

SOUTH AFRICA / JUDGMENT

Modibedi v Raborife N.O and Another (M614/2022) [2023]

ZANWHC 182 (3 October 2023)

[2023] ZANWHC 182

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid, S Mfenyana

CASE / FILE NUMBER

M614/2022

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Source record**IN THE HIGH COURT OF
SOUTH AFRICA****NORTH WEST DIVISION,
MAHIKENG****CASE NUMBER: M614/2022****Reportable: YES/NO**

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional

Magistrates: YES/NO

In the matter between:-

MODIBEDI

THABO

Applicant

and

MAGISTRATE

L RABORIFE N.O

1st

Respondent

CLERK

OF THE REGIONAL COURT (MOGWASE)

2nd

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 03 October 2023.

ORDER

Coram: FMM REID J et S

MFENYANA J: The

following order is made: (i)
The application for review in terms of Section 22(1) (b) and (d) of Act 10 of 2013 against the decision of Regional Magistrate Raborife in convicting the applicant of rape on 3 May 2022 is dismissed;
(ii)
The proceedings under RCA01/19 in the Regional Court for the Regional Division of North West Held at Mogwase is to proceeded before Regional Magistrate Raborife as a matter of urgency.

JUDGMENT

Introduction:

[1] This is an application for review in terms of section 22(1)(b) and (d) of the Superior Courts Act 10 of 2013 (Superior Courts Act), against the judgment of Regional Magistrate Raborife (the Magistrate) granted at the Regional Court for the Regional Division of North West held at Mogwase, under case number RCA 01/19

on 3 May 2022.

[2] The applicant (to whom I refer to as “the applicant” or “the accused” interchangeably) was convicted of rape as contained in the provisions of section 3 read with section 1, 55, 56(1), 58, and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of section 51 and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The applicant has not been sentenced yet, pending this review, and remains in custody.

[3] The provisions of section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable, since the complainant alleged to have been raped more than once.

[4] Throughout the proceedings, the applicant / accused was legally represented by a duly admitted advocate, Mr Moeti.

Lapse of time

[5] I deem it prudent to firstly address the time lapse from the date of the conviction in May 2022, to the date of this judgment on review.

[6] The following summation of the main events suffices:

6.1.

The accused was convicted of rape on 3 May 2022;

6.2.

The bail of the accused was revoked by the presiding officer after conviction;

6.3.

An application for bail on new facts were heard on 19 July 2022. This application for bail was refused;

6.4.

The legal representatives brought an application for the recusal of the Regional Magistrate Raborife on 19 October 2022. This application was not successful.

6.5.

The applicant launched this review application on 18 November 2022.

6.6.

On 23 November 2022 the matter was allocated a date to be heard, namely 3 February 2023.

6.7.

On 27 January 2023 the applicant removed the matter from the roll as set down to be heard on 3 February 2023.

6.8.

The applicant again applied for the allocation of a date of hearing of the review on 8 March 2023.

6.9.

A date was allocated for the hearing of the review application on 21 July 2023, on which date the review application proceeded.

The proceedings

[7] I briefly summarise the proceedings in as far as they have reference to the grounds of review.

[8] The accused pleaded not guilty to the charge, and elected to remain silent. No admissions were made by the accused. The record reflects that the accused confirmed to have been fully appraised of the competent verdicts of the charge he is facing, as well as the statutory minimum prescribed sentence of life imprisonment that the court should impose in the absence of compelling and substantial circumstances.

[9] The state called two witnesses, being a medical practitioner and the complainant. The medical practitioner confirmed in accordance with the J88 that the complainant informed him that she was sexually assaulted by the accused. The complainant testified that she and the accused are former lovers. She testified in detail about the two sexual acts that the accused forced on her on 21 October 2018. Of significance is that the complainant was not cross-examined on her version. The record reflects that the Magistrate did confirm the intention of the legal representative to not cross examine the complainant, no less than three (3) times.

[10] After the complainant testified, the parties agreed to a postponement for the prosecution to obtain a death certificate of one of the state witnesses. The Magistrate enquired whether the death of the witness was common cause. On paginated page 18, line 13 of the record, the following is recorded:

“Court: Are you the one that is disputing this death [intervene]

Mr Moeti: I am not disputing it.

Court: Or your client?

Mr Moeti: I am not disputing it.”

[11] Later, after discussing the principle of the “best evidence rule” and the need to call witnesses where issues are not disputed, the following exchange is recorded on paginated page 20, in relation to the death of the deceased:

“Mr Moeti: ... Your Worship, that the best form of evidence, Your Worship, is proof and original proof before the Court, Your Worship.

