

SOUTH AFRICA / JUDGMENT

S v Mkhari (A86/15) [2015] ZAGPPHC 84 (16 February 2015) [2015] ZAGPPHC 84

COURT

North Gauteng High Court, Pretoria

BEFORE

MSIMEKI, N.M.MAVUNDLA

CASE / FILE NUMBER

A86/15

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IN THE GAUTENG DIVISION, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case number: A86/15

Date: 19 February 2015

Magistrate: Nelspruit

Review Case no: 2036/12

Magistrate's Serial no: SP44/14

High Court Ref no: 848/14

THE STATE

VS

SAMUEL MKHARI

REVIEW JUDGMENT

MSIMEKI. J

- [1] This matter serves before me on special review.
- [2] The accused, not legally represented, appeared before magistrate Sambo in Nelspruit charged with theft of corrugated irons valued at R2 000.00.
- [3] He initially pleaded guilty to the charge. The magistrate, in terms of section 113 of the Criminal Procedure Act 51 of 1977 (CPA), altered the plea to one of not guilty once it became clear to him that the accused was pleading not guilty.

- [4] The trial proceeded before magistrate Sambo. The state closed its case and the accused testified and called a witness. The matter was then postponed to 12 December 2012 to enable the accused to bring his other witness.
- [5] The matter has since been on the roll. In the meantime the accused failed to attend court and a warrant for his arrest was authorised and issued. The accused was arrested and later released on bail.
- [6] It appears that Mr Sambo had entered into a contract of service with the department of justice and that the contract has since expired. Mr Sambo, evidently, has failed to finalise the matter and it is not very clear why this has happened. One can only assume that Mr Sambo is unobtainable and unavailable for whatever reasons which have not been disclosed to the court.
- [7] Upon receipt of the matter I requested information from the magistrate office. This became necessary as it was not clear why the matter was before us. The Senior magistrate responded to my query dated 24 December 2014 and advised that:

“Mr Sambo, the magistrate who had been attending to the matter was a contract magistrate whose contract has expired”.

It appears Mr Sambo is no longer available to complete the case that he started.

- [8] The question which needs an answer is whether the matter can proceed before another magistrate. The simple answer is yes.
- [9] In *Punshon v Wise, N.O. and Others* 1948 (1) SA 81 (NPD), the magistrate had written out, on a paper, the sentences which he proposed passing on the accused. The defence attorney, before the Crown had closed its case, came across the paper when going through the record. This prompted the defence to ask the magistrate to recuse himself from the case. The magistrate acceded to the application and became *functus officio*. The magistrate became unable to enter a verdict. The proceedings became a nullity.
- [10] In *Zackey v Magistrate of Benoni* 1957 (3) SA 12 (T) the magistrate was asked to recuse himself from the case after inadmissible evidence had been expunged from the record. The accused,

subsequently were arraigned on an identical charge but they refused to plead on the ground that they had already pleaded to the charge and no verdict had been recorded in terms of section 169 (6) of Act 56 of 1955 (the old Criminal Procedure Act). In an application for a declaratory order and an interdict restraining the magistrate from trying them, the court held that an accused who successfully asked for recusation was not entitled to claim a verdict as the earlier proceedings became a nullity.

- [11] In *S v Polelo* 2000 (2) SACR 734 (NKA) the magistrate who had a partly heard matter to attend to resigned before the matter was finalised. The magistrate who inherited the matter then sent it on special review so that the matter be heard *de novo*. I must point out that the state

had closed its case when the magistrate resigned. The defence, however, had not yet placed its case before the magistrate. The court held that where a presiding magistrate withdraws from a case for one or other reason the case must be commenced de novo before another presiding officer and that needed no declaration by the court that the previous trial be declared a nullity and that the matter be heard de novo.

- [12] The facts of the current matter are no different from those of the three cases above. The need, accordingly, does not arise for any court to declare the previous trial to be a nullity and ordering the matter to be tried before another judicial officer:

There is therefore no difference between a magistrate who recuses himself and a magistrate who resigns and refuses to complete the case. (See *S v Suliman* 1969 (2) SA 385 (A) at 390H-391 A).

The same principle, in my view, applies to a case where the contract of the magistrate, such as in this case, has expired.

- [13] It is not necessary to make any order in the current case because it is perfectly within the state's right to charge the accused de novo before another magistrate.

M. W. MSIMEKI

JUDGE OF THE GAUTENG DIVISION

PRETORIA

I agree

And it is so ordered.

N.M.MAVUNDLA

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