R E P O R T A B L E

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Review Number: **22/2021**

Magistrates' Court Case No: **OSH171/07**

In the matter between:

THE STATE

and

LLEWELLYN STUURMAN Accused

and

Magistrates' Court Case No: **GSH4/250/08**

In the matter between

THE STATE

and

XOLO JOSEPH KHONZE Accused

REVIEW JUDGMENT: 18 AUGUST 2021

PANGARKER AJ

Introduction

1. Two matters were referred on review by the Regional Court President's office ostensibly in terms of section 304A of the Criminal Procedure Act 51 of 1977 *('the Act').* I considered the record of proceedings, requested feedback regarding a Constitutional Court decision in one of the matters and invited the Office of the Director of Public Prosecutions, Cape Town, to provide submissions with regard to the matters. State Advocate Ms Schölzel has provided written submissions which were of great assistance and she is thanked for her contribution in this regard.

2. In both matters, criminal proceedings had commenced before regional magistrates but for the reasons set out below, were not finalized and in addition, both judicial officers (the regional magistrates who commenced the proceedings) were later appointed as Judges to the Western Cape High Court. In the correspondence referring the matters to the High Court, the request was that the proceedings in respect of the accused in each matter should now proceed before the respective Judges who presided at the time in the Regional Courts. I have used the words *"judicial officers"* when referring to the Judges who were the regional magistrates who commenced the proceedings in question.

3. The circumstances of these matters raise the following questions:

3.1 Are the proceedings which commenced before the judicial officers, abortive and therefore a nullity?;

3.2 If so, are the proceedings to commence *de novo* before other regional magistrates?;

3.3 Is it necessary for this Court to set the proceedings aside?;

3.4 The applicability of section 304A.

S v Qolo Joseph Khonze

4. The trial of the accused, Mr Khonze, on a charge of murder commenced in the Parow Regional Court in September 2009 and the evidence of two State witnesses was heard, whereafter the trial was postponed for further hearing to a date in October 2009. On the next trial date, the accused absconded and the judicial officer authorized a warrant for the accused's arrest. Eleven years later, in 2020, the accused was eventually arrested on the warrant. The judicial officer before whom the trial commenced was in the interim period appointed as a Judge to the Western Cape High Court.

5. Section 118 of the Criminal Procedure Act 51 of 1977 *(the Act)* concerns the situation where the presiding officer becomes unavailable after the accused has pleaded not guilty but before evidence at a trial has been adduced, while section 275(2) applies where the presiding officer becomes unavailable after conviction but before sentencing of an accused person. In the circumstances of Mr Khonze's matter as described above, neither of these two sections would apply.

6. The first three questions posed above would require a consideration of the authorities regarding the status of a matter where the judicial officer before whom proceedings commenced, becomes unavailable prior to its conclusion. In **R v Mhlanga** 1959 (2) SA 220 (T) at 222, addressing the transfer of a magistrate during a trial, the High Court found that such transfer was akin to a cessation of the magistrate's jurisdiction in the Court in which the plea was taken and thus the proceedings become abortive and therefore a nullity. **S v de Koker 1978 (1) SA 659 (O),** referring to **S v Gwala 1969 (2) SA 227 (N)** and **Magubane v Van der Merwe NO 1969 (2) SA 417(N)**, held that where there is an impossibility of continuation of the trial due to the unavailability of the magistrate, then the proceedings became abortive or null and it is therefore not necessary for the High Court to set the proceedings aside before a new trial can commence. Thus in **de Koker**, the High Court made no order setting aside the proceedings because the proceedings had lapsed.

7. Kennedy AJP in **Gwala** distinguished between circumstances where the magistrate is transferred to another district and held that the magistrate must in that situation conclude the case, as opposed to his resignation or dismissal, which would result in the matter commencing *de novo* against the accused before another magistrate. In a later judgment **S v Zungu 1984 (1) SA 376 (N) at 380**, Milne JP adopted the same approach as the earlier authorities, holding that:

> *"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".

8. Thus, having regard to the authorities, the Judge cannot be called upon to hear and finalise the matter in the Regional Court as if he were still in the service of the Department of Justice in his capacity as a regional magistrate. In my view, his unavailability as a result of his appointment as a Judge is comparable to his Regional Court appointment having terminated and his jurisdiction in Mr Khonze's matter having ended. Stated differently, the judicial officer's jurisdiction in the Court in which the accused's plea was taken in the proceedings, came to an end.

9. In the result, it follows *ex lege* that the proceedings before the judicial officer which commenced in 2009 and remained partheard, are a nullity and abortive by virtue of his jurisdiction in the matter having ended upon his appointment to the position of Judge. The situation in Mr Khonze's matter finds a parallel in **S v de Koker** and in the circumstances, there is no need for the intervention of the High Court to set aside the proceedings pre-conviction. In the event that the State wishes to proceed with the matter, it may commence *de novo* before a regional magistrate.

S v Llewellyn Stuurman

10. In this matter, the accused was 14 years old when he appeared in the Oudtshoorn Regional Court in 2005 on a charge of murder of a 14-year old girl. Subsequently, in 2009 and at the age of 18 years, he appeared before the judicial

officer who later became a Judge of this Division. The record reflects that the accused sustained a serious head injury at the age of 5 years old which had left him severely intellectually disabled. The judicial officer referred the accused for observation in terms of sections 77, 78(2) and 79 of the Act and he was assessed by three psychiatrists. An enquiry in terms of section 77 (6)(a) of the Act commenced before the judicial officer in 2009 and the record indicates that the findings of the experts were not unanimous, with at least one expert (Professor Kaliski) of the opinion that the accused was fit to stand trial at the time.

