

SOUTH AFRICA / JUDGMENT

S v Makuyana (R09/2020) [2020] ZAFSHC 25 (13 February 2020)

[2020] ZAFSHC 25

COURT

Free State High Court, Bloemfontein

BEFORE

S Naidoo, P Molitsoane

CASE / FILE NUMBER

R09/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Review

No: R09/2020

Magistrates

Court Case No: A680/19

In

the review between:

THE
STATE
versus
DAVID
MAKUYANA
Accused

CORAM:

NAIDOO J et MOLITSOANE J

JUDGMENT:

NAIDOO, J
DELIVERED

ON:

13 FEBRUARY 2020
REVIEW

JUDGMENT

[1] This matter was referred to us by the Magistrates Court, Welkom in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA), with the request for the court to make an appropriate order. The accused was charged in the Magistrates Court, Odendaalsrus with one count of contravening section 1(1)(a) of the Trespass Act 6 of 1959 and one count of contravening section 49(1)(a) of the Immigration Act 13 of 2002. The accused who was legally represented, pleaded guilty to both counts and was accordingly found guilty, after the matter was dealt with in terms of section 112(2) of the CPA. The statement prepared by the accused's legal representative was read into the record. The court a quo sentenced him as follows:

1. Count 1 – A fine of (Six Thousand Rand) R6000.00 or eight (8) months' imprisonment
2. Count 2 – A fine of (Six Hundred Rand) R600.00 or two (2) months' imprisonment

[2] The Senior Magistrate, Welkom, referred the matter to the High Court under cover of a letter pointing out that the statement in terms of section 112(2) of the CPA was a regurgitation of the elements of the offence as contained in the charge sheet and did not disclose the facts upon which the accused's admissions were made. For completeness, I set out the contents of the statement:

“I, the undersigned,

DAVID MAKUYANA

Make this statement in terms of Section 112(2) of the Criminal Procedures (sic) Act voluntary (sic) and without undue influence.

COUNT 1:

1. I admit that I am guilty of the crime of contravening the provisions of Section 1(1A) (sic) of the Trespass Act 6 of 1959 in that upon 12 May 2019 and at Tshepong Mine District Odendaalsrus, I did unlawfully and without permission of Tshepong Mine trespass the property of the said mine.
2. I admit that I have no defence to the charge and plead guilty.

COUNT 2:

3. I admit that I am guilty of the offence of contravening Section 49(1)(a) of the Immigration Act 13 of 2002 in that on 12 May 2019 and at Tshepong Mine district Odendaalsrus I entered the Republic in Contravention of the Act, by not having the necessary document to be in the Republic of South Africa and that I am an illegal foreigner.
4. I admit that I have no defence to the charge and plead guilty”

[3] A perusal of the charge sheet indicates that the statement in terms of section 112 (2) either repeats or paraphrases the wording of the charge sheet in respect of each offence. There were also parts of the statement that were added, and which do not appear in the charge sheet. It is noted that the accused is a Zimbabwean citizen, who was assisted by an interpreter in court. The accused was also legally represented. Section 112(2) requires the written statement to set out and specify the facts upon which his pleas of guilty were based, so that the court could have had insight into his reasons for pleading guilty and make a proper assessment of whether the accused in fact admitted all the elements of the offences with which he was charged.

[4] It has been held in a number of cases that the repetition or admission in a section 112(2) statement of the elements of the

offence is not enough to convict an accused and that the facts upon which such admissions are based should be disclosed. In *S v Mshengu* 2009(2) SACR 316 SCA, the court held at para [7] that

“Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of s 113 must be invoked”.

[5] *Mshengu* was distinguished in *S v Mbuyisa* 2012 (1) SACR 571 (SCA), where the court held at para [7]:

*“However, while it is no doubt undesirable for allegations contained in the charge-sheet to merely be repeated in a s 112(2) statement, there is no inflexible rule that an accused who uses certain of the phraseology in a charge cannot be convicted. Each case is to be considered in the light of its peculiar facts and circumstances. What s 112(2) requires is a written statement in which the accused sets out the facts upon which he or she admits guilt. Where these facts do not cover the essential elements of the charge — for example, in *Chetty's* case where on a charge of fraud it was not clear whether the person had been induced to act to his or her prejudice as a result of the accused's admitted representation — a conviction should not follow.” [S v Chetty 2008(2) SACR 157 (W)]*

The court found that although the section 112(2) statement contained some of the wording of the charge sheet, the court was satisfied that the appellant clearly admitted that she had poured petrol over the complainant with the intention to kill him.

[6] I am of the view that *Mbuyisa* is applicable in the present matter. The appellant stated in respect of count 1, that he admits having trespassed on the property of the Mine, “unlawfully and without permission of the Tshepong Mine”. Although those are the words used in the charge sheet, he added that he admits having no defence to the charge and therefore pleads guilty. Even if he expressed himself differently, for example, “I had no right to be at the mine”, it would still have amounted to trespass. With regard to count 2, although he paraphrased the words used in the charge sheet, he added that he admits being an illegal foreigner and that he has no defence to the charge, prompting his plea of guilty. It is clear

that he understood the elements of the offence and pleaded guilty accordingly. In my view therefore, the accused was correctly convicted. Having said that however, magistrates should pay heed to the salutary practice of ensuring that more detail is provided in the section 112(2) statement in respect of the facts giving rise to the plea of guilty, as required by that section.

[7] In the circumstances, the following order is made:

The convictions and sentences in this matter are confirmed

S. NAIDOO, J

I agree.

P MOLITSOANE J

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