



**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

**Review No. R12/2023**

**Magistrate's Court No. 03/2023**

In the matter between:

**THE STATE**

and

**NALEDI GLORIA MOREKI**

---

**CORAM:** MOLITSOANE, J *et* GUSHA, AJ

---

**JUDGMENT BY:** GUSHA, AJ

---

**DELIVERED ON:** 05 May 2023

---

[1] The accused is charged with theft in the Jagersfontein Magistrate's Court. On the 2<sup>nd</sup> February 2022 trial proceedings commenced before Magistrate Dyeyi.

- [2] On the aforesaid date, the accused pleaded not guilty to the charge preferred and the State adduced the evidence of one witness and the matter was remanded to the 23<sup>rd</sup> February 2022 for further trial.
- [3] Tragically, on the 6<sup>th</sup> February 2022, the Honourable Magistrate was involved in a motor vehicle accident. She sustained severe injuries which left her incapacitated to resume her official duties.
- [4] It is against this heart-rending backdrop that Ms Mda, the current Magistrate at Jagersfontein Magistrate's court, placed this matter before us on special review, and requests that the proceedings be set aside and ordered to start *de novo* before another presiding officer.
- [5] There is no provision in the Criminal Procedure Act, 51 of 1977 (the Act) which empowers the High Court to set aside the proceedings in the lower court in circumstances where the presiding officer becomes incapacitated due to ill health. Against this backdrop it has to be borne in mind that an accused person who has pleaded to a charge other than the lack of jurisdiction or an accused on whose behalf a plea of not guilty has been entered by the court is entitled to a verdict.<sup>1</sup> The limitation to this entitlement, however, is contained in s118 of the Act. In *S v Mayisa*<sup>2</sup> the court held as follows:

“Wanneer 'n beskuldigde eers gepleit het is hy geregtig om te eis dat hy vrygelaat of skuldig bevind word deur die geregtelike beampte voor wie die verhoor in aanvang geneem het. Die enigste beperking op hierdie beginsel is dat indien die geregtelike beampte voor wie die beskuldigde onskuldig gepleit het om enige rede nie beskikbaar is om die verhoor voort te sit nie en daar geen getuienis aangevoer is nie, die verhoor voor enige geregtelike beampte van dieselfde hof voortgesit kan word. Myns insiens berus hierdie siening op 'n korrekte uitleg van art 106(4) gelees met art 118.”

---

<sup>1</sup> See section 106(4) of the Criminal Procedure Act, Act 51 of 1977.

<sup>2</sup> 1983(4) SA 242 (T) at 247G-H.

- [6] The aforesaid provision does not avail the accused in this case as same can only find application where *'no evidence has been adduced'*<sup>3</sup>. In this case the Honourable Magistrate became incapacitated after the evidence of the first state witness was led.
- [7] The issue before us therefore, is whether this is a case where the interests of justice would require that we exercise our inherent jurisdiction and set aside these proceedings.
- [8] It is settled that where evidence has been adduced and before conviction and the presiding officer becomes unavailable due to death, retirement, discharge, resignation, or other incapacity, the trial may proceed *de novo* before another presiding officer, should the interests of justice so demand<sup>4</sup>.
- [9] Accordingly, having regard to the time the presiding officer has been incapacitated, it cannot be said that she will recuperate soon in order to finalize these proceedings. We are of the considered view that the interests of justice require that we exercise our inherent jurisdiction and set aside these proceedings.
- [10] We agree with the request by Ms Mda and thank her for her comprehensive report.
- [11] Resultantly, we make the following order:

## ORDER

---

<sup>3</sup> Section 118 of the Act provides that; "If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court."

<sup>4</sup> *S v Gema and Another* (CA&R 4/2022) [2022] ZANHC 5, 2023 (1) SACR 304 (NCK) (31 January 2022) see also *S v Lapping* 1998 (1) SACR 409 (W).

- 11.1. The part-heard trial before Ms Dyeyi is set aside.
- 11.2. The proceedings are to commence *de novo* before another Magistrate of the same court should the Prosecuting Authority so determine.

---

NG GUSHA, AJ

---

PE MOLITSOANE, J