

SOUTH AFRICA / JUDGMENT

M3D Developers (Pty) Ltd and Another v National Director of Public Prosecutions N.O and Others (M372/2014) [2015] ZANWHC 70 (29 October 2015)

[2015] ZANWHC 70

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

M372/2014

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IN THE NORTH WEST HIGH

COURT

MAHIKENG

CASE NO.: M372/2014

DATE: 29 OCTOBER 2015

In the matter between:

M3D DEVELOPERS (PTY)

LTD.....First

Applicant

MIKE

MARAIS.....Second

Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

N.O.....First

Respondent

THE DIRECTOR OF PUBLIC PROSECUTOR

NORTH WEST

N.O.....Second

Respondent
THE MAGISTRATE, MMABATHO /
MAHIKENG
N.O.....Third
Respondent
CIVIL MATTER
KGOELE J
DATE OF HEARING : 13 AUGUST 2015
DATE OF JUDGMENT : 29 OCTOBER 2015
FOR THE APPLICANTS : Adv. P. Van Wyk
FOR THE RESPONDENTS : Adv. J
Neveling

JUDGMENT

KGOELE J:

A. INTRODUCTION

- [1] The applicants are the accused in a Criminal prosecution instituted by the second respondent. They seek an order interdicting the respondents to prosecute them, tender and/or hear any evidence or to proceed with the trial against them pending compliance with the order in terms of the second prayer wherein they are requested to be ordered to produce certain documents as set out in the application.

B. BACKGROUND

- [2] In terms of proclamation R7 of 2007, as published in the Government Gazette 29381 dated 25 April 2007, the Special Investigating Unit (SIU) was mandated to conduct an investigation into fraud, corruption and maladministration in respect of the development and delivery of low cost housing in South Africa through the National Department of Housing, the Provincial Departments of Housing, the former Housing Development Boards and Corporations and Local Authorities and their appointed agents. One of such investigation which was commenced by the SIU involved the two projects mentioned in this application which were for Greater Taung Local Municipality area, North West Province. M3D Developers (the first applicant) was appointed as contractors to build and complete these projects and a total amount of R16 612 000-00 was paid to them in respect of both housing projects. These monies were paid over in the form of tranche (advance) payments by the Department of Human Settlement (the Department). R8 110 500-00 was paid in respect of the Ba Ga Phuduhucwana (360 housing project), and R8501 600-00 in respect of the Ba Ga Maidi (371 housing project).
- [3] According to the allegations by the team of the SIU investigations led them to visit the sites responsible and found that only one show-house was built and no services were installed on the Ba Ga Phuduhucwana 360 project, but all the houses and services were however

completed and installed on the Ba Ga Maidi 371 project. The investigation team further alleged that the former director of M3D, Mike Marais, (the second applicant) and his former secretary were responsible for the creation of numerous fraudulent or forged invoices and letters to the Department in an attempt to justify monies allegedly spent on the 360 housing project. According to them an amount of R7 942 725-33 could not be accounted for.

- [4] As a result, a criminal case, Taung CAS 60/07/2010 was registered with the South African Police Service (SAPS) for investigation and the SIU was assisting and cooperating with SAPS in the criminal investigations. A search and seizure of certain documentation and exhibits was conducted by the SIU and SAPS in terms of a search warrant which was authorised on the following premises, 2 D... la H.....] Street, [W.....], [K.....]; 23 [E.....] Street, [L..... L.....], [K.....] and at [K.....] [M.....] Complex.
- [5] The applicants as per agreement with the prosecutor made some oral and written representations (with available documentation) in order to persuade him as to their defence. The agreement with the prosecutor is not challenged. As seen from the application, the issue relates to certain documents which according to the applicant were seized during the said searches that were allegedly not returned. The applicants submitted that the prejudice which they will suffer is substantial in that without those documents, they cannot prepare for their defence.

C. APPLICANTS' CASE

- [6] According to the applicants, inclusive in the files seized at 2 De La Harpe Street, Wilkopies, Klerksdorp, were hard copies of e-mail correspondence between M3D Developers and the Department of Human Settlement North West, relating to meetings, dates, the authorized expenditure of funds and discussions and authority in respect of financial matters related to the project funds, especially the two projects which is the basis of the criminal charges against the applicants. The non-return of these documents is prejudicial in the preparation of the trial and presentation of the applicants defence to any witnesses.
- [7] The respondents' answer to these allegations is to the effect that the documents seized at these premises are listed on the inventory Annexure MM15 that was given to applicants already. The electronic devices seized are listed on the inventory compiled by Wigill and marked Annexure WVBA. Annexure WVB4 did not form part of the copy of the police docket which was furnished to the applicants. However, the item listed on Annexure WVB4 as well as where it was seized, is specified by Wigill in paragraph 5 of his statement which forms part of the docket which was furnished to the applicants. Therefore, according to applicants all the documents seized during this search were returned to applicants and Armed Johann Mynhardt oversaw the return of all these documents.
- [8] Applicants' argument on this answer is that Mynhardt was not even present during this search and cannot, as a fact, state what was seized at these premises, let alone testify that the items seized were returned.

