IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

High Court Review Ref: 18509/2018
Riversdal Magistrates' Court case no. SB295/16
Mossel Bay Magistrates' Court Special Review (C.M. Maseti)

In the matter between:

THE STATE

and

ELTON MOSES

REVIEW JUDGMENT

Dated 14 June 2018

BINNS-WARD J (BOZALEK J concurring):

[1] This matter was submitted by the magistrate at Riversdal (Mr C.M. Maseti) for special review in terms of s 304A of the Criminal Procedure Act 51 of 1977 ('the Act'). His reason for taking that course is best explained with reference to the history of the case.

[2] The accused, who was legally represented, pleaded guilty to the charges on which he was arraigned. He confirmed the content of a written statement in terms of s 112(2) of the

Act that was read into the record by his attorney, and was thereafter appropriately convicted. The statement (exhibit A) had been signed by both the accused and his then attorney. The further hearing of the case was then postponed at the defence attorney's request for a probation officer's report to be obtained.

[3] Sadly, by the time the report became available and the matter was ready for the sentencing hearing to proceed, the trial magistrate had died. Another magistrate (Mr Oosthuizen) stepped into the breach in terms of s 275 of the Act for the purpose of discharging the outstanding duty of imposing sentence. At that stage the accused had become represented by a different legal representative.

[4] The new representative (Mr Stemmet) informed the magistrate that the content of exhibit A was not consistent with his instructions. The magistrate thereupon, without enquiring into the detail of the deviance between the instructions now given by the accused and the plea statement, summarily altered the pleas to not guilty. In so doing he purported to act in terms of s 113 of the Act. It was notionally within the magistrate's power to have altered the pleas in terms of s 113; see *S v Osborne, S v Nero* 1978 (3) SA 173 (C). Whether he exercised the power competently in the circumstances is a question to which I shall return presently.

[5] After altering the pleas, and before the proceedings were taken further, the magistrate recused himself from the case because he had noted from the record that he had presided in the accused's bail application. He indicated that the matter might continue before another magistrate in terms of s 118 of the Act. The magistrate ordered that the clerk of the court should place the proceedings already on record (presumably the record concerning everything that had transpired prior to the alteration of the pleas) in a sealed envelope '[s]*odat dit nog altyd in die oorkonde bly maar nie deel van die sigbare oorkonde vorm nie*'.[1]

[6] The matter was thereafter allocated to Magistrate Maseti. It would seem that there had not been compliance with the order concerning the sealing of part of the record because upon perusing the file Mr Maseti came across the record of the accused's previous convictions. This made him feel uncomfortable about hearing the case. He could have chosen merely to recuse himself, and to ensure that the sealing order was complied with before the case was passed on to another judicial officer to try. He decided instead to send the matter on special review, however, because of his concern that the record shows that the

[1] '[S]o that it still remains part of the record, but does not form part of the visible record.' (My translation.)

charges were not put to the accused in strict compliance with s 105 of the Act at the commencement of the trial before the original trial magistrate. He suggests that the proper course in the given circumstances would be for the proceedings thus far to be set aside on review, with a direction that the trial commence *de novo* before another magistrate.

[7] The matter indeed raises a number of issues on which the prevailing position in law is in certain respects not altogether settled. Mr Maseti is to be commended for identifying that these should receive attention on special review before the hearing proceeds.

[8] In my judgment the following questions fall to be addressed on review:

a) Has the accused effectively pleaded to the charges?

b) If so, were his pleas competently altered to pleas of not guilty?

c) How should the matter proceed from here?

Has the accused effectively pleaded to the charges?

