

SOUTH AFRICA / JUDGMENT

S v Diswane (B349/2023) [2024] ZAGPPHC 587 (25 January 2024)

[2024] ZAGPPHC 587

COURT

North Gauteng High Court, Pretoria

BEFORE

K Strydom, M.P. Motha

CASE / FILE NUMBER

B349/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

High Court Reference

No: 104/2023

Special review

No: _____

Magistrate's serial

No: C/ville 6/23

Case No: B349/2023

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

Date

Signature

In

the special review from the Magistrates Court for the district of

Merafong, held at
Oberholzer of:THE STATE
and
KGOLOLOSEGO DISWANE

Summary:

Special review from Magistrates' Court following recusal by presiding officer after plea and evidence, but before conviction
– setting aside of proceedings and order to commence de novo requested
Recusal renders presiding officer unavailable in absolute sense – proceedings a nullity and set aside ex lege – High Court's inherent jurisdiction not engaged – commencement of proceedings de novo dependant on National Prosecuting Authority, not High Court
Principles in *Gumbi v The State* (414/2017) [2018] ZASCA 125 restated and applied
Lacuna in the Criminal Procedure Act, 51 of 1977 restated
REVIEW

JUDGMENT

K STRYDOM AJ

1. This special review was brought at the behest of the Acting Senior Magistrate, AL Maass. Following the mero motu recusal of the presiding officer, Mr Raath, this Court is requested to set aside the current proceedings and order that they are to commence de novo.

Background

2. On the 16th of March 2023, the accused was driving a motor vehicle, when he collided with a pedestrian, causing her death. He was arrested and charged with culpable homicide. He pled not guilty on the 17th of March 2023 and was released on bail. Following several postponements, the trial started on the 22nd of September 2023, with the prosecutor leading and, after cross examination, finishing the evidence of the State's first

witness. Before the prosecutor could call his second witness, the case was postponed to the 28th of September, when it was postponed again to the 11th of October 2023 and then to the 10th of November 2023.

3. On the 10th of November 2023, the presiding officer, mero motu, recused himself. The record provides no indication as to the reasons for the recusal, merely noting that:

“The Magistrate Mr HC Raath decided to recuse himself from this matter and is not proceeding with the trial. It has been discussed with the Attorney to start afresh. He understands and also accepts that decision.”

4. Mr Maass, however, indicates that Mr Raath is on leave for the period 20 November 2023 to 29 February 2024. He further states that: “There is a pending decision of possible suspension by the magistrate commission against the said magistrate.” The latest announcements from the National Assembly also indicate that the “(r)eport dated 23 November 2023, on the suspension from office of Mr H C Raath, Additional Magistrate, Oberholzer, in terms of section

13(4)(b) of the Magistrates Act, 1993 (Act No. 90 of 1993)” has been referred to the Portfolio Committee on Justice and Correctional Services for consideration and report.[1]

5. Whether or not an interrelation between the mero motu recusal and the possible suspension of Mr Raath, exists, is, as will presently become evident, irrelevant to the determination herein. It is accepted that there is no challenge against the recusal itself.
6. This Court is tasked with two primary determinations: should the proceedings be set aside and, if so, should it be ordered that they commence de novo?

Setting aside of part heard proceedings

7. For the sake of brevity, where I refer to “part heard” matters, the reference relates to the period in the criminal trial after an accused has pleaded and evidence has been led, but before the accused has been convicted.
8. It is trite that there are no statutory provisions in terms of which a Magistrates Court could, of its own accord, set aside proceedings in part heard matters. As the accused has pleaded and evidence has been led, Section 118, of the Criminal Procedure Act, 51 of 1977 (“the CPA”) does not apply[2] and, as he has not been convicted and/or sentenced, neither do Sections 304(4) or 304A.[3]
9. In referring such matter to the High Court, the Magistrature essentially requests that the High Court exercises its inherent jurisdiction by virtue of S173 of the Constitution.[4] In part heard matters, the High Court will exercise such powers sparingly [5] and only in cases of ‘great rarity – where grave injustice threatens and where intervention is necessary to attain justice’.[6]
10. Requests for the setting aside of part heard matters, as a result of the recusal of the presiding officer, are not unknown in the High Court and are usually acceded to as a matter of course. For instance, in *S v Kirsch* 2014 (2) SACR 419(WCC) a magistrate recused himself after the accused had pleaded and evidence had been led, but before he was convicted or sentenced. He referred the matter to the High Court on special review. The High Court then set aside the proceedings and remitted the matter to the court a quo to be heard by another presiding officer. This is, historically, the typical order that was made in these matters.
11. However, the Magistrates’ Court does not, in fact, need to refer such matters to the High Court to have the proceedings set aside. As Victor J explained, within the context of a magistrate’s recusal mid-trial, in *S v Skhosana and Others*:[7]

