

SOUTH AFRICA / JUDGMENT

David v Regional Court Magistrate and Others (153/17) [2017] ZAECBHC 15; 2018 (1) SACR 702 (ECB) (14 November 2017)

[2017] ZAECBHC 15

COURT

Eastern Cape High Court, Bhisho

BEFORE

Tokota

CASE / FILE NUMBER

153/17

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE LOCAL
DIVISION, BHISHO)

Case No: 153/17

In the

matter between:

SUNNY
ALABI DAVID
Applicant
and
REGIONAL
COURT MAGISTRATE
MRS
CENGANI
1st
Respondent
ACTING
REGIONAL COURT MAGISTRATE
MR
DAMANE
2nd
Respondent
REGIONAL
COURT PRESIDENT OF THE
EASTERN
CAPE
4TH
Respondent

THE
DEPUTY DIRECTOR OF THE SPECIALIZED
COMMERCIAL
CRIMES UNIT E.L.
5th
Respondent
DIRECTOR
OF PUBLIC PROSECUTION
BHISHO
EASTERN CAPE
6th
Respondent
MINISTER
OF JUSTICE AND
CORRECTIONAL
SERVICES
7th
Respondent
MINISTER
OF POLICE
8th
Respondent
ANNEXUTURE
TO LISTED CO-ACCUSED
9th
Respondent

JUDGMENT

TOKOTA J:

- [1] The applicant, together with ten others, (the accused) are facing criminal charges before the Regional Court Magistrate, Zwelitsha. The papers do not reveal what charges were preferred against them. Counsel for the applicant informed me from the bar that the accused are facing charges of fraud. What can be gleaned from the founding affidavit is that either on 31 August 2015 or 2 September 2015 the accused appeared before the first respondent. They all pleaded not guilty. I asked Counsel the exact date on which the accused pleaded. None of them knew the exact date. No basis of defence was disclosed. The matter was then postponed for trial.
- [2] After several postponements, on 20 February 2017, the matter was again in court ready for trial and the first respondent, before whom the accused had initially pleaded, was not available. The matter came before the second respondent. I was informed by Mr Maseti, who represented the applicant, that the applicant was accused No. 1 and was represented by an attorney, Mr Mphahlwa. On that date the parties agreed that the second respondent could proceed with the matter in terms of section 118 of the Criminal Procedure Act No. 51 of 1977 (the CPA) as no evidence had been led before the first respondent. The State then called a

witness to testify. After the testimony of this witness the matter was then adjourned to continue on the following day, 21 February

2017. On this day the legal representative of accused nos. 1, 2 and 3 withdrew. The matter was then postponed to 31 March 2017 to enable them (accused 1, 2 and 3) to engage the services of another attorney.
- [3] On 27 March 2017 the applicant launched these proceedings. He seeks an order:
- 3.1 That the decision of the first respondent to recuse herself in the matter be reviewed and set aside;
- 3.2 That the appointment of the second respondent to preside in the matter be reviewed and set aside as unlawful;
- 3.3 That the proceedings of the 20th of February 2017 be reviewed and set aside as wrongful;
- 3.4 That this court should direct that the criminal trial be started de novo before the first respondent;
- 3.5 That in the event there is an opposition of this application those respondents be ordered to pay costs thereof.
- [4] The application is opposed by the 3rd, 4th, 5th, and 6th respondents (the respondents). The first, second and seventh respondents will abide the decision of this Court.
- [5] The basis of opposition is that, first, the applicant should have brought this application in terms of rule 53 of the Uniform Rules of Court, and second, the application is premature.
- [6] As will be obvious hereunder, this matter does not concern the review of a decision of any magistrate. The substance of the application is the review of the decision of the public prosecutor to bring the matter before a magistrate who did not initially record the pleas of the accused. None of the magistrates cited took any decision which is subject of review. The first respondent never took a decision to recuse herself and no facts have been pleaded in this regard. The second respondent was never appointed to preside over a matter concerning the applicant and, also in this regard, no facts have been proffered to substantiate the applicant's case. On the contrary, the decision to continue with the case before the second respondent was taken by the prosecutor with the concurrence of legal representatives of the accused including that of the applicant.
- [7] Accordingly the matter will be determined on its real issues. The debate during the oral argument was directed at the review of the decision of the public prosecutor. It was correctly conceded on behalf of the applicant that no decision was taken by any magistrate which may be the subject of review.

