



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

HIGH COURT REF NO: 8/2021

REVIEW CASE NO.: B428/2019

MAGISTRATE'S SERIAL NO.: 107/2021

In the matter between:

THE STATE

v

SIYANDA MBALISA

Accused

JUDGMENT DELIVERED: WEDNESDAY, 27 JULY 2022

Nziweni AJ:

[1] This matter was placed before me on special review in terms of s 304 of the Criminal Procedure Act, 51 of 1997 (the Act). Mr Mbalisa (the accused) was arraigned before the district court, Caledon. The accused was charged in terms of section 65 (1) (a) (b), read with certain provisions of the National Road Traffic Act, 93 of 1996 (Driving under the influence of liquor). In the alternative, the accused was charged with a contravention of section 65 (2) (a) (b) of the same Act (driving a vehicle on a public

road while the concentration of alcohol in his blood was not less than 0.05 gram per 100 millilitres, to wit 0.11 gram per 100 millilitres.).

[2] It is necessary to set out what has brought us to this point. The trial commenced on 20 September 2019. The accused pleaded not guilty to both counts.

[3] The magistrate who presided over the matter took ill in the middle of the trial. Before the magistrate took ill, the State closed its case and the accused who was unrepresented at the time applied for his discharge in accordance with the provisions of section 174 of the Act. The application in terms of section 174 of the Act, was brought on 20 January 2020.

[4] Pursuant to the submissions made by the parties in the application for discharge, the magistrate reserved his judgment, and the matter was adjourned for judgment till 13 March 2020. The case is currently a partly-heard. It is discernible from the record that since 13 March 2020, the matter was postponed for the magistrate to deliver judgment.

[5] The accused wrote a letter dated 26 October 2020, to the judicial head of office expressing his frustration with the delay caused by the illness of the presiding magistrate. The accused in his communique requested that the matter should rather continue before another magistrate, instead of it starting de novo.

[6] Following the letter of the accused, the judicial head of the office sent this matter on special review for consideration and direction. A relevant medical report of the presiding magistrate was also placed before me by the judicial head of office to enable me to decide on the matter. After the perusal of the medical report which was dated 24 March 2021, it became apparent that the presiding magistrate was still going to be off work for quite a while as he had been further booked off until the end of August 2021. The medical report also indicated that the presiding officer was also due for another medical reassessment around the end of August 2021, to ascertain whether he would be able to return to work.

[7] The medical opinion revealed that during the assessment of the presiding officer on 23 March 2021, he was still within the recovery period, because it indicated that there is hope for further improvement with time; I therefore directed that the matter be postponed until the first week of September 2021, in order to assess whether the presiding magistrate would be back at work by then and to give him enough time to recover. I further indicated to the judicial head of office that, should the presiding magistrate be unavailable due to health reasons, by the first week of September 2021, then the matter could be forwarded to this Court to consider if the matter should not start *de novo* before another magistrate.

[8] After the expiration of the period that I indicated in my previous communique, the judicial head of office referred the matter back to me, informing me that the presiding officer is still absent from work due to ill health. The judicial head of office

requested this Court to consider whether the matter should proceed *de novo* before another magistrate.

[9] It has become apparent that the attempt to resolve the difficulty with a postponement, with the hope that the presiding officer's health would improve, did not work. I take due cognisance of the fact that the presiding officer has been on sick leave for almost three years since this matter was postponed for judgment. By any standard of criminal trial litigation the length of the delay in this matter amounts to an inordinate delay.

[10] Undeniably, this inordinately long delay is affecting the accused's right to a speedy trial that is guaranteed by section 35 (3) of the Constitution. It is of paramount importance to point out that, at this point, the delay comes with far-reaching implications and prejudice to the accused. The delay in this matter goes against the core principle of a speedy trial.

[11] The *prima facie* excessive delay is no longer tolerable. As such, to postpone the matter is no longer tenable. This matter has now reached a stage of impasse and a level of urgency, where the interest of justice requires that something that is definitive must be done to protect the constitutional rights of the accused as well. Evidently, when regard is had to the length of the delay juxtaposed to the reasons for it; it becomes quite clear that the ill health of the presiding officer has made him not to be capable to finalise the trial. Thus the interests of justice weigh heavily in favour of the matter starting *de novo*.

[12] Our jurisprudence has established and accepted that incapacity like ill health that makes a magistrate unavailable is one of the necessary incidents that can lead the trial to proceed *de novo* before another magistrate, should the interests of justice so demand (see *inter alia S v Bireke* 2003(2) SACR 225 (WLD);); *S v Polelo* 2000 (2) SACR 734 (NC)).

[13] In *S v Lapping* 1998 (1) SACR 409 (WLD) the following was stated:

'...It would appear from this passage that the Full Bench of the Transvaal recognized the possibility that, in theory, illness of a magistrate for a considerable period could, depending on the facts, justify an order that proceedings be commenced *de novo* before another magistrate. If in theory, illness of a magistrate for a considerable period could, depending on the facts, justify an order that a trial commence *de novo* before another magistrate, then, on a parity of reasoning, such an order would be justified if delay for a considerable period could result from the fact that the magistrate hearing the matter has been suspended. In each case, the incapacity of the magistrate to continue with the trial is total, albeit not necessarily permanent; and such cases fall to be distinguished from a case where a magistrate has been transferred because, in such a case, as was pointed out in *Tlailane's* case at 111 *in fine*, the necessary administrative arrangements can easily be effected in terms of ss 9(1)(d) and 9(4) of the Magistrates' Courts Act 32 of 1944.'

[14] In the result, the following order is made:

(a) The part heard proceedings are set aside;

(b) The matter should be referred to the Director of Public Prosecutions, to enable her to consider whether the accused should be prosecuted *de novo* before another magistrate.


NZIWENI, AJ

I agree, and it is so ordered.


FRANCIS, J