



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3376/2022

In the matter between:

DUMISANI TSOBO

Applicant

And

MAGISTRATE P BESTER

1st Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

2nd Respondent

BRIDGITTA MATSHELISO TSOBO

3rd Respondent

CORAM:

DANISO, J *et*, CRONJE, AJ

HEARD ON:

29 MAY 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by way of email and by release

to SAFLII. The date and time for hand-down is deemed to be on 23 August 2023 at 11h00.

- [1] On 23 September 2021 the first respondent, a Bloemfontein district magistrate (“the magistrate”) acquitted the third respondent on a charge of perjury privately prosecuted by the applicant after the National Director of Public Prosecutions had declined to prosecute.
- [2] At all material times hereto the applicant and the third respondent were married to each other though estranged and embroiled in acrimonious divorce proceedings. The charge arose from an affidavit deposed to by the third respondent in support of her Rule 43 of the Uniform Rules application in which she sought interim maintenance for herself and the parties’ minor child pending the finalization of the divorce proceedings.
- [3] According to the charge sheet, the third respondent was accused of contravening the provisions of section 9 of the Justice of Peace and Commissioners of Oath Act¹ in that she:

“intentionally, wrongfully and unlawfully gave the following false statements under oath in order to get Rule 43 order to her benefit, by declaring the following:

- (a) The complainant and herself built a R3 million house in Pretoria cash;*
- (b) Their marital home is not owing to the Bank;*
- (c) The complainant bought his parents a vehicle;*
- (d) Each house in Bloemfontein generates an income of approximately R48 000.00;*
- (e) R1500.00 monthly clothing for minor child;*
- (f) The complainant removed their minor child from his medical aid;*

¹ Act No, 16 of 1963.

and

(g) She spends R1 250.00 on medical aid for the parties' minor child.

[4] At the trial, the applicant and the third respondent testified. No other witnesses were called. The applicant's case was essentially that the third respondent had lied under oath in her rule 43 affidavit (Exhibit "A") with the purpose of inflating the applicant's financial status and income in order to secure high maintenance which the applicant could ill afford. The third respondent denied any malfeasance and contended that there was nothing fraudulent or even misleading about the evidence contained in her rule 43 affidavit. She stated that the applicant's financial details that she had alluded to were merely estimates and they were duly accepted by the high court with the result that the relief she sought in that regard was granted.

[5] After all the evidence was proffered, the magistrate delivered an "ex tempore judgment"² stating the following:

"COURT: Madam, we have got two different versions before court of what happened and at this stage the Court cannot decide between the two versions. And it is quite clear in law if the Court cannot decide you must get the favour of the decision of the Court. If this Court at this stage finds that the case against you is not proved beyond a reasonable doubt, then you are found not guilty and are discharged."

[6] The applicant is aggrieved by the magistrate's decision to acquit the third respondent. On 02 June 2022 he filed a request for reasons as provided for in section 310 (1) of the Criminal Procedure Act (the CPA)³ in terms of which the magistrate was requested to state a case for consideration of this court setting out the question of law on the basis of which the third respondent was found not guilty. The magistrate was also requested to provide his decision on that question of law and the findings of fact he made in

² Record page 207, lines 11 to 18.

³ Act No, 51 of 1977.

that respect.

[7] The magistrate's written response was simply:

"KINDLY TAKE NOTE THAT I HAVE NOTHING (SIC) TO ADD TO MY REASON GIVEN DURING MY JUDGMENT."

[8] According to the applicant, the magistrate's response falls short of what is required in section 310 of the CPA and it is in that regard that he has instituted these reviews proceedings for an order:

- "1. That the failure by the First Respondent to deliver a full and reasoned judgment in the criminal prosecution instituted by the Applicant against the Third Respondent in the Bloemfontein Magistrates' Court under case number: 19/95A/2021, Be reviewed and set aside;*
- 2. That the failure by the First Respondent to appropriately respond to the request in terms of section 310 of the criminal procedure Act 51 of 1977 served on him by the Applicant on 2 June 2022, be reviewed and set aside;*
- 3. That the first respondent be directed to appropriately respond to the applicant's request by:*
 - 3.1. Setting out the questions of law on which the First Respondent found in favour of the Third Respondent;*
 - 3.2. Setting out the First Respondent's findings of fact in as far as they are material to the questions of law on which he gave a decision in favour of the Third Respondent; and*
 - 3.3. Setting out his decisions on such questions of law and his reasons therefor.*
- 4. That the First and Second respondents be ordered to pay cost of this application, jointly and severally;*
- 5. That the Applicant be granted such further and/or alternative relief as this Honourable Court may deem fit."*

