

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
19/9/2014	

In the matter between

THE STATE

and

JH SKHOSANA AND 5 OTHERS (41/2193/2008)
OF MOTLATSI AND 2 OTHERS (41/0308/2009)
R MASILU AND ANOTHER (41/0860/2009)
Z MKHIZE AND 2 OTHERS (41/2063/2009)
P MKHIZE AND 3 OTHERS (41/2200/2009)
A KOPS (41/2031/2010)
MS KARIM AND ANOTHER (41/2046/2010)

M NCUBE AND ANOTHER (41/0026/2011)
M MOYO AND 2 OTHERS (41/572/2011)
S MUYAMBU (41/1065/2011)
S NDOBE AND 2 OTHERS (41/01107/2011)
A PAULSEN AND 2 OTHERS (41/01213/2011)
KJ NKUNA (41/406/2012)
LR REILLY AND 2 OTHERS (RC/495/2012)
S MATCHEBELE AND ANOTHER (41/973/2012)
EO MOSIMANEKGOTLA (41/1798/2012)
D NQWENYA AND 2 OTHERS (41/1961/2012)
B MGANA (41/0040/2013)
PA SITHOLE (41/0426/2013)
O HABIBA (41/0507/2013)
J NKWANE (41/862/2013)
T NDOU (41/1154/2013)

SPECIAL REVIEW FROM JOHANNESBURG MAGISTRATES' COURT

VICTOR J

[1] The Regional Court President Gauteng Mr Djaje has requested a special review of some 22 part-heard criminal trials. The relevant names and case numbers are listed on a schedule and are reflected in the above heading. They are all matters emanating from the Johannesburg Magistrates' Court.

[2] All the matters are part-heard matters before Mr BP Luyt, a retired regional magistrate who was appointed in an acting capacity to preside over a backlog of criminal trials. Mr Luyt was involved in a near fatal accident which required extensive hospitalisation including a month in the intensive care unit of the hospital, an acute ward for a month and three weeks of rehabilitation. He cannot walk and is experiencing memory loss. He has to have a hip replacement. I accept the conclusion that he will not be able to preside again and will not be able to complete the part-heard matters which he has been assigned.

[3] The question is whether Mr Luyt's unavailability to finalise the part-heard matters before him, due to his ill health, should result in the trials continuing before another presiding officer without further referral to the High Court or should they commence *de novo* before another presiding officer irrespective of the stage reached. Although not expressly stated in the special review request it is necessary to determine whether firstly the matters that have reached conviction stage must be treated in the same manner as those that have reached sentencing phase. Secondly the question is whether this court, being a higher court, needs to make an order in respect of both stages.

POST CONVICTION

[4] Section 275 of the Criminal Procedure Act 51 of 1977 (the CPA) makes provision for a part-heard matter which has reached the stage where the

conviction has been completed and the only outstanding issue is sentence. In such a case s275 spells out clearly that the matter can proceed before another judicial officer for sentence. Of course the new presiding officer must ensure that he reads the record meticulously, listens to further evidence on sentence and takes whatever steps are necessary to ensure a fair trial and completion of the matter.

s275 (1) provides as follows:

275 (1) If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he or she had not been absent.

- [5] s275 directs that the matter proceed before another magistrate without the necessity of the matter going to a higher court for review. The relevant and material words are “any judicial officer of that court ... pass sentence”. In my view therefore the Regional President or another senior magistrate in charge of the roll may make such re-allocation for the purpose of sentence only.

- [6] It would seem that very few of the 22 matters referred for special review fall into the above category where the conviction has been finalised and a stage has been reached where only sentence is outstanding so that the matters can be dealt with on an administrative level.

PRIOR CONVICTION

- [7] The majority of the matters referred to have not reached conviction stage and the question arises whether in the absence of a provision in the CPA the matter can be dealt with administratively by the role planner allocating the matter to another magistrate without it being referred to the High Court for special review.
- [8] The case law prior to the introduction of s275 of the CPA seems to have developed along the lines that wherever possible the original magistrate must return to complete the matter. It seems to me that the case law does not provide for a situation when the trial magistrate becomes unavailable to continue before conviction stage (i.e. because he or she leaves the service or dies).
- [9] There are three questions that arise out of this. Must the proceedings which are part heard before conviction:
- 9.1 be aborted and commenced *de novo* before another magistrate; or

9.2 continue before another magistrate; and

9.3. whether it is necessary for the High Court to give direction on this?

[10] In *S v De Koker* 1978 (1) SA 659 Flemming J as he then was, stated at 660, after referring to *S v Gwala* 1969 (2) SA 227 (N) and *Magubane v Van der Merwe NO* 1969 (2) SA 417 (N)

"Volgens die regspraak bring onmoontlikheid daarvan om met die verhoor voort te gaan weens onbeskikbaarheid van die landdros mee dat die verrigtinge sonder meer as abortief beskou word en verval sonder die noodsaak van enige tersyderstelling deur 'n hoër Hof"

[11] In *S v Zungu* 1984 (1) SA 376 (N) Milne JP held:

"It appears to me that the non-availability of the trial magistrate must be considered in the same light as if his non-availability had been brought about by his dismissal. This is not a case where arrangements can be made for the trial to be heard by him as might occur if he had been transferred or perhaps resigned."