- [8] It is a fundamental principle of our law that in motion proceedings the notice of motion and founding affidavit, together with its annexures, constitute pleadings and evidence which must justify the grant of the relief sought. Therefore, in the founding affidavit, the applicant must set out facts that are sufficient to disclose the cause of action relied on and evidence establishing that cause of action.[1]
- [9] It has been held that the court is not bound by the parties' characterisation of their cases. Indeed the court has a duty to determine the matter in accordance with what appears to be the real issues.[2]
- [10] Accordingly the matter is to be determined on the basis of the pleadings. The pleadings contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.
- [11] The history of the criminal matter is summarised in paragraph 2 above. The founding affidavit is scanty and no facts have been placed before me to substantiate the relief sought. The affidavit is a farrago. In order to follow what the substance of the relief sought and the basis thereof one would have to search diligently and possibly in vain for the main plank of the applicant's case among a forest of assorted trees.
- [12] There is not one iota of evidence forthcoming from the applicant that the first respondent recused herself from the case or is there any to the effect that the second respondent was appointed to preside in the matter. Counsel for the applicant correctly conceded this much.
- [13] The question is now whether there is any legal basis for reviewing the decision taken by the parties on the 20th of February 2017 to invoke the provisions of section 118 of the CPA. It was argued on behalf of the applicant that section 118 of the CPA did not apply; alternatively, it was invoked in order to commit fraud on the part of the prosecution. The alleged fraud occurred when the charge sheet was amended to insert "SAPS" instead of "DPCI". This argument is not apparent in the papers. The papers state that the State was afforded sufficient time to amend the charge sheet, if so advised, but the prosecutor was adamant that the accused had defrauded DPCI. No reference to the SAPS can be found in the papers. In my view the argument does not touch the cause of action.
- [14] The complaint, as appears in the papers, is that when the matter came before the second respondent there was no explanation to the accused as to the reasons why the first respondent was not available to continue with the case. The applicant states that he sensed that an injustice was to ensue as a result of the change of presiding officers. He lays no basis for the suspicion. Mr Maseti, who appeared for the applicant, argued that the charge sheet was fraudulently amended to replace DPCI with SAPS. When asked what prejudice his client suffered as result of such amendment, he could not explain.
- [15] However, there is a problem about the State having committed fraud because there was an agreement to proceed before another Magistrate. The applicant was properly represented in that agreement by his attorney, Mr Mphahlwa. There is nothing in the papers to suggest that

Mr Mphahlwa acted outside his mandate when he agreed that the matter should proceed before another magistrate. Furthermore, in the replying affidavit the applicant did not deny that the first respondent was not available. He simply noted the allegation. I drew Mr Maseti's attention to the case of *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V) at 386 where the Learned Acting Judge said: "In the course of argument I put it to counsel for applicants that, where a deponent is under a duty to admit or deny or to confess and avoid a direct allegation, a reply that the allegations are 'taken note of' would, in the circumstances, amount to an admission. See in this respect the case of *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E - D where it is stated that whilst 'quiescence is not necessarily acquiescence', a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him."

[16] This court is entitled to infer that Mr Mphahlwa acted within his mandate when he agreed to proceed with the matter as stated above. Legal representatives are expected to act in good faith and are obliged to further their clients' causes to the best of their ability. An attorney, including of course an advocate, is expected to be honest and candour with the court. On this basis and, in the absence of evidence to the contrary, it must be accepted that Mr Mphahlwa consulted with the applicant before taking a decision affecting him. The decision to review that decision must have been an afterthought based on ill-advice.

[17] Section 118 of the CPA provides:

"Non-availability of judicial officer after plea of not guilty"

If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court."

