

SOUTH AFRICA / JUDGMENT

Botha and Others v Regional Magistrate, Springs and Others (A807/2015) [2017] ZAGPPHC 128 (28 March 2017) [2017] ZAGPPHC 128

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod, Makhoba

CASE / FILE NUMBER

A807/2015

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA

DATE:

28/3/2017

CASE

NO:A807/2015

In

the matter between:

MORNE

BOTH A

FIRST APPELLANT

ANDRIES

GREYVENSTEIN

SECOND APPELLANT

EMERALD

FIRE TRADING 76 (CC) AS

REPRESENTED

BY ADRIES GREYVENSTEIN THIRD

APPELLANT

JOHAN

VAN DER

LINDEN

FOURTH APPELLANT

MICHAEL

ALLEN

MARTIN

FIFTH APPELLANT

NORTHERN

SPARK TRADING 237 (PTY) LTD
AS
REPRESENTED BY JOHAN VAN DER LINDEN SIXTH
APPELLANT
QUINTON
HENDRIKS
SEVENTH APPELLANT
and
THE
REGIONAL MAGISTRATE, SPRINGS
MRS
B
OSWELL
FIRST RESPONDENT
THE
NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS
SECOND RESPONDENT
THE
OFFICE OF THE STATE
ATTORNEY THIRD
RESPONDENT

JUDGMENT

RANCHOD J:

Introduction

[1] This is an application for the review and setting aside of a ruling of the first respondent on 21 January 2015 when certain evidence obtained and admissions made by the applicants during a search and seizure operation by the police on 15 August 2006 were declared admissible against them. The ruling was made after a trial-within-a-trial. The details of the evidence obtained are not

relevant for purposes of this judgment.

[2] The accused applied for and obtained a postponement of the trial pending the bringing of this application for a review of the

ruling.

Background

- [3] The applicants are the accused in a trial in the regional court, Springs. They are charged with contravention of sections 2(1)(e), 2(1)(f) and 4(1)(i) of the Prevention of Organised Crime Act 121 of 1998; contravention of section 143(1) of the Mining Rights Act 20 of 1967 (three counts); alternatively contravention of section 143(3) of the latter Act (3 counts) and three counts of contravention of section 149 of the latter Act (three counts).
- [4] The applicants objected to the admissibility of the evidence obtained and admissions made during the search and seizure operation, inter alia, on the basis that their constitutional rights were not explained to them prior to the operation but only much later the same day after it had been concluded.
- [5] The applicants aver that the interim ruling was to the effect that the evidence obtained and admissions made during the search and seizure operation by the applicants were declared finally admissible. Hence, as I understand counsel's argument, the accused are entitled to a review of that decision notwithstanding the

fact that the magistrate indicated that she may change the ruling if, in the course of the trial evidence emerged which causes the court to question its earlier ruling. The court a quo was of the view that it would then be entitled to overrule its earlier decision.

- [6] At the end of the trial within a trial the court a quo stated that the evidence obtained and the admissions made were provisionally admissible. Defence counsel objected to the provisional ruling on the basis that the accused were left unsure of the case they had to meet. In fact, the prosecutor also held the view that the court should make a final ruling and referred to *S v Molimi* [1] in which it was held by the Constitutional Court at paragraph [41] that:

'A timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings is, ... a procedural safeguard.'

And at paragraph [42] c-d:

'It is not open to question that a ruling on the admissibility of evidence after the accused has testified is likely to have an adverse effect on the accused's right to a fair trial. ...for example, when a ruling on admissibility is made at the end of the case, the accused will be left in a state of uncertainty as to the case he is expected to meet and may be placed in a precarious situation of having to choose whether to adduce or challenge evidence. ' (My underlining).

- [7] In this case the trial had not been concluded. The State had not closed its case as yet. After much discussion the learned magistrate decided to give reasons for the

ruling.

Defence counsel, Mr Van der Merwe then asked: [2]

'Worship, I would just enquire your ruling; does it still stand in respect of provisional admissibility?

COURT: No. I will make it. .. [intervenes].

Mr Van Der Merwe: Finally admissibility? (sic)

COURT: Finally admissibe, just to clarify it insofar as the defence knows where to go from hereon forward, but still bearing in mind that depending on the relevance of whatever evidence is going to come out now, there is always the chance that the court might rule that none of it or only some of it is admissible at the end of the day.'

[8] It is thus apparent that the court a quo made its 'final' ruling subject to the proviso that if evidence emerged later causing it to change its mind it will do SO.

The Law

[9] A court of appeal would be slow to exercise its review powers in instances where the proceedings in the trial court have not been concluded.

[10] In Wahlhans and Others[3] the Supreme Court of Appeal held that a Superior Court would in rare cases exercise its review power where the proceedings in the lower court are not finalised. It said:

"It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or mandamus

- against the decision of a magistrate's court given before conviction. (See *Ellis v Visser and Another*, 1956 (2) SA 117 (W), and *R v Marais*, 1959 (1) SA 98 (T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (61h ed., vol. I p.750) state:

"While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the uninterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. ... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available. '

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's

courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly the prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction (see too the observation of MURRAY, J., at pp. 123

- 4 of Ellis' case. Supra). As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal. "

[11] The learned authors Schwikkard & van Der Merwe[4] say:

'Once the court is satisfied that the requirements for admissibility set out in s217(1) of the CPA [the Criminal Procedure Act 51 of 1977] have been met, the confession will be admitted into evidence. However, if during the course of the trial evidence comes to light

which causes the court to question its earlier ruling, it is entitled to overrule its own decision. Conversely, a court may not

provisionally admit a confession on the basis that evidence may emerge later to justify its admission.'

