



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **3239/2021**

In the matter between:

EDDIE SITHOLE

First Applicant

ISAAC VUYO MASHAVA

Second Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

MAGISTRATE – MR FURSTENBERG

Third Respondent

CORAM: **DANISO, J et CRONJÉ, AJ**

HEARD ON: **27 JULY 2023**

DELIVERED ON: **07 SEPTEMBER 2023**

JUDGMENT BY: **PR CRONJÉ, AJ**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 07 September 2023.

- [1] The Applicants apply for the review and setting aside of the decision of Magistrate Furstenberg of the District Court in Welkom ("*the Magistrate*") who ordered the Applicants to appear before the Circuit High Court in Welkom. The Applicants abandoned a prayer declaring the substantial delay in their prosecution as a failure of justice.

- [2] The Applicants are businesspersons who reside in Welkom. They were arrested on 11 November 2014 and indicted with eleven (11) other accused persons. Since their arrest they appeared numerous times in the District Court of Welkom. The Applicants lodged several applications in the High Court and an appeal to the Constitutional Court to compel the State to provide further and better particulars to the charges against them.

- [3] The Applicants brought an application in this Division¹ in 2018, requesting that they be tried in the Regional Court and not the High Court. On 13 August 2018, Musi, JP *et* Loubser, J in this Court, reviewed and set aside the decision of the Regional Court to transfer the case to the High Court. The Court ordered that the matter be remitted back to Regional Court in Welkom.

- [4] Pursuant to that judgment, the Regional Court found that the Applicants and their co-accused were unlawfully/improperly before that Court and the matter was struck from the roll.

¹ Reported under *Sithole and Others v Director of Public Prosecutions and Another* (6146/2017) [2018] ZAFSHC 34 (29 March 2018)

[5] On 30 June 2021, the Applicants appeared before the Magistrate. The prosecutor, representing the First Respondent (DPP), requested that the matter be transferred to the High Court.

[6] Section 75 of the Criminal Procedure Act² (CPA) provides for the hierarchical chain of courts before which accused persons shall appear:

“(1) When an accused is to be tried in a court in respect of an offence, he shall, subject to the provisions of sections 119, 122A and 123, be tried at a summary trial in—

- (a) a court which has jurisdiction and in which he appeared for the first time in respect of such offence in accordance with any method referred to in section 38;*
- (b) a court which has jurisdiction and to which he was referred to under subsection (2); or*
- (c) any other court which has jurisdiction and which has been designated by the attorney-general³ or any person authorized thereto by the attorney-general, whether in general or in any particular case, for the purposes of such summary trial.*

*2(a) If an accused appears in a court which does not have jurisdiction to try the case, the accused shall **at the request of the prosecutor** be referred to a court having jurisdiction.*

*(b) If an accused appears in a magistrate’s court and **the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment⁴ in excess of the jurisdiction of a magistrate’s court but not of the jurisdiction of a regional court. the court shall if so requested by the prosecutor refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge.***

[my emphasis]

[7] The wording of section 75(2)(a) is clear. The accused must, at the request of the prosecutor, be referred either to the Regional or High Court.

² Act 51 of 1977.

³ Now the National Director of Public Prosecutions (NDPP) – the Second Respondent in this application.

⁴ In respect of sentencing the Regional Court would have jurisdiction over the Applicants.

[8] Mr Langa, who appeared for the accused before the Magistrate, argued that the matter cannot be transferred to the High Court as the matter was referred back to the Regional Court.⁵ The Magistrate was referred to the order of Musi, JP and Loubser, J. The prosecutor submitted that the matter was enrolled in the District Court and requested that it should be transferred to the High Court.

[9] Mr Omar appeared before us and argued that the procedure was unfair⁶ and that the Magistrate is bound by the High Court order. The principle of *stare decisis* applies. In *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal*⁷ the Supreme Court of Appeal stated it as follows:

“[3] ... The basic principle is *stare decisis*, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. ... Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.”

[10] The fact that the prosecuting authority and the Magistrate, did not file any papers in respect of the review application, does not in itself mean that the application has to succeed.

[11] In Musi, JP and Loubser, J's judgment the matter was transferred from the Regional Court, which had jurisdiction itself, to the High Court to try the matter. Therefore section 75(2)(a) did not apply as that section refers to the District Court. The court also found that s 75(2)(b) did not apply as, on the record, there was nothing which pointed to the transfer having been done in terms of the

⁵ Pleadings, page 9, line 8 – page 5, line 1.

⁶ The test is whether it is sanctioned by law or un-procedural.

⁷ (1250/2016) [2018] ZACC 19 (16 March 2018).

imposition of a sentence.⁸ It is simply on those reasons that the Regional Magistrate's decision to transfer the matter was set aside. The principle of *stare decisis* does not apply.

- [12] The contention that by transferring the matter from the District Court to the High Court the Magistrate is in breach of Musi, JP and Loubser, J's judgment, is therefore unsound. On the Applicants' own submission the matter was struck from the roll of the Regional Court after the order of Musi, JP and Loubser, J. The Applicants and the co-accused were thereafter served with summons / warrants of arrest to appear in the District Court. An order striking off a matter from the roll terminates the proceedings. The matter then has to start afresh in the District Court. In *Thint Holdings (Southern Africa) (Pty) Ltd and another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions*⁹ it was held:

"First, once the original criminal case had been struck from the roll, the trial ended and there was no certainty that it would be reinstated; so that Applicants were objectively not accused persons."

- [13] The judgment of Musi, JP and Loubser, J is therefore of no assistance to the Applicants and this court cannot interfere with the transfer.
- [14] Mr Omar requested that the DPP pay the costs of the application. Having failed to convince this Court that the Magistrate was wrong, it would only be fair that no order as to costs is made. The First and Second Respondents only gave notice of intention to oppose but did not file opposing papers and did not appear before us.

- [15] I would therefore make the following order:

⁸ Record, p. 42, par [10].

⁹ 2009 (3) BCLR 309 (CC).

ORDER

1. The application to review and set-aside the order of Magistrate Furstenburg is dismissed.
2. There is no order as to costs.

I agree:



P R CRONJé, AJ



N S/DANISO, J

On behalf of Applicants: Zehir Omar Attorneys
Horn & Van Rensburg Attorneys
Bloemfontein

On behalf of Respondents: No appearance