

SOUTH AFRICA / JUDGMENT

Mkolo and Others v Jacobs and Another (1831/2015) [2017] ZAE CGHC 46 (11 April 2017) [2017] ZAE CGHC 46

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe, JM Roberson

CASE / FILE NUMBER

1831/2015

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IN THE HIGH
COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)
CASE
NO.: 1831/2015
In

the matter between:

PHUMLANI
MKOLO
First
Applicant
ZINTLE
NKUHLU
Second Applicant
NOSIPHIWO
MATI
Third Applicant
MPINDO'S
EMERGENCE AND
TRAINING
SERVICES CC
Fourth Applicant
And
THE
REGIONAL MAGISTRATE, MS J JACOBS
First Respondent
THE

DIRECTOR OF PUBLIC PROSECUTIONS
Second Respondent

JUDGMENT

BESHE J:

- [1] This is an application for the review of a decision that was taken by the first respondent which was to the effect that sufficient particularity had been provided by the second respondent in the charge sheet used in the prosecution against inter alia the applicants in this matter. First respondent ordered that the applicants who are accused numbers 4, 14, 15 and 16 respectively, as well as their co-accused persons in the matter should plead to the charges and that the trial should proceed.
- [2] The applicants further seek an order that the first respondent be directed to order that second respondent furnish the applicants with particulars about the alleged common purpose as requested in their request for further particulars dated 19 December 2014.
- [3] The criminal proceedings against the applicants were instituted in the Regional Court, East London before the first respondent. The matter is against sixteen (16) accused persons. During their first appearance in the Regional Court, the accused were handed copies of a “draft charge sheet”. The draft charge sheet contained eleven counts of contraventions of different statutes as well as common law crimes. However not all eleven charges related to all sixteen accused. A thread that ran through the charges is that, where there are more than one person charged the accused in respect of the charge in question are alleged to have “acted in common purpose”.
- [4] At a subsequent appearance of the accused, an updated version of the charge sheet was provided to them. This updated version of the charge sheet consisted of thirteen (13) counts formulated along the same lines as the draft charge sheet. This prompted a request for further particulars by first, third and fourth applicants in December 2014.[1] The further particulars requested related to the allegations that the applicants had acted in common purpose with others. In respect of all those instances where common purpose was alleged the following particulars were required:

The second respondent was required to particularise in respect of each of the applicants:

- 1.1 Those actions and facts upon which it relies in order to establish the common purpose;
- 1.2 Those acts where each individual accused was present; and
- 1.3 Particularise which acts each individual accused committed personally; and
- 1.4 Particularise the approximate time and date of each act committed by each individual accused; and

1.5 Particularise each place where each act was committed by each individual accused.

- [5] In what appears to be a bid to provide the required particulars, in February 2015, a representative of the second respondent, one Mr Ketani, provided applicants' attorney with a statement that was deposed to by accused number two in the matter which was made in terms of Section 204 of the Criminal Procedure Act 51 of 1977. According to the applicants, and this appears to be common cause between the parties, Ketani also provided the applicants with inter alia the following:
- an email to the effect that he was yet to finalise his analysis of phone records that will show a clear relationship between first applicant and other accused;
 - Ketani also annexed accused number one's plea agreement in terms of Section 105A of the Criminal Procedure Act>;
 - A summary of substantial facts;
 - A reply to the request for further particulars (17 March 2015) which only referred to first applicant.

Applicants not being satisfied that their request for further particulars was met, filed a notice of objection to the charge sheet in terms of Section 85 of the Act.

- [6] It is common cause that the trial of the matter was scheduled to commence on the 7 April 2015. According to the applicants at

approximately 10h50 on the trial date, the prosecutor (Ketani) provided them with another version of the charge sheet which consisted of fifteen (15) counts. All the versions of the charge sheet have long preambles. The preamble to the latest version of the charge sheet comprises of 16 paragraphs. Also annexed to the charge sheets were certain schedules.

