

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)**

**Case Nr: 29/2006
Delivered: 07/06/2006**

In the matter:

STATE

versus

ISAK BROUERS

Coram: Kgomo JP et Lacock J

JUDGMENT ON SPECIAL REVIEW

KGOMO JP

1. In June 2006 I dispatched the following memorandum to the office of the Director of Public Prosecution for the attention of Adv C G Jansen of that office:

“1. One of my colleagues brought this case to me because the Regional Court Magistrate was informed that as a result of your consultation with me I suggested that the case be sent on special review. I cannot recall the conversation but will accept if you say so.
2. *It appears to me that the case was competently before the Regional Court and was erroneously sent on review. Kindly give an urgent opinion marked for my attention.”*
2. Ms Jansen has since furnished a very helpful opinion for which I thank her. If it was not for the fact that the Learned Regional Magistrate, Mr I V Z Taljaard, or any Regional Magistrate who will

be dealing with the matter need to know precisely what gave rise to the proposed review, I would simply have stated that the matter is not reviewable.

3. The affected accused, Mr Isak Brouers, was convicted on the 10th May 2004 in the District Court of the theft of a garden hosepipe valued at R 250-00. He conducted his own defence. His case was transferred to the Regional Court in terms of Section 116(1) (b) of the Criminal Procedure Act, 51 of 1977 (the CPA) for sentencing because the District Magistrate was of the opinion that accused's long list of previous convictions merit a sentence in excess of the District Court's punitive jurisdiction.
4. In the Regional Court the accused, sensibly, opted to engage a Legal Aid funded legal representative. The accused's (Mr Brouers') legal representative, Ms De Bruyn, made representations to the Regional Magistrate that her client seems to be suffering from a mental defect and may not have the mental capacity to comprehend the nature of the proceedings – in the sense of distinguishing wrong from right. This issue never surfaced in the District Court.
5. On the 16th February 2005, the accused was seen by a psychiatrist, Dr Piotrowski, of West End Hospital, for mental evaluation. The doctor's opinion was that the accused presented with symptoms of dementia and psychosis and recommended that he be sent for fromal forensic mental observation to Valkenberg Hospital, Western Cape.
6. As regards the circumstances under which the case was sent for review I can do no better than quote a few excerpts from Adv Jansen's opinion/report to me:

“Our office was contacted. It is a well known fact that there is currently no Psychiatric Hospital or Mental Health Care Facility in the Northern Cape with the ability to conduct forensic observations as envisaged by sections 77 -79 of Act 51 of 1977. Although a new hospital with such facilities is in the pipeline, this is a long term solution, since the hospital will not be completed in the next 2 to 3 years. The Department of Health, and specifically Ms C L Isaacs, the mental health co-ordinator of the Northern Cape, has struggled unsuccessfully for alternatives the past 5 years. Even at a national level no short term solution can be found.

As a favour Valkenberg Hospital in the Western Cape makes one bed at a time available to the Northern Cape for observation in terms of section 77 -79. Because of this, the accused to be sent for observation is put on a waiting list and normally only serious matters where an order in terms of section 77(6)(a)(i) or 78(6)(a)(i)(aa) or 78(6)(b)(i)(aa) is envisaged, are placed on the list. Prosecution is stopped in terms of section 6(b) of the Criminal Procedure Act or the charges are withdrawn where it is clear that the accused has a mental health problem in less serious matters. These former accused are then admitted to West End Hospital, a Mental Health Care Facility in terms of Act 17 of 2002, on a voluntary, assisted or involuntary basis for care, treatment and rehabilitation. (See Chapter V of the Mental Health Care Act, Act 17 of 2002.)

If the State became aware of accused 2, Isak Brouers', mental health care problems prior to the conviction in the District Court, our office would have given permission in terms of section 6(b) of Act 51 of 1977 to stop prosecution. It would not make economic sense to pay more or less R 30 000 for a formal observation in terms of section 77 -79 where the accused has stolen a hosepipe of R 250. The bill is paid by the Northern Cape Regional Office of the Department of Justice. It will also not

make sense given the dire situation with the availability of only one bed for forensic observation for the whole of the Northern Cape Province. Serious matters such as rape and murder normally will take precedence over a theft of a hosepipe. Furthermore, it will be difficult to prove that it is in the public interest that the accused 2, Isak Brouers, be declared a so-called “state patient” – (see section 77(6)(i) and section 78(6)(i)(aa) of the Criminal Procedure Act.)

The State’s hands are tied, because it cannot stop the prosecution and an order in terms of section 77(1) was made by the regional court magistrate. It was under these circumstances that the Deputy Director, Adv C W Louw had an informal discussion with **Judge President Kgomo** in November 2005 about a review in terms of section 304 of Act 51 of 1977. One of the other reasons was the time the accused would spent waiting for the formal observation, since the waiting period is on average of about a year.

The State does not want the conviction to be set aside on the basis as was done in the unreported matter of **The State versus Mouers A**, and **The State versus Slinger W F, case 435/04 and 237/05**, judgment delivered on 11/11/2005 in the Northern Cape Division of the High Court by **Lacock, J.**

“[4] This Court has, despite the aforesaid, the inherent jurisdiction to prevent an injustice being committed to any person within its jurisdictional domain. The inherent jurisdiction has now been statutorily conferred on inter alia this Court in section 173 of the Constitution of the **Republic of South Africa, Act 108 of 1996**. Since Mouers and Slinger are suffering from a grave injustice by no fault of their own, we regard it as our constitutional duty to exercise our jurisdiction to end this travesty of justice.”

