

SOUTH AFRICA / JUDGMENT

detention of Ms N December in the Port Alfred Magistrates Court Cells (CA&R 207/2020), In Re [2020] ZAECGHC 129; 2021 (1) SACR 655 (ECG) (24 November 2020)

[2020] ZAECGHC 129

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.M Roberson, T Malusi

CASE / FILE NUMBER

CA&R 207/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA&R 207/2020

Date delivered: 24/11/2020

In re: the detention of Ms N December in the Port Alfred Magistrate's Court cells on 29 October 2020.

REVIEW JUDGMENT

ROBERSON J:

- [1] This matter has been sent on review by the senior magistrate, Makhanda, under cover of a very helpful and comprehensive letter.
- [2] The review concerns the order by the magistrate Port Alfred, in terms of which Ms N December, a candidate attorney employed by Legal Aid South Africa, was detained in the court cells. It is not clear for how long Ms December was detained but she was released on the same day.

- [3] The transcription of the proceedings reflects that on 29 October 2020 the matter of S v Ndiyana was called. The prosecutor placed on record that Ms December was standing in for a Ms Babinya on behalf of the accused, that the matter was on the roll for sentence and that the doctor was present to testify about the extent of the injuries suffered by the complainant. The accused had been convicted of assault with intent to do grievous bodily harm.
- [4] Before the doctor was called to testify, Ms December informed the magistrate that she had strict instructions from her manager that she was not to deal with the matter, and that a Ms Ngxitho was the attorney dealing with the matter. Ms December stated that she was at court only to deal with her own part-heard matter and that all other matters were to be postponed. She said she was not familiar with S v Ndiyana and that it would be unethical for her to proceed with the matter. She had not consulted with the accused and if he was sentenced to a custodial sentence, so she stated, there would be serious consequences for her. She was instructed by her manager to request a postponement in order for Ms Ngxitho to be available to appear for the accused.
- [5] The magistrate pointed out that the accused had pleaded in February 2020, that he was in custody, and that the matter had been postponed

several times for Ms Ngxitho or for, as she put it, legal aid. She further pointed out that Ms Ngxitho had already addressed the court with regard to mitigation of sentence, and that the matter had not been finalised at that stage because she, the magistrate, had wanted to ascertain the nature of the injuries suffered by the complainant. The magistrate expressed the view that it was not fair to the accused for the matter to be repeatedly postponed when the accused was in custody. All that was required of Ms December, so the magistrate said, was to take instructions from the accused on the nature of the injuries suffered by the complainant.

- [6] Ms December repeated that she was subject to the instructions of her manager to which the magistrate replied that the manager did not control the court. Ms December then placed on record that she would not cross-examine the doctor and if the witness was called to testify by the court, she, Ms December would withdraw as the attorney of record. The doctor was then sworn in and Ms December announced that she was withdrawing as attorney of record. The magistrate told her that she needed permission to withdraw and could not withdraw without a valid reason for doing so. The magistrate then led the evidence of the doctor and the prosecutor had no questions for the doctor. Ms December was then called upon and stated that she had withdrawn as attorney of record. The magistrate repeated that Ms December required her permission to withdraw and that she had to provide reasons for such withdrawal. The magistrate said that the reasons already provided were not acceptable. Ms December repeated that she had withdrawn and the magistrate instructed her to take instructions from the accused on the nature of the complainant's injuries. She added:

“Not unless you are disrespecting me, so that I can take it now. It is instructions on injuries sustained, nothing else, nothing more. Not unless you are disrespecting me. So that I can deal with you now.”

[7] Ms December said that she was just obeying her manager's instructions. The magistrate then warned her that if she, Ms

December, wanted her to take further action, she would do so. Ms December repeated that she had withdrawn for ethical reasons and invited the magistrate to contact her manager. The magistrate responded as follows:

"Ms December, that amounts to disrespecting the court, if you want me to take further instructions, I will do that. Fortunately the act does allow me to do that, if you want me to do that I will do it. I do have powers to deal with somebody who does not have respect for court. If you want me to do that I will."

