



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

REV: 155/2023

- (1) REPORTABLE: **NO/YES**
(2) OF INTEREST TO OTHER JUDGES:
NO/YES
(3) REVISED.

..... 20/09/2024

In the matter between:

CASSIUS PHUKELA

APPLICANT

IN RE THE MATTER OF:

THE STATE

v

CASSIUS PHUKELA

ACCUSED

JUDGMENT

NAUDÈ-ODENDAAL J:

- [1] This is Special Review Application of a partly heard criminal trial in the Nkowankowa Magistrates Court, held at Nkwowankowa, under case number A07/2022, brought by the Accused, in terms whereof the Accused requests this court's intervention and review of the partly heard criminal trial. The Accused submits that the proceedings in the court *a quo* were not conducted in accordance with justice and applies that it be stayed and ordered to start *de novo* before a different presiding officer. It must be borne in mind that the State is still busy leading evidence and at least 4 more witnesses are to be called by the State.
- [2] The Applicant did not bring the application for review on a Notice of Motion supported by a Founding Affidavit, but merely in a letter requesting the review of the proceedings in the court *a quo*. It is not clear in terms of which statute or rule the review application is brought either.
- [3] Apart from its statutory powers to review the proceedings in the lower courts, the High Court is vested with an inherent jurisdiction to correct errors occurring in proceedings before the lower courts. This power

should be exercised sparingly and should not be used to rectify mistakes made by one of the parties.

- [4] The High Court will exercise its inherent jurisdiction to review proceedings in lower courts before the conclusion thereof in that court, where grave injustice might otherwise result or where justice might not by other means be attainable. The reason why the courts are slow to interfere with proceedings in lower courts is to avoid a piecemeal appeal or review.
- [5] An Accused (Applicant) who wants to have untermiated proceedings reviewed will have to make out a case that he would suffer irreparable prejudice if the trial were allowed to proceed to conclusion. In addition, the Applicant will have to show that his complaint falls within one of the grounds of review stipulated in Section 22 of the Superior Courts Act, 10 of 2013.
- [6] In the present matter, there is no proper application or affidavit before me on which to consider the review application, in addition, even if the letter in terms of which the Accused requested a review is considered, no case was made out that the review falls within one of the grounds of review stipulated in Section 22 of the Superior Courts Act, 10 of 2013.

- [7] **Section 22 of the Superior Courts Act 10 of 2013** deals with the grounds upon which the proceedings of a Magistrate's Court may be reviewed whilst **Rule 53** lays down the relevant procedure.
- [8] Generally a High Court will be reluctant to review incomplete proceedings in a Magistrate's Court. (See **Motata v Nair & Another 2009 (2) SA 575 (T) 578 H-I.**). This is so unless the review Applicant can show grave injustice would otherwise result, or whether justice would not be attained by any other means.
- [9] **Section 22 of the Superior Courts Act 10 of 2013** stipulates as follows:-
- "22 Grounds for review of proceedings of Magistrates' Court [sic]***
- (1) *The grounds upon which the proceedings of any Magistrates' [sic] Court may be brought under review before a court of a Division are —*
- (a) *absence of jurisdiction on the part of the court;*
- (b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*

- (c) *gross irregularity in the proceedings; and*
- (d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*
- (2) *This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."*

[10] The grounds upon which the Applicant wants the matter to be reviewed does not fall within the ambit of **Section 22 of the Superior Courts Act 10 of 2013**.

[11] In addition, what seems to have been overlooked by the Applicant is that this review is one *in medias res*. In ***Motata vs Nair NO and Another [2008] ZAGPHC 215; 2009 (1) SACR 263 (TPD)*** at paragraph 9 the following was stated by Hancke and Pickering JJ, relevant to reviews *in medias res*:

"[9] *It is trite that as a general rule a High Court will not by way of entertaining an application for review interfere with incomplete proceedings in a lower court. As stated in Wahlhaus & others v Additional Magistrate, Johannesburg & another 1959 (3) SA 113 (AD) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point*

decided against the accused by a magistrate is fundamental to the accused's guilt. At 119H–120A Ogilvie Thompson JA (as he then was) stated as follows:

'It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict, or mandamus – against the decision of a magistrate's court given before conviction. (See Ellis v Visser and Another 1956 (2) SA 117 (W) and R v Marais 1959 (1) SA 98 (T), where most of the decisions are collated.) This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansdown (6th Ed., vol. I p.750) state:

'While a Superior Court having jurisdiction in review or appeal will be slower to exercise any power, whether by mandamus or otherwise, upon the untruncated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained . . . In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below,

and to the fact that redress by means of review or appeal will ordinarily be available.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's court."

