



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

- (1) REPORTABLE: ~~NO~~/YES
(2) OF INTEREST TO OTHER JUDGES: ~~NO~~/YES
(3) REVISED.

REV27/2021

28/04/2021 *M/s (Signature)*
DATE SIGNATURE

KAGISO RAKIMANA

And

THE STATE

REVIEW JUDGMENT

Summary: Special Review- Criminal procedure Act, 1977- Quaere whether a retired

Magistrate 'available' to conclude untermiated trial he/she is seized of prior to retirement- whether proceeding's should be declared a nullity and start *de novo* before another presiding officer- expeditious commencement of and speedy conclusion of trial is a pinnacle of fairness of trial within the purview of S.35 (3) (d) of the Constitution- S. 9 (7) (a) of the Magistrate's court Act 1944 provides for continuity of officers 'unavailable' to dispose of untermiated trial- once the accused has pleaded to a charge and evidence led, except if it is absolutely impossible to dispose of the matter, the accused is entitled to acquittal or conviction - *in casu*, presiding officer not permanently debilitated to conclude trial still pending - S. 118 of Act 51 of 1977, and interests of justice finds application.

MG PHATUDI J:

[1] This matter came before us on special review at the instance of the Head of Magisterial District of Molemole, Mr M.J Ramothopo. The facts giving rise to the enquiry are briefly set out hereunder.

1.1 The accused was charged in the Magistrate Court for the District of Molemole, held at Morobeng of 2 counts of theft, and the alternative counts of forgery, and uttering. (Case no. C314/2014).

1.2 The trial proceedings against the accused commenced in earnest as early as 2014. The case was, however, punctuated by several postponements albeit for a variety of reasons not relevant to this enquiry. The interruptions were from both the side of the state and in some, instances, due to the accused's

own default. These included, inter alia, disruptions occasioned by hard alert Level 5 National Lockdown¹, Covid-19 global pandemic

1.3 It appears from the record provided by the learned Magistrate who referred this matter on special review that the accused, who was legally represented by attorney Mr Papole, pleaded not guilty in respect of all four counts, and in the same vein, exercised his right to remain silent. The plea was tendered before the Magistrate, Mr M.D Maluleke, who then was the Presiding Officer in the trial court on 19 July 2016.

[2] The record also reveals that several witnesses had already testified before the learned Magistrate Mr Maluleke, and on the last hearing date on 18 May 2020, the proceedings, were, once again, postponed to 26 September 2020, even though the record erroneously referred to 26 September 2018 (Bundle, P489, Record).

[3] Mr Ramothopo, wrote to inform this court that the trial was re-enrolled for further evidence on 02 February 2021.

[4] Prior to the resumption of trial on 02 February 2021, Mr. Ramothopo intimated that he invited the retired Magistrate Mr. Maluleke, to resume trial, but the latter allegedly became reluctant to proceed to trial due to an email penned by Ms. Busi Nkosi, the Senior Magistrate, dated 14 August 2020.

[5] I quote an extract from the contents thereof.

"I discussed the issue of your part heard matters with Chief Magistrate and the conclusion was that the matters (sic) to start *de novo* as your appointment as a Magistrate ceased on 31 July 2021"

¹ Record, P120-124- (Bundles of record not indexed per volumes)

- [6] It was the contents of this email as addressed to the retired Magistrate Mr. Maluleke, that gave rise to the present review proceedings.
- [7] A perusal of the record, (consisting of 5 securely bound Bundles of 488 paginated pages) reveals that the trial was overly protracted. The state called 5 witnesses, with Warrant Officer Mashudu David Tshisikawe being the last to testify on 31 July 2018. The latter retired from the SAPS's employment service. Furthermore, the state has not yet closed its case.

THE ISSUE:

- [8] At issue in the present enquiry is whether or not should the untermiated proceedings be set aside as a nullity and a trial *de novo* be commenced with?

THE APPROACH:

- [9] The starting point, in my view, should be the constitutional imperatives laid down in S. 35 (3) (d) of the Constitution.² (RSA) which provides that:-

SECTION 35 (3):

"Every accused person has a right to a fair trial, which includes the right—

(a)-----

(b)-----

(c)-----

(d) to have trial begin and conclude without unreasonable delay."

- [10] The commencement of and a speedy conclusion of the trial is in terms of S.35 (3) (d) the pinnacle of fairness in every criminal proceedings.
- [11] The aforementioned proposition stems from the premise that an accused person is constitutionally entitled to a speedy 'conclusion' of the trial without 'unreasonable

² The Constitution Act 108 of 1996, as amended

delay 'in order to enjoy a fair trial. Absent the fulfillment of the right enshrined in S 35 (3) (d), I am unable to appreciate how fairness of the trial can possibly be achieved.

