

SOUTH AFRICA / JUDGMENT

Goldberg and Another v Boshoff NO and Another (09/53076) [2010] ZAGPJHC 164 (30 July 2010)

[2010] ZAGPJHC 164

COURT

South Gauteng High Court, Johannesburg

BEFORE

P.A. Meyer, P. Coppin

CASE / FILE NUMBER

09/53076

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SOUTH

GAUTENG HIGH COURT, JOHANNESBURG

Case

No. 09/53076

DATE:30/07/2010

In

the matter between:

LAWRENCE

GOLDBERGFirst

Applicant

MARGARITA

REED.....Second

applicant

and

MAGISTRATE

R BOSHOFF

N.O.....First

Respondent

NATIONAL

PROSECUTING AUTHORITY

(SOUTH

GAUTENG).....Second

Respondent

JUDGMENT

MEYER, J

- [1] The applicants are being tried in the Regional Court, Alexandra, South Gauteng before the first respondent on inter alia a count of fraud, five hundred and ninety three counts of theft, a count of defeating the ends of justice, and a count of malicious damage to property. Their criminal trial is underway and the state has not yet closed its case.
- [2] The state had made an application to the court a quo that the first respondent issue a letter of request in terms of s 2(1) of the International Co-operation in Criminal Matters Act¹ ('the ICCMA') in which the assistance of the relevant authority in the United Kingdom is sought to obtain the evidence of twelve persons, who are in the United Kingdom, and whose evidence, according to the state, is relevant to the fraud and theft charges.
- [3] The nature of the assistance which the state had applied for to be requested includes the securing by the relevant authorities of the attendance of the twelve witnesses at a venue in the United Kingdom from where the court a quo, sitting in Alexandra, would receive their evidence by means of electronic media equipment. The witnesses are to be examined, cross-examined,
- and re-examined by electronic means from the court room in Alexandra.
- [4] The state's application was opposed on behalf of the accused, who are the applicants in these review proceedings. The state argued that the enabling legislation to request such form of assistance from the relevant authorities of a foreign state is s. 2(1) of the ICCMA² or s. 158 of the Criminal Procedure Act³ ('the CPA').⁴ Counsel for the second respondent submitted to us that the provisions of s. 158 of the CPA find application to requests for foreign assistance by virtue of the provisions of s. 31 of the ICCMA.⁵ The disputed issues, in short, were whether the examination of the witnesses who are in the United Kingdom are 'necessary in the interests of justice',⁶ whether it would be legally competent for the court a quo to issue a letter of request in which the form of assistance as contended for by the state is sought from a foreign state, and, if s 158 of the CPA enables such form of request and procedure, whether the requirements of that section have been met.
- [5] The matter was argued before the court a quo on 23 December 2009. The learned regional magistrate delivered an ex tempore judgment. It appears from a reading of the transcript of the proceedings and from the further reasons given by the learned regional magistrate for the purpose of the present review proceedings that he accepted that

s. 2(1) of the ICCMA and s. 158 of the CPA authorise the procedure and the seeking of assistance from a foreign state in the manner as applied for by the state. He appears to have been satisfied that the examination of the witnesses at the criminal proceedings over which he presides is necessary and in the interests of justice, and also that the requirements of s. 158 of the CPA have been met for ordering that the witnesses give their evidence by means of electronic media.

[6] It appears that the court a quo was informed that the accused would consider admitting certain of the evidence to be obtained by means of the letter of request. The learned regional magistrate said:

‘I am going to grant the request by the state, but I am also going to postpone the matter for a few weeks to give the parties the opportunity to get together and I want to urge both parties now that in many ways this court is dependent on you.

If you cannot come to an agreement I will have to formulate the request myself or otherwise attach Advocate Karin de Beer’s request and then also with clear instructions from my side and also the defence instructions attached to the UK Government.

So, however, I urge you, see what will be admitted, thereafter determine the issues, and now that we want to hear these witnesses as the court ruled that it is in the interest of justice to hear them, and then report back to me.

I do not think that is an unfair request. ...

So the long and the short of the order today is get together, sort out what will be admitted and if there is any problems with Advocate de Beer’s summary sort it out, have it correctly worded before the next date.’⁷

[7] The applicants’ counsel then addressed the court a quo as follows:

‘Your worship we would respectfully submit that your worship is incorrect in its findings and we would therefore request that your worship formally give an order so that we may take this order on urgent appeal. ... Your worship an order that we get together and discuss submissions is unsatisfactory ...’

[8] The learned regional magistrate reiterated that an indication was given that admissions might be made and he was not going to make an order ‘... while that hangs in the air ...’. The record of the proceedings read:

Counsel: ‘Your worship I would request that your worship please formulate that letter of request I do not believe that it is appropriate for your worship to suggest that we need to get together ... outside the court to ...’