Court: If it is in dispute.

Mr Moeti: If it is ... Of course, if it is in dispute, Your Worship.

Court: Now at this stage we do not know.

Mr Moeti: It is not in dispute, Your Worship....”

(own emphasis)

[12] After the accused confirmed with his legal representative that he had heard rumours that the deceased is dead, but did not see him dead, the Magistrate postponed the matter on application of the State to obtain the death certificate.

[13] On resuming, the prosecutor informed the Magistrate that the death certificate could not be obtained, as the investigating officer was involved in a car accident, and was not in a position to obtain the death certificate. The prosecution’s request to postpone the matter for the second time, to obtain the death certificate, was refused.

[14] The prosecutor informed the Magistrate that there were two (2) other witnesses who were subpoenaed to testify, but they were not there. The application by the prosecutor to postpone the trial to trace the witnesses, was refused.

[15] The state then closed its case. Mr Moeti then applied for a discharge of the accused in terms of section 174 of the Criminal Procedure Act. This application was dismissed.

[16] The defence closed its case without calling any witnesses.

Grounds of review

[17] This review application is based on three (3) grounds:

17.1. That the Magistrate committed a gross irregularity;

17.2. That the Magistrate admitted inadmissible evidence; and

17.3. That there was malice or bias from the Magistrate.

[18] These grounds of review are set out in more detail as follows, in the application for review:

“The application is based on the grounds that the Learned Magistrate was biased and malicious, and has admitted inadmissible evidence in one or more of the following respects:

(1) The learned Magistrate conceded being in possession of the accused’s bail affidavit / bail proceedings before the commencement of the trial. that invokes a reasonable suspicion that she has perused it / his previous convictions – rape being one of them – causing her to be biased against the accused.

(2) Allowed a postponement for the death certificate of one of the witnesses, whom it was said by the investigating officer as having

heard that was deceased, however the said certificate was never provided to the court and the learned Magistrate took it as a going

concern that the particular witness is deceased without any proof to that fact which is against the ruling of *Ormichund v Barker* 1745 Atk 21, 26 ER 16, and the Best Evidence Rule as well as section 3 of Act 45 of 1988;

(3) Failure to apply the cautionary rule in that the complainant testified as a single witness and conceded to not knowing the cause

of her injuries in the evidence in chief, thus acting against the prescripts of *R v Mokoena* 1932 OPD 79 that for such evidence to be taken into account has to be satisfactory on all material respects. This indicates bias against the accused;

- (4) Failure to apply an adverse inference in terms of *S v Texeira* 1980 (3) SA 755 (A). The State undertook to call five witnesses however failed to call not even one of them. The inference to be made is that the state witnesses would have contradicted the evidence of the state and as such the evidence of the single witness to be rejected.
- (5) Absence of DNA results coupled with fact that J88 recorded no sign of trauma to the genitalia, Section 9 of the Constitution guarantees equal protection of the law as well as equal benefit of the law. The denial of legal benefit as per *R v Mokoena* 1932 OPD 79 and *S v Texeira* 1980
- (3) SA 755 A are unjustifiable by law, thus malicious;
- (6) An application for recusal based on *Audi Alteram Partem*, *Nemo Iudex in sua causa* and apparent bias and malice as well as the contravention of Section 9 of the Constitution was brought and denied on the 19th of October 2022.

Wherefore in continuing the above, it is respectfully submitted that the continuation of the trial will cause failure of Justice with real and substantial prejudice to the accused since he is already in custody as per *Makhubele* 1982 (2) SA 541 (T)."

The record of proceedings

[19] Of significance is the following that appears on paginated pages 252-253 of the record:

"Mr Moeti: Do we agree that Your Worship, can at least hear the bail on new facts because Your Worship had entertained the bail after he was

sentenced?

Court: You requisition me and you requisition him and [intervenes].

Mr Moeti: Your Worship will hear.

Court: I hear you because I am the one that made the decision that he be kept in custody."

[20] The legal representative of the accused then requested that the matter stands down to 19 July 2022 for the accused to bring a bail application on new facts, before the Magistrate.