[9] The accused was charged on three counts; one of trespass and two of housebreaking with intent to steal and theft. The transcript of the proceedings reflects the following concerning the plea process:

> HOF: Goed, op die 7de Augustus van 2017, die staat teen Elton Moses saaknommer SB295/2016. Die partye is genotuleer soos op die oorkonde. Ek aanvaar u het die klagtes verstaan. Daar is een van betreding en twee van huisbrake. Korrek so?
> BESKULDIGDE: Reg so, meneer.
> HOF: Hoe gaan u pleit op die klagte, meneer?
> BESKULDIGDE: Ek pleit skuldig.
> HOF: Dankie, mevrou.
> **KLAGTE NIE FORMEEL AAN BESKULDIGDE GESTEL**
> **BESKULDIGDE PLEIT SKULDIG**
> ME VAN DER HEEVER: Dankie Edelagbare. Bevestig my instruksie vir 'n pleit van skuldig. Ek hou die verklaring aan die hof voor. [2]

[2] COURT: Very well, on the 7th of August 2017, the state versus Elton Moses case no. SB295/2016. The parties are as noted on the record. I assume that you understand the charges. There is one of trespassing and two of housebreaking. Not so?
ACCUSED: That is so, sir.
COURT: How do you intend pleading to the charges, sir?
ACCUSED: I plead guilty.
COURT: Thank you, madam.
CHARGES NOT FORMALLY PUT TO ACCUSED
ACCUSED PLEADS GUILTY

[The accused's legal representative thereupon read into the record a statement in which the accused confirmed that he had committed the offences with which he had been charged and that he done so with the required legal intention. The plea statement expressly recorded that the accused pleaded guilty to the count of trespass and one of the counts of housebreaking. Although an intention to plead guilty to the other charge was not expressly included in the statement, it was clear from the context that the accused was confessing to having committed the offence and that his plea statement was intended to be supportive of a plea of guilty to that charge too. The plea statement also gave amplified expression to the accused's reply in answer to the magistrate's question about how he was going to plead to the charges: '*I plead guilty*'.]

> Geteken deur die beskuldigde en myself, edelagbare. Verlof om op te handig.
> HOF: Mnr Moses, hierdie verklaring wat u regsverteenwoordiger aan my voorgelees het, het u dit verstaan?
> BESKULDIGDE: Ja, edelagbare.
> HOF: Is dit reg so?
> BESKULDIGDE: Dit is reg so, edelagbare.[3]
> PRESIDING OFFICER: Does the State accept?
> PROSECUTOR: Accept the plea, Your Worship.

The magistrate then proceeded to find the accused guilty as charged in accordance with his pleas as recorded in the passage from the record that I have just quoted.

[10] Section 105 of the Act provides as follows:

> **Accused to plead to charge**
> The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.

Sections 77, 85 and 105A had no application on the facts. It is clear, however, that s 105 was not complied with according to its letter. This begged the question that troubled Magistrate Maseti concerning the validity of the ensuing proceedings.

MS VAN DER HEEVER: Thank you, Your Worship. Confirm my instruction for a plea of guilty. I present the statement to the court.
(My translation.)

[3] Signed by the accused and myself, Your Worship. Leave to hand up.
COURT: Mr Moses, this statement which your legal representative has read out to me, did you understand it.
ACCUSED: Yes, Your Worship.
COURT: Is that so?
ACCUSED: That is so, Your Worship.
(My translation.)

[11] The plea process in the current matter was remarkably similar to that reported in the judgment on appeal in *S v ZW* 2015 (2) SACR 483 (ECG) at para. 28. The only significant difference is that in the current case the magistrate's remarks implied that he assumed that the accused had had insight into the charge sheet, whereas in *ZW*, the prosecutor expressly informed the magistrate that '*the defence*' (the accused in that matter was also legally represented) had had insight into the charge sheet. Stretch J (with whom Negpen J concurred) noted (at para. 38) that the court had been informed during argument '*by both counsel for the appellant and counsel representing the state that this procedurally irregular conduct has become practice in the lower courts.*' The learned judge proceeded: '*If this is indeed so, presiding officers are invited not only to be vigilant in discouraging and reprimanding such sloppy prosecution, but also to resist becoming a part of what can only be described as a series of unfortunate irregularities*'.

