

SOUTH AFRICA / JUDGMENT

S v Chabalala (100/2016) [2017] ZALMPTHC 5; 2017 (2) SACR 486 (LT) (15 May 2017) [2017] ZALMPTHC 5

COURT

Limpopo High Court, Thohoyandou

BEFORE

D Nair, K Makhapola

CASE / FILE NUMBER

100/2016

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REPUBLIC OF SOUTH
AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA
LIMPOPO

LOCAL DIVISION, THOHOYANDOU
15/5/2017

REPORTABLE

Not

of interest to other judges

Revised.

REVIEW

NO: 100/2016

MAGISTRATES

SERIAL NO: 23/16

In

the matter between:

THE
STATE
And
CHABALALA
GEZANI LUCKY

JUDGMENT

NAIR AJ

[1] This is a review forwarded to the High Court in terms of section 302

(1) (a) (i) of Act 51 of 1977. The accused pleaded guilty to a contravention of section 117(a) of the Correctional Services Act 111 of 1998 (Escaping). After questioning in terms of section 112(1) (b), he was convicted and sentenced to 8 years imprisonment.

[2] I addressed the following query to the learned Magistrate and requested his comments thereto:

1. The sentence appears to be in excess of the jurisdiction of the Magistrate's Court - See S v Mhlongo 2005(JOL) 14325 T.

2. The manner of addressing the accused as "accused"

[3] In response to my query, the Magistrate requested that I amend the sentence accordingly. There was no response forwarded to the second leg of my question.

[4] The provisions of s 117 of the Correctional Services Act 111 of 1998 are set out hereunder:

117. Escaping and absconding.-any person who-

(a) Escapes from custody;

(b) conspires with any person to procure his or her own escape or that of another offender or who assists or incites any offender to escape from custody;

(c) is in possession of any document or article with intent to procure his or her own escape or that of another offender;

(d) in any manner collaborates with a correctional or custody official or any other person, whether under the supervision of such correctional or custody official or person or not, to leave the correctional centre without lawful authority or under false pretences; or

(e) is subject to community corrections and where he or she absconds and thereby avoids being monitored,

is guilty of an offence and liable on conviction to a fine or to incarceration for period not exceeding ten years or to incarceration without the option of a fine or both.[9]

[5] It is trite that the district court's jurisdiction is limited unless it is increased by a particular statutory provision for a specific offence or class of offences. In terms of section 92(1), the punitive jurisdiction vesting in the district court is that of 3 years imprisonment.

- [6] The predecessor to Act 111 of 1998 was the Correctional Services Act 8 of 1959. Section 48 thereof stipulates that the offence of escaping was punishable by imprisonment for a period not exceeding 5 years. Section 51(2) of Act 8 of 1959 increased the jurisdiction of the Magistrates Court to impose any penalty specifically prescribed by that Act, The legislature omitted to include such provision in the new Act. This was highlighted in *S v Mhlongo* {2005} JOL 14325 (T) wherein Judge Bertelsmann stated " Although the penal provision for escaping has been doubled in Act 111 of 1998, there is no section in this later Act which corresponds to section 51 (2) of Act 8 of 1959. It is clear that the Legislature has, through inadvertence, failed to clothe the Magistrates court with the increased jurisdiction to impose a penalty more severe than 3 years imprisonment."
- [7] The accused was serving a sentence of 3 years imprisonment for housebreaking with intent to steal and theft when he escaped. He was tasked with washing vehicles belonging to the Department of Correctional Services when he saw the chance to escape. The accused was extensively questioned during the section 112(1) (b) proceedings and I find that the conviction is in accordance with justice.
- [8] The offence is very serious and gravity of this crime may be inferred from the severe penalty provision that the legislature deemed fit to enact. Escaping whilst serving a term of imprisonment for housebreaking with intent to steal and theft is deplorable. More so when one is given the opportunity to perform a menial task within the precinct but outside the prison. Society expects that those deserving of a custodial sentence remain in custody to foster the principle of rehabilitation and deterrence. I have considered the accused's personal circumstances and am of the view that they are outweighed by the seriousness of the offence. The sentence falls to be replaced with one of 3 years imprisonment.
- [9] The second part of my query addressed to the learned magistrate was the manner of addressing the accused. The learned magistrate repeatedly addresses the accused as "accused".
- [10] This appears to be the case on more than one occasion on the record. On page 1 of the typed record the learned Magistrate commences with the following "Do you understand the charge against you accused?" Page 2 of the record reads as follows "accused you have the right to legal representation meaning that you are allowed to employ a legal representative of your own choice.....During plea proceedings the court goes on to state as follows "yes accused the court shall put some questions to you to establish whether you did admit all the allegationsOn page 3 the court further asks the following: "Accused are you, is it correct that you are Chabalala Gezani Vicky. " The court commences the sentence proceedings with the following: "Accused you have been convicted of a serious offence...."
- [11] In *Motsisi v The State* unreported (513/11) {2012} ZASCA 59 (2 April 2012) it was stated

