

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

Review No: 168/2014(B)

In the review between:

THE STATE

And

BOETIE STEVEN MOFOKENG

CORAM: KRUGER, J et MOTLOUNG AJ

JUDGMENT: KRUGER, J

DELIVERED ON: 18 SEPTEMBER 2014

REVIEW JUDGMENT

- [1] This is a special review under section 304(4) of the Criminal Procedure Act 51 of 1977 (the Act) concerning a case in the magistrates' court at Steynsrus where, on 17 January 2013, a witness was convicted of not attending court after having been subpoenaed, and sentenced to a fine of R600 or three months' imprisonment. This fine was paid. On 24 July 2014 the Deputy Director of Public Prosecutions of the Free State sent a letter to the chief magistrate of the Welkom cluster pointing out that the conviction of the witness did not appear to be in order. On 30

July 2014 the magistrate of Steynsrus who convicted the witness furnished reasons for the conviction of the witness stating that in his view the conviction was correct. Thereafter, on 15 August 2014 the senior magistrate of Kroonstad sent this matter to the registrar of this court for special review and requested that the conviction and sentence of the witness be set aside.

- [2] The facts surrounding this case are as follows. The two accused, Johannes Gerhardus Uys, aged 52 years and Hermanus Van Niekerk Uys, aged 18 years, both of the farm Nooitgedacht were summonsed to appear in the magistrates' court at Steynsrus on 12 July 2012 on a charge of assault to do grievous bodily harm in that on 9 April 2012, at or near the farm Waterval in the district of Lindley they had assaulted Steven Mofokeng by bumping him with a vehicle and assaulting him with open hands. In the annexure to the charge sheet in respect of Hermanus Van Niekerk Uys the allegation is added that he hit the complainant with fists.
- [3] On 12 July 2012 the two accused appeared in court and the matter was postponed to 18 October 2012 as arranged with their legal representative. Subpoenas to attend court on 18 October 2012 were issued in respect of two witnesses. The police officer who served the subpoena on Steven Mofokeng certified thereon that he served the subpoena personally on Steven Mofokeng in the year 2012 at Steynsrus. The endorsement does not state on what date or time the subpoena was served.

- [4] On 18 October 2012 both state witnesses were absent. The prosecutor requested warrants of arrest for the two absent witnesses, Steven and Joseph Mofokeng. The magistrate granted the warrant in respect of Steven, and not for Joseph, presumably because the subpoena on Joseph had not been personally served. The case was postponed to 17 January 2013.
- [5] On 17 January Steven Mofokeng was before court. The prosecutor called him to testify, and he was sworn in. Before the prosecutor could start questioning him, the magistrate told the prosecutor that the witness had been subpoenaed personally to attend court of 8 October but was absent, and asked whether the witness had an excuse. The witness responded that he was busy on the farm where he works with the cattle and the person who promised to come and fetch him did not do so. The magistrate's immediate response was that it was not a valid excuse and he convicted the witness of failure to attend court.
- [6] Section 188(1) of the Act provides that if a person who has been subpoenaed to attend criminal proceedings fails to attend, that person is guilty of an offence and liable to the punishment contemplated in subsection (2) which in turn refers to section 170(2). Section 170(2), adapted as the circumstances require, provides that a court may, if satisfied that a witness has failed to appear after having been informed of the obligation, "in a summary manner enquire into his failure 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 R300 or to

imprisonment for a period not exceeding three months”. In **S v Singo** 2002 (4) SA 858 (CC) the court dealt with section 72(4) of the Act, concerning the failure of an accused who was released on warning in lieu of bail to attend. Section 72(4) contains the same provision as that quoted above, dealing with the enquiry when the accused fails to appear. The Constitutional Court ordered that the words “there is a reasonable possibility that” had to be inserted between the words “that” and “his failure”. This means that the person who failed to attend court is only guilty of an offence if that person failed to satisfy the court that there is no reasonable possibility that the failure to attend was not due to fault on his part. Put differently, the court has to acquit the person if there is a reasonable possibility that the failure to attend was not due to the fault of the person who failed to attend. The constitutional objection to the wording as it stands is that it places a burdensome reverse onus on the person who has to explain why he or she is not guilty of an offence. The objections upheld by the constitutional court against section 72(4) apply with equal force to section 170(2). The court can only convict a witness who failed to attend as contemplated in section 188(1) and 170(2) if the court is satisfied that there is no reasonable possibility that the failure to attend was not due to the fault of that person.

- [7] The next aspect to consider is the adequacy of the magistrate’s summary enquiry. “What justice and common sense require is that the presiding officer should explain to the accused the position in which he finds himself, namely that *prima facie* he is in default, service having been effected properly, and that the *onus* is upon him to rebut the *prima facie* fact that he is in default or to

prove to the court that he has some other reasonable excuse for his failure or evasion as the case may be.” (per Cloete J in **S v Du Plessis** 1970(2) SA 562 (ECD) at 564H-565A).

- [8] In this case the magistrate merely asked the witness why he did not attend, and after the response of the witness immediately convicted him. At the very least he should have asked the witness to advance reasons why he believed the explanation to be adequate. Apart from that, the enquiry should have started by asking the witness if he admitted that he had been properly subpoenaed, and when that happened. The subpoena does not state when it was served, it appears to be inadequate. Apart from that, the reason advanced by the witness, namely that his transport did not arrive, appears to be sufficient. He is a farm labourer earning R1 400 (presumably per month). The magistrate should at least have asked him what alternative arrangements (if any) he tried to make when his lift did not arrive.

- [9] The correct way to deal with a witness who fails to appear, is for the magistrate to warn the witness that it appears that he has committed an offence. The magistrate must then ask the witness whether he or she admits that the subpoena was properly served. Then the witness should be allowed to explain by means of evidence under oath and argument why he or she should not be convicted under section 188 read with section 170(4). Only if the magistrate is satisfied that the explanation offered by the witness is not reasonably possibly acceptable, can a conviction follow. Further, the witness will usually be unrepresented, and now being an accused, will have the rights of an accused as set out in

section 35(3) of the Constitution and explained in **S v Singo** (*supra*) pars 11-13.

[10] Lest there be confusion as to the quantum of the fine because section 170(2) provides only for a fine of R300 and the magistrate imposed a fine of R600, it must be pointed out that, in terms of the Adjustment of Fines Act 101 of 1991, 3 months' imprisonment is now the equivalent of a R5 000 fine. That is because 3 years' imprisonment is equal to a fine of R60 000. The magistrate was entitled to impose a fine of R600, if the conviction was in order, which it was not.

[11] The conviction of the witness of his failure to attend court was wrong and should be set aside.

ORDER

The conviction and sentence of Boetie Steven Mofokeng on 17 January 2013 are set aside.

A. KRUGER, J

I agree.

I.M.M. MOTLOUNG, AJ