[21] The record in the court file does not include the bail proceedings or the outcome thereof. However, the following quotation from the applicant's heads of argument is instructive thereof, that the bail application was denied and the accused remains in custody:

"The applicant's bail was cancelled immediately after he was convicted, though he was out on bail for more than a year of which he was diligent in his bail conditions and bail process. A new bail Application was brought and denied though it was clear the matter would be taken on Review and same might take a lengthy period of time (page 34 par: 10 dated 03/05/22). Ever since conviction the Applicant has been languishing in custody. Undoubtedly this is pure rancour and indicative of malice."

The bail affidavit

[22] After the conviction of the accused, the Magistrate enquired about the previous convictions of the accused. The following is recorded from paginated page 199 of the record:

“Court: The court will proceed from this point. Ms Mokoka, do you have previous convictions?”

Prosecutor: As the court pleases.

Mr Moeti: Your Worship, before my learned colleague proceeds, I have another request to make to the court.

Court: I am listening sir. You can have a seat Ms Mokoka.

Mr Moeti: Your Worship, I submit that the Court will recall at some stage, Your Worship, during the elementary stages of the proceedings, there

is a point where Your Worship has highlighted, on record, that your Worship was in possession of the bail affidavit that belongs to the accused before Court.

Court: I never said that. I would not even do a matter where I have that bail affidavit.

Mr Moeti: Let me finish what I am saying, Your Worship.

Court: Yes.

Mr Moeti: Your Worship said, what is this attached to the charge sheet, seeing that it is a bail affidavit and gave it to the State and said,

next time please put this away or put it inside the envelope. Do not let it be like this.

Now, Your Worship, point is that the bail information, or the bail application affidavit was in the hands of the Court at some stage. I submit for Your Worship to have said that that is a bail affidavit it means that Your Worship must have decipher as to what has been written on the first offence.

Now as to how far of that particular document Your Worship has seen or perused is unknown to me. It is only known to the Court. I submit that now Your Worship will have to answer questions to me, like Your Worship will be under cross-examination [indistinct].

So now Your Worship for the sake of the legal magazine [indistinct] I submit that now, Your Worship's role is completed insofar as dealing with this matter any further.

On this point, I will have to make an application, Your Worship, for a special review so that the High Court can tell us as to what is to be done concerning that.

Court: According to you, Adv Moeti, what have I seen, except that this is bail proceedings.

Mr Moeti: Your Worship, a bail affidavit contains, amongst other things, the accused previous convictions. That has [intervenes].

Court: Are you insinuating that I read the affidavit?

Mr Moeti: Your Worship, I did not say that. I cannot deny it.

Court: What are you insinuating?

Mr Moeti: What I can say is that it was in Your Worship's hands.

Mr Moeti: Your Worship has seen it. If your Worship had seen that it is a bail affidavit, we do not know how far your Worship has perused it.

Court: if I am looking at this document, I can see it is a charge sheet. Does that automatically mean that I have seen it in the name of the accused? That the structure of it is that of a [intervenes].

Mr Moeti: You see, My Worship, that is what I was trying to avoid, by saying that [intervenes].

Court: Do not avoid it. Deal with it.

Mr Moeti: Yes, now Your Worship is in the untenable situation where Your Worship has to explain That is not how proceedings should be conducted, Your Worship.

Court: I have to explain in any event. If the matter taken on review, I have to explain.

Mr Moeti: Ja, but not on record, like this, Your Worship, as in having a dialog of sort where one will say we have seen the previous convictions and Your Worship will say I have not seen it. Your Worship, it is neither here nor there.

Court: Adv Moeti, this is a court and when you are in court you have a right to be heard. I cannot say, because you want to bring review proceedings against me, I should not hear you. I should know what is it that you are saying I did unprocedural, because one of the grounds for review is gross irregularity. If I am going to postpone a matter for gross irregularity you will state on record what you believe I have seen; besides the fact that the structure of the document was that of bail. What is it that I have seen that is prejudicial to your client?

Mr Moeti: Your Worship, the previous convictions of the accused person.

Court: I have not seen them.

Mr Moeti: But Your Worship has perused or have seen the document.

Court: I did not peruse it.

Mr Moeti: Okay, but it was in Your Worship's hands.

Court: It was in my hands.

Mr Moeti: It was an occurrence.

Court: It becomes an irregularity when I have perused it.

Mr Moeti: Your Worship was able to [indistinct]. That is what I am saying.

Court: The structure of the document was that of bail.

Mr Moeti: That is because Your Worship has perused it.

Court: Now let us go to the second aspect. This point that you want to raise at this stage of the proceedings, why was it not raised when the proceedings started? When there was an opportunity for another Presiding Officer to replace me, as you are saying "I am conflicted".