Ms December then left the matter in the hands of the court.

[8] The magistrate proceeded to warn Ms December to take instructions from the accused and Ms December asked for the matter to stand down so that she could report to her manager. The magistrate said that she did not deal with the manager and was dealing with an attorney. She repeated her instructions to Ms December to take instructions from the accused. Ms December again asked for the matter to stand down so that she could call her manager and said that she was not being disrespectful to the court. The magistrate said:

"I am warning you for the third time. I can take you to the cells if I want, I am warning you for the third time. I am warning you for the third time in the presence of everyone. I am giving you instructions to take instructions on injuries sustained. Before I request the police to take you to the cells. I am talking, you stand up when I am talking. I am going to need the court orderlies to assist me to take you to the cell if you do not comply."

[9] Ms December said that she could not go against the instructions of her manager and was in a difficult position. The magistrate

interrupted her and said that the only option she was left with was to take Ms December to the cells for disrespecting the court.

Ms December repeated that she had not been disrespectful and that she had already withdrawn as attorney of record. The magistrate

again interrupted her and asked that a Mr Ntatse (a police constable) be called to assist her. Ms December again tried to explain her position and was about to say something about Ms Ngxitho when the magistrate interrupted her and told her she was not allowing her to withdraw. Ms December asked to address the court and the magistrate asked for the court orderlies. Ms December said that she had come to the Port Alfred court because her own matter had been rolled to that day and that Ms Ngxitho had been assigned in her place to the Alexandria magistrate's court. The magistrate continued to call for the court orderlies and then remarked that it was strange that Ms December had dealt with other matters and it was only *S v Ndiyana* that she did not want to deal with. Ms December repeated that she could not disobey her manager's instructions.

[10] The magistrate proceeded as follows:

“For me to give you permission to withdraw as an attorney of record you have to give me reasons. The accused person that you are representing as an officer from the legal aid has been in custody, convicted and it was postponed due to legal aid attorneys, including yourself, all what has to be done, the doctor is here, is to take instructions on the nature of injuries sustained, nothing else, nothing more. Then you are done. If you are telling me that is unethical then you can take me to the magistrates commission, I am giving you permission, because I am also going to take you to the law society as well. If that is injustice, or unethical for someone who has been in custody, everything has been done, it is only injuries sustained. Then let us take it further. Then let us push it, it is clear we have to push it so that there should be clarity. I am talking to you, I am waiting for you, you are not allowed to sit down. What is your response?”

Ms December said she had no response.

[11] The magistrate went on to say:

“Can you please call Constable Ntatse so that they can take her to the cells. And I am not going to be disrespected by you. I am left with an option but to take you to the cells.”

Ms December was told that the court orderlies would take her to the cells. The magistrate then postponed the matter to 5 November 2020.

[12] Ms December was brought back to court the same day and, despite the fact that she had already been detained in the cells, the magistrate

proceeded to tell her that what she had done amounted to disrespecting the court and that the court had powers to deal with people who do not respect the court. She again accused Ms December of disrespecting her because she had not proceeded with the Ndiyana matter. She finished up by saying:

“It is only the injuries that were sustained by the accused before I give you a proper sentence. And I requested you to take instructions, just on nature of injuries sustained, nothing else, nothing more. You chose not to. And if the court officials start disrespecting the court, how much more to the members of the public, because if you have got a problem with me you stand the matter down and deal with the court in chambers. I do not think this would ever happen again. Thankyou.”

[13] In his letter the senior magistrate said that he had asked the magistrate to indicate the statutory provision in terms of which she had ordered the detention of Ms December. In her response to the senior magistrate, after setting out what happened in court leading up to her order, the magistrate said that she had erred by invoking the provisions of s 108 of the Magistrates' Courts Act 32 of 1944 (the MCA) and combining them with s 178 of the Criminal Procedure Act 51 of 1977 (the CPA). She acknowledged that Ms December was not formally charged and convicted in terms of s 108 of the MCA. She stated that Ms December had refused to comply with the court order after being warned several times and said she felt that Legal Aid South Africa could not interfere with her judicial independence and prescribe to her how to conduct her court.

