

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 08/05/2026 SIGNATURE: 

CASE NO. REV 73/2025

In the matter between:

State

And

Tshivhula Tshifhiwa

JUDGMENT- REVIEW

AML PHATUDI J.

[1] This is a special review sent to this court at the instance, and request of the presiding Magistrate.

[2] The accused, conducting his own defense, faces one count of imputation of witchcraft¹ and one count of "assault by threat"² at the Magistrates Court of Makhado held at Dzanani. He pleaded not guilty to both counts.

¹ Contravening the provision of section 1(a) of the Witchcraft Suppression Act of 1947

[3] The State proceeded by calling the first witness, who appears to be the complainant. A relationship between the accused and the presiding officer emerged during cross examination, when the accused revealed that he called the presiding officer, believing he is still being an attorney, sought advice relating to the issues that led to him being prosecuted relating to the case at hand.

[3] The State raised a concern that the presiding officer has prior knowledge of the matter and that the accused is or was his client. Immediately after the State had placed its concern on record, the presiding officer, without any hesitation, recused himself. The presiding officer then wrote a letter to this court, seeking an order to set aside the proceedings because he recuses himself.

[4] Section 35 (3) (o) of the Constitution of Republic of South Africa provides that 'every accused person has a right to a fair trial, which includes the right of appeal to, or review by, higher court'. Grounds for review are provided for in the Criminal Procedure Act 51 of 1977, and the Superior Court Act 10 of 2013.

[5] On perusal of the record including the memorandum submitted by the magistrate, it is clear that neither the automatic review provisions encapsulated in section 302 nor the special review provisions under section 304 (4)³ or 304A⁴ of the Criminal Procedure Act 51 of 1977 apply to the

² Threatening to kill the complainant by a motor vehicle causing the complainant to believe that which the accused intended to and had the means to forthwith carry out his threat.

³ Section 304(4) of the CPA provides as follows:

"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

⁴ Review of proceedings before sentence

(a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the

present situation, because, in the first instance, no sentence was passed and the second, the accused has not being convicted.

[6] Reviews regulated in terms of sections 302 and 304 (4) of CPA can only be invoked after the sentence has been passed and those regulated in terms of section 304A, only after the conviction but before sentence.

[7] The ground of review of the proceedings of the Magistrates' court are provided for in terms of section 22 of the Superior Court Act 10 of 2013. An interest in the cause is one of the grounds upon which the proceedings of the Magistrates' Court may be brought under review before a Division⁵.

[8] The State's concern over the presiding officer who presided over the case he not only had prior knowledge of, but expressed his legal advice to the accused, demonstrates that the presiding officer has an interest in the cause-leaving him conflicted. The presiding officer ought to have recused himself outright.

[9] Applying the principle set out above regarding the presiding judicial officer's conduct, I am of the view that the complaint does amount to an interest in the cause and his independence is compromised. He is conflicted and ought not to have presided over the case in the first place.

proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.

(b) When a magistrate or a regional magistrate acts in terms of paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.

⁵ Section 22 (1) (b)

[10] The law and procedure regarding recusal is very clear. Once a judicial officer recuses himself or herself from a case, he/she becomes *functus officio* and that is *candid quaestio* (end of the matter).

[11] The head of court is duty bound to reallocate the matter to another presiding officer who may start the proceeding *de novo* (start from the beginning). It will be in the interest of justice to reallocate the case to another presiding officer and should start a fresh.

[12] It will, as a result, be appropriate to make the following order

ORDER

12.1 The review is upheld.

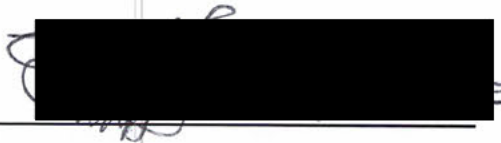
12.2 Case Number B334/25 heard in the Magistrates' Court for the District of Vhembe, held at Dzanani, is referred to the Magistrates' court for hearing.

12.3 The head of court or senior magistrate is authorized to allocate the trial for another magistrate.

12.4 The trial is to start *de novo* before another magistrate.


AML PHATUDI
JUDGE OF THE HIGH COURT

I agree


T.C TSHIDADA
JUDGE OF THE HIGH COURT