



**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CRI/T/0001/2019**

In the matter between:

**REX**

And

**NO. 11508 CPL TJEKANE SEBOLAI**

**1<sup>ST</sup> ACCUSED**

**NO. 52249 PVT SELONE RATSIU**

**2<sup>ND</sup> ACCUSED**

Neutral Citation: Rex v Sebolai and Another [2023] LSHC Crim 199 (28<sup>th</sup> November 2023)

**CORAM: S.P. SAKOANE CJ**

**HEARD: 09<sup>TH</sup> AUGUST 2023**

**DELIVERED: 28<sup>TH</sup> NOVEMBER 2023**

## SUMMARY

*Criminal law – resignation of judge mid-trial – what happens to the trial - duty of judge to finish what he/she started - whether such duty owed by non-resident judge - Constitution, sections 120 (5), 120 (6) 121 (7) and 152.*

### **ANNOTATIONS:**

#### CITED CASES:

##### NAMIBIA

S v Dornadus (CR 8/2017) [2017] NAHCNLD 67 (24 July 2017)

##### SOUTH AFRICA

S v Thobela 2008 (1) SACR 605

##### ZIMBABWE

Monderwa Farm (Pvt) Ltd v BJB Kirstein (Pvt) Ltd 1994 (1) SA 430 (ZSC)

#### LEGISLATION:

Constitution of Lesotho, 1993

High Court Act No. 5, 1978

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## RULING

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### I. INTRODUCTION

- [1] On a pronounced my decisions in open court and initiated that reasons would follow. These are my reasons.
- [2] The accused are on trial before me following the resignation of the acting trial judge. Since this is the first time in this jurisdiction for this to happen, counsel were invited to make submissions on the effect of the acting judge's resignation which happened after the Crown's case. The court is indebted to counsel for providing it with written submissions.

### Indictment

- [3] The two accused are serving members of the Lesotho Defence Force indicted on three counts of murder, attempted murder and damage to property.

[4] When the trial judge resigned in 2018, the Crown had closed its case after hearing the evidence of twelve (12) witnesses, out of which five (5) were admissions. Following the resignation, the case was re-allocated to me on 13 December 2022 at the end of the second session of this Court. A Pre-trial Planning Conference (PTPS) was held on 15 March 2023. It is on that date it transpired the indictment had been amended to remove the names of a third accused who had been discharged by the acting trial judge.

### **Submissions**

[5] In its written submissions, the Crown referred to the Namibian case of **S v Dornadus** (CR 8/2017)<sup>1</sup> for the proposition that where a judicial officer (a magistrate in that case) resigns, it is necessary for the trial to start *de novo* before a different magistrate without the necessity of the proceedings having to be set aside on review by the High Court.

[6] Mr. *Ts'abeha*, for the accused, relied on their rights to a fair trial guaranteed by section 12 of the Constitution of Lesotho, 1993. He submitted that the court should put in the scales the three years lost to the trial against the accuseds' agony, anxiety, expenses and the time taken to subject them to a re-trial. In support of his argument, he sought reliance

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<sup>1</sup> S v Dornadus (CR 8/2017) [2017] NAHCNLD 67 (24 July 2017)

on the case of **S v Thobela**<sup>2</sup> where the court, in considering all the relevant circumstances, held that to start a trial *de novo* would inevitably result in prejudice to the accused and further that the interests of justice are better served by their acquittal.

## **II DISCUSSION**

[7] The acting judge is a citizen of Botswana who was on an 18 months contract. His reasons for resigning do not warrant mentioning because they are not relevant to the legal question of what should be done in the circumstances.

### **Appointment and Tenure of Acting Judges**

[8] Section 120 (5) of the Constitution provides for appointment of acting judges as follows:

“(5) If the office of any puisne judge is vacant or if any such judge is appointed to act as Chief Justice or is for any reason unable to perform the functions or his office or if the Chief Justice advises the King that the state of business in the High Court so requires, the King, acting in accordance with the advice of the Judicial Service Commission, may appoint a person who is qualified to be appointed as a judge of the High Court to act as a puisne judge of that Court:

Provided that a person may act as a judge notwithstanding that he has attained the age prescribed for the purposes of section 121(1) of this Constitution.”

