THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 200/2018

In the matter between:

MOEKETSI MOKOENA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mokoena v The State* (200/2018) [2019] ZASCA 74 (30 May 2019)

Coram: Maya P and Tshiqi, Saldulker and Swain JJA and Gorven AJA

Heard: 14 May 2019

Delivered: 30 May 2019

Summary: Criminal Procedure – regional court magistrate *mero motu* closing defence case in terms of s 342A(3)*(d)* of the Criminal Procedure Act 51 of 1977 (the Act) - notice in terms of s 342A(4)*(a)* not given by the State – evidence irregularly excluded - appeal court incorrectly remitting matter back to same magistrate to continue hearing – conviction and sentence set aside – s 324*(c)* applied.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Weiner and Mailula JJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following order:

'a. The appeal succeeds and the conviction and sentence of the appellant are set aside.

b. It is ordered in terms of s 324*(c)* of the Criminal Procedure Act 51 of 1977, that proceedings in respect of the same offence for which the appellant was convicted may again be instituted on the same charge, suitably amended if necessary, as if the appellant had not been previously arraigned, tried and convicted: Provided that the magistrate before whom the original trial took place shall not take part in the proceedings.'

JUDGMENT

Saldulker JA (Maya P, Tshiqi and Swain JJA and Gorven AJA concurring):

[1] This appeal, with the special leave of this court, is directed against the order of the Gauteng Local Division, Johannesburg (Weiner and Mailula JJ). They upheld an appeal by the appellant, Mr Moeketsi Mokoena, against his conviction for the theft of R1 million, for which he was sentenced to 15 years' imprisonment before the Johannesburg Regional Court (Magistrate A Petersen). The high court found that the magistrate had incorrectly applied the provisions of s 342A(3)*(d)* read with s 342A(4)*(a)* of the Criminal Procedure Act 51 of 1977 (the Act) when ruling that the proceedings were to continue and be disposed of as if the case for the appellant had been closed. The high court however then ordered that the matter be remitted to the regional court for the trial to continue before the same magistrate.

[2] There are two issues on appeal. First, whether the magistrate was entitled *mero motu* to invoke the provisions of s 342A(3)*(d)* read with s 342A (4)*(a)* of the Act, in the absence of the requisite notice by the State given beforehand, that it intended to apply for an order that the proceedings be continued and disposed of as if the case for the defence had been closed. Second, whether the high court was correct to remit the matter for the re-opening of the defence case, to the same magistrate (who had already convicted and sentenced the appellant), and to allow the leading of further evidence where the same magistrate had already made strong credibility findings against the appellant.

[3] The appeal arises against the following factual backdrop. The appellant was charged with the theft of R1 million which was the property of SBV Cash Services and its employers. At the time of the theft the appellant was in the employ of SBV Cash Services. The trial against the appellant commenced in September 2013 in the regional court. During March 2014, the State informed the appellant that it was not relying on a witness who was to testify in respect of certain video footage and made the witness available to the appellant. After the close of the State's case, the appellant testified in his defence, and the matter was thereafter postponed to June 2014 for the purpose of securing the attendance of this witness along with the necessary equipment to show the video footage.

[4] However, by the adjourned date no steps had been taken to secure the attendance of the witness by subpoena. The magistrate informed the appellant that this would be a final postponement for securing the attendance of the witness. The matter was postponed until August 2014. On the adjourned date and despite a subpoena having been issued for his attendance, the witness did not attend court. The appellant requested another postponement but declined the offer by the magistrate that a warrant of arrest be issued to secure the attendance of the witness. The State objected to a further postponement of the matter. The magistrate, in refusing the postponement, stated that the appellant had been made abundantly aware of the fact that the matter had been finally postponed and that the provisions of s 342A of the Act came into effect, as the

appellant had 'been given due notice of the aspect of the matter been final today'. The magistrate then concluded that the completion of the proceedings was being delayed unreasonably and because the appellant sought a further postponement and did not wish to proceed with the matter at that stage, an order as contemplated in subsection (3)*(d)* of the provisions of s 342A[1] of the Act, should issue that the 'proceedings be continued and disposed of . . . as if the case for the defence has been closed'. After hearing argument, the regional court convicted and sentenced the appellant.

[5] In its judgment, the high court, pointed out that it was common cause that neither the defence nor the State had applied for an order in terms of the above section, and that neither of the parties had given notice of their intention

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[1] Section 342A of the Criminal Procedure Act 51 of 1977 reads:
'**Unreasonable delays in trials**
(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.
(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
(a) The duration of the delay;
(b) the reasons advanced for the delay;
(c) whether any person can be blamed for the delay;
(d) the effect of the delay on the personal circumstances of the accused and witnesses;
(e) the seriousness, extent or complexity of the charge or charges;
(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
(g) the effect of the delay on the administration of justice;
(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
(i) any other factor which in the opinion of the court ought to be taken into account.
(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
(a) refusing further postponement of the proceedings;
. . .
(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
. . .
(4) *(a)* An order contemplated in subsection (3) *(a)*, where the accused has pleaded to the charge, and an order contemplated in subsection (3) *(d)*, shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.'

to seek such an order. However it rejected the argument by the appellant, that the refusal by the magistrate to grant a postponement and the grant of an order in terms of s 342A(3)*(d)* of the Act, in the absence of the requisite notice, vitiated the proceedings. This was despite the high court finding that the provisions of s 342A must be strictly interpreted in view of the serious consequences of such an order and its effect upon the right to a fair trial as envisaged in s 35(3) of the Constitution.

