

SOUTH AFRICA / JUDGMENT

Director Public Prosecutions Limpopo Division v Grobler and Others (CC01/2024) [2024] ZALMPPHC 204; 2025 (1) SACR 357 (LP) (13 December 2024) [2024] ZALMPPHC 204

COURT

Limpopo High Court, Polokwane

BEFORE

E M Makgoba

CASE / FILE NUMBER

CC01/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: CC01/2024

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED: YES/NO

SIGNATURE:

Makgoba Retired JP

DATE:

13/12/2024

In

the matter between: THE
DIRECTOR PUBLIC PROSECUTIONS
APPLICANT
LIMPOPO
DIVISION
and
JOAQUIN
THOMAS GROBLER
FIRST RESPONDENT
DAWID
GROENEWALD
SECOND RESPONDENT
KAREL
TOET
THIRD RESPONDENT
JACOBUS
MARTINUS PRONK
FOURTH RESPONDENT

Delivered : 13 December 2024. This judgment was handed down electronically
by circulation to the parties' legal representatives by email and
released to SAFLII.
The date and time for hand-down of the judgment
is deemed to be 13 December 2024 at 10h00.

JUDGMENT

MAKGOBA RETIRED JP:

[1] The Applicant brought an application against the Respondents seeking an order in the following terms:

1.1. That the First Respondent, who is a practicing attorney, representing the Second, Third and Fourth Respondents in a criminal trial as described in the Applicant's founding affidavit, be permanently barred from representing the said Second, Third and Fourth Respondents and/or any other accused persons cited in the indictment during the criminal trial enrolled on the Court roll of this Court on 7 October 2024 with case number CC 01/2024. That the First Respondent be barred from representing the respondents mentioned above up and until the finalisation of the mentioned case.

1.2. Further and/or alternative relief.

[2] The Applicant in this matter has instituted a criminal prosecution against the Second, Third and Fourth Respondents as well as other accused persons that are not party to the present application. The First Respondent (Mr Grobler) is the legal representative for the Second, Third and Fourth Respondents referred to above as well as Mr T. Erasmus who is not cited in the present application.

- [3] The criminal prosecution currently pending against the aforementioned Respondents as well as other accused persons who are not parties to the present application is currently pending under case number CC 01/2024 in the High Court, Polokwane after being transferred from the High Court, Pretoria. The first appearance in the High Court, Polokwane was the 9th February 2024.

Mr Grobler represented the aforementioned Respondents and others while the case was in the High Court, Pretoria. When the criminal matter was transferred to the High Court, Polokwane the Second, Third and Fourth Respondents still engaged the services of Mr Grobler.

- [4] On the first appearance in the High Court, Polokwane on 9 February 2024 the State (the Applicant) informed Mr Grobler that he cannot proceed to represent the four accused in the criminal matter due to the fact that there will be an ethical challenge as there is a conflict of interest due to the fact that Mr Grobler is listed as a State's witness in the said pending criminal case.
- [5] The withdrawal of Mr Grobler as attorney of record for the Second, Third and Fourth Respondents could not be resolved amicably, hence the Applicant brought the present application before this Court.

Factual Matrix

- [6] The facts in this case are mainly common cause and not seriously disputed. Such facts are set out hereunder.
- [7] The criminal case currently pending before the High Court, Polokwane under case number CC 01/2024 commenced in September 2010 in the Magistrate Court of Musina and was thereafter transferred to the High Court, Pretoria. Mr Grobler attested to a statement dated 4 March 2009 on behalf of Mrs. Groenewald as the attorney of record for both the Second Respondent and his wife, Mrs. Groenewald.
- [8] Mr Grobler represented the Second Respondent since his arrest in September 2010 up until the matter was transferred from Musina Magistrate Court to the High Court, Pretoria and continued to do so until his mandate was terminated due to practical, logistical and financial reasons. When the matter was transferred from Gauteng High Court, Pretoria to Limpopo High Court, Polokwane the Second Respondent re-engaged Mr Grobler as his legal representative.
- [9] The issue of Mr Grobler being a state witness and whether he should withdraw as attorney was earlier brought up while the criminal matter was pending in the High Court, Pretoria after which the question whether any ethical challenges would cause a conflict of interest and consequently require Mr Grobler to withdraw as attorney of record, was referred to the then Law Society of the Northern Provinces. The Law Society of the Northern Provinces confirmed in writing that they could not find any reason why it could be expected from Mr Grobler to withdraw as attorney of record.

