THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

HIGH COURT REF NO: R29/2022

MAGISTRATE CASE NO. K164/2022

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) OF INTERESTS TO MAGISTRATES: YES
(4) REVISED.

08 December 2022 .....
DATE SIGNATURE

In the matter between:

THE STATE

And

SAMORA KANSAS MASHABA **(THE ACCUSED)**

REVIEW JUDGMENT

RATSHIBVUMO J

[1]. This is a bizarre case in which a man who did not stand trial or face any charge, found himself being convicted and sentenced by a court of law. How this came about would be difficult to explain as there is not even a proper record of proceedings that captured the events of 22 July 2022 at Nkomazi District Court held at Komatipoort. The presiding Magistrate noted that the court recording machine was not operational that day. What is contained in the file falls short of long hand recording of the proceedings. The file content is referred to by the Magistrate as "a record reconstructed from the notes". There is no explanation as to why there was a need for the record to be reconstructed or who else took part in the reconstruction besides the magistrate herself.

[2]. What can be gleaned from the submitted "reconstructed record" is that the accused was summoned to appear in court on 22 July 2022 in order to face a charge of contravening section 31(1) of the Maintenance Act, no. 99 of 1998 (the Maintenance Act); following his failure to comply with an order made against him to make payments for maintenance of a child. Before this matter was called, the accused approached the Public Prosecutor and made arrangements that he would pay off the amount in arrears totalling R6 000.00 in two instalments of R3 000.00 each. The first payment was to be made later that day and another one to be made in September 2022, which was just over a month away. The Public Prosecutor was happy with this arrangement and called the case for a postponement to allow the accused to pay the maintenance arrears.

[3]. When the case was called, the Public Prosecutor informed the court of the arrangement he reached with the accused and requested it to confirm this and if he admitted that he owed R6 000.00 in arrears for maintenance of the child. In the process of asking this, things took an about turn when out of nowhere,

the accused suddenly heard the court pronounce that he was found guilty as charged and he was called upon to address it in mitigation.

[4]. When the Public Prosecutor was invited to address the court for sentencing purposes, he had no submissions to make. At this stage of proceedings, the Magistrate contemplated converting the "trial" into an inquiry in terms of section 41 of the Maintenance Act. She invited the Public Prosecutor to comment on this, but the offer was not accepted, as the State made no submission in this regard. The court then decided on its own to convert the proceedings into an inquiry as envisaged. For some unexplained reason, the accused was still sentenced with the "reconstructed record" reflecting, "see J15 for sentence." I suppose the Magistrate meant J605 instead of J15.

[5]. The following is reflected as the sentence on J605:

> "Accused fined R6 000.00 (six thousand rand) or 6 (six) months imprisonment. [Sentence amended in terms of S 298 of CPA 51/1977]. Matter converted to a Maintenance Court in terms of S 41 of the Maintenance Act 99/1996 (sic). Arrears deferred: R2 000.00 on the 29/07/2022 and R4 000.00 on/before 29/09/2022."

[6]. After reading this inscription several times, I still struggle to understand the sentence imposed on the accused. Is the fine of R6 000.00 the outcome of the sentence after it was amended in terms of section 298 of Act 51 of 1977? If not, what is the amended sentence? I can only wonder if the clerks of the court who had to implement this, understood it any better. It seems the Magistrate realised after imposing the sentence that after the conversion of a "trial," the accused should not have been sentenced. She may have decided to order the accused to rather pay the maintenance arrears instead. The inscription does not reflect this though, I merely make presumption from the words, "arrears deferred." It is not clear as to whether the order to pay the arrears amount is over and above the fine or it was meant to be the new sentence she referred to

when she wrote, “see J15 for sentence”. But surely an order to pay the arrears amount cannot be construed to be a sentence.

[7]. Of importance though is that the Magistrate decided to have the matter sent on special review. This must have been in terms of section 303(4) of the Criminal Procedure Act, no. 51 of 1977. The covering letter thereof is dated 25 July 2022. It is not clear as to what caused her to submit the matter on review or whether her hand was forced by any other person. She however raised a query as to whether it was procedurally correct for an accused to be convicted through merely admitting the elements of a crime without the State putting a charge against him and without affording him a chance to plead. In conclusion, she concedes by remarking that the proceedings were not in accordance with the law. She only fell short of asking that they should be set aside.

[8]. Office of the Director of Public Prosecutions (the DPP) Mpumalanga, was requested to opine on the proceedings and the query raised by the Magistrate. The Court is indebted to Adv Mpolweni, the Deputy Director of Public Prosecutions who together with Adv Lusenga, submitted comprehensive views. This judgment acquired its shape from their profound submissions. It suffices for present purposes to state that the DPP agrees that the proceedings were not in accordance with justice and that they should be set aside.

[9]. It is important to note that the DPP understood the sentence that was imposed as “a fine of R6 000.00 or six months’ imprisonment.” This conclusion was reached by the DPP without any trouble involving the interpretation reflected in paragraph 6 above. This amplifies my worry on how the Clerk of the Court understood the sentence to be.

