



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

Not reportable
Review no: R11/2025

In the matter between

THE STATE

and

MPHO EPHRAIM MOSEKI

Coram: Reinders ADJP et Van Rhyn J

Delivered: 24 April 2025

Summary: Special Review s 304(4) Criminal Procedure Act 51 of 1977-
Summary enquiry held in terms of s 170(2) of the Criminal Procedure Act 51 of
1977 - failure to appear- onus on accused to present reasonable explanation -
Unrepresented accused- failure to explain implication of onus and nature of
proceedings -reference made to incorrect section - proceedings not in
accordance with justice and are set aside.

ORDER

On review from the Magistrates' Court for the district of Lejweleputswa held at
Wesselsbron (sitting as the court *a quo*):

1. The conviction and sentence imposed are set aside.

JUDGMENT

Van Rhyn J (Reinders ADJP concurring)

[1] This matter is before us on Special Review in accordance with the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977 (the 'CPA') from the Magistrates' Court for the district of Lejweleputswa held at Wesselsbron.

[2] Mr Mpho Ephraim Moseki ('Mr Moseki'), who appeared as accused 2 and his co-accused ('accused 1') were summoned to appear before court on 11 October 2024 in terms of s 54(1) of the CPA on a charge of theft of a garden chair and a green hose pipe, the property of Mr Oberholzer. Both accused were represented by their legal representative, Ms Leshabane. On the 11th of October 2024 the matter was remanded to 22 October 2024 and both accused were warned to appear at 08h00. On 22 October 2024 only accused 1 appeared in court. Upon questioning by the presiding magistrate, he was unable to present any explanation for Mr Moseki's absence.

[3] A warrant for the arrest of Mr Moseki was issued and the case against both accused was remanded to 5 November 2024 in order to trace Mr Moseki. On 5 November 2024 Mr Moseki had still not been traced and the matter was again remanded to 19 November 2024. The record of the proceedings indicates that Mr Moseki appeared on 15 November 2024 subsequent to his arrest on the warrant that was authorised on 22 October 2024. On 15 November 2024 the presiding magistrate informed Mr Moseki that an enquiry will be held due to his failure to appear as warned and that he is entitled to legal representation of his own choice in respect of such enquiry. In the event of him not being able to afford his own legal representative he may apply for legal aid or continue on his own. The record indicates that Mr Moseki's legal representative placed on record that Legal Aid is not awarded to such enquiries and that she is therefore not appearing on his behalf at the said enquiry.

[4] Mr Moseki then indicated that he will proceed in person in respect of the inquiry to be held. The presiding magistrate informed him that he did not come to court as warned but had to be brought to court subsequent to being arrested by the police as per the warrant. The provisions of s 72 of the CPA were explained to Mr Moseki and he was provided with an opportunity to satisfy the court that his failure to appear as warned was not due to his fault. Mr Moseki then proceeded to explain that he has a mental problem and on the day that he had to appear in court he found himself walking to Welkom. According to him, the mental problem 'comes and goes'. Upon questioning by the presiding magistrate he explained that he has never been to a medical doctor regarding his mental problem and does not take any medication in this regard. He informed the court *a quo* that he 'walks the streets' to beg for food and he is not cared for by his parents. He is frustrated with his situation and suffers due to poverty and lack of food.

[5] Mr Moseki was subsequently found guilty of breaching s72(4) as per the record (the J15 indicates that Mr Moseki was convicted of 'contravening section 75(4)' of the CPA) and summarily sentenced to 30 days imprisonment for his failure to attend the proceedings on 22 October 2024. The case was then remanded to 19 November 2024 and thereafter remanded to 2 December 2024 when accused 1 pleaded guilty to the charges. On the said day the charges were withdrawn against Mr Moseki.

[6] Section 72 of the CPA is applicable when an accused may be released on warning in lieu of bail when an accused, who is 18 years or older, is in custody in respect of any offence and a police official or a court may in respect of such offence release an accused on bail under ss 59 or 60 Of the CPA, as the case may be. An accused who is released under subsection (1)(a) and who fails to appear or, as the case may be, to remain in attendance at the proceedings in accordance with a warning under that paragraph shall be guilty of an offence and liable to punishment prescribed under subsection (4). The option of a release on warning in terms of s 72 of the CPA is limited to those cases in which an accused is in custody for an alleged crime and may be released on bail by a policeman¹ or a court². It is therefore applicable subsequent to the arrest of an accused person and then warned to appear in court.

¹ Section 59 of the Criminal Procedure Act 51 of 1977.

² Section 60 of the Criminal Procedure Act 51 of 1977.

