

SOUTH AFRICA / JUDGMENT

S v Mabena and Others (REV06/2021) [2021] ZALMPPHC 14 (26 April 2021)

[2021] ZALMPPHC 14

COURT

Limpopo High Court, Polokwane

BEFORE

MF. Kganyago, MV Semenya

CASE / FILE NUMBER

REV06/2021

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Source record

REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
REV06/2021
In

the matter between:	THE STATE And MOLOKO AARON MABENA AND 2 OTHERS ACCUSED
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JUDGEMENT

KGANYAGO J

- [1] The Head of District Molemole Magistrate Court has brought this matter on review under section 173 of The Constitution of the Republic of South Africa Act[1] for this Court to exercise its inherent jurisdiction and supervisory powers over magistrates' courts.

- [2] On 5th August 2020, the accused allegedly robbed, raped and attempted to kill complainants in the farming area of Mogwadi which falls within the area of jurisdiction of Molemole. The accused also allegedly robbed the complainants of their family motor vehicle which was used to load the stolen items.
- [3] One accused was arrested in Mogwadi whilst the other accused were cornered in Polokwane where a shootout ensued with the police. During the shootout one suspect was shot and killed. Two accused were arrested in Polokwane. The stolen vehicle was recovered together with the firearms and ammunition stolen at the farm. When the accused were arrested in Polokwane, they were charged with five counts of attempted murder, one count of murder, possession of firearms and ammunition together with the other accused who was arrested in Mogwadi.
- [4] The bail application of the accused was brought in the main seat of the magisterial district of Molemole in Morebeng Regional Court. All the accused were refused bail. Before the accused bail application was heard, the State Prosecutor did not approach the office of the Director of Public Prosecutions and the Regional Court President to identify an appropriate court to entertain the bail application, or to obtain written authority to do bail application in one identified centralised district court since the offences were committed in two different magisterial districts, which are Polokwane and Molemole.
- [5] On receipt of the review, I have requested the comments from the office of the Deputy Director of Public Prosecutions (DDPP). They have furnished me with a valuable opinion, of which I am indebted to them. According to the DDPP, this Court should find that the proceedings were in accordance with justice, and order that a written authority be issued by the Director of Public Prosecutions (DPP) directing that the matters emanating from the two magisterial districts be centralized in order to cure the defect. The DDPP further submitted that in the alternative, this Court may order bail proceedings to be in accordance with justice in as far as charges falling within the jurisdiction of Molemole Magistrate Court.
- [6] The question which must be determined by this Court is whether the failure by the prosecution to approach the office of the DPP and Regional Court President to identify an appropriate court or to obtain written authority to entertain the bail application in the Regional Court renders the whole bail proceedings to be irregular, and should be set aside.
- [7] The accused were arrested for offences which allegedly took place in two different magisterial districts. Generally, bail proceedings are held in a court within the magisterial district which the offence/s were committed. The accused in this matter are facing Schedule 6 offences. Section 50(6)(c) of the Criminal Procedure Act[2] (CPA) read as follows:

“The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate’s court: Provided the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her, may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.”

- [8] In terms of section 50(6)(c) bail proceedings of an accused who is facing a Schedule 6 offence must be heard in a magistrate court. Bail proceedings for a Schedule 6 offence may only be heard in a regional court when the DPP or a prosecutor authorised for that purpose, directs in writing. The subsection uses the word “must”, which means that it is peremptory to obtain a written authority for bail application of a Schedule 6 offence to be heard in the regional court.
- [9] The accused bail application was held in a regional court. According to the memo of the Head of the District Court, on both hard copy of the record and mechanical proceedings, there is no mention that written authority was obtained from the DPP, chief prosecutor or senior prosecutor for the bail application to be heard in the regional court. The written authorisation must be handed to the presiding magistrate before the commencement of the bail application. That did not happen in the case at hand and it therefore amount to gross irregularity.
- [10] Section 90(8) of the Magistrate’s Courts Act[3] read as follows:
- “Where an accused is alleged to have committed various offences within different districts within the area of jurisdiction of any attorney-general, the attorney general concerned may in writing direct that criminal proceedings in respect of such various offences be commenced in the court of any particular districts within his area of jurisdiction, whereupon such court shall have jurisdiction to act with regard to any such offence as if such offence had been committed within the area of jurisdiction of that court, and the court of the regional division within whose area of jurisdiction the court of such district is situated, shall likewise have jurisdiction in respect of any such offence if such offence is an offence which may be tried by the court of a regional division.”*
- [11] The attorney-general referred to in section 90(8) of the Magistrates’ Court Act will refer to the DPP. It is not in dispute that the offences which the accused are facing have allegedly been committed in two different magisterial districts. The prosecution was obliged to have approached the office of the DPP to obtain written authority which identifies the magistrate court where the accused bail application was supposed to be heard. The prosecution has failed to do so. A magistrate court is a creature of statute, and has no inherent powers like a High Court. A magistrate court is therefore not empowered to do something that the empowering legislature does not authorize it to do. The regional court held in Morebeng did not have jurisdiction to hear the bail application for offences allegedly committed in the magisterial districts of Polokwane. Therefore, failure by the prosecution to obtain written authority from the office of the DPP identifying the magistrate court where the accused bail application should have been held, amounts to gross irregularity.

[12] In *Johannes Windvogel v The State*[4] at para 8 Mhlana JA said:

“Subsequent to the hearing of the appeal, it became apparent that the court a quo did not have jurisdiction to hear an application for leave to appeal to this court as s16(1)(b) of the Superior Courts Act 10 of 2013 (the Act), which came into operation on 23 August 2013, provided that leave to appeal against any decision of a division on appeal to it lies to the Supreme Court of Appeal upon special leave being granted by this court. Consequently, the jurisdictional basis for an appeal to this court was absent. In the result, the court a quo did not have the power to grant the appellant leave to appeal to this court, and the proceedings of 1 March were a nullity.”

[13] Even though *Windvogel* case relates to the interpretation of s16(1)(b) of the Superior Courts Act, the principle of establishing the jurisdictional basis before a court could hear the matter remains the same. Without the prosecution having obtained written authorisation from the office of the DPP for the bail application of the accused to be heard in the regional court, and also having failed to obtain written authorisation from the office of the DPP which identified the court within a particular area of jurisdiction to hear the bail application, it follows that the bail application heard by Morebeng regional court is a nullity in its entirety. The proceedings of the said bail application of the accused were not in accordance with justice, and stand to be reviewed and set aside.

[14] In the result I make the following order:

14.1. The proceedings of the bail application for the accused held at Morebeng regional court are reviewed and set aside in its entirety.

14.2. The matter is remitted back to the magistrate court for a fresh bail application before another magistrate, and also for the prosecution to obtain the necessary written authority from the office of the DPP should the accused wish to proceed with a fresh bail application.

MF. KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

MV SEMENYA

Date delivered: 26th April 2021

[1] 108 of 1996

[2] 51 of 1977

[3] 32 of 1944

[4]

[2015] ZASCA 63 (8 March 2015)

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Prepared on 10 October 2026 · Esheria