[10] The Law Society of the Northern Provinces, after an investigation and consideration of the complaint, concluded in their letter dated 14 February 2012, that Mr Grobler does not and did not act improperly in any manner by continuing to represent the Second Respondent. The Law Society concluded as follows in their letter:

"is die Etiek Komitee van mening dat, op die beskikbare inligting, daar nie van Mnr Grobler ver wag kan word om te onttrek nie"

After receipt of the letter from Law Society of the Northern Provinces Mr Grobler proceeded to represent the Second Respondent and other co-accused.

[11] On 24 March 2010 the Second Respondent received a message that the relevant authorities intended to do an inspection on his farm, Prachtig in Soutpansberg. The Second Respondent was not present at the farm and he instructed his attorney, Mr Grobler to attend the farm, as his attorney, in order to protect his rights. Indeed Mr Grobler, in his capacity as the legal representative of the Second Respondent attended the said compliance inspection conducted by the officials of the South African National Parks and the Limpopo Department of Environmental Affairs at the farm, Prachtig, on 24 March 2010.

[12] The Second Respondent was arrested in September 2010 in connection with the pending criminal case. His first appearance in Court was on 22 September 2010. The Second Respondent and his wife (Mrs. Groenewald) were legally represented by Mr Grobler in their bail application in the Musina Magistrate Court. The indictment in the High Court was served on the Second, Third and Fourth Respondents and others in 2014 for the Pretoria High Court matter under case number CC 92/2014.

[13] On the 9 February 2024 during the first appearance in the Limpopo High Court, Polokwane, the State (the Applicant) informed Mr Grobler that he is number one on the list of witnesses attached to the indictment and that he should withdraw as attorney of record. Mr Grobler did not agree to the request for withdrawal as contemplated by the Applicant.

Issues

for determination

[14] The Applicant relies on two issues to justify their request for an order to permanently bar the First Respondent (Mr Grobler) from representing the Second, Third and Fourth Respondents in the pending criminal trial:

14.1. That Mr Grobler attested to a statement on 4 June 2009 during bail proceedings in a criminal case against two persons wherein he made certain averments on behalf of one of his previous clients, Mrs Groenewald.

14.2. The fact that Mr Grobler personally attended a compliance inspection operation that was executed on the farm Prachtig 538 MS, Soutpansberg, District Musina on 24 March 2010. The compliance inspection was done with regard to rhino related aspects and mainly to observe the state of grazing on the farm as Mr Groenewald had put in a tender to purchase 100 rhinos from SANParks during 2010.

[15] In opposing the application the Respondents contend that the relief sought in this application is extremely prejudicial to them. That this is an attempt to infringe on their fundamental right to legal representation as provided for in section 35(3)(f) of the Constitution.

[16] Accordingly, the following issues are to be determined by this Court:

16.1. Whether Mr Grobler is a compellable witness; and

16.2. Whether Mr Grobler should be barred from representing the Second, Third and Fourth Respondents in the criminal matter at hand.

Applicable Law

[17] The right to legal representation is an important right given to an accused person by the Constitution of the Republic of South Africa, 1996.

Section 35 of the Constitution states the following:

"35 Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right-

(a)

(b)

(c)

(d)

(e)

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly.

(g)

(h)

[18] Section 201 of the Criminal Procedure Act 21 of 1977 states the following:

"201 Privilege of Legal Practitioner

No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned."

