



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: **AR374/2022**

In the matter between:

**THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL**

APPLICANT

and

**MR MZANYWA
ACTING ADDITIONAL MAGISTRATE
PORT SHEPSTONE
SBONGISENI COSMOS SOSIBO**

FIRST RESPONDENT

SECOND RESPONDENT

In the matter of an application for the review of a ruling made by the First Respondent in the criminal proceedings in the Magistrate's court, Port Shepstone under case no: VB1155/2021

Coram: Mossop J and E Bezuidenhout J
Heard: 13 October 2023
Delivered: 13 October 2023

ORDER

On review from: Port Shepstone Magistrates' Court (sitting as the court of first instance):

1. The review application is dismissed.

JUDGMENT

Mossop J (E Bezuidenhout J concurring):

[1] The matter before us purports to be a review of criminal proceedings that were conducted in the Port Shepstone Magistrates' Court. In those proceedings, the first respondent was the presiding magistrate and the second respondent was the accused.

[2] In those proceedings, the second respondent was charged with the offence of culpable homicide, it being alleged that he wrongfully and negligently caused a collision on the Izotsha Road near Shelley Beach, between the motor vehicle that he was driving and a motorcycle being driven by Mr Wolfgang Schwarz (the deceased). As a consequence of the collision, the deceased passed away. After a trial was conducted and evidence was led by the State, the second respondent was acquitted on 30 June 2022.

[3] As a consequence, the State, five months later, brought the review application that now serves before us. The relief claimed is the following:

'(a) That the order made by the first respondent in the Port Shepstone Magistrates Court under case no B1155/2021 on 30 June 2022 of finding the Second Respondent not guilty and discharged on a charge of Culpable Homicide and its alternative, reckless or negligent driving be and is reviewed and set aside.

(b) That this Honourable Court finds that the First respondent (sic) committed a gross irregularity and misdirection when acquitting the Second Respondent.

(c) That the trial (sic) start *de novo* before another magistrate.

(d) Ordering the Respondent/s that oppose/s this application to pay the costs of the application jointly or severally.

(e) Further and or alternative relief, and that the accompanying affidavit of Muziwodumo Miza will be used in support thereof.’

[4] Mr Muziwodumo Miza (Mr Miza) is the public prosecutor who appeared for the applicant and who prosecuted the second respondent. He is the same person who deposed to the founding affidavit in these review proceedings. He is also the person who drew the applicant’s heads of argument. Thankfully, despite his name appearing on the heads of argument, he is not the counsel who appeared before us to argue the matter, as it is obviously totally undesirable that counsel should personally argue a matter in which he or she has deposed to the founding affidavit. That is because: ‘... if he is a witness he compromises his capacity to give the conduct of the case his objective professional attention.’¹

[5] In his founding affidavit, Mr Miza states that the first respondent erred in acquitting the second respondent and states that:
‘As such, I now make an application for the review of the ruling made by the First Respondent acquitting the Second Respondent.’

[6] The aim of the review application is therefore to set aside the acquittal of the second respondent. Mr Miza goes on to set out what he considers to be the facts of the matter and then indicates that after the State had closed its case, the second respondent sought a discharge in terms of the provisions of section 174 of the Criminal Procedure Act 51 of 1977 (the Act), which was refused by the first respondent. The second respondent then immediately closed his case without testifying or calling any witnesses and was duly acquitted.

[7] In his founding affidavit, Mr Miza quoted from the judgment of the first respondent as follows:

‘But the standard practice is that in an accident a report is compiled, accompanied by a sketch plan that would show the position of the various vehicles and persons affected by that accident. Some cases even need some photos to support the evidence. Even in the inspection in loco, the evidence of the state witnesses was not backed up by any drawings. This deficit has left the court with a doubt as to how many vehicles were involved in this

¹ *Beyleveld v Patel NO and others* [2006] ZAECHC 66 para 16.

accident. Was the vehicle of the accused the only vehicle to have been involved in that accident, or the vehicle of the accused hit by another vehicle and during that the vehicle of the accused hit the motorcycle from the back so as to cause the subsequent death of the deceased. If the court has any doubt, the accused stands to benefit. The accused is, in the circumstances, found not guilty and discharged.'

[8] That, essentially, is where the founding affidavit ends and constitutes the high water mark of the grounds for the review application.

[9] From the foregoing, it is plain that Mr Miza is dissatisfied with the finding of the first respondent. He believes that the second respondent ought to have been convicted on the evidence led. While the notice of motion alleges that the first respondent committed a gross irregularity and misdirection when acquitting the second respondent, what that gross irregularity was, is not identified at all. No irregularities in procedure are identified in the founding affidavit. The complaint of the applicant appears to arise solely from the judgment of the first respondent and the decision to which he came.

