

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 28/2015

In Re: INQUEST REVIEW (RUNDU INQUEST NO 133/2014): FESBERTU VENDA

HIGH COURT MD REVIEW CASE NO 1449/2015

*Neutral citation: Inquest Review Vernda (CR 28-2015) [2015] NAHCMD 228 (25
September 2015)*

CORAM: HOFF J et LIEBENBERG J

DELIVERED: 25 September 2015

Flynote: Review – Inquest – Section 21 (1) of the Inquests Act 6 of 1993 – Section must be read with s 18 (1) providing for instances where body of deceased person destroyed or not found or recovered – Findings in term of s 18 – Magistrate found identification of deceased and date of death unknown – Findings made not consistent with evidence – Section 21 (2) – Unless finding not set aside on review – Effect of an order of the High Court as a presumption of death – Findings set aside on review.

ORDER

1. In terms of s 21 (2) of the Inquests Act, Act No 6 of 1993, the findings made in terms of s 18 (2) by the magistrate for the district of Rundu, are set aside.
2. The matter is remitted to the magistrate with a direction to proceed in terms of s 10 of the Act and to bring the proceedings to its natural conclusion.

JUDGMENT

LIEBENBERG J: (Concurring HOFF J)

[1] This is an inquest forwarded by the magistrate for the district of Rundu in terms of s 21 (1) of the Inquests Act¹ (hereinafter ‘the Act’) which reads:

¹ Act No 6 of 1993

'21 Certain findings on review equivalent to order presuming death

(1) Whenever at an inquest contemplated in subsection (1) of section 18 a regional magistrate or magistrate records a finding in regard to the matters mentioned in that subsection and in paragraphs (a) and (c) of subsection (2) of that section, such regional magistrate or magistrate shall submit the record of the inquest, together with any comment which he or she may wish to make, to the High Court of Namibia for review by that Court or a judge thereof.

(2) If such finding of the regional magistrate or magistrate is not set aside on review, such finding shall have the effect of an order of the High Court of Namibia presuming the death of the person concerned.

(3) ...

(4) ...'

[2] Section 18 referred to in the section provides for the following:

'18 Finding

(1) If, in the case of an inquest where the body of the deceased person is alleged to have been destroyed or where no body has been found or recovered, the evidence proves beyond reasonable doubt that a death has occurred, the judicial officer holding the inquest shall record a finding accordingly, and thereupon the provisions of subsection (2) shall apply.

(2) At the close of an inquest the judicial officer holding the inquest shall record a finding as to-

- (a) the identity of the deceased person;
- (b) the cause or probable cause of death;
- (c) the date of death;
- (d) whether the death was brought about by any act or omission prima facie involving or amounting to an offence on the part of any person.

(3) If the judicial officer is unable to record any finding mentioned in subsection (2), he or she shall record that fact.'

[3] It would appear from the inquest docket that criminal proceedings were not instituted in connection with the death of the deceased and statements and other documents pertaining to the deceased person's death were submitted to the magistrate by the public prosecutor in terms of s 6 (1) of the Act for purposes of holding an inquest as to the circumstances and cause of death as provided for in subsection (2).

[4] The magistrate's findings in terms of s 18 (2) were as follows:

- (a) Identity of the deceased person: Unknown
- (b) Date of death: Unknown
- (c) Cause or likely cause of death: Head injury
- (d) Whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person: Unable decide. (sic)

[5] Section 21 (2) of the Act makes plain that unless the finding made by the magistrate is not set aside on review, such finding shall have the effect of an order of the High Court as a presumption of death of the person concerned. This section must be read together with s 18 (1) which deals with instances 'where the body of the deceased person is alleged to have been destroyed or where no body has been found or recovered', something which is clearly not the case in the present matter. I intend dealing with each finding made by the magistrate *seriatim*.

[6] Although the magistrate had found the identity of the deceased person to have been unknown, there is evidence on record to the contrary. Erna Sirenga Sikerete (A6) on oath stated that she was the common law wife of the deceased and that they got married in

1994 and three children having been born from the marriage. According to the statement of Oswin Kudumo Kangume (A7) the deceased has a brother by the name of Batista who lives in Kehemu who informed him that he was going to the mortuary to look for the deceased's corpse. Furthermore, the statement of Captain Jerry Mbwalala (A9) from the Namibian Defence Force Intelligence Unit stationed at Rundu reads that he knew the deceased by the name of Fesbertu Venda, aged 34 years. Despite the foregoing information being available, there is nothing on record explaining why the deceased's wife or brother, being his next of kin, were never approached in order to make a statement pertaining to the identity of the deceased. It is inconceivable that neither of these persons would not have been able to identify the deceased. Such information was readily available and the magistrate should not have proceeded with the inquest by making a finding that the identity of the deceased was unknown in circumstances where the identity of the deceased could have been established without any difficulty. The approach adopted by the magistrate constitutes an irregularity and the magistrate should have referred the docket back to the public prosecutor with a direction to obtain the relevant information. This was clearly not done. The finding made by the magistrate on the identity of the deceased being unknown, accordingly falls to be set aside.

