

SOUTH AFRICA / JUDGMENT

Director of Public Prosecutions v Tsupa and Others (65/2019) [2021] ZAFSHC 80 (31 March 2021)

[2021] ZAFSHC 80

COURT

Free State High Court, Bloemfontein

BEFORE

Daniso

CASE / FILE NUMBER

65/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

Number: 65/2019

In

the matter between:

THE
DIRECTOR OF PUBLIC PROSECUTIONS
Applicant
And
MOKOANA
ROBERT TSUPA
First Respondent
ABRAHAM
MORATWE MOFOKENG
Second Respondent
NKGAUDISE
NELSON MOLEFE
Third Respondent
MABIDIKWANA
WILFRED MATJELE
Fourth Respondent
TEFO
WARNICK MONTSITSI
Fifth Respondent
CONFIGEN

CC (t/a ZERO TOLERANCE)
Sixth Respondent
DIAKANYO
KHAMPEPE
Seventh Respondent
NRATENG
PORTIA KHUMALO
Eight
Respondent
SOLOMON
MBONGISENI NYEMBE
Ninth Respondent
HEARD

ON: 25
FEBRUARY 2021

JUDGMENT

BY: DANISO, J

DELIVERED ON: 31 MARCH 2021

- [1] On 30 November 2020 the respondents were acquitted of all charges in terms s 174 of Act 51 of 1977 (“The Act”). The order followed a ruling in terms of s 342A (3) (d) read with s 342A (4) (a) that the proceedings were to continue as if the applicant’s case was closed after it failed to call further witnesses.
- [2] On 08 December 2020 the applicant filed an application for leave to appeal on the following terms:

“PLEASE TAKE NOTICE THAT the Applicant herein, intend to bring an application in the Free State High Court, Bloemfontein, on a date to be determined by the Registrar, for leave to appeal in terms of Sections 310A and 316 of Act 51 of 1977 against the order given in favour of the accused,

- Wherein a request for a postponement was refused, resulting in
- The State’s case closed by the court, which led to
- A dismissal in terms of section 174 where Section 342A of the Criminal Procedure Act was incorrectly applied by the Honourable Judge Daniso in the Free State High Court held in Bethlehem in case number 65 /19 on 30 November 2020.

PLEASE TAKE FURTHER NOTICE THAT the grounds of appeal are as following (sic):

2.1. No notice beforehand was given to the State as required by Section 342A of the Criminal Procedure Act 51 of 1977.

2.2. The court failed to hold an enquiry as required by the said section.

2.3. The court misdirected itself by referring to an earlier Section 342A ruling which was granted during the pre-trial proceedings.

2.4. The Honourable Judge erred by not stating the exceptional circumstances and or the absence of such exceptional circumstances as required by Section 342 A of the Criminal Procedure Act 51 of 1977.”

- [3] The application was opposed by all the respondents except for the second and the eighth. Approximately a month later, on 08 February 2021 the applicant filed another notice of application titled:

“AMENDED NOTICE OF APPLICATION FOR RESERVATION OF QUESTION OF LAW IN TERMS OF SECTION 319 OF THE CRIMINAL PROCEDURE ACT AS AMENDED.”

- [4] The respondents raised preliminary objections that the state’s application constitutes an irregular step and also contains a contradictory matter. One cannot tell whether it is an application for leave to appeal or an application for reservation of question of law and, if it is the latter what informs the procedure adopted by the applicant, namely: to amend the initial application without having notified the respondents of the intended amendment as required by the rules of court and to bring an application for the reservation of questions of law over two months after the proceedings were disposed of.
- [5] It was contended by counsel for the respondents that the application is entirely flawed, pointless and a perpetuation of abortive applications launched by the applicant. Immediately after the dismissal of the applicant’s request for a further postponement at the trial court counsel for the applicant Mr. Ponye, brought an application in terms of s 317 which he simply withdrew when the respondents objected that it was irrelevant to the proceedings. Similarly, when the respondents were served with the application to appeal in terms of s310A and 316, counsel for the first respondent Mr. Bomela raised a point of procedure with regard to the form and content of the notice. Again, Mr. Ponye responded by abandoning the said application and attempted to replace it with the so called amended application in terms of s 319 which is also incompetent. The application was clearly intended to circumvent rules of court which regulate the time periods in terms of which an appeal must be lodged.
- [6] It was argued on behalf of the respondents that the applications constitute an abuse of court process and an invasion of the respondents’ rights. The respondents were duly acquitted but they still find themselves in court to answer to misconceived applications at a substantial cost of appointing counsel. The application must be dismissed solely on that score.
- [7] Mr. Ponye argued that the amended notice is intended to amend the previous notice due to the fact he had realized that he had relied on the wrong section of the Criminal Procedure Act. The notice of the intended amendment was served on the respondents and there was no opposition.