[10] As a general proposition, dissatisfaction with a decision does not found a review but an appeal. The distinction between an appeal and review was set out in *Tikly and others v Johannes NO and others*.² The court in that matter described an appeal as existing either in the wide or the narrow sense. An appeal in the wide sense involves a complete re-hearing and a fresh determination on the merits, with or without additional evidence. An appeal in the strict sense involves a re-hearing on the merits which is limited to the evidence on which the decision under appeal was given and 'the only determination is whether that decision was right or wrong'. A review, on the other hand, is not intended to determine whether the decision was correct or not, but whether the decision maker exercised his or her 'powers and discretion honestly and properly'.³ It accordingly follows that a review is not intended 'at correcting a decision on the merits' but 'is aimed at the maintenance of legality'.⁴

² *Tikly and others v Johannes NO and others* 1963 (2) SA 588 (T).

³ *Ibid* at 590F-591A. See also *Cell C (Pty) Ltd v Commissioner, South African Revenue Service* 2022 (4) SA 183 (GP) para 9.

⁴ *Pretoria Portland Cement Co Ltd and another v Competition Commission and others* 2003 (2) SA 385 (SCA) para 35.

[11] As a rule of thumb, therefore, a review considers whether a decision is lawful, whereas an appeal is concerned with whether it is correct.⁵ A review is ultimately concerned with process and regularity, and this is determined by the record and the reasons given.⁶

[12] The decision taken by the first respondent is accordingly not reviewable in the absence of any identified irregularity. I am aware of the judgment of Levinsohn DJP in *DPP KwaZulu-Natal v The Regional Magistrate, Vryheid*,⁷ in which he permitted the review of an acquittal that had been granted in the regional court. In my view, that matter is distinguishable from the facts of this matter. Unlike in this matter, there were grounds upon which a review could be considered. The learned judge identified them as follows:

‘Firstly, the magistrate’s decision to release Sithole from undergoing any further cross-examination. Secondly, to expunge this uncompleted testimony and thirdly to constructively close the State case.’

There are no such grounds identified by the State in this matter. The ground of review is the decision itself.

[13] While I have indicated that an appeal is the appropriate way to challenge a decision in a criminal matter in the absence of procedural irregularities, I do not wish to be understood as saying that is what the State ought to have done in this matter or that it has prospects of success if it does so. In my view, the decision of the first respondent is also not appealable. In our law, the policy has traditionally been that an acquittal of an accused person by a competent criminal court is regarded as final. If an accused is found not guilty, for example, because of a deficiency in the evidence led by the State, he or she should not be harassed by a second prosecution.⁸ In *Magmoed v Janse van Rensburg*,⁹ the Supreme Court of Appeal indicated that it was concerned by the prospect of an accused person should not be

⁵ *Liberty Life Association of Africa v Kachelhoffer NO and others* 2001 (3) SA 1094 (C) at 1111A.

⁶ *Cell C (Pty) Ltd v Commissioner, South African Revenue Service* 2022 (4) SA 183 (GP) para 9.

⁷ *Director of Public Prosecutions, Kwazulu-Natal v Regional Magistrate, Vryheid and Others* (AR 397/2007) [2009] ZAKZPHC 10 (24 March 2009).

⁸ *S v Makopu* 1989 (2) SA 577 (E). On the issue of double jeopardy see also Jordaan: ‘Appeal by the prosecution and the right of the accused to be protected against double jeopardy: a comparative perspective’ XXXII CILA 1999.

⁹ *Magmoed v Janse van Rensburg and others* 1993 (1) SACR 67 (A).

placed in jeopardy of a conviction more than once. The interests of justice proclaim that there should be finality in criminal proceedings.

[14] Presently, the State only has a right of appeal in a criminal matter on an issue of law where there has been an acquittal in a lower court.¹⁰ The concept of a 'question of law' is generally interpreted narrowly. In *Magmoed*,¹¹ the Supreme Court of Appeal confirmed this narrow approach and cautioned that a broad interpretation of this concept:

'... would be opening the door to appeals by the prosecution against acquittals, contrary to the traditional policy and practice of our law.'¹²

The Supreme Court of Appeal held further that the reasonableness of an acquittal based upon the strength of the evidence led at a trial is not a proper basis for an appeal by the State, as the reasonableness of a verdict of not guilty inherently amounts to a question of fact. This is because such a verdict deals with the question of whether a factual foundation exists for the application of a legal rule.¹³

[15] It therefore appears that while the decision taken by the second respondent is not reviewable, it is also not appealable in the hands of the State.

[16] For these reasons, I would propose that the review application be dismissed.

MOSSOP J

¹⁰ Section 310(1) of the Act.

¹¹ *Magmoed v Janse van Rensburg and others* 1993 (1) SACR 67 (A).

¹² *Ibid* at 101H.

¹³ *Ibid* at 96G-I. See also Jordaan: 'Appeal by the prosecution and the right of the accused to be protected against double jeopardy: a comparative perspective' XXXII CILA 1999 page 11.

I agree:

E BEZUIDENHOUT J

APPEARANCES

Counsel for the applicant	:	Mr R du Preez
Instructed by:	:	Director of Public Prosecutions Durban
Counsel for the first respondent	:	No appearance
Counsel for the second respondent	:	No appearance
Date of argument	:	13 October 2023
Date of Judgment	:	13 October 2023