



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: R12/2024

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

2 July 2025
DATE


SIGNATURE

In the application between:

THE STATE

and

ALBERT SIBUSISO TSHABALALA

ACCUSED

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10:00 on 2 July 2025.

LEAVE TO APPEAL JUDGMENT

Moleleki AJ

[1] This is an appeal against the entirety of the judgment and order dismissing the appellant's application to review and set aside the judgment delivered in the Specialised Commercial Crimes Court on 11 October 2021, as well as to have the matter resume *de novo*. As a result, the matter was remitted to the Regional Court for further hearing and conclusion of the sentence proceedings before another Regional Magistrate.

Background Facts

[2] The applicant and two others appeared before the Specialised Commercial Crimes Court in Mbombela. The applicant was convicted of fraud on 11 October 2021. The Acting Regional Magistrate who convicted the applicant recused himself from the matter. The Regional Magistrate before whom the applicant appeared for sentence referred the matter to this court for review in terms of section 304A(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA). This section makes provision for the review of proceedings before sentence.

[3] This court found that the case did not warrant interference. As a result, the case was remitted to the Regional Court for further hearing and conclusion of the sentence proceedings before another Regional Magistrate.

[4] At this stage, the applicant challenges the outcome of the review application and contends that the court erred in the following respects:

4.1 By finding that the Regional Magistrate, when referring the matter for review, did not substantiate that there was a failure of justice;

4.2 By not addressing its view on the non-substantiation of the failure of justice with the referring Regional Magistrate;

4.3 By finding that the failure by the Acting Regional Magistrate to place on record that he was approached by the complainant in his chambers did not constitute any irregularity that resulted in the failure of justice, was an error;

4.4 By not having regard to the fact that the Acting Regional Magistrate was aware of the sentiments of the complainant, which is a clear indication of interaction between the Acting Regional Magistrate and the complainant;

4.5 By finding that the question of bias is only relative to the continuation of the proceedings and had no effect on the trial prior to the conviction;

4.6 By finding that the recusal of the Acting Regional Magistrate sufficiently addressed the irregularity prior to the conviction; and

4.7 By finding that the irregularity prior to the conviction does not warrant interference.

Legal Principles

[5] Applications for leave to appeal are governed by the provisions of section 17 of the Superior Courts Act 10 of 2013. Section 17 provides as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[6] It is an established principle of our law that the High Court will not ordinarily, by way of appeal, review or mandamus, interfere with untermiated proceedings in a lower court. The court’s power to interfere is exercised sparingly and in those cases where the court is satisfied that a grave injustice may otherwise result or where justice might not be obtained by other means.

[7] The court’s reluctance to interfere in untermiated proceedings stems primarily from (a) the effect that such procedure has on the continuity of proceedings in the court below; (b) the undesirability of hearing appeals and reviews piecemeal; and (c) the fact that redress by other means, such as review or appeal, will ordinarily be available in due course.

[8] As stated, the applicant was before this court for a review in terms of section 304A of the Criminal Procedure Act. The section is the exception to the general rule that review courts do not readily intervene in incomplete proceedings. The rationale is that a case should follow its normal course, through conviction to sentencing, before the matter is taken to a higher court. In other words, courts should avoid a piecemeal approach to review.

[9] The leading case in this regard is *S v Delport and Others*¹ in which the appellants challenged the authority of the prosecutors to prosecute their matter. The Magistrate before whom they were appearing found in their favour and referred the matter to the High Court for special review. The High Court, without considering the merits, found that there were no proper grounds for the Magistrate to have referred the matter for review before the conclusion of the trial. The matter was accordingly remitted for the trial to continue. Subsequent thereto, the appellants sought to amend their plea by introducing a special plea. The Magistrate upheld their application. The State appealed against that decision to the High Court. The matter was once again remitted for the trial to continue. The appellants then applied for leave to appeal against this ruling. The court granted the appellants leave to appeal.

[10] The Supreme Court of Appeal in *Delport*² held that the general rule, underpinned by section 35(3)(d) of the Constitution, was against permitting piecemeal appeals. It is therefore in the interests of justice that criminal trials should commence and be completed without unreasonable delay and that appeals should not be entertained before the trial is completed. However, in unusual circumstances, a departure from the general rule might be required. The general rule, therefore, required a remittal order not to be appealable unless unusual circumstances warranted it.