“S275 of the CPA deals expressly with matters post conviction. In the absence of the Legislature dealing with pre conviction matters does it follow ex lege that there was a deliberate intention by the Legislature to exclude the pre conviction process from being a mere administrative one and thus requiring nullity proceedings to be declared so by the High Court? The cases of S v De Koker expressly eschews that approach and R v Mhlanga although not dealing with this point directly does not suggest that it requires a High Court to set the matter aside. It simply remains a nullity and this follows ex lege. I am therefore of the view that the High Court does not have to set a pre-conviction trial aside as the nullity principle ex lege sets the trial aside.”

12. Where a magistrate has recused himself, he becomes functus officio and is unavailable in the absolute sense. [8] Instances of absolute unavailability include “...death, retirement, dismissal, resignation or recusal.”[9] Hiemstra explains the context of “absolute” as follows:

‘In S v Mkosana 2004 (1) SACR 205 (Ck) par [22] the court drew a distinction between absolute and other incapacity (pars [7][13]). If the magistrate is permanently unable to continue with the trial the proceedings are regarded as abortive and fall away (par [6]). In cases in the second category ("other incapacity") the high court has a discretion to order that the trial commence de novo (par [10]).’[10]

13. Where there is no challenge to the recusal itself,[11] the part heard proceedings are therefore a nullity and are set aside ex lege. The High Court has no role to play in such instances and no order needs to be made setting aside the proceedings.

De novo commencement of proceedings

14. The question is then whether the High Court’s jurisdiction is engaged when it comes to a request for an order that the proceedings commence de novo.
15. The Magistrates’ Court clearly has no such statutory authority. For instance, in S v Richter 1998 (1) SACR 311 (C), the magistrate recused herself and ordered that the matter be heard de novo before another court. The High Court ruled that the de novo order was an irregularity and set it aside. It, however, further found that the High Court should be approached if such a declaration is sought.
16. The latter part of the order, however, is not legally, or logically, sustainable when it is accepted that recusal renders the proceedings

a nullity. As was stated in Mgubane v Van der Merwe N0:[12]

"Once a magistrate has recused himself the proceedings over which he formerly presided become a nullity. They vanish, as it were, and nothing remains of them. For that simple reason the provisions of s 169 (6) (now s 106 (4)) cannot be applied to a case where the magistrate has either recused himself or for some other reason become incapacitated, either through physical or mental incapacity or where he has been dismissed or where he resigned. He has become functus officio. The proceedings are aborted and a nullity and the way is open therefore for a fresh trial to be brought against the person originally charged." [Underlining my own]

17. On a very basic level, the problem with orders, such in Richter, is that, once something “vanishes”, no Court can order that it to “re-appear”. If the proceedings are a nullity, they are such ab initio. The nuances of the underlined finding in Mgubane (above) become evident: once proceedings are deemed a nullity, the way is open for such proceedings to be brought again, not simply continued with.
18. Historically, the Court in Richter was not alone in its interpretation that a High Court should be approached to order that proceedings start de novo.
19. However, in 2018, in Gumbi v the State (“Gumbi”),^[13] the Supreme Court of Appeal set the record straight. On appeal, it was asked to set aside the conviction of the accused based on

irregularity in proceedings before the High Court. In the High Court, the trial had commenced before a Judge, who, after hearing the evidence and reserving his verdict, but before delivering it, became incapacitated and unavailable in the absolute sense. Following a “special review” ruling, the matter proceeded before a second Judge, who, by agreement between the state and defence, and relying on Sections 214 and 215 of the CPA, accepted into evidence the record of the proceedings before the incapacitated Judge. The second Judge, on the strength of the evidence as per the record, proceeded to convict the accused. Whilst the accused’s appeal placed great focus on the use of these sections, Ponnann JA, pointed to a much more fundamental problem with the approach followed in the High Court:

“

- ^[9] Section 215 of the Act requires that the trial be of the same person upon the same charge. Logically therefore the section can only find application to a situation where the prior proceedings amount to a nullity and, in consequence, new proceedings are instituted. In that regard, it is important to distinguish between criminal proceedings and the trial as such, which is only a part of the entire criminal proceedings. It having been accepted that the matter had to commence de novo, it was for the prosecution to decide whether proceedings should be instituted in respect of the same offences on the original indictment, amended if necessary, or upon any other charge.” [Underlining my own]

20. After the pronouncements in Gumbi,

orders

from the High Court in these types of matters began to read along the lines of: “The proceedings are to commence de novo before a different Magistrate should the Prosecuting Authority so determine.” ^[14]

21. However, upon closer conspectus, it is clear that these types of “orders” do not cure the defect referred to by Ponnann JA.

