

**IN THE COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

High Court Reference: 688/2014

Magistrate's Serial: 04/2014

Date of judgment: 2 December 2014

Case number: A907/2014

In the matter between:

**LEHLOHONOLO RABUPAPE**

Accused

and

**THE STATE**

Respondent

**REVIEW JUDGMENT**

**A.M.L. PHATUDI J:**

Introduction

[1] This matter is referred to this Court as a special review. The senior magistrate referring this matter for review contends that the presiding magistrate ought not to have referred the child in conflict with the law for diversion as envisaged in terms of Child Justice Act 75 of 2008.

**Factual Background**

[2] The accused was legally represented during the trial in the Magistrates Court for the district of Nigel where he faced a charge of culpable homicide (motor vehicle). He is a child of 16 years. It was alleged that on 16 August 2013, the child, while driving a motor vehicle without a licence, overtook two cars whilst it

was unsafe to do so and collided head on with the oncoming vehicle that resulted in the taking of the life of one E[...] J[...] M[...] (the deceased).

[3] On 26 February 2014, the defence brought an application for diversion in terms of the Child Justice Act. The State opposed the application. The court *a quo* ordered diversion after having considered the submissions made including the Probation Officer's recommendation to that effect. The order reads:

‘[In terms of] section 69 (1) Act 75 of 2008, the child in conflict with the law is referred for diversion.’ The matter was then postponed to 06 May 2014 for assessment report and to see if the accused complied with the diversion program.

[4] On 06 May 2014, the State applied for postponement of the matter for purposes of sending same for review on the basis that ‘the accused drove without a license... and the fact that a person was killed.’ The Control Prosecutor's written submissions were read into the record. The submissions are, *inter alia*, that the magistrate acted *ultra vires* in diverting the matter for the child to attend a Life Skills Program. Notwithstanding the defence's opposition thereto, the magistrate, after careful consideration of the reasons placed before him, agreed with the Control Prosecutor's submissions and referred the matter for review.

## **The law**

[5] Child Justice Act 75 of 2008 was enacted and promulgated on 01 April 2010 with a view to (among others) establish a criminal justice system for children who are in conflict with the law. The Act further aims to provide for the holding of a preliminary inquiry and to incorporate the possibility of diverting matters away from the formal criminal justice system.

[6] Chapter 8 (sections 51 - 62) of the Child Justice Act, provides for the objectives and procedure to be followed for diversion. Section 52 (1) provides:

‘(1) A matter may, after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion if-

(a) the child acknowledges responsibility for the offence;

(b) the child has not been unduly influenced to acknowledge responsibility;

(c) there is a *prima facie* case against the child;

(d) the child and, if available, his or her parent, an appropriate adult or a guardian, consent to

diversion; and

(e) the prosecutor indicates that the matter may be diverted in accordance with subsection (2) or the Director of Public Prosecutions indicates that the matter may be diverted in accordance with subsection (3).'

Section 52 (2) provides:

‘(2) A prosecutor may, in the case of an offence referred to in Schedule 1, if the matter has not already been diverted in accordance with Chapter 6, or in the case of an offence referred to in Schedule 2, after he or she has-

(a) considered the views of the victim or any person who has a direct interest in the affairs of the victim, whether or not the matter should be diverted, unless it is not reasonably possible to do so; and

(b) consulted with the police official responsible for the investigation of the matter, indicate that the matter may be diverted.<sup>[1](#)</sup>

Section 52 (5) provides:

‘(5) If the prosecutor or a Director of Public Prosecutions indicates that the matter can be diverted in terms of subsection (2) or (3), the prosecutor must request the presiding officer at the preliminary inquiry or child justice court to make an order for diversion in respect of the child, in accordance with the provisions of this Chapter.’

## **Evaluation**

[7] The presiding judicial officer may, after consideration of all relevant information presented at a preliminary inquiry, consider diversion if the child acknowledges responsibility for the offence<sup>[1](#)</sup> and the prosecutor indicates that the matter may be diverted in accordance with subsection (2).<sup>[2](#)</sup>

[8] It is clear from the record that the application for diversion was instituted by the defence. It appears that the presiding officer was persuaded by the defence’s submission that the child acknowledged responsibility for the offence. Notwithstanding the public prosecutor’s opposition thereto, the presiding officer ordered for diversion without considering the provisions of the Act. In my view, the presiding officer misdirected himself by accepting the child’s acknowledgement of responsibility for the offence without considering the provisions of section 52(1) (e). Put differently, the presiding officer erred and acted irregularly.

[9] Further thereto, the prosecutor may, in the case of an offence referred to in Schedule 2,<sup>3</sup> after he/she has considered the views of the victim or any person who has a direct interest in the affairs of the victim, may indicate whether or not the matter should be diverted<sup>4</sup> There is no evidence of either the deceased's family or any person with direct interest in the affairs of the deceased or of the police official responsible for the investigation of the matter demonstrating that they were consulted before diverting the matter.<sup>5</sup> The evidence on record is just that of the prosecutor opposing diversion. The diversion ordered by the presiding officer is, on this leg as well, irregular.

[10] The question to be answered is whether the matter can be reviewed and set aside seeing that the accused is legally represented. **Section 35 (3) (o) of the Constitution of the Republic of South Africa provides that** 'every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court.'

[11] Section 21 (1) of the Superior Courts Act 10 of 2013 provides:

'(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a) ...

(b) to review the proceedings of all such courts...

[12] Section 22 of the Superior Courts Act stipulates the grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division. Gross irregularity in the proceedings is among the stipulated grounds. Further thereto, section 22 (2) provides that this section does not affect the provisions of any other law relating to the review of proceedings in the Magistrates' Courts.

[13] Section 304 (4) of the Criminal Procedure Act 51 of 1977 as amended provides that

'if in any criminal case in which a magistrates' court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 ... 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 will 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.'

[14] The presiding officer, as the record demonstrates, in referring the child in conflict with the law (accused

herein) for diversion in terms of section 69 (1) of Child Justice Act realised the irregularities that the court had committed. He, in his statement stated that he ‘truly agrees with the submissions made by the Control Public Prosecutor that the accused minor child should face the full might of the law’. The presiding officer, being *functus officio*, cannot retract or rescind his own judgment and order. The matter, in my view and in the interest of justice, is reviewable.

[15] Based on the irregularities committed by the presiding officer which are mentioned herein, the order for diversion made stands to be set aside. Indeed the matter stands to be referred to the Child Justice Court for the minor child to face the full might of the law. The following order is thus made:

**Order:**

The order made by the court *a quo* in terms of section 69 (1) of Act 75 of 2008, is hereby set aside and replaced with the following:

**'The minor child is referred to Child Justice Court for trial.'**

A.M.L. Phatudi

Judge of the High Court

I agree.

M.W. Msimeki

Judge of the High Court

[footnote1](#)