

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 221/2013

In the matter between:-

NICOLAS MOSALA

Applicant

and

MAGISTRATE D. M. SOOMAROO
THE STATE

1st Respondent
2nd Respondent

CORAM:

LEKALE, J *et* PHALATSI, AJ

JUDGMENT BY:

PHALATSI, AJ

DELIVERED ON:

12 SEPTEMBER 2013

- [1] This matter came to us by way of special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977 ("the CPA").
- [2] The accused, Nicolas Mosala, is the applicant in this application, in which he seeks this court to rescind and set aside the decision of Magistrate S. M. Soomaroo, in terms of which the state was allowed to reopen its case, after the said magistrate had ordered that the state's case is deemed to have been closed in terms of section 342A(3)(d) of the CPA.
- [3] The facts in this case are briefly, the following:
The applicant appeared in the Regional Court in Brandfort on 29 April 2013, where he pleaded not guilty to 2 charges, being one of murder

and the other of assault with intent to cause grievous bodily harm. Only one state witness testified and the matter was remanded to 28 May 2013, as no other witnesses were available. On the said date the prosecutor who started the matter (Mr Els), was not present and the relief prosecutor indicated that he was not in a position to proceed with the matter.

- [3] The court then made an order in terms of section 342A, indicating that this was a final remand for all witnesses and the said Mr Els. When the trial resumed on 10 June 2013, both Mr Els and all the witnesses were not present in court. The matter was further postponed until 18 June 2013 in terms of section 342A. On the said date both Mr Els and the state witnesses were present and the witnesses testified. Thereafter Mr Els indicated that he would like to call a certain Chester as a witness, but he still needed to take his statement. The defence attorney objected that this was a new witness but the court ordered the state to provide the defence with the copy of the statement as soon as it has been taken and the court then again ordered a final remand until 17 July 2013. On the said date Mr Els was once again not present and the relief prosecutor paged through the docket in the presence of both the presiding officer and legal representative of the applicant and confirmed that there was no statement of the new witness in the docket. The said relief prosecutor again indicated that he does not know the matter and he was therefore not in a position to proceed with same. The applicant made an application that the state's case be deemed closed in terms of section 342A(3)(d) of CPA, and the state did not oppose the said application. The court then granted such an order.

- [4] The matter was remanded in terms thereof until 22 July 2013. On the said date, Mr Els was still not present and the prosecutor indicated to the court that Chester's statement is in the docket and that it was taken on the 7th of July 2013. She further stated that Chester's real name is Jeremiah Sera and that he was present in court on 17 July 2013. The relief prosecutor was not aware that Chester and Jeremiah Sera is the same person. The statement had, however, not been given to the applicant's legal representative. She further indicated that the post-mortem report was not handed in, and she intended to apply for re-opening of the state case on this basis.
- [5] The Magistrate indicated that she would not have given the order that she made, if these facts were placed before her on the 17th of July 2013. This is surprising in that even if she had known that Chester's statement was available and that he (Chester) was also in court, the matter could still not have proceeded as Mr Els was not available. Be that as it may, she granted the state's intended application to re-open the state's case. I say "intended application" because that is exactly what the prosecutor said. There was no formal, properly motivated application brought by the state to re-open its case, on record. The applicant's legal representative then, (correctly in my view) requested the magistrate to indicate on which aspect(s), has the state been granted permission to re-open its case. After a lengthy discussion, the court informed the prosecutor that they must ensure that the state's witnesses, Mr Jeremiah Sera, the doctor and the police officer (presumably the investigating officer), be present in order to finalise the state's case.

- [5] The order made in terms of section 342A(3)(d) is appealable in terms of section 342A(4)(b) of the CPA. This means that once the magistrate has made such an order, he/she becomes *functus officio*, as the order is a final one. The court cannot on its own revisit or rescind the said order. The court, in its ruling, indicated that it had granted the section 342A(3)(d) order, without knowledge that the witness concerned was at court on that day and that the statement of that witness was in the docket and that was not presented to the defence. Had these facts been brought to its attention on the day the order was made, the court would not have granted the said order. On the basis thereof, the court granted the state's application to re-open its case. It is clear from this ruling that what the court was really interested in, was to rescind the order it had made. As I have stated above, the court would not have been able to rescind the said order as it was *functus officio*. To achieve its intended aim, the court made an order that would have the same effect of rescinding its order, under the guise of granting the state the application to re-open its case. I have already alluded to the fact that the state never made a formal, properly motivated application to re-open its case in terms of section 150 of the CPA. No basis was laid for such an application and it was the court that stated that the state had made such an application and that it was granted.
- [6] It is conceivable that, where the court has held an enquiry and made an order in terms of section 342A(3)(d), the state can still successfully apply for the re-opening of its case, without the court making a mockery of the provisions of the said section. This is because of the fact that there are no fixed grounds on which such an application can be brought, as each case will depend on its own facts and the

granting or not of the application falls within the discretion of the court. It is obvious,*in casu*, that no discretion could be exercised in the absence of the facts upon which the discretion could be based. The “grounds” mentioned are those of the court which had never been advanced and relied upon by the state.

- [7] I therefore find that *in casu*, there was not only gross irregularity, but that the decision to re-open the state’s case is an abuse of the process of the law and should therefore be set aside. Indeed, even the learned magistrate concedes this point, and I can do no better than to quote her verbatim:

“I am fully aware that this is an irregular process for the court to have followed, but unfortunately the court feels that, in order for the interest of justice to be served, it has to go this way.” See page 147, lines 16 – 19 of the transcribed record.

I refrain from commenting any further.

- [8] In conclusion, I must mention this fact, which, in my view is disturbing, although it does not form part of the applicant’s papers. According to the charge sheet, the applicant was arrested on 28 October 2011 and his first appearance in court is stated as 12 March 2013. It might be that the 12 March 2013 is the date of first appearance in the regional court. It is, however, still disturbing even in that event, that it took about 16 months for the accused’s case to be transferred from the district to the regional court. The reason for this lengthy delay is not apparent from the record, but I would urge the relevant authorities to investigate this matter, as the applicant has been in custody since 28

October 2011, and his case has still not been finalised. He is still languishing in goal, some 23 months later.

[9] In the premises, I make the following order:

- 9.1 That the magistrate's order, dated 22 July 2013, that the state's case be re-opened, is hereby set aside;
- 9.2 That the state's case is and remains closed;
- 9.3 That the applicant's/accused's case be commenced and dealt with on the next date agreed upon for continuation of the trial.

N. W. PHALATSI, AJ

I concur.

L. J. LEKALE, J

/eb