

[REPORTABLE]

**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

High Court Ref. No: 0035054
Magistrate's serial No: 135/03
Case No: 3/1022/02

In the matter between:

THE STATE

VS

DANIEL STOFFELS & 11 OTHERS

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REVIEW JUDGMENT: 21 NOVEMBER 2003

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FOURIE, J:

[1] This matter has come before me on special review. It involves 12 part-heard matters in the Mitchells Plain Magistrates Court. The presiding magistrate was allegedly involved in a shooting incident on 30 November 2002, which resulted in criminal charges being brought against him. He is due to appear in this court on 1 March 2004 on a charge of murder. The magistrate has also been provisionally suspended from office by the Magistrate's Commission.

[2] The presiding magistrate requested that the 12 matters be sent on special review and states that “*whatever the outcome of my case might be, I do not intend to preside in the court of law again.*” He accordingly requests that the proceedings in the 12 part-heard matters be set aside with a direction that the said cases are to be heard *de novo* before a different magistrate.

[3] Section 118 of the Criminal Procedure Act, No. 51 of 1977 provides that if the presiding officer before whom an accused at a summary trial has pleaded not guilty, is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other presiding officer of the same court. In the instant case section 118 does not apply as evidence has been adduced in each of the 12 matters.

[4] Where a magistrate dies or has become incapacitated or where he/she has been dismissed or has resigned, the part-heard proceedings before him/her are aborted and therefore a nullity. The same applies where the magistrate has recused himself/herself. The trial may then commence *de novo* before another magistrate without an order of the High Court setting the earlier proceedings aside. See **R v Mhlanga**, 1959 (2) SA 220 (T): **S v De**

Koker, 1978 (1) SA 659 (O); **S v Molowa**, 1998 (2) SACR 422 (O) and **S v Bolelo**, 2000 (2) SACR 734 (NC).

[5] In **S v Richter**, 1998 (1) SACR 311 (C), the magistrate could not continue with the trial as she had become aware of the previous convictions of the accused. She ordered that the matter be heard de novo before another court. The order of the magistrate was held to be an irregularity as there is no statutory authority for a magistrate to order that the trial should be instituted before another court. Where such a declaration is required, the matter should be referred to the High Court for the setting aside of the proceedings.

[6] Where, as in the instant matter, the magistrate recuses himself, I am of the view that such recusal constitutes an absolute supervening impossibility which nullifies the proceedings. In **Richter** no such supervening impossibility was present and the magistrate erred in granting an order for which she had no statutory authority. It follows, in my view, that the decision in **Richter** does not apply in the instant case.

[7] In the result each of the 12 matters may commence de novo before

another magistrate without an order of this court setting the earlier proceedings aside.

P.B. FOURIE, J

I agree

D.V. DLODLO, AJ