- [9] The applicants alleges further that during the search at 23 Edna Street, Songloed, Klerksdorp, four arch lever files, containing correspondence and financial documents including minutes of financial meetings held with the Department of Human Settlements, North West, and written authority relating to claiming of funds and authorised expenditure of said funds of the first applicant as well as a computer were seized. No inventory in respect of this search and or seizure was received and only the computer was later returned.
- [10] The respondents' answer to these allegations is to the effect that the documents seized at these premises are included in the police docket furnished to the applicants as well as on the list as per Annexure MM14. Annexure MM14 was according to the papers before Court supplied during the correspondence that preceded this action on the 17th April 2013.
- [11] Applicants' arguments to this answer is to the effect that the respondent by keeping mum about the inventory means that they concede to the fact that there is no inventory in respect of documents seized, it cannot therefore be stated that all documents seized were returned.
- [12] In as far as the search at Kuruman Mothibestad Complex is concerned, it is common cause between the parties that the laptop was the only thing seized and it cannot be found at this stage. The respondents described to the applicants the circumstances which led to it missing but submitted that the applicants will not be prejudiced in preparation for their defence and during trial because a copy of the forensically sound image of the contents of the laptop is however available.
- [13] The applicants' argument to the answer is that the forensically sound image cannot be compared with the exhibit seized. Further that, as far as the folders on the laptop that applicant saved that he says cannot be retrieved through any other computer, they conceded to this fact. According to the applicants, this relates to the meetings held, correspondence and e-mails addressed to the Department. From Mr Wigmill's statement, he make reference to certain key words that he used to obtain these documents, but interesting enough, applicants further argues, only three key words namely: Project 360, Project 371, Minutes Kept, were used to get information copied. He furthermore indicates in his statement that "No digital information of the project was found". This, according to the applicants, means that Mr Wigmill did not make copies of the whole computer.
- [14] Applicants finally submitted that all of these amount to prejudice to the applicants because crucial documents corroborating applicants defence cannot be found. Meetings were held +- 7 years ago therefore it is difficult to indicate who sat in those meetings. Applicants urged this Court that although there are disputes in this case as to whether the documents were seized or not and or returned or not, the matter can be simply resolved by the reference to the case of *Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (AD). According to the applicants, the facts averred in the applicants' affidavits which have been admitted by the respondents, together with the facts alleged by the respondents, justify that an order as prayed for by them and should be granted on papers.

E. ANALYSIS

[15] The nub of the applicants' case is that due to the loss of the documents and the laptop seized by the state they will suffer irreparable trial-related prejudice. Unfortunately in our matter, unlike in all the cases the applicant's Counsel relied upon and referred this Court to, which deal with lost documents, there is some dispute as to:

- (i) whether such documents referred to by applicants were seized or not;
- (ii) whether such documents if seized were returned or not;
- (iii) and lastly, whether the applicants will suffer prejudice.

[16] It is important to note that the applicants are not asking for a permanent stay of prosecution, but to stay prosecution pending the return of documents. The applicants allege that the failure by the respondents to return the documents is prejudicial to them. The order requested has the effect of permanently staying the prosecution if the respondents fail to return the documents. The same principles relating to permanent stay of prosecution are applicable. And therefore it should be considered in the same standard of permanent stay of prosecution

[17] In the case of *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) referred to by Counsel dealt with the undue delay, not documents. The *Broome v DPP, Western Cape* and *Others* 2008(1) SACR 178 (C); *Bothma v Els and Others* 2010 (2) SA 622 (CC) cases are also closer to our matter in that the issues were undue delay and loss of evidence / documents. Although these two cases are closer, the major difference with our matter as already indicated in the previous paragraph is that it was common

cause in both of them that the evidence was lost. Despite this, the principles enunciated in the *Bothma* case are important in the consideration of issues relating to trial prejudice the applicant may suffer in our matter.

[18] At paragraph 68 of the *Bothma* judgment the Court remarked:-

"These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained."