22. In the first instance, the entire foundation for the proceedings being set aside, in cases of recusal, is the unavailability of the judicial officer in the absolute sense. Within that context, the reference to “a different Magistrate” is superfluous.
23. Secondly, “proceedings” do not “commence” before a magistrate. In terms of Section 76(1) of the CPA,

proceedings “...shall be commenced by lodging a chargesheet with the clerk of the court..” in the magistrates court or by service and lodgement of an indictment in the High Court (as the case may be).

24. Interrelated to this second issue is the third; namely that the reference to the Prosecuting Authority’s discretion, (to decide whether proceedings should commence de novo), is a restatement of the position that exists regardless of whether or not so ordered. Where proceedings have been set aside and therefore have proverbially “vanished”, the prosecuting authority does not require the permission, or direction, of the High Court to commence with new proceedings. As stated in Gumbi:

“ [10] Criminal proceedings in a superior court commence with the service of an indictment on the accused and its lodgement with the registrar of the court (s 76). In terms of s 105 the charge must be put to an accused by the prosecutor before the trial is commenced. As soon as the charge is put to an accused he or she must plead to it. The plea determines the ambit of the dispute between the accused and the prosecution. It is only after the accused has pleaded to the charge that the lis is established between the accused and the prosecution. It is the function of the prosecuting authority, not the court, to decide the charges upon which an accused should be brought to trial and the function in that regard extends up to the time when a plea is tendered and the decision has to be made whether the plea is to be accepted or not.”

- [14] It is not for this Court, as was suggested by counsel for the State, to remit the matter for trial afresh. Rather, it is for the State to decide whether it will re-indict the appellants.” [Underlining my own]

Finding

25. In summation, the prevailing position, in cases where a magistrate has become incapacitated in the so-called absolute sense,[15] during part heard criminal proceedings, [16] is therefore that:
- The part heard proceedings become a nullity and are set aside ex lege. As such, there is no need to engage the High Court’s inherent jurisdiction to have such proceedings ordered to be set aside.
 - The question of whether or not proceedings should commence de novo, similarly, does not engage the High Court’s inherent jurisdiction, as that decision falls within the purview of the prosecuting authority.

26. The conclusion that, in view of (a) and (b), such cases need not, and should not, be referred for special review by the High Court is both sensible and in the interest of justice.
27. Firstly, from a purely practical and logical perspective, in cases where a presiding officer is absolutely unavailable to proceed with a trial, it does not require a constitutionally afforded inherent jurisdiction to determine that the trial cannot proceed and that the proceedings thus far should be set aside. No order, from any Court, is powerful enough to transform a factual reality of absolute unavailability or incapacity of a magistrate (or any person for that matter). Furthermore, logic dictates that, once proceedings are set aside, the prosecuting authority, for various practical reasons (e.g availability of witnesses, own internal capacity, changes in legislation etc) is best suited to determine whether it should, or wants to, commence proceedings afresh against the accused.
28. Secondly, to hold that, regardless of the fact that proceedings had already been set aside *ex lege* at the time of the recusal, an accused should tolerate Damocles' sword precariously dangling over his head, whilst the matter proceeds through the review process, is unnecessarily burdensome and an infringement of the accused's constitutionally enshrined rights.
29. For instance, in cases where bail had been granted, such as the present one, the accused's right to have his trial begin and end without unreasonable delay, in terms of Section 35(3)(d) of the Constitution, would be infringed upon, at the very least.
30. Even more disconcerting is the position of an accused who was not granted bail. For instance, if the accused in *casu* had not been granted bail, he would have been remained incarcerated from the date of recusal, until date of finalisation of this judgment., despite the fact that, immediately after the recusal, the proceedings against him "vanished" as they were set aside *ex lege*. He would have remained incarcerated over the entire Christmas period, awaiting this judgment – which serves only to confirm that proceedings against him had been set aside automatically on the 10th of November 2023. Whilst this judgment was being checked for typing errors, he would have had to endure being deprived of, to name but a few, his Sections 12, 35(2)(d) and 35(3)(d) rights on a daily and extremely prejudicial basis – all because of a poorly worded statute written dating from a time when the concept of a Bill of Rights was a pie in the sky.
31. It is therefore important to appreciate that, despite the finding herein, one cannot fault the Acting Senior Magistrate for his cautious approach. The Magistracy's authority is, after all, bound in statute and the prevailing statute, the CPA has, from inception, had a glaring lacuna relating to part heard matters in general. And yet, in spite of various pronouncements by the higher courts, decades and a multitude of amendments later, this lacuna and the confusion it creates, persists.

