

SOUTH AFRICA / JUDGMENT

Mpashe v The State (179/2017) [2017] ZAGPPHC 956 (3 July 2017) [2017] ZAGPPHC 956

COURT

North Gauteng High Court, Pretoria

BEFORE

De Vos, Molefe

CASE / FILE NUMBER

179/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REVIEW CASE NO.: 179/2017

MAGISTRATES COURT CASE NO.: D766/2016

3/7/2017

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

In the matter between:

EDWIN MPASHE

And

THE STATE

REVIEW JUDGEMENT

DE VOS J:

- [1] This matter came before me as a special review brought by the accused to have the prosecution stopped before the Presiding Magistrate and a further order that the matter be heard de nova before another Magistrate.

- [2] The review instituted does not comply with the provisions of Rule 53 of the Rules of this Court read with section 22 of the Superior Courts Act 10 of 2013 and should fail on this ground alone.
- [3] In the present matter it appears after reading the record:
- a. That the accused mero moto approached this Court to apply review proceedings before the accused was convicted or sentenced.
 - b. There is no provision for such a procedure as in the Criminal Procedure Act 51 of 1977. A person feeling offended by the behaviour of a Magistrate should bring a review application in terms of the provisions of Rule 53 of the High Court Rules.
- (i) An accused person who is aggrieved by the way the trial is conducted, and allege that he/she is not receiving a fair trial must first apply for the Presiding Officer's recusal before bringing an application to stop the proceedings before judgment is given. No recusal was requested in the present application. The locus classicus on an earlier review and the requirements for such an application is set out in *Wahlaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A)* and the procedure set out in that case should be adhered to.
- [4] In the present matter the Presiding Magistrate did not request a review. The legal representative out of his own accord prepared an application for review and handed it to the Presiding Magistrate when the matter was set down for argument on the merits. The application merely cited the State as the Respondent without identifying the magistrate as the person against whom an order is sought. Upon handing up the application the Magistrate postponed the proceedings pending the outcome of this application. In further response thereto the Magistrate attached a letter to the proceedings in which he sets out the reasons for opposing this application. If the Magistrate was properly cited as a Respondent he would have filed an opposing affidavit as required by the Rules of this Court. No blame can be placed on the Magistrate's shoulders for not adhering to the Rules of Court as he was not properly cited as Respondent in this matter. The applicant is solely to be blamed for this situation.
- [5] This Court has repeatedly said that the bringing of review applications before judgement or sentence is imposed shall only be heard in exceptional circumstances, ie. to prevent an otherwise irreversible and serious failure of justice. Only if it will lead to a failure of justice with substantial prejudice to the accused will the Court interfere. After reading the record I came to the conclusion that there is no merit in this application. The record speaks for itself and confirms what is stated by the Magistrate in his letter, i.e. that certain irrelevant questions asked by the accused's legal representative were ruled to be irrelevant. Nowhere in the record could I find any indication that the magistrate is or was biased against the accused. Furthermore, applicant's failure to comply with the provisions of Rule 53 of the High Court Rules amounts to an abuse of process which cannot be condoned. If the accused as applicant is serious in its application for a review there is nothing that prevents him to issue a proper application in terms of the Rules of this Court.

ACCORDINGLY THE FOLLOWING ORDER IS MADE:

1. The application for a special review is struck from the roll.
2. The matter is to proceed before the same Magistrate at a time and place to be arranged by the Prosecutor, subject to the accused's

right to institute review proceedings afresh in terms of the provisions of Rule 53 of the High Court Rules.

DE VOS J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

I agree.

MOLEFE J

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