[19] The Constitutional Court in the *Bothma* case went to an extent of looking at the manner in which South African Courts have evaluated trial prejudice and also dealt with the *Broome* matter quoted above. At paragraph 81 the Court remarked:-

“The key controlling element, as far as fairness of the trials is concerned, would be the presumption of innocence. The gravity of the offence and the public interest in ensuring that perpetrators are brought to book can never in themselves justify a conviction if the evidence is insufficient. In this respect, the contention by Mr Els’s counsel that the paucity of surviving evidence could result in an innocent man going to jail cannot serve as a basis for stopping the proceedings in advance of the trial. The trial Court will be obliged to give due weight to the evidential deficit facing Mr Els. In the words of L’Heureux-Dubé J in the Canadian Supreme Court:

‘Difficulty may well be experienced by an accused in gathering rebuttal evidence. [Yet] the potential for such difficulty is likely one of the reasons why the prosecution bears the heavy onus of proving all aspects of guilt beyond a reasonable doubt. In that regard the criminal system has always taken into consideration that it will occasionally be difficult for an accused to demonstrate innocence, and has removed the need to do this, by putting a high onus of proof upon the Crown. [Her Emphasis]

And should the trial court err, the court hearing an appeal should, in the circumstances of a case like the present, be especially attentive to ensuring that any doubt would favour the accused”

[20] The Court went to as far as explaining the quotation above and remarked as follows at paragraph 82:-

“What this boils down to, however, will be that it is up to the trial court to “ensure that Mr Els has a fair trial”. It would be ill-advised at this stage to rehearse scenarios. The possibility exists that after Mrs Bothma has presented her evidence, an application could be made for a discharge on the ground that no prima facie case has been made out. It is not desirable to speculate on the different forensic permutations possible. What is sure is that if the trial proceeds to its conclusion and all the available witnesses whom the parties wish to call are led, the trial court would be obliged to give due weight to all the difficulties that Mr Els would have had in presenting his evidence. If, bearing this in mind, his guilt is not proved beyond reasonable doubt, he must be acquitted.”

[21] The following quotes in paragraphs 85 and 86 are more relevant and apposite in our matter:-

85. “The matter would have been different if Mrs Bothma had been responsible for the destruction of evidence. In these circumstances, the case for aborting the trial would have been powerful. Yet there is not suggestion on the record that she in any way contributed either to the demise of potential witnesses or to the loss of possible documentary exhibits. The fact is that the delay appears to have deprived both parties equally of supporting testimony. In the result, the High Court was faced with a classic case of bald allegation versus bald denial. One of the litigants was lying, the other telling the truth. The law has one time-honoured way of determining who should be believed, and that is through examination and cross-examination of oral evidence and if after the evidence is tested in this way, the court has any reasonable doubt about where the truth lies, that doubt will entitle the accused to an acquittal”.

86. “The High Court cannot be faulted for the manner in which it contextualised the issues, and, within its frame of reference, it provided well-motivated reasons for coming to the conclusion it did. However, the frame it adopted was too narrow. First, it gave no scope for placing on the scale the nature of the offence and its significance in explaining the delay. Second, it provided too narrow a test for determining what would constitute irreparable trial prejudice. Moreover, the structure of the analysis directed the High Court towards deciding matters itself, which should have been left to the trial court”.

[22] A careful analysis of the correspondence the applicants relies upon for the missing evidence reveals that the first letter that they wrote complaining about the missing documents was on the 28 November 2012 which letter was fully responded to by the respondents on the 7 February 2013. The respondents fully answered their letter in point form and amongst others indicated therein that all the documents which were seized were fully provided to them. From this onwards all the letters from the applicants are not specific and only refers to the fact that there were more files taken by the respondents than that was brought back. In particular, the respondents’ letter dated 25 March 2013 also enquired about the specification of the files that were alleged were still outstanding and the reply from the applicants dated 4 April 2013 amongst others indicated that they cannot indicate which particular file or files were not brought back and requested instead inventories / proof from the respondents of what was seized for them so that they can be able to indicate. It also appears that the respondents sent the inventories as requested later to the applicants.

[23] It is only in the founding affidavit the applicants attempt to be specific as they allege:-

“Inclusive in the files seized at this premises was hard copies of e-mail correspondence between M3D Developers and the Department of Human Settlement, North West, relating to meetings, dates, the authorised expenditure of funds and discussions and authority in respect of financial matters related to the project funds, especially the two projects which is the basis of the Criminal Charges against applicants”.

[24] It is important to note that in both premises where documents were seized, the description of those documents that apparently went missing in the founding affidavit is the same. In my view, and as correctly pointed by respondents’ Counsel, applicants still do not give full details and exposition of the documents that is said to be missing. It is clear that applicants capitalises on the fact that in paragraph 30 of their answering affidavit the respondents said “No inventory of the documents seized during this search is available”, referring to the search in 23 Edna Street, Klerksdorp. But this paragraph should not be read in isolation. If read with paragraph 29, one will clearly see that although there was no inventory made by the respondents, according to this paragraph documents seized at these premises were included in the police docket furnished to the applicants as well as on the list as per Annexure MM14 which was attached and were returned to the applicants. This contention is clearly premised on a selective reading of the papers by the applicants’ Counsel.

