

SOUTH AFRICA / JUDGMENT

Kotelo v S (REV/57/2024) [2024] ZALMPPHC 93; 2024 (2) SACR 564 (LP) (12 August 2024) [2024] ZALMPPHC 93

COURT

Limpopo High Court, Polokwane

BEFORE

TC Tshidada, J Ngobeni

CASE / FILE NUMBER

REV/57/2024

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IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: REV/57/2024

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

DATE: 12/8/2024

SIGNATURE: TC TSHIDADA J

In the matter between:

PODILE MASHOTO KOTELO

and

THE STATE

REVIEW JUDGMENT

TSHIDADA J.

Introduction

- [1] This matter served before this court as a special review referred to it by Mrs. C Langley, the Acting Judicial Head of Mogalakwena Mokopane Magisterial District.

- [2] The current review seeks clarity from this court of a legal impasse on whether a criminal trial proceedings which commenced at the Magistrate court before an Acting Magistrate whose acting stint or term expired prior to finalization of a trial, should be declared a nullity, such that it should be ordered to start de novo before another presiding officer, alternatively, whether the concerned and available Acting Magistrate, whom by law is deemed to be seized with the said partly-heard matter, should be invited by the Head of that particular court to come and finalize the pending or unterminated trial.

Factual Background

- [3] The accused was charged on one count of corruption (Accepting a benefit whilst a Public Officer) in the Magistrate Court for the District of Mogalakwena held at Mokopane under Case No: B20/2018.
- [4] Following several appearances and postponements of the matter for a variety of reasons unnecessary to discern herein, the record reflect that the main trial ultimately commenced and got underway before Acting Magistrate M.K Mmakola, sometime during 2018/2019. The accused tendered a plea of not guilty through his legal representative. Evidence of several state witnesses was led and finalized.
- [5] However, the review referral letter indicates that the Acting Presiding Officer vacated the office soon after his acting term came to an end in July 2019, amidst the trial under consideration. In spite, it is recorded that on or during 2021, the then Judicial Head of the court, one Mr. T.S Boloka, was strangely instructed by the Sub-Cluster Head of their court to inherit the aforesaid matter and start it de novo, despite the fact that Mr. Mmakola was still available to continue and finalize his matter, provided the office assisted him with the necessary arrangements to enable the matter to proceed.
- [6] Regardless of the instruction to commence the matter de novo, the record indicates that on 12 May 2021, Mr. Boloka struck the matter off the roll due to what he considered unreasonable delay on the part of the state to finalize the matter. Regrettably, Mr. Boloka is also reported to have resigned from service.
- [7] The referral letter further advises that on or about the 22 February 2024, the charges against the accused were re-instated by the same court, wherein on the day of appearance the accused's legal representative informed the court that the proceedings in respect of the re-instated charges were partly-heard before the same court.
- [8] Consequent thereto, Mrs. Langley (Acting Judicial Head of the Court) advised that she then contacted Mr. Mmakola in order to ascertain how can he be assisted with arrangements to return to the office in order to finalize his partly heard matter. To her dismay she reports that Mr. Mmakola indicated he was unable to do so without furnishing her with reasons. It was the afore-going response that prompted the current special review of the matter.

- [9] Upon perusal of the referral letter, this court wrote to Mrs. Langley and directed her to seek and obtain written reasons from Mr. Mmakola to explain why he was unable to make himself available to come and finalize his partly heard matter as required by law and as a matter of urgency to avoid violating the accused's constitutional right envisaged in Section 35(3)(d) of the Constitution[1] which provides thus:

“the accused is entitled to have their trial begin and conclude without unreasonable delay.”

- [10] This court is enjoined to determine and resolve the question whether the referred and untermiated proceedings should be set-aside as a nullity and a trial to be commenced de novo, alternatively to decide and direct Mr. Mmakola to make arrangements jointly with Mrs. Langley or her office to come and expeditiously finalize his matter.
- [11] This court has in the past aptly laid down the guidelines in terms of which untermiated criminal proceedings may or may not be ordered to start de novo.
- [12] The observation was made by MG Phatudi J (as he then was) in the case of *Rakimana v State* (Rev 27/2021) [2021] ZALMPPHC 89 (28 April 2021) where the learned Judge stated in para [10] that:-

“ The commencement of and speedy conclusion of the trial is in terms of terms of Section 35(3)(d) the pinnacle of fairness in every criminal proceedings”.

