

SOUTH AFRICA / JUDGMENT

Mogaecho v Regional Court Magistrate and Another (A162/2016) [2017] ZAFSHC 176 (2 November 2017) [2017] ZAFSHC 176

COURT

Free State High Court, Bloemfontein

BEFORE

Jordaan, Van Schalkwyk

CASE / FILE NUMBER

A162/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

Nr: A162/2016

In

the appeal of:

ARTHUR
ITUMELENG
MOGAECHO
Applicant
and
REGIONAL
COURT MAGISTRATE,
MRS MEINTJIES,
First Respondent
NATIONAL
PROSECUTING AUTHORITY, (FREE STATE)
Second Respondent

CORAM:

JORDAAN, ADJP et
VAN SCHALKWYK, AJ

JUDGMENT

BY: VAN SCHALKWYK, AJ

HEARD ON: 17 AUGUST 2017

DELIVERED ON: 02 NOVEMBER 2017

JUDGMENT

- [1] The Applicant instituted an Application for review in terms of Rule 53 (1) (a) against his conviction and sentence in case number 59/2003 (Botshabelo Regional Court).
- [2] The Applicant's Notice in terms of Rule 53 and Founding Affidavit do not comply with the prescriptions of that Rule and the subrules thereto.
- [3] The Court invited the Applicant to remove the Application from the Court Roll in order to re-draft the Application and to ensure that the technical makeup of the Application will not count against the Applicant. The Applicant has indicated in his Heads of Argument that the complete record of the proceedings in the Magistrates Court did not form part of the record before this Court. The Applicant has indicated that he is not going to rely upon the missing portions of the record and therefore the invitation has been declined.
- [4] The grounds upon which the proceedings in the Magistrates Court may be brought under review before a High Court are those set out in Section 22 of the Superior Courts act. Those grounds are the following:

Absence of Jurisdiction on the part of the Court;

Interest in the cause, bias, malice, or corruption on the part of the Presiding Judicial Officer;
Gross irregularity in the proceedings; The admission of in-admissible or incompetent evidence or the rejection of admissible or competent evidence.

- [5] The alleged irregularities can be summarised under three main objections:

- i. The investigation and prosecution of the case by the Prosecutor;
- ii. Bias by the Presiding Magistrate;
- iii. The Magistrates ruling at the end of the state's case, for the separation of Trials.

- [6] The first ground the Applicant relied upon is found in the Investigating Officer's testimony to the effect that the Prosecutor

and himself were involved in photo identification parades on two occasions at certain offices at Botshabelo and Bloemfontein. The

Prosecutor explained his involvement at the identification parades as merely conducting consultations with witnesses. The question that has to be answered is whether this conduct by the Prosecutor can be qualified as irregular to the extent that it could have led to an unfair trial of the Applicant. The Prosecutor's involvement has not caused him to become a witness in the case and as such that could not be considered as irregular, nor can his involvement in the investigation of the case be qualified as such. The Prosecutor, because of his involvement in the investigation of the case, has made him a potential witness in the case but the Investigating Officer's presence and the fact that the Investigating Officer has in fact testified in the case, has rendered the evidence by the Prosecutor, unnecessary and therefore irrelevant. More important is the fact that not once during the testimony of the Investigating Officer has the Applicant ever been implied during the photo identification or can it be contended that the Prosecutor's involvement in the Investigation has had any detrimental effect on the Applicant's Trial.

- [7] The second ground on which the Applicant relied is based on two separate scenarios, the one which occurred during the Trial and the second one after the conviction of the Applicant.
- [8] The Applicant contended in paragraph 9 of the Supplementary Affidavit that the Presiding Magistrate was biased in that she had regular contacts, at tea intervals, with a certain Mrs. Wilmaritha Le Roux, in her capacity as one of the Magistrates in Botshabelo. This Magistrate allegedly gave instructions to the Applicant, long before he has been arrested, as to how admission of guilt fines must be dealt with and which has formed an important part of the case against the Applicant in the Magistrates Court.

The contact between the two Magistrates raised doubts in the Applicant's mind about the objectivity of Magistrate Meintjies and that she could have been influenced by Magistrate le Roux as to what her experience was of the Applicant in the past. Although the Applicant indicated that he intended to call Mrs. le Roux as a witness during his trial, he waived his right thereto because he believed that she would have given adverse evidence against him.

- [9] The applicant is also aggrieved by the fact that the Presiding Magistrate has indicated that she is willing to testify in the

Applicant's disciplinary hearing, which was set for a date in between the conviction and the sentence of the Applicant. The important

question for consideration is whether the Presiding Magistrate was factually biased or whether a reasonable, objective and informed

person would on the correct facts reasonably apprehend that the Presiding Officer did not adjudicate the case with an impartial mind. The mere fact that she allegedly agreed to testify does not imply that she would give adverse evidence to the applicant. That happened after conviction and, in any event, never materialised. It is not an indication of possible bias.

The perception of impartiality of a judicial officer is crucial to the administration of justice. Magistrate Meintjies has been seconded from her usual office in the Magistrates Court of Bultfontein to the Magistrates Court of Botshabelo as a precautionary measure against the slightest presumption of bias.

- [10] The third and final ground on which the Applicant relies is the Order by the Magistrate in terms of Section 157 (2) of the Criminal Procedure Act whereby the Trial of the Applicant and his co-accused has been separated. This separation was at the request of the legal representatives for applicants co-accused and in accordance with an agreement with the State. The only reason why the contents of the agreement have not been disclosed was because the representative for the co-accused intimated that disclosure might be prejudicial to applicant. On the Applicant's own version he was aware that the reason was the intention of his co-accused to plead guilty to some of the charges.
- [11] The Applicant alleged that he was being prejudiced by the separation due to the fact that the evidence by his co-accused could have favoured his case. The prediction as to what the Applicant's co-accused would have come to testify and whether such evidence would have been in his favour, is pure speculation and as such, cannot be reckoned as any prejudice towards the Applicant. The order by the Magistrate for the separation of trials had no negative effect on the Applicant, especially not as far as his right to call his co-accused as witnesses, was concerned. He still had the right to call any of them as witness if he so wished.
- [12] I am therefore convinced that the Presiding Magistrate has exercised her discretion judicially and the separation of trials did not prejudice the Applicant.
- [13] Notwithstanding the duration of this trial, the Presiding Magistrate has accommodated the Applicant at every request posed to the Presiding Magistrate. Throughout the trial she has listened and considered, impartially and objectively to all the evidence. The Presiding Magistrate's judicial professionalism and integrity is above any suspicion.
- [14] The Applicant's reliance on bias and gross irregularity is without merit and not substantiated by facts but rather based on his unfounded suspicion of a plot against him.

I would therefore issue the following Order:

1. The Application is dismissed with costs.

VAN SCHALKYWYK, AJ

I concur and it is so ordered.

JORDAAN, ADJP

On Behalf of Appellant: In Person

Athur Itumeleng Mogaecho Phahameng

Bloemfontein

On Behalf of Respondent: No Appearance

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Prepared on 11 October 2026 · Esheria