

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

Review no: R 16/2022

Magistrate court Case: A 1115/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THE STATE

and

THABISO ELVIS MOKOENA

CORAM: LOUBSER, J et MOLITSOANE, J

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 04 MAY 2022

[1] This matter, together with another one under case number A864/2021 were sent on special review under cover of a letter titled '*Reasons in terms of section 304(4) Act 51/1977.*' This judgment is only confined to the proceedings in case number A1115/2020.

[2] The accused was arrested on 5 September 2020 and made his first appearance before court on 7 September 2020. He was charged with the following

crimes: crimen iniuria, assault with intent to do grievous bodily harm and malicious injury to property.

[3] Following his first appearance he made further numerous appearances. The record reveal that it was only on 1 February 2022, about fifteen months after his first appearance that charges were put to him to which he pleaded not guilty. The accused is not entirely innocent as to the delay in these proceedings because at some stage two warrants for his arrest were authorized due to his non-attendance at court. It appears that on 1 February 2022 evidence was led and the case became a so called 'part- heard'. After the matter was postponed the case never proceeded as the presiding officer retired from active service and was and is still apparently ill, thus unable to finalise these proceedings.

[4] In the letter accompanying this case the Acting Senior Magistrate says:

1. *"The two above matters are part-heard before Additional Magistrate, Kroonstad, Mr Viljoen. He has since retired effective from 31 March 2022.*
2. *The accused in the two matters are in custody.*
3. *It was brought under my knowledge that immediately prior to his retirement and even to date; he was and is still not well. It is unknown as to when he will be medically fit to finalize his part- heard matters.*
4. *In light of the uncertainty alluded to in the preceding paragraph and the continued detention of the accused in these matters, I request that the Judge on Review make the following orders:*
 - i. *Set aside the entire proceedings in these matters,*
 - ii. *Order that the trials start de novo², or*
 - iii. *Any other order necessary under the circumstances."*

[5] It is necessary at the onset to make the following remarks:

- i. The original or certified record of the proceedings was not sent together with this review. Although this review is not brought in terms of section 302 of the Criminal Procedure Act 51 of 1977, (the CPA) it is my considered view that it is proper that the original or a copy certified by

the clerk of the court be transmitted to the review court as envisaged in section 303 of the CPA;

- ii. The record of the proceedings is incomplete. The transcribed record reveal that the accused pleaded to the charges on 1 February 2022. It is not clear from the record if any evidence was led. I am however tempted to believe that the evidence was led having regard to the cryptic notes of the Honourable Magistrate on that day. And as a result the case became part-heard. There is no record of the proceedings for that day. The following inscription appears on record which fuels my temptation that the evidence was led:

“Date: 1 February 2022

Acc. Pres. Confirm ID

Dig Rec

14h00 Mr Mahanke not feeling well.

Rem 17 February 2022

I/C

part Heard

Witnesses Terrence Oliphant

Gountry Nomembe O/W.”

[6] Notwithstanding the incompleteness of the record I am of the view that the interests of justice demand that this court should deal with this review as a matter of urgency. The record of the proceedings has no bearing on the reason for sending this matter on review. The presiding officer seized with the matter is sick and it is unclear as to when he will be in a position to proceed with this case.

[7] The accused in this matter is still in custody. The record reveals that on 8 October 2021 the state successfully applied for the cancellation of the bail of the accused following his failure to appear before court and he has been in custody since. It is thus clear that failure to finalise this matter greatly prejudices the accused. The delay in finalising these proceedings negatively affect his personal liberty and freedom.

[8] The accused is entitled to a speedy trial. Section 35(3)(d) of the Constitution entrenches this right and provides as follows:

“Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.”

[9] Over and above the right to a speedy trial the accused is entitled to a verdict once he has been made to plead to these charges.

[10] While from the letter of the Honourable Acting Senior Magistrate it appears that the review is brought in terms of section 304(4) of the CPA, this cannot be correct. This section “makes provision for the review of criminal cases tried in a magistrate’s or regional court, which are not subject to automatic review. The essential elements of this provision are that it involves (1) any criminal case;(2) in which a magistrate has imposed a sentence; (3) that is normally not reviewable; and (4) that is ‘not in accordance with justice¹’”

[11] Review in terms of section 304(4) thus takes place where the criminal proceedings in the lower court have been finalised and a sentence imposed. Section 304A is also not applicable as the provision is only applicable after conviction but before sentence. In the case before us, the accused has neither been convicted nor sentenced. The High Court has, however, an inherent jurisdiction to review the proceedings of the lower court and it is on this basis that this matter will be dealt with.

[12] In *S v Skhosana and Others*² several matters were sent for special review to the High Court as the matters could not be finalised due to the unavailability of the presiding officer who was involved in a near fatal accident. Some of the cases were partly heard with the accused having pleaded but not yet convicted. Having dealt with the case law in circumstances where the accused had not been convicted, the court ultimately held that the unavailability of the presiding officer rendered the earlier proceedings a nullity *ex lege*. The court further held that the proceedings

¹ Commentary on the Criminal Procedure Act, De Toit et al 30-22.

² (41/2193/2008[2014] ZAGPJHC 223- (18 September 2014).

should commence de novo before another magistrate and in such a case there was no need for intervention of the High Court.

[13] In *Skhosana*³ the court said:

“Our courts have held on several occasions that the prolonged incapacity of a presiding officer may warrant the setting aside of the proceedings before such presiding officer so that, in the interests of justice, a trial de novo can commence before another presiding officer. Each case will depend upon its own circumstances (*S v Makoni and Others* 197(1) SA 169(R); *S v Chigumbu* 1980(1) SA 927(Z); and *S v Tlailane Another* 1982(4) SA 107 at 110H-111A.”

[14] It is apparent that the presiding officer in this case is sick. It is not clear when he will be healthy again to proceed with this matter. The delay in finalising the case infringes the constitutionally entrenched right of the accused to a speedy trial. It is in the interests of justice that these proceedings should be set aside. I accordingly propose this order:

ORDER

1. The proceedings in Magistrate Court: Kroonstad case number A1115/2020 are hereby reviewed and set aside;
2. The accused is to be released from custody immediately.
3. The case is to be referred to the Director of Public Prosecutions to decide whether to institute fresh proceedings against the accused or not.

P.E. MOLITSOANE, J

I concur and it is so ordered

P. J. LOUBSER, J

³ Supra para [15].