IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

REPORTABLE

REVIEW CASE: HIGH COURT REF NO: 3283/08
MAGISTRATE'S SERIAL NO. 06/2008
RANDFONTEIN CASE NO: A370/2007

In the matter between:

THE STATE

and

VINCENT SCHEEPERS

JUDGMENT: SPECIAL REVIEW

WILLIS J:

[1] This matter has been referred to me by way of special review in terms of section 304 of the Criminal Procedure Act, No. 51 of 1977, as amended.

[2] The accused had been arraigned in the Magistrate's Court held at Randfontein on a one count of theft of a bicycle valued at R1500-. It was alleged that the offence occurred on 1st March, 2007.

[3] The accused pleaded not guilty. He was released on warning. He elected to have the benefit of legal aid. The trial commenced on 5th April, 2007. Evidence was led but the trial was postponed to 11th April, 2007. On this date, the accused failed to appear at court. A warrant for his arrest was authorised. The accused was brought to court on 12th June, 2007 and the matter postponed again to 15th June, 2007. He was again released on warning. He failed to appear in court on 15th June, 2007 and, once again, a warrant for his arrest was authorised. The accused was brought to court on 20th August, 2007. The matter was postponed to 22nd August, 2008. On this day the trial was postponed to 3rd September, 2007 and the accused was, once again, released on warning. The accused failed, yet again, to appear in court on 3rd September, 2007. Once again, a warrant for his arrest was authorised. On 15th October, 2008 - more than a year later - the accused was brought to court. The matter was postponed to 23rd October, 2008. The matter then came before the learned magistrate, Ms E Botha. In the meantime, the learned magistrate who had heard evidence relating to the charge of theft, Mr D.J. Erasmus, had left the service of Department of Justice. He now lives in England. No verdict had been reached in regard to the charge of theft. Ms Botha sentenced the accused, now 21 years of age, to a fine of R900- or 90 days imprisonment for his failure to appear in court on 3rd September, 2007. His excuse had been that he had been staying in Ventersdorp for the past year or so. The accused has not paid the fine and remains in custody. The question of the sentence of the fine or imprisonment for failure to appear in court has not been sent to the High Court for review. In any event, against the background of events, even were this court to exercise its inherent powers of review, it cannot be found that this particular sentence is not in accordance with justice.

[4] Ms Botha has referred to matter to the High Court for special review by reason of the fact that the trial in relation to the charge of

theft cannot proceed before the magistrate who was seized with the matter, Mr Erasmus. Ms Botha has asked that the High Court, acting in terms of section 304(2) (c) (iii) of the Criminal Procedure Act to set aside the trial proceedings on the charge of theft and direct that the trial may commence *de novo*.

[5] In *R v Mhlanga* 1959 (2) SA 220 (T), Claassen and Boshoff JJ had to deal with a situation where a magistrate, who had heard some evidence, was transferred to a post in what was then known as South West Africa. The prosecutor had made application to another magistrate for the proceedings before the magistrate who had been transferred to be set aside and the trial to commence *de novo* before a different magistrate. The accused had not objected. The trial commenced with evidence being taken all over again. The accused was convicted and sentenced. He appealed against conviction on the basis that it was "bad in law" by reason of the earlier proceedings having been set aside and the trial having commenced *de novo*. Claassen and Boshoff JJ dismissed the appeal. Claassen J said at 222:

> "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."

[6] In *S v Gwala* 1969 (2) SA 227 (N) Kennedy AJP, Miller J concurring, disagreed with the decision in the *Mhlanga* case insofar as it related to situations where a magistrate had been transferred "for he can be officially returned to the district concerned to complete the case" (at p229B).

[7] In *S v De Koker* 1978 (1) SA 659 (O), the court, on review, had to deal with a situation which had facts remarkably similar to the present one. Relying on the above *dictum* in the *Mhlanga* case, Flemming J (as he then was), Klopper JP, concurring, held that it was unnecessary to make an order setting aside the proceedings and directing that the trial may commence *de novo*. They declined to make any order. They referred to the *Gwala* case but observed that in the case with which they were dealing, the magistrate could not be brought back into the trial by way of simple administrative arrangements. On the contrary, they held that the *Gwala* case recognised that where it was impossible to proceed before the same magistrate, the proceedings could be set aside and the trial commence *de novo*.

