

SOUTH AFRICA / JUDGMENT

# Ntsimane v S (A49/2008) [2010] ZAGPPHC 209 (22 November 2010)

**[2010] ZAGPPHC 209****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

Tuchten, Ebersohn

**CASE / FILE NUMBER**

A49/2008

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IN THE NORTH GAUTENG HIGH COURT.

PRETORIA REPUBLIC OF SOUTH AFRICA

CASE NO: A49/2008

DATE: 22/11/2010

In the matter between

BERTHA BETTY NTSIMANE.....

and

THE STATE.....

**JUDGMENT**

Tuchten J

The case in the regional magistrate's court

1. The appellant, a former magistrate in the Randburg magistrate's court, was convicted by a regional magistrate on a charge of

defeating or obstructing the ends of justice. The charge arose out of a case the appellant tried in her court. She was sentenced to four years imprisonment and is presently on bail pending appeal.

2. Appellant presided in a criminal case brought against a Mr van Wyk. The main charge in the Van Wyk case was culpable homicide arising from the driving of a motor vehicle. There were also certain additional charges brought against Van Wyk. The identity of these additional charges in the Van Wyk case is critical to the outcome of the case against the appellant and thus this appeal.
3. Van Wyk was represented at the Van Wyk trial by an attorney, Mr van Vuuren, Van Wyk pleaded not guilty to all the charges put to him but was convicted by the appellant on all such charges. Van Wyk then applied for leave to appeal. The appellant dismissed both Van Wyk's application for leave to appeal and also Van Wyk's application for bail pending appeal.
4. The crux of the State case was this:
  - 4.1 Van Wyk was only charged with;
    - 4.1.1 culpable homicide alternatively reckless or negligent driving; plus
    - 4.1.2 failing to stop immediately after an accident; plus
    - 4.1.3 failing to ascertain the nature and extent of injuries.
  - 4.2 In November 2002, the appellant convicted Van Wyk of all charges against him and noted on the form J15 charge sheet almost invariably used in criminal cases in the lower courts "Guilty on all Counts 1 -4".
  - 4.3 The appellant then remanded Van Wyk's case to 18 November 2002 for sentence.
  - 4.4 Although Van Wyk was only charged with these three charges (plus the alternative charge to the culpable homicide charge of reckless or negligent driving), on 18 November 2002 the appellant sentenced Van Wyk on a total of seven charges. The charges on which the appellant sentenced Van Wyk were:
    - 4.4.1 the counts listed in 4.1 above (without distinguishing between the main charge of culpable homicide and the alternative charge of reckless or negligent driving); plus
    - 4.4.2 failure to render assistance to the injured person; plus
    - 4.4.3 failure to ascertain the nature and extent of any damage; plus
    - 4.4.4 failure to report the accident.
  - 4.5 The appellant imposed a custodial sentence on Van Wyk. On the same day that Van Wyk was sentenced, attorney Van Vuuren brought an application on his behalf for bail pending appeal.
  - 4.6 Attorney van Vuuren noticed, when he examined the J15 during the morning of November 2002 before the appellant sentenced Van Wyk, that the appellant had only convicted Van Wyk on the charges I have listed in paragraph 4.1 above.

4.7 When arguing the bail application, attorney Van Vuuren made the point to the appellant that an Irregularity had occurred in the trial in that Van Wyk had been charged with the charges listed in paragraph 4.1 above but had been convicted of seven charges. None of the points made by attorney Van Vuuren in favour of his client, Van Wyk found favour with the appellant and she refused bail pending appeal.

4.8 Attorney van Vuuren looked at the J15 again when preparing to bring an appeal to the High Court against the refusal of bail for Van Wyk pending appeal. He saw that the appellant had written into the J15 after the words "Guilty on all 1-4" the words "& 5-7". A later stage Van Wyk instructed Van Vuuren to lay charges against the appellant arising out of her alteration J15.