While the authors say this in the context of a confession it is no doubt equally applicable in the case of an admission.

[12] The purpose of a trial-within-a-trial is to insulate the inquiry relating to voluntariness and the other requirements of admissibility in a compartment separate from the main trial, since it is essential that the issue of admissibility be kept clearly distinct from the issue of the accused's guilt. It is a procedural device which is essential to prevent the collision or attenuation of two important rights of the accused, both of which have now found constitutional expression; the right to elect not to testify at the close of the prosecution's case and the right to challenge evidence adduced against him or her and, thus, to prevent inadmissible evidence from being received against the accused [5].

[13] It is only the question of admissibility that is in issue at the stage of a trial-within-a-trial. Whether the statement was made at all, or in the terms alleged by the prosecution, remains to be determined by the court at the end of the evidence [6].

[14] However, if subsequent developments in the trial throw new light on the voluntariness of an admission or confession the presiding officer may reconsider and overrule his or her decision. The court's decision at the conclusion of the trial-within-a-trial is interlocutory. Should new facts bearing on the admissibility of an admission or confession come to light at a later stage, it is the court's duty to reconsider the issue at that stage and not at the end of the trial, lest an accused be cross-examined on what later transpires to be an inadmissible

admission or confession.

[15] It must be stressed however, that the reception of an admission or confession is 'provisional' only in the sense that evidence may thereafter emerge which requires it to be excluded.

[16] The accused may lead the same evidence as he or she adduced during the trial-within-a-trial in order to persuade the court, at a later stage, that little weight should be attached to the admission or confession because of the circumstances in which it was made.

[17] In *Robert Matshikwe, Magistrate, Stutteheim v Mbulelo Clement Erasmus Mashuya* (case no 102/2002) the Supreme Court of Appeal had this to say:

"14 The higher courts have however emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity[7] - where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the Constitution. [8] At the same time, although the cases in which intervention has actually occurred are uncommon, the Court has refused to define or limit the circumstances in which intervention would be justified. The categories remain open.[9] "

[18] In the more recent case of *Basheer Sayed and Another v Lovitt N. 0 and Another* in the Kwa-Zulu Natal High Court, Pietermaritzburg (Case No. AR101/2011; Case No. 5582/2010) Uudgment delivered on 25 June 2012) Steyn J held:

'2 As a general rule, the review of uninterminated criminal proceedings is a power which is sparingly exercised and only in exceptional

circumstances. The rationale for such an approach is obvious since the remedy against a wrong decision is to appeal after the case has been concluded. Steyn CJ in *Ismail and Others v Additional Magistrate, Wynberg and Another*, *infra* has emphasised that courts

will exercise such exceptional review powers in limited circumstances:

"As to the second ground I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Walhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial

procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in uninterminated proceedings in a court below, and should, generally speaking, confine the exercise of its powers to "rare cases where grave injustice might otherwise result or where injustice might otherwise result or where justice might not by other means be attained. "

[19] As I said, the trial has not run its course. The court a quo may yet overrule its earlier decision. It would therefore be premature to review the court a quo's decision at this stage. In the result it is not necessary for this court to at this stage embark on an

analysis

of the evidence led in the trial- within-a-trial as the applicants submit it should. Such a power should be 'sparingly exercised' [10]. I do not think the present case is one where such power should be exercised at this stage.

[20] What the applicants are in effect seeking at the unconcluded stage of the criminal trial is an appeal against the magistrate's ruling in the trial within a trial. Again, as was stated in Walhaus and Others supra it is 'a salutary rule that appeals are not entertained piecemeal'. Of course, the applicant may even launch a review application at the end of the trial if so advised. The trial in the court a quo should continue.

[21] In all the circumstances the application falls to be dismissed.

RANCHOD J

JUDGE OF THE HIGH COURT

I AGREE

MAKHOBHA AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellants : Adv. A. R Van der Merwe

Instructed by

: Dawid M van Wyngaard

Att Inc.

Counsel on behalf of Respondent : Adv. J Cronje

Instructed by

: Director of Public Prosecutions, Pretoria

Date heard

: 27 February 2017

Date delivered

: 28 March 2017

- [1] 2008(2) SACR 76 (CC)
- [2] Transcript: typed p737 line 25- p738 lines 1-9.
- [3] Wahlhans and Others v Additional Magistrate, Johannesburg and Another 1959(3) SA 1 13 (A) at 1 1911-120E
- [4] Principles of Evidence. Schwikkard & van Der Merwe 3rd Edition 348.
- [5] The South African Law of Evidence - Zeffert & Paizes 2nd Edition p 560-561 and the authorities cited there.
- [6] Zeffert & Paizes supra at 563.
- [7] Eliovson v Magid and Another 1908 TS 558 per Innes CJ at 561; 'The case is a very special and peculiar one.' In Ginsberg v Additional Magistrate of Cape Town 1933 CPD 357 at 360 Gardiner JP (Watermeyer and Jones JJ concurring) envisaged instances where a magistrate tried a case in the absence of the accused, or refused to allow the accused legal assistance.
- [8] Levack and Others v Regional Magistrate, Wynberg and Another 2003(1) SACR 187 (SCA) para 27.
- [9] In Ismail (above) 1963(1) SA at 6C-D Steyn CJ suggested very broadly that a denial of justice in the sense that it deprived [accused

persons] of any right or set in train prejudicial results which they could not avoid might justify intervention.

- [10] Wahlhans and Others supra.

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