

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 90/2012

1. The First Review

In the review between:-

THE STATE

versus

JOHANNES MOLEFI NTHONGOA

2. The Second Review

In the review between:-

THE STATE

versus

TLALI JOHANNES HLAZA

ELIAS BARDA

3. The Third Review

In the review between:-

THE STATE

versus

SELBY BHEKUYISE MTSHALI

ZAMUXOLO NICKSON KHOLO MAJOVA

4. The Fourth Review

In the review between:-

THE STATE

versus

PERCY KABAS QHAMAKOANE

KHETSING PAVINCE KOLISANG

TSETSI PAUL TSELI

RALEPOTSI AUGUST TSELI

MATSOSO MAHLOMOLA JULIUS

5. The Fifth Review

In the review between:-

THE STATE

versus

KENALEMANG WILLIAM MAKHALEMA

6. The Sixth Review

In the review between:-

THE STATE

versus

MBALEKELWE JOHN CHABALELE

TOHLEY TEBOHO EDWIN MLANGENE

7. The Seventh Review

In the review between:-

THE STATE

versus

PULE WILLIAM MATHOZI

MOEKETSI GIVEN SONYATHI

JACOB TIEHO MOTAUNG

8. The Eight Review

In the review between:-

THE STATE

versus

SAZISO TOFU

MONYANE MAKHETHA

PAUL MOHAPI

PEDRO LAQUEN

9. The Ninth Review

In the review between:-

THE STATE

versus

AFRICA PULE HLAKOANE
TATOLO ANDREW BAADJIE

10.The Tenth Review

In the review between:-

THE STATE

versus

SIPHO THEMBA MBOWENI

11.The Eleventh Review

In the review between:-

THE STATE

versus

THANDISIEWE NGXATHA

VUMI NGXATHA

LULAMA NASHOMBOZA

12.The Twelfth Review

In the review between:-

THE STATE

versus

MOSES MOTSHEARE MOTSOENENG

THAPELO MATLALA

MARK MIQUEL MESA

13.The Thirteenth Review

In the review between:-

THE STATE

versus

SIMPHIWE NOVEMBER

14.The Fourteenth Review

In the review between:-

THE STATE

versus

PHUMIZILE WISEMAN SEBOTHO

MOTHIBEDI JAN LEBATLA

15.The Fifteenth Review

In the review between:-

THE STATE

versus

TSEDISO BENJAMIN SEITLHEKO

MODULELO PETRUS PITSO

NTOMBI EVELYN MATROOS

16.The Sixteenth Review

In the review between:-

THE STATE

versus

VUSI JOHANNES NGXOBOYI

17.The Seventeenth Review

In the review between:-

THE STATE

versus

PONO ZWELINZIMA MOKHUMA

SELEMPI STOFFEL LONDON

CORAM: HANCKE, AJP *et* SNELLENBURG, AJ

JUDGMENT BY: SNELLENBURG, AJ

DELIVERED: 10 MAY 2012

[1] The aforesaid 17 matters were all referred to this Court for special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977, as amended [“the Act”].

- [2] The matters were all referred under the same request for review and are considered and dealt with together as the same issue arises in all the matters.
- [3] All the matters relate to cases that are partly heard (evidence has been led in all the cases) before Mr E H Ludick, an acting Regional Magistrate seated at Welkom.
- [4] Due to the nature of the issue that needs to be determined in this review it is not necessary to deal with the full factual background of each case, save to repeat that the matters have proceeded and are all partly heard before the said Regional Magistrate.
- [5] The three of matters have 2008 case numbers; one matter has a 2009 case number; one has a 2010 case number and the remaining twelve cases have 2011 case numbers.
- [6] The background facts and circumstances that are relevant and pertinent to this matter appear from the request for special review by the Regional Court Magistrate, Welkom, to wit Mr, J.J. Human and include the under mentioned.

- [7] Mr Ludick's services were terminated on 31 December 2011.
- [8] After several attempts to secure the attendance of the trial magistrate, Mr Ludick, to finalise the partly heard matters that were outstanding and which includes the matters that form the subject matter of these review proceedings, Mr Ludick eventually agreed to return and to finalise the outstanding matters.
- [9] To this end Mr. Ludick started again on 6 March 2011 but his services were finally terminated on 16 March 2011 by the Regional Court President due to health related and other problems.
- [11] Although the precise nature of the health and other problems do not appear from the written request, dated 28 March 2012, the fact of the matter remains that Mr. Ludick's services have been finally terminated and he will not return to finalise the partly heard matters.
- [12] The accused in all the matters under consideration have a constitutionally entrenched right to a fair trial that is finalised without undue delay. Section 35(3)(d) of the Constitution of the Republic of South Africa, 108 of 1996 provides,

“Every accused has a right to a fair trial, which includes the right

—

...