Mr Moeti: Well, Your Worship it was not necessary at all.

Court: But in any event you and I know that review proceedings does not suspend these proceedings. You can continue with the review proceedings.

Let us proceed with what is supposed to happen when you are doing the review.

Mr Moeti: Yes, Your Worship, as a matter of fact, I will request that the bail be extended Your Worship, of the accused person before Court and pending outcome of the review application.

Court: I will not grant you an application to suspend these proceedings pending the review. The review proceedings are going to continue at the same pace as this matter. Review proceedings do not suspend the case.

Mr Moeti: They do not, Your Worship, I agree with Your Worship.

Court: Yes. Now we are at the stage where I have given judgment. What I asked the prosecutor to do is how do we proceed from this point to bring this matter to finality.

Mr Moeti: Yes, and what [intervenes].

Court: Go to sentencing stages.

Mr Moeti: Yes, Your Worship. That is why I said before my learned friend comes to the fore, a pre-sentence report will also be necessary in this regard, which means that [intervenes].

Court: Can we be procedural? Allow her to do what is supposed to be done here and apply for a postponement when she is done; because now we are at the state where we either get the... we are either advised whether your client has previous convictions or not. Once we are done with that then we go to the stage where the defence will tell me whether they are proceeding with or without a pre-sentence report. Let us be procedural.

Mr Moeti: Ja, but I wanted to circumvent that [indistinct] the accused previous convictions, Your Worship. That is also the point in issue

what we are taking the matter on review for. So, in a way, Your Worship, I do not see it opportune for my learned friend to disclose [intervenes].

Court: I find it opportune. Continue Ms Mokoka.

Mr Moeti: As the court pleases, your Worship. The State is in possession of the SAPS 69's ..."

Legislative framework

[23] Review of the proceedings of a Magistrate's Court is regulated by section 22 of the Superior Courts Act, which reads as follows:

"22 Grounds for review of proceedings of Magistrates' Court

- (1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-
 - (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

[24] I intend to deal with the grounds of review as set out in paragraph

[18] above, individually.

Possession of the bail affidavit

[25] This ground for review is phrased as follows:

"The learned Magistrate conceded being in possession of the accused's bail affidavit / bail proceedings before the commencement of the trial. That invokes a reasonable suspicion that she has perused it / his previous convictions – rape being one of them – causing her to be biased against the accused."

[26] As quoted above, the record indicated that the Magistrate did have the bail affidavit in her possession prior to the hearing of the matter. The record reflects that the Magistrate, upon discovering the document that is compiled to appear similar than that of the bail affidavit, proceeded to hand the affidavit down to the prosecutor.

[27] The Magistrate agreed to having the affidavit in her possession, but emphatically stated that she did not read the bail affidavit. She further confirmed that it would constitute irregular proceedings had she read the bail affidavit, but that she handed the bail affidavit down to the prosecutor to prevent any allegations of irregular conduct.

[28] There is no indication that the Magistrate did read the bail affidavit, or was aware of the previous offences of the accused prior to the trial commencing. There was consequently no procedural irregularity in the proceedings by the Magistrate handing down the bail affidavit upon becoming aware of it, and without reading it. It also does not constitute taking into account of irrelevant evidence, as the Magistrate did not read the bail affidavit.

[29] This ground of review can thus not be sustained.

The death certificate

[30] This ground of review is framed as follows in the application for review:

“Allowed a postponement for the death certificate of one of the witnesses, whom it was said by the investigating officer as having heard that was deceased, however the said certificate was never provided to the court and the learned Magistrate took it as a going concern that the particular witness is deceased without any proof to that fact which is against the ruling of Ormichund v Barker 1745 Atk 21, 26 ER 16, and the Best Evidence Rule as well as section 3 of Act 45 of 1988”

[31] On my understanding, this ground for review is that the Magistrate allowed a postponement to obtain a death certificate, which was not produced. Furthermore, the death of the witness was accepted by the Magistrate without the death of the witness being proven.

[32] A perusal of the record indicates that the death of the witness was not disputed by the accused or his representative. However, the prosecutor requested a postponement to lay the issue to rest in as far as it may become disputed. The death certificate could not be produced, apparently due to the investigating officer recovering from an illness. When the prosecutor requested another postponement, the request was refused and the matter proceeded on trial.

[33] The fact that the record reflects that the death of the witness was not disputed, justifies the Magistrate’s finding to not make a negative inference in the absence of the production of a death certificate.

