

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

REV NO: 43/2020

NEBO: RCN 32/19

(1) REPORTABLE: ~~NO~~/YES
 (2) OF INTEREST TO OTHER JUDGES: ~~NO~~/YES
 (3) REVISED.
 09/09/2020
 DATE SIGNATURE

In the matter between

THE STATE

AND

MOTSEDI BUSHY MAKOLA

ACCUSED

 JUDGMENT

KGANYAGO J.

- [1] The accused was charged in the Regional Court sitting at Nebo with the two counts of intimidation in contravention of section 1(1)(b) read with section 2 and 3 of Intimidation Act 72 of 1982, two counts of pointing of fire arm, an antique firearm or airgun in contravention of section 120(6)(a) read with section 1, 103, section 121 and also read with schedule 4 and section 151 of the Fire Arms Control Act 60 of 2000; and one count of *crimen injuria*.
- [2] The accused had pleaded not guilty to all the counts he is facing. He was convicted on 30 September 2019 on two counts of intimidation and one count of *crimen injuria*. He was found not guilty and discharged on two counts of pointing of a fire arm.
- [3] After being convicted of the three counts, the matter was postponed for pre-sentencing reports. On the day on which the defence and the State were supposed to address the trial court on both mitigating and aggravating factors, the defence submitted that the charge (two counts of intimidation) on which the accused was convicted was declared invalid by the Constitutional Court in the matter of **Moyo and Another v The Minister of Police and Others CC174/208, CCT178/2018 [2019] ZACC 40; 2020 (1) BCLR 91(CC) (22 October 2019)**.

- [4] The accused was convicted before the Constitutional Court had declared section 1(1) (b) of the Intimidation Act to be unconstitutional and invalid. The matter has been brought before this court on special review in terms of section 304(4) of Act 51 of 1977 seeking directions whether it will be in accordance with the administration of justice for it to proceed sentencing the accused on the two counts of intimidation.
- [5] I have requested the opinion of the Deputy Director of Public Prosecutions (the DDPP). They have furnished me with a helpful opinion and I am indebted to them. The DDPP is of the opinion that the sentencing of the accused on two counts of intimidation will not be in accordance with the administration of justice. The DDPP has submitted that the conviction on the two counts intimidation ought to be set aside and the matter be remitted to the trial court to proceed with the sentencing proceedings on the charge of *crimen injuria*.
- [6] It is not in dispute that the judgment in the Moyo case was handed down after the accused was convicted of the two counts of intimidation. The question to be determined is whether the order of invalidity in the Moyo's case applies retrospectively to pending trials or appeals.

- [7] The general rule is that there is a presumption against the retrospective operation of a provision, unless it is clearly stated that the provision will operate retrospectively. The order of invalidity in Moyo's case read as follows:

"4. The order of invalidity is retrospective to the extent that it operates in trials or pending appeals based on contravention of section 1(1) (b) of Intimidation Act 72 of 1982 where the right of appeal has not yet been exhausted".

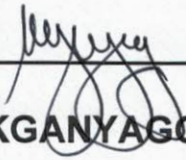
- [8] In paragraph 79 of the Moyo's case the Constitutional Court has held that the order of invalidity will operate immediately on hand-down of the judgment. The declaration of invalidity was not suspended to afford the Legislature to correct the defect. It is clear that the order applies retrospectively to pending trials or appeals where right of appeal has not yet been exhausted.

- [9] The accused has only been convicted but not yet sentenced. His trial has not yet been finalized and he has not even reached a stage where he can exercise his right of appeal. He is therefore covered by the declaration of invalidity of section 1(1) (b) of the Intimidation Act by the Constitutional Court in the Moyo case. I therefore agree with the DDPP that it will not be in accordance with administration of justice for the trial court to continue with the sentencing proceedings in respect of the two counts of contravention of section 1(1) (b) of Act 72 of 1982.

[10] In the result I make the following order:

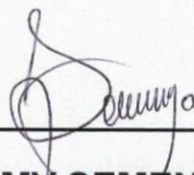
10.1 The conviction in respect of two counts of contravention of section 1(1) (b) of Act 72 of 1982 are reviewed and set aside.

10.2 The matter is remitted to the trial court to proceed with the sentencings proceedings on the count of *crimen injura*.



MF KGANYAGO J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

I agree



MV SEMENYA J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE