

SOUTH AFRICA / JUDGMENT

S v Dlamini (234/04) [2005]

ZAGPHC 122 (28 November 2005)

[2005] ZAGPHC 122

COURT

High Courts - Gauteng

BEFORE

E M Du Toit

CASE / FILE NUMBER

234/04

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IN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION)

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(

WITWATERSRAND LOCAL DIVISION

)

Case No 234/2004

In the matter between:THE STATEvsDLAMINI, JOSEPH THEMBA SIFISO

In the matter between:

THE STATE

vs

DLAMINI, JOSEPH THEMBA SIFISO

J U D G M E N T

E M DU TOIT AJ:Delivered2005 11 28

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Delivered

2005 11 28

This trial, in which the accused was arraigned on 30 counts, has from the outset been dogged by constant adjournments and delays of varying duration due to all manner of unavoidable circumstances ranging eg from Counsel and the assessors, usually at the request of Colleagues,

being released to assess or appear in other Courts, or being unavailable for some other reason, to the accused being allowed to recover firstly from an extremely painful medical condition which suddenly afflicted him and subsequently, during his cross-examination, from fatigue and a resultant inability to concentrate due to deprivation of sleep in the Johannesburg Jail where he was detained; from the unfortunate death of the investigating officer, to Counsel appearing for the State being taken to hospital with severe injuries when the doors of a lift in this building closed on his head; and from a witness going into labour while under cross-examination at a crucial stage of the case, to Counsel appearing for the State finding himself in a personal predicament which in my opinion precluded him from continuing to prosecute in the matter. For the most part the Deputy Judge President was kept abreast of the more important vicissitudes of the case.

In August this year Counsel appearing for the State was by consent granted leave to interrupt the cross-examination of the accused and call a further witness, whereafter I permitted another witness to be called as well. During the latter's cross-examination on Friday 2 September she showed signs of physical discomfort and, upon enquiry, told me that she was in the last month of her pregnancy, was experiencing abdominal pains and would prefer an adjournment until the Monday. On Monday the 5

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we were informed that the witness had given birth over the weekend and was still in hospital, whereupon the matter stood until the following day for a prognosis of her condition in order to assess the situation. To my dismay the investigating officer brought the witness to Court on Tuesday morning. She was clearly in no state to testify and at her request the trial was provisionally adjourned until Thursday the 8

, on which date we learnt that she and her baby had, not surprisingly, been readmitted to hospital. Thereafter the case was adjourned virtually from day to day in expectation of the witness' recovery.

On Monday 19 September Counsel appearing for the State unexpectedly and without any intimation failed to arrive at Court. I adjourned the trial until the following day, when Mr

Mopatlane

of the Directorate of Public Prosecutions appeared for the State as a matter of courtesy but had no information as to his colleague's whereabouts, the reasons for his absence or the prospects of his return. I had for some time been extremely perturbed by the duration of the trial and, as the third term was due to end on Friday 23 September, in consultation with Counsel for the defence, Mr

and the assessors the three weeks commencing on the second day of the present term, viz from Tuesday the 4

to Friday 21 October inclusive, were reserved for the continuation of the matter. In fairness I further directed that a transcript of the evidence to date of both the accused and the witness under cross-examination be prepared and that they were entitled to refresh their memories therefrom before cross-examination continued.

The Judge President subsequently took me to task for having adjourned the trial as aforesaid and told me that I had no right to postpone cases to a following term without first consulting the Deputy Judge President. I was unaware of any such prerequisite and all postponements of criminal trials had merely been to the first available date with the concurrence of all Counsel, but primarily Counsel appearing for the State who almost invariably first consulted the Roll Planner in the Directorate of Public Prosecutions whose unenviable task it is to plan and compile the entire criminal trial roll in the light of prevailing and anticipated circumstances and exigencies.

