

SOUTH AFRICA / JUDGMENT

S v Van Eeden and Another (AR 291/06) [2008] ZAKZHC 78 (1 January 2008)

[2008] ZAKZHC 78**COURT**

High Courts - Kwazulu Natal

BEFORE

Van der Reyden, Koen

CASE / FILE NUMBER

AR 291/06

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(NATAL****PROVINCIAL DIVISION)****CASE****NO.: AR 291/06****In****the matter between:**

Louise
T van Eeden First Appellant
Ferdinand
J Labuschagne Second Appellant
and
The
State Respondent

JUDGMENT

VAN DER REYDEN, J.: The court a quo granted the appellants leave to appeal against their conviction on a charge of defeating or obstructing the course of justice. The gist of the charge was that they, with the intent to defeat or obstruct the course of justice, instructed one Sithole to make a statement to the effect that his original statement, (made to the police), was false and that he (Sithole) had made the original statement under duress. No objection was raised by the defence to the lack of particulars in the charge sheet. At first blush the court a quo's judgment is a magnum opus. It covers 331 pages and reflects an industrious and pain-staking effort on the part of the Regional Magistrate to analyse and evaluate the evidence tendered with an even more enquiring and dissecting approach where he deals with the evidence of the appellants and their

witnesses. Before dealing with the merits of this appeal it is necessary to set out concisely the relevant facts against which the court a quo's finding has to be considered. The catalyst which led to the arrest, arraignment and conviction of the two appellants (respectively the officer commanding 121 Battalion at MATUBATUBA and the legal officer of that Battalion) was the arrest of two fellow officers of 121 Battalion (Bronkhorst and Goosen) on a charge of conspiring to murder a fellow senior officer, the second in command of 121 Battalion (Manekwane). The principal witness in the conspiracy case against Bronkhorst and Goosen was one Sithole, a rifleman employed at 121 Battalion on a 5 year contract. The State's case was that the appellants intervened on behalf of Bronkhorst and Goosen by influencing Sithole to retract his statement (first statement) made to the police in which he implicated Bronkhorst and Goosen as the conspirators in the plot to murder Manekwane. Appellant No. 2, on the State's version, is the officer who initially interviewed Sithole and thereafter on the same day in the presence of appellant No. 1 and other persons influenced and persuaded Sithole to retract his statement in which he declared that he had falsely implicated Bronkhorst and Goosen in the conspiracy to kill Manekwane. On the same day appellant No. 2 took Sithole to the Mtubatuba Magistrate's Court where he made a statement, (second statement) through the intervention of Magistrate Badenhorst, to Inspector Ndwandwe of the SAPS, in which he retracted his first statement on the basis that he had been forced to falsely implicate Bronkhorst and Goosen in the conspiracy to kill Manekwane. 3 When Sithole's retracting statement was handed to the prosecutrix shortly after it had been recorded she informed the investigating officer of Sithole's second statement. That same evening the police obtained a third statement from Sithole in which he retracted his second statement and confirmed his first statement in which he implicated Bronkhorst and Goosen. This brief outline does not set out the finer detail testified to by the State and Defence witnesses. The relevant detail will be dealt with in the analysis of the evidence led in the court a quo. The Regional Magistrate in an obvious attempt to give some structure to his judgment identified Sithole's retraction of his statement (on 12 May

2003) and whether this was done freely and voluntarily or under duress from the appellants as the main plot with three sub-plots namely: The events on 13 May 2003, when Sithole was taken to the Mtubatuba Magistrate's court and subsequently placed in a witness protection programme by the investigating officer.

The events of 15 May 2003 when Sithole allegedly contacted the defence witness Annette Nel and the 2nd appellant and

The events of 16 May on which date Sithole allegedly made phone calls (to Annette Nel and the 2ND appellant) whilst in the witness protection programme. The rationale for the division into the central and sub-plots appears from the following passages of the Regional Magistrate's

judgment:

"In order to make these factual findings, the Court will make an assessment of all the witnesses, and in order to ultimately make a finding on the main plot as to whether in fact Sithole was influenced into making that retracting statement, the Court will have to approach this case in determining on the totality of the evidence whether indeed the State has proved the charge or charges against ... both accused beyond a reasonable doubt, or the converse of that being that whether the accused's version is not reasonable possibly true. In doing so, the Court is (compelled) to assess the testimony of witnesses, not necessarily in the sequence they testified, but with regard to the central plot in mind, that is the events that occurred on 12 May 2003, and then also with regard to the sub-plots referred to above. It may be prudent to mention in so far as the State case is concerned, the testimony of Sithole is crucial, but ultimately the testimony of other witnesses, including, inter alia, Captain Mbatha, Superintendent Zikhali, Inspector Ndwandwe and Captain Mthembu are somewhat relevant and have a decided effect on the quality and cogency of the evidence of Sithole. These witnesses, in this Court's view, are pivotal in determining the credibility as well as the reliability of Sithole's testimony, but as the Court had earlier pointed out, that credibility and reliability must also be considered in the context of the entire evidence that has been led, that is of the accused as well as any other witness that had testified in this case, if regard is to be had to the totality of the evidence within that context at least. Counsel for the defence, in his argument, that is both written heads as well as viva voce in court, contented that the State's case largely depended on the showing of Sithole as a single witness in so far as the main event is concerned as to whether the episode as he described occurred in the bush off the road to St Lucia or not, and that according to counsel, that Sithole as a witness did not prove to be a satisfactory witness. In so far as the first aspect of counsel's argument is concerned, that crucially Sithole is the witness virtually on which the case for the State stands or falls, the Court finds that that sort of submission may be tenable if there was a contest simply between Sithole's testimony and that of both the accused, but that is indeed not the case. This Court is of the view that in a consideration of making a finding in a case of this nature, the Court has to have the approach of a consideration of the totality of the witnesses and the impact it has either towards the State case based on Sithole as a witness, as opposed to both accused in the defence case. Moreover, in this case the Court finds that a unique situation arises where the credibility of not only Sithole, but both accused and of course the primary witness such as Annette Nel has to be considered with regard to events of a material nature which allegedly unfolded from the day after Sithole allegedly made a retracting statement, and these would be by reference to findings in so far as the sub-plots are concerned. This Court believes that it is essential that in the scheme of things in this case that the findings as to whose version the Court should believe in so far as the sub-plots are concerned are contributing factors in determining where the truth lies, and that is what this Court has to seek, nothing more but the truth. The following remarks of the Regional Magistrate are also apposite; "The Court having had insight into this case from the inception, and having heard all the evidence, having summarised it, and after having heard counsels' argument as well, must point out that this case has all the characteristics of a tragic play where, inter alia the prejudices, bias and so forth based on race

kinsmanship, partisanship and other prejudices are rife, and were indeed exposed." Having warned himself thus one would have expected that the Regional Magistrate would approach the case with an objective and open mind. However he did not do so. He lost sight of the fact that Sithole's first and second statement revealed two possible plots namely a conspiracy on the part of white officers to get rid of Manekwane and/or a conspiracy on the part of black officers to get rid of the white officers. This is borne out by the following remarks in his judgment: "This Court is not dealing with the truth or otherwise of the allegations made by Sithole in the initial implication of Bronkhorst and Goosen, far from it. This Court is simply dealing with a State witness who had made a statement to the South African Police Services as to whether this witness was made to retract that statement or not. The Court would not go into the merits of the initial statement, that would be usurping the function of the presiding magistrate who dealt with that matter". It is clear from these remarks that the Regional Magistrate had closed his mind to the probability that Sithole had falsely implicated Bronkhorst and Goosen, that he went to 2nd appellant of his own volition and disclosed to him the falsity of his final statement and that his second statement retracting his first statement, reflected the true position. This oversight on the part of the Regional Magistrate resulted in him defining the main plot solely based on the State case.

IN THE HIGH COURT OF SOUTH AFRICA

(NATAL PROVINCIAL DIVISION)

CASE NO.: AR 291/06

In the matter between:

Louise T van Eeden First Appellant

Ferdinand J Labuschagne Second Appellant

and

The State Respondent

JUDGMENT

VAN DER REYDEN, J.:

The court a quo granted the appellants leave to appeal against their conviction on a charge of defeating or obstructing the course of justice.

The gist of the charge was that they, with the intent to defeat or obstruct the course of justice, instructed one Sithole to make a statement to the effect that his original statement, (made to the police), was false and that he (Sithole) had made the original statement under duress.

No objection was raised by the defence to the lack of particulars in the charge sheet.

At first blush the court a quo's judgment is a magnum opus. It covers 331 pages and reflects an industrious and pain-staking effort on the part of the Regional Magistrate to analyse and evaluate the evidence tendered with an even more enquiring and dissecting approach where he deals with the evidence of the appellants and their witnesses.

Before dealing with the merits of this appeal it is necessary to set out concisely the relevant facts against which the court a quo's finding has to be considered.

The catalyst which led to the arrest, arraignment and conviction of the two appellants (respectively the officer commanding 121 Battalion at MATUBATUBA and the legal officer of that Battalion) was the arrest of two fellow officers of 121 Battalion (Bronkhorst and Goosen) on a charge of conspiring to murder a fellow senior officer, the second in command of 121 Battalion (Manekwane).

The principal witness in the conspiracy case against Bronkhorst and Goosen was one Sithole, a rifleman employed at 121 Battalion on a 5 year contract,

The State's case was that the appellants intervened on behalf of Bronkhorst and Goosen by influencing Sithole to retract his statement (first statement) made to the police in which he implicated Bronkhorst and Goosen as the conspirators in the plot to murder Manekwane.

Appellant No. 2, on the State's version, is the officer who initially interviewed Sithole and thereafter on the same day in the presence of appellant No. 1 and other persons influenced and persuaded Sithole to retract his statement in which he declared that he had falsely implicated Bronkhorst and Goosen in the conspiracy to kill Manekwane.

On the same day appellant No. 2 took Sithole to the Mtubatuba Magistrate's Court where he made a statement, (second statement) through the intervention of Magistrate Badenhorst, to Inspector Ndwandwe of the SAPS, in which he retracted his first statement on the basis that he had been forced to falsely implicate Bronkhorst and Goosen in the conspiracy to kill Manekwane.