11. The accused was legally represented and, subsequently assisted by Legal Aid South Africa, launched a constitutional challenge in respect of section 77(6)(a) read with section 77 of the Act. The result was that the prosecution against the accused was stayed pending the outcome of the constitutional challenge and on 5 September 2014, under case number 4502/2010, Griesel J granted various orders, *inter alia*, that section 76(a)(1) and (2) of the Act were declared unconstitutional. A curator *ad litem* was appointed for the accused and his mother represented him as an applicant in the High Court and Constitutional Court. Subsequently, on 26 June 2015, in **De Vos NO and Others v Minister of Justice and Constitutional Development [2015] ZACC 21**, the Constitutional Court did not confirm the High Court's declaration of invalidity but held that section 77(6)(a)(i) of the Act was invalid and inconsistent to the limited extent as set out in its order (the details of the further orders are not relevant for the purpose of this judgment).

12. The record reflects that subsequent to the Constitutional Court's judgment, the

matter was placed on the roll of the Oudtshoorn Regional Court again and that the State and defence were *ad idem* that notwithstanding an older record which was destroyed, that the accused had not pleaded to the murder charge. The parties made submissions to the regional magistrate in March 2018 regarding the issue of the non-availability of the judicial officer (the Judge) who heard the enquiry and the applicability of section 118. Eventually, in April 2020 the Regional Court heard evidence of a probation officer who compiled an updated report on Mr Stuurman's background and subsequent to further submissions by the parties, the Acting Regional Court President referred the matter to the High Court with the request referred to at the outset of the judgment.

13. This matter differs from **S v Khonze** in that no plea was noted and the trial on the merits had not commenced, in light of the section 77(6) enquiry. However, the similarity is that evidence was adduced in an enquiry but no ruling had been given by the judicial officer because of the constitutional challenge which was launched. Ms Schölzel submits that sections 118 and 275 of the Act do not apply to Mr Stuurman's matter and having regard to paragraph 5 above I am in agreement with her. In the absence of statutory regulation, and having regard to the fact that the judicial officer's jurisdiction in the matter ended by virtue of his appointment as a Judge, the same approach adopted in Mr Khonze's matter should apply to the proceedings heard by the judicial officer in Mr Stuurman's matter: the proceedings are to be regarded as a nullity and abortive, and therefore the section 77(6) enquiry should start *de novo* before a regional magistrate. Mr Stuurman is currently 30 years old and it bears mentioning that more than 10 years have elapsed since the enquiry in terms of section 77(6) and the determination as to whether he is fit to stand trial must be made at the time of the trial.

14. The authorities I refer to in Mr Khonze's matter apply equally to the position in Mr Stuurman's matter. For the reasons set out above, the nullity of the proceedings before the judicial officer who was appointed as a Judge arises *ex lege* and there is no need for the High Court's intervention to set aside those proceedings.

The applicability of section 304A

15. There is a final aspect which I consider requires comment and that is the applicability of section 304A to the facts and circumstances of both matters. Section 304A states that:

> **304A Review of proceedings before sentence**
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> *(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.*

16. In both matters, the accused persons were not convicted, and in my respectful view, the type of review contemplated in section 304A (a) does not find application. I am fortified in this view by the judgment of **S v Engelbrecht and Others 2005 (2) SACR 383 (C)** where Fourie J (Hlophe JP and Dlodlo J concurring) held at paragraph 3 that**:**

> *"Absent a conviction, as in the present case, the matter is not reviewable in terms of section 304A of Act 51 of 1977. It is also not reviewable in terms of s 302(1) or s 304(4) of Act 51 of 1977, as the accused have not been convicted and sentenced."*

17. Furthermore, none of the four limited grounds for review of the proceedings of a Magistrates' Court as contained in section 22 (1) of the Superior Courts Act 10 of 2013 read with Uniform Rule 53 apply in these two matters. While the High Court has inherent power to review proceedings of the lower Courts in terms of section 173 of the Constitution of the Republic of South Africa, 1996, read with section 35(3) such authority should be used in rare instances where grave injustice may result or where justice may not be obtained by any other means **(Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 120E-H)**. The two matters are in the Regional Courts and I am of the view that there is no reason to hold that a grave injustice would ensue if they proceed to be finalized in those Courts. There is accordingly no reason for this Court's intervention in the un-concluded proceedings of Mr Khonze and Mr Stuurman. However, given the lapse of time, the need for finality in proceedings and the interests of justice, Mr Stuurman and Mr Khonze's matters should receive urgent attention in the Regional Court.

Conclusion

18. In the circumstances, no orders are granted setting aside the proceedings in **S v XJ Khonze** and **S v L Stuurman** and these matters are referred back to the relevant Regional Courts. A copy of this judgment will be sent to the Regional Court President, Western Cape and the Director of Public Prosecutions, Western Cape, for their attention.

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M PANGARKER

Acting Judge of the High Court

I agree and it is so ordered.

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L BOZALEK

Judge of the High Court