On Monday 3 October,

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the day before the trial was due to continue, a senior member of the Directorate of Public Prosecutions informally advised me of prosecuting Counsel's abovementioned predicament. I immediately apprised the Deputy Judge President of this new development and told him that in my opinion Counsel appearing for the State should not continue to do so and that I intended having the whole record transcribed as a matter of urgency in order to enable another Counsel to take over the prosecution as soon as possible. I thereupon telephonically advised the acting Roll Planner of my aforesaid ruling and intention.

Before the matter was called the following morning, 4 October, Counsel who had been appearing for the State, accompanied by the acting Roll Planner, came to see the assessors and me in Chambers. I informed him that I had been told about his predicament and of my ruling in the light thereof that he was not to continue as prosecuting Counsel in the trial.

Later that morning Mr

Vlok

of the said Directorate, also accompanied by the acting Roll Planner, came to see us. Mr

informed us that a senior member of the Directorate had been to discuss the matter with the Deputy Judge President, who had directed that the trial continue with the same prosecuting Counsel. I confess that I initially did not credit Mr

's averment of this directive, for which I hereby apologise to him, and most unfortunately even ridiculed it during a subsequent progress report to the Deputy Judge President. At the time I merely reiterated my ruling, but advised Counsel that I was obviously prepared to hear argument thereanent in open Court. In the event it was decided to abide my ruling and Mr

Davidowitz

has since taken over the prosecution in the matter. However, going over my head in order to have my ruling reversed is totally unacceptable conduct and also negates my independence as a Judge.

I thereupon directed that the record be transcribed as a matter of urgency and subsequently by agreement adjourned the trial until 31 October, by which date it was reasonably expected that the record would be ready and the further conduct of the trial could be considered.

Meanwhile on 26 October the Judge President sent the following circular to all Acting Judges:

“PART HEARD MATTERS

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PART HEARD MATTERS

1. Please let me have, urgently, a list of:

1.1 all your part heard matters, and if postponed to a particular date, 1.2 the date thereof.

2. As it may not be assumed that you will necessarily be acting next year, please

2.1 endeavour not to have part heard matters when the term ends; 2.2 do not postpone any matter to a date unless discussed with me or the Deputy Judge President;

3. Please note that attempts will have to be made to hear and finalise all part heard matters during the coming recess period.

...”

”

On 31 October both the witness then under cross-examination and the accused refreshed their memories from the relevant portions of the record, whereupon Counsel and the assessors promptly made themselves available and the evidence of the witness was duly completed on 3 November.

In the light of informal discussions with Counsel for the State and for the defence and the assessors, I accepted Counsel's estimate that at least a further month would be required for completion of the trial. Upon consideration of all the circumstances, and having regard to the availability of Counsel and that of the assessors, it was clear that the trial could not be finalised during the present term and ensuing recess, and it was agreed that it could most expeditiously be concluded by setting aside four weeks therefor during March of next year. However, in view of the Judge President's circular I forthwith advised the Deputy Judge President of my decision to adjourn the trial and of the dates which had been agreed upon, and fully explained the position to him. He said that he would come back to me the following day and the matter was adjourned until 4 November.

On the 4

the Deputy Judge President without explanation told me that March 2006 was out of the question for the hearing of the matter and directed that the matter be heard, and that I attempt to dispose of it, during the forthcoming recess. This directive was discussed with Counsel and the assessors, and the only suitable available period during the recess turned out to be 9 to 20 January 2006, which

ex hypothesi

was regarded as being inadequate for the finalisation of the trial. The position was explained to the accused and the trial adjourned until 9 January 2006, it being noted that the subsequent days until and including 20 January were reserved for the case.

Subsequently I was informed by the Deputy Judge President that he had questioned one of the assessors as to whether the trial would be concluded in the allotted time during the recess, and that he had been told that it would not. In my respectful view the questioning of an assessor about an unconcluded trial in which she or he is sitting is clearly undesirable and, to say the least, a breach of the principles of judicial confidentiality and independence.

