

SOUTH AFRICA / JUDGMENT

S v Moema (Review) (HC02/2025)

[2025] ZANWHC 36 (11 February 2025)

[2025] ZANWHC 36**COURT**

North West High Court, Mafikeng

BEFORE

T Masike, FMM Reid

CASE / FILE NUMBER

HC02/2025

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****REVIEW NUMBER: HC****02/2025****MAGISTRATE'S****SERIAL NUMBER: 01/2025****MAGISTRATE'S****CASE NUMBER: RE 2510/2023****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates: YES****Circulate****to Regional Magistrates: NO****In the matter between:****THE STATE****Versus****ANDRIES MOEMA****DATE RECEIVED: 3 FEBRUARY****2025****DATE HANDED DOWN: 11****FEBRUARY 2025****ORDER****(i)**

The proceedings in the matter in the
Magistrate's Court for the District of Odi held at Garankuwa
under case number RE2510/2023
before Magistrate Tsoku are set aside;

(ii)

The matter is referred back to the office of the National Prosecuting Authority to decide whether to commence proceedings against Mr. Moema de novo before any presiding officer other than Magistrate Tsoku.
REVIEW

JUDGMENT

MASIKE AJ

INTRODUCTION

- [1] This matter serves before the Court as a special review, having been forwarded to the High Court by Acting Senior Magistrate van Rooyen. The proceedings sought to be reviewed are partly heard before Magistrate Tsoku.

BACKGROUND FACTS

- [2] Mr. Andries Moema (Mr. Moema), appeared in the Magistrate's Court for the District of Odi held at Ga Rankuwa on charges of assault with intent to do grievous bodily harm (count 1), Malicious Injury to Property (count 2), and Assault with intent to do grievous bodily harm (count 3) on 7 October 2024.
- [3] The charges were put to Mr. Moema and he pleaded not guilty to the proffered charges against him. Mr. Moema did not give a plea explanation as envisaged in Section 115 of Act 51 of 1977 (the CPA). Mr. Moema was represented by Ms. Fakude from Legal Aid during the trial.
- [4] Ms. Malemela Ntloko (Ms. Ntloko), was called as a witness in respect of count 1. The state led the evidence of Ms. Ntloko and after the evidence of Ms. Ntloko was led, Ms. Fakude proceeded to cross examine Ms. Ntloko.
- [5] During the cross examination of Ms. Ntloko by Ms. Fakude, the presiding officer, Magistrate Tsoku, put certain questions to Ms. Ntloko. The prosecutor objected to the questions and the prosecutor submitted to the Magistrate Tsoku as follows "...I would like to firstly. Your worship, that the state appreciates the court's the interjection and assist the client. However, your Worship, to some extent we feel that Your Worship the Court is no longer treating our witness with a fairness. And I say this, Your worship, with the following reasons. The witness, Your Worship, is the victim in this matter and now she indicates to this Court that cross examine on my speaking to account reflected that she is an elderly person. Now the Court put to the witness and say that the witness imply that it was dark."

- [6] The learned Magistrate in response to the issue raised by the State said the following “I only told the witness to be careful. No, I am only sensitizing her to be careful in answering because she invites follow up question.”
- [7] The prosecutor then asked “Why is the Court suggesting to the witness that she is implying that it was dark?” The prosecutor went on to say “The witness could hear many things and should be let to explain on her own.”
- [8] The learned Magistrate once more repeated that she was trying to sensitize the witness to which the prosecutor replied as follows “It could mean many things. It could mean many things that it was, it could mean that, I was from bed is not maybe conscious enough.”
- [9] In response to this submission the learned Magistrate replied as follows “Mr. PP the witness was not answering the question in the first place.” The prosecutor replied to the learned Magistrate by saying “What I am trying to say, Your Worship, is that the issue of [indistinct] to say that this is, this is the victim yes, we appreciate the assistance. I just want the Court to be cautious and not treat the victim unfairly.”
- [10] The learned Magistrate there and then stated that she is recusing herself from the case.
- [11] The matter was then postponed to 29 October 2024 for the transcribed record.

ANALYSIS

- [12] Courts generally discourage the sending of part heard matters on special review. The reasoning appears from the examination of Section 304 and 304A of the CPA. The reading of the sections suggests that it was never intended for situations when the Magistrate becomes indisposed before completion of a trial.
- [13] An accused person is in terms of Section 35(3)(d) of the Constitution of the Republic of South Africa is entitled to have a trial begin and conclude without unreasonable delay.
- [14] In addition thereto, Section 106(4) of the CPA, reads as follows “An accused person who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.”
- [15] The procedural right of an accused person to demand that he be acquitted or convicted does not exist if the accused person has pleaded that the Court does not have jurisdiction to try the offence, where a plea of not guilty is entered by the Court on behalf of the accused and where the Criminal Procedure Act, Act 51 of 1977 or any other law expressly provides to the contrary.

- [16] It has been stated that the purpose of Section 106(4) of the CPA is to prevent the trial proceedings hanging over the head of an accused indefinitely after he has pleaded (See: *S v Delport and Others* 2015 (1) SACR 620 (SCA) at 34).
- [17] Section 118 of the CPA makes provision for the hearing of a trial by another Magistrate or Judge where the accused person has pleaded not guilty at a summary trial before a Magistrate or Judge and that Magistrate or Judge is not available to continue with the trial, and no evidence has been adduced yet, the trial may be continued before any other Magistrate or Judge of the same court.
- [18] It is clear that Section 118 of the CPA does not find application in this matter. Mr. Moema has pleaded to the proffered charges against him and evidence has been adduced. In terms of Section 118 of the CPA, the trial cannot be continued before another Magistrate.
- [19] Where a Magistrate has recused himself or herself, he or she becomes *functus officio* and is unavailable in the absolute sense. Instances of absolute unavailability include death, dismissal, resignation and recusal. See: *Magubane v Van Der Merwe*, NO – 1969 (2) SA 417 (N) at page 419A – D; See: *S v Makgetle*; *S v Matlowe and another* 1980 (4) SA 256 (B) at page 257 A – C.
- [20] As a result of the Magistrate having recused herself, resumption of the proceedings is impossible. The proceedings have become a nullity and the trial will have to be heard *de novo* before another judicial officer. (See: *Rakimana v S* (REV27/2021) [2021] ZALMPPHC 89 (28 April 2021) See: *S v Makgetle*; *S v Matlowe and another* *supra* at page 257A – C.
- [21] Because the proceedings so far are a nullity, the accused person cannot at this stage demand a verdict.

ORDER:

[22] Resultantly the following order is made: -

- (i) The proceedings in the matter under case number RE2510/2023 in the Magistrate's Court for the District of Odi Held at Ga Rankuwa are set aside;
- (ii) The matter is referred back to the office of the National Prosecuting Authority to decide whether to commence proceedings against Mr. Moema *de novo* before any presiding officer other than Magistrate Tsoku.

T MASIKE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

FMM REID

JUDGE OF THE HIGH COURT

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