5. The appellant denied that Van Wyk had only been charged with the three charges plus the alternative. She asserted that Van Wyk had been charged with all seven charges, that all seven such charges had been put to Van Wyk for him to plead to and that she had noted the words "Guilty on all Counts 1-4 & 5-7" on one single occasion, immediately upon conviction of Van Wyk.
6. The regional magistrate believed attorney Van Vuuren and disbelieved the appellant and convicted her of defeating or obstructing the ends of justice. On 1 March 2005, the regional magistrate sentenced the appellant to four years imprisonment and refused leave to appeal. Although there is no reference to this in the appeal record, it appears from an affidavit filed by the appellant in this court on 17 November 2008 that the appellant was granted bail pending appeal on 3 March 2005 pursuant to an urgent application to this court. She is presently at liberty on bail.

Events between refusal of leave to appeal in regional magistrate's court and day on which appeal called for first time before Tuchten J and Ebereohn A J

7. There is a letter dated 23 July 2007 from Legodi J to the Court Manager of this court on the court file. In the letter, the learned

judge records that during June 2006, a petition for leave to appeal was placed before the Judge but the documents were not accompanied by the judgment on conviction or a complete record of the proceedings in the regional court. There then followed correspondence between officials of this court and the clerk of the regional court relating to the petition record and letters from the appellant herself dated 15 November 2006 to the petition clerk of this court and dated 27 November 2006 to "The Manager Pretoria Magistrate"

complaining about the delays in the adjudication of her petition. Section 309C(4) of the Criminal Procedure Act, 51 of 1977 requires the clerk of the lower court to submit certain documents to the registrar of the high court without delay after receiving from the accused a notice under s 309C(3) (b). These documents are, in a case such as the present, the application to the magistrate for leave, the reasons for the refusal of the application for leave and the record of proceedings in the lower court.

8. On about 3 September 2007 the appellant finally lodged an application for leave to appeal with this court which I assume, because it was dealt with as I describe below, complied, at least substantially, with the provisions of s 309C of the Criminal Procedure Act.

I received the petition today just before lunchtime. The petition has no merit as far as conviction and sentence are concerned. The applicant was a very poor witness and the documentary evidence is conclusive against her. Leave to appeal is granted solely on basis that her right to a speedy trial may have been infringed by a delay of about three years since her application for leave to appeal was refused. [my emphasis]

10. In fact the delay between the refusal of leave to appeal and the date on which the petition reached Bertelsmann J was two and a half years. The petition under s 309C is not before us. Nor for that matter is the record of the Van Wyk trial before the appellant, although there is, as one would expect, copious reference to the record of the Van

Wyk trial in the transcript of the appellant's trial before the regional magistrate. The record in the Van Wyk trial was an exhibit in the trial before the regional magistrate.

11. No information has been placed before us to explain the delay. I shall assume in favour of the appellant that no part of the delay before the petition reached Bertelsmann J on 3 September 2007 was attributable to the appellant.
12. There then proceeded a most remarkable series of postponements of the appellant's appeal in this court pursuant to the leave to appeal granted by Bertelsmann J and Makhafola AJ. We learnt this mainly from the submissions of counsel made from the bar when the appellant applied to us for yet another postponement of the appeal alternatively an order that the appeal be struck from the roll when it was called before us on 16 November 2010. However, there are certain documents, not forming part of the appeal record, lying loose in the court file to which we were not referred but which I read for the first time, either while preparing for the appeal (at which stage I did not appreciate their significance) or while preparing this judgment and which cast light on the events I shall proceed to recount.
13. It emerged from counsel's submissions that the following is a fair chronology of events relevant to the appeal. I must stress that some of what follows is the product of inference on my part but I have had to undertake this task without any documents or affidavits from the appellant or her attorney other than those which I found in the file and with the deficiencies I have mentioned in the record;

13.1 03/09/07 Leave to appeal granted by High Court

13.2 10/09/07 Registrar's order re leave to appeal issued.

13.3 09/05/08 Appeal set down for hearing in High Court Classen and Rabie JJ; appellant appears in person; appeal struck off, probably for want of heads of argument for appellant.

13.4 17/11/08 Appellant delivers notice of application for condonation for late filing of heads of argument and extension of her bail pending the outcome of her appeal.

13.5 29/01/10 Undated "Leave to appeal application" served on DPP and Registrar, NG High Court, for leave to appeal to NG High Court against order of 3 September 2007 'on the merits'

13.6 27/02/09 Appeal postponed, probably because NG High Court could not competently grant leave against order of 3 September 2007.

