



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NUMBER: CR 77/2018

In the matter between:

THE STATE

And

GERT BAARMAN

AND

CASE NUMBER: CR 78/2018

THE STATE

And

JOHANNA ELIZABETH STEENKAMP

AND

CASE NUMBER: CR 79/2018

THE STATE

And

GEORGE MAASDORP

FIRST ACCUSED

BERNHARD HAMALWA

SECOND ACCUSED

AND

CASE NUMBER: CR 80/2018

THE STATE

And

STEYN SITAPATA

FIRST ACCUSED

MICHAEL GAWAXAB

SECOND ACCUSED

DAVID GOMXOB

THIRD ACCUSED

DINGAAN NADEB

FOURTH ACCUSED

MICHAEL HOGOBE

FIFTH ACCUSED

Neutral citation: *S v Baarman* (CR 77; 78; 79; 80 /2018) [2018] NAHCMD 315 (1 October 2018)

Coram: **DAMASEB, JP, NDAUENDAPO J and LIEBENBERG J**

Delivered: 1 October 2018

Flynote: **CRIMINAL LAW – SPECIAL REVIEW** – Whether the High Court needs to be sanctioned for an order setting aside part-heard proceedings of lower courts in instances where the judicial officer becomes unavailable and subsequently order the matters to start *de novo* before another judicial officer.

Summary: This judgment concerns matters that were sent to this court for an order setting aside part-heard cases of the lower court in instances where the judicial officer has lost jurisdiction, due to resignation, dismissal, recusal, death and or separation of trials. The issue is whether such instances need intervention of this court.

Held- that in instances where a judicial officer becomes unavailable, she or he has in essence lost jurisdiction. This aborts and nullifies the part-heard proceedings and same may commence *de novo* before another judicial officer without a declaration by the High Court.

SPECIAL REVIEW JUDGMENT

DAMASEB JP (NDAUENDAPO J and LIEBENBERG J concurring):

Introduction

[1] The matters under consideration were sent on special review in terms of s 304(2)(c)(iii) of the Criminal Procedure Act, 51 of 1977 (the CPA). It involves four part-heard matters in the Gobabis Magistrate’s Court tried by the same magistrate. The presiding magistrate left the employ of the Magistracy on 28 February 2018 before the trials were finalised. The accused persons in all cases tendered pleas of not guilty and were legally represented. No convictions or sentences have been entered against the accused persons on the charges preferred against them. In light of the aforesaid, the records of the proceedings were forwarded to the Registrar of the High Court under cover of a letter in which it is requested that the proceedings in

each case be reviewed and set aside. Further that it be ordered that the trials commence *de novo* before another magistrate.

Relevant provision

[2] The CPA does not expressly make provision for this court to set aside part-heard proceedings of lower courts where a judicial officer for some reason becomes unavailable to continue hearing the matter. A practice has developed amongst the judges of the High Court to, in such circumstances, invoke the power under s 304(4) of the CPA. This subsection provides that if in any criminal case in which a magistrate's court has imposed a sentence not subject to review in the ordinary course in terms of s 302, or in which a regional court has imposed any sentence, it is brought to the notice of the High Court or a judge of that court, that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of s 303 of the CPA.

Issue

[3] The issue to be determined is what approach a lower court should adopt in cases where the presiding officer who sat on a part-heard case becomes unavailable to finalise the trial. The unavailability could be due to resignation, dismissal, death, recusal, ill-health or separation of trials.

[4] Two conflicting approaches to the issue at hand are apparent from judgments of the High Court.

The conflicting judgments.

[5] In *S v Kaaronda*¹, the accused person was arraigned on charges of assault with intent to do grievous bodily harm. The trial commenced and proceeded before a magistrate whose fixed-term contract was not extended on expiration.

¹ (Case No: 922/2011, 21 September 2011).

[6] Parker J, relying on the South African case of *S v Scheepers*², held that the trial may commence *de novo* before another magistrate at the Prosecutor-General's discretion. This approach was subsequently followed in two other cases of this court.

[7] In *S v Kahuika*³, the magistrate resigned from the magistracy before the trial was finalised. Her position was that she had no jurisdiction to nullify the trial proceedings without the sanction of the High Court. Following the above approach in *S v Kaaronda*, Ndauendapo J (with Parker AJ) concurring, found that it was 'desirable and good practice' for an application to be made to the High Court by way of a special review in order to set the part-heard proceedings aside, and order that the trial starts *de novo* before another magistrate. This approach was recently followed in *S v Links*⁴.

[8] Based on these judgments, the Prosecutor-General on 22 February 2018 issued a directive to prosecutors that in light of *S v Kahuika*⁵, all part-heard matters in which a magistrate has become unavailable to finalise the matter, an application to set those proceedings aside should be made to the High Court by way of a special review.

