

SOUTH AFRICA / JUDGMENT

S v Ndzeru and Another (Review) (REV81/202) [2024] ZALMPTHC 33; 2025 (1) SACR 409 (LT) (13 November 2024) [2024] ZALMPTHC 33

COURT

Limpopo High Court, Thohoyandou

BEFORE

T.C Tshidada, AML Phatudi

CASE / FILE NUMBER

REV81/202

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IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

LOCAL DIVISION, THOHOYANDOU)

CASE

NO: REV81/ 202

CASE

NO: WB30/2024

(1)

REPORTABLE: YES

(2)

OF INTEREST TO THE JUDGES: YES

(3)

REVISED.

DATE: 13/11/2024

SIGNATURE:

In

the matter between: THE
STATE
and
RHULANI
OLDER NDZERU
1ST ACCUSED
MAKUNGU
NDZERU
2ND ACCUSED
REVIEW

JUDGMENT

TSHIDADA J

[1] This matter served before me as special review in terms of section 304 of the Criminal Procedure Act 51 of 1977 as amended. The request for special review has been commissioned by magistrate W.J Smit from the Magistrate Court for the District of Makhado, sitting at Waterval.

Factual Background per record.

[2] The two accused are charged with one count of assault. Both accused first appeared before court on 19 February 2024 and were ultimately released on warning on the same day. The trial was set down for 3 July 2024.

[3] The accused criminal trial served and commenced before the then acting Magistrate, Mr L.C Matlejoane at Waterval Magistrate Court.

[4] Both accused pleaded not guilty to the charge. State only managed to lead evidence of the complainant on the day. Proceedings were then adjourned to the 2 August 2024 for the state to call further witnesses.

[5] It was surreal when it emerged during the next appearance of the matter, that in fact the acting presiding Magistrate's appointment had lapsed before he was even seized with the trial under consideration. His acting

appointment as a judicial officer came to an end on 30th June 2024. It is recorded on the request for special review attached to the record herein, that the impugned acting Magistrate was soon after the discovery, relieved of all the magisterial duties and requested to vacate the office with immediate effect [sic].

[6] The current review seeks to determine whether the unfinalized criminal proceedings presided over by the referred acting Magistrate after his acting appointment had come to an end before he was assigned the matter was irregular and unlawful.

- [7] Section 35 of the Constitution provides that ‘every accused person has a right to fair trial’ which includes right to have a trial begin and conclude without unreasonable delay. The above right in my view should not be limited to an accused’s right to appear before a competent court of justice and a properly appointed and/or officiated presiding judicial officer. (My emphasis)

Legal Framework.

- [8] Section 9(3)(c) read with subsections 5(a)(i) and 6(b) of the Magistrate Courts Act 32 of 1944 provides thus:

“... the Minister, after consultation with the head of the court concerned, may appoint any appropriately qualified, fit and proper person to act-

- (c) as a Magistrate in addition to any Magistrate of a regional division or a district.

Subsection 5(a)(i) provides thus,...any person appointed in terms of subsection (3), holds that office for a period determined by the Minister at the time of the appointment, but the period so determined may not exceed 12 months.

Subsection 6(b) provides thus,...any person appointed in terms of subsection (3) or (4), is also deemed to have been so appointed in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceeding-

- (b) which have not been disposed of at the expiry of the period for which he or she was appointed.
- [9] Essentially, any court proceedings that an acting Magistrate preside over after the expiration of the acting period for which he or she was appointed are rendered null and void in terms of the Act, solely because of the Magistrates’ lack of official authority to do so.
- [10] Ostensibly, the irregularity results into an impermissible injustice to the litigants before that court. In the accused’s instance, it is tantamount to violation of their constitutional right enshrined in Section 35 of the Constitution of the republic and a further violation of their unscripted right to appear and be criminally tried by a competent and legally appointed judicial presiding officer.
- [11] It is trite that as a general rule, a High Court will usually not by way of review ordinarily interfere with pending proceedings in a lower court before conviction, See *Motata v Nair No and Another* [2008] ZAGPHC 215; 2009 (1) SACR 263 TPD at 266 F-G.
- [12] However, and exceptionally in the instant matter, the outlook of failure to interfere with the pending criminal

proceedings against the accused herein, in my view, shall be akin to travesty of justice and non-compliance with the rule of law by this court, if the accused were to be continuously subjected to appear and be tried by a court which was from the commencement of the trial clearly not properly constituted nor competent to adjudicate their case from inception.

[13] The proceedings presided over by the acting Magistrate herein were repugnantly flawed ab initio.

[14] Consequently, this court finds that it shall be a grave injustice not to review and set-aside the pending proceedings under review.

[15] In the result, the following order is made:

15.1 The pending criminal proceeding against both accused under Case No: WB30/2024, held at Waterval Magistrate Court is hereby reviewed and set-aside, and substituted with the following order;

15.1.1 It is ordered that the criminal trial against the accused herein should start de novo before a new Magistrate to be assigned by the Senior Magistrate at Waterval Magistrate Court as soon as possible.

15.1.2 The office of the Waterval Magistrate is further directed to notify the accused legal representative of the new trial date timeously.

T.C TSHIDADA

JUDGE OF THE HIGH COURT

I agree

AML PHATUDI

JUDGE OF THE HIGH COURT

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Prepared on 10 October 2026 · Esheria