



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: R251/2018

In the matter between:

THE STATE

State

and

BOKANG THOLE

Defence

CORAM:

MHLAMBI, J *et* MOLITSOANE J

JUDGMENT BY:

MHLAMBI, J

DELIVERED ON:

28 November 2018

SPECIAL REVIEW JUDGMENT

Mhlambi, J

- [1] This matter came before me by way of special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977. The

query was forwarded to the reviewing judge by the acting senior magistrate under cover of the letter dated 28 September 2018 which reads as follows:

- [1] The matter is sent on review in terms of section 304 (4) of Act 51 of 1977 as upon systematic checks by the Acting Senior Magistrate the following irregularities were detected.*
- [2] The accused was convicted of "failure to appear" and the Magistrate did not give an indication in terms of which section of the Act he found the accused guilty.*
- [3] The defence made submissions on behalf of the accused that the accused failed to come to court on the date in question as the accused believed that the case would be withdrawn against him, and that the investigating officer even called the mother of the complainant who confirmed same. The Magistrate wanted an affidavit to this effect which was not forth coming.*
- [4] The Magistrate seemed to misconstrue the purpose of the enquiry, as the question was not whether the complainant wished to withdraw or not, or even if the submission was true, the question was simply whether there was a reasonable possibility that the failure of the accused was not due to fault on the part of the accused- S v Singo 2002 (2) SACR 160 (CC).*
- [5] In the judgment the Magistrate even seems to accept the submissions of the accused, but wants support in the form of an affidavit, with all due respect, the Magistrate could not saddle the accused with the burden to produce an affidavit which would normally be contained in a docket.*
- [6] The Magistrate seems to convict the accused, not on the failure to appear before court, but because of the accused's belief that he need not have appeared before court, which was not supposed to be the basis of the enquiry, and at most negligent, that coupled with the absence of the section which the accused contravened, has led to my respectful submission that the conviction and sentence be set aside.*

[7] *The Magistrate is currently acting in the Regional Court in Welkom, and I have not solicited his views, my request is that if the Honorable Judge so requires, his views can be sought.*

[8] *Attached hereto the charge sheet and record for the attention of the Honorable Reviewing Judge”*

[2] The proceedings did not appear to be in accordance with justice, with the result that I sent a query to the magistrate wherein I asked the following:

- “1. Request the views of the presiding magistrate to the contents of the letter dated 28 September 2018.*
- 2. The presiding magistrate should also advise whether the accused was present in court when the alleged enquiry was held”.*

[3] The response from the presiding officer was forwarded under cover of a letter dated 31 October 2018 and reads as follows:

- “1) This matter was brought to my attention after it was sent on special review by the Acting Senior Magistrate.*
- 2) The Honorable Reviewing Judge requested my views on the contents of the letter dated 2 September 2018.*
- 3) The said letter referred to above was sent to me incomplete and I requested the Acting Senior Magistrate to resend me the complete letter which she did.*
- 4) My respectful comments to the Honorable Judge’s remarks are as follows:*
- 5) With regard to the second remarks, I submit that the accused was present during the enquiry. I am referring the Honorable Judge to Page 1 lines 5-6 of the transcribed record where the Accused Attorney Mr. Sekonyele requested the Court to approach his client and the Court granted him permission to take instructions.*
- 6) With regard to the first remark relating to the Letter of the Acting Senior Magistrate, my views are as follows:*

- 7) *The record speaks for itself. I did not give an indication in terms of which section of the Act I found the accused guilty. The enquiry I held was in terms of section 170 (2) of the Criminal Procedure Act 51 of 1977. It is in terms of this section because the adjournment was after the accused had appeared before the court and it is the Court that warned him to appear on the next date.*
- 8) *The conviction for Failure to attend Court is in terms of Section of 170(1) of the Criminal Procedure Act 51 of 1977.*
- 9) *In the case of S v Singo 2002 (2) SACR 160 (CC) the Constitutional Court stated that enquiry to be held is for the accused to satisfy the court that there is a reasonable possibility that failure to attend court was not due to fault on his part. The onus rest with the accused. I submit that non-indication of the section does not render the enquiry irregular.*
- 10) *My judgment for not accepting the accused version is not based on the fact that the accused did not produce an affidavit filed in the docket about the withdrawal.*
- 11) *It is the Court that gave the accused the order to return back to Court on the specified date. This is a valid Court order that must be complied with.*
- 12) *I respectfully submit that there was no irregularity and that I applied my mind and judicial discretion properly and the conviction should stand”.*

[4] Section 170 of the Act provides as follows:

- (1) *An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).*
- (2) *The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned, issue a warrant for*

his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding three months”.

- [5] It is so that the conviction is in terms of section 170 (1); and that there may be support for the magistrate’s decision in **State vs. Singo**¹ as suggested. The question that arises is whether the principles, as suggested in that case, were appreciated by the magistrate and correctly implemented, namely, that the accused satisfied the court whether there was a reasonable possibility that his failure to comply with such warning was not due to fault on his part. This creates an evidentiary burden on the accused to raise a reasonable doubt².
- [6] Section 170 corresponds with sections 55(3) and 72(4) of the Criminal Procedure Act which apply to similar cases of persons who have respectively been summoned and warned to appear and who subsequently fail to appear. The court has the same powers as those it has in respect of sections 55(3) and 72(4)³. In **State vs. Bakenlele**⁴, the court was of the view that the failure to ask the accused whether he wanted to testify or call witnesses to explain his failure to appear at the hearing of a case, was a gross irregularity which prejudiced the accused. The implications of the onus on him to give a reasonable explanation must be explained

¹ 2002 () SACR 160

² Singo, supra 176 paragraph 41

³ Hiemstra, s Criminal Procedure Act – Albert Kruger- May 28 22-67

⁴ 1983 (1) SACR 515 (O)

to him. The conviction and sentence were set aside as justice did not prevail. An enquiry in a summary manner as suggested in section 170(2) means that the court must inform the person concerned of its intentions and inform the person there and then to defend himself or to explain why he did not comply with the provisions of section 170(1). The proceedings should afford the accused a fair trial.⁵

[7] In the light of the above, notwithstanding the magistrate's submissions to the contrary; and despite the fact that the accused was legally represented, it is clear that there was a serious irregularity in the proceedings. The matter was handled in a slapdash manner. Both conviction and sentence stand to be set aside.

[8] In the circumstances, the following order is made:

The conviction and sentence are set aside.

MHLAMBI, J

⁵ State v Baloyi 2000 (1) SACR 81 paragraph 29

I concur

MOLITSOANE, J