13.7 30/03/09 Appeal called before Msimeki J and Ebersohn AJ;2 content of order of 3 September 2007 AJ drawn to attention of appellant's representative; appeal postponed to enable appellant to petition Supreme Court of Appeal for general leave to appeal.

13.8 07/12/09 Appeal postponed, probably because no petition had been presented to SCA, "Finaal Uitgestel",

13.9 02/02/10 Appeal again postponed.

13.10 17/08/10 Appeal called before Bam and Van der Byl AJJ: appeal postponed for reason unknown.

13.11 16/11/10 Appeal called before Tuchten J and Ebersohn AJ.

14. On 16 November 2010, when the appeal was called, there was no appearance for the appellant. A copy of a petition to the SCA,

bearing for some reason petition no. 113/06, was on the file of the appeal in this court. It bore the date stamps of the DPP, 7 October 2010, and of the registrar of this court, 3 November 2010, but no date stamp of the SCA. In the petition to the SCA the appellant seeks general leave to appeal against the conviction and sentence imposed by the regional magistrate. The filing notice and the notice of motion accompanying the petition both bear the date 30 September

2010. The supporting affidavit is undated. Counsel for the State told us that she had been informed by the attorney for the appellant that no response to the petition to the SCA for general leave had been received from that court and that it had been agreed with the attorney for the appellant that the appeal would be postponed. This was the first we heard of any application for postponement of the appeal. We declined to accede to this informal and belated request without further information from the appellant. We adjourned the application for postponement to the next day. 17 November 2010.

15. On that day, counsel appeared on behalf of the appellant to move for a postponement. It then emerged that contrary to what counsel for the State had been led to believe, no petition had been filed with the SCA at all.

16. We learnt from submissions made by counsel for the appellant from the bar that the petition, in the form it was, placed before us, ie without any of the annexures referred to in the supporting affidavit, without any of the relevant judgments from which leave to appeal was being sought, with a supporting affidavit that does not reflect the date upon which it was

sworn and without any accompanying application for condonation, had been presented to the registrar of the SCA and had been rejected by that functionary because it did not comply with the rules of the SCA. Thereupon no action at all was taken by the appellant or her attorney to put the petition in order so that it could again be presented to the SCA.

17. I must add that during the hearing of the application for the postponement of the appeal I was under the impression that there was no certainty about whether the record of the proceedings before Msimeki J and Ebersohn AJ had been transcribed. While preparing this judgment, I came across what seems to be an uncertified transcript of those proceedings lying loose in the file. It bears out an allegation in the petition to the SCA that on 30 March 2009 the High Court, per Msimeki J and Ebersohn AJ, suggested that a petition to the SCA might be appropriate. There is also some merit in the allegation in the petition that the court suggested that the charge against the appellant in the regional court might have arisen from a clerical mistake on her part. But I must make it clear that this suggestion arose during the course of a discussion between the one of the members of the court and counsel for the appellant during the hearing on 30 March 2009 and was by no means a considered view of the court<sup>3</sup>. I mention this particularly because in the application for postponement I was somewhat scornful of the submission that the court

might have viewed the conduct of the appellant as a clerical error.

18. I dismissed the application for postponement in an ex tempore judgment delivered on 16 November 2010, with which Ebersohn AJ concurred. That judgment should be read with a transcript of what was told to us by counsel because no affidavit was presented by the appellant in support of the application for postponement. One

important reason for dismissing the application for postponement was that the appellant or her attorney or both of them had misled the DPP and this court about the status of the petition to the SCA and more particularly that neither (the DPP nor this court had been told until we pointedly asked what the position was in that regard, that the petition had been rejected by the registrar of the SCA for non-compliance with the rules of that court and that nothing at all had been done to rectify the position. We ruled that the appeal had to proceed. Counsel for the appellant then withdrew and there was no appearance by or on behalf of the appellant. Neither the appellant nor her attorney was at court on either of the two days on which the appeal was before us.

