

REPUBLIC OF SOUTH AFRICA



A53/2014

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

30/01/2014

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
27/01/2014	
DATE	SIGNATURE

High Court Reference No: 1123
Magistrate's Serial No: 14/13
Magistrate's Case No: 2041/2013

In the matter between:

THE STATE

And

SPHAMANDLA MLONDO

REVIEW JUDGMENT

MOLEFE J:

[1] This is a review which came before this Court in terms of Section 302 (1) of the Criminal Procedure Act 51 of 1977 ("the CPA").

In this matter the accused was found guilty of contravening Section 170 (1) of the CPA, (failure to appear) and sentenced to pay a fine of R300-00 or in default of payment to thirty (30) days imprisonment.

[2] Mrs S. Kusche, the magistrate, Piet Retief, sent the matter on special review under cover of a letter dated 20 November 2013 which read as follows:

- ' 1. Attached please find the above-mentioned case for consideration by the Honourable Reviewing Judge.*
- 2. The accused was found guilty of contravening section 170 (1) of Act 51 of 1977, failure to appear and sentenced to pay a fine of R300-00, or in default of payment to thirty (30) days imprisonment.*
- 3. When checking the cases the following lacuna was noted by me and I decided, after a discussion with the Presiding Magistrate, to bring it under the attention of the Honourable Reviewing Judge to consider whether conviction was in accordance with justice.*

3.1 Accused defaulted coming to court on the 05/11/2013 and the magistrate held an enquiry into his failure to appear.

3.2 Section 170 (1) of Act 51 of 1977 specifically states that "an accused who is not in custody or on bail can be convicted."

3.3 Accused was released on bail and therefore could not have been found guilty'.

[3] The Presiding Magistrate's reasons for judgment were attached to the letter and the reasons read as follows:

'1. Introduction

The matter was brought to my attention by Mrs Kusche, Head of Judiciary, after I had found the accused guilty and sentenced him. This case was heard by me on 08/11/2013.

2. Reasons for Judgment

The accused in this case was brought before court after being arrested on a J165 warrant. Accused has paid bail. He failed to appear on 05/11/2013 and the Warrant of Arrest was authorised and his bail money was declared provisionally forfeited to the state until 19/11/2013. On the 08/11/2013, I then proceeded with an enquiry into accused's failure to appear, whereas the accused had been out on bail. An enquiry into failure of an accused to appear cannot be held where the accused who had defaulted was released on bail.

The enquiry into accused's failure to appear was held without properly referring to the record of proceedings and not in accordance with the Criminal Procedure Act, which is regretted and will not be repeated.

The main case against the accused is still pending and is ready for trial.

The bail money was re-instated.

The accused has been informed of the special review proceedings.

Your review of the proceedings pertaining the enquiry into the accused's failure to appear, will therefore, be appreciated'.

[4] Section 170 (1) of the CPA reads as follows:

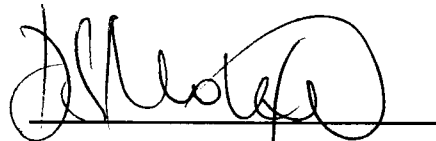
"1. An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2)".

[5] The magistrate, Mrs S. Kusche correctly pointed out that the accused in this case was not in custody and was released on bail. He could not therefore have been found guilty in accordance with section 170 (1) of the CPA.

- [6] I agree with Mrs Kusche's submission. The section 170 (1) of the CPA is concerned only with persons who are not in custody and have not been released on bail. (See **S v Swartbooi 1991 (2) SACR 54 (Nm) at 55 i**)

The proceedings pertaining to the accused's failure to appear and his being found guilty of contravening section 170 (1) of the CPA were therefore not in accordance with justice.

- [7] In the circumstances, the accused's conviction and sentence are set aside. The pending main case against the accused should proceed for trial.



D. S. MOLEFE

JUDGE OF THE HIGH COURT

I agree.



H.J. DE VOS

JUDGE OF THE HIGH COURT