

SOUTH AFRICA / JUDGMENT

S v Makibi (R 84/2020) [2021]

ZAFSHC 77 (11 March 2021)

[2021] ZAFSHC 77

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Chesiwe

CASE / FILE NUMBER

R 84/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Review case number: R 84/2020

In the matter between:

THE STATE

and

SEPHOKO DANIEL MAKIBI

CORAM: REINDERS, J et CHESIWE, J

JUDGMENT BY: REINDERS, J

DELIVERED ON: 11 MARCH 2021

SPECIAL REVIEW IN TERMS OF SECTION 304 (4) OF ACT 51 JUDGMENT

- [1] The Control Magistrate Welkom submitted this matter for special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (“the CPA”).
- [2] In a letter attached to the special review, the Control Magistrate set out the relevant circumstances and facts in respect of the referral to be the following:

“The case was received on 26 November 2020 from the Head of office with the request that the case be sent on review since the Presiding officer has retired whilst the case is still partly heard.”

The accused person is charged with the offence of Crimen Iniuria. He is conducting his own defence. The local magistrates at the Virginia court house are known to the accused being a court orderly at the Court house. Another magistrate has been arranged to attend to the trial.

Henceforth the magistrate from Theunissen was arranged to attend to the case. The trial commenced 23 April 2019 and the accused person pleaded Not guilty. The case proceeded partly heard before the magistrate up until 14 May 2019 and the case was remanded to 24 May 2019 for the accused to call witnesses. It was in the interim remanded to 11 June 2019 for further trial. On 11 June 2019 the accused's witnesses were absent and he requested a remand which the magistrate granted until 20 June 2019. The accused person was absent on 20 June 2019 and a warrant was issued for his arrest. He reappeared on 23 July 2019 and the case was remanded to 28 August for the defence to proceed. From that period the magistrate fell ill and was booked off for an extended period until him applying for early retirement. He was absent from office until he retired. The case was remanded in his absence pending his return to attend to the matter. The magistrate officially communicated that he will not be finalizing this partly heard case.

Seen in the light of different points of opinion whether to have the proceedings set aside, this case is referred for the honourable

Judge's decision.

See Hiemstra's Criminal Procedure 8th Edition page 18-13 ad paragraph 5.

In *State vs Mokoena* 2005 (2) SACR 280 (O) Page 280 ad paragraph (i), the following was decided: Where the magistrate was continuously unavailable due to ill health the finding by a Review Judge was necessary where the unavailability was uncertain and where it was in the interest of justice not to postpone the trial any further. An order for setting aside the proceedings is possibly desirable."

- [4] The record of proceedings reflect that the magistrate who postponed the matter on 15 October 2020 informed the accused that the matter was to be send on review in view thereof that the presiding officer was not available anymore. The comment of the accused boils down thereto that he did not object as it would appear that the complainant (according to him) did not wish to proceed with the matter any further. Whether the matter will proceed in future is the discretion of the Director of Public Prosecutions who is at liberty to start with prosecution afresh should the Director so decide.
- [5] The appropriate relief based on the information supplied by the Control Magistrate is that the proceedings should be set aside as the magistrate regrettably suffered from ill health and has since retired as a result thereof. It is evident that he would not return to finalize the partly heard case. A postponement of the trial would thus serve no purpose and would not be in the interest of justice.

Compare: *State vs Mokoena* 2005 (2) SACR 280 (O)

[6] I therefore make the following orders:

1. The proceedings in case number A258/2019 in the Magistrate's Court for the District of Virginia is set aside in toto.

2. The Director of Public Prosecutions is at liberty to decide upon any prosecution afresh.

C REINDERS, J

I concur.

S CHESIWE, J

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