

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

In the matter between:

THE STATE

APPLICANT

and

ABDUKUTIF YUSSIF

(R69/2024)

MADODA GODFREY TSHABALALA

(R70/2024)

MZIKAYISE ROBERT TWALA

(R71/2024)

DATE: 25 FEBRUARY 2025

SPECIAL REVIEW FROM HARRISMITH MAGISTRATES COURT

as it becomes a nullity *ex-lege*. Prosecuting authority may reinstate the prosecution *de novo*.

ORDER

Part- heard criminal proceedings at pre- conviction stage become a nullity and are set aside *ex-lege* if the magistrate becomes unavailable on account of death, resignation, retirement, dismissal, or recusal.

JUDGMENT

Nemavhidi AJ

[1] The Chief Magistrate Bloemfontein instructed the senior magistrate to request a special review of those three-part heard criminal trials, the relevant names and case numbers are listed on a schedule and are reflected on the above heading. They are all matters from the Harrismith Magistrate's court.

[2] The circumstances of the cases are different, but the relief sought is similar.

[3] All the matters are part-heard before Mr. Pratt, a magistrate who has since filed an application for his discharge from service on grounds of medical incapacity. He is thus unable to finalize these cases.

[4] These three matters have not reached the conviction stage and the question

arises whether in the absence of the provision in the Criminal Procedure Act (CPA), these matters can be dealt with by the roll planner allocating these matters to another magistrate without them being referred to the high court for a special review.

[5] In *S v Skhosana and others 2015 (1) SACR 562 GJ (18 September 2014)* para 17 and 18 the court stated as follows: '*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 1978(1)SA 659 expressly eschews that approach and R v Mhlanga 1959(2)SA 220 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*'.

[6] the High Court does not have to set a pre-conviction trial aside as the nullity principle *ex lege* sets the trial aside.'

[7] Where a magistrate has recused himself, he becomes *functus officio* and is unavailable in the absolute sense. Instances of absolute unavailability include " death, retirement, dismissal, resignation, or recusal. (Hiemstra's Criminal Procedure 7th edition page 15-22)

[8] In *s v Mkosana 2004 (1) SACR 205 CK para [22]* the court stated '*.... If the magistrate is permanently unable to continue with the trial the proceedings are regarded as abortive and fall away.*'

[9] 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.

[10] 'The proceedings are to be commenced *de novo* before a different magistrate should the prosecuting authority so determine.' - see *S v Moreki [2023]ZAFHC 184 (5 May 2023)*

[11] Where the proceedings have proverbially 'vanished' the prosecuting authority does not require the permission or the direction of the High Court to commence with the new proceedings.

FINDINGS

1. Where a magistrate has passed on, became incapacitated, resigned, dismissed, or recused himself during part-heard criminal proceedings;
 - a. 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 set aside.
 - b. The question of whether 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.

ORDER:

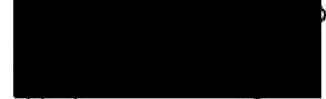
The special review stands to be dismissed as there is nothing to review.

- a. The proceedings are a nullity and were set aside *ex-lege* upon the discharge of the magistrate on the grounds of medical incapacity.
- b. The prosecuting authority retains the authority to decide whether to commence proceedings against the accused *de novo*.



NEMAVHIDI AJ

I agree.



CHESIWE J