- [7] Even though the applicants had served second respondent with an objection to the charge sheet on a previous date, the prosecutor

without dealing therewith intimated to court that he was ready to put the charges to the accused. This prompted the raising of the said objection in court. Applicants complained that the charges do not comply with Section 85 (1) (a), (b), (c) and (d) of the Criminal Procedure Act 51 of

1977. Further that the accused have not been informed of the charges with sufficient detail to enable them to plead and answer to them as provided for in Section 35 (3) (a) of the Constitution.[2]

- [8] Applicants complain inter alia, that not all the requested particulars were provided by the second respondent as to how each of the accused acted in common purpose with the others. Further that the charge sheet is irregular in that the allegations contained therein are irreconcilable with annexure A as well as the summary of facts. The applicants as well as their co-accused persons pointed out other maladies and short comings in the latest version

of the charge sheet. The applicants and their co-accused persons lamented that the state has taken a long time to formulate charges against them properly and thereby delayed the matter unreasonably. The first respondent was urged to order that the charges be withdrawn and that they should not be re-instated without the authority of the Director of Public Prosecutions as provided for in Section 342 A of the Act. There was a proposal in the alternative that the matter be rolled over to the following day so as to afford their legal representatives

time to go through the latest version of the charge sheet.

[9] Mr Ketani addressed the court at length and gave a chronology of events leading up to the setting down of the matter for trial, explaining the reason for the evolution of the charge sheet. He asserted that the reason the charge sheet grew to 72 pages was because of the state's endeavour to provide the accused with as much detail or information about the charges as possible. He submitted that apart from a few errors here and there sufficient particularity has been provided in the charge sheet to enable the accused to know what case they are to meet.

[10] Having heard these submissions, first respondent adjourned the proceedings until the following day for her ruling on the application

in terms of Section 85 of the Act namely the objection to the charge.

[11] On the following day, the first respondent found that the objection did not have merit, that the information provided by the state in the preamble to the charge sheet, the charges and schedule to the charges constituted sufficient particularity to enable the accused to prepare for trial. She once again adjourned the proceedings until the following day and directed the prosecutor to effect all the corrections to the charge sheet and furnish a copy of the corrected version to all the parties by 13h00 on the day of the order, the 8 April 2015.

[12] First respondent's abovementioned order is one of the orders sought to be reviewed and set aside.

[13] When the matter was called the following day, the applicants (as well as their co-accused persons) moved for the charges to be quashed in terms of Section 85 (2) (a) and (b) of the Act. [3] The basis for making this application was that the prosecutor had failed to amend or correct the charge sheet and it was still

deficient. It was submitted that apart from what the prosecutor submitted were typographical mistakes, the charge sheet contained

material errors that rendered it incomprehensible. Applicants submitted that additional charges have been included in the charge

sheet, and that therefore the affected accused were entitled to ask for further particulars in relation to those additional charges. The applicants persisted with the complaint that they have not been provided with sufficient particulars as to why it alleged they acted in common purpose with others to commit the offences charged. Applicants took the court through the charge sheet in a bid to illustrate details pertaining to the common purpose allegations were lacking from the charge sheet.

[14] Applicants also complained about having been provided with incomplete cellular phone records. It was submitted that this is another reason why the accused were not in a position to plead to the charges.

[15] After hearing counsel in this regard, first respondent once again made a ruling that the charge sheet complies with the requirements

set out in Section 84 of the Act and ordered the prosecutor to put charges to the accused. This is the second order against which this review application is directed.

[16] The orders are sought to be reviewed on the basis that they infringe on the applicants' rights to a fair trial in terms of Section 35 (3) (a) and (b) of the Constitution because they were made notwithstanding:

- the fact that the charge sheet lacked sufficient particularity to enable the applicants to understand the charges particularly in relation to instances where common purpose is alleged.
- the applicants were not given an opportunity to request further particulars to the amended charge sheet; and
- they were not given an opportunity to prepare for the trial on the "amended" charge sheet.

[17] To bolster their contention that the charges where common purpose is imputed on the applicants' lack particularity, they rely heavily on *S v Mpetha* 1981 (3) SA 803 (C) where the following was stated at 809H-810H:

"Having regard to the matters I have discussed in this judgment and presupposing that the accused have in fact asked for the

particulars hereinafter referred to, it seems to me to be fair and just to order the State to give sufficient particulars to satisfy the following guidelines:

1

- (a) Where a number of accused are charged with having committed a series of acts the State should particularise which acts each individual

accused committed personally.

