

**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: R33/2023(B)

In the matter between: -

THE STATE

and

CAROLINE KHOMO	ACCUSED NO.1
MOSIUWA STEPHEN MOKHELE	ACCUSED NO.2
TSEKO MAKHATA	ACCUSED NO.3
TEBOHO NTHOLI	ACCUSED NO.4

CORAM: **MOLITSOANE, J et MATSHAYA, AJ**

JUDGMENT BY: **MATSHAYA, AJ**

DELIVERED ON: **3 OCTOBER 2023**

INTRODUCTION

[1] This matter serves before us 'purportedly' as a special review in terms of **section 304(4) of the Criminal Procedure Act** (the CPA).¹ I shall elaborate further on this later. The accused persons are facing a charge of murder and

¹ Act 51 of 1977.

kidnapping before the magistrate's court for the district of Ficksburg. From the record of the proceedings, it appears that one Mr Mohale appeared for the state. Accused no.1 was legally represented by Mr Radebe and the rest of the accused by Ms Motsoeneng. After a prolonged formal bail application, they were all granted bail.

BACKGROUND

[2] The Senior Prosecutor (Ms. Maponya) at Ficksburg Magistrate's Court addressed a letter dated 3 March 2023 under the emblem of the National Prosecuting Authority of South Africa (NPA) to Mr Mralasi, the Judicial Head of Court, Ficksburg citing some perceived "irregular procedure by the presiding officer." To give a full picture of her concerns it is important to quote the relevant extracts *verbatim* as I hereby do:

- "1.
- 2.
- 3.
- 4.
5. *The judicial officer did not follow the procedure prescribed by section 60(11) B.*
6. *Further she granted bail without giving state opportunity [sic] to address regarding conditions and quantum.*
7. *This is a gross irregular procedure and not in accordance with Justice.*
- 8.
9. *This judicial officer does not understand the criminal procedure. She [sic] commits criminal procedure blunder after blunder. This case is just a tip of an iceberg.*" My underlining.

[3] It is presumed that the above letter was forwarded by Mr Mralasi to the presiding magistrate Ms Ramohlale who wrote a covering letter in which she elected to abide by her reasons as enunciated in her judgment. Hence the matter serves before us. We have had the benefit of the full transcribed record of the bail proceedings which gives a pure picture thereof.

RELEVANT LEGISLATION

[4] **Section 304(4) of the CPA**² provides:

“If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.”

[5] The above is viewed generally as the empowering legislation upon which matters are sent on special review. The High Court has statutory³ and inherent powers to review the decisions of the lower courts within its jurisdiction. In the case before us, no sentence was imposed as envisaged in **s304(4) of the CPA** to trigger the mechanism set out in the said section. The simple reason is that the proceedings were about the release of the accused on bail. **Section 304(4)** is thus not applicable. The review is also not before us pursuant to the provisions of **s22 of the Superior Courts Act**.

[6] The Court in **Ex Parte Millsite Investments Co (Pty)**⁴ described the inherent jurisdiction of the then Supreme Court as follows:

“ ...apart from powers specifically conferred by statutory enactments and subject to any deprivations of power by the same source, a Supreme Court can entertain a

² Supra.

³ Section 22 of the Superior Courts Act 10 of 2013 provides: “The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are-

- (1)
- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.”

⁴ 1965(2) SA 582(T) at 585 G-H.

claim or give any order which, at common law, it would be entitled to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court...The inherent power is not merely derived from the need to make the court's order effective, and, and to control its own procedure, but to hold the scales of justice where no specific law provides directly for a given situation."

This special review will thus be dealt with by us by virtue of the inherent powers this Court has, to review any proceedings of the lower courts.

THE MAIN ISSUE FOR DETERMINATION

[7] The crux of this matter is whether the presiding magistrate committed an irregularity in relation to **section 60(11)B of the CPA**⁵ which should vitiate the proceedings.

THE COMPLAINT BY THE STATE

[8] In summary, Ms Maponya submitted the following:⁶

- That the investigating officer testified that the accused had previous convictions;
- That the accused deliberately concealed same;
- That the magistrate did not follow procedure in terms of **section 60(11)B** of the **CPA**;⁷
- That bail was granted without giving the state the opportunity to address the court regarding the conditions and quantum; and
- That this was a gross irregular procedure and not in accordance with justice.

[9] It seems from the record that there was a dispute regarding the exact schedule under which the matter fell but the proceedings were conducted under the auspices of schedule 6. This is not an issue in these proceedings

⁵ Supra.

⁶ Paragraphs 3, 4, 5, 6 and 7 of Ms. Maponya's letter dated 3 March 2023.

⁷ Supra.

but I shall give guidance later on this aspect in view of the manner in which it was handled.

- [10] The main gripe by the state is the alleged failure by the magistrate to follow the procedure prescribed by **section 60(11)B of the CPA** which provides that:

“(a) In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether -

(i) the accused has previously been convicted of any offence; and

(ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

(b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.