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When Sithole's retracting statement was handed to the prosecutrix shortly after it had been recorded she informed the investigating officer of Sithole's second statement. That same evening the police obtained a third statement from Sithole in which he retracted his second statement and confirmed his first statement in which he implicated Bronkhorst and Goosen.

This brief outline does not set out the finer detail testified to by the State and Defence witnesses. The relevant detail will be dealt with in the analysis of the evidence led in the court a quo.

The Regional Magistrate in an obvious attempt to give some structure to his judgment identified Sithole's retraction of his statement (on 12 May

2003) and whether this was done freely and voluntary or under duress from the appellants as the main plot with three sub-plots namely:

The events on 13 May 2003, when Sithole was taken to the Mtubatuba Magistrate's court and subsequently placed in a witness protection

programme by the investigating officer.

The events of 15 May 2003 when Sithole allegedly contacted the defence witness Annette Nel and the 2nd appellant and

The events of 16 May on which date Sithole allegedly made phone calls (to Annette Nel and the 2ND appellant) whilst in the witness protection programme.

The rationale for the division into the central and sub-plots appears from the following passages of the Regional Magistrate's

judgment:

"In order to make these factual findings, the Court will make an assessment of all the witnesses, and in order to ultimately make a finding on the main plot as to whether in fact Sithole was influenced into making that retracting statement, the Court will have to approach this case in determining on the totality of the evidence whether indeed the State has proved the charge or charges against ... both accused beyond a reasonable doubt, or the converse of that being that whether the accused's version is not reasonable possibly true.

In doing so, the Court is (compelled) to assess the testimony of witnesses, not necessarily in the sequence they testified, but with regard to the central plot in mind, that is the events that occurred on 12 May 2003, and then also with regard to the sub-plots referred to above.

It may be prudent to mention in so far as the State case is concerned, the testimony of Sithole is crucial, but ultimately the testimony of other witnesses, including, inter alia, Captain Mbatha, Superintendent Zikhali, Inspector Ndwandwe and Captain Mthembu are somewhat relevant and have a decided effect on the quality and cogency of the evidence of Sithole. These witnesses, in this Court's view, are pivotal in determining the credibility as well as the reliability of Sithole's testimony, but as the Court had earlier pointed out, that credibility and reliability must also be considered in the context of the entire evidence that has been led, that is of the accused as well as any other witness that had testified in this case, if regard is to be had to the totality of the evidence within that context at least.

Counsel for the defence, in his argument, that is both written heads as well as viva voce in court, contented that the State's case largely depended on the showing of Sithole as a single witness in so far as the main event is concerned as to whether the episode as he described occurred in the bush off the road to St Lucia or not, and that according to counsel, that Sithole as a witness did not prove to be a satisfactory witness.

In so far as the first aspect of counsel's argument is concerned, that crucially Sithole is the witness virtually on which the case for the State stands or falls, the Court finds that that sort of submission may be tenable if there was a contest simply between Sithole's testimony and that of

both the accused, but that is indeed not the case. This Court is of the view that in a consideration of making a finding in a case of this nature, the Court has to have the approach of a consideration of the totality of the witnesses and the impact it has either towards the State case based on Sithole as a witness, as opposed to both accused in the defence case.

Moreover, in this case the Court finds that a unique situation arises where the credibility of not only Sithole, but both accused and of course the primary witness such as Annette Nel has to be considered with regard to events of a material nature which allegedly unfolded from the day after Sithole allegedly made a retracting statement, and these would be by reference to findings in so far as the sub-plots are concerned. This Court believes that it is essential that in the scheme of things in this case that the findings as to whose version the Court should believe in so far as the sub-plots are concerned are contributing factors in determining where the truth lies, and that is what this Court has to seek, nothing more but the truth.

The following remarks of the Regional Magistrate are also apposite;

"The Court having had insight into this case from the inception, and having heard all the evidence, having summarised it, and after having heard counsels' argument as well, must point out that this case has all the characteristics of a tragic play where, inter alia the prejudices, bias and so forth based on race kinsmanship, partisanship and other prejudices are rife, and were indeed exposed."

Having warned himself thus one would have expected that the Regional Magistrate would approach the case with an objective and open mind.

However he did not do so. He lost sight of the fact that Sithole's first and second statement revealed two possible plots namely a conspiracy on the part of white officers to get rid of Manekwane and/or a conspiracy on the part of black officers to get rid of the white officers.

This is borne out by the following remarks in his judgment:

"This Court is not dealing with the truth or otherwise of the allegations made by Sithole in the initial implication of Bronkhorst and Goosen, far from it. This Court is simply dealing with a State witness who had made a statement to the South African Police Services as to whether this witness was made to retract that statement or not. The Court would not go into the merits of the initial statement, that would be usurping the function of the presiding magistrate who dealt with that matter".

It is clear from these remarks that the Regional Magistrate had closed his mind to the probability that Sithole had falsely implicated Bronkhorst and Goosen, that he went to 2nd appellant of his own volition and disclosed to him the falsity of his final statement and that his second statement retracting his first statement, reflected the true position.