- [12] Furthermore, an accused who pleads to a charge, except for raising a plea ousting the court's substantive jurisdiction, is in appropriate instances, entitled to a return of verdict. This is, of course so, where there are exceptions otherwise provided for by the Criminal Procedure Act or any other law in particular. There are, however, generally exceptions to the above stated principle.³ Each case will naturally depend on own merits.
- [13] The provisions of S.106 (4), properly interpreted import the meaning that save for as stated above, (Para: [12]) an accused who has already pleaded to a charge, such as in the present instance, may demand an acquittal or conviction. This is in line with the common law principle that trial proceedings has to be commenced with and be finalized as expeditiously as possible. This time celebrated principle is in our modern times, vindicated by S.35 (3) (d) of the Constitution⁴.
- [14] The foregoing observation is, as already shown, subject to the exception that where the accused has pleaded the court's lack of jurisdiction, he may not acquire the legal benefit of the said principle as this is simply an interlocutory plea where the guilt or innocence of the accused does not arise at this stage of the proceedings.
- [15] In the instant case the issue is whether or not the presiding officer who prior to his retirement and seized of the matter is 'available' to finalize the trial pending. In other

³ S. 106 (4) Act 51 of 1977, as amended. Exceptions are under S.77 (6) in cases of state president's patient or where there has been a separation of trials in terms of S.157 (2) of the Act.

⁴ Bothma v Els & Others 2010 (2) SA 622 (CC)

words, does the fact of the Magistrate's retirement legally preclude him from bringing the trial to a conclusion?

- [16] The view I take of the issue is that, the fact that the accused has already pleaded to the charges, and that extensive evidence has also been led, to that extent, he should be entitled in terms of the provisions of S.106 (4) read with S118 of the Act, to a verdict.
- [17] The only exception to the foregoing observation is where the presiding officer before whom proceedings had commenced, was 'unavailable,' and no evidence adduced, in which event, the matter could be resumed before another officer of the same court⁵. But, in the present instance, however extensive evidence had been led by several witnesses for the prosecution, before the same magistrate, Mr. Maluleke.

IS THE SAME PRESIDING OFFICER AVAILABLE?

- [18] The question whether the judicial officer before whom proceedings had commenced and sized of the matter is available is a question of fact depending invariably on the circumstances and merits of each case. It is common cause that Mr Maluleke had since retired from active service as a Magistrate. His retirement took effect whilst the trial before him was not yet finalized, and even more so, that the state has not yet closed its case, nor the accused elected either to testify in his defence, or chose to remain silent or even close his case.

LEGAL FRAMEWORK:

⁵ S v Mayisa 1983 (4) SA 241 (TPD).

[19] The provisions of S 9 (7) (a) of the Magistrate's Court Act 32 of 1994 as amended⁶, is the relevant platform regulating the vacancy of a presiding officer, who was otherwise seized of a pending matter, before the vacancy or reason for his/her unavailability had arisen. The relevant section provides that:-

"A magistrate appointed in terms of sub-section (1) who presided in criminal proceedings in which a plea was recorded in accordance with section 106 of the Criminal Procedure Act (51 of 1977), shall, notwithstanding his/her subsequent vacation of the office of magistrate at any stage, dispose of those proceedings and, for such purpose, shall continue to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of those proceedings"

19.1 What S9 (7) (a) and (b) entail, among other things, is the following:-

- (a) There must have been a plea recorded; and
- (b) The plea recorded and evidence led before a magistrate who participated in the proceedings before whom the accused pleaded in accordance with S.106 of the Act; and
- (c) The proceedings must not have been finally disposed of when the tenure of the officer concerned as a magistrate became vacant.

19.2 Upon establishment of the above jurisdictional factors, the outgoing magistrate shall notwithstanding his/her subsequent vacation of the office of magistrate at any time, (1) bring to a conclusion those proceedings at the court where he/she exercised jurisdiction prior to departure from or at any agreed court and, (2) shall continue to hold office in respect of the matter during which

⁶ The relevant amendment was introduced by the Magistrate Act 90 of 1993 read with S.10 of Act 32 of 1994, as amended.

he/she was necessarily engaged in connection with the disposal of those proceedings in which the officer participated, (3) and which proceedings were not disposed of.

19.3 The foregoing exemptions also apply to an application for leave to appeal in respect of such proceedings⁷.

[20] The weight of authority I have come across, it would seem to me to favour the view that once an accused has pleaded to a charge, except where specifically provided for in the Act, or any other law, or where it is absolutely impossible to finalise the pending trial, for instance, on account of death or justified instances of recusal of the presiding officer, **he/she shall be entitled to a verdict of either guilty or not guilty by the judicial officer who commenced the trial from origin. (Own emphasis)**

See, *S v Gwala & Others*,⁸

[21] Applying the foregoing principles to the facts in the instant case, I find nothing that debars Mr. Maluleke to resume the trial to its conclusion regard being had to the provisions of S9 (7) (a) of the said Act. I may add further that the fact that Mr Maluleke went on retirement after the commencement of trial, that alone does not disqualify him from properly resuming the untermiated hearing in the district where proceedings begun or in other agreed district.