- (b) Where the acts extend over a number of days the State should particularise the approximate time and date of each act committed by each individual accused.
- (c) Where the acts are alleged to have been committed in a number of different places the State should particularise each place where each act was committed by each individual accused.
- 2. Where a number of accused are charged with being responsible for a series of acts by virtue of being party to a common purpose the State should particularise, in respect of each individual accused,
 - (a) those actions and facts upon which it relies in order to establish the common purpose, and
 - (b) those acts where each individual accused was present, and
 - (c) give the same degree of particularity in respect of the common purpose acts as is visualised in para 1 above in respect of acts committed personally by each accused.
- 3. Where a number of accused are alleged to have incited, instigated, commanded, aided, advised, encouraged or procured various persons to commit various acts, then the State should particularise when, where and in what manner each individual accused either incited or instigated or commanded or aided or advised or encouraged or procured each person to commit each one of the acts referred to in the charge.
- 4. Where, in a charge under the Terrorism Act 83 of 1967, a number of acts are alleged to have had or to have been likely to have had one or more or all of the 12 results envisaged in s 2 (2) thereof, the State should particularise which acts had or were likely to have had which particular results. If an act had or was likely to have had more than one of the envisaged results, then it is proper to say so. It is not necessary for the State to say why a particular act had or was likely to have had a particular result.
- 5. Where a number of accused on a charge of public violence are alleged to have marched about divers public roads, the State should particularise when and where and along which roads the marching took place.
- 6. Where a number of accused on a charge of public violence are alleged to have defied lawful instructions to disperse permanently the State should particularise when, where, by whom and in what manner these instructions were given.
- 7. Where a number of accused are charged with a conspiracy to commit crimes the State should particularise when, where and in what manner each individual accused became a party to the conspiracy. The State should particularise what acts it relies on in alleging that each individual accused was a party to the conspiracy.
- 8. Where a number of accused are alleged to have attended meetings the State should particularise which accused attended which meeting. The meetings should be identified by reference to approximate times and dates and place and a brief reference to the subject-matter of the meeting. It is not necessary for the State to say who addressed the meetings or

to give full details of what was said at the meetings, unless the fact of a particular accused addressing the meeting is relied upon by the State as proof of one of the elements of the charges.”

[18] Applicants submit that by finding that the charge sheets presented by second respondent on 8 and 9 April 2015 contained sufficient

particularity to enable them to plead, coupled with first respondent’s failure to afford applicants an opportunity to request further particulars of the latest version of the charge sheet constituted a violation of applicants’ rights as entrenched in Section 35 (3) (a) and (b) of the Constitution. (Right to a fair trial). Applicants complain that first respondent ignored their submissions inter alia that because the cell phone records they were provided with were incomplete, they needed more time to do their own analysis. As well as based on their submission that the latest / corrected charge sheet was unclear and insufficient, that they were therefore entitled to request further particulars.

[19] On a reading of the record of proceedings before first respondent, I did not understand applicants to be making an application that the matter be postponed or proceedings adjourned so as to enable them to consider / analyse the cell phone records and ask for further particulars. The applicants and their co-accused persons applied for the withdrawal of charges against the accused in terms of Section 342 A of the Act. This is also pointed out by the first respondent in her answering affidavit.

[20] At the next appearance the following day (8 April 2015), second respondent produced a purportedly corrected version of the charge sheet. Applicants persisted with their complaint saying the charge sheet was still deficient and asked that charges be quashed in terms of Section 85 (2)

(a) of the Criminal Procedure Act / Section 342 A of the abovementioned Act

[21] Applicants contend that the two rulings made by the first respondent were taken irrationally, arbitrarily and without taking into account the relevant applicable principles.

[22] First respondent maintains that the objections raised by the applicants were addressed in the final version of the charge sheet.

She asserts that from the charge read with the preamble the role which each accused played is clearly set out and the allegations in the charge sheet were not irreconcilable with Annexure “A” annexed thereto. First respondent contends that documents pertaining to the plea proceedings in respect of accused number one and two (who are said to have pleaded guilty) were not before her and that she did not therefore have regard to those documents as alleged by the applicants, in coming to the impugned decision.

[23] The complaint about the insufficiency of details or lack of particularity is essentially directed at the charges where common

purpose is alleged, as pointed out earlier. Out of a total of twelve

(12) counts, in seven (7) of the counts some of the accused are alleged to have acted in the execution of a common purpose with others. An example of such a charge is count 6 where it is alleged accused 4, 5, 6, 7, 8, 9 and 11 are guilty of fraud.

COUNT 6

THAT accused 4, 5, 6, 7, 8, 9 and 11, acting in common purpose, are guilty of the common law crime of fraud, read with section 103 of the Criminal Procedure Act, Act No. 51 of 1977, as amended; read with the Adjustment of Fines Act, Act 101 of 1999.

