

SOUTH AFRICA / JUDGMENT

S v Nthoesane (R15/2022; A864/2021) [2022] ZAFSHC 92; 2022 (2) SACR 188 (FB) (12 May 2022) [2022] ZAFSHC 92

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser, Molitsoane

CASE / FILE NUMBER

A864/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Review

number: R15/2022

Kroonstad

Magistrate's Court case no: A864/2021

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

THE

STATE

and

LERATO

ITUMELENG NTHOESANE

CORAM:

LOUBSER, J et MOLITSOANE, J

JUDGEMENT

BY: LOUBSER, J

DELIVERED ON: 12 MAY 2022

- [1] This matter was referred by the Acting Senior Magistrate of Kroonstad to this Court for a special review “in terms of Section 304(4)” of the Criminal Procedure Act 51 of 1977. In a covering letter the Magistrate informs that the trial of the accused is part-heard before Additional Magistrate Viljoen who has retired from active service on 31 March 2022. Prior to his retirement, and even to the present time, Mr. Viljoen was and is still not well as a result of illness. It is unknown whether Mr. Viljoen will recover sufficiently to finalize his part heard matters, the covering letter says. The Acting Senior Magistrate suggest that the trial proceedings be set aside in the circumstances, since the accused is in custody awaiting finalisation of his trial. He further suggests that it be ordered that the proceedings against the accused start de novo before another Magistrate.
- [2] The request for a review is accompanied by a full set of documents pertaining to the case against the accused, including a transcribed record of the proceedings against him so far. It appears from the documents that the accused was arrested and charged with the crime of Housebreaking with Intent to Steal and Theft, alternatively a contravention of Section 36 of the General Laws Amendment Act 62 of 1955, in that he was found in possession of suspected stolen goods without being able to provide a reasonable explanation for his possession of those goods. He was arrested on 18 September 2021 after dark, and he first appeared in Court on 20 September 2021. Soon thereafter the accused applied for bail, which application was refused after a full hearing in Court. His five previous convictions on charges of Theft appears to have been decisive in the Court’s decision not to grant the accused any bail.
- [3] The record of proceedings on the merits of the case shows that the proceedings got underway before Mr. Viljoen on 31 January 2022, on which day the accused pleaded not guilty to both the main and the alternative charges, and no plea explanation was presented on his behalf by his legal representative. The first witness for the state was a female police official who testified that, on the evening in question, she and other police officials were patrolling the streets

in Kroonstad. They came across the accused who was carrying household goods and equipment, to wit, a television set, a heater, blankets and so forth. He explained that he was given these items by someone at a certain guesthouse in town.

- [4] According to the witness, the accused then took the police to the guesthouse in question. There were no people present at the guesthouse, and the police were unable to gather any other information that night. At this point the proceedings were remanded so that the State could call further witnesses. In the end, no further evidence was heard by the Court, because the case had to be remanded a further 5 times because of the illness of Mr. Viljoen. As mentioned earlier, he went on retirement on 31 March 2022.
- [5] It is clear now that Mr. Viljoen will in all probability not be able to return and dispose of the matter. The problem is that the accused has been in custody now for almost 8 months, while he is in terms of Section 106 (4) of the Criminal Procedure Act 51 of 1977 entitled to demand that he be acquitted or convicted on charges to which he had pleaded. Moreover, in terms of Section 35 (3)(d) of the Constitution, an accused person has the right to have his trial begin and conclude without unreasonable delay. The present delay in the proceedings is obviously not due to any fault on the side of the accused.
- [6] Section 304 (4) of the Act deals with reviews where the proceedings in the lower court have already been finalised and a sentence imposed. The present review therefore cannot take place in terms of that section, as the Acting Senior Magistrate has suggested. The High Court has, however, an inherent jurisdiction to review the proceedings of the lower courts, and it is on this basis that this matter will be dealt with.
- [7] The authorities on this subject-matter show that a trial will be a nullity if the judicial officer is unavailable in the absolute sense for a reason such as death, retirement, dismissal, resignation or recusal. In such cases there is no need for the High Court to set aside the proceedings, and the trial will simply commence de novo before another judicial officer.[1]
- [8] In this case the judicial officer is now in retirement. At the same time, it is not altogether clear whether he will recuperate to such an extent that he will be able to return so that the trial can proceed. In such circumstances I deem it in the interests of justice to make an order setting aside the proceedings rather than postponing the matter until Mr. Viljoen becomes available again, which is not certain in any event.
- [9] In the premises, the following orders are made:
1. The proceedings in the Kroonstad Magistrate Court under case number A864/2021 are hereby reviewed and set aside.
 2. The proceedings must commence de novo before another presiding officer as soon as possible.

P. J. LOUBSER, J

I concur

P. E. MOLITSOANE, J

[1] S v Polelo 2000 (2) SACR 734 (NC) 736 c-e, S v Stoffels and 11 Similar Cases 2004 (1) SACR 176 (C), S v De Koker 1978 (1) SA 659 (O)

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