

SOUTH AFRICA / JUDGMENT

S v Mongwe (A122/2016) [2016] ZAGPPHC 100 (1 March 2016)

[2016] ZAGPPHC 100

COURT

North Gauteng High Court, Pretoria

BEFORE

N.M. Mavundla, M.W. Msimeki

CASE / FILE NUMBER

A122/2016

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THE

JUDICIARY

REPUBLIC

OF SOUTH AFRICA

A122/2016

REVIEW CASE NO. MR

3/2016/PCL

A QUO CASE

NO: A767/14

HIGH COURT REF NO:

12/2016

1/3/2016

Not reportable

Not of interest to other

judges

Revised

In the matter between:

THE STATE

And

GOFREY ZWELAKHE

MONGWE ACCUSED

SPECIAL REVIEW

JUDGMENT

MAVUNDLA J.

[1] This matter was referred to this Court by the Acting Senior Magistrate of the Regional Division of Mpumalanga held at Nkomazi/ Tonga on special review in terms

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of section 304 (4) of Act 51 of 1977, requesting that the proceedings be set aside and the trial of the accused commence de nova because the matter was part heard and the presiding officer has since passed on.

[2] The office of the Director of Public Prosecutions, at the request of the Court, has favoured us with its opinion, for which we are indebted. The office of the OPP referred to the matter *S v Stoffels and 11 Similar Cases* 2004 (1) SACR 176(C) and *S v*

Skhosana and Others 2015 (1) SACR 526(GJ) and opined that the matter should be

referred back for trial de nova before another magistrate without an order of this Court setting the earlier proceedings aside.

[3] In the *S v Stoffels and 11 Similar Cases* matter (supra) the Court held as follows:

"[3] Section 118 of the Criminal Procedure Act 51 of 1977 provides that if the presiding officer before whom an accused at a summary trial has pleaded not guilty, is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other presiding officer of the same court.

[4] Where a magistrate dies or has become incapacitated or where he or she has been dismissed or has resigned, the part-heard proceedings before him or her are aborted and therefore a nullity. The same applies where the magistrate has recused himself or herself. The trial may then commence de nova before another magistrate without an order of the High Court setting the earlier proceedings aside. See *R v Mhlanga* 1959 (2) SA 220 (T); *S v De Koker* 1978 (1) SA 659 (O); *S v Molowa* 1998 (2) SCAR 422 (O) and *S v Pole/a* 2002

(2) SACR 734 (NC)."

[4] In the matter of *S v Skhosana* 2015 (1) SACR 529 the Court cited with approval some of the authorities referred to supra, in particular *S v De Koker* (supra) and *R v Mhlanga* (supra) and held that where the matter is part heard before a magistrate who becomes unavailable on account of resignation, or death such proceedings become a nullity and should be commenced de nova without the necessity of the High Court to order as such.

[5] In casu, the accused had already pleaded not guilty to the charge of armed robbery. The State called some witnesses, who were cross examined on behalf of the accused who was

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dully legally represented. The matter was postponed several occasions until the presiding officer past on.

[6] In the premises, I make the following order:

1. That the proceedings are a nullity and must be commenced de novo before another magistrate.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree

M.W. MSIMEKI

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Prepared on 9 October 2026 · Esheria