

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

A394/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

☒ (3) REVISED.

9/6/2016.
DATE


SIGNATURE

Date: *14/6/2016*.....

High Court Reference No: 163/16

Magistrate's serial No: SPECIAL REVIEW: 04/2016

Case No: TB70/2013

MAGISTRATE

EKURHULENI SOUTH EAST (held at TSAKANE)

THE STATE V GOODMAN MASHININI

SPECIAL REVIEW JUDGMENT

POTTERILL J

- [1] The accused is a 31 year old male who was charged in the District Court of Tsakane with housebreaking with the intention to steal and theft.
- [2] The accused was sent for observation to Sterkfontein Hospital by the Presiding Magistrate. Pursuant to the observation he was found not fit to stand trial and not criminally responsible at the time of the commission of the crime as per the psychiatric report.
- [3] The office of the Director of Public Prosecutions Gauteng Division Pretoria instructed the prosecutor on 14 October 2014 to request the court to act in terms of section 77(6)(a) of the Criminal Procedure Act, Act 51 of 1977 ("the Act"), to make a finding whether the accused is fit to stand trial and whether the accused committed the act in question. The prosecutor was further instructed to, if the court finds that the accused is not fit to stand trial and that the accused committed the crime, request the court to proceed in terms of section 77(6)(a)(ii)(aa) of the Act and to direct that the accused be admitted to an institution as an involuntary mental healthcare user in terms of the Mental Health Care Act, No. 17 of 2002.
- [4] On 5 November 2014 the court conducted the requested enquiry. Pursuant thereto the court found that the accused was incapable of understanding the proceedings as

to set up a proper defence despite having found that the accused committed the act in question. The magistrate then disposed of the matter in terms of section 47 of the Mental Healthcare Act, No. 17 of 2002 i.e. he was regarded to be a state patient.

[5] Adv. Leonard SC acting as official *curator ad litem* in her capacity as Deputy Director of Public Prosecutions in light of the gross irregularity committed by the Presiding Magistrate requested the Senior Magistrate of Brakpan to send the matter on special review.

[6] The special review is now before us.

[7] In terms of section 21 of the Superior Courts Act, Act 10 of 2013 ("Superior Courts Act"):

- "(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –*
- (b) to review the proceedings of all such courts."*

In terms of section 22 of the Superior Courts Act:

"(1) The grounds upon which the proceedings of any Magistrate's Court may be brought under review before a court of a Division are –

(c) gross irregularity in the proceedings."

[8] The accused committed an offence of housebreaking with intent to steal and theft not involving serious violence and therefore cannot be declared a state patient in terms of section 47 of Act 17 of 2002 despite the fact that Sterkfontein Hospital recommended that he be referred as such. It is thus the opinion of the Deputy Director of Public Prosecutions E. Leonard SC and M. Marriott, State Advocate, that there was an error in law committed by the Magistrate that led to a gross irregularity – *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 at 638D-H.

[9] We were also referred to *S v Pedro* 2015 (1) SACR 42 (WCC) at paragraph 106-108 wherein the court found that there are occasions where in the interests of justice a less formal process may be followed. It is accordingly the opinion of the Director of Public Prosecutions that the Magistrate's order dated 5 November 2014 on the face of the J15 as well as the order found on the MC20 must be set aside. The order should be substituted with an order that the accused committed an offence other than one contemplated in section 77(6)(a)(i) of the Criminal Procedure Act and that the accused is to be admitted and detained at Sterkfontein

Hospital as if he was an involuntary mental healthcare user in terms of section 37 of the Mental Health Care Act, No. 17 of 2002 until a further lawful order is given.

[10] I accordingly make the following order:

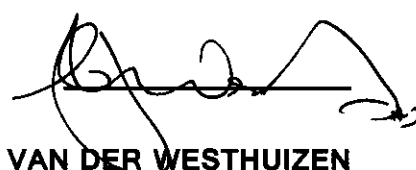
- 10.1 The Magistrate's order dated the 5th of November 2014 as recorded on the face of the J15 as well as the order found on the MC20 are set aside.
- 10.2 The order is substituted with an order that the accused committed an offence other than one contemplated in section 77(6)(a)(i) of the Criminal Procedure Act and that the accused is to be admitted and detained at Sterkfontein Hospital as if he was an involuntary mental healthcare user in terms of section 37 of the Mental Health Care Act, No. 17 of 2002 until a further lawful order is given.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



C.J. VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT