

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 1/2013

Case No: CR 2/2013

In the matter:

**IN RE: OUTJO INQUEST 30 OF 2012**

**(HIGH COURT MAIN DIVISION REVIEW REF NO 2136/2012)**

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In the matter:

**IN RE: OUTJO INQUEST 48 OF 2012**

**(HIGH COURT MAIN DIVISION REVIEW REF NO 2137/2012)**

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**Neutral citation:** *In re: Outjo Inquest 30 of 2012; In re: Outjo Inquest 48 of 2012*  
(CR 1-2013; CR 2-2013) [2013] NAHCMD 1(7 January 2013)

**Coram:** VAN NIEKERK, J

**Delivered:** 7 January 2013

**Flynote:**           **Inquests** – section 18 and 21 of the Inquests Act, 1993 (Act 6 of 1993) discussed

**Summary:**       The magistrate of Outjo held inquests into the circumstances and cause of death of two persons in terms of the Inquests Act, 1993 (Act 6 of 1993). The magistrate submitted the records of these inquests for review by the High Court or a judge thereof in terms of section 21 of the Inquests Act. The Court considered the provisions of section 18 and 21 of the Inquests Act. Section 18(1) is concerned with a situation where there is reason to believe that an unnatural death has occurred, but there is no body available for a post-mortem examination to be held in terms of section 4 of the Inquests Act. If the evidence proves beyond a reasonable doubt that a death has occurred, the magistrate must record such a finding and proceed to make certain other findings in terms of section 18(2), read with 18(3). The purpose of section 21 is to provide a statutory mechanism in certain cases whereby a presumption of death may be given legal effect without the need to approach the High Court for such an order in the normal course by way of application under the common law. In both these inquests a body was available and a post-mortem examination was held. It was therefore not necessary for any finding in terms of section 18(1) to be made. The Court found that it is not clear why the magistrate considered it necessary to submit the inquest records for review, as there is no need to presume that the persons in question are dead. It is only in cases where no body is available and the magistrate has made (i) a finding in terms of section 18(1) that a death has occurred; (ii) a finding in terms of section 18(2)(a) about the identity of the deceased; and (iii) a finding in terms of section 18(2)(c) about the date of death, that section 21 requires submission of the inquest record for review. These matters should not have been submitted for review under section 21 of the Inquests Act. No orders were made. The inquest records were merely returned to the magistrate.

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## JUDGMENT

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VAN NIEKERK, J:

[1] In these two matters the magistrate of Outjo on 21 November 2012 held inquests into the circumstances and cause of death of two persons in terms of the Inquests Act, 1993 (Act 6 of 1993). As the issues are the same, it is convenient to deal with them by way of a single judgment.

[2] In Outjo Inquest No. 30 of 2012 the magistrate recorded his findings as follows:

‘Findings in terms of section 18(1) of Act No 6 of 1993:

- a) Identity of the deceased person: Unknown – Male
- b) Date of death: Unknown
- c) Cause or likely cause of death: Unknown
- 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: Unknown’.

[3] In Outjo Inquest 48 of 2012 the findings were the same, except that the identity of the deceased was found to be Kaleb Mushinga, a male person.

[4] The magistrate submitted the records of these inquests for review by this Court or a judge of this Court in terms of section 21 of the Inquests Act. The relevant parts of section 21 provide as follows:

**‘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) .....’

[5] To understand section 21 it is necessary to consider section 18 of the Inquests Act which provides as follows:

### **‘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.’

[6] It is clear from a consideration of the provisions of section 18(1) that they are concerned with a situation where there is reason to believe that an unnatural death has occurred, but there is no body available for a post-mortem examination to be held in terms of section 4 of the Inquests Act. If the evidence proves beyond a reasonable doubt that a death has occurred, the magistrate must record such a finding and then, as (s)he would normally do in all inquests, act in terms of section 18(2) and, if need be, section 18(3). This means that the magistrate must proceed to make further findings in terms of section 18(2) in relation to the matters set out in this section. Should the magistrate be unable to

make a finding on any of these matters, (s)he must record this fact in terms of section 18(3).

[7] The purpose of section 21 is to provide a statutory mechanism in certain cases whereby a presumption of death may be given legal effect without the need to approach the High Court for such an order in the normal course by way of application under the common law.

[8] In both these inquests a body was available and a post-mortem examination was held, but because the bodies were in advanced stages of decomposition, the examinations conducted were limited and the cause of death could not be determined. As the body was available in each case, it was not necessary for any finding in terms of section 18(1) to be made. Indeed, the magistrate made no such finding. Although he refers to section 18(1), the matters he did consider were those contemplated in section 18(2). It is not clear why the learned magistrate considered it necessary to submit the inquest records for review, as there is no need to presume that the persons in question are dead. Their bodies provide the clearest evidence that they are indeed dead.

[9] It is only in cases where no body is available and the magistrate has made (i) a finding in terms of section 18(1) that a death has occurred; (ii) a finding in terms of section 18(2)(a) about the identity of the deceased; and (iii) a finding in terms of section 18(2)(c) about the date of death, that section 21 requires submission of the inquest record for review. It should also be noted that, even if there is no body available and the magistrate is able to find beyond a reasonable doubt that a death has occurred, but (s)he is unable to make a finding on the identity or the date of death, the matter is not reviewable in terms of section 21.

[10] Clearly these matters should not have been submitted for review under section 21 of the Inquests Act. There is no need for any orders to be made. The inquest records are merely returned to the magistrate.

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K van Niekerk

Judge