IN THAT on or about 10 January 2014 and at or near East London in the Regional Division of the Eastern Cape, accused 1 did unlawfully and with intent to defraud BCMM and/or its employees and/or Chief Financial Officer and/or Pillay in the amount as illustrated in Row 10 and Columns 1 to 5 of Schedule "A" of the Annexure to the Charge Sheet to the potential prejudice of R3,013,000.00,

misrepresent in documents submitted and/or represented to the BCMM and/or its employees and/or the Acting Chief Financial Officer:

Pillay and/or the Municipal Manager of BCMM, which caused potential prejudice, and requesting a payment alleging, inter alia,

THAT

Services were rendered for the transportation of members of the public to a memorial service in and around BCMM and at Nelson Mandela

Metropolitan Municipality (NMMM) from in and around East London area attributed to the late former President of the Republic of South Africa doctor RN Mandela. As a result of the said misrepresentation that was submitted to the BCMM and/or its employees and/or the Chief Financial Officer: Pillay and/or the Municipal Manager of BCMM and/or its employees and/or Fani in some amount of R3, 013,000 which was, after discovery of the fraud stopped before it was electronically transferred into Standard Bank Business Current Account No. 042049172, held at Vincent Park Branch belonging to accused 1 from BCMM as shown in Row 10 and Columns 1 to 5 of Schedule "A" of the Annexure to the Charge Sheet.

WHEREAS the accused knew in truth and fact when he represented the documents for payment

THAT:

On 9 December 2013 a document purporting to be a quotation was also submitted to ECDC also alleging that services were rendered for the transportation of members of the public to attend a memorial service in and around BCMM and/or at Nelson Mandela Metropolitan Municipality (NMMM) from in and around East London area attributed to the late former president doctor Nelson Mandela. No services were rendered as alleged in the documents submitted to BCMM.

From the above, it is not clear what the other accused persons apart from accused number one are alleged to have done to associate themselves with the common purpose. Annexure A (the preamble) is not of much assistance in this regard.

[24] It is important to note what the doctrine of common purpose entails and what its purpose is:

Common purpose is defined as follows:

“Where two or more people agree to commit or actively associate in a joint enterprise, each will be responsible for specific criminal conduct committed by one of their number which fall within their common design. Liability arises from their “common purpose” to commit the crime.”[4]

This was affirmed in *S v Thebus and Another* [2003] ZACC 12; 2003 (2) SACR 319 CC at 335 [18]. Moseneke J as he then was also confirmed that the rationale for the existence of the common purpose rule is one of crime control. The following was stated in this regard:

“[40] Common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate

objective of limiting and controlling joint criminal enterprise. It serves vital purposes on our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime.”

[25] It is clear from the example I cited earlier, that is count 6, where it is alleged that the accused therein acted in common purpose to commit fraud, reference is only made to accused number one's actus reus. In a response to the request for further particulars (preceding the final version of the charge sheet) the particulars provided only related to first applicant, who is accused number four in the matter. No particulars were provided regarding the imputed common purpose as regards the fraud charge amongst other charges in respect of which particulars were sought. Not even in respect of first applicant in respect on whom the further particulars are purportedly being furnished.[5] By its very nature, liability that is based on common purpose entails that it may not be necessary for the state to prove beyond reasonable doubt every participant's committed conduct which ultimately contributed to the crime under consideration, in this case fraud. It will be sufficient if the state can prove that the accused agreed to commit the crime in question or associated themselves with commission of the crime.[6] It is common cause or at least not in dispute that count six (fraud) was only introduced in the latest version of the charge sheet to include the applicants. This charge was initially against accused numbers one, two and three. It stands to reason therefore that further particulars could not have been requested by all the applicants and provided by the second respondent in relation to the earlier version of the charge sheet because they were not charged with fraud at that stage.

[26] As far as count seven in respect of which further particulars were required, the reply purportedly to the request for further

particulars does not provide answers to the questions asked in the request for further particulars. Surely the applicants are entitled

to sufficient further particulars in order for them to prepare their defence properly. It may not be possible to answer each and every question contained in a request for further particulars, especially in the manner suggested in *S v Mpetha supra*. What is required is to provide sufficient particulars to enable an accused person to adequately prepare for his /her defence.

