

SOUTH AFRICA / JUDGMENT

S v Sebetso and Others (01/2020)

[2020] ZANWHC 79 (9 October 2020)

[2020] ZANWHC 79**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

01/2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****HIGH****COURT REF:**

01/2020
MAGISTRATE
CASE NO: R/C22/2013
In
the matter between:-
THE
STATE
AND
TSHEPISO
ANDREW SEBETSO
VUSUMSI
MPHAKWE
LETLHOGONOLO
TAOTE
09 OCTOBER 2020
REVIEW JUDGMENT
ORDER
(i)
The
proceedings in case number R/C
22/2013
in the Regional
Court, Taung
is reviewed and set aside.

(ii)
The
trial should start de
novo
before a different Regional Magistrate, other than Mr.
Tsatsi.

JUDGMENT

HENDRICKS DJP

Introduction

- [1] Messrs. Orapeleng Itumiseng (accused 1), Tshepiso Andrew Sebetso (accused 2), Vusumsi Mphakwane (accused 3) and Letlhogonolo Taote (accused 4) were arraigned before the Regional Court, Taung facing ten (10) different charges. At the commencement of their trial on 15th January 2014, all the charges were withdrawn by the State against accused 1. The remaining accused persons pleaded not guilty to all the counts before Acting Regional Magistrate, Mr. Tsatsi. On the 12th March 2014, the trial proceeded and the State presented the evidence of one state witness, Mr. Leo.
- [2] There were a number of remands of the matter due to inter alia Mr. Tsatsi being indisposed for quite some time. Ultimately, the matter again came before Mr. Tsatsi on 27th November 2019, when he recused himself. As reason for his recusal, the learned Acting Regional Magistrate stated that he presided over a civil trial involving the erstwhile accused 1.
- [3] During the course of the civil trial, a copy of the case docket of this criminal trial was presented as an exhibit. It is only then that he realized that the present criminal matter is still part-heard before him. In interest of justice, he was therefore duty-bound to recuse himself from this criminal trial. This is indeed a valid reason for the recusal seeing that justice must not only be done but must be seen to be done.
- [4] In *President of the Republic of South and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999
- (4) SA 147 (CC), the following is stated in paragraph [48]:

“[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which

they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

- [5] In *S v Le Grange and Others* 2009 (2) SA 434 (SCA), the following is stated in paragraph [13] and [14]:

*“[13] The recusal application brought to the fore the question whether the learned Judge President’s conduct bore the appearance of bias. It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity.¹ It is not necessary in this case to determine whether the presiding officer’s conduct, bearing and utterances would have provided a reasonable person in the appellants’ position with reasonable grounds to think that the court might be biased or whether, by the time the recusal application was made, sufficient had occurred to create that impression. That is so because by the time the appeal came to be argued before us the main contention advanced on behalf of the appellants ranged beyond the simple fact that the recusal application had been wrongly refused and that the proceedings which followed constituted a nullity. The principal thrust of the argument on appeal was that having regard to the manner in which the learned Judge President had conducted himself, the appellants had not had a fair trial. As it was put by Milne JA in *S v Tyebela* 1989*

- (2) SA 22 (A) at 29G, ‘[i]t is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled

to a fair trial. ... This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires.’ Where the offending questioning

sustains the inference that in fact the presiding judge was not open-minded, impartial, or fair during the trial, this court will

intervene and grant appropriate relief. (See *S v Rall* 1982

- (1) SA 828 (A) at 833B, *S v Meyer* 1972

- (3) SA 480 (A) at 484D). In such a case the court will declare the proceedings invalid without considering the merits.”

- [14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be ‘manifest to all those who are concerned in the trial and its outcome, especially the accused’. The right to a fair trial is now entrenched in our Constitution. As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by s 35(3) of our Constitution. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of

a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also to be seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state.”

- [6] The learned Acting Regional Magistrate then sent the criminal matter on special review to this Court. This is to have the trial proceedings reviewed and set aside and for an order that the trial should start de novo before a different Regional Magistrate; hence this review.
- [7] It is trite law that a Magistrate’s Court (be it District Court or Regional Court) is a creature of statute and a Magistrate can only do what is prescribed by statute. Resultantly, a District Court Magistrate or a Regional Court Magistrate is not empowered by any statute to order that a matter should start de novo before another Magistrate. Only the High Court is empowered to do so and also to set aside irregular proceedings.

See: Maxwell Ngema v The State, case numbers SOC 117/10 and SOC 124/14, of the North West Division of the High Court, Mahikeng, dated 26 April 2012.

- [8] I am in full agreement with the learned Acting Regional Magistrate that the trial proceedings need to be reviewed and set aside. Furthermore, that it should be ordered that the trial should start de novo before a different Regional Magistrate, other than Mr Tsatsi.
- [9] Consequently, the following order is made:

R. D. HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

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