In both the above mention cases the accused were referred to a

reform centre, but because of the lack of youth reform centres or like institutions for the rehabilitation of juveniles found guilty of criminal conduct, they were incarcerated in prison pending their transfer to a youth centre. Because no such youth centre elsewhere in the country could be found, willing to accept them, they stayed incarcerated. Their sentences, although confirmed on review, were set aside.(and suspended sentences submitted therefor).

See also: **S v Z and 23 similar cases 2004(1) SACR 400 (E)** about a similar situation in the Eastern Cape

In **S v De Wee and others 206(1) SACR 210 (NC)** probation officers complained about the sentences of some of the accused after the matters were finalized. The matters were sent on review by the magistrate. **Olivier J**, made the following findings on 212 b - f:

“[6] Be that as it may, the question which arises is whether the magistrate had, in any event, been entitled to submit the matter for review in this fashion. In my opinion, this question should be answered in the negative. ’

7. Adv Jansen concluded in paragraph 12 of the opinion/report:

“12. When Adv Louw discussed the matter with Judge **President Kgomo**, the time the accused would have spent waiting for the formal observation was approximately one year. Given the long period which had already transpired for the matter to be referred and reviewed the accused, Isak Brouers, is currently the next person to be sent for observation in the Northern Cape. It can therefore not at present be argued that an exceptional instance exist where a failure to intervene would result in a grave injustice. It is therefore respectfully submitted that the accused, Isak Brouers, be sent for formal observation in terms of section 77 - 79 of Act 51 of 1977. After a

finding in terms of section 77(6) of Act 51 of 1977, the criminal proceedings can be finalized in the regional court with regard to both the accused."

8. In this matter the proper procedure was not followed to submit this matter for review. At p 25(16) – 26(24) the record of proceedings in the Regional Court reflects the following:

STAAT: ... Agbare, my opdrag van die senior aanklaer is dat die Regter President aanduiding gegee het dat hierdie saak op spesiale hersiening gestuur moet word sodat hy dan kan besluit indien u dan nou sou weier het mnr Benson my meegedeel dat die saak dan uitgestel word, die Beskuldigde is dertiende op die lys, dit sal ongeveer elf na twaalf maande wees voor hy Valkenberg to kan gaan. Daar is net een bed beskikbaar en daar is probleme ook blykbaar Agbare. So dit is die mededeling wat hy aan my gemaak het.

HOF: Die van die Regter President, is dit nou `n mededeling van wie af, van mnr Benson?

STAAT: Mnr Benson het aan my mededelings gemaak dat (tussenbei).

HOF: Maar waar het hy dit nou vasgestel?

STAAT: Hy sê (tussenbei).

HOF: Hoekom is daar nie (tussenbei).

STAAT: Advokaat Jansen het dit saam met die RP gaan bespreek en toe het sy vir hom gebel daaroor maar indien u wil kan ek vir hom sê dat ons die saak uitstel dat dit op skrif gestel word.

HOF: Ja-nee, hulle moet dit maar vir my op skrif stel want dit is nie normale prosedure nie. Ek het nie `n probleem om dit te doen as dit die opdrag is nie maar ek wil eers sekermaak dat dit wel so is.

STAAT: Ek sal vir hom so meedeel Edlagbare.

HOF: Dit wyk ietwat af van die gronde vir spesiale hersienings,

so ek moet eers `n skrywe in die verband hê.

STAAT: *Ek sal so sê Edelaagbare."*

9. I fully share the views of the Regional Magistrate that there was no jurisdictional factor on the basis of which he could competently send the matter on review. The Regional Magistrate ultimately dispatched the matter on review after he was apparently furnished with some kind of written document emanating from some unspecified source. Whatever the contents were they were sufficient to persuade the Regional Magistrate at a subsequent hearing to declare and order that:
"HOF: *Goed, ek sal voldoen aan hierdie versoek. Ek sal die saak in terme van artikel 304(A)(1) van Wet 51 van 1977 op speciale hersiening stuur."*

10. I regret that the Regional Magistrate was placed in such an invidious position. I appreciate the fact that he offered his co-operation in an apparent endeavour to prevent an injustice from occurring. However, I probably expected the office of the Director of Public Prosecutions (Mr Louw or Ms Jansen) to furnish me with a written report to enable me to make an informed decision. My aim was certainly not to direct the Regional Magistrate orally (or even in writing) to send the case on review irrespective of the merits, demerits or circumstances. That would amount to undermining or interfering with the independence of the Regional Court (or even a District Court). A Judge, in my view, is not competent to give such a directive because the competency or discretion is reposed in the Magistrate. The discretion has to be judicially exercised and the competency goes hand-in-hand with jurisdictional factors.

11. Adv Jansen has cited a number of examples of cases in this jurisdiction and elsewhere in which it became necessary for the

High Court to be approached to intervene on urgency in Criminal matters, particularly where indigent, unsophisticated and unrepresented accused are concerned. I am not closing the door to such exceptional cases, but the proper and principled procedures must still be followed. I am also mindful of the remarks of the Constitutional Court, in a different (civil) context, which are equally opposite to this case, in **Fose v Minister of Safety and Security** 1997 (3) SA 786 at 826H-J (para 69) whereat it is enunciated:

“(I)n a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”

12. In the result, much ado about nothing, I find that the case was not reviewable and make the following order:

Order:

The case is not reviewable. The matter is remitted to the Regional Court to be disposed of in accordance with the Law.

**F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

I concur:

H J LACOCK
JUDGE
NORTHERN CAPE DIVISION