[6] In this respect the high court erred because in terms of s 342A(4)*(a)* no order shall be issued in terms of 342A(3)*(d)* unless exceptional circumstances exist and all other attempts to speed up the process have failed, and the defence or the State as the case may be, has given notice beforehand that it intends to apply for such an order as provided for in s 342A(4)*(a)* of the Act. The requirements of s 342A(4)*(a)* are clearly peremptory. Thus, the defect in these proceedings was that the regional court magistrate acted *mero motu* in terms of s 342A(4)*(a)* in the absence of any notice given beforehand by the State that it intended to apply for such an order. Because the application of the provisions of s 342A(4)*(a)* may have far reaching consequences, it is essential that proper notice as required by the section be given to the other party so as to enable such party to prepare in advance.

[7] Although the magistrate stated when the matter was postponed for further hearing in June 2014, that it was a final postponement for the defence to secure its remaining witness to testify on the video footage, the magistrate did not refer to s 342A, nor did the State give notice that it intended to rely on this section. It was only when the regional court magistrate made the ruling that the provisions of s 342A were referred to for the first time. The magistrate purported to deal with the requirement of notice by stating that the defence had accordingly been made aware of the fact that the matter was finally postponed, and that the provisions of the section therefore came into effect. This quite obviously did not constitute the requisite notice in terms of the section.

[8] In this context it must be stressed that there is a significant difference, between the situation, as in the present case, where the magistrate warns a

party that this will be a final adjournment of the matter and the situation where that party is given notice in terms of the section. In the latter instance, the magistrate will be asked to make an order that the case of that party is closed. In the former situation the affected party still possesses an election whether to close their case or not, and may decide not to close his or her case and lead additional evidence not related to the issue that caused the delay, whereas in the latter situation, that election is removed and placed in the hands of the magistrate. It should be made clear that s 342A(4)*(a)* requires the State or a party to give notice. A magistrate may not do so.

[9] The grant of the order in term of s 342A(3)*(d)* was clearly a technical irregularity. Once an irregularity has been committed, the provisions of s 309(3) of the Act find application. Section 309(3) provides:

'. . . [N]o conviction or sentence shall be reversed or altered by reason of any irregularity . . . in the record or proceedings, unless it appears . . . that a failure of justice has in fact resulted from such irregularity . . . .'

The question thus arises whether the irregularity in question resulted in a failure of justice. The answer is clear. In *S v Naidoo* 1962 (4) SA 348 (A) and *S v Moodie* 1962 (1) SA 587 (A), a technical irregularity was described as one which justified the setting aside of a conviction by the court of appeal where it precluded valid consideration of the merits. In this case material evidence relating to a video footage was excluded. A failure of justice resulted.

[10] I turn to deal with the second issue on appeal, namely whether the high court was correct to remit the matter for the re-opening of the defence case, to the same magistrate. The high court agreed with the submission by the State that the same magistrate would hear any further evidence and apply his mind to the facts and the evidence in arriving at his decision. In addition, the high court's remittal order was problematic, as the high court did not set aside the conviction and sentence, and in the absence of such an order, the magistrate would have been unable to continue with the trial. In doing so the high court failed to take into account that the magistrate had made serious credibility findings against the appellant and had rejected his version on the evidence.

[11] Where an irregularity which gives rise to a failure of justice occurs, the provisions of s 324*(c)* of the Act apply. In terms of this section where a conviction and sentence are set aside by a court of appeal on the grounds that there has been a technical irregularity or defect in the procedure, then proceedings in respect of the same offence may be instituted as if the accused had not been previously arraigned, tried and convicted: Provided that no Judge or assessor before whom the original trial took place shall take part in such proceedings. The need for the proviso is clear. When a presiding officer has already concluded that the appellant is guilty of an offence and furnished his reasons for doing so, he or she cannot hear any further evidence in the matter. Importantly, according to *Director of Public Prosecutions, Transvaal v Mtshweni* [2006] ZASCA 165; [2007] 1 All SA 531 (SCA) this provision does not conflict with s 35(3) of the Constitution, as it does not result in double jeopardy because of the vitiating nature of the irregularity. The appeal must accordingly succeed and the conviction and sentence of the appellant be set aside in terms of s 324*(c)* of the Act.

[12] In the result the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following order:

a. The appeal succeeds and the conviction and sentence of the appellant are set aside.

b. It is ordered in terms of s 324*(c)* of the Criminal Procedure Act 51 of 1977, that proceedings in respect of the same offence for which the appellant was convicted may again be instituted on the same charge, suitably amended if necessary, as if the appellant had not been previously arraigned, tried and convicted: Provided that the magistrate before whom the original trial took place shall not take part in the proceedings.'

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H K Saldulker

Judge of Appeal

ÁPPEARANCES

FOR APPELLANT	N J Du Plessis Instructed by NJ Du Plessis and Associates East London c/o Christo Dippenaar Attorneys Bloemfontein
FOR RESPONDENT	Adv D E Zinn Director of Public Prosecutions Johannesburg