[12] Despite the court's observation in *ZW* (at para. 41(c)) that

> The provisions of s 105 are peremptory, not only with respect to the stating of the charges in open court, but also particularly with respect to the party seized with the duty to do so, being the prosecutor who after all is the official representative of the state, being the accused's accuser. See *S v Mamase and Others* 2010 (1) SACR 121 (SCA) para 7. Furthermore, an accused person is at the outset of criminal proceedings entitled to be advised of the case which he is called upon to answer to with sufficient particularity so as to instruct his legal representative properly and to plead to the charges in a meaningful way, should he so wish. The accused's right to be informed of the charge with sufficient detail to answer it is a fundamental non-derogable right which enjoys absolute protection in terms of s 35(3)*(a)* read with s 37(5)*(c)* of the Constitution.

the court did not hold that the non-compliance with the strict tenor of s 105 in the circumstances of that case had vitiated the proceedings. The only effect of the non-compliance with the letter of the provision in that particular case was that it resulted in the appellate court not being satisfied that the accused had been alerted to the application of the prescribed minimum sentences applicable to the offences with which he had been charged. In the result the court dismissed the appeal against the convictions, but substituted the sentences of life imprisonment that had been imposed in terms of the prescribed minimum sentence regime with determinate sentences of imprisonment.

[13] Whilst the court in *ZW* did not expressly reason its conclusions along these lines, I think the order made in the matter implicitly demonstrated the application by the court of the recent trend in statutory construction which is to have regard in respect of the practical application of statutory provisions less to the characterisation of the language in which a

provision has been couched (whether as 'peremptory' or 'directory'), and more to whether on the facts of the given case the evident substantive purpose of the provision has been achieved or not.[4]

[14] Para 7 of the judgment of the Supreme Court of Appeal in *S v Mamase and Others* 2010 (1) SACR 121 (SCA), to which reference was made in *ZW* in the passage quoted earlier,[5] does not hold that s 105 is peremptory in the sense that it is essential that it be complied with to the letter. The judgment holds that a plea process in criminal proceedings is peremptory in terms of s 105, which is something different. The appeal court made that observation in the context of determining when a trial commences. Its determination was that that the effect of s 105 (and s 106, which prescribes the nature of the various types of plea that an accused may plead) is that a criminal trial does not commence until the accused pleads to the charge(s). To use an analogy from civil procedure, *litis contestatio* is not obtained, and the case is not triable, until the accused has pleaded.

[15] The issue in *Mamase* was one of jurisdiction. The accused in that matter had applied to the court before which they had been indicted for a ruling that it did not have jurisdiction. The application was made before the criminal trial had commenced. The appeal court held that the court of first instance should not have entertained the application because, on a proper approach, the issue of its jurisdiction to entertain the matter would arise only in the context of plea in terms of s 106(1)(f) of the Act.[6] It explained that a challenge to the court's jurisdiction only becomes a justiciable issue when the court has become seized of the proceedings, which, in a criminal trial happens only when the accused enters a plea. It follows that it is therefore necessarily implicit in the judgment in *ZW* that the court accepted that the accused in that case had effectively entered a plea notwithstanding non-compliance with the letter of s 105.

[16] Another comparable case is *Motlhaping v S* [2015] ZANWHC 60 (17 September 2015). In that matter the full court of the North West division (Landman J, Gura and

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[4] Cf. *Weenen Transitional Local Council v Van Dyk* [2002] ZASCA 6, 2002 (4) SA 653 (SCA), [2002] 2 All SA 482, at para. 13, and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 51, 2014 (1) SA 604 (CC); 2014 (1) BCLR 1, at para. 30.

[5] At para. [12] above.

[6] Section 106(1)(f) provides:

Pleas
(1) When an accused pleads to a charge he may plead-
…
that the court has no jurisdiction to try the offence; …

Chwaro JJ concurring) was seized of an appeal from the judgment of a single judge in a criminal matter. The appellate court's judgment records that the plea process in the trial court went as follows:

> … when the prosecutor requested that the indictment be read to the appellant, the trial Judge turned to appellant's counsel and asked her whether she represented the appellant and then said: "And the accused is familiar with the charges against him?" When counsel replied in the affirmative the trial Judge said "And he has instructed you to plead?" Counsel replied: "Not guilty." The trial judge then said:
>
> > "Just confirm with the accused that he pleads not guilty on all the charges. No, just ask him if he pleads not guilty on all the charges. You will interpret what I say and not what you want to interpret."
>
> The appellant replied: "Not guilty."