[19] In this case it should be noted that Mr Grobler started to represent the Second Respondent and the others in the pending criminal case in September 2010 upon their arrest and during the bail proceedings in the Musina Magistrate Court and up until the case was transferred to Gauteng High Court Pretoria. When the State drew up the indictment and enlisted Mr Grobler as a State witness, Mr Grobler was still the legal representative of the Second Respondent and the others.

[20] It was therefore not proper for the State to enlist Mr Grobler as a state witness while being aware that he is the legal representative of the Respondents.

[21] Furthermore when Mr Grobler attended the compliance inspection at the Second Respondent's farm on 24 March 2010, he did so in his capacity as the Second Respondent's legal representative, duly instructed by his client. Therefore, Mr Grobler cannot be a competent and compellable witness to testify against his client.

It is trite that professional communications by client to attorney are privileged if they are of a confidential nature and for the purpose of obtaining legal advice.

See: *S v Kearney* 1964 (2) SA 495 (A) at 499E

[22] There is a strong policy consideration underlying our system of the administration of justice which inclines the Courts not to oblige a legal representative to testify against his own client. It is generally undesirable that an attorney or advocate should be forced to give evidence against a person for whom he has acted in his professional capacity.

In *S v Boesman and Others* 1990 (2) SACR 389 (E) at page 393 it was held that:

"It is a cornerstone of our judicial system that there should be the utmost freedom of disclosure to their legal advisors by persons seeking legal advice, as only then will the legal advisors be in a position to advise them properly"

See also *R v Fouchee* 1953 (1) SA 440 (W) at 445-6

[23] The State does not dispute the fact that the Second Respondent (Mr Groenewald) was not in the country during the compliance inspection on his farm and that Mr Grobler attended the inspection as his attorney of record.

[24] What is strange in the present case is that although Mr Grobler is listed on the indictment as a state witness, he was never interviewed by the State nor a statement obtained from him. It is therefore not known what evidence he is supposed to give at the trial. Moreso it is not known whether such evidence will be relevant and admissible at the trial.

In *Beyleveld v Patel NO and Others 2006 ZAECHC* the defendant served a subpoena on the Plaintiff's Counsel to give evidence against his own client in circumstances where there is no sound reason to believe that Counsel will be able to give admissible evidence which will advance the defence case. The Court held that the most probable inference is that the service of the subpoena is an abuse of the process of the Court which could justify a punitive order for costs on a scale as on an attorney and client.

[25] With reference to section 201 of the Criminal Procedure Act, 1977 quoted in paragraph [18] above, it is also evident from the content of the said statement made by Mr Grobler on 04 March 2009 that Mr Grobler was already professionally employed by Mr Groenewald and Mrs. Groenewald during the time the said information was related to him and consequently Mr Grobler will not be a compellable witness under the circumstances.

Conclusion

[26] I come to the conclusion that in the circumstances of this case the listing of Mr Grobler as a witness for the State was irregular and without any legal or factual basis for its justification. Under the circumstances it is clear that the Applicant's application is utterly flawed in various aspects as they could not show any real basis on which Mr Grobler should be barred from representing the Second, Third and Fourth Respondents as well as Mr Erasmus.

[27] There remains the question of costs. As the successful parties the Respondents are entitled to costs. It was argued on behalf of the Applicant that this Court should order that each party pays his own costs in the event of the application being dismissed. On behalf of the Respondents it was argued that the Applicant be ordered to pay punitive costs.

The question of costs is in the discretion of the Court. In my view the normal rule that a successful party be awarded costs shall apply in this case. I find no justification for a punitive costs order.

[28] In the result the following order is granted:

1. The application is dismissed.
2. The Applicant shall pay costs on party and party scale.

3. The costs payable shall include the costs of Senior Counsel for drafting the papers in this application.

E M MAKGOBA

RETIRED JUDGE PRESIDENT OF THE HIGH COURT,

APPEARANCES

Heard on

: 5 December 2024

Judgment

delivered on : 13 December 2024

For the Applicant : Adv. NT Makhubele

Office of the Director of Public Prosecutions,

Limpopo

For the Respondents : Mr. JT Grobler

Thomas Grobler Attorneys

Polokwane

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