This oversight on the part of the Regional Magistrate resulted in him defining the main plot solely based on the State case.

He also overlooked the fact that a finding that Sithole went to No 2 appellant of his own volition and disclosed to him the true position namely that he had falsely implicated Bronkhorst and Goosen could only have had one outcome: An acquittal on the charge of Defeating or Obstructing the course of Justice. Having spent considerable time on reading the Regional Magistrate's judgment and the evidence tendered at the trial I am satisfied that because of his misformalization of the main plot and his reliance on perceived discrepancies and conflicts in the evidence of the Defence witnesses, which in his judgment seriously affected their credibility, there is no profit to be found in his zealous approach, in which he relied on these perceived demerits, created by his extensive cross-examination of the Defence witnesses for the basis on which he rejected the defence raised by the appellants. The Regional Magistrate's disavowal of any reliance placed on the results of his cross-examination is at odds with his reference throughout his judgment to these demerits and his reliance thereon. In this regard see his reasons set out in Annexure "A" hereto for his questioning of the Defence witnesses. The more reliable and time honoured approach is to identify the issues, the facts relating thereto and then consider the merits and demerits of the evidence of the witnesses for the State and the Defence and to have regard to the probabilities. *S v Guess* 1976(4) SA 715 (AD). In this regard the court a quo was presented with the evidence of Sithole, a single witness, on the crisp issue whether he retracted his statement because of the appellants interference or whether he approached the 2nd appellant on his own volition in order to tell him the truth. In this process the court a quo had to consider the alibi raised by the 1st appellant to the effect that at the time of the alleged interference, intimidation or persuasion of Sithole he was not at the secluded spot where these events allegedly took place. His defence was that he was in his office until lunch time. Earlier that morning his official Land Rover had to undergo a service inspection by the transport Section of 121 Battalion, and he only got the Land Rover's keys returned to him by his secretary at lunch time when he left his office for lunch. The fact that his Land Rover had gone for a service inspection on the day in question and the keys returned to his secretary is confirmed by Sithole. The official inspection release document reflects that his Land Rover inspection had been completed at 11h00 on the day in question

- some time after Sithole had been influenced on his way to the magistrate of Mtubatuba to retract his statement. He and his Land Rover could therefore not have been at the spot where Sithole was persuaded to retract his statement. His secretary and the telephone records of incoming landline phone calls to the 2nd appellant confirm his presence in his office right up to lunch time -thereafter the records reflect that incoming landline calls to his office were redirected to his cellphone. This was during the time period after lunch that the 2nd appellant was at the Mtubatuba Magistrates Court. Dealing now with 2nd appellant's defence. The investigating officer in Bronkhorst and Goosen's case confirmed that he did not identify Sithole to the appellants as the person who implicated Bronkhorst and Goosen in the Manekwane murder conspiracy plot on Friday 9 May 2003 when Bronkhorst and Goosen were arrested. If it is accepted, that 2nd appellant was unaware that Sithole had implicated Bronkhorst and Goosen, then the probabilities favour his version, as supported by Annette Nel, that Sithole on his own volition came to him and disclosed to him on 12 May 2003 that

he had falsely implicated Bronkhorst and Goosen. However if 2nd appellant was aware of the fact that Sithole had implicated Bronkhorst and Goosen before the 12 May 2003 then the probabilities favour Sithole's version that 2nd appellant called him to his office and confronted him with this knowledge and thereafter persuaded him to retract his statement. The court a quo had no problem in resolving this issue, It found that because of the Magistrate's intervention to arrange for the retracting statement to be taken by a police officer not involved in the investigation of Bronkhorst and Goosen's case, and the appellant's influence and contact with the judiciary, 2nd appellant must have been aware of the fact that Sithole was the person that implicated Bronkhorst and Goosen. This is but one of numerous inferences drawn by the magistrate against the appellants with no acceptable factual basis for such an inference or probability. A further aspect which favours 2nd appellants defence that he did not intimidate and/or influence Sithole at the alleged secluded spot on the way to the Magistrate's Court is his testimony that he contacted Colonel Rothman, the Legal Officer for KwaZulu Natal, and informed him that Sithole had told him that he had falsely implicated Bronkhorst and Goosen. This phone call was made shortly after 08h00. Rothman confirmed 2nd appellants evidence that he (Rothman) instructed 2nd appellant to take Sithole to a Magistrate for a statement to be taken. Again, having regard to the probabilities - why was there any need for Sithole to be taken to a secluded spot to extract a retraction from him if he had, shortly after 08h00, informed 2nd appellant, that he had falsely implicated Bronkhorst and Goosen? If the two appellants' defence, supported by their evidence and by defence witnesses are weighed against Sithole's evidence and having regard to the merits and demerits of Sithole and the appellants and their witnesses the demerits the Regional Magistrate relied on the part of the defence witnesses' were contradictions arising from cross-examination by him of the appellants and their key witnesses which equalled and in some instances exceeded the length of the prosecutor's cross-examination. Surprisingly the Regional Magistrate did not question Sithole and the State witnesses at length and even more surprisingly he did not view the fact that Sithole had made conflicting statements, and whose evidence was riddled with contradictions and improbabilities, as demerits in the latter's evidence. Sithole's evidence had to be weighed against 1st appellant's alibi. It is trite law that the onus is on the State to prove beyond reasonable doubt that 1st appellant's alibi is false beyond reasonable doubt. The State failed to do so. The only proper and correct finding the court a quo could and should have made is that the State did not discharge the required onus and that there was no basis on which it could find that 1st appellant was present at the secluded spot where Sithole was influenced to retract his original statement. It follows logically that once 1st appellant's alibi is accepted there is no basis on which a court can find that 2nd appellant was at the secluded spot where Sithole was persuaded to retract his original statement. The final nail in the State case is the undisputed evidence of the telephone call made to 2nd appellant's office landline from a call box near the place where Sithole had been placed in a witness protection programme ostensibly because his life was in danger. The events surrounding the witness protection programme and telephone call from Sithole to 2nd appellant were accepted by the court a quo as corroboration of Sithole's evidence on the main plot. The first question that springs to mind is why was Sithole not

