

SOUTH AFRICA / JUDGMENT

S v Tsame and Another (01/2024 ; 02/2024) [2024] ZANWHC 318; 2025 (2) SACR 191 (NWM) (25 October 2024) [2024] ZANWHC 318

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Wessels

CASE / FILE NUMBER

01/2024 ; 02/2024

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
HIGH COURT CASE
NUMBERS:01/2024,
02/2024
MAGISTRATE COURT CASE

NUMBERS: RC143/2015, RC30/2015

Reportable: YES / NO
Circulate
to Judges: YES / NO
Circulate
to Magistrates: YES / NO
Circulate
to Regional Magistrates: YES / NO
In the matters
between: -
RC143/2015
THE
STATE
AND
THATAYAONE
TSAME
FIRST
ACCUSED
OLEBOGENG

MOSEKI
SECOND
ACCUSED
RC30/2015
THE
STATE
AND
POGISHO
PATRIC SEINOLO
ACCUSED
Coram: Petersen J et
Wesssels AJ
Date: 25 OCTOBER 2024
ORDER

(i)

The rulings by the Magistrate in case numbers RC143/15 and RC30/15 ordering the matter to proceed before another Magistrate de novo is reviewed and set aside.

(ii)

It is ordered that these trials are to proceed before another Magistrate de novo as preferent matters upon the authority of the National Prosecuting Authority to commence proceedings against the accused de novo.

(iii)

A copy of this Judgment shall be forwarded to the Regional Court President and the Director of Public Prosecutions, Mahikeng and the Magistrate's Commission by the Registrar of this Honourable Court.

REVIEW

JUDGMENT

Wessels AJ

Introduction

[1] These are special reviews from the Regional Court, sitting in Taung. It was referred to this Court by the learned Regional Court President, Magistrate M Malane in terms of Section 304 of the Criminal Procedure Act.[1]

[2] These reviews emanate from the recusal of the same presiding

Magistrate and ordering the matter to commence de novo before another Magistrate.

RC143/2015

[3] Both accused face two charges of rape, one charge of sexual penetration and robbery.

[4] On 21 July 2023, the Learned Magistrate Bekker (“the Magistrate”), who had been seized with the matter since the inception of the trial that commenced on 23 October 2017 recused herself from the proceedings.

[5] Although the Magistrate cited many obstacles encountered during the course of the matter such as the non-availability of the legal representatives of the accused, the non-availability of prosecutors and the impact of Covid 19 on the flow of the roll as reasons for her recusal, these reasons are subservient to the true basis for her recusal. The most pertinent reason advanced by the Magistrate for her recusal centers around the Magistrate’s

medical condition which emanates from the record of the proceedings as follows:

‘However, the court is forced by this medical specialist, that should the court continue, that there could be a triggering or. aggravating of the court's illness, to rather now recuse than wait until a later stage. It is also taken into account, the right to a fair and speedy trial, which is clearly not happening here, in the interest of justice, that this court recuse herself and that this matter start de novo before another presiding officer in Taung that are readily available, that can deal with systemic errors of load shedding, of interpreters not available, court rooms not being availed for this court, you know, forcing the court to sit and wait and actually have the minimum of time to continue with any of her cases and fortunately, you know, it is not only yourself, but the victim and the community in this matter that suffers, court wishes and hopes with doing this it will be prevented and that justice will be seen to be done.’

[6] To substantiate the reasons mentioned above, the Magistrate attached to the charge sheet a medical certificate of a psychiatrist under whose treatment the Magistrate had been since 2014.

RC30/2015

[7] The accused is charged with rape.

On 21 July 2023, the Magistrate, who had been seized with the matter since the inception of the trial (that commenced on 31 January 2018), granted an application for her recusal from the proceedings brought by the prosecutor based on the ill health of the Magistrate (the same medical condition as mentioned in RC143/2015).

[8] It is apposite to mention that the application for recusal was opposed by the accused’s legal representative. At the time of the Magistrate’s recusal, the Magistrate had heard an application in terms of Section 174 of the CPA and what remained was for the Magistrate to give judgment. Immediately before the Magistrate was to give judgment on the Section 174 application, she granted the application for recusal.

- [9] The application for recusal is premised on a medical certificate of a psychiatrist under whose treatment the Magistrate had been since
2014. The psychiatrist expresses the view in the medical certificate that the Magistrate's continued involvement in, inter alia, these matters, might aggravate the Magistrate's post-traumatic stress syndrome and can trigger a mood disorder.
- [10] The Magistrate stated that her illness could be triggered or aggravated at any given moment. The Magistrate referred to other matters she is seized with, in the same Court, from which she either had or was intending to recuse from, but stated that she would have been able to give judgment on the Section 174 application in
- this matter. To this extent, the Magistrate stated that her mind was clear and that she was able to give a well-reasoned
- judgment. The Magistrate conceded that despite her willingness to give judgment on the Section 174 application, there could
- nonetheless be aggravation or triggering of her illness.
- [11] Despite these assurances by the Magistrate, the prosecutor persisted with the application for recusal on the basis of the Magistrate's illness as indicated on the medical certificate.