[34] I find no procedural irregularity in the Magistrate’s conduct and this ground of review cannot be upheld.

Single witness cautionary rule

[35] The next ground for review is phrased as follows:

“Failure to apply the cautionary rule in that the complainant testified as a single witness and conceded to not knowing the cause of her injuries in the evidence in chief, thus acting against the prescripts of R v Mokoena 1932 OPD 79 that for such evidence to be taken into account has to be satisfactory on all material respects. This indicates bias against the accused.”

[36] The complainant testified that she was raped on more than one occasion, the same evening, by the accused. The complainant was not cross-examined.

[37] The Magistrate enquired from the legal representative of the accused no less than three

(3) times that the complainant is not going to be cross-examined. The Magistrate was thus correct to accept the evidence of the complainant as uncontested evidence before Court.

[38] There is no indication in the record that the complainant “conceded to not knowing the cause of her injuries”. The Magistrate, in accepting the uncontested evidence of the complainant, did not act in malice or bias.

[39] This ground of review can therefore not be upheld.

State not calling all the listed witnesses

[40] The next ground for review is phrased as follows:

“Failure to apply an adverse inference in terms of S v Texeira 1980

(3) SA 755 (A). The State undertook to call five witnesses however failed to call not even one of them. The inference to be made is that the state witnesses would have contradicted the evidence of the state and as such the evidence of the single witness to be rejected.”

[41] It is custom that the names of possible witnesses that the State intends to call, be listed and such list be attached to the charge sheet. This however, places no obligation on the State to call these witnesses. At the close of the State’s case, after failing to call the witnesses, the defence is entitled to call any of the witnesses identified in the list. The fact that the witnesses are not called by either party, does not justify any negative inference.

[42] The prosecutor calls witnesses from the list, as and when necessary during the course of the trial. Since all the facts of the rape was uncontested in the absence of any cross-examination to the complainant, the prosecutor had no duty to call any more witnesses. This would amount to a waste of the court’s time and resources if witnesses are called to testify in relation to issues that are not disputed.

[43] This ground does not amount to an irregularity in the proceedings and cannot be upheld.

DNA and identity of the accused

[44] The applicant claims that the absence of the DNA from the forensic laboratory and the absence of injuries to the complainant’s genitalia is unprocedural and malicious.

[45] This ground of review is phrased as follows:

“Absence of DNA results coupled with fact that J88 recorded no sign of trauma to the genitalia, Section 9 of the Constitution guarantees equal protection of the law as well as equal benefit of the law. The denial of legal benefit as per R v Mokoena 1932 OPD 79 and S v Texeira 1980 (3) SA 755 A are unjustifiable by law, thus malicious.”

[46] The identity of the accused was not disputed. It was common cause that the accused and the complainant were former lovers.

[47] The sexual acts were also not disputed. Absence of injuries to the complainant’s genitalia in the J88 form does not amount to a denial of sexual conduct, especially in the absence of any cross examination of the complainant.

[48] To present evidence of the DNA where identity is not disputed would amount to a waste of the court's time and resources. This does not amount to a procedural irregularity.

[49] This ground for review is to be dismissed.

Failure to recuse

[50] The applicant states that the Magistrate had a duty to recuse herself.

[51] This ground for review is framed as follows:

“An application for recusal based on Audi Alteram Partem, Nemo Iudex in sua causa and apparent bias and malice as well as the contravention of Section 9 of the Constitution was brought and denied on the 19th of October 2022.”

[52] The applicant does not state on what basis he holds the view that the Magistrate did not hear both sides (audi alteram partem) or was the “judge and executioner”, (nemo iudex in sua causa) save to refer to the possession of the bail affidavit, which has been dealt with above.

[53] This ground for review is thus also not sustainable.

Conclusion

[54] None of the grounds for review as advanced by the applicant, can be sustained for the reasons set out above.

[55] The application for review is thus to be dismissed.

Order:

[56] In the premises I make the following order:

- i) The application for review in terms of Section 22(1) (b) and (d) of Act 10 of 2013 against the decision of Regional Magistrate Raborife in convicting the applicant of rape on 3 May 2022 is dismissed;
- ii) The proceedings under RCA01/19 in the Regional Court for the Regional Division of North West Held at Mogwase are to proceed before Regional Magistrate Raborife as a matter of urgency.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

I agree

S MFENYANA

DATE OF HEARING:

21 JULY 2023

DATE OF JUDGMENT: 03 OCTOBER 2023

APPEARANCES:

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