"It has long been established even long before the constitutional era that all witnesses ought to be addressed in a humane manner in court proceedings. See also *S v Basson* 2007 (2) SA 852 (CC) par [33 -

'...Judges should always seek to be measured and courteous; where it was necessary to censure litigants or lawyers, this should be done in a manner befitting judicial office. However, inappropriate behaviour by a Judge would not ordinarily give rise to an apprehension of bias; it would do so only where it was of such quality that it became clear that it had arisen not from irritation or impatience, but from what might reasonably be perceived as bias'

[12] In *S v Gwebu* 1988 (4) SA 155 0/V) at 158F-H it was stated:

"It is perhaps as well also to say something about the habit which a number of magistrates, and some prosecutors in the magistrate's

courts, have developed in recent years, of addressing accused persons by the appellation "accused" or "beskuldigde".

And, one sees, too in many records that some magistrates (not in this case) refer to witnesses as "witness" or "getuie".

This depersonalising of people is disrespectful and degrading. It is no cause for difficulty for people to be called by their proper

names. I can find no reason for the appellant, in this case when addressed directly by the magistrate not being called "Mr

Gwebu". Members of the public who appear in our courts, whether as accused or as witnesses, are entitled to be treated

courteously and in a manner in keeping with the dignity of the court. It is hoped that judicial officers will always be alive to this and discouraged this practice. Nothing further need be said on this issue.

[13] The practice of addressing an accused as did the learned Magistrate is deprecated and not in keeping with the decorum of the Court. The manner in which judicial officers address litigants, witnesses and accuseds is a reflection in some instances of the temperament of the bench as a whole.

[14] A third aspect that necessitates my intervention is the manner of responding to queries from the High Courts. The failure by the learned Magistrate to respond to the second leg of my question is another area of concern that must be addressed whenever reasons are requested on review. In *S v JOALE* 1998 (1) SACR 293 (0) it was held that "Magistrates ought not to regard a query directed by a judge in charge of reviews as an unnecessary irritation, to be disposed of as quick as possible. When a Judge directs a query, it means that he is *prima facie* not satisfied that justice was done. The magistrate can, by furnishing proper reasons, contribute to the removal of the Judge's initial doubt, and to the confirmation of the

conviction and/or sentence."

- [15] Magistrates are reminded that the duty to provide "reasons" derives from a statutory injunction and not at the whim of a Reviewing Judge. Section 304 (2)(a) of the Criminal Procedure Act 51 of 1977 enjoins a reviewing judge to do the following if it appears that the proceedings are not in accordance with justice "If, upon considering the said proceedings , it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings

are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed."

- [16] It is becoming common place for reasons to be written in an unacceptable manner and in some instances with a level of disrespect

for the Higher Courts. See in S v NJIVA & ANOTHER in 216957 Eastern Cape Local Division, Mthatha. DJP Nhlangulela. stated as

follows in paragraphs [40] and [41] "The queries raised in this matter by reviewing Judge are set out earlier in this judgement. They are couched in respectful and moderate terms. Many of the responses by learned magistrate, also set out above, do not address the merits of the issues raised, but cast aspersions on the integrity and intellectual and judicial capacity of the Judge. The intemperate, uncivil and disrespectful

language used by the learned magistrate is not only totally unacceptable, but also calls for strong censure.

- [17] See Njiva and another supra at paragraph 45. "Under our Constitution, the Judiciary and Magistracy constitute one undivided

Judiciary under the administrative management of the Office of the Chief Justice. It will be a sad day in our democracy if these two arms of our Judiciary are allowed to continue to address each other in the terms used by the learned magistrate in this case."

- [18] An invite to a Magistrate to provide reasons at the request of the High Court is an opportunity to persuade the Judge and Director of Public Prosecutions to appreciate what led to the decision or approach adopted. It is also a very helpful mechanism to develop the ability to argue cogently and foster learning among ourselves. The Management echelon within the Magistracy is enjoined to ensure that reasons on review are submitted timeously and further to ensure that reasons written with courtesy and respect to the Bench.

- [19] To this end it will be beneficial for the leadership of the Magistracy to develop a culture of Judicial Management oversight over matters wherein reasons are requested. Provided that same does not compromise the independence of the judicial officer but certainly protects the collegial relationship between judicial officers serving in a single Judiciary. A copy of this judgement is to be forwarded to the Secretary of the Magistrates Commission and to the Deputy Minister of Justice and Constitutional Development. I deem it meet to direct that the

Legislature revisit the provisions of the new Act to address the lacuna in this regard. This can be done by insertion of a similar statutory provision as was contained in the previous Act.

D NAIR

ACTING JUDGE OF THE HIGH COURT

LIMPOPO LOCAL DIVISION

I agree

K MAKHAPOLA

JUDGE OF THE HIGH COURT, LIMPOPO

LOCAL DIVISION

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