[14] Section 108 of the MCA provides:

“108 Custody and punishment for contempt of court

- (1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in subsection
- (3) of section 5 provided) be liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine. In this subsection the word 'court' includes a preparatory examination held under the law relating to criminal procedure.
- (2) In any case in which the court commits or fines any person under the provisions of this section, the judicial officer shall without delay transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement,

certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.”

[15] Section 178 (2) of the CPA provides:

“178 Arrest of person committing offence in court and removal from court of person disturbing proceedings

- (1) Where an offence is committed in the presence of the court, the presiding judge or judicial officer may order the arrest of the offender.
- (2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and that he be detained in custody until the rising of the court.”

[16] The senior magistrate expressed the view that it was impossible to assign the actions of the magistrate in ordering Ms December’s

detention to any statutory provision. I agree. A simple reading of both statutory provisions demonstrates that Ms December’s

conduct was not remotely that which is envisaged in those provisions.

[17] Following her initial response to the senior magistrate, the magistrate submitted the matter to the Registrar for review by a judge. In her covering letter she stated that she had acted in terms of s 178 of the CPA and that the order she made was not appropriate. She said that the conduct of Ms December did not warrant the invocation of s 178, specifically that the conduct did not disturb the peace or order of the court. This is a reference to s 178 (2) of the

CPA. The magistrate requested that her order be set aside. Specific reliance on s 178 (2) of the CPA was a change of stance from the magistrate's earlier response to the senior magistrate and in my view was an ex post facto attempt at justification for the order to detain Ms December.

[18] More needs to be said about this matter than merely reviewing and setting aside the magistrate's order for the detention of Ms December. It seems to me that the magistrate was annoyed and frustrated that the trial could not be concluded, and wrongly regarded Ms December's conduct as disrespectful. It is unfortunate that the accused's matter could not be finalised that day. However, if the magistrate had the provisions of s 108 of the MCA or s 178 (2) of the CPA in mind at the time she made her order, with proper consideration she would have realised that Ms December's conduct was not what was envisaged in either of those provisions. Further she was required to warn Ms December of her intention to proceed in terms of the statutory provision she had in mind, in order to give Ms December an opportunity to address her with specific reference to such provision. She did not do so. I am of the view that she vaguely had in mind a power to detain someone until the rising of the court and that is why Ms December was brought back to court, apparently at the end of the court roll.

[19] In my view, in ordering Ms December's detention, the magistrate came very close to acting arbitrarily and ultra vires. She

certainly acted precipitately without the necessary caution required in invoking either of the statutory provisions. At the very least she committed a gross irregularity in her purported application of either provision. It goes without saying that to deprive a person of their liberty, even for a short period, is an extremely serious matter. A judicial officer simply cannot order the detention of a person in such a fashion without having in mind the exact statutory power invoked and without giving the person to be detained an opportunity to address the court in relation to that particular statutory power. This was in my view a serious invasion of Ms December's right to liberty and dignity. The magistrate went even further because when Ms December came back to court after her detention, she continued to accuse Ms December of disrespect. By that time Ms December had served her detention. The whole experience must have been frightening, shocking and humiliating for Ms December.

[20] The following order will issue:

The proceedings on 29 October 2020 in the Magistrate's Court, Port Alfred, during the matter of S v Ndiyana, whereby the magistrate

decided that Ms N December was disrespectful to the court, and the order for the detention of Ms December in the court cells, are

reviewed and set aside.

J.M ROBERSON

JUDGE OF THE HIGH COURT

MALUSI J

I agree

T MALUSI

JUDGE OF THE HIGH COURT

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/129.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/detention-of-v-ms-n-unknown-topic-aecghc-2020>

Prepared on 12 October 2026 · Esheria