Application of legal principles

- [12] In the often quoted judgment by the Constitutional Court in the matter of President of the Republic of South Africa and Others v South African Rugby Football Union and Others [2] the following principles, to be applied in case of recusal, have been laid down:
- '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.'
- [13] The test as laid down in the SARFU [3] is undoubtedly objective in nature. When applied to the Magistrate's reasons, her recusal cannot be labelled as unreasonable or arbitrary. It is meaningful that the Magistrate refers to also other cases mentioned in her medical certificate which according to her psychiatrist, might aggravate and/or trigger her disorder.
- [14] The Magistrate's Oath prescribed by Section 9(2)(a) of the Magistrates' Court Act[4] reads as follows:

‘(I)...do hereby swear/solemnly affirm that in my capacity as a judicial officer I will be faithful to the Republic of South Africa, will

uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.’

[15] Although instructive, the oath places an obligation on a Magistrate to administer justice to all persons in accordance with the Constitution and law. If the Magistrate is unable to fulfil this obligation, her recusal is warranted. These two matters cannot be left lingering on the roll. Bearing in mind that the

earliest of these matters commenced in 2017 (and although the recusal of the Magistrate is in accordance with justice) the injustice

perpetrated by the inordinate delays in these matters militates against the proper and effective administration of justice.

[16] In a review judgment pertaining to the recusal of the same Magistrate that served before this Court[5], Petersen J (with whom Hendricks JP concurred) very aptly remarked that it is prudent for the Magistrate’s Commission to intervene in the interest of both the Magistrate and the greater administration of justice. Whether the Magistrate’s Commission had intervened or if it had intervened, whether such intervention bore any fruits, is unknown.

[17] Although the recusal of the Magistrate is in accordance with justice,

this is not where this Court’s inquiry should cease for the reason that following the Magistrate’s recusal, she ordered

that the matter proceed de novo before another Magistrate.

[18] Section 22(1) of the Superior Courts Act[6] provides the general basis for the review of an order from a Magistrate’s Court. In terms of the provisions of subsection

(c) thereof, one of the grounds upon which the proceedings of a Magistrate’s Court may be brought for review before this Court is on the grounds of a gross irregularity in the proceedings.

[19] The limitations of the Magistrate’s powers to grant an order to this effect have been dealt with in the unreported judgment of this court of Maxwell Ngema v The State[7] by Kgoele JA (J as she then was) with whom Hendricks JP (J as he then was) concurred the following was stated at paragraph 3 of the

judgment:

‘It is further accepted in our law that a magistrate is a creature of statute and can only do what is prescribed by the statute. Consequently a district court magistrate or a Regional Court magistrate is not empowered by any statute to order the matter to start de novo. Only the High Court has such powers which includes the powers to set aside irregular proceedings.’

[20] Regarding the discretion of this Court to order the trial to start de novo the Supreme Court of Appeal in *Gumbi and Others v S*[8] provided the necessary guidance in exercising such discretion.

‘Section 215 of the Act requires that the trial be of the same person upon the same charge. Logically therefore the section can only find application to a situation where the prior proceedings amount to a nullity and, in consequence, new proceedings are instituted. In that regard, it is important to distinguish between criminal proceedings and the trial as such, which is only a part of the entire criminal proceedings. It having been accepted that the matter had to commence de novo, it was for the prosecution to decide whether proceedings should be instituted in respect of the same offences on the original indictment, amended if necessary, or upon any other charge.’

[21] The orders of the Magistrate are clearly irregular and are reviewed and set aside.

[22] It is imperative that urgent steps be taken to commence these trials de novo with preference in relation to their allocation on the roll and charge sheets with all exhibits which have been admitted as evidence in the proceedings to be returned to the prosecution.

Order

[23] Resultantly the following order is made:

(iii) A copy of this Judgment shall be forwarded to the Regional Court President, the Director of Public Prosecutions, Mahikeng and the Magistrate’s Commission by the Registrar of this Honourable Court.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

I agree.

AH PETERSEN

JUDGE OF THE HIGH COURT

[1] Act 51 of 1977.

[2]

[1999] ZACC 9; 1999 (4) SA 147 (CC) at par 48 (“SARFU”)

[3] fn 2 supra.

[4] Act 32 of 1944

[5] High Court case numbers 06, 07,08,09/2023 being The State v Gilbert Sejamoholo (R/C 11/2014), The State v Omphemetse Sehunelo

(RC85/2016) The State v James Buti Sitsi and others (R/C115/2015), The State v Tsholofelo Wesi (R/C 02/2016)

[6] Act 10 of 2013

[7] Unreported Judgment of the North West High Court under case number SOC117/10.

[8]

[2018] ZASCA 125 at paragraph 9

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