Then on the 17

instant during a meeting with the Judge President and the Deputy Judge President, convened to discuss suitable dates for the continuation of another part heard matter, my handling

inter alia

of the present trial and the fact that it had not concluded during the present term were emphatically questioned. The Deputy Judge President thereupon, unexpectedly and without any previous intimation whatsoever, announced that he was dissatisfied with my services and would not be requesting my reappointment next term.

I had assumed from the Judge President's circular that Acting Judges would be reappointed for the recess, or at least for such period or periods therein as were required for the finalisation of unfinished work. However, in view of the tenor of the meeting I immediately attempted to obtain clarity in this regard from the Deputy Judge President. In his absence his Secretary informed me that he had ascertained from the Judge President's Office that I will neither be reappointed for the recess, nor for the hearing of any matter during it. Subsequently I received the following letter from the Deputy Judge President:

"1. I reconfirm that I will not be asking the Judge President to appoint you as an acting judge for the first term of 2006. It is further confirmed that you do not need a further appointment as an acting judge to complete matters which are part heard before you.

2. The matter of Putter is part heard before you and you are at liberty to determine a date to which to postpone it, bearing in mind the need to dispose of it as expeditiously as possible. To this end this office has already assisted you by obtaining a record of the transcript on an urgent basis and securing the commitment of the Legal Aid Board to appoint counsel who is available to deal with the matter and dispose of it without undue delay.³ The Director of

Public Prosecutions should be contacted to make a court room available to you to finalise part heard matters during recess.

In passing I respectfully point out that at the meeting the Deputy Judge President said that he would not be requesting my reappointment next term, and not that he would not be asking the Judge President to appoint me as an Acting Judge. Moreover, the learned Judge President in my respectful opinion has no power to appoint Acting Judges.

I furthermore respectfully disagree with the view that I do not need a further appointment as an Acting Judge to complete matters which are part heard before me. I was appointed an Acting Judge by the Minister of Justice and Constitutional Development in terms of s 175(2) of the Constitution, which appointment has currently been extended to 2 December

2005. In my respectful opinion the Minister has the duty, after consulting the Senior Judge concerned, to appoint Acting Judges eg for a stated period or for a defined purpose such as presiding over a commission or a specified trial until the conclusion thereof. My appointment has been extended for a stated period and when it comes to an end on 2 December, my judicial powers will lapse and I shall revert to being an advocate of this Court. The present is a lengthy trial that is expected to run for a further four weeks at least and for which I shall require full judicial powers and not merely the limited implied residual jurisdiction which is generally accepted to exist in respect of eg delivering reserved judgments, revising judgments and rulings, and hearing applications for leave to appeal. In this regard I point out that other Acting Judges have been placed on the recess duty roster with mention of their part heard matters, whereas neither my name nor the present trial appears thereon.

But quite irrespective of the question of my jurisdiction to continue to preside in the present matter, I am respectfully of the view that the expressed dissatisfaction of the Deputy Judge President with my services herein, and especially his unfortunate intervention in the trial by countermanding my ruling as regards the prosecution therein, by directing me to attempt to dispose of the trial during recess contrary to the agreement by the representative of the Directorate of Public Prosecutions and my assurance that in my opinion this could not be done, and by questioning an assessor about the case, my authority has been impaired and my judicial independence compromised. The question then arises as to what the perception of the public, the accused, Counsel appearing in the matter and the assessors would be if I were nevertheless to continue to preside in the trial.

After giving the matter anxious consideration I have reluctantly come to the conclusion that my position is an untenable one and that in the interests of justice it is my duty to recuse myself, which I hereby do. In the premises the assessors are discharged from further duty in the matter. It then merely remains for me to express my gratitude for, and appreciation of, the assessors' helpful services and the sacrifices they have made in their practices in order to continue to assist me in this lengthy and extremely demanding trial.

E M DU TOIT

ACTING JUDGE OF THE HIGH COURT

J R Davidowitzfor the StateR J Stransham-Fordfor the accused

J R Davidowitz

for the State

R J Stransham-Ford

for the accused

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