Mr Maseti advanced argument that section 118 of the CPA could not be invoked in the present matter because the first respondent was still stationed at Zwelitsha where the initial plea was taken. In his view, the unavailability envisaged in section 118 refers to a judicial officer who is deceased or transferred to another district. It does not apply to a case where the magistrate is just on leave. For this contention he relied on the decision of *S v Mkhuzangewe* 1987 (3) SA 248 (O).

[18] Ms Cossie, who appeared for the respondents, submitted that no irregularity had occurred in the matter and that the case relied on by Mr Maseti was distinguishable. She argued further that as the proceedings were incomplete before the magistrate, this Court should refused to entertain the review and dismiss the application. There is merit in this submission. She persisted with the point that the applicant should have followed a procedure in terms of rule 53 of the Uniform Rules of Court. There is no merit in this argument.

- [19] It is true that once an accused pleads not guilty he is entitled to a verdict before that judicial officer before whom he has pleaded. The purpose of section 118 of the CPA is to cater for situations where the judicial officer becomes unavailable after the plea but before evidence has been led. In such a case it is permissible that the trial should continue before a judicial officer who is available.
- [20] The Constitutional Court in *Judge President Hlophe v The Premier of the Western Cape* 2012(6)BCLR 567 (CC) had to interpret what was meant by “absent” in the context of an appointment of an Acting Judge in terms section 175(1) of the Constitution of the Republic of South Africa Act, 1996. In that case the court concluded that “absent” means physical absence of the judicial officer to perform the duties. In any event this case is distinguishable from the present matter.
- [21] The purpose of section 118 is different. It is to ensure that the accused, who is entitled to a speedy trial, is not unduly delayed by waiting for a judicial officer who may be unavailable to continue with the case for whatever reason. Bearing in mind that, it is important that it is always in the interest of justice that the trial should commence and be finalised before the same magistrate who takes the plea, the section ensures that a plea explanation, if any, is taken at an early stage by one magistrate and that the actual trial can commence before a different magistrate.
- [22] As pointed out earlier in this judgment due to the fact that the papers are scanty none of the parties have disclosed as to why the first respondent was not available to continue with the case. The respondents simply stated that she was not available without stating her whereabouts. The applicant did not state whether the first respondent was indeed available despite the fact that the matter continued before the second respondent. In the replying affidavit he simply noted that she was not available. I must therefore accept that the first respondent was not available hence the legal representatives of the accused, including that of the applicant, agreed to continue with the matter before another magistrate.
- [23] In my view the section is satisfied if the magistrate who took the plea becomes unavailable and no evidence has been led. I conclude therefore that there was no irregularity committed by continuing with the matter before the second respondent. The agreement to continue with the trial before the second respondent was legally permissible.
- [24] The case of *Mkhuzangewe* relied upon by the applicant does not assist him. In that case the accused was charged with dealing in dagga. He appeared in the magistrate’s court and pleaded not guilty. He was questioned by the magistrate in terms of section 115 of the CPA. The case was thereafter postponed on various occasions and after a while the charge sheet, the record and the police docket were apparently misplaced. A duplicate charge sheet and docket were then drawn up.
- [25] The accused was again brought before the court by way of a warrant of arrest and was asked to plead to the same charge after he informed the court that he had not pleaded before. The case was then postponed again and resumed before another magistrate as the magistrate

before whom he had pleaded was not available. On the date when the case was disposed of the original charge sheet was found and it was discovered that the accused had already pleaded. As it was not recorded that the magistrate who took the initial plea was not available there was no compliance with section 118. Accordingly the ratio of Mkhuzangewe was the failure to record that the first magistrate was not available to continue with the case. It is therefore

distinguishable from the present case.