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<sup>2</sup> S v Thobela 2008 (1) SACR 605

[9] The tenure of an acting judge is laid down at section 120 (6) in the following

terms:

“(6) Any person appointed under subsection (5) to act as a puisne judge shall, subject to the provisions of section 121(7) of the Constitution, continue to act as judge for the period of his appointment or, if no such period is specified, until his appointment is revoked by the King, acting in accordance with the advice of the Judicial Service Commission:

Provided that, notwithstanding the expiration of the period of his appointment or the revocation of his appointment, he may thereafter continue to act as a puisne judge for so long as necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him previously thereto.”

[10] The Constitution categorically requires a judge whose period of appointment expires or is revoked to continue to “deliver judgment or to do any other thing in relation to proceedings that were commenced before him previously thereto.” So, the proper inquiry is whether an acting judge who resigns is caught by the proviso in section 120 (6), such that he is obliged to complete whatever commenced before him/he and to deliver judgment.

### **Duty to finish what is started**

[11] Section 120 (6) is subjected to section 121(7) which reads as follows:

“(7) If the question of removing the Chief Justice or a judge from office has been referred to a tribunal under subsection (5), the King, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice and acting in accordance with the advice of the Chief Justice in the case of a puisne judge, may suspend the Chief Justice, or as the case may be, the judge, from the exercise of the functions of his office and any such suspension may at any time be revoked by the King, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal advises the King that the Chief Justice or the judge should not be removed from office.”

[12] The effect of this subordination is that the cessation of the tenure of an acting judge comes about by in three ways: effluxion of time for appointment, revocation of appointment and impeachment. Absent impeachment, or cessation of appointment either by effluxion of time or revocation, an acting judge is obliged to complete all judicial business that he started. What happens if he resigns?

[13] In their written submissions, counsel do not discuss the constitutional sections at play. They rely on *dicta* in foreign authorities where magistrates resigned. The legal propositions in all the cited authorities is that the resignation of a magistrate renders the proceedings a nullity, with the consequence that the trial must start *de novo*.

[14] The legal question *in casu* is whether the same consequence follows in cases where a judge resigns. In my respectful view, the resignation of a judge does not inexorably lead to the consequence. This is because the scheme of section 121 (7) of the Constitution requires judges who leave office, other than by impeachment, to finish outstanding judicial business. In other words, the expired tenure of a judge is implicitly extended to enable him/her to finish outstanding judicial business.

## Resignation

[15] A judge, whether acting or substantive, may resign from judicial office in terms of section 152 of the Constitution. Reading this section together with section 120 (6), it is my judgement that the resignation does not relieve the judge of the obligation to finish what he has started. The reason is that the constitutional duty to finish what was started is incidental to the proper exercise of judicial authority. For this proposition, I find support from the judgment of the Supreme Court of Zimbabwe in **Monderwa Farm**<sup>3</sup> in which it held that:

“The effect of a similarly worded provision in the Constitution of India, namely proviso (a) to s 217(1), was considered in the case of *Union of India v Gopal Chandra Misra AIR 1978 SC 694*. The Supreme Court held that it gave to the Judge a unilateral right or privilege to resign his office, his resignation becoming effective from, and his tenure of office terminating upon, the date on which he, of his own volition, desires to quit office. No acceptance is required to make the resignation complete. I respectfully agree with this judgment. It means that the President of Zimbabwe may not attach any conditions to the proposed date of resignation, such as that the Judge must, prior thereto, complete all matters commenced before him.

