

SOUTH AFRICA / JUDGMENT

S v Khathutshelo and Another (38/2018, R D2/2016) [2018] ZALMPTHC 2; 2019 (1) SACR 480 (LT) (26 June 2018) [2018] ZALMPTHC 2

COURT

Limpopo High Court, Thohoyandou

BEFORE

Mangena, NF Kgomo

CASE / FILE NUMBER

38/2018, R D2/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

(1) REPORTABLE

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED.

High Court Review Case No: 38/2018

Dzanani Magistrate Court Case No R

D2/2016

26/6/2018

In the matter between:

THE STATE

and

MPHANDE KHATHUTSHELO

Accused 1

HLONGWANI MORIMISI MORRIS

Accused 2

REVIEW JUDGMENT

Mangena AJ

- [1] The two accused are charged with the offence of contravening section 4 read with section 1,2,4 (2),24,25 and 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. They appeared before magistrate Kellerman of the Regional Division of Limpopo held at Dzanani.
- [2] They pleaded not guilty to the charges and stated the following as the basis of their defence in terms of section 115 of the Criminal Procedure Act 51 of 1997 as amended.
- i. The name of the agent as indicated on the directive of the DPP differs from the actual agent utilized in the entrapment.
- ii. The entrapment and their subsequent arrest took place outside of the time frame period indicated on the directive of the DPP.
- iii. The conduct of the said agent went beyond providing an opportunity to commit an offence, and
- iv. The handler of the agent and the actual agent was one and the same person.
- [3] As the state was relying on the provision of section 252(A) of the Criminal Procedure Act, the accused through their legal representative submitted to the court that they deny the admissibility of the trap evidence which is in the possession of the state. They then indicated that they would like to have a trial - within - a trial held to determine the admissibility of the trap evidence. The state objected to the holding of a trial-within-a trial on the basis that the evidence on the admissibility is intertwined and closely connected to the evidence on the merits of the case.
- [4] After listening to the submission, the learned magistrate made a ruling that "a trial - within - a trial is not necessary .The accused will allow the state to present its evidence before the court and the court will then after hearing all of the evidence make a ruling with regard to the admissibility of entrapment"
- [5] Aggrieved by the ruling, the accused are approaching this court by way of a special review in terms of section 304(4)(A) of the Criminal Procedure Act 51 of 1977 as amended.
- [6] The review landed on the desk of my brother Makhafola J who directed a query to the parties in the following terms:
- "The most important question to attend first is ; Can a special review be at the instance and request of a legal practitioner or is it at instance and request of a Magistrate?
- [7] Comments were received from Advocate Madzhuta of the office of the Director of Public Prosecutions as well as magistrate Kellerman. I am thankful for their valuable inputs. I am in agreement with the submission they made that section 173 of the constitution grants the

high court inherent powers to review cases brought to them where the interest of justice so requires. However, I am of the view that such proceedings should be brought on notice in terms of the procedure prescribed by the Uniform Rules. There should be a substantive application clearly setting out issues for determination and same should be supported by an affidavit. The accused failed to do so and there is therefore no proper review to be considered.

- [8] In the event I am wrong in my finding that the accused did not follow the correct procedure, I nevertheless believe that the review should still fail.
- [9] It is trite that, as a general rule, a high court will not by way of entertaining an application for review; interfere with uncompleted proceedings in a lower court. See *Motata v Nair No and Another*, [2008] ZAGPHC 215; 2009 (1) SACR 263.
- [10] In *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another*, 1959 (3) SA 113 (A) Ogilvie Thompson JA (as he then was) put the position as follows:

"It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may in a proper case,, grant relief by way of review, interdict or mandamus against a decision of a magistrates court given before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power, for each case must depend on its own circumstances .The learned authors of Gardiner and Lansdown state that

"While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the uninterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained----in general, however ,it will hesitate to intervene especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available"

- [11] In *Ismail and others v Additional Magistrate,Wynberg and others*, 1963 (1) SA 1 (A),the position was authoratively stated by the learned Judges as follows:

"I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhuis and others v Additional Magistrate, Johannesburg and another*, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrates decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A superior court should be slow to intervene in uninterminated proceedings in the court below. and should generally speaking. confine the exercise of its powers to rare cases

were grave injustice might otherwise result or were justice might not by other means be attained'

[12] The above position has been followed in a number of cases and it has been expressed that the underlying reluctance of the courts to interfere in unterminated proceedings in the lower court is the undesirability of hearing appeals or reviews piecemeal. In *Eliovson v Magid*, 1908 TS 558 at P 561, Innes CJ stated the position as follows:

"It is quite true that as a judicial rule judicial proceedings are only brought under review after a final decision has been given and as a general rule that would be the most convenient and proper course". See also *Lawrance v Assistant Resident Magistrate of Johannesburg*, 1908 TS 525.

[13] In the context of the review of the decision regarding the procedure to be followed in case of entrapment, the court held in *S v Matsabu*, 2009 (1) SACR 513 that our courts have long accepted that it is both desirable and necessary, to the end of achieving a fair trial, to try issues of the voluntariness of extra-curial statements or conduct of accused persons separate from the merits of the case. Therefore the holding of a trial- within-a-trial will usually be appropriate to decide admissibility under S252A. However section 252A (7) provides implied legislative sanction for a trial court to exercise a judicial discretion on whether to try admissibility as a separate issue. There is recognition that there may be cases where the interest of the accused will not be prejudiced by either the making of a ruling without hearing evidence or even delaying a ruling until the conclusion of the case.

