

REPUBLIC OF SOUTH AFRICA



A 397/2016

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

20/6/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
13 June 2016	
DATE	SIGNATURE

REVIEW CASE NO. SR 9/2015/BEM

In the matter between:

THE STATE

And

BOKANG MATJELO

REVIEW JUDGMENT

MOLOPA-SETHOSA J:

[1] This matter came before me on special review in terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977, as amended, ("The Act").

[2] The unrepresented 39 years old accused was charged in the Daveyton Magistrate's Court with the following:

[2.1] Count 1: the offence of entering or remaining in the Republic in contravention of section 49(1) (a) read with sections 1, 10, 25 and 26 of the Immigration Act, 13 of 2002 as amended.

[2.2] Count 2: cruelty to animals in contravention of section 2(1) (a) of the Animals Protection Act 72 of 1962 read with sections 1, 2, 3, and 4 of the Animal matters Amendment Act 42 of 1993-Cruelty to Animals.

[3] On 21 May 2015 the accused pleaded guilty to count 1 and the court dealt with the accused under s112 (1) (a) of the Act. The magistrate convicted the accused on his plea and he was sentenced on the same day [21 May 2015] as follows:

“You are fined to R300-00 (Three Hundred Rand) or 3 (three) months imprisonment wholly suspended for a period of 5 (five) years on condition that you are not convicted on the same or similar offence within the duration of suspension. You are also declared unfit to possess a firearm with immediate effect.”

- [4] After the first count (count 1) was dealt with, the accused pleaded guilty in respect of count 2. During questioning by the presiding magistrate in terms of section 112 (1) (b) of the Act the accused described how he defended himself from the attacking dog. The presiding magistrate then entered a plea of not guilty in terms of section 113 and the matter was postponed for trial. It is not clear on the record why the matter was separated and subsequently postponed.
- [5] The matter was sent on a special review by the acting head of the office, the learned magistrate Bhoola, after mistakes were noted by the acting head of the office. In referring the matter for special review the learned magistrate remarked as follows:

“1. *Mr Bokang Matjelo was summoned to appear in court on the 30/04/2014 whereby he faced two (2) counts; Count one (1) was for being an illegal foreigner in that he had contravened section 49 (1) (a) read with sections 1, 10, 25 and 26 of the Immigration Act, 13 of 2002 as amended, and Count two (2) was for contravening the provisions of section 2 (1) (a) of the Animals Protection Act 72 of 1962 read with sections 1, 2, 3 and 4 of the Animal Matters Amendment Act 42 of 1993 – Cruelty to Animals.*

2. *Mr Matjelo, was unrepresented and pleaded guilty in terms of section 112 (1) (a) of Act 51 of 1977 in respect of count one (1) and guilty in terms of section 112 (1) (b) of Act 51 of 1977 in respect of count two (2). Count two (2) was changed to a plea of not guilty. The plea was taken before a contract magistrate; Mr Lumka.*
3. *Mr Matjelo was sentenced to a fine of R300 (three hundred rand) or a fine of (sic) (3) months imprisonment wholly suspended for a period of (5) five years on condition that the accused is not again convicted of the same or similar offence committed during the period of suspension. He was declared unfit to possess a firearm and was ordered to be deported after the conclusion of the charge of Cruelty to Animals.*
4. *Upon conducting the overhead checking of the aforesaid charge sheet it had been noticed that:-*
 1. *Legal rights were not explained to Mr Matjelo on 20/05/2015.*
 2. *Rights in respect of bail application were also not explained to him on the 20/05/2015.*
 3. *The warrant of arrest that he was arrested on was not cancelled on the date that he appeared and there was no record on the charge sheet whether an inquiry was held in respect of Mr Matjelo's non appearance at court on the 30/04/2015.*
 4. *Mr Matjelo appeared again on 21/05/2015 and no rights in respect of legal representation or bail were explained to him again.*

5. *Mr Matjelo was convicted in terms of section 112(1) (a) of Act 51 of 1977 which generally deals with minor offences. Therefore the order made that Mr Matjelo be declared unfit to possess a firearm could not be made because the offence for which Mr Matjelo was convicted does not fall under any of the offences listed under section 103(1) of the Fire Arms Control Act, 2000 (Act number 60 of 2000). Furthermore neither the state nor the defence was asked any comment in this regard before the order was made.*
6. *Furthermore a deportation order was made against Mr Matjelo. The decision to deport is the discretion of Home Affairs which is preceded by an investigation in terms of the applicable prescripts.*
7. *Furthermore, the finalization of one charge and then postponement of another charge for further investigation after the plea was taken breaches the once-and-for-all principle.*
5. *I enclose herewith a letter addressed to the Magistrate together with his response.*
6. *When the record was retrieved he was given an opportunity to read the record but he elected not to.*
7. *Under the circumstances it is submitted that the proceedings be ordered to start de novo before another magistrate."*

[6] Prior to referring the matter to this court on special review, the learned magistrate expressed the view that cumulatively the accused did not

receive a fair trial. She therefore directed queries to the trial magistrate, and the trial magistrate responded.