[9] The Northern Local Division in *S v Dornadus*⁶ deviated from the approach followed in *S v Kaaronda*, *Kahuika* and *Links* without referring to any of these judgments. In this case the magistrate after hearing the partly-heard matter resigned from the employment of the magistracy and took up other employment. The legal practitioner for the accused made an application before the presiding magistrate to order the case to start *de novo* before another magistrate. This application was granted by the same magistrate without the sanction of the High Court.

[10] The Oshakati divisional magistrate then requested the court to set aside those proceedings due to the unavailability of the presiding magistrate in terms of s 304 of the CPA. Relying on the Cape Provisional Division decision of *S v Stoffels*⁷, January

² 2009 (2) SACR 58 (WLD).

³ (CR 1/2017) [2017] NAHCMD 3 (20 January 2017).

⁴ (CR 68/2018) [2018] NAHCMD 268 (4 September 2018).

⁵ Supra note 3.

⁶ (CR 8/2017) [2017] NAHCNLD 67 (24 July 2017).

⁷ 2004 (1) SACR 176 (C).

J (Damaseb JP concurring) held that in cases where a magistrate dies or has become incapacitated, or has been dismissed or has resigned, the part-heard proceedings before that magistrate are aborted and therefore a nullity. As such, the trial may commence *de novo* before another magistrate without the intervention by the High Court. In hindsight, in *S v Dornadus* we should have considered the cases of *Kaaronda*, *Kahuika* and *Links* and taken a view whether or not those cases were wrongly decided. The present review presents the opportunity to do so.

[11] In circumstances similarly to the instant matter, the magistrate in the South African case of *S v Scheepers* resigned from the Department of Justice. Wills J found that the fact that a lower court commences such proceedings *de novo* without an order of the High Court, would not result in a finding that an accused person was wrongly convicted. The learned judge however said in an obiter statement that it is nonetheless “*desirable and good practice*” to approach the High Court for such an order. It is this obiter statement that was relied on by Parker AJ, Ndauendapo J and later Usiku J in the three judgments that are in conflict with the view expressed in *S v Stoffels*.

[12] The question to be asked here is whether it is desirable to burden the already congested High Court roll with special reviews of proceedings from lower courts that abort on the basis of the unavailability of presiding officers who, in reality had lost jurisdiction due to resignation, dismissal, death, recusal and or separation of trials. Once such a judicial officer has lost jurisdiction, he or she cannot again assume jurisdiction. The approach that the High Court must sanction the commencement of a trial *de novo* once a magistrate becomes unavailable is based on the unspoken premise that the magistrate who has lost jurisdiction remains seized with the matter - which he or she is in reality not – or that if the High Court does not sanction the commencement of the trial *de novo*, the accused stands absolved of a prosecution. I am unable to find any sound reason in either public policy or established principles of the common law why the intervention of the High Court is a *sine qua non* in such circumstances, if one has regard to the fact that the written law does not make it a requirement.

[13] As Shivute CJ recently observed in *Brink NO v Erongo All Sure Insurance CC*⁸, that public policy requires that principles of law should be applied in a manner that does not result in injustices and thereby failing to serve their ultimate purpose. In other words, legal principles must be applied to promote the public interest. The inflexible requirement that the High Court's sanction must be obtained in every case where a magistrate has lost jurisdiction does not promote the public interest. If either the accused or the Prosecutor-General for good reason believes that such a sanction is required, the High Court may be appropriately moved for such relief; not as a default position – but out of necessity and depending on the circumstances of the particular case.

[14] It therefore makes logical sense as was held in *S v Dornadus*, that upon a magistrate losing jurisdiction in the circumstances such as those applicable in the cases now on review, the proceedings become a nullity and are aborted through a supervening impossibility. As a result, we see no reason why such cases cannot be heard *de novo* before another magistrate without a declaration by the High Court.

[15] In the result, we make the following order:

1. The request for special reviews in *S v Baarman & 3 similar cases* is declined.
2. It is directed that in cases where a judicial officer in the lower courts becomes unavailable to continue hearing a part-heard matter, such matters may commence *de novo* before another magistrate, without an order of the High Court to that effect first being granted.
3. The registrar of the High Court is directed to furnish a copy of this judgment to the Chief Magistrate and the Prosecutor General.

⁸ (SA 46-2016, 69-2016) [2018] NASC (22 June 2018) para 38.

P.T. DAMASEB
JUDGE PRESIDENT

G. N. NDAUENDAPO
JUDGE

J.C. LIEBENBERG
JUDGE