The full court declined to uphold the contention by the appellant's counsel that the convictions and sentences should be quashed solely on the basis that plea process had not complied faithfully with the language of s 105 of the Act.

[17] It is evident from the judgment that Landman J was astute to the fact that s 105 is a provision in terms of which effect is given to an aspect of the fair trial rights entrenched in terms of s 35(3) of the Bill of Rights.[7] In weighing the argument advanced by the appellant's counsel he took the view the proper approach was to consider whether the non-compliance had materially compromised the appellant's fair trial rights. He concluded that it had not. In this regard the learned judge stated (at para. 9), '*I am satisfied from a reading of the record that the appellant knew he was indicted on two counts of murder and that he confirmed counsel's statement that he pleaded not guilty to those charges*'.

[18] The approach adopted in the aforementioned decisions put substance over form. In both matters the court overlooked the failures of punctilious compliance with s 105 in the trial courts because they were satisfied that the purpose of the provision had been substantively fulfilled, and also, and more importantly, that the accused's constitutional right to be informed of the charge with sufficient detail to answer it had not been compromised. In both matters the appellate courts were satisfied that the accused had been sufficiently informed of the charges they faced and that the nature of their intended pleas had been effectively placed on record.

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[7] Section 35(3)(a) of the Constitution provides:

Every accused person has a right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer it; …

[19] That the application of s 105 should be approached pragmatically, rather than formalistically, is also supported by the authors of Du Toit *et al*, *Commentary on the Criminal Procedure Act* (Juta) at 15-2 – 15-2B [looseleaf edition Service 58, 2017]. They offer an example of how formal compliance with the letter of s 105 might even be logistically impractical in a given case:

> It is submitted that the prosecutor's duty to put the charge is based on the accused's right to know what the charge is. Is it then, strictly speaking, absolutely necessary for the charge(s) to be read out in circumstances where defence counsel, after proper consultation with the accused, takes the initiative by informing the court and the prosecutor that his client is aware of all the charges against him and in a position to plead? …
>
> Consider the case where the accused, an accountant, is charged with four dozen charges of fraud and is defended by senior counsel who is assisted by two fairly experienced juniors. No court in South Africa would insist, or should require, that in this type of case 'the letter of the law' should be followed by requiring that the charges with all their detail should nevertheless be put to the accused by the prosecutor. The procedural objective should be to allow a situation where an informed plea in respect of each count can be received. The plea determines the ambit of the *lis* between the defence and prosecution; and this, it is submitted, can also be achieved in cases where defence counsel has indicated that his client is 'familiar' with the charges and ready to plead to each numbered count in the charge sheet or indictment.

[20] *S v Porrit* 2016 (2) SACR 700 (GJ) serves as a real life example of the considerations that Du Toit *et al* have in mind. In that matter the trial judge observed that reading the charges for purposes of pleading would take a full week or more. The trial judge (Spilg J) acceded to the adoption of the procedure agreed upon between the accused and the state in terms whereof the accused presented a document signed by them confirming that they understood the charges, agreed that the charges need not be put to them in open court, and that a plea of not guilty, as well as a plea of lack-of-jurisdiction, be entered. (See *Porrit* at paras. 67-69). The accused in that matter were not legally represented, but evidently not unsophisticated persons. It is clear from the judgment that in allowing the plea process to proceed as it did the trial judge paid careful attention to the imperative that the purpose of s 105 and the accused's fair trial rights should not be thwarted or compromised. I have little doubt that should the accused in *Porrit* later seek to challenge the validity of their trial on the basis that the letter of s 105 of the Act had not been complied with, they would be given short shrift.