(c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

(d) An accused who wilfully -

(i) fails or refuses to comply with the provisions of paragraph (a); or

(ii) furnishes the court with false information required in terms of paragraph (a),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.”

- [11] It is difficult to comprehend what Ms Maponya envisaged by “*procedure prescribed by **section 60(11) B.***” Subsection (a) places a duty on the

accused to disclose previous convictions and or pending cases, if any. Subsection (b) places an obligation upon the court to confirm the above disclosure in the event that it had been done by the legal representative of the accused. Subsection (c) mainly provides that the court must inform the accused of the consequences of testifying during the bail application and that the record of bail proceedings shall form part of the subsequent trial while subsection (d) provides for the consequences in the event that the accused was mendacious pertaining to the disclosure mentioned in subsection (a) above.

[12] It appears from the hand written record that on 17 January 2023 a disclosure as envisaged in **section 60(11)B** was made in respect of accused 2-4. It also appears that accused no.1 has no previous convictions and no pending cases.⁸ The fact that accused no.2 did not disclose his previous conviction of pointing of firearm cannot be perceived as an irregularity particularly on the part of the presiding officer. If the state (in their view) is of the conviction that bail should not have been granted for that reason, this is not the appropriate forum to ventilate such as that cannot be conceived to be an irregularity. **Section 60(11) (B)(d)** creates an offence. It is thus the prerogative of the prosecution and not the judicial officer to institute criminal proceedings against an accused who wilfully fails to comply with the peremptory statutory obligations of s60(11) (B).

[13] The record clearly shows that both legal representatives of the respective applicants succinctly addressed the court. This was followed by 2 days of address by Mr Mohale after which the case was remanded for judgment. Upon a cursory browse of the record, it is apparent that the magistrate duly exercised her discretion and granted bail. It is settled law that the decision to grant or refuse bail rests in the discretion of the court. The contention by Ms Maponya that the prosecutor was not afforded an opportunity to address the court before bail was granted is not supported by the record. The personal circumstances of the applicants and their means to afford bail as well as the

⁸ See testimony of Capt Lebakeng on page 8 of the transcribed record.

version of the state pertaining to the circumstances of the case were already on record hence the magistrate was able to determine the amount thereof.

- [14] In view of the above, the submissions by Ms Maponya that the '*procedure was grossly irregular*' lacks merit and there is no basis upon which the proceedings can be perceived to be irregular. In any event, there were no grounds for the matter to be sent on special review.

THE CORRECT PROCEDURE

- [15] It is the duty of this court to give guidance particularly when review matters have not been handled properly like the present case. **Section 304** envisages a specific dispensation which acts as a remedy when there has been procedural irregularities that may vitiate the proceedings. In this case there was no such. Instead, the record reveals that the state was aggrieved by the decision of the magistrate which was reached after proper exercise of her discretion. The correct route for the state to have pursued was an appeal. High courts should not be burdened by unmeritorious matters which are not properly brought before them and judicial heads of courts in the magistrate's court should guard against disguised "appeals" like this one. Any matter that is referred to the High Court on special review ought to be sent under the covering letter of the judicial head of court who would have satisfied himself/herself that indeed the matter is one for special review. It cannot be correct that whenever a party is aggrieved by magistrate's judgments then matters are forwarded to the high court willy-nilly as it happened in this case.

THE TONE OF THE LETTER BY MS MAPONYA

- [16] The tone of Ms. Maponya's letter is regrettable. She is not the one who appeared in court during the bail proceedings. It is trite that in this constitutional dispensation the NPA enjoys independence from other spheres

of government.⁹ Ms. Maponya is the most senior member of the NPA in Ficksburg magistrate's court and the community that she serves as a 'people's lawyer' expect a certain level of professionalism from her. This also entails treating other stakeholders like the judiciary with the respect that they deserve. Irrespective of the position that she holds in the NPA, she had no right to cast aspersions on the competency or otherwise of the magistrate that "*she does not understand the criminal procedure and commits blunder after blunder.*" This statement is very unfortunate, unbecoming and has to be rebuked. If she had any concerns about Ms. Ramohlale there were more civilized, professional and structured protocols that she should have followed to address them, if she had any.

[17] Further, if she opined that Ms. Ramohlale committed '*blunder after blunder*', which opinion we have shown to be baseless and unmeritorious in this case, one would have expected that she ought to have known the remedies available to her or the state for proper redress instead of resorting to rude and unprofessional language. The Code of Conduct for members of the National Prosecuting Authority, promulgated under **s22(6) of the National Prosecuting Authority Act, 1998** imposes a positive obligation on the prosecutors to, inter alia, "*conduct themselves professionally, with courtesy and respect to all and in accordance with the law and recognized standard and ethics of their profession.*"

[18] A magistrate (like Ms. Ramohlale in this case) represents the judiciary arm of government and its authority is vested in **section 165 of the Constitution**.¹⁰ The buck stops with her in court and she has a duty to maintain proper decorum which is seriously threatened by the unfounded insults that were labelled against her. I do not suggest that a magistrate must never be criticized during the exercise of her duties but the manner of doing so must be respectful and professional. Anyone may hold a different view regarding decisions of a magistrate but Ms. Maponya's utterances cannot be condoned. This judgment and the whole record of proceedings which

⁹ See section 179 of the Constitution of the Republic of South Africa 1996.

