

SOUTH AFRICA / JUDGMENT

S v Tlhoboro; S v Makhubela & Ditsele (32/2014; 33/2014) [2015] ZANWHC 86 (22 January 2015) [2015] ZANWHC 86

COURT

North West High Court, Mafikeng

BEFORE

A M Kgoele

CASE / FILE NUMBER

32/2014; 33/2014

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IN THE NORTH WEST HIGH COURT

MAFIKENG

HC REF. NO.: 32/2014 &

HC REF. NO.: 33/2014

1. S v MOSES TLHOBORO: (CASE NO. J 544/11)
2. S v DIMAKATSO MAKHUBELA & PETER DITSELE: (CASE NO. J 455/13)

REVIEW

JUDGMENT

KGOELE J:

- [1] The two matters came before me on special review. They were referred to this Court together with the matter of S v Lesiba Kutu (HC Ref. No. 31/2014) which was laid before Gutta J under cover of a minute which indicated that the presiding officer in all these matters resigned before the accused were convicted and sentenced. A direction from this Court was also sought in light of the decision of S v Skhosana and Others (41/2093/2008) [2014] ZAGPJHC 223 (18 September 2014).
- [2] In the Skhosana matter supra, a special review was referred to the High Court as there were several partly-heard matters which could not be finalised because the presiding officer was involved in a near fatal accident and was incapacitated.

- [3] Gutta J, wrote a judgment in the Lesiba matter wherein the Skhosana matter referred to above including related cases from other Divisions were thoroughly ventilated. After a survey of these decisions Gutta J endorsed the approach taken by the Skhosana matter and others that followed it including an extended approach adopted by this

division in the review judgment matter of *S v Madisha* (HC Ref. No. 01/2014) delivered on the 2 May 2014 by Landman J.

- [4] The gist of the Skhosana matter is that although Section 275 of the Criminal Procedure Act 51 of 1977 (CPA) makes provision for a part-heard matter which has reached the conviction stage to proceed before another judicial officer for

sentence, it is however silent in the circumstances where the trial Magistrate is unavailable to continue with the trial pre-conviction.

Further that the proceedings in such circumstances are a nullity *ex lege* and should commence *de novo*. A common thread also runs through in all of the authorities referred to in this carefully considered survey of the cases above, that, each case must be adjudicated on its own merits. A consideration as to what would be in the interest of justice remains paramount.

- [5] In the Lesiba matter Gutta J also considered a further issue that relates to whether matters of this nature can be referred to the High Court for special review as Section 304 (4) of the CPA allows for special review of cases in circumstances where a magistrate or regional court has imposed a sentence which is not subject to automatic review in terms of Section 302, and it is brought to the notice of the provincial or regional Court that the proceedings in which the sentence was imposed was not in accordance with justice. Gutta J made analysis of the provisions of this section in comparison with the powers conferred by Section 304A of the same Act and remarked as follows:-

“27. From the foregoing, it is apparent that neither section 304(4) nor 304A applies as the accused was neither convicted nor sentenced, and the referral was not because the proceedings were not in accordance with justice.

28. A further question for consideration is whether a High Court presented with the aforestated pre-conviction scenario, can exercise its inherent jurisdiction to review the matter. In *Oosthuizen v RAF*

[2011] 4 All SA 71 (SCA), the Court held that:

“A High Court can only exercise its inherent jurisdiction in relation to the regulation of its own process when confronted with a case over which it already has jurisdiction and when faced with procedures and rules of the court which do not provide a mechanism to deal with an instant problem.”

29. Hence, when matters of this nature are referred to the High Court which has jurisdiction, the High Court can exercise its inherent jurisdiction to either refer the matter back to commence *de novo*, alternatively acquit the accused in the interests of justice.”

- [6] In order to avoid re-inventing the wheel, I am of the view that there is no need to re-harsh and or re-iterate the authorities Gutta J referred to above and the decision taken in that matter except to say that I echo the same sentiments. This leaves me to consider the facts of the two cases before me.