[14] The reason why legislature gave the presiding officer the discretion in such matters is to enable him/her to be in control of the proceedings. A presiding officer is inherently possessive of a fair and just mind. Her oath of office requires of her in the performance of her duties to exercise the discretionary powers in the interest of justice. The role of a presiding

officer in the management of the trial was stated by Curlewis J A in *R v Hepworth*, 1928 AD 265 as follows;

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a trial court is not merely that of an umpire to see that the rules of the game are observed by both parties. A Judge is an administrator of justice, he is not merely a figure head; he has not only to direct and control the proceedings according to the rules of procedure but see that justice is done"

[15] The exercise of the discretion may favour either the accused or the prosecution. None of the parties is entitled to have the discretion exercised in his or her favour. Once the discretion has been exercised, it can be called into question on appeal on various grounds.

[16] A careful perusal of the record reveals that the learned magistrate was aware of the provisions of section 252(A) as well as the risks inherent in the evaluation of the evidence in so far as admissibility is concerned. She has in my view correctly applied her mind to the facts including the basis of defence stated by the accused and in the exercise of her judicial discretion arrived at a decision that a trial-within-a-trial will not be necessary. This is made clear by the following statement:

"the court is not saying that the court is not going to rule on the admissibility of the entrapment, the court is just indicating that with regard to this case, it is from what the prosecution had addressed the court upon, not possible to isolate the evidence that will be led in the trial-within-a-trial from the evidence that touches on the merits of the case".

[17] In the circumstances, I am not able to find any reason to interfere with the ruling of the learned magistrate. The accused have failed to demonstrate and make out a case for intervention to avoid grave injustice.

[18] I am accordingly not persuaded that the circumstances of this case warrant an exercise of the power to set aside the proceedings.

[19] Having disposed of the matter, I am constrained to comment on the conduct of counsel for the accused and the utterances he made after the magistrate had ruled on the procedure. The record shows that counsel said the following:

Counsel: I am here to defend my client's and I do not just want to be overruled in that manner.

Court: You are not overruled.

Counsel: Ja but you must learn to listen. Listen to what I am saying.

Court: Please proceed

Counsel: You have to listen to me Court: I am listening

Counsel: We are not only here to listen to you

Court: Counsel, please proceed. I am listening

Counsel: I can't hear

Court: I am saying I am listening. Please proceed.

Counsel: Yes I am saying that we do not want this court to hear the merits of the case. That is why we want a trial-within-a-trial to be held. Now it cannot be, not in that fashion. Why jump straight into the merits of the case and then claim you will tell us when you want, you feel that a trial within a trial will be held. I cannot even think that feeling here. It will never be held. I still maintain, let us hold a trial within a trial. What is the difficulty with that, it is the state because they say it will

make the trial long unnecessarily."

- [20] The words used by counsel were both unnecessary and unfortunate. They demonstrated acute lack of respect to the court and its role in the administration of justice. Judges and magistrates alike have been entrusted with the most difficult job....to find the truth and administer justice between man and man. They are fallible like all others and in recognition of this weakness, there is a hierarchy of courts so that mistakes can be corrected on appeal or review. It does not serve any purpose for a practitioner to be theatrical and make demands which he knows the court is not in a position to accede to.
- [21] The ethics of the legal profession says an advocate is an officer of the court. As an officer of the court he is required to assist the court in the administration of justice. In as much as counsel has a duty to advance his/her client's case with zeal, vigour and determination, he should always remember that his primary duty is to the court. His role in court is not only to push his or her client's interests in the adversarial process. Lord Reid puts it better when he says " As an officer of the court concerned in the administration of justice, a barrister[legal practitioner] has an overriding duty to the court, to the standard of the profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests".
- [22] It is axiomatic therefore that an advocate should in the execution of his duties act with integrity and professionalism. He should always measure his words and be of good temperament. He should understand that he makes submissions to court with a view to persuade it to find in his client's favour. He does not make demands. Once the court has made a ruling, it becomes his duty as a person trained in law to advise a client on the remedies available to correct what he may regard as an error of fact, law or procedure.
- [23] He should always maintain the decorum of the court and protect its legitimacy in the eyes of the public so that its confidence is not eroded in their eyes. More than hundred years ago in the winter of 1908 Chief Justice Innes said the following about practitioners:
- " Now practitioners, in the conduct of cases, play an important part in the administration of justice. Without importing any knowledge or opinion of their own....they present the case of their clients by urging everything both in fact and in law, which can honourably and properly be said on his behalf". Incorporated Law Society v Bevan, 1908 TS 724.
- [24] The paramountcy of the duty to the court is of the utmost importance to the effective functioning of the legal system. It is imperative that lawyers, clients and the public understand this. The integrity of the rule of law and the public interest in the administration of justice depend upon it. When lawyers fail to ensure that their duty to the court is at the forefront of their minds, they do a disservice to their clients, the profession and the public as a whole. See paper by Honourable Marilyn Warren AC, 09 October 2009: The duty to the court - sometimes forgotten.

[25] In the premises, the special review application is dismissed. The accused must appear before the same Magistrate Kellerman for the matter to be proceeded with in accordance with her ruling.

M I MANGENA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION

I agree

NF KGOMO

JUDGE OF THE HIGH COURT OF South Africa

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