

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**REVIEW JUDGMENT**

Case No.: CR 8/2017

In the matter between:

**THE STATE**

and

**PANGEIKO DORNADUS**

**ACCUSED**

HIGH COURT NLD REVIEW CASE REF NO: 152/2017

**Neutral citation:** *S v Dornadus* (CR 8/2017) [2017] NAHCNLD 67 (24 July 2017)

**Coram:** DAMASEB JP and JANUARY J

**Delivered:** 24 July 2017

**Flynote:** Criminal Procedure – Special review – Presiding magistrate resigned – Part heard proceedings – Evidence led – Section 118 of Criminal Procedure Act not applicable

– Magistrate ordered proceedings to commence *de novo* – Irregularity – order set aside  
– Proceedings may commence *de novo* before another magistrate without this court having to set aside previous proceedings.

**Summary:** The accused in this matter was charged in the magistrates court Oshakati. He pleaded not guilty and a trial commenced with evidence being led. The magistrate in the meantime resigned and the matter still remains pending. The Divisional magistrate, Oshakati sent the matter for special review with a request that the proceeding must be set aside. This court concludes that it is not necessary that the proceeding should be set aside and may be commenced with *de novo* before another magistrate. The presiding officer however, made an incompetent order that the matter may commence *de novo* before another magistrate. This order is an irregularity and is set aside.

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### ORDER

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1. The order of the presiding magistrate that the matter may commence *de novo* before another magistrate is set aside.
  2. The matter may commence *de novo* before another magistrate without an order of this Court setting the earlier proceedings aside.
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### JUDGMENT

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**JANUARY J (DAMASEB JP CONCURRING)**

[1] This matter is before me on special review sent by the Divisional magistrate Oshakati. It involves a part-heard matter in the Oshakati magistrate's court. The

presiding magistrate left the magistracy years ago and can no longer sit as a presiding magistrate. It was not clear why the magistrate was no longer available and I contacted the Divisional magistrate to get clarity. I was informed that the magistrate resigned and now has another occupation.

[2] The record reflects that the magistrate presiding in the matter was available on 15 August 2012. Thereafter, the case was postponed for various reasons i.e. non-availability of the docket, the non-availability of the magistrate, the fixing of a new trial date because the magistrate was still periodically available. Eventually the legal representative of the accused brought an application on 25 November 2014 before the presiding magistrate for the case to start *de novo* before another magistrate. On that date it was already apparent that the magistrate would not have been available from the 17<sup>th</sup> of December 2014. The magistrate granted the application and ordered that the matter should start *de novo*. From the record it is not clear if indeed it started *de novo* but there is a reference on 03 February 2015 to A75/15. The Divisional magistrate found a case record with such a case number reflecting the same name as the accused in this matter. That case was withdrawn. It means that this case is still pending.

[3] The Divisional magistrate requests that the proceedings must be set aside and that it should be ordered that it should start *de novo* based on the non-availability of the magistrate.

[4] Section 118 of the Criminal Procedure Act 51 of 1977 provides that if the presiding officer 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 presiding officer of the same court. In the instant case section 118 does not apply as evidence has been adduced in the case.

[5] I agree with Fourie J where he states in *S v Stoffels and 11 similar cases* 2004(1) SACR 176 at 177 B-D

'[4] Where a magistrate dies or has become incapacitated or where he or she has been dismissed or has resigned, the part-heard proceedings before him or

her are aborted and therefore a nullity. The same applies where the magistrate has recused himself or herself. The trial may then commence de novo before another magistrate without an order of the High Court setting the earlier proceedings aside. 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) and *S v Polelo* 2000 (2) SACR 734 (NC).

[5] In *S v Richter* 1998 (1) SACR 311 (C), the magistrate could not continue with the trial as she had become aware of the previous convictions of the accused. She ordered that the matter be heard de novo before another court. The order of the magistrate was held to be an irregularity as there is no statutory authority for a magistrate to order that the trial should be instituted before another court. Where such a declaration is required, the matter should be referred to the High Court for the setting aside of the proceedings.' (my emphasis)

(6) In this instant matter the magistrate has resigned. The part-heard proceedings are aborted and therefore is a nullity. This court therefore does not have to set aside those proceeding and the proceedings may be commenced with before another magistrate.

(7) 'It is trite that a magistrate's court is a creature of statute and accordingly its powers are limited to those conferred upon it by statute. (*Santam Insurance Co Ltd v Liebenberg NO and Another* 1976 (4) SA 312 (N) at 323H.) There is no statutory authority for a magistrate to order that the trial should be instituted de novo before another court. Accordingly, where such a declaration is required, the matter should be referred to the High Court for the setting aside of the proceedings and a direction that it should proceed de novo. (See *S v Mbothoma en 'n Ander* 1978 (2) SA 530 (O) at 533; *S v Fourie* (supra); but cf: *S v Sass en C Andere* 1986 (2) SA 146 (NC).) The only power that is vested upon a magistrate's court to order that proceedings commence de novo are those contained in s 93ter(5) of the Magistrates' Courts Act 32 of 1944 which provides that the provisions of s 147 of the Criminal Procedure Act shall mutatis mutandis apply where an assessor dies or becomes incapable of continuing to act as an assessor. That section does not apply to the facts of the present case.

Accordingly, the magistrate did not have the power to declare that the proceedings should proceed *de novo* before another magistrate.’

[7] The order of the magistrate that the case may commence *de novo* before another magistrate is incompetent and an irregularity that stands to be set aside.<sup>1</sup>

[8] In the result:

3. The order of the presiding magistrate that the matter may commence *de novo* before another magistrate is set aside.
4. The matter may commence *de novo* before another magistrate without an order of this Court setting the earlier proceedings aside.

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**H C JANUARY**  
**JUDGE**

I agree,

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**P T DAMASEB**  
**JUDGE PRESIDENT**

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<sup>1</sup> S v Richter 1998 (1) SACR 311 (C) at 313 A-D