placed in the witness protection programme on the night of 12 May 2003 when he retracted his retracting statement? Why was he placed in the protection programme only on the 13 May 2003 after 2nd appellant had taken Sithole to the IU Magistrate's Court in anticipation of a bail application in respect of Bronkhorst and Goosen? The most probable answer is that the investigating officer, sensing that Sithole may be called to testify, lost no time in lodging a complaint with the Magistrate of Empangeni, who exercised control over the Mtubatuba Court, to put a stop to the bail application on the grounds of interference from the Magistrate and the appellants. Why was it necessary for the investigating officer, who had removed Sithole to his office in Richards Bay, to lock Sithole up in his office whilst preparations were made for him to be placed in the witness protection programme? The most probable answer is that he did this to stop any possibility of Sithole testifying at the bail application and not because his life was in danger. The Regional Magistrate rejected 2nd appellant's evidence that Sithole phoned him and complained that he had been placed in the witness protection programme against his will. He furthermore rejected 2nd appellants' evidence that he phoned Sithole to that call box when Sithole ran out of money. It is noteworthy that Captain Bhengu, the investigating officer, took offence when questioned by counsel for the appellants on his lack of enthusiasm to follow up the information concerning the location and telephone number of the call box from which 2nd appellant said that Sithole had phoned him from. The relevant extract from his evidence appears in the Annexure "A" to this judgment. Here again the Regional Magistrate's imagination led him astray based on speculation on the part of the investigating officer. He found that the appellants, because of their influence and contact in the Army, had acquired their knowledge of Sithole's safe house and the call box telephone number through the Army Intelligence Network. The reality is that there was not an iota of evidence that the appellants had acquired their knowledge of Sithole's whereabouts through the Army Intelligence Network. The source of their information was Sithole. This is confirmed beyond reasonable doubt by the call box number appearing on 2nd appellant's telephone record - confirming his evidence that he phoned that call box number on 16 May 2003 to continue his conversation with Sithole when the latter ran out of money. There is no need to deal at any length with the Regional Magistrate's descending into the arena. Suffice it to say his questioning of the appellants and their key witnesses exceeded the bounds of any enquiry to clear up issues. It amounted to a full scale cross-examination of these witnesses and reinforced the impression that he had aligned himself with the State case. The reasons given by the Regional Magistrate are without merit. See the relevant extract from the record in Annexure "B" to this judgment. Having warned himself of the racial undertones of the case one would have expected him to have kept an open mind as to which faction was responsible for the racial friction. However his judgment is interspersed with remarks which tend to favour the State witnesses

and denigrate the defence witnesses. These remarks seen against the Regional Magistrate's cross-examination of the defence witnesses reveal a lack of objectivity and impartiality and bias against the defence witnesses.

He also overlooked the fact that a finding that Sithole went to No 2 appellant of his own volition and disclosed to him the true position namely that he had falsely implicated Bronkhorst and Goosen could only have had one outcome: An acquittal on the charge of Defeating or Obstructing the course of Justice.

Having spent considerable time on reading the Regional Magistrate's judgment and the evidence tendered at the trial I am satisfied that because of his misformalization of the main plot and his reliance on perceived discrepancies and conflicts in the evidence of the Defence witnesses, which in his judgment seriously affected their credibility, there is no profit to be found in his zealous approach, in which he relied on these perceived demerits, created by his extensive cross-examination of the Defence witnesses for the basis on which he rejected the defence raised by the appellants.

The Regional Magistrate's disavowal of any reliance placed on the results of his cross-examination is at odds with his reference throughout his judgment to these demerits and his reliance thereon.

In this regard see his reasons set out in Annexure "A" hereto for his questioning of the Defence witnesses.

The more reliable and time honoured approach is to identify the issues, the facts relating thereto and then consider the merits and demerits of the evidence of the witnesses for the State and the Defence and to have regard to the probabilities. *S v Guess* 1976(4) SA 715 (AD).