[21] I would, however, respectfully agree with the enjoinder by Stretch J in *ZW* that s 105 of the Act should ordinarily be complied with according to its tenor. It is especially

undesirable that a presiding officer should be seen to be assuming the functions of the prosecutor in respect of putting the charges to the accused. But in the circumstances of the current case, in which it is clear (i) that the accused was familiar with the charge sheet, (ii) that he had already signed a plea statement in terms of s 112(2) of the Act that had been prepared with the assistance of his legal representative, (iii) the accused expressly stated his plea of guilty to the charges in open court, and (iv) confirmed the content of his plea statement in open court and where (v) the prosecution recorded its acceptance of the plea in open court, I consider that the object of s 105 was substantively fulfilled and that there was no prejudice to the accused's right to a fair trial. In the result I would address Magistrate Maseti's concern about the effectiveness of the accused's pleas by holding that the accused did effectively plead to the charges.

Were the accused's pleas competently altered to pleas of not guilty?

[22] The circumstances in which the accused's plea was purportedly altered in terms of s 113 of the Act to one of not guilty appear from the following passage of the transcript of proceedings before Magistrate Oosthuizen:

> HOF: Landdros Delport is ongelukkig oorlede en nie beskikbaar om voort te gaan met hierdie verrigtinge nie. … En derhalwe gaan die hof Artikel 275 van die Strafproseswet toepas en voortgaan met die verrigtinge.
>
> MNR STEMMET: Soos dit die agbare hof behaag. Edelagbare, my instruksies in hierdie aangeleentheid …(onhoorbaar) in hierdie aangeleentheid … (onhoorbaar) eintlik Artikel 113 toepas in hierdie aangeleentheid. Dit is my instruksie … (onhoorbaar) Edelagbare my instruksies is dat daar, beskuldigde voel hy was onskuldig in hierdie aangeleentheid edelagbare en hy wil graag sy dag in die hof hê.[8]

[23] [The accused's counsel, Mr Stemmet, then proceeded to refer to what appear to have been extracurial discussions concerning the irregularity of the plea process – an issue disposed of in relation to the first question discussed above – and indicated his understanding that the matter should have been sent on special review. The magistrate then intervened and the record goes on as set out below.

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[8] COURT: Magistrate Delport has unfortunately passed away and is not available to continue with these proceedings … And therefore the court is going to apply s 275 of the Criminal Procedure Act and continue the proceedings.
MR STEMMET: As the court pleases. Your Worship my instructions in this matter …(inaudible) in this matter … (inaudible) actually apply s 113 in this matter. It is my instruction … (inaudible) Your Worship my instructions are that there, the accused feels that he was not guilty in this matter Your Worship and he would like to have his day in court.
(My translation.)

HOF: So Bewysstuk A [the plea statement read out before the first magistrate by the accused previous legal representative and confirmed by the accused], wat inderdaad deur u (sic) vorige regsverteenwoordige uitgelees het (sic), waarin u (sic) erkennings vervat is en wat die 112(2) Verklaring vervat het, is nie u (sic) instruksies nie?

MNR STEMMET: Nee, edelagbare dit is definitief nie my instruksie nie. In fact my instruksie het dit glad nie so gebeur nie, edelagbare (sic).

HOF: Enige sentiment van u kant af mnr Pretorius [the prosecutor]?

AANKLAER: … (Onhoorbaar) vonnis. Artikel 275 …(onhoorbaar)

HOF: Ek kan nog steeds, as ek Artikel 113 van die Strafproseswet reg verstaan, kan die hof daardie artikel op enige stadium voor vonnis toepas.

MNR STEMMET: Dit is inderdaad korrek, edelagbare.

HOF: En dit blyk dan nou inderdaad dat die verdediging nie meer, nou dat die instruksies verander het, dat dit nie meer vervat word in Bewysstuk A nie. So ek kan nie sien nie dat daar 'n nodigheid is om die aangeleentheid te verwys na die Hooggeregshof toe nie. Die hof gaan bloot Artikel 113 toepas en ek gaan 'n pleit van onskuldig notuleer ten opsigte van al hierdie aanklagte.[9] [10]

….

