

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

High Court Review No: 033999

Review Case No: **465/03**

Magistrate's Case No: 15/478/03

In the matter between:

THE STATE

vs

RANDALL HANEKOM

REVIEW JUDGMENT DELIVERED: 3 DECEMBER 2003

YEKISO, J

[1] The issue which I have to determine in the instance of this matter is whether the unterminated criminal proceedings arising from the summary termination of the employment contract of the presiding judicial officer become a nullity on termination of employment of such a judicial officer. If such proceedings become a nullity a further

question I have to determine is whether such unterminated criminal proceedings have to be set aside before an accused person in such unterminated criminal proceedings can be tried *de novo* another judicial officer. This issue arises in this matter which came before me by way of a special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977.

[2] The matter relates to pending criminal proceedings before one Mr B P Thomas (who I shall hereafter refer to as “the trial Magistrate”) and who was appointed an acting Magistrate on contract. His contract would have expired on 31 August 2003. The proceedings which are the subject of this review commenced before the trial Magistrate on 21 July 2003. On the date the proceedings commenced the Court heard the evidence of one witness who testified for the State. Due to time constraints the proceedings could not be finalized and had had to be postponed until 12 August 2003. The proceedings were postponed at a stage when the witness had to be cross-examined by the accused’s legal representative.

[3] On 11 August 2003, a day before the pending trial would resume, the employment contract of the trial Magistrate was summarily terminated. This resulted in the proceedings not being proceeded with on 12 August 2003.

[4] On 25 August 2003 the Magistrate, Cape Town addressed a letter to the Registrar of this Court under cover whereof was enclosed the original case record inclusive of the transcription of the un-terminated proceedings, requesting that the proceedings before the trial Magistrate be set aside and an order that the proceedings commence *de novo* before another Magistrate.

[5] When the record of the proceedings was placed before me on 2 September 2003 I telephoned Mr Venter, Senior Magistrate, Cape Town. I requested him to let me have a copy of the employment contract of the trial Magistrate and also the reason for the summary termination of his employment contract. In response to my telephonic communication Mr Venter furnished me with a copy of a letter dated 11 August 2003 addressed to the trial Magistrate by the Chief Magistrate, Cape Town contents whereof read as follows:

“In view of certain incidents on 11 August 2003 you are hereby given 24 hours’ notice of termination of your employment as temporary magistrate. Your appointment as temporary magistrate is withdrawn with immediate effect. You need not attend office tomorrow, but payment of your salary will be authorized until tomorrow 12 August 2003.”

What is evident on basis of the contents of the letter by the Chief Magistrate to the trial Magistrate is that the latter no longer had

authority to adjudicate over matters which were pending before him prior to the summary termination of his employment contract, including the matter under review. He was thus ousted out of his jurisdiction to try the matter under review until final disposition thereof. It is quite evident that if the trial against the accused had had to proceed, it could only proceed *de novo* before another Magistrate.

[6] As has already been pointed out in paragraph [1] of this judgment the question which immediately arises is whether the unterminated proceedings have to be set aside before the trial of the accused commences *de novo* before another Magistrate or whether the accused can be tried before another Magistrate without the unterminated proceedings before the trial Magistrate being set aside. Put conversely the issue is whether the unterminated proceedings in an instance where the presiding officer is not available, in an absolute sense, renders the unterminated proceedings a nullity without an order of declaration of nullity or whether such nullity should be preceded by a formal order of declaration of nullity.

[7] On considering the record of the unterminated proceedings, I could not detect any irregularity *ex facie* the record. However, in view of the issue I raised in the preceding paragraph I addressed a letter to the Director of Public Prosecutions requesting for submissions as to:

- a) whether the current proceedings, unterminated as they are, ought to be set aside and an order be made that the accused be tried *de novo* before another Magistrate; or
- b) whether the accused can be tried *de novo* before another Magistrate without the un-terminated proceedings being set aside;

I am grateful to *Mr Badenhorst* of the office of the Director of Public Prosecutions for his incisive memorandum in response to the issues raised in my letter.

[8] A survey of decided cases reveals that there are various circumstances under which criminal proceedings become unterminated and these range from the death of the presiding magistrate; resignation by the presiding magistrate when the proceedings are partly heard; recusal, retirement, dismissal and suspension from service.

[9] The issue of unterminated proceedings, or pending proceedings to put it differently, is significant in view of the possibility of a plea of *lis pendens* being raised should fresh proceedings be instituted against an accused against whom such proceedings are pending whilst the fate of such pending proceedings has not as yet been determined and a further possibility of an accused against whom such proceedings are pending demanding a verdict in respect of the unterminated proceedings in which he has already tendered a plea.

[10] Section 106(4) of the Criminal Procedure Act provides as follows:
 “An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on whose behalf a plea of not guilty is entered by the

court, shall, save as is otherwise provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.”

As the accused in the instance of this matter has already pleaded, the question is whether such an accused can either demand a verdict or whether the possibility is open to him to raise a plea of *lis pendens* as is contemplated in section 106(4) of the Criminal Procedure Act should fresh proceedings be instituted against him without the pending proceedings being set aside. Once again a review of past decisions in various jurisdictions reveals that a plea of *lis pendens* or a demand for a verdict is not sustainable in an instance where the unterminated proceedings are a nullity.