- [26] There is a further problem in reviewing these proceedings. There is a well-established general rule that the High Court will not interfere with untermiated proceedings in the lower Courts unless, in rare cases, where a failure to do so will result in a grave injustice. This is the nub of Ms Cossie's argument. This general rule dates as far back as 1908. There is a long line of cases in this regard.[3]
- [27] Furthermore, it is not in the interests of justice that the proceedings be delayed any further by referring the matter to the magistrate who initially took the plea. It has not been shown that continuation of the proceedings before the second respondent will result in a grave injustice. The suspicion by the applicant that an injustice may result is unfounded. No facts have been placed before me to support that contention. The accused is entitled to a speedy trial in terms of section 35(3)
- (d) of the Constitution of the Republic of South Africa Act, 1996. The delay in the matter is an infringement of that right.[4]The delay would inevitably taint the overall substantive fairness of the trial. I have already found that the decision by the prosecutor to continue with the case before another magistrate did not constitute an irregularity.
- [28] With regard to the point of the procedure on rule 53 I do not agree that it is always necessary to follow the procedure laid down in this rule. The purpose of rule 53 is to regulate and facilitate applications for review by granting the aggrieved party, seeking to review a decision of an inferior court, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court.[5] A failure to follow rule 53 in the review proceedings is not necessarily an irregularity. The rule is designed to enable an applicant and the review court to assess whether the decision-maker had acted lawfully when it made its decision. For this reason the record which contains all the information upon which the decision was based must be delivered. It is this record which includes all documents that were before the decision-maker when it made its decision, as well as its deliberations, if any, which must be

delivered.

[29] The rule exists primarily for the interests of the applicant and the applicant is entitled to waive his procedural rights. Its provisions are not peremptory.[6] Review proceedings can be brought even by way of summons or by way of notice of motion in terms of rule 6.[7] Furthermore in terms of section 173 of the Constitution the High Court has the inherent power to protect and regulate its own process,

taking into account the interests of justice. Accordingly this point cannot be upheld.

[30] In the criminal context rule 53 does not always serve that purpose. There is no evidence that any magistrate took any decision. Therefore there may be no record or information leading to the decision of the prosecutor.

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

1. The application is dismissed with costs.

B RTOKOTA

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv Maseti Instructed b: S N JIBA ATTORNEYS 44 Union Street EAST LONDON The respondent: Adv Cossie Instructed by: STATE ATTORNEYS Office of the Premier 32 Alexandra Road King William's Town

Date heard:19 October 2017

Judgement delivered: 14 November 2017

[1] MEC for Education, GP v Governing Body, Rivonia Primary School 2013

(6) SA 582 (CC) para.93; DH Bros Industries (Pty) Ltd v Gribnitz NO 2014 (1) SA 103 (KZP) para.17

[2] See CUSA v Tao Ying Metal Industries [2008] ZACC 15; 2009 (2) SA 204 (CC) para.68; Mgijima v EC Appropriate Technology Unit 2000 (2) SA 291 (Tk) at 309C-E; Chirwa v Transnet Ltd [2007] ZACC 23; 2008 (4) SA 367 (CC) para.93

[3] See: Lawrence v Assistant Resident Magistrate of Johannesburg 1908 TS 525; Ginsburg v Additional Magistrate of Cape Town 1933 CPD 357: dictum at 361; Ellis v Visser 1956 (2) SA 117 (W) at 120; Sita v Olivier NO 1967 (2) SA 442 (A); Haysom v Additional Magistrate, Cape Town; S v Haysom 1979 (3) SA 155 (C); Mendes v Kitching NO 1996 (1) SA 259 (E) (1995 (2) SACR 634); Motata v Nair NO and Another 2009 (2) SA 575 (T)

[4] See Director of Public Prosecutions, Transvaal v Minister of Justice & Constitutional Development 2009 (4) SA 222 (CC) para.236;

[5] Helen Suzman Foundation v Judicial Service Commission 2017 (1) SA 367 (SCA) para.13

- [6] See : S v Baleka 1986 (1) SA 361 (T) at 397-398A; Jockey Club of SA v Forbes [1992] ZASCA 237; 1993 (1) SA 649 (A) at 661H; Federal Convention of Namibia v Speaker, National Assembly of Namibia 1994 (1) SA 177 (Nm) at 193C
- [7] Administrator, Tvl v Traub [1989] ZASCA 90; 1989 (4) SA 731 (A); Administrator, Natal v Sibiya [1992] ZASCA 115; 1992 (4) SA 532 (A)
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Prepared on 11 October 2026 · Esheria