[10]. Some of the basic rights enshrined in our Constitution are contained in section 35 which provides,[1]

> "Every accused person has a right to a fair trial, which includes the right,
>
> To be informed of the charge with sufficient detail to answer it.
>
> To have adequate time and facilities to prepare a defence.
>
> To adduce and challenge evidence."

[11]. These basic rights need to be read alongside the provisions of section 105 of the Criminal Procedure Act, which provides,

> "105 Accused to plead to charge
>
> The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106."

[12]. When a criminal trial does not commence through the charge(s) being put to the accused and affording him an opportunity to plead thereto, everything that follows is not a trial in term of the laws of the country. A trial that is not preceded by a charge being put and the accused pleading is a mistrial, a gross irregularity and a misdirection on the part of the presiding officer. It is this misdirection that invites interference by the Review Court without any further consideration.

[13]. In *S v Gumbi and Others*,[2] Ponnan JA said,

> "In terms of s 105 the charge must be put to an accused by the prosecutor before the trial is commenced. As soon as the charge is put to an accused he or she must plead to it. The plea determines the ambit of the dispute between the accused and the prosecution. It is only after the accused has pleaded to the charge that the *lis* is

[1] See section 35(3)(a), (b) & (i) of the Constitution of the Republic of South Africa.
[2] 2018 (2) SACR 676 (SCA) at para 10.

> established between the accused and the prosecution. It is the function of the prosecuting authority, not the court, to decide the charges upon which an accused should be brought to trial and the function in that regard extends up to the time when a plea is tendered and the decision has to be made whether the plea is to be accepted or not."

[14]. Ponnan JA also referred with approval to *S v Mamase and Others*[3] where the Supreme Court of Appeal said,

> "At the time that the issue was raised and decided in the court below the appellants had not been asked to plead. Thus there was no plea in terms of s 106(1)*(f)* of the CPA that raised the absence or presence of jurisdiction as a justiciable issue for decision. A plea in criminal proceedings is peremptory in terms of s 105 and it is done in terms of s 106(1) and (2). It is therefore clear that the point that was decided was not an objection to the indictment, was not a reservation of a question of law and was not a plea of lack of jurisdiction."

[15]. It is clear from the above that the proceedings were irregular and should be set aside. I have also noted that the State did not take part in the prosecution and the conviction of the accused which appear to have come from one source being the court. In so doing, the Magistrate failed to promote the judicial independence which stems from the separation of powers, with the prosecution authority on one side and the judicial one on the other. The Magistrate also failed to protect the accused's constitutional rights in this matter. She could have simply refused a request for a postponement if the that did not appeal to her. This would have afforded the State an opportunity to choose between withdrawing the charges or commencing with the trial through putting the charges against the accused.

[16]. The last issue of some great concern to the court was not raised in the special review. It is with regard to the passing of the sentence even after the

[3] 2010 (1) SACR 121 (SCA) at para 7.

trial was converted into an inquiry in terms of section 41 of the Maintenance Act. The said section provides as follows,

> "41. Conversion of criminal proceedings into maintenance enquiry.
>
> If during the course of any proceedings in a magistrate's court in respect of-
>
> (a) an offence referred to in section 31(1); …
>
> it appears on good cause shown that it is desirable that a maintenance enquiry be held, the court may, of its own accord or at the request of the public prosecutor, convert the proceedings into such enquiry."

[17]. The enquiry referred to above would be as provided in section 10 of the Maintenance Act. The kind of orders that the court can issue are to be found under section 16 of the same Act. A sentence can only be imposed after a criminal trial and not after an enquiry. It was another misdirection on the part of the Magistrate to impose a sentence after the conversion of the "trial" into an enquiry.

[18]. This is one of the cases that expose the need for continuous peer training on the part of the judiciary. Mistakes such as this have a potential to bring the judiciary into disrepute and can cause grave injustice to members of the public with serious repercussions to judicial officers, including but not limited to being sued. It is incumbent upon members of the judiciary to always remember the oath of office we took, in which we swore to protect every citizen's rights enshrined in the Constitution and apply justice to all without fear, favour and prejudice. Every case we handle in court should be accorded the necessary weight because while it may appear to be a trivial matter in our view, it could mean everything to the litigants appearing before us.

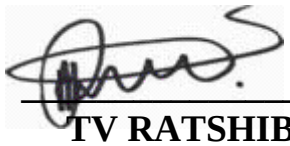
[19]. I suppose this case also signifies the need to have well trained and experienced magistrates to preside in Family or Maintenance Courts. For too long, these courts have been neglected alongside the Traffic Courts as courts

where only the inexperienced magistrates would be allocated to work. It is in these courts where persons of various classes of our community, some of whom, very popular often appear. Unless this trend is changed, the embarrassment that flows from the inaction could just be beginning. I will refer this matter to the Chief Magistrate, Mpumalanga so that she is able to identify the areas of need when it comes to training of judicial officers including but not limited the one who presided over this case.

[20]. I therefore propose the following order.

[20.1] The conviction and sentence are set aside.

[20.2] The Registrar should make a copy of this judgment available to the Chief Magistrate, Mpumalanga.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

I agree

D GREYLING-COETZER
ACTING JUDGE OF THE HIGH COURT

08 DECEMBER 2022