[22] In order to give effect to the above proposition, the Chief Magistrate or head of the district court concerned, may provide the necessary support to assist the officer in terms of S.9 (7) (a) to exercise his/her judicial powers in that court.

⁷ S. 9 (7) (a) (i) of the Magistrate's Court Act 1944.

⁸ 1969 (2) 227 [N.P.D.] at 230 D-E.

- [23] That said, it is accordingly not competent for another Magistrate to hear the pending case *de novo* merely because the officer before whom the trial was commenced, is 'unavailable' due to being pensioned off from active service as a Magistrate.
- [24] Similarly, it is only in such special circumstances as death, recusal, dismissal, resignation or even mental aberration that can render resumption of trial by the affected officer impossible to proceed with. In such event, the proceedings become a nullity and the trial could be heard *de novo* before another judicial officer. The present review does not, in my view, fall within the bracket of one such ill-fated proceedings. The officer seized of the matter cannot be said to be 'unavailable' or debilitated in the context of the special circumstances referred to

See also, S v Mahlangu⁹

- [25] There is furthermore yet another special statutory consideration to give credence to the above proposition.

S.118 of the same Act reads 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'.

- [26] In the instant case an examination of the record is replete with information that evince nothing to suggest that Mr. Maluleke, the Officer concerned, is absolutely 'unavailable' or that he is in anyway debilitated to inhibit his resumption of trial to a speedy conclusion.
- [27] In answer to the question I posed in paragraph [18] above, I am of the view that the presiding officer Mr. Maluleke should be available to resume the uninterminated

⁹ 1993 (1) SACK 183 (B) at 186

proceedings. There is thus no need to have such unterminated proceedings set aside and permitting the trial to start *de novo*. To do so would offend the accused's right to a speedy commencement of and conclusion of his trial envisaged in S. 35 (3) (d) of the Constitution. Not only that, the accused is, moreover, entitled to an acquittal or conviction in accordance with S.106 (4) of the Act, taking into account also the interests of justice.

[28] In the light of these considerations, where the unavailability of the judicial officer who has heard unterminated proceedings is absolute due to event of death, dismissal or discharge from employment, recusal, mental derangement, resignation and such non-availability becoming **absolute**, such that even the invocation of S. 9 (7) (a) of the Act would not redeem the situation, I am firm in my view that the relevant proceedings should be set aside and start *de novo*. *In casu*, S.9 (7) (a) is a mechanism that may be invoked in the circumstances to restore the status *quo ante*.

[29] In a situation such as this, does it really mean that each time when this kind of a predicament arises in our magistrate's courts, the High Court's intervention would be required to review and set aside or confirm the resumption of trials in the circumstances alluded to?

The answer, in my view, is a definite no.

[29] The head of the Magistrate's court concerned is obliged to apply the "**unavailability or non-availability**" test to decide whether or not to declare the unterminated proceedings a nullity and the trial to start afresh. The provisions of S.9 (7) (a) should always be borne in mind when the decision is made. I find no justification that a High Court order should always be sought in order to avoid unnecessary delay in the

the speedy finalization of the trial. See, S v POLELO¹⁰ See also, S v Hanekom (469/2003) [2003] ZAWCHC 67 (03.12.2003) para: [17], per Yekiso, J

[30] For all the reasons provided, and in order to ensure that the accused's right to a speedy finalization are not encroached upon, it is directed that Mr Maluleke be advised of this judgment on the matter, and he be administratively supported with all available resources to resume the trial to conclusion immediately.

For that, I make the following order.

ORDER:

- (a) The trial proceedings pending under case no: 314/2014 Molemole District, held at Morobeng be resumed, before Magistrate Mr. M.D Maluleke with immediate effect.
- (b) The Registrar of this court is directed to forward a copy of this judgment to the chief Magistrate, Limpopo and to all heads of Magistrate's court, Limpopo Province.



MG PHATUDI

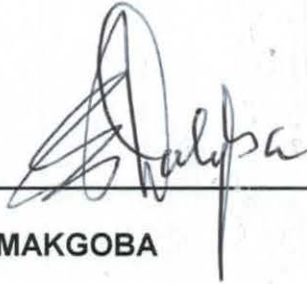
JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

¹⁰ 2000 (2) SACR 734 (NC) at 736 C-D

See Du Toit et al "commentary on Criminal Procedure Act at 15-37.

I agree



E.M. MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

DATE ISSUED: 28 APRIL 2021