- [13] The aforesaid proposition stems from the premise that an accused person is constitutionally entitled to a speedy ‘conclusion’ of the trial without ‘undue delay’ in order to enjoy a fair trial. Absent the fulfillment of the right enshrined in Section 35(3)(d), I am unable to appreciate how fairness of the trial can possibly be achieved.
- [14] At issue in the instant case is whether or not the presiding officer who prior to expiry of his acting stint and seized of the matter which was before him, is available to finalize the untermiated trial still pending.
- [15] The prevailing view should be that the fact that the accused has already pleaded to the charge and that extensive evidence had also been led, he should be entitled in terms of the provisions of Section 106 (4) read with Section 118 of the Criminal Procedure Act, (the Act) to a verdict.
- [16] Section 9 (7) of the Act lay down the jurisdictional factors necessary to determine the issue at hand.
- [17] That said, in sum, it is not competent for another Magistrate to hear the pending case de novo merely because the presiding officer before whom the trial commenced, is ‘unavailable’ due to not being remunerated in accordance with applicable rates or tariffs payable to Acting Magistrate (as opposed to counsel's fees). In casu, the proceedings pending can for that reason not be declared a nullity. See also *S v Mahlangu* 1993 (1) SACR 183 (B) at 186.

- [18] In response to this court's query, Mrs. Langley reported back in writing that Mr. Mmakola has since communicated and committed his willingness to finalize the part-heard matter provided that the office of the Chief Magistrate undertakes in writing that he shall be adequately compensated for the duration of his presiding over the matter.
- [19] Pursuant to Mr. Mmakola committing to finalize the matter, the only outstanding issue was for the magistrate's office to make sure that his permissible claims and remuneration is processed adequately. This is in line with the common law principle that trial proceedings has to be commenced with and be finalized as expeditiously as possible.
- [20] It is common cause that Mr. Mmakola has previously held acting period as Magistrate, therefore he would undeniably be aware and undoubtedly knows what is there to be claimed, compensated, the applicable rate and tariff when one takes up an acting appointment as a Magistrate.
- [21] It would therefore be inappropriate for this court to interfere with any legislated rates and tariffs with which acting presiding officers are remunerated. Unfortunately, we are all, including Mr. Mmakola, bound by the provisions and prescripts of the applicable judicial officer's remuneration legislation framework.
- [22] Any suggestion to nullify the partly-heard proceedings under the circumstances is a non-starter, more especially in an instance where the presiding officer seized with the matter is and still available to proceed and finalize his matter. Attempts to do that shall be tantamount to committing an unjustifiable irregularity not only to the accused, but to everyone involved in the matter.
- [23] It is against this background that in a matter where the accused has already pleaded to the charge, and the State has already adduced and led extensive evidence against him, the accused is entitled to, upon finalization of the matter, to demand that he be acquitted or be convicted in terms of Section 106(4) of the Criminal Procedure Act[2], as opposed to Section 118 of the Act which in summary provides for any other Judge, Regional Magistrate or Magistrate of the same court to proceed with any matter arising from that court wherein the accused would not have pleaded to the charges and where no evidence would have been led yet.[3]

Legal Framework

- [24] Section 9(7)(a) of the Magistrates' Court Act[4] regulates the process of a Presiding Officer who was seized with a pending matter before vacating and/or with reason for one becoming unavailable arises.
- [25] The Section provides the following, thus:

“A Magistrate appointed in terms of sub-section (1) who presided in criminal proceedings in which a plea was recorded in accordance with Section 106 of the Criminal Procedure Act 51 of 1977, shall, notwithstanding his or her subsequent vacation of the office of the Magistrate at any stage, dispose of those proceedings and, for such purpose, shall continue to hold such office in respect on any period during which he or she is necessarily engaged in connection with the disposal of those proceedings”.