In this regard the court a quo was presented with the evidence of Sithole, a single witness, on the crisp issue whether he retracted his statement because of the appellants interference or whether he approached the 2nd appellant on his own volition in order to tell him the truth.

In this process the court a quo had to consider the alibi raised by the 1st appellant to the effect that at the time of the alleged interference, intimidation or persuasion of Sithole he was not at the secluded spot where these events allegedly took place. His defence was that he was in his office until lunch time. Earlier that morning his official Land Rover had to undergo a service inspection by the transport Section of 121 Battalion, and he only got the Land Rover's keys returned to him by his secretary at lunch time when he left his office for lunch. The fact that his Land Rover had gone for a service inspection on the day in question and the keys returned to his secretary is confirmed by Sithole.

The official inspection release document reflects that his Land Rover inspection had been completed at 11h00 on the day in question

- some time after Sithole had been influenced on his way to the magistrate of Mtubatuba to retract his statement. He and his Land Rover could therefore not have been at the spot where Sithole was persuaded to retract his statement.

His secretary and the telephone records of incoming landline phone calls to the 2nd appellant confirm his presence in his office right up to lunch time -thereafter the records reflect that incoming landline calls to his office were redirected to his cellphone. This was during the time period after lunch that the 2nd appellant was at the Mtubatuba Magistrates Court.

Dealing now with 2nd appellant's defence. The investigating officer in Bronkhorst and Goosen's case confirmed that he did not identify Sithole to the appellants as the person who implicated Bronkhorst and Goosen in the Manekwane murder conspiracy plot on Friday 9 May 2003 when Bronkhorst and Goosen were arrested.

If it is accepted, that 2nd appellant was unaware that Sithole had implicated Bronkhorst and Goosen, then the probabilities favour his version, as supported by Annette Nel, that Sithole on his own volition came to him and disclosed to him on 12 May 2003 that he had falsely implicated Bronkhorst and Goosen.

However if 2nd appellant was aware of the fact that Sithole had implicated Bronkhorst and Goosen before the 12 May 2003 then the probabilities favour

Sithole's version that 2nd appellant called him to his office and confronted him with this knowledge and thereafter persuaded him to retract his statement.

The court a quo had no problem in resolving this issue,

It found that because of the Magistrate's intervention to arrange for the retracting statement to be taken by a police officer not involved in the investigation of Bronkhorst and Goosen's case, and the appellant's influence and contact with the judiciary, 2nd appellant must have been aware of the fact that Sithole was the person that implicated Bronkhorst and Goosen.

This is but one of numerous inferences drawn by the magistrate against the appellants with no acceptable factual basis for such an inference or probability.

A further aspect which favours 2nd appellants defence that he did not intimidate and/or influence Sithole at the alleged secluded spot on the way to the Magistrate's Court is his testimony that he contacted Colonel Rothman, the Legal Officer for KwaZulu Natal, and informed him that Sithole had told him that he had falsely implicated Bronkhorst and Goosen. This phone call was made shortly after 08h00. Rothman confirmed 2nd appellants evidence that he (Rothman) instructed 2nd appellant to take Sithole to a Magistrate for a statement to be taken.

Again, having regard to the probabilities - why was there any need for Sithole to be taken to a secluded spot to extract a retraction from him if he had, shortly after 08h00, informed 2nd appellant, that he had falsely implicated Bronkhorst and Goosen?

If the two appellants' defence, supported by their evidence and by defence witnesses are weighed against Sithole's evidence and having regard to the merits and demerits of Sithole and the appellants and their witnesses the demerits the Regional Magistrate relied on the part of the defence witnesses' were contradictions arising from cross-examination by him of the appellants and their key witnesses which equalled and in some instances exceeded the length of the prosecutor's cross-examination.

Surprisingly the Regional Magistrate did not question Sithole and the State witnesses at length and even more surprisingly he did not view the fact that Sithole had made conflicting statements, and whose evidence was riddled with contradictions and improbabilities, as demerits in the latter's evidence.

Sithole's evidence had to be weighed against 1st appellant's alibi. It is trite law that the onus is on the State to prove beyond reasonable doubt that 1st appellant's alibi is false beyond reasonable doubt. The State failed to do so. The only proper and correct finding the court a quo could and should have made is that the State did not discharge the required onus and that there was no basis on which it could find that 1st appellant was present at the secluded spot where Sithole was influenced to retract his original statement.

It follows logically that once 1st appellant's alibi is accepted there is no basis on which a court can find that 2nd appellant was at the secluded spot where Sithole was persuaded to retract his original statement.

The final nail in the State case is the undisputed evidence of the telephone call made to 2nd appellant's office landline from a call box near the place where Sithole had been placed in a witness protection programme ostensibly because his life was in danger.

The events surrounding the witness protection programme and telephone call from Sithole to 2nd appellant were accepted by the court a quo as corroboration of Sithole's evidence on the main plot.

The first question that springs to mind is why was Sithole not placed in the witness protection programme on the night of 12 May 2003 when he retracted his retracting statement? Why was he placed in the protection programme only on the 13 May 2003 after 2nd appellant had taken Sithole to the

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Magistrate's Court in anticipation of a bail application in respect of Bronkhorst and Goosen?