[7] Section 170 of the CPA provides for instances where an accused, who is not in custody and who has not been released on bail, fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned. An accused shall be guilty of an offence and liable to the punishment prescribed under subsection (2). In terms of the provisions of s 170(2) the court may issue a warrant if satisfied that an accused has failed to appear on the date to which the proceedings were adjourned and when the accused is brought before the court, in a summary manner, enquire into the accused's failure so as to appear or to remain in attendance and, unless the accused satisfies the court that his failure was not due to a fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300.00 or to imprisonment for a period not exceeding three months.

[8] Section 170 of the CPA corresponds with ss 55(3) and 72(4) of the CPA in matters where an accused has been summoned or warned to appear in court and who thereafter fail to do so. When the court holds a summary enquiry in terms of subsection (2) into a failure to attend, considerations of justice and common-sense demand that the court must inform the accused that there is an onus on him to tender a reasonable excuse for his failure to attend. In *Cooper v District Magistrate, Cape Town* 2018 (1) SACR 369 (WCC) the court held that the magistrate had failed to explain to the accused the position regarding the onus of proof. The magistrate was held (at para [20]) to have 'materially misdirected himself by applying the reverse onus'. The similarities between the enquiry directed by s 170(2) and that set out in s 72(4) were referred to and the court pointed to the finding by the Constitutional Court in *S v Singo* 2002 (2) SACR 160 (CC) that the imposition of a reverse onus in s 72(4) was unconstitutional.

[9] In *Cooper v District Magistrate, Cape Town* the accused was summoned to appear in court and he duly appeared. The case against the accused was postponed on more than one occasion and he was warned to appear in court on a certain date, which he failed to do. His attorney however appeared in court and explained the accused's absence due to a consultation with the medical practitioner as he was suffering from chest pain. When the accused appeared in court on the next occasion, although once again represented by his attorney, he was told by the presiding magistrate to enter the witness box. The magistrate then held a warrant enquiry and

sentenced him to a fine of R3000 for his failure to appear in court in contravention of s 55 of the CPA. This conviction was entered, despite the accused not having been informed of the charge, the nature of the proceedings or his rights. It was held, on review, that the manner in which the enquiry into the accused's failure to attend court was conducted amounted to a substantial injustice since it infringed his constitutionally entrenched rights to a fair trial. Not only were his rights to access to justice curtailed when his legal representative was ignored, but the court had further more erred in finding him guilty of contravention of s 55 of the CPA instead of s 170(1) of the CPA. The conviction was entered, despite the accused not having been informed of the charge, the nature of the proceedings or his rights. It was clear that the magistrate had made significant errors in addition to that relating to the onus of proof. The proceedings were not in accordance with justice and therefore had to be set aside.

[10] In the matter at hand there is no indication that the magistrate made it clear to Mr Moseki, who appeared in person, that he was being charged with a criminal offence or what the commensurate penalties upon a conviction might be. Instead, the provisions of s 72 (1) and (2) were read to him. Mr Moseki had to be advised that he might call witnesses and giving evidence himself.³ This was not done. The magistrate failed to afford Mr Motseki a fair opportunity to prepare for the hearing, to present a defence or to call witnesses. Mr Motseki did provide an explanation that he suffers from a mental condition. It is evident from the record that the presiding magistrate, apart from ascertaining that no such a diagnosis had been made by a medical doctor, failed to interrogate him further with a view of determining whether a reasonable possibility exists that he may suffer from any mental illness or the precise symptoms experienced by Mr Motseki. The presiding magistrate was obliged by the requirements of fairness towards Mr Motseki to attempt to ascertain the truth in the inquiry and is enjoined to determine whether there is a reasonable possibility that the failure of Mr Motseki to appear was not due to fault on his part.⁴

[11] I am therefore of the view that Mr Motseki was not only incorrectly found guilty of contravening the provisions of s 72(4) or (5) instead of s 170(1) of the CPA but the

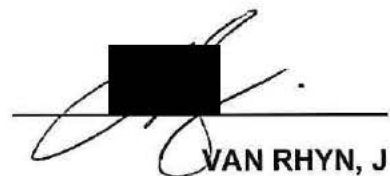
³ *S v Bkenlele* 1983 (1) SA 515 (O).

⁴ *S v Baloyi* 2000 (1) SACR 81 (CC) para [29].

legal principles pertaining to the inquiry were misapplied, to the prejudice of the applicant.

[12] In the result I would make the following order:

The conviction and sentence imposed are set aside.



VAN RHYN, J

I concur and it is so ordered.



REINDERS, ADJP