[The magistrate then explained that he was unable to continue with the trial because of his prior involvement in the hearing of the accused's bail application, whereafter the continued as follows.]

HOF: Die hof pas dan nou Artikel 113 toe en ek notuleer pleite van onskuldig ten opsigte van al drie die aanklagtes. Ek gaan die aangeleentheid dan uitstel vir my ampsbroer om 'n verhoordatum te reël. Maar die pleit van onskuldig is nou reeds genotuleer. En my ampsbroer kan net Artikel 118 toepas en voortgaan met die verrigtinge, sonder dat daar (sic), want daar is geen pleitverduideliking aan my voorgehou nie.[11]

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[9] COURT: So exhibit A [the statement in terms of s 112(2) of the Act] which was in fact read out by your previous legal representative, in which your admissions are set out and which comprises the statement in terms of s 112(2) is not your instructions?
MR STEMMET: No, Your Worship. It is definitely not my instruction. In fact my instruction is that it that it did not happen that way at all, Your Worship.
COURT: Anything from your side, Mr Pretorius [the prosecutor]?
PROSECUTOR: (Inaudible)… sentence. Section 275 (inaudible).
COURT: I can still, if I understand s 113 correctly, the court can still apply that provision at any stage before sentence.
MR STEMMET: That is indeed so, Your Worship.
COURT: And it now appears indeed that the defence no longer, now that the instructions have changed, that it is no longer reflected in exhibit A. So I cannot see that there is a necessity to refer the matter to the High Court. The court is merely going to apply s 113 and I am going to note a plea of not guilty in respect of all of these charges.

[10] It bears mention in passing that the magistrate's opinion that changing the recorded pleas from guilty to not guilty would, of itself, avert the necessity to send the matter on special review was misplaced. Section 113 could not have been invoked if the accused had not effectively pleaded guilty in the first place.
(My translation.)

[11] COURT: The court now applies s 113 and records pleas of not guilty in respect of all three charges. I am then going to postpone the matter for my Colleague to determine a trial date. But the plea of not guilty is

[24] It is convenient at this stage, having regard to the magistrate's references to them in the passages from the record that I have just quoted, to set out the provisions of ss 113 and s 118 of the Act. Section 113 provides:

> **113 Correction of plea of guilty**
>
> (1) If the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.
>
> (2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.

Section 118 of the Act reads as follows:

> **118 Non-availability of judicial officer after plea of not guilty**
>
> If the judge, regional magistrate or magistrate 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 judge, regional magistrate or magistrate of the same court.

[25] It is evident that s 113(1) may be triggered (i) if something occurs in the post-plea proceedings that makes the presiding officer *mero motu* doubt whether the accused is guilty of the offence to which he has pleaded guilty - this commonly happens when an accused says something in mitigation of sentence that calls into question whether he has properly admitted all the elements of the offence; (ii) if it is alleged that the accused does not admit an allegation in the charge or (iii) that the accused has incorrectly admitted any such allegation; (iv) where it appears to the court that the accused has a valid defence to the charge and (v) if the court is of the opinion for any other reason that the accused's plea of guilty should not stand. The circumstances of a given case might give rise to a situation in which there is an overlapping engagement of more than one of the aforementioned five triggering situations.[12]

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already recorded. And my Colleague is in a position just to apply s 118 and continue with the proceedings, without there (sic), because no plea explanation has been presented to me.
(My translation.)

[12] The Appellate Division's identification in *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) of *four* situations in which s 113 is triggered happened before the provision was amended in terms of s 5 of Act 86 of

The proviso to s 113(1) can sensibly apply, however, only when the plea is altered in circumstances in which the third of the aforementioned triggers is applicable.