Section 79(1) of the Constitution vests the judicial authority of Zimbabwe in the Supreme Court, the High Court and such other courts subordinate thereto as are established under an Act of Parliament. Section 3 of the High Court of Zimbabwe Act 29 of 1981 vests the Judges of the High Court with judicial authority or power in respect of civil matters, criminal trials, the review of proceedings of inferior courts and other bodies, and appeals. And s 4 makes provision to permit of the continuation of an appeal or application notwithstanding a reduction by whatever cause of the number of Judges sitting.<sup>4</sup>

Mr. *Gillespie*, who appeared for the respondent, argued that it was reasonably incidental to the carrying out of the judicial authority of a High Court Judge, as outlined above, that subsequent to resignation he may complete all outstanding matters with which he alone was seized. He stressed that retention of such power arose by necessary implication from:

- (a) the Judge’s oath of office which binds him to do justice;

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<sup>3</sup> *Monderwa Farm (Pty) Ltd v. BJB Kirston (Pty) Ltd 1994 (1) SA 430 (Z) @ 432 B – 433 I*

<sup>4</sup> These sections are comparable to sections 2 (1) (a), 7 and 8 of the High Court Act, 1978



- (b) the judicial duty to pronounce judgment;
- (c) the tradition and practice of this country which demands that a Judge conclude existing litigation with which he is seized so as to avoid inconvenience to the parties and their witnesses, if any, as well as the wastage of costs; and
- (d) an acceptance that the intention to resign upon a specified date does not negate the obligation to complete all outstanding matters.

Section 20(2) of the Interpretation Act Chap 1 (Z) is relevant.

It reads:

‘Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or are incidental to the doing thereof.’

The concept of an implied power may be traced to Roman law, as expressed in Digest 2.1.2 in the maxim *cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit* (where jurisdiction is conferred the recipient is deemed also to have been granted jurisdiction). And it has long been recognized by the Courts...

In my opinion, Mr. *Gillespie* is correct in his submission that the power to conclude unfinished matters after resignation, as did Mr Justice *Greenland*, is reasonably incidental to the proper performance of the judicial authority or power outlined in s 3 of the High Court of Zimbabwe Act which vests in a Judge of the High Court. That this is an ancillary power which it is necessary to imply to the function of judicial office is, to my mind, further borne out by the existence of the express provisions in respect of fixed period, acting or retired Judges – such provisions being inserted in the Constitution *ex abundante cautela* on account of the enforced termination of office. But, in the case of a Judge removed from office pursuant to s 87(1) of the Constitution for inability to discharge the function of his office due to infirmity of body or mind or any other cause, or for misbehaviour, the power to complete outstanding matters subsequent to the date of removal (or suspension by the President pending a decision whether or not to remove for misbehaviour) is not to be implied. If the Judge concerned is found to be unfit to discharge the functions of his office then he is obviously unfit to complete matters previously commenced.”

[16] Should this be so where a judge is not at all available because he has left Lesotho for his native country?

[17] Surely the obligation to complete unfinished judicial work post-resignation is predicated on the availability of the judge in Lesotho. In other words, the issue turns on whether the judge is an *incola* or *peregrine* (if one borrows the language of the doctrine of attachment to found or confirm jurisdiction). The obligation is easily enforceable in respect of a resident judge but difficult to enforce in respect of a non-resident judge. The latter might not be willing to return to complete judicial work as is the case *in casu*.

[18] The Constitution does not operate beyond the borders of the Kingdom. Thus, it is obviously difficult to enforce it on a non-resident judge. In the circumstances of this case, the interests of justice compel a result similar to the application of the principle that obtains in respect of a magistrate who resigns, namely, nullity of proceedings and commencement of the trial *de novo*.

## CONCLUSION

[19] In the result, the resignation of *Lebotse AJ* rendered the criminal trial of these accused before him a nullity. Their trial can start afresh before me.

  

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**S.P. SAKOANE**  
**CHIEF JUSTICE**

**For the Crown:** Mr. M. *Rafoneke*  
**For the Defence:** Mr. S.S. *Tsabeha*