[27] Applicants' other complaint is that the charge sheet and plea explanation by applicants' erstwhile co-accused who have since pleaded guilty were placed before first respondent. And that this was irregular. Respondents deny that these documents formed part of the papers that served before the first respondent. First respondent asserts that these therefore played no role in influencing her to order as she did (that sufficient particularity had been provided by state to enable the accused to plead to the charges). In urging the court to dismiss this application, Mr Schoeman for the first respondent argued that the issues raised in the notice of objection related to an earlier version of the charge sheet and does not take cognisance of the fact that the final charge sheet contained additional allegations in the preamble. He refers to details appearing in annexure "B" yet no such annexure was placed before us. The preamble is marked as annexure "A" to the charge sheet. Even if exhibit "A" was inadvertently referred to as annexure "B", the requested particulars could not be gleaned from annexure "A". In her answering affidavit and in asserting that the charge sheet contained sufficient particulars to enable the applicants to plead – first respondent states:[7]

"I mention that a careful reading of the final charge sheet makes it abundantly clear what role the state alleges each accused played in the various transactions about which they were charged. One must bear in mind that the accused were given a complete set of the docket and the accused therefore had access to the statements by the state witnesses and one must assume that the role that each individual played could be gleaned therefrom."

Unfortunately first respondent is not privy to what is contained in the witness' statements and her assumptions may be misplaced. What also transpires from first respondent's answering affidavit is that she was not aware of the request for further particulars made earlier and the response thereto.[8] She was therefore not aware of the deficiency in the answer to the said request. I have already alluded to the fact that not all the answers were provided by the state.

[28] Be that as it may, the fact of the matter is that the particulars requested by applicants were not provided by the state. Without such particulars (or those that could reasonably be provided) the applicants could not properly prepare for their defence, which

includes the manner in which they would plead to the charges. In view also of the fact that an amended version of the charge sheet was presented to the applicants and their co-accused persons on the date appointed for trial, they were not provided with adequate time to prepare their defence.[9] This through no fault of the first respondent. I am satisfied that the applicants have made out a case for the relief that they seek.

[29] Applicants seek a costs order against the respondents. The respondents are sued in their official capacities. Applicants contend

that first respondent's decisions were taken in bad faith and for reasons other than those given. First respondent refutes this by asserting that she acted in good faith and in her official capacity. And that it will not be appropriate to order that she pays the costs of this application. It is trite that an order for costs will generally not be awarded against a public official where his / her actions or decision was bona fide. I am not persuaded that the decisions taken by first respondent were taken in bad faith. This is so especially in view of the fact that she was not placed in possession of the prior request for further particulars and the response thereto. I am in agreement with her that it will not be appropriate to order her to bear the costs of this application. I am not persuaded that she acted mala fides.

[30] In the result the order that I propose in the circumstances is the following:

1. The decision taken by first respondent to the effect that sufficient particularity has been provided by the second respondent in the charge sheet used in the prosecution against the applicants in respect of Case Number RC3/15/2015 be reviewed and set aside.
2. The first respondent is directed to order that the second respondent furnish to the applicants the particulars that were requested in the applicants' request for further particulars dated 19 December 2014 in respect of all those charges where common purpose is alleged in the current charge sheet.
3. There will be no order as to costs.

N G BESHE

JUDGE OF THE HIGH COURT

I agree, it is so ordered.

JM ROBERSON

APPEARANCES

For the Applicants : Adv: L Hodes SC & Adv: Ngcangisa

Instructed by

: MILI ATTORNEYS

110 High Street

GRAHAMSTOWN

Tel.: 046 – 622 7076

Ref.: Mr Mili

For the First Respondent :

Adv: AD Schoeman SC

Instructed by

: NN DULLABH & CO

5 Bertram Street

GARHAMSTOWN

Tel.: 046 – 622 6696

Ref.: Mr Marius Wolmarans

For the Second Respondent : Adv: TN Price SC

Instructed by

: STATE ATTORNEY

C/o NETTELTONS ATTORNEYS

118A High Street

Tel.: 046 – 622 7149

Ref.: MG Marabini

Date Heard

: 9 June 2016

Date Reserved

: 9 June 2016

Date Delivered

: 11 April 2017

[1] Page 160 of record.

[2]

(3) Every accused person has a right to a fair trial, which includes the right – (a) To be informed of the charge with sufficient detail to answer it.

[2]

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

(a) To be informed of the charge with sufficient detail to answer it.

[3]

- (2) (a) If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it deem fit.
- (b) Where the prosecution fails to comply with an order under paragraph (a) the court may quash the charge.

[3]

- (2) (a) If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it deem fit.
- (b) Where the prosecution fails to comply with an order under paragraph (a) the court may quash the charge.

[4] Principles of Criminal Law 4th Ed.: Jonathan Burchell page 467

[5] See pges 253 to 259 of record “FA8”.

[6] Principles of Criminal Law supra page 467.

[7] Paragraph 27 of first respondent’s answering affidavit.

[8] Paragraph 12 of answering affidavit.

[9] Section 35 (3) (b) of the Constitution.

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