[26] Section 113 did not have a legal predecessor in the 1955 Criminal Procedure Act, and in the early years after its introduction in the current Act there was notable jurisprudential disharmony on its import. The position was settled by the judgment of the late Appellate Division in *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A). The appeal court held that s 113 should be construed consistently with the common law, which it stated had been correctly enunciated in *S v Britz* 1963 (1) SA 394 (T) at 398H-399B as follows:

> The accused wishing to withdraw his plea of guilty must give a reasonable explanation as to why he had pleaded guilty and now wishes to change his plea. A reasonable explanation could be, for example, that the plea was induced by fear, fraud, duress, misunderstanding or mistake. If he fails to give an explanation the court would be entitled to hold him to his plea of guilty. If he does give an explanation there is no *onus* on him to convince the court of the truth of his explanation. Even though his explanation be improbable the court is not entitled to refuse the application, unless it is satisfied not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he should be allowed to withdraw his plea of guilty.

The judgment in *Botha* emphasised that there is no onus on an accused to satisfy the court on a balance of probability that he should be permitted to change his plea. A reasonable explanation by the accused is all that is required to trigger the provision, and oblige the court to alter the plea (see *Botha* at 329G-H).

[27] As the passage from the record quoted in paragraph [22] above shows, the magistrate altered the plea to one of not guilty without any explanation by or on behalf of the accused having been given whatsoever. It is not an explanation for a new legal representative merely to state without elaboration that the accused's plea statement was inconsistent with his instructions. It was equally not explanatory to say that the accused wanted 'to have his day in court'. Certainly, without more, that would not amount to a reasonable explanation (cf. the remarks of Grosskopf J, Vivier J concurring, in a comparable context in *S v Du Plessis* 1978 (2) SA 496 (K), especially at 498G-H).

1996. The wording preceding the proviso to subsection (1) then read '*If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution:* '

[28] The magistrate should have enquired into the matter before changing the plea. He should have ascertained which of the allegations that the accused had admitted in his plea statement were no longer admitted and ascertained why they were no longer admitted. It may well be that the magistrate upon such enquiry would have altered the plea, but without the enquiry he could have no basis to assess one way or the other whether there was a reasonable possibility of the explanation being true, or as to whether or not he should be in reasonable doubt about the tendered and accepted pleas of guilty. As the judgment in *Botha* confirms in a case like the present a reasonable explanation by the accused is the qualifying criterion for the court to change his pleas. It was absent.

[29] In addition, the magistrate's failure to elucidate the accused's position meant that no basis was provided for the operation of the proviso to s 113(1). It is not apparent on the record which of the allegations in the charge that the accused had admitted in his plea statement he now wished to place in issue. The plea statement admitted all the allegations in the charge sheet except for excluding some of the items of property allegedly stolen from the complainants in the counts of housebreaking and theft. Depending on the nature of the explanation given for the accused's change of stance, the magistrate should have ascertained which allegations the accused contended had been incorrectly admitted in order to clarify which of the accused's admissions could stand as proof in the manner contemplated by the proviso to s 113(1).

[30] The ruling made by the magistrate altering the accused's plea to one of not guilty on all three of the charges was not competently made, and therefore falls to be reviewed and set aside.

How should the matter proceed from here?

[31] Magistrate Maseti is concerned that he should not proceed with the trial because he has had sight of the record of the accused's previous convictions, which were proved before the case was postponed for the obtaining of a probation officer's report. There are conflicting judgments concerning the competence of a trial continuing before a judicial officer who alters a plea in terms of s 113 of the Act after conviction and before the imposition of sentence if the accused's previous convictions have been proved. In *S v Sass en Andere* 1986 (2) 146 (NKA) it was held (per Rees AJ, Jacobs JP concurring) that s 113 implicitly contemplated the continuation of the trial before the same presiding officer; whilst the opposite view was expressed (per Van Zyl J, Smit J concurring) in *S v Fourie* 1991 (1) SACR 21 (T). I read the

obiter remarks of Lamprecht AJ (Phatudi J and De Vries AJ concurring) in *S v Dlamini* 2014 (1) SACR 530 (GP) at para. 21.4 and footnote 16, where it is suggested that the approach laid down in *Fourie* '*might be in need of reconsideration at an appropriate time …*' as preferring the judgment in *Sass*.