- [8] The submission turned out to be false as when the respondents' counsel maintained that no such notice was served on all the respondents, Mr. Ponye admitted that the notice was not served.
- [9] There are indeed defects in the applicant's "amended notice of motion". A notice of motion is amended in accordance with the rules of court applicable to the amendment of pleadings or documents.[1] A party desiring to amend a notice of motion as in the case of a summons or pleading is required to notify all other parties of its intention to amend and shall furnish particulars of the amendment stating that unless a written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.[2] An amendment which was not effected in terms of the rules of court is incompetent. See *Tengwa v Metrorail* 2002
- (1) SA 739 (C) at 745-746.
- [10] In casu there was clearly no compliance with the rules of court. The result is that the purported amendment is irregular and the consequent amended notice of motion is a nullity.
- [11] Having regard to the established principle affirmed in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*
- [2002] ZACC 22; 2002 (6) SA 642 (CC) at paras 21-22, I held that despite the shortcomings in the procedural methodology employed by the applicant, it would be in the interests of justice and of the parties that I hear the merits of application.
- [12] It was the applicant's case that the application is premised on the provisions of s 319 (1) of the Criminal Procedure Act 51 of 1977. The state requires the following question of law to be reserved by the Supreme Court Appeal: whether the court correctly applied the provisions of s 342A when on 30 November 2020 it ruled that the proceedings were to continue as if the applicant's case was closed with the result that the respondents were acquitted in terms s 174.
- [13] It was Mr. Ponye's submission that the application can be brought anytime, even months after the proceedings were concluded. In support of his contentions he made reference to Director of Public Prosecutions, *Limpopo v Kagiso Kodishi Mokgotho*. [3]
- [14] On the other side it was the respondents' submissions that the applicant is not entitled to bring an application for reservation of questions of law after the proceedings have been completed. The application should have been brought on the trial court and not some months after the acquittal of the respondents by way of a purported appeal.

- [15] I'm in agreement with the respondents' contentions. At the outset the Mokgotho matter[4] is at odds with the applicant's case. It relates to an appeal after the trial court had dismissed the state's application for a reservation of a question of law. It is also important to note that in para 16 of the said judgment it is conspicuously stated that the application had been made at the court of first instance. The reliance on this case is therefore misguided.
- [16] The provisions of s 319 are clear. 'If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court (my emphasis) shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.'
- [17] The reservation of a question of law cannot be raised in the court sitting as an appeal court. It is the trial court that reserves a question of law and enters it in the record to enable the Supreme Court of Appeal to understand what it entails. After the trial is concluded the court is functus.
- [18] The application is also based on a gross distortion of the factual events which took place in court, namely that the applicant was not pre-warned that the court will invoke the provisions of s 342A. No enquiry was held and the court also failed to state the exceptional circumstances or the absence thereof as required by s 342A.
- [19] The transcript of the proceedings reveals that on the first day of the trial, 05 October 2020 the parties handed in a draft order, Exhibit "F" by concurrence. The order was made at a pre-trial hearing held on 23 March 2020 in terms of which the parties certified that the matter was trial ready and would proceed on 05 to 16 October 2020 and on 23 November to 11 December 2020. Then in para

4 of the said order the following is recorded:

"The parties are specifically warned of the provisions of section 342A of the Criminal Procedure Act 51 of 1977 in that:

- (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;
- (b)...
- (c)...

