

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SPECIAL REVIEW JUDGMENT

PRACTICE DIRECTION 61

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| Case Title: <i>The State v Fan Jia and 13 Others</i> | Case no: CR 142/2023 |
| | Division of Court: Main Division |
| Coram: Shivute J et Christiaan AJ | Delivered on: 07 December 2023 |
| Neutral citation: <i>S v Jia</i> (CR142/2023) [2023] NAHCMD 806 (07 December 2023) | |
| It is hereby ordered that: <ol style="list-style-type: none">1. The proceedings and court order dated 6 October 2023 and 19 October 2023, in so far as it relates to the accused persons objection in terms of s 50 of the Criminal Procedure Act 51 of 1977, is hereby set aside.2. The matter is remitted to the magistrate or an alternate magistrate to <u>urgently</u> make a determination of the accused person's objection raised in accordance with <u>section 50(1)</u> of the <u>Criminal Procedure Act 51 of 1977</u>. | |

3. The accused persons are to be afforded the opportunity to adduce evidence in support of their application in terms of s 50 of the Criminal Procedure Act, in respect of evidence that he wishes to lead in support thereof.
4. The respondent is to be afforded the reasonable opportunity to adduce evidence in response to any evidence presented by the accused persons in accordance with paragraph 3 above.

Reasons for the order:

CHRISTIAAN AJ (SHIVUTE J concurring):

[1] The matter comes before this court as special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).

[2] The accused persons appeared in the Magistrate's Court for the district of Windhoek charged with various counts as follows: one count each with respect to accused 4, 5, 6, 8, 9, 10 and 11 of contravening s 29(1) remaining in Namibia after expiration of visitors permit of the Immigration Control Act 7 of 1993 (the Act) ,one count each with respect to accused 2, 4, 5, 6, 8, 9, 10, 11, 12 and 13 of contravening s 29 (5) read with s 1 and 8 of the Act - working in Namibia without a work permit, 1 count each with respect to accused 12 and 13 of contravening s 34(3) read with s 34(1) of the Act - entry into Namibia without a valid permit and failing to report to an immigration officer and 2 counts with respect to all accused of contravening s 56(a) read with s 1 and 8 of the the Act - aiding and abetting any prohibited person to remain in Namibia: 98 counts with respect to all accused, of contravening s 3(1)read with s 1 and 29 - trafficking in persons, two counts in respect of accused 1 : contravening s 6(1) read with s 6(2) , 1 and 29 – possession and confiscation of identification documents and travel documents, 97 counts with respect to all accused of contravening s 8(1) read with s 8(2) , 1 and 29 – using services of victims of trafficking, of the Combating of Trafficking in Persons Act 1 of 2018 ;one count of fraud with respect to all accused persons, one count with respect to all accused persons of contravening s 4 read with s 1,7,8 and 11 of the Prevention of

Organised Crime Act 29 of 2004;1 count with respect to all accused persons of contravening s 2(1) (a), (b) and (c) as read with sections 1,2 (2) (a) and (b), 38 and 11 of the Prevention of Organised Crime Act 29 of 2004 and further as read with s 94 and 332 (5) of the Criminal Procedure Act 51 of 1977 – racketeering: one count of contravening s 65(1)(a) read with s 12(1), 15(1), 25(a), 55, 56, 59, 60, 65, 66, 83, 87 and 97 of the Income Tax Act 24 of 1981 as amended and further read with s 94 and 332 (5) of the Criminal Procedure Act 51 of 1977 – Failure to pay tax.

[3] The divisional magistrate for the district of Windhoek, brought this matter to our attention with a request to set aside the proceedings of 6 October 2023 and 19 October 2023, due to alleged procedural errors that arose when the presiding magistrates had to deal with an objection raised by the accused persons that they were not brought to court within 48 hours.

[4] The following procedural errors were identified during the proceedings of 6 October 2023:

- 4.1 The learned magistrate made a ruling without giving the defence an opportunity to be heard after the arresting officer testified;
- 4.2 The learned magistrate did not give the unrepresented accused person an opportunity to cross-examine the arresting officer who testified under oath;
- 4.3 The learned magistrate erred by inviting the parties to bring an application on the same issue he already ruled on as he is *functus officio*.

[5] The following procedural error were identified during the proceedings of 19 October 2023.

5.1 The learned magistrate adjourned the matter for an enquiry on the 48 hour objection, after this matter was heard and ruled on, this would amount to a review of another Magistrate's decision.

