

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2018/00033

In the matter between:

**SIEGRIED GAROEB**

**1<sup>st</sup> APPELLANT**

**ERNEST BOCK**

**2<sup>nd</sup> APPELLANT**

**WILLEM GASEB**

**3<sup>rd</sup> APPELLANT**

v

**THE STATE**

**1<sup>st</sup> RESPONDENT**

**MAGISTRATES' COMMISSION**

**2<sup>nd</sup> RESPONDENT**

**Neutral citation:** *Garob v S* (HC-MD-CRI-APP-CAL-2018/00033) [2018]  
NAHCMD 330 (19 October 2018)

**Coram:** NDAUENDAPO J *et* LIEBENBERG J

**Heard:** 28 September 2018

**Delivered:** 19 October 2018

**Flynote:** Criminal – Procedure – *De novo* – Magistrate in part-heard matter unable to continue with matter – Case may commence *de novo* before

another magistrate without order of the High Court – Magistrates' do not have power to order proceedings to start *de novo* before another magistrate.

**Summary:** The appellants appeal against the magistrate's order to refer their case to commence *de novo* before another magistrate because the trial magistrate had become unavailable. The issue on appeal is whether the magistrate can order that proceedings commence *de novo* before another magistrate.

Held, that, magistrates' do not have the power to order proceedings to start *de novo* before another magistrate.

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### ORDER

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1. The order of magistrate Jagger that the matter must commence *de novo* before another magistrate is set aside.
2. The matter may commence *de novo* before another magistrate without an order of this court setting aside the earlier proceedings.

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### JUDGMENT

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LIEBENBERG J (NDAUENDAPO J concurring):

[1] The appellants were jointly charged in the Swakopmund Magistrate's Court on one count of housebreaking with intent to steal and theft. They appeared before magistrate Prinsloo and proceeded to trial up until 07 December 2016. The record of the proceedings held on 21<sup>st</sup> August 2017 reads that magistrate Prinsloo was elevated as a judge to the High Court and therefore no longer available to preside over the matter. In view thereof the presiding magistrate, Ms Jagger, subsequently ordered the trial to start *de novo* before another magistrate.

[2] Dissatisfied with the outcome the appellants initially lodged an application for special review which, so it would appear from the record, was abandoned in view of the appellants decision to rather appeal against the order made by magistrate Jagger. The mainstay of the appellants' appeal is for an order by this court directing that the trial magistrate (Prinsloo) proceed with the trial until it has been finalised.

[3] During oral submissions we have pointed out to the appellants that the trial magistrate has become unavailable since her appointment as a judge in the High Court and that her return to the magistracy is simply impossible. Having appreciated that their appeal is doomed to fail for that reason, no further argument was advanced. However, what still has to be decided is the order made by the court below that the matter be referred to this court to order the trial to start *de novo*.

[4] The issue at hand is whether part-heard cases where the trial magistrate has become unavailable must be sent on review in order to have the proceedings set aside, and the review court ordering the trial to start *de novo*. There were until recently two conflicting approaches to the issue but in the Full Bench decision in *S v Baarman*<sup>1</sup> this court found that matters may commence *de novo* before another magistrate without an order of the High Court to that effect first being granted. The reason being that the part-heard proceedings are aborted and therefore a nullity.

[5] The present facts are similar to that encountered by the court in *S v Dornadus*<sup>2</sup> where the court considered and adopted the approach followed in *S v Richter*<sup>3</sup> and concluded that the magistrate did not have the power to order proceedings to start *de novo* before another magistrate. The order was accordingly set aside.

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<sup>1</sup> (CR 79/2018) [2018] NAHCMD 315 (1 October 2018).

<sup>2</sup> (CR8/2017) [2017] NAHCNLD 67 (24 July 2017).

<sup>3</sup> 1998 (1) SACR 311 (C).

[6] Whereas the magistrate in the present instance issued a similar order, it follows that it should befall the same fate as in *Dornadus*.

[7] In the result, it is ordered:

1. The order of magistrate Jagger that the matter must commence *de novo* before another magistrate is set aside.
2. The matter may commence *de novo* before another magistrate without an order of this court setting aside the earlier proceedings.

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JC LIEBENBERG  
JUDGE

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GN NDAUENDAPO  
JUDGE

## APPEARANCES:

APPELLANTS: In person.

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RESPONDENT: H K A lipinge  
Of the Office of the Prosecutor-General,  
Windhoek.