Court: 'Well I told you I believe it is quite appropriate and you have encountered this order many many times in the High Court so it is quite appropriate to urge the parties to get together, to sort out their differences and to determine the issues so in other words and that is even my suggestion what you suggested here but nevertheless you yourself so that is why I am asking you today on what chair do you want to sit?'

Counsel: 'Your worship I would respectfully request that your worship prepare the letter of request, any negotiations that proceed between the prosecution and the defence will not be part of your worship's judgment. ... Your worship, if your worship wishes to prepare a letter of request then your worship we request that all the documentation that has been submitted to your worship is submitted as part of that letter of request and then your worship must also specify exactly in which nature the witnesses are to present the evidence ...

Court: 'I have made my ruling.'

Counsel: 'Indeed your worship and this is why your worship we would respectfully submit that if there is a definitive ruling (inaudible) leave to appeal that ruling as a matter of urgency before the next postponement. ...'

- [9] The applicants' counsel then orally applied from the bar for leave to appeal. The learned regional magistrate refused the application for leave to appeal on the grounds that the ruling was interlocutory, '... in other words...' said the learned regional magistrate, '...it can change ...'.
- [10] Before the learned regional magistrate had postponed the matter to 13 January 2010, he invited counsel for the defence to provide him with interrogatories on behalf of the accused for the witnesses. This request, it seems to me, further demonstrates the open-endedness with which the matter was left on 23 December 2009. Any party to the proceedings before a court which issued the letter of request may, in terms of s. 3(1) of the ICCMA, and 'provided that it is permitted by the law of the requested State', either submit interrogatories for the purpose of the examination of a witness in the foreign state or appear at the examination, either through a legal representative or, in the case of an accused who is not in custody or in the case of a private prosecutor, in person, and may examine, cross-examine and re-examine the witness. Examination of a witness on interrogatories submitted by or on behalf of the defence is inconsistent with the procedure contended for by the state of examining, cross-examining and re-examining a state witness via electronic media.
- [11] It is, in my view, reasonable to infer that counsel for the applicants also realised that the matter was left in the air. He repeatedly requested the learned regional magistrate at the proceedings on 23 December 2009 to issue a letter of request. Counsel also informed us from the bar that he approached the learned regional magistrate in chambers after the court had adjourned when he requested the learned regional magistrate to issue the letter of request that had been prepared by the Director of Public Prosecutions for the South Gauteng High Court, and submitted to the court a quo. The prosecutor in the court a quo, who was present in court when this matter was argued before us, and state counsel representing the second

respondent, at my request, contacted the learned regional magistrate and we were informed that he had not yet issued the letter of request.

[12] The applicants nevertheless issued the present review application on 29 December 2009, wherein they seek the setting aside of the learned regional magistrate's

'... order of 23 December 2009, in terms of which he ordered the issue of a letter of Request in terms of Section 2(1) of the International Co-operation in Criminal Matters Act, No 75 of 1996 for witnesses to testify via teleconference facility from the United Kingdom.'

[13] The learned regional magistrate has no authority, either in terms of the provisions of s. 2(1) of the ICCMA or in terms of the provisions of s. 158 of the CPA, to issue a letter of request in which the relevant authorities in the United Kingdom are requested to arrange and facilitate the attendance of witnesses at a venue in the United Kingdom from where they, by electronic means, would give their evidence at the proceedings in the court a quo. Such power and procedure cannot be read into the clear wording of these statutory provisions.

[14] The ICCMA facilitates mutual assistance in criminal cases between the Republic of South Africa and foreign States. D'Oliveira⁸ correctly points out that

'... assistance requiring intrusive measures or compulsion can only be rendered if the domestic law of the requested state specifically provides therefor and the judicial authority is engaged. For example, ... to obtain a deposition from an unwilling witness, ... judicial authorisation is necessary.'

[15] The relevant provisions of the ICCMA⁹ permit the examination at proceedings in the foreign state of a person who is in the foreign state, if the evidence of such person is 'necessary in the interests of justice' in the proceedings before a court of this country and 'the attendance

of such person cannot be obtained without undue delay, expense, or inconvenience'. Judicial authorisation to request this form of assistance from a foreign state is required and is given when a court issues a letter of request.¹⁰ The law and procedure of the foreign state apply to the proceedings at the examination of the witness abroad. Such proceedings at which the witness is examined are not proceedings of the court which issued the letter of request. The evidence obtained at such proceedings is admitted as evidence by the court which issued the letter of request '...in so far as it is not inadmissible at such proceedings.'¹¹

