

SOUTH AFRICA / JUDGMENT

Diels v S (A520/16) [2016] ZAGPPHC 680 (8 August 2016) [2016] ZAGPPHC 680

COURT

North Gauteng High Court, Pretoria

BEFORE

P M Mabuse, W R C Prinsloo

CASE / FILE NUMBER

A520/16

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

A520/16

Reportable:

No

Of

interest to other judges: No

Revised.

HIGH COURT REF. NO.:69/16

MAGISTRATE'S CASE

NO.:377/2014

MAGISTRATE'S SERIAL NO.:

01/16

DATE:

8 August 2016

TWAN

DIELS

And

THE

STATE

REVIEW

JUDGMENT**MABUSE J:**

- [1] This matter came before me by way of a special review in terms of s 304 of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [2] This review must be seen against the following background. The accused in this matter, Mr. Twan Diels, appeared before a magistrate at Volksrust where he was charged with contravention of s 17 of the Domestic Violence Act 106 of 1998 ("the Domestic Violence Act"). When he appeared before the court on 4 December 2014, he pleaded guilty to the charge and was accordingly convicted. Upon his conviction, he was sentenced to 24 months' imprisonment. The accused then applied for leave to appeal but his application was turned down by the magistrate. Leave to appeal against his sentence was, however, granted on petition by the Gauteng Division of the High Court on 16 October 2015.
- [3] The accused then applied for bail pending appeal. At the conclusion of the evidence, the magistrate reserved the judgment. In the meantime the magistrate received a letter from the accused in which he had set out his dissatisfaction with the manner in which the case had been adjudicated upon by the magistrate. Seemingly upon receipt of the said letter and without the accused himself having brought a substantive application in that regard the magistrate, on his own, took a decision to recuse himself. The magistrate has now requested that the bail proceedings up to this stage be set aside so that they may proceed de novo before another magistrate.
- [4] Upon receipt of this file by this Court I was dissatisfied with the manner in which the magistrate took a decision of recusing himself from the presented case. His conduct leaves much to be desired. The magistrate should not have done so if there was not before him any substantive application for him to recuse himself from the proceedings.
- [5] In view of the fact that the magistrate already has taken a decision that he will not proceed with the matter and in view furthermore of the fact that it will serve no purpose to order that he must rehear the matter, the bail proceedings should start de novo before another magistrate. As will be demonstrated by reference to authority, It is not necessary that the part-heard proceedings should be sent to the High Court for review in order for them to be set aside. It is enough if one of the events referred to below has taken place.
- [6] In *S v Stoffels and 11 Similar Offences* 2004(1) SA SACR 176 the full bench adopted the approach that the situation where a magistrate has recused himself from a case after evidence has been adduced is akin to a situation where the magistrate has died or become incapacitated to continue with the case or has been dismissed or has resigned. In such a case, the part-heard proceedings before

him are aborted and are therefore a nullity. The same applies to a situation where the magistrate has recused himself from the

proceedings. The trial may then proceed de novo before another magistrate.

[7] Accordingly our law is that in the following circumstances the part-heard proceedings before a magistrate or presiding officer become abortive and a nullity; where the magistrate:

7.1. dies;

7.2. becomes incapacitated;

7.3. has been dismissed;

7.4. has resigned;

7.5. has recused himself.

Where any one of the events named in paragraph 7 above has taken place, the part- heard proceedings become automatically abortive and a nullity. Accordingly, and for that particular reason, no court order is required to set such part-heard proceedings aside. The proceedings should start de novo before another magistrate. In my view, this point is best illustrated by the case of *R v Mhlanga* 1959(2) SA 220(1). Here I wish to quote copiously from the said authority:

"In my opinion that point taken is not a good point In my opinion the relative sub-section of the Code relied upon applies if the court as then constituted at the time of recording the plea, continues in existence and retains jurisdiction until the time is ripe to render a judgment of acquittal or conviction. 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 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."

[8] Once one of the events as set out in paragraph 7 has taken place, it means that:

"1. It is unnecessary to send the part-heard proceedings to the High Court so that the High Court can review and set aside the proceedings; an order of the High Court to set aside the proceedings becomes unnecessary and superfluous;

2. the accused may not plead at his *tis pendens*;

3. finally the accused in such a case may not demand that he be acquitted or convicted."

[9] Accordingly the following order is made:

1. It is hereby ordered that the accused's application for bail pending his appeal should be heard afresh before another magistrate.

P. M. MABUSE

JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

W.R.C. PRINSLOO

JUDGE OF THE HIGH COURT

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