[32] I respectfully agree with the judgment in *Sass* and disagree with the relevant part of the judgment in *Fourie*.[13] In my judgment s 113 expressly provides for the continuation of the matter before the judge or magistrate before whom the accused pleaded guilty. This much follows from the words in s 113(1) that upon altering the plea the court shall '*require the prosecutor to proceed with the prosecution*'. The legislature must have appreciated when it provided that the alteration of the plea might be allowed at any time before sentence was imposed that that might be after the disclosure of the accused's previous convictions. If it had intended that in such circumstances the prosecutor should proceed with the prosecution before a different judicial officer, it would surely have said so; as, for example, it did in s 105A(6)(c) and 105A(9)(d). I also endorse the remarks made in *Sass*, with reliance on the dicta of Innes CJ in *R v Essa* 1922 AD 241 at 246-7,[14] subsequently endorsed by Curlewis JA in *R v Mgwenya* 1931 AD 3 (in which the late Appellate Division dismissed an appeal based on a special entry that the trial judge, who sat without a jury, had perused the record of the accused's previous convictions put before him with the record of the preparatory examination), that it falls to be understood that a judicial officer, as distinct from a layman or a juror, is well qualified to exclude the knowledge obtained of the accused's criminal record in the assessment of the evidence upon which the verdict must be based. However, should a judicial officer for any reason nevertheless feel uncomfortable about proceeding with the matter with knowledge of the accused's previous convictions after altering the plea in terms of s 113, he or she may properly recuse themselves and, provided that they do so before any

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[13] The main part of the judgment in *Fourie* deals with the proper construction of s 113 consistently with the common law. In that regard the judgment was expressly approved by the Appellate Division in *Botha* supra.

[14] '*Now it must be borne in mind that the real disqualification for the due discharge of a juror's duty is not knowledge, but bias. And a Judge is specially trained to separate the two; to acquire the one without entertaining the other. He is continually confronted with the task. He listens to a hardened offender relating a plausible story; he must not allow the knowledge of a long list of previous convictions to influence him in the slightest degree in summing up the case to the jury. He has a record read to him, from which it is necessary in the result to excise certain portions; he must dismiss these portions from consideration. During the course of a trial important evidence is objected to. Its nature and effect transpire before he can give his decision, he must treat the case as if he had never heard the evidence. So that his intellect is trained to discriminate between various facts all within his knowledge, to apply some and to reject others as having no bearing upon the matter to be decided. These general considerations show that a Judge is not in the same position as an ordinary juryman as regards the propriety of acquainting himself with the earlier stages of a criminal investigation.*'

evidence has been adduced, the trial may continue before a substitute in terms of s 118 of the Act.

[33] By reason of the order that will be made reviewing and setting aside the alteration of the pleas, Magistrate Maseti will only get to stage of having to consider his position if, after appropriate enquiry into the issue raised by Mr Stemmet's cryptic indication that the accused might wish to change his plea, he properly decides that the accused's pleas should be altered. Unless Magistrate Maseti is persuaded by a reasonable explanation that the accused's plea must be altered in terms of s 113, he must proceed to impose sentence on the accused. In the event that he alters the plea and feels constrained to recuse himself, he should ensure that the references in the record to the accused's previous convictions are sealed before the matter is passed on to a different magistrate for completion in terms of s 118.

[34] The following order is made:

(a) The order made by Magistrate Oosthuizen altering the accused's pleas in terms of s 113 of the Criminal Procedure Act 51 of 1977 is reviewed and set aside.

(b) It is declared that pursuant to the order made in paragraph (a) above, Magistrate Maseti may continue with the trial in terms of s 275 of the Criminal Procedure Act, and in accordance with the guidance provided in this judgment.

A.G. BINNS-WARD
Judge of the High Court

L.J. BOZALEK
Judge of the High Court