[11] The presence of unusual circumstances would depend on the facts of each case. A court that has to decide whether the advantages of entertaining the appeal outweigh the disadvantages, thus constituting unusual circumstances, would have to

¹ *S v Delport and Others* 2015 (1) SACR 620 (SCA).

² *Ibid* para 27.

look at considerations of convenience, delay and prejudice. In *Delpont*, the appellants were unable to persuade the court that there was anything unusual that obliged the court to entertain the appeal. Accordingly, the appeal was struck from the roll.

[12] Having considered the grounds set out by the applicant, as well as submissions made, nothing that was placed before the court persuades it that there are unusual circumstances which, in the interests of justice, require a departure from the general rule.

[13] Section 309(1) of the CPA provides that an appeal lies only against convictions and “any resultant sentence or order” flowing from the conviction. As stated above, the general principle on reviews applies to appeals as well. What this means, as noted by the authors of Du Toit in *Commentary on the Criminal Procedure Act*,³ is –

“... as a general principle, allegedly wrong decisions made in the course of a criminal trial, which are capable of correction by way of appeal, should be permitted to be challenged only after the trial has run its course, unless there is a compelling reason to allow an appellant to do otherwise... Criminal trials should be continuous, with no appeals or interlocutory approaches to a court of appeal before conviction.”

[14] As correctly pointed out by the respondent, there has been a delay in these proceedings. A period of more than three years has elapsed since the trial court pronounced on the conviction of the applicant. This is undesirable as it means that the criminal trial has not been concluded without undue delay, as is envisaged by section 35(3)(d) of the Constitution. The criminal proceedings remain pending, not only to the prejudice of the applicant himself but to that of the complainants as well. The complainants are legitimately entitled to finality. What remains, and is of significance, is the interests of justice. In my view, the interests of justice call for the finalisation of the criminal trial before an appeal can be heard.

³ Du Toit: *Commentary on the Criminal Procedure Act*, RS 73, 2024 chapter 30 at p24Q-24R.

[15] With reference to *Moyo and Another v Minister of Justice and Constitutional Development and Others*,⁴ courts should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of section 35(5) of the Constitution. Although the court's "doors should never be completely closed to litigants", courts should not entertain such litigation "in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings".⁵

[16] The main reason why preliminary appeals are not normally in the interests of justice is that all the approaches to the higher courts take time, while the matter could likely be resolved more quickly if started and concluded with the trial court deciding on all the issues before it. The delays tend to "defeat the speedy resolution of criminal cases contrary to the provisions of s 35(3)(d) of the Constitution".⁶

[17] In *Stow v Regional Magistrate, Port Elizabeth NO and Others*,⁷ a distinction was drawn between reviews and appeals as follows: an appeal is against the result of the proceedings, and a review is an attack on the method of proceedings. The section 304A review was brought to challenge a perceived irregularity in the proceedings after the applicant's conviction. It was not intended to be dispositive of the case against the applicant in its entirety. Like in *Delport*, this court did not pronounce on the merits of the matter, that is, the correctness or otherwise of the criminal proceedings. There is therefore no basis to depart from the general rule that a remittal order need not be appealable, unless unusual circumstances warrant it.

[18] Based on the above, I am not persuaded that a different court would find in accordance with the applicant's submissions. The application for leave to appeal is without merit and should therefore be dismissed.

[19] I accordingly make the following order:

1 The application for leave to appeal by the applicant is dismissed.

⁴ *Moyo and Another v Minister of Justice and Constitutional Development and Others* 2018 (2) SACR 313 (SCA).

⁵ *Ibid* para 161.

⁶ *Ibid* para 168.

⁷ *Stow v Regional Magistrate, Port Elizabeth NO and Others* 2019 (1) SACR 487 (SCA) para 25.

2 The case is remitted to the Regional Court, Mbombela, for further hearing and conclusion of the sentence proceedings before another Regional Magistrate.



M.R MOLELEKI AJ
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

For the Applicant: Mr. MMW Van Zyl SC
Barnard Incorporated Attorneys
Pretoria
Email. eloise@barnardinc.co.za
Tel. 012 001 2739

For the State: Mr ZH Nxumalo
DDPP: SCCU Mpumalanga
Mbombela
hnxumalo@npa.gov.za

Judgment delivered on: 02 July 2025