[26] Section 9(7)(a) and

(b) of the Act sets out the following jurisdictional factors:

- (a) That there must have been a plea recorded;
- (b) Evidence led before a Magistrate whom the accused pleaded before in accordance with Section 106 of the Act;
- (c) Lastly, that the proceedings must not have been finally disposed of when the tenure of the officer concerned as a Magistrate or Acting Magistrate became vacant.

[27] Having considered the afore-going, Mr. Mmakola's confirmation to attend to his outstanding matter as well as the commitment by the office of the Chief Magistrate to remunerate him accordingly, I find nothing that can obstruct him and/or his court from resuming the matter where it was left off and to be continued with to finality. What remains is for the acting presiding officer assisted by the designated officials to make arrangements when the proceedings shall be resumed with as a matter of urgency.

[28] The issue on how Mr. Mmakola proposed to be remunerated should not, in my view, be considered a bar or reason to nullify untermiated proceedings, more particularly in an instance where he cannot be assumed to lack knowledge of what he is entitled to claim in his capacity as an Acting Magistrate, noting that it is a position which he held before, and of which he would have most definitely submitted his claims for remuneration in the past.

[29] Section 9 (7)(a)(d) of the Magistrates' Court Act provides how benefits of a Magistrates who has to dispose of pending cases after vacating the office of a magistrate should be determined. There is absolutely no reason why the provided tariffs and rates should not apply to Mr. Mmakola.

[30] As a result, the legislated processes should equally be followed when Mr. Mmakola's claims and remuneration is determined and processed. Solely because Mr. Mmakola shall not be sitting as an Advocate entitling him to be reimbursed as if he was counsel on brief when dealing with the partly-heard matter, instead he shall be sitting as an acting Magistrate assuming the position he was in when he initially started with the proceedings under consideration, something which shall not be new to him to require different and/or new terms as intimated by him.

[31] It is therefore impermissible, irregular and untenable in law for a partly-heard matter to be rendered a nullity and to start de novo before another presiding officer for any other reasons other than that which is provided for in terms of the law. Unauthorized and unlegislated

demands of whatever form by an office-bearer cannot be considered a reason to abandon the duties and responsibility any officer of the court is entrusted with, not unless as in this instance, the “unavailability” of a Magistrate could be due to special circumstances such as death, recusal, dismissal, resignation and/or mental incapacity, which is clearly not the case in casu.

[32] It is therefore my considered finding that the current review does not warrant a consideration to have the pending proceedings herein declared null and void, such that they have to be set aside and ordered to commence afresh.

[33] Consequently, I direct that Mr. Mmakola, Mrs. Langley, the court administration support staff and the legal representatives involved in this matter, be informed of this judgment in order to put all systems in place as soon as possible and make sure that the pending criminal trial resumes and is finalized in the best way possible without further undue delay.

[34] In the circumstances, I accordingly grant the following order:

34.1 That the accused’s pending criminal trial under Case No. B20/2018 in Mokgalakwena Magisterial District held at Mokopane be resumed as soon as it is reasonably possible or with immediate effect before Acting Magistrate M.K Mmakola.

34.2 The Registrar/Clerk of the court responsible for payments of Acting Magistrate’s claims is directed to pay Mr. Mmakola what is permissible for his travelling and subsistence claims in terms of rates and tariffs per applicable legislation for the position.

34.3 The Registrar of this court is directed to transmit a copy of this judgment, as a matter of urgency, to Mrs. C. Langley (Acting Head of the Mokopane Magistrates Court) so that it can immediately be transmitted to Mr. Mmakola, and to be distributed further to all Heads of Limpopo Magisterial Courts.

T.C TSHIDADA

JUDGE OF THE HIGH COURT

I agree.

J. NGOBENI

ACTING JUDGE OF THE HIGH COURT

[1] The Constitution Act 108 of 1996, as amended

[2] Act 51 of 1977

[3] See *State v Mayisa* 1983 (4) SA 241 (TPD)

[4] Act 32 of 1944 as amended

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Prepared on 9 October 2026 · Esheria