[9] The application is unopposed as except to file a notice indicating

their intention to oppose the order relating to costs, no opposing papers (answering affidavits) have been filed by the respondents.

[10] At the hearing of the matter only the relief sought in prayer 3 and 4 was pursued and on the basis that only the second respondent should be mulcted with costs.

[11] Section 310 of the CPA must be read with Rule 67 (12) of the Magistrates' court rules. The relevant provisions provide thus:

"Section 310 Appeal from lower court by prosecutor

(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law."

[12] Whereas, rule 67 (12) (a) and (b) pertains to the formalities of the stated case namely that *'the stated case shall be divided into paragraphs numbered consecutively and shall be arranged in the following order:*

(i) The judicial officer's findings of fact in so far as they are material to the questions of law on which decision in favour of the appellant was given;

(ii) questions of law; and

(iii) the judicial officer's decision on such questions and his or her reasons therefor.'

[13] From the analysis of section 310(1) it is clear that one of the jurisdictional requirements to be met by the applicant in order to

require the magistrate to state a case for the consideration of this court is that the decision made in favour of the third respondent was based on a question of law.

- [14] The determination of whether the magistrate's decision was based on a question of law involves the examination of the judgment which embodies the charge itself, the facts of the matter, the totality of the evidence led, the magistrate's findings and the reasons therefor.⁴ In this matter, except to flittingly state that the "law" enjoins him to discharge the third respondent on the basis of the divergent versions proffered by the parties regarding the circumstances under which the third respondent deposed to the rule 43 affidavit, the magistrate did not render a judgment. It was stated in *Strategic Liquor Services v Mvumbi NO*⁵ that:

"It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process. A reasoned judgment may well discourage an appeal by the loser."

- [15] The magistrate's failure to render a judgment is indeed a grave lapse of duty. What compounds the situation is the magistrate's refusal to provide reasons when he was subsequently requested to do so. In my view, the magistrate's conduct is what is aptly described as "poor judicial service" in *Strategic Liquor Services supra*.

- [16] Factual disputes are resolved by making findings on: the probabilities, the strength and weaknesses of both the state and the defence versions, the credibility of the factual witnesses and whether the party burdened with the onus of proof has succeeded in discharging it.⁶ The question of whether the magistrate correctly

⁴ *S v Nzimande* **2010 (2) SACR 517** SCA.

⁵ **2010 (2) SA 92** (CC) at 96 para 15.

⁶ *Stellenbosch Farmers' Winery Group Ltd & Another v Martell Et Cie & Others* **2003 (1) SA 11** SCA at para 5.

applied this principle correctly to arrive at the conclusion that the applicant failed to prove the third applicant's guilt beyond a reasonable doubt is a question of law.

[17] For the above-mentioned reasons, I am satisfied that the applicant has made out case for the relief he seeks. The application succeeds and there is no reason why the costs should not follow the results.

[18] In the circumstances, the following order is issued.

1. The first respondent is ordered to appropriately respond to the applicant's application in terms of section 310(1) of the Criminal Procedure Act, 51 of 1997 by setting out;
 - 1.1. the questions of law on which he found in favour of the third Respondent;
 - 1.2. his findings of fact in as far as they are material to the questions of law on which he gave the decision in favour of the third Respondent; and
 - 1.3. his decision on such questions of law including the reasons therefor.
2. The second respondent shall pay the costs of this application.

N.S. DANISO, J

I agree, it is so ordered

P.R. CRONJE, AJ

APPEARANCES:

Counsel on behalf of Applicant:

Instructed by:

Adv. M.S Mazibuko

Mazibuko & Wesi INC.

BLOEMFONTEIN