[25] The respondents have, in my view, done their best to provide information of what was seized and returned. The applicants on the other hand do not have any proof of what was seized. Taking into consideration the magnitude of the charges the applicants are faced with, and the trunk of the documents seized, it comes as a surprise that the applicants did not as a matter of common sense also keep copies or records of the inventories when the documents were seized and left it to the respondents to keep same. In the Broome matter, in addition to the unreasonable delay, most importantly, the state had been responsible for the loss of the

documents instrumental to the defence and the applicants had provided a detailed exposition of the material that was missing and a full explanation of the significance of the working papers, in addition to denying the applicants access to the documents, which factors contributed to a large extent for the Court to come to the conclusion it did. Unfortunately all of these factors are not present in our matter. Moreover, in the Broome matter, the applicant wanted to make photocopies of these documents when it was initially seized by the state, but was denied the opportunity to do so, a fact which is also not present in our matter.

[26] With due respect, I do not agree with the submissions by the applicants' Counsel that the applicants had made a case of the document seized at the two premises in Klerksdorp, except describing the documents seized in a bald and vague manner. In my view, there is a real dispute of fact. An important question that needs to be answered is whether the said documents which were insufficiently described ever existed or not as the state alleged that whatever was seized was returned. Secondly, it needs to be also determined whether those documents were seized or not. Unfortunately these questions cannot be answered in a motion

application. I am saying this because respondents in their submissions indicated that the applicants were long before the SIU

became involved in this matter requested by the Provincial Internal Audit Division and the Programme Management Unit respectively to account for the projects funds. The obvious question which comes to mind is if they all along had documents and/or information of an exculpatory nature regarding the expenditure of the project, which is the major issue in this matter that culminated to them being charged, why were these documents not given to or never revealed to the Internal Audit Division and the Programme Management Unit? In my view and as correctly pointed by the respondents' Counsel, the trial Court and not this Court is best suited to deal with this issue.

[27] The only thing that the applicants were able to specify sufficiently is the laptop which was seized at Kuruman Mothibi Complex which the respondents admit that it is lost. Be it as it may, the respondents submitted that the possible prejudice which the applicants might suffer as a consequence hereof, is mitigated by the fact that Wigill did make a forensically sound image of the content of the laptop, whilst he had the laptop in his custody, and this copy has in the meantime been made available to the applicants. This is a more convincing reason why this Court cannot use the absence of the laptop as the basis for pre-empting the

very trial that was to determine whether the loss had been prejudicial. To borrow from the words of Sachs J who wrote the judgment in Bothma,

“the conclusionary cart should not have been (in this case) placed before the evidential horse”. The trial Court will in my view be able to determine the question whether it is only through the return of the laptop that applicants would be able to discern the contents of the documents they are claiming.

- [28] Barring the prosecution before the trial begins (and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case) is far-reaching. Indeed, it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused”. See: *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC) at page 245 paragraph 38.
- [29] The appellants or the accused must satisfy the Court of the facts upon which they rely for their contention that their right to a fair trial has been infringed. See: paragraph 48 at page 189 of the *Broome* case referred to above. See also: *Mamase v National Director of Public Prosecutions and Others* 2013 (2) SACR 491 at p503 paragraph 49.
- [30] The Constitutional Court in *Bothma* clearly indicated that, it is the duty of the trial Court to determine whether the rights of the applicants were infringed, or whether the absence of the evidence will render the trial unfair and or whether there are certain mechanisms available to assist the applicants (accused). I agree with Counsel for the respondents that paragraph 82 of the *Bothma* judgment sums the judgment of the Constitutional Court and is apposite in our matter.
- [31] I am of the view that the following quote from the case of *R v Carosella* [1997] 1 SACR 80, which was quoted in the *Bothma* case as the remarks made by L’Heureux-Dubé J for the minority in paragraph 59 is worth quoting:-

“The criminal justice system, being very much a human enterprise, possesses both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused’s guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon the case which does not appear before the trier of fact. Still, society expects courts of law to ascertain that person’s guilt or innocence by way of a trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. It is a crucial role which should not be abdicated except in the most extreme cases”.

D. ORDER

[32] Consequently, the following order is made:-

32.1 The application by the applicants is hereby dismissed;

32.2 No order as to costs is made.

A M KGOELE

JUDGE OF THE HIGH COURT

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