[8] In *S v Tlailane en 'n Ander* 1982 (4) SA 107 (T), a full bench consisting of Franklin, Van Reenen and Van der Walt JJ held (at p111G) that the decision in *Mhlanga's* case went too far insofar as the aspect of the transfer of a magistrate was concerned. It preferred the approach that the court had adopted in *Gwala's* case. In the *Tlailane* case, the court said the following (at p110G):

> "Alleen wanneer 'n landros werklik *functus officio* is, kan en moet die saak *de novo* verhoor word. As voorbeelde van gebeure wat 'n landdros *functus officio* sou maak word genoem:
>
> 1. By afsterwe.
> 2. By uitdienstrede, hetsy by bereiking van ouderdomsgrens, bedanking of skorsing.
> 3. Rekusering, hetsy op versoek van enige van die partye, of *mero motu*.
> 4. Skeiding van verhore."

My translation of this passage is as follows:

> "It is only when a magistrate is truly *functus officio* that a trial can and should be heard de novo. The following are mentioned

> as examples of instances which would make a magistrate *functus officio* :
> 1. Death.
> 2. Leaving service, whether upon reaching the requisite age limit, resignation or dismissal.
> 3. Recusal, whether at the request of any of the parties, or *mero motu*.
> 4. Separation of trials."

[9] In *S v Makoni and Others* 1976 (1) SA 169 (SR), Davies and Beck JJ recognised that the incapacity of a magistrate through serious illness could justify the setting aside of the proceedings and the commencement of the trial *de novo*. In the *Tlailane* case, Van Reenen J referred to this approach in the *Makoni* case but said (at p110H-111A) that whether incapacity as a result of the illness of a magistrate could justify such an approach would depend on the facts of the particular case and should be decided in the discretion of the court hearing the review.

[10] In *S v Chigumbu* 1980 (1) SA 927 (ZR), Gubbay J (as he the was), Newham J concurring, had to deal with a situation where a magistrate had been taken seriously ill and it was not known how many months it would take for him to recuperate. Gubbay J, together with Newham J, granted an order that the proceedings be set aside and that the trial be commenced *de novo*.

[11] In *S v Lapping* [1998] 1 All SA 331 (W), Cloete J (as he then was), Marais J concurring, doubted the correctness of the decision in the case of *De Koker* (at p339) and held that "A lower court does not have the power to set aside its own proceedings".

[12] A perusal of the line of cases above seems to indicate that the failure of a lower court to apply for the setting aside of proceedings and the commencement of a trial *de novo*, as a result of the

unavailability of the magistrate who began hearing evidence in the matter, will not necessarily result a finding that an accused was subsequently wrongly convicted, if a trial *de novo* does, in fact, take place, without the prior sanction of the High Court. Nevertheless, it would certainly be desirable and good practice for an application to be made to the High Court, by way of special review, for the setting aside of previous proceedings and the commencement of a trial *de novo*. After all, it is not difficult to imagine instances where substantial injustice to an accused could arise were a trial *de novo* to be ordered or the trial to remain in suspense indefinitely. Rather than take the risk of injustice and unnecessary expense and inconvenience for the State and the accused, it is, by far, preferable to approach the High Court, as has occurred in this case, for a special review: the commencement of a trial *de novo* is not merely an administrative matter. The High Court must then balance the competing interests which prevail in order to regularize the proceedings in the lower court. This seems to have been the approach which Cloete and Marais JJ adopted in the *Lapping* case (see p339). In that case, the learned judges left it to the Attorney-General to decide whether to prosecute the accused *de novo*.

[13] The "uitdienstrede" of the learned magistrate who commenced hearing evidence *in casu*, is a recognised ground for the setting aside of those proceedings and the authorising of the commencement of a trial *de novo*. The authority in this regard is, in any event, binding upon this court. Although the accused is a young man facing trial for a relatively minor offence which allegedly occurred more than a year ago, the record makes it plain that he has largely himself to blame for the delays which have resulted in the unfortunate predicament which must now be addressed. It cannot be found that it would not be in accordance with justice for the trial to commence *de novo*. Nevertheless, it would seem appropriate for the Director of Public

Prosecutions to be left with the discretion to decide whether to prosecute the accused *de novo*.

[14] The following is the order of this Court:

1. The trial proceedings before the magistrate, Mr Erasmus, in this matter are set aside;
2. The trial may commence *de novo* before another magistrate in the discretion of the Director, Public Prosecutions.

DATED AT JOHANNESBURG THIS 25th DAY OF NOVEMBER, 2008.

N.P.WILLIS

JUDGE OF THE HIGH COURT

I agree.

F.H. D. VAN OOSTEN
JUDGE OF THE HIGH COURT