

SOUTH AFRICA / JUDGMENT

S v Bennett (SS40/2006) [2018] ZAGPJHC 501 (14 August 2018) [2018] ZAGPJHC 501

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

SS40/2006

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 40/2006

Not reportable

Of interest to other judges

Revised.

14 August 2018

THE STATE

V

BENNETT, SUSAN HILARY Accused no. 2

JUDGMENT

OF 14 AUGUST 2018

SPECIAL ENTRY

SPILG, J:

INTRODUCTION

1. On 27 June 2018 Accused no 2, Ms Bennett, applied for a special entry to be made. The entry she wished to make reads:

"APPLICATION FOR SPECIAL ENTRY ito S.317 OF THE CPA:

1. That the demand by the above Honourable Court that Accused 1, and thereafter Accused 2, produce numerous documents relating to the Surrey Development Trust and the Pembroke Trust in order to support the pending reasons for the order which the Court had already given relating to the limitation of Mr Porritt's cross-examination of Mr Milne, was irregular.
2. That the refusal of the above Honourable Court on 25 June 2018 to explain the reasons for such demand to Accused 2 was irregular".

I will refer to this as the First Special Entry,

2. On 30 July 2018 Bennett made a further application for a special entry. It reads:

"1.1 That the demand by the above Honourable Court that Bennett henceforth make all her submissions to the court on oath is irregular and not according to the law because:

1.1.1 the court may not place an accused in a position where she is effectively required to go into the witness box and be cross- examined on any submissions which she may wish to make in argument;

1.1.2 such ruling reflects a lack of even-handedness and an imbalance between the Court's treatment of Bennett and the State, whose prosecutors are permitted to make submissions, which include incorrect statements of fact and hearsay evidence, from behind the bar without having to place such submissions on oath.

1.2 That the demand by the above Honourable Court during June 2018 that Bennett is to advise the Court whenever the First Accused, Gary Porritt, makes a statement which she does not agree with otherwise the Court will assume that Porritt represents her views, is irregular and not according to the law, for the following reasons:

1.2.1 Porritt and Bennett are separate accused and are permitted by law to make their own separate defences. Porritt is required to make his own case and Bennett is separately required to make hers. The Court may not make the assumption that, because they are ad idem on certain issues, in conducting his defence and his cross-examination of the State witnesses, Porritt represents Bennett. It is Bennett's right to make her own statements in her own defence and, if the Court wishes to ascertain whether Bennett agrees with

Porritt on certain issues, it is required to ask her separately'.

This will be referred to as the Second Special Entry

3. The State opposed both applications and, after both parties filed detailed heads of argument, I heard the matter yesterday afternoon.

PREREQUISITES FOR THE NOTING OF A SPECIAL PLEA

4. A special entry of irregularity or illegality must meet the requirements of s 317(1) of the Criminal Procedure Act 51 of 1977

("the CPA") which provide that:

"(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

In terms of subsection (4) if the application is granted then its terms "shall be settled by the court which or the judge who grants the application for a special entry."

5. The section has been described as an anachronism dating from the time when the right of appeal in criminal cases was severely restricted.[1]
6. In *S v De Vries and others* 2012(1) SACR 186 (SCA) at para 29 the Supreme Court of Appeal, referring to *Staggie*, stated that two requirements must be satisfied for a valid special entry;
 - a. The irregularity affecting the trial must not appear from the record;
 - b. The attack cannot relate to a ruling made during the course of proceedings.[2]
7. During the course of argument *Adv Ferreira* for the State referred to the more recent decision of *S v Nkabinde* 2017 (2) SACR 431 (SCA) where *Schippers AJA* said at para 27:

"The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under s 318(1) of the Act.[2] The latter section provides, inter alia, that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the basis of the irregularity stated in the special entry. Recently this Court has held that the sole purpose of a special entry is to record an irregularity that does not appear on the record. As is shown below, all of the so-called special entries are not proper special entries but grounds of appeal under s 316 of the Act, because they appear on the record. Some 60 years ago this Court held that the special entry procedure is of vital importance and should be utilised where the irregularity does not appear on the record of the proceedings. So, the statement in the application for leave to appeal to this Court that a special entry is 'simply a method of applying for an appeal in regard to irregularities on or off the record' is quite wrong."