19. Another important reason for dismissing the application for postponement was that no application had been made to the SCA for

condonation for late presentation of the petition to that court. The order of Bertelsmann J and Makhafola A J was made on 3 September 2007 and issued by the registrar on 10 September 2007. The discussion in this court when the appellant was specifically alerted to the possibility that she should petition the SCA took place on 3 March

2009. So at the very best for the appellant and ignoring the delay that occurred before 10 September 2007 (the date when the order of Bertelsmann J and Makhafola A J was issued by the registrar) she delayed for some 18 months before making the feeble efforts I have described to petition the SCA. This delay could not be explained by counsel for the appellant and appeared to us to be inexcusable and was probably brought about simply to put off the day of ultimate reckoning.

The order of 3 September 2007 of Bertelsmann J and Makhafola AJ

20. The order of 3 September 2007 of Bertelsmann J and Makhafola AJ restricts in its terms the capacity of the appellant to appeal the merits of her conviction or the sentence imposed upon her. The terms of that order confer on the appellant the right to appeal only on the basis that she was denied a fair trial, which I think in this context means a fair appeal.
21. I doubt whether it was competent for the court, as a matter of law, to impose such restrictions. Section 309C(7) requires the judges who consider a petition either to grant it or refuse it. The section does not in terms empower the judges to grant conditional leave to appeal. This provision maybe compared with s20(5) of the Supreme Court Act, 59 of 1959, in which the power is specifically conferred to grant conditional leave to appeal.
22. As the point has not been adequately argued before us. I shall not decide it but shall assume in favour of the appellant that the restrictions imposed in the order of 3 September 2007 are not competent and that the appellant was granted unconditional leave to appeal.

The merits of the appeal

23. The merits of the appeal may be swiftly disposed of. The judgment of the appellant in the Van Wyk case convicting Van Wyk was transcribed and is before us as part of the appeal record. It is clear from the appellants own judgment in the Van Wyk case that the charges she was considering were limited to those listed in paragraph 4.1 above. Furthermore, although the record of the proceedings in the Van Wyk case itself is not, as it should have been, part of the record on appeal, it is abundantly clear from the transcript of the evidence in the trial before the regional magistrate that the record of the Van Wyk case was an exhibit in the trial before the regional magistrate and that the record in the Van Wyk case showed that Van Wyk only pleaded to the charges listed in paragraph 4.1 above. Furthermore, it would have made no sense for the appellant to have written the words 'Guilty on all Counts 1-4 & 5-7' on one and the same occasion. If the appellant had found Van Wyk guilty of all the counts preferred against him she would have written "Guilty on all Counts 1-7". The reason why the appellant wrote the words "Guilty on all Counts 1-4" on the J15 can only have been because she failed to distinguish between the main count of culpable homicide and the alternative to the main count of reckless or negligent driving.
24. I agree with Bertelsmann J that the appellant was a very poor witness. Her attempts to explain away the facts I have outlined in the previous paragraph were utterly unconvincing. The regional magistrate rejected the appellant's evidence as false. I agree with the conclusion of the regional magistrate in this regard.

25. I have no doubt that the appellant did alter the J15 in the manner alleged and that she did so to avoid the embarrassment she would have suffered if and when the argument was made on appeal to the high court that the appellant had acted irregularly in sentencing Van Wyk on charges that were never put to him. The alteration was in my judgment by no means a clerical error as was suggested by the court (Msimeki J and Ebersohn AJ) on 30 March 2009. Rather than face the consequences of her own elementary error, the appellant tried to cover up her mistake by falsifying the J15 in the manner described, to the manifest prejudice of Van Wyk and the administration of justice in general.

26. The appeal against conviction must therefore fail. I turn to the appeal against sentence.

#### The appeal against sentence

27. In heads of argument dated 9 March 2009, filed for the hearing of the appeal on 30 March 2009 by counsel then acting for the appellant, it is submitted that the regional magistrate disregarded or attached insufficient weight to the following:

27.1 the appellant's specific personal circumstances;

27.2 the fact that she was a first offender;

27.3 the element of mercy in sentencing;

27.4 the fact that the appellant was not enriched by her criminal conduct;

27.5 the fact that Van Wyk suffered limited prejudice<sup>4</sup>

27.6 the appellant's prospects of rehabilitation (by which is no doubt meant that the appellant has learnt her lesson and is unlikely to commit the crime of defeating the ends of justice again).