[11] The full bench of the Transvaal Provincial Division made the following observation in *S v Mayisa 1983(4) SA 242 (T)* at 247 G-H:

“Wanneer 'n beskuldigde eers gepleit het is hy geregtig om te eis dat hy vrygelaat of skuldig bevind word deur die geregtelike beampte voor wie die verhoor 'n aanvang geneem het. Die enigste beperking op hierdie beginsel is dat indien die geregtelike beampte voor wie die beskuldigde onskuldig gepleit het om enige rede nie beskikbaar is om die verhoor voort te sit nie en daar geen getuienis aangevoer is nie, die verhoor voor enige geregtelike beampte van dieselfde hof voortgesit kan word. Myns insiens berus hierdie siening op h korrekte uitleg van art 106(4) gelees met art 118.”

[12] In all the instances mentioned in paragraph 7 of this judgment the presiding judicial officer is not available to continue with the trial. It would appear that a distinction is drawn on the availability or otherwise of a presiding judicial officer in the sense of relative unavailability or absolute unavailability. Hiemstra: *Suid-Afrikaanse Strafproses 6th Edition* puts the position as follows at p287:

“Waar die verhoor, sover as wat dit gekom het, blyk nietig te wees kan die beskuldigde nie h bevinding eis nie want geen geldige bevinding kan op h nietigheid volg nie. h Aangevange verhoor sal nietig wees waar die geregtelike amptenaar in die absoluut sin nie meer beskikbaar is nie om h rede soos afstorwe, aftrede, ontslag, bedanking of rekusering. Dan moet die verhoor *de novo* begin voor h ander regtelike amptenaar.”

Hiemstra, in his work cited above, seems to place unavailability in instances of death, retirement, discharge, resignation and recusal referred to in paragraph 7 of this judgment in the category of non-availability in the absolute sense and

does not refer to an instance of a non-availability arising from suspension. It would seem Hiemstra excludes suspension from service from the category of unavailability in the absolute sense in his classification of categories of unavailability.

[13] In *S v De Koker 1978(1) SA 659(O)* at 660 Flemming AJ made the following observation:

“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 meer die noodsaak van enige tersyderstelling deur h hoer hof.”

Hiemstra, in his work referred to in paragraph [11] of this judgment places unavailability in instances of death, retirement, dismissal, discharge and recusal in the category of unavailability in an absolute sense as against unavailability as a result of instances such as transfer to another district, suspension or unavailability due to ill health. In all such instance where the presiding magistrate is unavailable in the absolute sense, the untermiated proceedings become a nullity and the accused may be tried *de novo* before another magistrate without the need for an order setting aside such proceedings which appears to accord with *S v De Koker* supra.

[14] In *S v Lapping 1998(1) SACR 409(W)* the presiding magistrate in a part-heard trial was suspended from service pending the outcome of criminal and disciplinary proceedings instituted against her. Her return to active service depended on the outcome of the pending criminal proceedings and the disciplinary proceedings which would follow. There was thus no certainty about her availability and, in the interim, the proceedings against the accused could not be finalised because of her unavailability. The accused was obviously prejudiced because of the delay in having the proceedings finalised. Because of this uncertainty the proceedings had had to be set aside, leaving it to the Attorney-General to institute fresh proceedings against the accused should it be desirable to do so.

[15] In *S v Polelo 2000(2) SACR 734 (NC)* at 736 *c-d* it was held that in the event of the resignation of the presiding judicial officer in a part-heard matter, the trial could commence *de novo* before another presiding judicial officer without an order of the High Court setting aside the untermiated proceedings. In the view of Hiemstra supra, which was followed in *S v De Koker*

supra, such un-terminated proceedings become a nullity on the resignation of the presiding judicial officer and, thus, there is no need for an order to set aside such proceedings before the accused could be tried *de novo* before another presiding judicial officer. (See also *Du Toit et al: Commentary on the Criminal Procedure Act* at 15-37)

[16] In the instance of this matter the contract of the presiding judicial officer, who was appointed temporarily, was summarily terminated. From the moment his contract was terminated he no longer had jurisdiction to proceed with the trial of the matter to its finality. This is a matter of certainty so that in that sense his unavailability is absolute. Following the reasoning in Hiemstra, *S v De Koker* and *S v Polelo* supra the unterminated proceedings became a nullity on the summary termination of the contract of the trial Magistrate.

[17] It therefore follows in the instance of this matter that the unterminated proceedings became a nullity on summary termination of the employment contract of the trial Magistrate. Such proceedings, being a nullity, do not need to be preceded by any formal declaration of nullity before fresh proceedings could be instituted against the accused before another Magistrate.

[18] In the result the accused in this matter could be tried before another Magistrate without an order setting aside the unterminated proceedings which, in any event, became a nullity on summary termination of the employment contract of the trial Magistrate. Consequently there is no need for an order for the unterminated proceedings to be set aside.

N J YEKISO, J