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

[13] Save that Section 275 of the Act makes provision that any other judicial officer of the court in which a conviction was granted may pass sentence or make any order that the judicial officer that passed the conviction could have made, if the last mentioned judicial officer becomes unavailable before the accused is sentenced, the Act contains no express provision regarding the unavailability of a judicial officer in the present circumstances.

[14] The Act therefor contains no express provision for the further conduct where the judicial officer becomes unavailable to finalise a partly heard trial before a conviction is made or an acquittal is granted in the proceedings.

[15] In addition, an accused may demand a verdict once he has pleaded. There are however exceptions to this rule.

[16] The answer is to be found in the judgment by Hiemstra CJ in **S v MAKGETLE** 1980 (4) SA 256 (B) at 257A - D,

“Where the magistrate who started the trial is no longer available in the absolute sense, as where he dies or has recused himself, the trial can be resumed *de novo* before another magistrate, if the prosecutor so decides (Punshon v Wise 1948 (1) SA 81 (N); Zackey v Magistrate of Benoni 1957 (3) SA 12 (T); Magubane v Van der Merwe NO 1969 (2) SA 417 (N)). That is so because the proceedings so far are a nullity in that the court has ceased to exist. Where the magistrate has been transferred the proceedings are not a nullity. He must be brought back to the court where the trial commenced and must conclude it (S v Gwala 1969 (2) SA 227 (N)). There is no direct authority on the instance where the magistrate has resigned from the service. It is however clear that he is in the same position as one who is in the absolute sense unavailable, like a magistrate who has died or has recused himself. These are therefore also cases where the accused cannot at this stage demand a verdict.”

[17] In the matters under review Mr. Ludick’s services have been finally terminated and as such the judicial officer that presided in the partly heard matters has become unavailable to conclude the trials in the absolute sense.

[18] The matters are reviewable in terms of the provisions of Section 304(2)(c)(iii) and(v) read with Section 304(2)(c)(vi). That finding in itself cannot dispose of matter. It remains to consider whether the accused will have a fair trial as envisaged in Section 35(3)(d) of the Constitution if the proceedings start afresh.

[19] As stated, save for the three matters which date from 2008 and the one matter that date from 2009, the remaining matters are all 2010 and 2011 matters.

[20] There has not been an inordinate delay from the date that the magistrate became unavailable in the absolute sense until this review.

[21] On that basis alone the matters under consideration are to be distinguished from the matter under consideration in the as yet unreported judgement recorded on **SAFLII AS S v THOBELA** (258/07, DV237/2001) [2007] ZAGPHC 204 (11 September 2007).

[22] The matters are also to be distinguished on the facts of the matters.

[23] It follows that the proceedings in all the cases under review (in this matter) are a nullity as the court has ceased to exist and must be set aside. The prosecuting authority must be authorised to commence with the proceedings *de novo* if it so decides.

[24] I accordingly make the following order:

24.1 The proceedings in case numbers:

24.1.1 SHO 30/11;

24.1.2 RC 74/11;

24.1.3 RC 128/11;

24.1.4 SH 46/11;

24.1.5 RC 407/11;

24.1.6 RC 248/08;

24.1.7 SHO 5/11;

24.1.8 RC 228/11;

24.1.9 RC 15/11;

24.1.10 RC 68/11;

24.1.11 RC 560/09;

24.1.12 SH 123/08;

24.1.13 RC 189/11;

24.1.14 SHBV 20/11;

24.1.15 RC 489/10;

24.1.16 SHO 1/11; and-

24.1.17 SH 324/08,

are declared a nullity and are set aside;

24.2 The cases in 24.1 are remitted to the Regional Court, Welkom and the prosecuting authority is authorised to commence with proceedings *de novo* in each of the cases before another judicial officer if it so decides.

N. SNELLENBURG, AJ

I concur.

S.P.B. HANCKE, AJP