28. It is further submitted in these heads of argument that the sentence imposed was an impermissibly exemplary sentence and that the seriousness of the offence and the community interest were overemphasised.

29. It is true that the appellants personal circumstances are mitigatory. So is the fact that she is a first offender. One would hope that the appellant is unlikely to commit this type of offence again because she has shown herself thoroughly unfit to hold judicial office and should never again be allowed to preside in any kind of court or to hold any public office in which she would be in a position to put her own personal interests above those of the persons whose interests she should be serving. She has also suffered the great humiliation of losing her career and position as a magistrate.

30. But against these factors stands the fact that the appellant has committed a serious crime for which she has expressed no remorse

whatsoever. She did not commit the offence for direct financial gain. She did so to protect her own reputation at the expense of Van Wyk and the administration of justice. The wrong done to Van Wyk was righted but the harm done to the administration of justice by a judicial officer

acting as the appellant has done will endure. Every judicial officer makes mistakes. In our judicial system, an accused person is fully entitled to make of such mistakes what he will before a court of appeal. The honest judicial officer acknowledges her mistake, takes such criticism as may be forthcoming from the court of appeal in her stride and resolves to learn from her mistake and not to err in that regard again. In my view the sentence was entirely appropriate.

31. Although the initial delay in the submission of a proper petition to this court for leave to appeal is not attributable to the appellant, the whole of the delay thereafter is entirely her fault. The impression I formed from the appellant's conduct after 10 September 2007 is that she is trying to delay the day of reckoning. Except possibly for the period between 1 and 3 March 2005, the appellant was at liberty on bail throughout. I see no basis for reducing her sentence because of the lengthy period which has elapsed between the date on which the regional magistrate refused leave to appeal and the date on which the appeal was finally heard. There was no suggestion in the heads of argument or the abortive petition to the SCA that the appellant wishes to argue that the initial delay in the presentation of her petition for leave to the High Court should in some way operate to reduce the sentence imposed on her. The appeal against sentence must therefore fail.

#### Order of court

32. I intend in my order, for avoidance of doubt, to make it plain that the bail granted to the appellant pending appeal has lapsed and that she must report forthwith to begin serving her sentence.
33. I have also on reflection decided that there is sufficient material in this judgment to enable the Law Society of the Northern Provinces to commence an investigation into the conduct of the appellant's present attorneys, Moleko Ratau Attorneys, regarding the petition abortively submitted to the SCA.
34. I make the following order:

34.1 The appeals against conviction and sentence are dismissed. The conviction of the appellant and the sentence imposed upon her by the regional magistrate are confirmed.

34.2 It is declared that the bail granted to the appellant pending her appeal has lapsed because the appeal has been heard and dismissed.

The appellant must by no later than 6 December 2010 report to a police station in Gauteng to begin serving her sentence. The Director

of Public Prosecutions must ensure that this paragraph of the order is enforced.

34.3 A copy of this judgment must be delivered to the Law Society of the Northern Provinces by the Director of Public Prosecutions within two weeks of the date on which this judgment is handed down.

34.4 The Law Society is requested to consider whether any disciplinary action would be appropriate against any partner, director, associate or employee of the appellant's attorneys, Moleko Ratau Attorneys, arising out of the conduct of any such person relating to the petition to the Supreme Court of Appeal bearing the date 30 September 2010 in which the present appellant Bertha Betty Ntsimane, sought leave to appeal unconditionally against her conviction and sentence imposed in the regional court of Southern Gauteng under case no. 41/1429/03.

NB Tuchten

Judge of the High Court

22 November 2010

I agree.

P Ebersohn

Acting Judge of the High Court

1The alternative charge of reckless or negligent driving and all the other charge I have described as additional to the charge of culpable homicide were brought under the provisions of Act 29 of 1989.

2Ebersohn AJ has no independent recollection of this occasion

3Pages 11-12 of the record of proceedings before Msimeki J and Ebersohn AJ on 30 March 2009

4 Van Wyk's conviction and sentence were apparently set aside by the High Court

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Prepared on 11 October 2026 · Esheria