Background facts

The proceedings of 06 October 2023

[6] The divisional magistrate in her letter explained that the presiding magistrate, on the first appearance of the accused persons, was confronted with an objection that the accused persons were not brought before court within 48 hours after arrest, thus making their detention unlawful. Some of the accused persons were represented, and others were conducting their own defence. The Magistrate did an enquiry, by calling the investigating officer who testified under oath. The represented accused persons through their legal representatives cross-examined the investigating officer, but the unrepresented accused were not afforded such opportunity. After the investigating officer was excused, the court without affording the accused persons an opportunity to testify in their defence, made a ruling in the following terms:

‘Good, I have listened to both the Application by the Defence as well as the State. Now, (indistinct) our rule is clear is common course we know when and how it should apply. It is not clear before this court as to when the Accused were arrested, when they were detained. The difference between detention and arrest. Now as per the testimony of. The police officers, police officer that is the officer in charge looking at the amount of items that are mentioned it becomes a complex matter. Now, if Accused were found on the 3rd around 10:00 and they were detained or questioned and it took them into the 4th, one cannot say that they were rearrested, one would then say that they were detained for questioning basically. So, having taken that into regard and looking at the matter's complexity, the Court will then give the benefit of the doubt to the State, Mr Kasper and Mr Awila and the Court is then bound to keep Accused in detention until the matter is finalised (intervention).’(Our emphasis)

[7] The record reflects that the matter was adjourned to 19 October 2023, and the parties were invited to file an application addressing the alleged non-compliance of the arresting officer with the provisions of s 50 of the Criminal Procedure Act 51 of 1977(the CPA). The record reflects that the accused persons made their first appearance in court on the 6th day of October 2023. Some of the accused persons were represented and others were conducting their own defence. The legal practitioners for the represented accused persons raised an objection that the accused persons were illegally detained and did not appear in court within 48 hours as required by s 50 of the CPA.

[8] The record reflects that, [8] the basis of the objection was twofold, firstly, the

accused were arrested on 3 October 2023 and that bringing them to court only on the 6th of October 2023, the 48 hours would have elapsed. Secondly, that the charge sheet reflects the date of arrest as 5 October 2023, which is according to the accused persons not entirely correct. Further to the aforementioned, in support of the objection, the defence counsel submitted what the record reflects as detention receipts, indicating that they were detained as from 4 October 2023. This detention receipt does not form part of this record that was sent on review.

[9] The learned magistrate on the insistence of the legal practitioners, called the investigating officer to testify under oath as to when the accused persons were arrested. The State was afforded an opportunity to lead evidence, where after, the defended accused, through their legal practitioners, were afforded an opportunity to cross examine the witness. It is important to note that the undefended accused persons did not raise the objection of 48 hours, and they were not afforded the opportunity to rebut the allegation during and after cross-examination. The court pronounced itself on the objection after excusing the witness and without affording the accused persons to lead evidence under oath to rebut the allegations. Disgruntled by the decision of the court, the accused persons raised an objection that they were not afforded an opportunity to lead evidence. This is the response that the learned magistrate offered the parties:

‘No, the Defence handed up papers when the Accused were arrested, this is a first appearance. If there is a dispute as to arresting and detention, the matter can be heard this is the first, this is just first appearance of the Accused persons, yes Defence can still bring an Application and the Court will listen to the Application as to (intervention).’

[10] The proceedings were adjourned to 15 February 2024 for further investigations, with a direction that the court will await the application in terms of section 50 of the CPA.

The proceedings of 19 October 2023

[11] On 19 October 2023, the matter appeared before a different magistrate, and after the prosecutor informed the court that the matter is on the roll for bail, the objection of 48 hours remained the central point of discussion and the short of it is that the legal

practitioners elected to approach the High Court on an urgent basis, to bring an application against the alleged unlawful detention of the accused persons. The urgent application was heard and removed from the roll, without the merits of the application being discussed. We will now proceed to deal with the applicable legal principles.

[12] Article 11(3) of the Constitution provides as follows:

'All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.'

[13] Section 50 of the Criminal Procedure Act insofar as it is relevant to the issues that need determination reads:

(1) A person arrested with or without warrant shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding forty-eight hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjudication upon the cause for his arrest: Provided that if the period of forty-eight hours expires-

(a) on a day which is not a court day or on any court day after four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of the court day next succeeding;

(b) on any court day before four o'clock in the afternoon, the said period shall be deemed to expire at four o'clock in the afternoon of such court day;

(c) . . .

(d)

(2) A court day for the purposes of this section means a day on which the court in

question normally sits as a court.

(3) ...'

[14] This court is not concerned with determining whether the arrest was lawful or not, but rather whether the learned magistrates have committed procedural errors that would require the intervention of this court.

Failure to afford the parties an opportunity to cross examine the witness under oath and to present evidence in support of their objection.

[15] The notion surrounding the *audi alteram partem* principle has been rehearsed in a plethora of cases and it is that the spirit and tenor of the *audi alteram partem* principle must preside and permeate the processes of decision making.

[16] The *audi alteram partem* principle was eloquently defined by Browde JA in *Swaziland Federation of Trade Unions v The President of Industrial Court of Swaziland and Others*,¹ in a passage which was quoted with approval in *Kaishugu v Minister of Land Reform*² at parah 35, in which it was remarked that:

'The *audi alteram partem* principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time. . . Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them.'

¹ *Swaziland Federation of Trade Unions v The President of Industrial Court of Swaziland and Others* (11/97) [1998] SZSC 8 (01 January 1998).

² *Kaishugu v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2017/00292) [2018] NAHCMD 329 (18 October 2018).