[12] In *R v Mhlanga* 1959 (2) SA 220 (T) at 222 Claassen J held:

"Many events may however occur after the taking of the plea which may render the proceedings abortive and therefore a nullity because the court, as constituted at the plea stage, has ceased to exist or the presiding judicial officer has ceased to have jurisdiction in the matter. Such events may include the death of a magistrate, his resignation or dismissal, his recusal or his transfer out of the particular district. One can think of other possibilities too, but I think it is quite clear that the magistrate only has jurisdiction in a particular district as long as his appointment in that district

continues. The moment his appointment there is terminated, his jurisdiction has also come to an end. When an event such as a transfer has taken place, the magistrate has ceased to have jurisdiction in the court in which the plea was taken and the proceedings in the particular case therefore have become abortive; they have logically become a nullity."

[13] In *S v Gwala* Kennedy AJP distinguished the position where a magistrate has been transferred and held that in such a case the magistrate must be brought back to conclude the case. At 229, dealing with a part-heard case, he says:

"Clearly such officer becomes *functus officio* upon his recusal and, the prosecutor desiring to proceed with the case; it becomes necessary to have a completely new hearing. Equally so the death of a magistrate, his resignation or dismissal would give rise to the opening of a case *de novo* against an accused person."

[14] The same Judge in *Magubane v Van der Merwe* NO at 419 held:

"Once a magistrate has recused himself the proceedings over which he formerly presided become a nullity. They vanish, as it were, and nothing remains of them. For that simple reason the provisions of s 169 (6) (now s 106 (4)) cannot be applied to a case where the magistrate has either recused himself or for some other reason become incapacitated, either through physical or mental incapacity or where he has been dismissed or where he resigned. He has become *functus officio*. The proceedings are aborted and a nullity and the way is open therefore for a fresh trial to be brought against the person originally charged."

[15] Our courts have held on several occasions that the prolonged incapacity of a presiding officer may warrant the setting aside of the proceedings before such presiding officer so that, in the interests of justice, a trial *de novo* can commence before another presiding officer. Each case will depend upon its own circumstances (See *S v Makoni and Others* 1976 (1) SA 169 (R); *S v Chigumbu* 1980 (1) SA 927 (Z); *S v Tlailane and Another* 1982 (4) SA 107 at 110H-111A).

[16] Both logic and the authorities to which I have referred indicate that the disability of Mr Luyt renders the earlier proceedings in these matters a nullity and they should therefore commence *de novo*. The question is whether the proceedings which are a nullity require to be set aside by the High Court or whether the roll planner can simply set the trial down to commence *de novo* before another magistrate.

[17] s275 of the CPA deals expressly with matters post conviction. In the absence of the Legislature dealing with pre conviction matters does it follow *ex lege* that there was a deliberate intention by the Legislature to exclude the pre conviction process from being a mere administrative one and thus requiring nullity proceedings to be declared so by the High Court? The cases of *S v De Koker* expressly eschews that approach and *R v Mhlanga* although not dealing with

this point directly does not suggest that it requires a High Court to set the matter aside. It simply remains a nullity and this follows *ex lege*.

[18] I am therefore of the view that the High Court does not have to set a pre-conviction trial aside as the nullity principle *ex lege* sets the trial aside.

UNDUE DELAY AS A RESULT OF MR LUYT'S INCAPACITY

[19] The honourable Regional Court President may wish to consider whether the abortive proceedings have not resulted in an unreasonable delay in the conclusion of trial and whether this violates the accused's right to a fair trial. S 35(3)(d) of the Constitution provides that the right to a fair trial includes the right to begin and conclude the trial without unreasonable delay. See *Bothma v Els and others* 2010 (2) SA 622 (CC) and *S v Mokoena* 2008 (5) SA 578 (T). In such a case the cessation of prosecution would introduce a factor which may well require a High Court to pronounce on that aspect. I do not know what the delay is.

[20] Section 304(2)(c)(vi) of the CPA reads that "on review such court, whether or not it has heard evidence, may, subject to the provisions of section 312, make any such order ... generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice."

[21] If there has been a long delay then the powers set out supra can be invoked by the High Court to bring the proceedings to an end. Much greater detail would be required.

[20] Mr Luyt's illness constitutes an "extended illness" and also meets the strict standard of "substantial grounds" as he has physical and mental restraints due to his accident that make him unable to complete the part-heard matters he was assigned.

[22] This is not a situation where I have to weigh the advantages and disadvantages of postponing the proceedings. Mr Luyt is unable in the foreseeable future to return to preside over these matters. It is in the interests of justice to ensure that the trials are concluded timeously. This is so that the accused have access to a fair and speedy trial, and so that all those harmed by the accused, and society as a whole, see that justice is done. Accordingly, it is best not to postpone the matters.

[23] As a result of taking the above into consideration, I make the following order:

1. Where the accused have already been convicted the question of sentence may continue without pronouncement by the High Court.
2. Similarly where the part heard trials have not reached the stage of conviction the proceedings are a nullity *ex lege* and can continue before another magistrate *de novo* without the necessity of an order from a High Court.

Date : 18 September 2014



VICTOR J



SATCHWELL J

Summary:

Criminal - Special review – Incapacity of magistrate to complete part-heard matters due to ill health or death – Some matters have reached the stage of conviction, other matters have not reached the stage of conviction - S 275 of the Criminal Procedure Act provides for a part- heard matter after conviction to be heard before a another magistrate for the purpose of sentence and it follows without the necessity of pronouncement by the High Court – The Criminal Procedure Act does not provide for the procedure to be adopted of part heard matters pre-conviction stage. – *Held*: High Court does not have to set a pre-conviction trial aside as it is a nullity *ex lege*, therefore High Court intervention is unnecessary.

Held: Where the accused have already been convicted the question of sentence may continue without pronouncement by the High Court. *Held*: Similarly where the part heard trials have not reached the stage of conviction the proceedings are a nullity *ex lege* and can continue before another magistrate *de novo* without the necessity of an order from a High Court.