S V DIMAKATSO MAKHUBELA & ANOTHER: (CASE NO. J455/2013)

- [7] The accused were charged with 3 counts of housebreaking with intent to steal and theft of the various items which were listed on the respective Annexures attached to the charge sheet, which items belonged to three different complainants. They appeared for the first time in Court on the 20/06/2013 represented by Mr Mafaralala from the Legal Aid Board South Africa (LASA). The matter was postponed to the 26/09/2013 for state witnesses and their bail was extended. On the 26/09/2013 a warrant of arrest was authorised in respect of accused 2 as he did not appear. The matter was postponed to the 10/10/2013 pending his arrest. On the 10/10/2013 his warrant of arrest was cancelled as both accused appeared represented by Mr Monchusi. The matter was further postponed to the 21/10/2013 for disclosure of the contents of the docket. A further postponement was granted on this day till 19/11/2013 for state witnesses and trial. It appears that on the 19/11/2013 the accused pleaded not guilty and the matter proceeded up to a stage where cross-examination was reserved by Mr Monchusi and consequently postponed to 23/01/2014.
- [8] The record of the transcribed proceedings was not provided with this matter, it therefore becomes difficult to indicate how many witnesses had testified thus far. On 23/01/2014 their legal representative was not present which necessitated this matter to be postponed to the 26/02/14. On the 26/02/14 the matter proceeded but was later postponed due to DCRS problems. After this period, the matter was subjected to a number of further postponements for various reasons including the absence of the legal representative and accused 2 at some stage, obtaining of a transcribed record of the

proceeding due to the new legal representative taking over the matter, including the absence of the presiding officer himself up

until he resigned on the 6 of October 2014.

- [9] When considering the facts and circumstances of this matter, I am of the view that the proceedings should be set aside and commence de novo.

S v MOSES TLHOBORO: (CASE NO. J544/2011)

- [10] The accused in this matter was charged with two counts of fraud of presenting himself as if he is the lawful owner of two different identity documents on two different occasions to the officials of the Department of Transport and Licensing Authority. He appeared for the first time in Court on the 30/06/2011. The matter was subjected to a number of postponements due to various reasons including further investigations, at the request of the state, a possible payment of Admission of Guilt fine, accused applying for Legal Aid etc. On the 24/07/2012 the accused appeared and was represented by Ms Maleka. The matter could not proceed on

this date because the legal representative had not yet received all the contents of the documents requested despite having applied for their disclosure on two occasions earlier. The matter was further postponed to 17/09/12 for disclosure. On 17/09/12 accused did not appear. Due to Ms Maleka not having further instructions she withdrew as attorney of record. On 25/9/12 accused appeared on a warrant of arrest and bail was fixed after his explanation was not accepted and the accused was remanded in custody till 12/10/12 for case docket.

[11] The proceedings finally started on the 16/04/2013 after it was postponed twice from the previous date 12/10/2012. The accused plead not guilty to both counts. From the 16/04/2013 the matter was further subjected to a total number of 16 postponements for various reasons including absence of the legal representative and the accused on some occasions, and for further evidence. Five of the said postponements were due to the absence of the presiding officer who finally came back on the 25/06/14, but on this day the legal representative of the accused was not present. The matter was as a result postponed further to the 17/07/14. The record of proceedings reveal that it was the last time the presiding officer presided over the matter because the entries from this date indicates that it was postponed by other presiding officers till he resigned on the 6/10/2014.

[12] A numerical counting of the postponements from the first day when the accused appeared to this date reveals that they were +36, which is a similar situation to that of the matter of Madisha supra. In *S v Thobela* [2007] ZAGPHC 204; 2008 (1) SACR 605 (W), the Court considered what would be in the interests of justice and acquitted the accused. In the Madisha supra Landman J adopted a similar approach to the Thobela matter and made the following finding:

“[17] When a matter has been postponed 36 times and the accused has not yet received an opportunity to present his case through no fault of his own, it cannot be said that justice has been done. I am not inclined to make an order which has been requested. I intend to grant an order as was done in S v Thobela acquitting the accused.”

See also: *S v Molobi* (02/2014) (02 May 2014); *S v Masubelele* (29/2014) (30 October 2014).

[11] I find the remarks by Landman J apposite in this matter. The conclusion that I reached is that circumstances are such that the accused in this matter ought to be acquitted.

ORDER

[12] Consequently the following order is thus made:-

12.1 The proceedings in the matter of *The State v Dimakatso Makhubela and Another*: Case No. J455/2013 in the District Court of Moretele, held at Temba, are reviewed and set aside and should commence de novo.

12.2 In the matter of *The State v Moses Tlhoboro*: Case No. J544/2011, in the District Court of Moretele held at Temba, the accused is acquitted.

A M KGOELE

JUDGE OF THE HIGH COURT

DATED: 22 JANUARY 2015

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