[16] The provisions of ss. 158(2) – (5) of the CPA concern the giving of evidence by an accused or by a witness through closed circuit television or similar electronic media at local proceedings in a criminal court and the circumstances under which the court may order that the evidence be given through such media. These provisions do not permit a procedure for the taking of evidence across borders by electronic means at a local criminal trial. Nothing in these subsections suggest an '... arrangement or practice for the provision or obtaining of international co-operation in criminal matters' as was submitted to us by the second respondent's counsel.¹²

- [17] This, in my view, is not a proper case for the granting of relief by way of review. The application was prematurely brought and should, at best for the applicants, have awaited the authorisation by the learned regional magistrate of a letter of request in final form. Only then would it have been appropriate for this court to consider whether or not the interests of justice require interference with the conducting of the proceedings at the court a quo.¹³ The issues raised in these proceedings may then not have arisen. Resort to this court at a premature stage has now caused a delay in the finalisation of the criminal trial of about seven months.
- [18] It is accepted that, once this judgment has been brought to the attention of the learned regional magistrate, the parties will be permitted to revisit the application for the issue of a letter of request and the learned regional magistrate will afresh give due consideration to all the relevant factors that are to be taken into account and weighed in deciding whether or not to grant judicial authorisation for the relevant authorities in the United Kingdom to assist in an examination of some or all the witnesses at proceedings abroad.
- [19] This application was postponed on 12 January 2010, on 3 February 2010, and again on 17 March 2010. The wasted costs occasioned by the postponement were reserved on each occasion. We were informed that non-compliance by the applicants with the rules of practice of this court resulted in the postponements.
- [20] In the result, the application is dismissed and the applicants are ordered to pay the second respondent's costs of the application, including the wasted costs occasioned by the postponements on 12 January 2010, on 3 February 2010, and on 17 March 2010, jointly and severally, the one paying the other to be absolved.

COPPIN, J

[21] I agree.

P.A. MEYER

JUDGE OF THE HIGH COURT

P. COPPIN

30 July 2010

1 Act No. 75 of 1996.

2 S. 2(1) of the ICMMA reads: 'If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.'

2

S. 2(1) of the ICMMA reads:

‘If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.’

3 Act No. 51 of 1977.

4 S. 158 of the CMA reads: ‘(1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.

- (2) (a) A court may, subject to section 153, on its own initiative or on application of by the public prosecutor, order that a witness or an accused, if the witness or the accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
- (b) A court may make a similar order on the application of an accused or a witness.
- (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would-
 - (a) prevent unreasonable delay;
 - (b) save costs;
 - (c) be convenient;
 - (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
 - (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.
- (4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.
- (5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.’

4

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- (2) (a) A court may, subject to section 153, on its own initiative or on application of by the public prosecutor, order that a witness or an accused, if the witness or the accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
- (b) A court may make a similar order on the application of an accused or a witness.
- (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would-
 - (a) prevent unreasonable delay;
 - (b) save costs;
 - (c) be convenient;
 - (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
 - (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.
- (4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.
- (5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.’

5 S. 31 of the ICCMA reads: ‘Nothing in this Act contained shall be construed so as to prevent or abrogate or derogate from any arrangement or practice for the provision or obtaining of international co-operation in criminal matters otherwise in the manner provided for by this Act.’

6 The requirements of which a court must be satisfied before issuing a letter of request in terms of s. 2(1) of the ICCMA, which

requirements include a consideration and weighing of various factors.

7 The reference to Adv. De Beer’s summary is a reference to a statement that had been prepared by the Director of Public

Prosecutions for the South Gauteng High Court, Johannesburg, Adv. Charin de Beer SC, and submitted to the court a quo.

8 International co-operation in criminal matters: The South African contribution 2003 SACJ 323, at p 337.

9

See ss. 2(1), 3(1), 3(3), 4, 5(1), 5(4) and 6 of the ICCMA.

9

See ss. 2(1), 3(1), 3(3), 4, 5(1), 5(4) and 6 of the ICCMA.

10 S. 2(1) of the ICCMA. It should be noted that a court issuing the letter of request is enjoined to inter alia request 'that an accurate record of the proceedings at the examination of the witness be kept according to the procedure normally followed in the requested State' (s. 4(1)(a)) and that the person presiding at the examination make an accurate record of the witness's refusal to answer any question or to produce any book, document or object, and of the reasons for such refusal' (s. 4(b)), and it may request other forms of assistance, such as that 'that a video recording of the proceedings at the examination of a witness be made' (s. 4(2)(a)).

11 S. 5(4) of the ICCMA.

12

See: Para 4 supra and footnote 5.

12

See: Para 4 supra and footnote 5.

13 See: *Whalhaus and Others v Additional Magistrate Johannesburg and Another* 1959 (3) SA 113 (A), at pp 119D – 120E.

13

See: *Whalhaus and Others v Additional Magistrate Johannesburg and Another* 1959 (3) SA 113 (A), at pp 119D – 120E.

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