a mistake of law introduced by the Prosecutor-General who claimed to have a right to have the decision set aside because a guilty man had been acquitted.

[52] The Supreme Court referred to *Lubisi,* stating that it was an "unusual case" and even "if it is assumed that *Lubisi's* case was correctly decided, the facts there were very special and bear no resemblance to what occurred in this case".

[53] The facts of this case are distinguishable from those in *Makriel, Makopu and Bushebi*. In this matter there was no acquittal of the accused and this Court is not required to set aside any “acquittal”.

[54] I have set out the background of this case and the subsequent course it took over a period of nine years without reaching any conclusion. This is an unusual case having regard to the numerous postponements, the large number of legal practitioners who at different stages appeared for the accused persons and the reasons why this matter has not yet been finalised.

[55] It may be so that this case has on occasions been postponed due to the fact that the accused did not consult with his legal representatives, but the impression I gained from perusing the record was that the accused person embarked upon an exercises of delaying tactics in the light of the protestations of the accused and his insistence that he would not receive a fair trial if he is not represented by a legal practitioner *of his choice*. The constant turnover of legal practitioners instructed by the Directorate of Legal Aid, resulted in various defence counsel not being ready to proceed when the State was ready, with the result that the State witnesses who had on numerous occasions attended the court proceedings, had been greatly inconvenienced and had to return to court without any prospect that their testimonies would be heard.

[56] I am further of the view that the conduct of the accused person over the years unmistakably amounted to an abuse of process and is still an abuse of process.

[57] The interest of justice, so aptly stated in *Makopu (supra),* include justice not only to an accused person but to the prosecution was well. Is this not a prime example that due to

policy considerations which require certainty and finality in criminal cases that this case should be concluded immediately ? I am convinced this to be the case having regard to the specific circumstances of this case. What other remedy is there available ?

[58] I am further of the view that the accused person is not prejudiced (in view of the fact that he had pleaded guilty) if the recorded plea of not guilty, is set aside.

[59] This case is in my view one of those rare instances of material irregularities where grave injustice not only might otherwise result, but has resulted or where justice might not be attained by other means and warrants the intervention by this Court at this stage.

[60] I was informed that the magistrate who had entered a plea of not guilty in terms of section 113 is no longer employed by the Ministry of Justice.

[61] In the result the following order is made:

1. The entry of a plea of not guilty in terms of section 113 of Act 51 of 1977 entered by Magistrate Muchali on 30 June 2007 is hereby set aside.

2. The record of the proceedings is returned to the clerk of the court, Windhoek for the finalisation of the case before another magistrate in terms of the provisions of section 275 Act 51 of 1977.

_____

HOFF, J

I agree

_____

MILLER, AJ