[17] The take away from the above legal principles is that a party must be heard before an order can be granted against him and/or that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them. As far as the proceedings of 6 October 2023 are concerned, it is evident from the record of proceedings that the unrepresented accused were not granted an opportunity to cross examine the witness after he testified and that all the accused persons were not afforded an opportunity to present evidence to rebut the allegations made under oath.

[18] In *Standard Bank of Bophuthatswana v Reynolds NO and Others*³ Friedman JP referred to *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others*, and *SA Freight Consolidations (Pty) Ltd v Chairman, National Transport Commission and Another*⁴ and remarked as follows at p 89E:

'(O)ur courts have held where a decision - maker takes a decision unsupported by any evidence or by some evidence which is insufficient reasonably to justify the decision arrived at, or where the decision maker ignores uncontroverted evidence which he was obliged to reflect on, the decisions arrived at will be null and void.'

[19] It is important to note at this stage, the Criminal Procedure Act does not explicitly lay down a procedure that must be followed once an accused is arrested and not brought to court within 48 hours. However, it is safe to conclude that once an objection is raised in terms of s 50 of the CPA, it would involve the exercise of a discretion, which must be exercised judicially. All the parties must be afforded an opportunity to be heard, to allow the court to exercise a well informed decision.

[20] After due consideration of the above remarks, it is safe to conclude that the learned magistrate's failure to afford the accused persons an opportunity to cross examine the witness under oath and its failure to allow the accused persons an opportunity to present their side of the story, amounts to an irregularity that destroys the foundation of the decision, as the decision would remain unsupported by evidence, which

³ *Standard Bank of Bophuthatswana v Reynolds NO and Others* 1995 (3) SA 74 (BG).

⁴ *SA Freight Consolidations (Pty) Ltd v Chairman, National Transport Commission and Another* 1988 (3) SA 485 (W).

is sufficient to justify the final decision arrived at.

Order by the magistrate directing the accused to bring an application on the same issue already ruled on as he is functus officio and order by a subsequent magistrate to postpone a matter on an issue already ruled on.

[21] In *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others*⁵ the Supreme Court expressed itself on the doctrine of *functus officio*. It again had a later opportunity to do so in *Hashagen*⁶, where it expressed itself in the following terms:

[28] As Pretorius aptly observes:

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.

[29] What this means then is that once an administrative body has exercised an administrative discretion in a specific way in a particular case, it loses further jurisdiction in the matter. It cannot go back on it or assume power again in respect of the same matter between the parties.'

[22] It appears that there are very few and circumscribed circumstances in which a decision-maker can be allowed to revisit or reopen his or her decision. This would be in circumstances where the law expressly provides that unusual avenue or where it impliedly allows a second bite to the same cherry.

[23] It is our considered view that the learned magistrate could not revisit and re-open the issue after he had fully and finally exercised his discretion, by issuing an order that

⁵ *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) 834 (SC).

⁶ *Hashagen v Public Accountants and Auditors Board* (SA 57/2019) (2021) NASC (5 August 2021).

was a conflicting directive which was contrary to an earlier decision that he has taken, that surely would amount to a review and setting aside of his own decision, in which he was *functus officio*.

[24] Considering the irregularities committed, we are in agreement with the Divisional magistrate, it cannot be said that the proceedings were in accordance with justice and will be set aside. A further important consideration is whether the aforementioned conclusion, has the result of discharging the accused persons from custody.

[25] It is important to note that this court was tasked with the issue whether the procedure applied by the court in dealing with the objection in terms of s 50 the CPA, was in accordance with justice and not whether the accused persons further detention was unlawful. Article 11(3) and s 50 of the CPA, grants authority to the court before whom the accused will appear, to order the further incarceration of the accused persons. The lawfulness or unlawfulness of such an order, is an issue that can only be canvassed after evidence has been presented for the court to exercise its judicial discretion. We therefore conclude that the orders made by the learned magistrates on 6 October 2023 and 19 October 2023, that is to further detain the accused persons, fall within the ambit of Article 11(3) and s 50 of the CPA and is therefore not irregular and should be allowed to stand.

[26] Having considered the circumstances of this case and the documents placed before this Court, we make an order in the following terms:

1. The proceedings and court order dated 6 October 2023 and 19 October 2023, in so far as it relates to the accused persons objection in terms of s 50 of the Criminal Procedure Act 51 of 1977, is hereby set aside.
2. The matter is remitted to the magistrate or an alternate magistrate to urgently make a determination of the accused person's objection raised in accordance with section 50(1) of the Criminal Procedure Act 51 of 1977.
3. The accused persons are to be afforded the opportunity to adduce evidence in

support of their application in terms of s 50 of the Criminal Procedure Act, in respect of evidence that he wishes to lead in support thereof.

4. The respondent is to be afforded the reasonable opportunity to adduce evidence in response to any evidence presented by the accused persons in accordance with paragraph 3 above.

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| P CHRISTIAAN ACTING JUDGE | NN SHIVUTE JUDGE |