8. If the irregularity complained of does not appear from the record and does not relate to a ruling made then it will not result in a conviction or sentence being set aside (if that is the outcome of the trial) " unless it appears to the appellate court that a failure of justice has in fact resulted from such irregularity or defect"[3]

9. Once these requirements are satisfied a court is obliged make a special entry unless it is of the opinion that the application "is not made bona fide or that it is frivolous or absurd or the granting of the application would be an abuse of the process of the court"[4]

WHETHER THE REQUIREMENTS FOR INVOKING S 317 HAVE BEEN SATISFIED

10. In advancing her case Bennett relies on extracts from the record. This is apparent from the comprehensive heads of argument she handed up. In reply to the State's argument that she had not relied on any facts extraneous to the record Bennet could only submit that it was not evident from the record that the accused had said that it was irregular to ask for the documents afterwards. That is not a fact but a conclusion. The facts upon which Bennett relies for both the first and second special pleas are all those she contends (whether accurately or not) are contained in the record.
11. In addition the second special entry is an attack on two rulings I was alleged to have made; namely that all Bennett's submissions to the court were to be made on oath and that she was obliged to advise the court if she did not agree with a statement Porritt may make concerning her position otherwise it may be assumed that she endorses it.
12. Moreover Bennet does not allege either in the written application or in her heads of argument that as a result of the alleged

irregularities there has been a failure of justice that would entitle her to set aside any conviction or sentence should that eventuality arise.

13. For these several reasons neither of the two applications satisfies the requirements set out by the SCA in Nkabinde for a competent special entry.

THE STATE'S OTHER GROUNDS FOR ATTACKING THE APPLICATIONS

14. The State further submitted that the applications were not made bona fide, were frivolous and absurd and that they amount to an abuse of the process of the court.
15. The State argues that this is not the first time that either accused has asked for a special entry to be made. They had done so on two previous occasions prior to even pleading. The fact that it may not have been competent to do so at that stage is not here relevant.
16. The one related to a refusal by Borchers J to suspend her judgment of March 2009 granting the accused Legal Aid. The State's heads of argument contend that the focus of that application was the question of legal representation; Bennett and Porritt complaining that Borchers J's decision that the four Legal Aid counsel appointed to represent them remain engaged despite Legal Aid South Africa having no objection to that course while their appeal was pending against the order appointing legal aid counsel to represent them.

The second special entry contended that the appointment of Adv Coetzee to the prosecution team was irregular.

17. Adv Ferreira submitted that the first special entry was to stall the proceedings by not continuing with the engagement of appointed

counsel. Bennett however said that the accused wished to change their counsel so that senior counsel could be appointed. It is evident that the other special entry made before Borchers J has been rejected by the SCA on two separate occasions; the first occasion on appeal before it and the other when it refused a petition to appeal my decision regarding the continued presence of the prosecution team.

18. In regard to the first special entry before me, it is evident from Bennett's replies that as long as I did not have the trust documents called for before me I could not rule by when Porritt was to complete his cross examination of Milne. The suggestion that I could have obtained them from the Master does not meet the other leg of her contention that I was not entitled to them from whatever source.
19. The net effect of Bennett's submission is that even by today I would still be unable to direct by when Porritt is to complete his cross examination of Milne. Her position is one directed at infinite regression. When I became alive to this possibility I decided that the court not be placed in such an intolerable situation and therefore devised a structured order that would for the meantime not necessitate a final decision on the issue.
20. The framework of the order of 5 June 2018, which may be construed in civil law terms as the equivalent of a rule nisi made it plain that I have left it open for Porritt to motivate a further extension if he is so minded. Accordingly no final decision was taken. It becomes final if Porritt does not bring the required application motivating an extension to complete the cross examination of Milne and join the trustees and the Legal Aid Board. For sake of completeness I said the following in my judgment of 4 July 2018:

"FAILURE TO PROVIDE DOCUMENTS AS UNDERTAKEN

I have given Porritt the opportunity to provide the trust documents. He agreed to do so. He has not provided any change of trustees or documents that would indicate the basis on which monies would be made available for his defence. One would also expect that his children as beneficiaries would come to his assistance by reason of the mutual obligation of support.

At the hearing on 15 May I considered that the trust documents were critical to my assessment. I also indicated that I would be prepared to make assumptions if they were not produced.

They were not provided on 4 June and based on the contingency that I would not receive them it was necessary to consider a structured order that was not unequivocal.

At the hearing on 5 June I was informed for the first time that no documents would be provided. This vacillated at a later stage to there being no problem in providing some documents but others would be problematic. Bennett contended that she had a right to be involved and did not see the relevance. She also said that she had consulted with Cohen and on the last occasion pursuant to a further consultation with Cohen and Adv Vermeulen required me to note a special entry. The competency of raising the special entry is still before me and therefore I do not deal with it now.

It is evident that Porritt has backtracked from being amenable and capable of providing the documentation to claiming he has no ability to access them and is not prepared to.

The issue will come down to whether Porritt has de facto control of the funds in the trust or can otherwise readily access them having regard to the way they have been distributed to him previously and whether de facto the other trustees have historically dealt with any monies used for his legal fees.

I was naturally reluctant to make assumptions on the papers before me. But equally it was necessary for Porritt to know his position as soon as possible as to whether, and if so by when, he is to complete his cross-examination of Milne.

The court was therefore placed in an invidious position. Hence the structuring of the order in a way that allowed Porritt the ability to bring a formal application for an extension of time to complete his cross-examination. Since the making of the order my concern that Porritt will bring a formal application to further extend the time allowed for cross-examining Milne has materialised. Despite claiming that he intends to put his version, Porritt has veered from doing so on crucial aspects when one would have expected him to, claiming either that he is not yet ready to or requires documents he does not have to do so.

