

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 471/08

In the review between:-

THE STATE

and

TEFO ABRAM MOKONE

CORAM: HANCKE, J *et* RAMPAL, J

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 14 AUGUST 2008

[1] This is a special review which originates from the Welkom regional court where the accused was tried on a charge of theft of 2841 banting guides to the tune of R63 666,81 the property of Masimong Gold Mining Co (Pty) Ltd which was in the lawful possession of J.G. van der Merwe at number 5 shaft of the aforesaid mine at Hennenman on 1 September 2000.

[2] The trial of the accused began on 21 August 2001 in the Welkom regional court where he pleaded not guilty before

Mr. A.J. Visser. Mr. L. Bontes and later Mr. P.H. de Kock appeared for the State, whereas Mr. A. de Jager and later Mr. T. Chabane appeared for the defence. Mr. J. Tshabalala was the interpreter.

[3] All in all four witnesses have testified so far – three for the prosecution, namely J.G. van der Merwe Terblanche, C.W. Thompson and J.F. Swartz for the prosecution and T.A. Mokone for the defence. The State case has been closed, but the defence case not.

[4] On 20 November 2001 the case was postponed to 5 March 2002. On 5 March 2002, however, the accused did not attend court. A warrant for his arrest was authorised and a provisional order of forfeiture of the bail was made. The case was postponed to 9 April 2002. On that day the accused was still absent. A final order of forfeiture of the bail money was made.

[5] The accused was still at large when the trial magistrate, Mr. A.J. Visser, took pension and went on retirement in October 2005. Over two years later, on 20 November 2007 to be

precise, the accused appeared in court on a warrant of arrest. On 14 December 2007 he was again released on bail. Since then the case was postponed several times for the resumption of the hearing. The trial magistrate was contacted and efforts were made to persuade him to come back from retirement to finalise the case. On 22 April 2008 Ms Ismail, the regional court magistrate, recorded that the trial magistrate was not prepared to do so.

[6] In the light of the foregoing circumstances Mr. J.J. Human, the regional court magistrate, in an undated memo, requested that the incomplete proceedings be set aside and that the hearing of this case should start afresh.

[7] The trial magistrate has taken pension and retired from public service. Such retirement means that, for all practical intends and purposes, the trial magistrate has ceased to be an active employee of the State. In the absence of any subsisting employment relationship between a retired magistrate and his former employer, there exists no legal mechanism whereby he can be compelled to come back from retirement in order to finalise the pending trial. In the

circumstances I am inclined to grant the request of Mr. J.J. Human.

[8] Accordingly I make the following order:

8.1 The entire incomplete proceedings that were heard before the retired regional court magistrate, Mr. A.J. Visser, from 21 August 2001 until the accused absconded on 20 November 2001 are hereby set aside.

8.2 The accused must be tried *de novo* before another regional court magistrate other than the retired Mr. A.J. Visser.

M.H. RAMPAL, J

I concur.

S.P.B. HANCKE, J