32. Hopefully, this lacuna will be investigated by the newly appointed Advisory Committee on Criminal Procedure Reform Investigation in their review of the current, archaic provisions of the CPA and will be remedied when a new Criminal Procedure Act is drafted. [17]

Order

33. Under the circumstances, the special review stands to be dismissed as there is, effectively, nothing to review. However, given the uncertainties, as set out *supra*, it would be appropriate to make the following declaratory order:
1. The *mero motu* recusal of the additional magistrate, Mr Raath, on the 10th of November 2023, rendered him unavailable to preside over this matter in the absolute sense.
 2. The proceedings thus far are resultantly a nullity and were set aside *ex lege* upon the recusal of Magistrate Raath.
 3. The National Prosecuting Authority retains the authority to decide whether to commence proceedings against the accused *de novo*.

K. STRYDOM

ACTING JUDGE OF THE HIGH COURT

I agree

M.P. MOTHA

JUDGE OF THE HIGH COURT

- [1] Parliament of The Republic of South Africa: ‘Announcements, Tablings And Committee Reports’ No 169—2023, Fifth Session, Sixth Parliament Wednesday, 29 November 2023
- [2] Section 118 of the Act provides that; “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.”
- [3] See for instance: *S v Engelbrecht and Others* 2005 (2) SACR 283 CPD at para [3].
- [4] *Botha & others v Regional Magistrate, Springs & others* (unreported, GP case no A807/2015, 28 March 2017) at [20]
- [5] *Botha & others v Regional Magistrate, Springs & others* (unreported, GP case no A807/2015, 28 March 2017) at [20]
- [6] *Magistrate, Stutterheim v Mashiya* 2003 (2) SACR 106 (SCA) at paras [13] and [14]
- [7] *S v Skhosana and Others* (41/2193/2008) [2014] ZAGPJHC 223; 2015 (1) SACR 526 (GJ) (18 September 2014) at paras 17 and 18. Also 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), S v Polelo 2000 (2) SACR 734 (NC) and S v Stoffels and 11 similar cases 2004(1) SACR 176 at 177 B-D
- [8] S v Polelo 2000
- (2) SACR 734 (NC) 736ce); Magubane v Van der Merwe NO 1969 (2) SA 417 (N); S v Mpetshwa 1979 (1) SA 925 (Tk); S v Makgetle 1980 (4) SA 256
- [9] Hiemstra's Criminal Procedure 7th edition page 15-22
- [10] Hiemstra's Criminal Procedure 7th edition, page 18-13
- [11] For instance, in November 2023, the High Court S v Lamb and Another (398/2023; RCA40/2021) [2023] ZAWCHC 292 (21 November 2023) set aside the recusal and not the proceedings. In that matter, however, the Court was requested to “...make an order for the matter to start de novo or any other order as this Court deems fit.”
- [12] Mgubane v Van der Merwe NO 1969
- (2) SA 417 (N)]
- [13] Gumbi v The State (414/2017) [2018] ZASCA 125 (26 September 2018)
- [14] S v Moreki (R12/2023) [2023] ZAFSHC 184 (5 May 2023). This wording mirrors that used in S v Gema and Another (CA&R 4/2022) [2022] ZANCHC 5; 2023 (1) SACR 304 (NCK) (31 January 2022)
- [15] This judgment only concerns instances of “absolute incapacity” and not instances of “other incapacity” (as per the delineation of the concepts in S v Mkosana 2004 (1) SACR 205 (Ck))
- [16] “Part heard” in the context as set out in paragraph 7 of this judgment
- [17] Appointed by Mr Ronald Lamola, Minister of Justice and Correctional Services,, in terms of section of section 7A(1)(b)(ii) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973) on 17 December 2023

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