Accordingly the trust documents called for remain relevant and the court is not prepared to be in a position where Porritt contends that the issue of his ability to engage attorneys is speculative. The court has been able to avoid that with the structured order of 5 June 2018. But it will not be placed in a position of being damned if it does and damned if it does not require the documents when considering the merits of the anticipated application for an extension to complete cross-examination of Milne."

21. It is therefore evident that I did not close the door to Porritt to seek an extension of time within which to complete his cross-examination of Milne. It should be recalled that the whole purpose of hearing representations as to the length of time still

needed to complete Milne's cross examination arose because Porritt had previously said that he would need between one year to two years more to complete Milne's cross-examination.

22. The question of whether Porritt voluntarily elected not to engage legal representation arose pertinently because he had not completed documentation requested by legal aid to enable them to assess if he qualified and he also blamed the court for not being able to engage counsel of choice despite funds being available. The contention was that the only condition why the funds were not provided was because I did not accede to a belated request on 19

August 2016 to delay the commencement of the trial on 5 September 2016 as the accused were due to testify in a civil matter concerning Lomax.

23. In this regard it is significant that during argument before me yesterday Bennett confirmed that the Lomax hearing has still not commenced despite the lapse of almost two years since that application for the postponement before me and despite the condition

for the release of funds for Porritt's defence, according to Bennett, being simply that the Lomax case actually starts in court. One would have expected greater alacrity in getting the Lomax case started. Porritt will be afforded an opportunity to deal with this if he brings an application for extension.

24. Para 1.1 of Second Special Entry claims that I required Bennett to make all her submissions under oath. In her heads of argument Bennett claims that this was said by me at the hearing of 30 July. On that day I gave an extempore ruling on Porritt's request to stand down the cross examination of Milne for two days. In the course of giving my reasons for declining the request I said:

"I see the current application as one that indirectly deflects from the nub of my last order. All the other arguments by Porritt and what I refer to as the gratuitous introduction of evidence by Bennett not under oath were dealt with when I considered my last order and are contained in the transcript of my judgment which Bennett confirm she has (and which I have not received because of the unresolved transcription issues). The answer to them remains complying with the requirements of my order if an extension of time is sought. None of those terms have been touched on."

25. If it happened that during the hearing I used the word "submission" then in the context it was clearly an error: I was obviously referring to the introduction of evidence via the back door under the

guise of a submission- as was made clear in my reasons.

26. Para 1.2 of the Second Special Entry avers that I have been treating Porritt and Bennett as representing each other. The record is replete with my making it plain that they are their own counsel and that Porritt should not claim to put a version for Bennett. Despite this Porritt continued to do so and Bennett appeared to have no difficulty with that.

27. I believed it was my duty to indicate that if the assumption made that she supported him if he put a version that included reference to her was incorrect then she should indicate this. I accordingly indicated that despite my previous position that Porritt should not be putting a version that purported to state Bennett's position, if he did do and she was uncomfortable with anything he was putting on her behalf then she should indicate this to the court.

28. Once again the history of the court intervening when Porritt put a version involving Bennett is on record. No demand was made of Bennett: If she does not raise the point that Porritt cannot speak for her position when he does so, then she knows that she is on risk.[5]

29. For sake of completeness, neither Porritt nor Bennett are seated in the dock. They sit next to each other, constantly confer, and Porritt regularly seeks her counsel or is directed by her to something in a document or on her laptop screen. There is a visible close collaboration between the accused in presenting their case, in the utilisation of the contents of documents and asking questions of Milne. It would therefore be natural to assume that they had discussed what was put at least where Bennett was mentioned. The court did not want a situation to arise where an assumption was made, as a court is entitled to, because she did not appreciate that she needed to disassociate herself from something Porritt purported to put on her behalf.[6]
30. At this stage it suffices simply to raise these matters for the accused's consideration should either of them be minded to take the issues further at any stage.

ORDER

31. I find that the two applications fail to satisfy the requirements of a special entry and are refused.

SPILG J

DATE OF HEARING: 13 August 2018

DATE OF JUDGMENT: 14 August 2014

FOR ACCUSED NO. 2: In person

FOR THE STATE: Adv EM Coetzee SC

Adv JM Ferreira

Adv PJ Louw

[1] See Hiemstra's Criminal Procedure at 31-29 citing Staggie v S {2011} ZASCA 88 and its reference in S v Masoanganye 2012(1) SACR 292 (SCA) at para 9

[2] At 29: "As this court has recently been at pains to point out, the purpose of a special entry is to record an irregularity

affecting the trial that does not appear from the record: and an attack upon a ruling made by a trial court during a course of

proceedings does not qualify"

[3] Nkabinde at para 27

[4] Section 317(1)

[5] S v Botha 2006(1) SACR 105 (SCA) at paras 10-13

[6] Botha at paras 10-13

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