[6.1] The letter addressed to the trial magistrate by the acting head of the court dated 10 June 2015 reads as follows:

“Upon conducting the overhead checking of the aforesaid charge sheet I have noticed the following:-

- 1 Legal rights were explained to Mr Matjelo on 20/05/2015.*
- 2. Rights in respect of bail application were also not explained to him on the 20/05/2015.*
- 3. The warrant of arrest that he was arrested with, was not called on the date that he appeared and there is no record on the charge sheet whether an inquiry was held in respect of Mr Matjelo's non appearance at court on the 30/04/2015.*
- 4. Mr Matjelo appeared again on 21/05/2015 and no rights in respect of legal representation or bail were explained to him again.*
- 5. Mr Matjelo was not sentenced to direct imprisonment therefore he could not be declared unfit to possess a firearm because the offence for which he was convicted does not fall under section 103(1) of the Fire Arms Control Act, 2000 (Act number 60 of 2000).*

6. *Furthermore no order could be made for deportation because this is the discretion of Home Affairs. Deportation can only be preceded by an investigation in terms of the applicable prescripts.*
7. *Furthermore, you have finalised one charge and then postponed the other charge for further investigation after the plea was taken breaches the once-and-for-all principle (sic).*

Under the circumstances I am of a view that the matter must be sent on special review to be set aside and that the proceedings be ordered to start de novo before another Magistrate.

Are you in agreement with the aforesaid and would you like to comment or add anything further?"

[6.2] In an email dated 11 June 2015, the trial magistrate responded as follows to the head of the court's letter of 10 June 2015:

"Madam

1. The above matter and your letter dated 10 June 2015 refer.

2. *Below see my response to the relevant paragraphs.*

Ad Paragraph 1

Legal rights were explained to Mr Matjelo and the proceedings were mechanically recorded.

Ad Paragraph 2

Rights with regard to bail were explained to Mr Matjelo and the proceedings were mechanically recorded.

Ad Paragraph 3

An enquiry was held regarding Mr Matjelo's failure to appear at court, proceedings were mechanically recorded and notes kept and attached to the charge sheet.

Ad Paragraph 4

Legal rights were explained to Mr Matjelo and the proceedings were mechanically recorded.

Ad Paragraph 5

I concede.

Ad Paragraph 6

I concede."

- [7] After receiving the record from the Magistrate's court, the record, together with the query from the magistrate was referred to the office of The Director of Public Prosecutions ("DPP") for comment.
- [8] Advocate B E Makoe (Makoe) of the DPP, with whom Adv. H M Meintjies SC agrees, commented that on the totality of the facts on the transcribed record the accused probably did not have a fair trial, that the proceedings cannot be said to have been in accordance with justice.
- [9] From the response of the trial magistrate to the acting head of court's query set out in Para [6.2] here above, though the trial magistrate responded that the accused's rights to legal representation had been explained to the accused, the transcribed record of proceedings does not bear witness to this. This seems to have been done only prior to postponement of the trial for evidence to be led on count 2 (*vide* page 9 lines 20-24 of the transcribed record), i.e. subsequent to the plea and conviction on count 1.
- [10] Even the question by the trial magistrate whether he/accused wanted to apply for a legal aid attorney or to conduct his own defence was done so superficially that it cannot be said that the accused really understood that he had a right to legal representation. The right to legal representation should have been explained to the accused on the very first appearance, and prior to the accused pleading guilty on count 1.

- [11] I am in agreement with the submissions by Makoe that on the facts before this court it cannot be said that the proceedings had been in accordance with justice. The accused clearly cannot be said to have had a fair trial.
- [12] The accused's rights to legal representation had not been explained to him before the trial started. These actions by the court are highly irregular and the only conclusion is that the accused did not have a fair trial. The irregularity which took place vitiated the whole trial. In the absence of an explanation of his rights, the accused's right to a fair trial guaranteed by s 35(3) of the Constitution was negated; see *S v Mbathsha* 2014 (2) SACR 143 at 145 para [9]. It is the task of the presiding judicial officer to explain the rights of an unrepresented accused to such accused; see *S v Malatji and Another* 1998 (2) SACR 622 (W) at 624c-h
- [13] Further, since the accused was unrepresented, the trial magistrate should, as a matter of fairness, have explained to him the provisions of Section 112(1) (a), and in particular that he could be convicted on his mere plea of guilty. The transcribed record does not reflect that this was done.
- [14] The magistrate also omitted to ascertain from the accused whether he is pleading guilty freely and voluntarily.
- [15] Before the accused was declared to be unfit to possess a firearm (which was part of the sentence imposed) in terms of the provisions of section 103 (1) of the Fire-arms Control Act 60 of 2000, he should have been

invited to place facts before the court to enable the court to determine whether or not he was indeed unfit to possess the firearm. In S v Lukwe 2005 (2) SACR 578 (W) at 580f-581a the following was stated "...the automatic forfeiture of the right to possess a firearm may have serious repercussions for an accused and, as a layman, he cannot be expected to know of the existence of the provisions of s 103 (1). For this reason, these provisions should be brought to his attention."

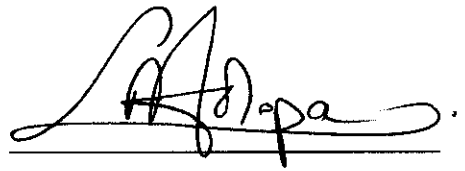
[16] In any event, as pointed out by the acting head of office, s103 does not find application in this matter.

[17] Proceeding to the sentencing stage on the first count, whilst the second count still had to be dealt with constituted a gross irregularity.

[18] On the totality of all above, I am of a considered view that Mr Matjelo did not have a fair trial and that the proceedings should be set aside, as not having been in accordance with justice.

[19] In the light of the foregoing the following order is made:

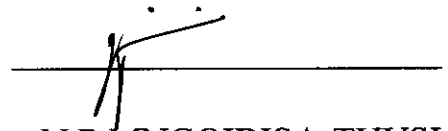
1. The conviction and sentence are set aside.
2. The accused is to be tried *de novo* before a different magistrate.

A handwritten signature in black ink, appearing to read 'L M MOLOPA-SETHOSA', written over a horizontal line.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

A handwritten signature in black ink, appearing to read 'N P MNGQIBISA-THUSI', written over a horizontal line.

N P MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

It is so ordered