At 120D, the learned Judge continued:

"[T]he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps a fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction. (See too the observation of Murray J at pp 123–124 of Ellis case supra.) As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

[12] In **Mispha CC and Another v The Honourable Regional Magistrate and Others**, Case No.: 2647/2011, 15 August 2013, ECD Grahamstown (delivered on 18 September 2013) the Full Bench held as follows as to Review *in medias res*:

"[46] Against this background our Courts are extremely reluctant to interfere with or allow the review of proceedings not yet completed in an inferior court. It has been said that a court will only do so in exceptional

circumstances where serious injustice will otherwise result or when justice cannot be achieved in any other way. Wahlhaus and Others v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) at 119H – 120C; Building Improvements Finance Co (Pty) Ltd (supra) at 793F – 794A; R v Marais 1959 (1) SA 98 (T) at 101H; Van Tonder v Kilian NO 1992 (1) SA 67 (T) at 74D-I; Nourse v Van Heerden 1999 (2) SACR 198(W); S v The Attorney-General of the Western Cape, S v The Regional Magistrate, Wynberg 1999 (2) SACR 13(C)...”

- [13] In **Adonis v Additional Magistrate, Bellville and Others 2007 (2) SA 147 (C)** at paragraphs [21] and [22] the following appears:

“[21] It is generally accepted that this Court will not readily intervene in lower court proceedings which have not yet terminated, unless grave injustice may otherwise result or where justice may not be obtained by other means. See Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119H – 120C; Ismail and Others v Additional Magistrate, Wynberg, and Another 1963 (1) SA 1 (A) at 5G – 6A; Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg, and Another 1978 (4) SA 790 (T) at 793F – G; Levack and Others v Regional Magistrate, Wynberg, and

Another 1999 (4) SA 747 (C) (1999 (2) SACR 151; [1999] 3 All SA 374) at 754A – F (SA).

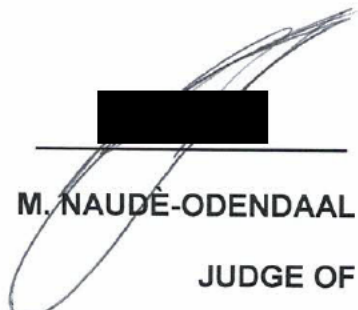
[22] *Intervention on review will be justified in the case of a gross irregularity which has caused, or is likely to cause, prejudice to the applicant. See the Building Improvements case (supra) at 792H – 793C. In Rynders v Bankorp Ltd t/a Trust Bank and Others 1995 (2) SA 494 (W) it was held that a magistrate's court did not have the power to grant an ex parte application for the provisional liquidation of a close corporation. According to MacArthur J (at 497B – D) the grant of such an order constituted an irregularity which caused the applicant 'substantial wrong' in that he was confronted with all the consequences of a provisional liquidation order. This entitled the applicant to take the magistrate's decision on review, despite the fact that he might have failed to exhaust his remedies in the magistrate's court."*

[14] In the present matter the State is still busy leading evidence and as stated here above still has at least four witnesses to call, the matter is partly heard before the court *a quo*, I am not persuaded that a grave injustice will occur if the proceedings are not reviewed and set aside. I am further not persuaded that justice would not be attained by any other means.

[15] In my view, the correct approach would be for the court *a quo* to hear and finalise the trial.

[16] In the result the following order is made:-

1. The matter is remitted back to the court *a quo* for hearing and finalization of the Criminal Trial.



M. NAUDE-ODENDAAL
JUDGE OF
THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

I AGREE:

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M.S. MONENE

**ACTING JUDGE OF
THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

JUDGMENT DELIVERED ON: 20 SEPTEMBER 2024