The most probable answer is that the investigating officer, sensing that Sithole may be called to testify, lost no time in lodging a complaint with the Magistrate of Empangeni, who exercised control over the Mtubatuba Court, to put a stop to the bail application on the grounds of interference from the Magistrate and the appellants. Why was it necessary for the investigating officer, who had removed Sithole to his office in Richards Bay, to lock Sithole up in his office whilst preparations were made for him to be placed in the witness protection programme?

The most probable answer is that he did this to stop any possibility of Sithole testifying at the bail application and not because his life was in danger.

The Regional Magistrate rejected 2nd appellant's evidence that Sithole phoned him and complained that he had been placed in the witness protection programme against his will. He furthermore rejected 2nd appellant's evidence that he phoned Sithole to that call box when Sithole ran out of money.

It is noteworthy that Captain Bhengu, the investigating officer, took offence when questioned by counsel for the appellants on his lack of enthusiasm to follow up the information concerning the location and telephone number of the call box from which 2nd appellant said that Sithole had phoned him from. The relevant extract from his evidence appears in the Annexure "A" to this judgment.

Here again the Regional Magistrate's imagination led him astray based on speculation on the part of the investigating officer. He found that the appellants, because of their influence and contact in the Army, had acquired their knowledge of Sithole's safe house and the call box telephone number through the Army Intelligence Network.

The reality is that there was not an iota of evidence that the appellants had acquired their knowledge of Sithole's whereabouts through the Army Intelligence Network. The source of their information was Sithole. This is confirmed beyond reasonable doubt by the call box number appearing on 2nd appellant's telephone record - confirming his evidence that he phoned that call box number on 16 May 2003 to continue his conversation with Sithole when the latter ran out of money.

There is no need to deal at any length with the Regional Magistrate's descending into the arena. Suffice it to say his questioning of the appellants and their key witnesses exceeded the bounds of any enquiry to clear up issues. It amounted to a full scale cross-examination of these witnesses and reinforced the impression that he had aligned himself with the State case.

The reasons given by the Regional Magistrate are without merit. See the relevant extract from the record in Annexure "B" to this judgment.

Having warned himself of the racial undertones of the case one would have expected him to have kept an open mind as to which faction was responsible for the racial friction. However his judgment is interspersed with remarks which tend to favour the State witnesses

and denigrate the defence witnesses.

These remarks seen against the Regional Magistrate's cross-examination of the defence witnesses reveal a lack of objectivity and impartiality and bias against the defence witnesses.

Rothman bore the full brunt of the Regional Magistrate's discontent with the Defence case. In this regard Exhibit "F", (Annexure "C" hereto) a Minute from Rothman to the Provincial Commissioner, elicited an emotional outburst from the Regional Magistrate which highlighted his lack of objectivity, his alignment with the State case and a biased attitude towards the defence. A copy of

the relevant part of his judgment appears in Annexure "D". It is noteworthy that there is no reference to a "white magistrate" in Exhibit "F", yet the Regional Magistrate on pages 1384 lines 17 to 26 and 1385 lines 1 to 28 based his finding for racial prejudice on the part of ROTHMAN *inter alia* on the fictional reference to a "white magistrate". In conclusion I am of the view that Magistrate Badenhorst was treated rather harshly by the Regional Magistrate. This court is not called upon to adjudicate Magistrate Badenhorst's conduct in facilitating the taking of Sithole's statement. On the face of it his conduct was questionable. That however is an issue for the Magistrate's Commission to deal with. The impression created by the conduct of the Regional Magistrate when he questioned Magistrate Badenhorst was that the latter was prosecuted and convicted by him and thereafter left to be sentenced by the Magistrate's Commission. What the Regional Magistrate lost sight of was that Magistrate Badenhorst was a witness and not a Respondent in a Disciplinary Enquiry and that the adverse conclusions he drew against Magistrate Badenhorst might influence any subsequent disciplinary enquiry. Having regard to the reference in his judgment to his role in Court Marshals in which he presided in the Navy he should warn himself for future reference to concentrate on his function as a presiding officer in the Regional Court and not as a Naval Officer presiding

in a Court Marshal or a presiding officer in a Disciplinary Enquiry. I am satisfied that the appellants appeal should be upheld and their convictions and sentences be set aside

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Having regard to the reference in his judgment to his role in Court Marshals in which he presided in the Navy he should warn himself for future reference to concentrate on his function as a presiding officer in the Regional Court and not as a Naval Officer presiding

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I am satisfied that the appellants appeal should be upheld and their convictions and sentences be set aside

I make that order KOEN, J: I agree.

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KOEN, J: I agree.

