

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

High Court Ref No: 40/11  
Magistrates' Serial No: R 7/2010  
Case N0: A 478

In the special review matter of:

STATE

*versus*

KGALUSHI ALPHEUS LEKWADU

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REVIEW JUDGMENT

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MEYER , J

[1] This matter came before us on special review. The accused was charged in the Magistrates' Court, Germiston with the offence of possession of stolen property. It is alleged in the charge sheet that he was found in unlawful possession of one Willard battery belonging to Spoornet or Transnet on or about 14 October 2009 at or near Germiston, in regard to which there was a reasonable suspicion that it had been stolen and that he was unable to give a satisfactory account of his possession.

[2] The criminal trial of the accused commenced on 3 September 2010. The state called two witnesses, Sergeant Josiah Bazima and Mr. Michael Mxonisi Kaliba

whereafter its case was closed. The accused testified. He indicated that he wished to call a witness. On 15 October 2010, the trial was postponed to 7 December 2010.

[3] A Senior Magistrate, Germiston, requested a special review of this matter and that it be ordered that it starts *de novo* before another magistrate. In a letter dated 11 March 2011 the learned senior magistrate advised that the magistrate who presided at the criminal trial of the accused ‘...has become permanently unable to continue...’ with it. He explained as follows:

‘The magistrate had a contract appointment and was implicated in a pending fraud matter and arrest on those charges was imminent, and the Chief Magistrate thought it prudent to terminate his contract with immediate effect to save embarrassment to the Judiciary.’

[4] The learned senior magistrate referred us to *S v Lapping* 1998 (1) SACR 409 (WLD). Cloete J, with whom Marais J, concurred said the following at pp 415 i - 416 b of that judgment:

‘...It would appear from this passage that the Full Bench of the Transvaal recognized the possibility that, in theory, illness of a magistrate for a considerable period could, depending on the facts, justify an order that proceedings be commenced *de novo* before another magistrate. If in theory, illness of a magistrate for a considerable period could, depending on the facts, justify an order that a trial commence *de novo* before another magistrate, then, on a parity of reasoning, such an order would be justified if delay for a considerable period could result from the fact that the magistrate hearing the matter has been suspended. In each case, the incapacity of the magistrate to continue with the trial is total, albeit not necessarily permanent; and such cases fall to be distinguished from a case where a magistrate has been transferred because, in such a case, as was pointed out in *Tlailane’s* case at 111 *in fine*, the necessary administrative arrangements can easily be effected in terms of ss 9(1)(d) and 9(4) of the Magistrates’ Courts Act 32 of 1944.’

[5] The same reasoning in my view applies to a matter such as the present where a presiding magistrate’s ‘contract appointment’ had been terminated due to his alleged implication in criminal activity. I do not express any view on the validity of the

termination of the presiding magistrate's contract. The presiding magistrate is obviously totally incapable of continuing with the trial unless and until the termination of his contract is set aside. It cannot be assumed that such will ultimately happen nor can it be assumed that the presiding magistrate will remain incapacitated from continuing with the trial.

[6] I am accordingly of the view that the High Court has the power to grant an order that the proceedings in this instance commence *de novo* before another magistrate. The relative advantages and disadvantages of a postponement as opposed to a trial *de novo* ought now be considered. See: *S v Lapping* (supra) at pp 416 e – 417 a.

[7] Apposite to the facts of this matter is the following *dictum* of Cloete J in *S v Lapping* at p 416 h – i

‘... in the present matter, the only alternative to an order directing a new trial would be to postpone the trial indefinitely in the hope that the trial magistrate will ever be able to do so. Speculation in this regards will involve *inter alia* prejudging the result of her pending criminal trial which has not yet commenced. If convicted, she may appeal. In the meantime the present matter, which commenced more than seven months ago, could not proceed.’

[8] The accused is on bail. Having regard to the record of the proceedings in the court a quo – the state called only two witnesses, the accused testified and wished to call one witness – it appears that a trial *de novo* could be commenced and finalized in a relatively short period of time. I am accordingly of the view that the relative advantages and disadvantages of a trial *de novo* outweighs those of an indefinite postponement.

[9] In the result, the following order is made:

The proceedings are set aside to enable the Director of Public Prosecutions – should he or she so decide – to prosecute the accused *de novo* before another magistrate.

WEPENER J

I agree with my brother Meyer, J.

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PA MEYER  
JUDGE OF THE HIGH COURT

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WL WEPENER  
JUDGE OF THE HIGH COURT

19 May 2011