[7] As regards the date of death, the magistrate found same to be unknown contrary to several witness statements reflecting that the incident in which the deceased was killed took place on 08 June 2000 and, according to Captain Mbwalala, the person was already dead when he arrived at the scene. In view of such evidence, it boggles the mind how the magistrate found the date of death to have been unknown; hence this finding is evidently wrong and must be set aside.

[8] Pertaining to the cause of death it was found that it was due to head injury. With deference to the magistrate, there is no evidence to that effect and the only evidence about any injury the deceased suffered from was that of Sergeant Joseph Nangolo (A10) who said he found the deceased who was already dead and he then realised that 'he should have been shot on his chest or rather up on his body'. None of the other witnesses

described the injury inflicted by the gunshot and the finding made in this regard is clearly not supported by the available evidence. Hence, the finding so made equally falls to be set aside.

[9] The last finding turns on the culpability or otherwise of the person who had caused the death of the person. The circumstances in which the deceased was fatally injured can briefly be summarised as follows:

The deceased and one Antonio Sapwire were former Unita soldiers who had come to Namibia during 2000 and settled themselves at Nakazaza village, Rundu. On the evening 8th of June 2000 they were to be arrested for interrogation and were approached at their respective homes in the village by Private Joseph (A8) and Sergeant Nangolo (A10), each accompanied by an informer. The officer in charge of the operation was Captain Mbwalala from the Intelligence Unit of the Namibian Defence Force (NDF) who had remained at the vehicle at the relevant time. The deceased was shot by Private Joseph who claims that he had acted in self-defence when he had come under attack from the deceased who tried to hit him with an axe. Though Captain Mbwalala claims to have seen the axe used by the deceased at the scene, this fact was clearly inserted afterwards into his statement (par 13) which, in itself, appears suspect. There is further no evidence that the said axe was seized as evidence and handed over to the police; neither had any member of the NDF reported the incident to the police. When Detective Sergeant Sindimba (A1) later that evening arrived at the scene, the body of the deceased had already been removed by members of the NDF and taken to the military base. According to Captain Mbwalala the incident had been reported to 'superiors' who had given instructions to him to hand over the body to a FAA Commander (supposedly from the Angolan military). The instructions were complied with which, according to him, was set procedure namely, that suspected Unitas having been killed should be handed over to Angolan Commanders who would then dispose of the body.

[10] This so-called procedure that was in place between the NDF and the Angolan military clearly defies the laws of Namibia. Chapter 3 of the Namibian Constitution protects the fundamental rights and freedoms of all persons within Namibia and makes no distinction between citizens and foreigners. Hence, the laws of this country equally apply to all persons on Namibian soil.

[11] Section 2 of the Inquests Act in imperative terms states that 'any person who has reason to believe that a person has died an unnatural death, shall as soon as possible report accordingly to a member of the police,...' while s 3 places an obligation on any member of the police to investigate or cause to be investigated the circumstances of the person's death. Section 4 provides for an examination of the body for purposes of determining the cause of death, while subsection (6) provides for the prosecution of any person who hinders or obstructs *inter alia* a member of the police in exercising a power or performing a duty under the section.

[12] It is evident from the statements filed of record that the deceased in this instance had died an unnatural death and the aforementioned sections of the Act therefore find application. However, compliance could not be given thereto as the body was seized by the NDF members and later disposed of by handing same over to officials from Angola. No mention had been made of the weapon used in the shooting having been seized as evidence. It would therefore appear to me that, *prima facie* viewed, the actions of the NDF members was a deliberate obstruction of the course of justice for which they, and those responsible for the disposal of the body, could be held accountable.

[13] As regards the circumstances under which the deceased was shot, there is contradicting evidence as to whether or not the deceased was armed with an axe. Had that indeed been the case, the axe should later have been found at the scene by the police. The only mention of the axe at the scene came from Captain Mbwalala who stated in par 13 of his statement that he saw the axe lying approximately 5 metres from the

deceased's body. As already stated, it is clear from the statement itself that this sentence was later inserted and did not initially form part of the statement. Not only is it suspect, there is no corroborative evidence in support thereof.

[14] For the foregoing reasons the magistrate, in my view, did not exercise her discretion judiciously by dispensing with the giving of oral evidence at the inquest. In the present circumstances the magistrate ought to have directed that evidence be heard during a formal inquest as provided for in s 10 of the Act. Only thereafter would the magistrate have been properly informed and able to make findings as required by s 18 (2) of the Act.

[15] In the result, it is ordered:

1. In terms of s 21 (2) of the Inquests Act, Act No 6 of 1993, the findings made in terms of s 18 (2) by the magistrate for the district of Rundu, are set aside.
2. The matter is remitted to the magistrate with a direction to proceed in terms of s 10 of the Act and to bring the proceedings to its natural conclusion.

J C LIEBENBERG

JUDGE

E P B HOFF
JUDGE