



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST HIGH COURT, MAFIKENG**

**SOC 117/10
SOC 124/04**

In the matter between:-

MAXWELL NGEMA

Appellant

and

THE STATE

Respondent

REVIEW JUDGMENT

KGOELE J.

[1] The matter was sent to this court on special review under cover of a minute couched in the following terms:-

“1. The matter is submitted to the Honourable Judge of the High Court with a request to set the proceedings under the case 124/04 aside and to order that

the proceedings in the case SOC 117/10 to continue.

2. History of the case

(a) The accused in this matter was charged before magistrate B Van Wijck.

(b) He pleaded to the charge and evidence was tendered

*(c) Here after the record of proceedings went missing, record could not be reconstructed and the Magistrate directed that the case starts **de novo** in another court.*

(d) No judgment in the said case was delivered and the Magistrate did not recuse himself from the proceedings. The case was struck from the roll.

*(e) The case then stated **de novo** under case number SOC 117/10 in front of Magistrate S. Benade.*

(f) The accused pleaded to charges and evidence was tendered

(g) The accused required the record of the proceedings under case number SOC 124/04 to do cross examination. The record could not be traced or reconstructed.

(h) It was then brought to the attention of the court that the case was struck from the roll under case SOC 124/04 that the evidence was tendered and that no judgment was delivered.

Submission

It is my humble submission that the accused was in terms of section 106 (4) of the act 51'77 entitled to judgment under case SOC 124/04.

*Since the matter was struck off the roll and since proceedings started **de novo** the honourable judge is requested to set the proceedings held under case SOC*

124/04 aside and to direct that the proceedings under SOC 117/10 continues.

It is my humble submission that the accused will not be prejudiced. That a technical error occurred and that it will be in the interest of justice should the present proceedings proceed.”

- [2] It is trite law that if a record is missing an attempt to “reconstruct the record of the proceedings” should be made in accordance with the guidelines laid down in **S v Joubert 1991(1) SA 119 (A)**.
- [3] It is further accepted in our law that a magistrate is a creature of statute and can only do what is prescribed by the statute. Consequently a district court magistrate or a Regional Court magistrate is not empowered by any statute to order the matter to start *de novo*. Only the High Court has such powers which includes the powers to set aside irregular proceedings.
- [4] In this matter, it is quite apparent that there are three irregularities called for consideration by this court. Firstly, the absence of facts where upon the presiding officer in the matter **SOC 124/04** could safely conclude that a properly reconstructed record could or could not be produced. Secondly, that the presiding officer in the very same matter did not have the power to set aside and abandon the said proceedings and further order that the matter should start *de novo*. Thirdly, that the matter **SOC 117/10** which proceeded before the current Regional court magistrate, was not properly before that court in that the court that made an order

on the 22 April 2010, in the matter **SOC 124/04** as indicated above, did not have the requisite powers to order the matter to start *de novo*. These proceedings are therefore a nullity.

- [5] I fully agree with the sentiments by the current Regional Magistrate that send the matter on special review that the accused in the two matters is entitled to a judgment in the matter **SOC 124/04** as he had already pleaded and the matter had already been proceeded with. However taking into consideration the length of time that had already passed since the record was said to be missing, I am of the view that it may very well be an impossible task to the clerk of the court at the present moment to compile a reconstructed record as required. To send the said matter back will create further injustice to the accused.
- [6] On the same breath, I do not agree with the submission of the current Regional Magistrate that I should direct that the proceedings in the matter **SOC 117 /10** to continue. I am of the view that a proper conclusion in the circumstances of the two matters is to set aside the order made by the then presiding officer in the matter **SOC 124/04** for the reasons given above, and further set aside the current proceeding in the matter **SOC 117/10** as they are not proper before the current Regional Magistrate. This conclusion will take care of the three irregularities that occurred in these matters.

[7] Consequently the following order is made:-

7.1 The proceedings and the resultant orders made by the court *a quo* in case no: SOC 124/04 are hereby set aside.

7.2 The proceedings in case no: SOC 117/10 are hereby declared null and void *ab initio*.

7.3 The matter against the accused is to start *de novo* before a presiding officer other than the two that presided over the two case numbers referred to in 7.1 and 7.2 above.

A.M. KGOELE
JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS
JUDGE OF THE HIGH COURT

DATED : 26 APRIL 2012