- (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.”
- [20] Exhibit “F” militates against the applicant’s assertion that the applicant was not pre-warned of the provisions of s 342A(4)(a). On 27 November 2020 during the hearing of the application for a postponement by the applicant. Mr. Ponye on his own accord presented arguments in relation to the provisions of s 342A, clearly aware of the contents of Exhibit “F” and its implications. (Pages 1 – 2 and 10 – 19 of the transcript of the proceedings).
- [21] There is also no merit to the applicant’s contention that no enquiry was held in terms of s 342A (1). Mr. Ponye and his co-counsel were at pains to explain their view of what entails the holding of an enquiry as provided for in s 342 A (1) and this is despite the fact that at the trial court no proper application for a postponement was brought. The court had to elicit the information relating to the reasons why none of the applicant’s witnesses were available, whether they were aware of the dates of the trial, whether they were subpoenaed and whether they had given any reasons for their unavailability.
- [22] In *S v Huysteen* 2004 (2) SACR 478 (C) at para 8 the court held that s 342A (3) does not require a formal hearing or even a formal finding to be made when deciding on whether to grant or refuse a postponement. ‘If the presiding officer enquires as to the reasons for the request for a further postponement and concludes that a further postponement would lead to an injustice, that is sufficient.’
- [23] In respect of this particular matter, page 25 to 29 of the transcript of the proceedings details the enquiry undertaken by the court to establish the reasons for the unavailability of the applicant’s witnesses.
- [24] Pre-trial hearings and the orders made therein are meant to facilitate and expedite the handling of the trial by eliminating any preliminary issues that may delay the trial. The applicant’s contention that the court misdirected itself by referring to a s 342A ruling granted during the pre-trial proceedings is plainly bad and disingenuous.

Costs

- [25] The respondents have asked that the applicant should be mulcted with a cost order on attorney and client scale. In support of the requested punitive cost order the respondents made reference to the fact that the respondents have already been

acquitted by the court. The applicant has launched incomprehensible applications of which the reliefs sought therein are not even ascertainable. The respondents could not understand what case they were expected to respond too even their counsel were in the dark. The respondents were entitled to oppose the applications which has caused them an extreme inconvenience and financial strain. The second respondent has also passed away.

- [26] The application for costs was not opposed by the applicant.
- [27] The general rule is that a successful party is entitled to its costs. I have found no reason to deviate from the general rule.
- [28] With regard to a punitive cost order, it is imperative for the court to have regard to the conduct of a litigant and also its counsel how it shaped the proceedings. The applicant has brought various frivolous and plainly bad applications. It is noteworthy that the applicant in its grounds for the purported application/s relies on factual details of what transpired in court. The transcript of the proceedings was inexplicably not filed with the application/s. Mr Ponye's response to why the record was not filed was merely that the transcription of court proceedings takes time and this is despite the fact that approximately five days after filing the "amended notice of motion" on 15 February 2021 he contacted the registrar of the court requesting the date for the hearing. There has been no explanation why he deemed the hearing to be so urgent that he could not wait to obtain the transcript of the proceedings.
- [29] The applicant has clearly conducted itself in a vexatious manner, the flagrant disregard of the rules of the court, the rights of the respondents and the lack of candour displayed by the applicant is deserving of the court's censure.

Conclusion

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

1. The application by the state for the reservation of a question of law for consideration by the Supreme Court of Appeal in terms of s 319 (1) of the Criminal Procedure Act 51 of 1977 is dismissed.
2. The applicant to pay the costs of opposition by the respondents with the exception of the second and eight respondents. The costs to include the costs of their attorney / counsel on a punitive scale of attorney and own client.

NS DANISO, J

For the applicant:

Adv. MM. Ponye (with him) Adv. PC. Zondo

The Director of Public Prosecutions

Bloemfontein.

For the 1st respondent Adv. L Bomela

Qwelane, Theron & Van Niekerk Attorneys

Bloemfontein

For the 3rd & 9th respondents Mr T Thusi

Tshepo Thusi Attorneys

For the 4th respondent Adv. GSJ van Rensburg

Marthinus Gerhardus Attorneys

Bethlehem

For the 5th & 6th respondents Adv. CJ van Rensburg (SC)

Harringtons Inc

For the 7th respondent Mr Bester

Human Le Roux Meyerowitz Attorneys

[1] *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at p 369F – I.

[2] Rule 28 (1) and (2) of the Uniform Rules of Court.

[3]

[2017] ZASCA 159 (24 November 2017).

[4] *Ibid* fn 3.

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