¹⁰ Supra.

includes the letter by Ms. Maponya must be forwarded to the Director of Public Prosecutions (DPP) to sensitize other prosecutors particularly Ms. Maponya regarding proper language to be used for official purposes and acceptable ethical standards.

LESSONS TO BE LEARNT BY THE MAGISTRATE

[19] It would be remiss not to highlight a certain aspect which came to our attention upon reading of the record which has the potential to tarnish the image of the magistracy. There is a general perception that magistrate courts do not sit on Fridays or adjourn early at the expense of serving members of the public. Such perceptions find credence on the following utterances by the presiding magistrate during the proceedings of 24 February 2023:

“Magistrate: Okay. Thank you. Mr Mohale. I see now the time is 15:00 and Mr Mohale you are the first one that is going to argue...”

Prosecutor: ...

Ms Motsoeneng...

Magistrate: And the parties Mr Radebe, both of you will be given an opportunity to argue. But we are already at 15:00 in the afternoon on a Friday. Can we then agree on a date for arguments? Even if Mr Radebe you argue we can give you a chance to argue now. You will be the only one arguing because we are knocking off at 16:00.” My underlining.

[20] The above comments by the magistrate were preceded by her similar comments on the same matter on 10 February when she said:

“Prosecutor: Your Worship, I also see now it is four minutes just to give a warning to the Court as we had agreed that we are adjourning at three.

Court: At 3 o'clock. Mr Radebe, how many questions do you still have so that we can wrap this up and then Ms Motsoeneng will be the one starting on the 15th.”

Mr Radebe...

Court: Yes, we can postpone for further cross examination. I was hoping that you are maybe nearly at the end.” The case was then remanded for further bail hearing.

- [21] The above remarks by the magistrate display little or no appreciation to utilise available court time optimally. Her hurriedness and impatience to the parties that is informed by the fact that it was a Friday is a cause for concern. It took the persistence of the parties for the matter to proceed until address by both Mr Radebe and Ms Motsoeneng was done and concluded before the matter was adjourned to a future date. The reference by Ms Ramohlale to a Friday gives the impression that the court should adjourn early because it's a Friday. It is generally accepted that court time starts at 9h00 to 16h00 on any court day.
- [22] Furthermore, paragraph 5.1(vi) of the **Norms and Standards**¹¹ states that:
- “Judicial Officers should make optimal use of available resources and time and strive to prevent fruitless and wasteful expenditure at all times.” My underlining.
- [23] The prescripts are unambiguous that judicial officers should utilise court hours optimally and finalize cases expeditiously inclusive of Fridays. The Cluster Head, Sub-Cluster Head and the judicial head of office in Ficksburg ought to ensure that compliance to the Norms and Standards is adhered to so as to achieve their objectives.¹²
- [24] Bail proceedings are urgent in nature because continued detention of the accused has the effect of infringing and or limiting the detainee's right to freedom of movement as enshrined in **section 21(1) of the Constitution**. The period it took from start to finalisation of this bail application is a cause for concern.¹³ Without any doubt Ms Ramohlale needs to improve on this aspect.

¹¹ Issued by the Chief Justice of the Republic of South Africa in terms of section 8 of the Superior Courts Act 10 of 2013 read with section 165(6) of the Constitution.

¹² Paragraph 4 of the Norms and Standards.

¹³ It appears from the record that the bail application commenced on 17 January and judgment delivered on 2 March 2023.

[25] There are many aspects in this case in which there is room for Ms Ramohlale to improve as a judicial officer. For example, she went beyond mere questioning expected of the court and literary cross examined the investigating officer, Capt. Lebakeng.¹⁴ I do not want to bore this judgment and dwell much on those except to direct that the record of the bail proceedings be forwarded to the Cluster Head to identify areas of her possible improvement. Equally, there are aspects where Mr Mohale could possibly improve regarding the manner in which he conducted his case. Just as a guide, his contention for a pre-meditated murder which was on the face of it, not supported by an inch of evidence at that stage. We leave that in the capable hands of the DPP.

CONCLUSION

[26] Despite the above concerns regarding the manner in which the bail application was conducted by the affected parties, there is no merit on the contention that the proceedings were grossly irregular. Consequently, I propose the following order:

ORDER

- (a) The bail proceedings were in accordance with justice.
- (b) The registrar of this court is ordered to forward a copy of this judgment to the DPP Bloemfontein and to the Acting Chief Magistrate, Bloemfontein Cluster for their attention.

M.M. MATSAHAYA, AJ

I agree and it is so ordered.

P.E. MOLITSOANE, J

¹⁴ Page 22-29 of the record.