ANNEXURE"A" MTHEMBU'S EVIDENCE ON WHY HE DID NOT FOLLOW UP TELEPHONE NUMBER OF CALL BOX MR BOOYENS Ja but really, Captain, I mean after this bail application at least, you are an experienced policeman, you are not a constable with three months duty. — Sir, you have rightfully said that I'm experienced. It was due to that very experience, I could see through my experience that it was not necessary for me to follow what was said further. Let me tell you why it was important and I would have expected you to have been able to figure it out by yourself, COURT Yes, let's hear what the reasons for you should follow it up, MR BOOYENS At the time of the bail application I was in possession of highly classified information as to the whereabouts of a safe house. COURT Wait, wait, wait, don't answer yet. MR BOOYENS Ja. --- No, sir, I'm answering that. That's what you heard, it meant nothing to me. It did not concern me at all. You see, your Director Beavon knew that the man was - my information was right, he was a Jacaranda Lodge, but not only did I know that, but I told you why I knew it. I said that your witness had phoned my client and gave him the information. COURT You told him this? MR BOOYENS In cross-examination yes, Your Worship. COURT Yes. MR BOOYENS Because at page 73 of the bail application I put to you, "That's in fact a call box with a number that is quite close to Jacaranda Lodge". I said to you that from that call box that I could give you the number, but you had the information, the State had the information in any case, your witness made a number of phone calls to not only the army base, but to accused No 2's house. COURT Yes. MR BOOYENS It is also contained in Exhibit F that you could have got from Director Beavon, because I told you he had all the information, that in fact No 2 at one stage phoned him back to that number. Now, as an experienced policeman, you must know that circumstantially the value of this is the following. Your witness is at Jacaranda Lodge. There's a phone box near to it. From this phone box calls are made to 121 Battalion and to the private phone number of accused No 2. Are you saying that evidence is unimportant? — I repeat and I would explain. I repeat that it was not important to me, it was not necessarily important. COURT Yes. As I've said shortly before that I need now to teach you how to investigate cases. The public telephone booth is outside in the open. It will never tell you then name of the person who dialled the number there and phoned as to who was that person. I do not deny that there was some person who phoned the accused No 2 from that particular phone, and that is not certainty that that person who phoned was Sithole. And in your mind did you have a theory who possibly could have done this if it was not Sithole? — I say yes,

Your Worship. Somebody could have phoned and even called himself Sithole. Yes, but do you ... (intervention). — Being not Sithole. Yes. For what purpose? — Your Worship, the same people concerned can do it themselves in order to defeat the success of the case. Your Worship, I say it was whoever phoned as alleged was still the same plot of trying to defeat the ends of justice by the same group. BOOYENS And they just coincidentally knew this phone from a location quite near to this highly secret place where this witness is kept? — Your Worship, the army has got a network which is very vast and sophisticated. For that matter the information of the Court, these accused have got relatives in Pretoria. Most of them they come from Pretoria, some of them. Your Worship, I with respect to the counsel, I wish he must take this serious. We are talking about the life of somebody which is concerned. I am taking this very seriously. — To prove their interest and their ability, myself being the investigating officer at and until that allegation I did not know the whereabouts of Sithole, but they already knew where Sithole was. Let's go further. We look at these documents I've given evidence using the word that the documents were hijacked. One can see from that, one can read how sophisticated or how deep these people are. COURT In a nutshell what you're saying is they have contacts in the right places? — I say there's nowhere where they cannot

penetrate or infiltrate. Yes. MR BOOYENS Okey. So, we've now heard about the nebulous network of theirs. Would you try to suggest some names or type of people or anything of that nature? — Yes. Okay, let's hear the names, because I want to subpoena these spies in the Defence Force. COURT Well, it doesn't necessarily mean defence, but the people who you say are their connections or contacts. MR BOOYENS Ja, who are the connections? COURT Who do you believe are their connections who assisted them, not only in this situation, but generally as you're trying to say, that penetrate anywhere? — Your Worship, I'm talking about the network. I say the network is too wide. Their network is very wide. MR BOOYENS No, let's have some names of the rest of the net. No, that I'm not to say. Okay, you don't know a single person that's part of the network? Pages 482 line 4 through to page 485 line 14. COURT That is your inference in other words? That is my

ANNEXURE"A"

MTHEMBU'S EVIDENCE ON WHY HE DID NOT FOLLOW UP TELEPHONE NUMBER OF CALL BOX

MR BOOYENS Ja but really, Captain, I mean after this bail application at least, you are an experienced policeman, you are not a constable with three months duty. — Sir, you have rightfully said that I'm experienced. It was due to that very experience, I could see through my experience that it was not necessary for me to follow what was said further.

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inference, Your Worship ANNEXURE "B" REGIONAL MAGISTRATE'S REASONS FOR QUESTIONING DEFENCE WITNESSES This Court believes that in this case the Court found that the testimony of most of the defence witnesses that on various occasions, and on various aspects gave evidence which did not accord, not only with the Court's sense of, inter alia, logic, probabilities, reality and reasonableness, and of course the Court's own perception of what legal principles and legal practice is all about, in that context. In this Court's view, such witnesses of the defence, in particular for example Annette Nel, even to that extent accused 2, undermined the experience, the intelligence and sense of logic and reasonableness of not only the counsel for the State, but also the Court by expecting the Court to simply believe any form of evidence despite its unreasonableness, its being illogical and just contrary to plain, simple sense of reality. This Court must point out that a judicial officer is not a silent umpire, but a trier of fact to ensure that the truth has been told. A criminal trial is not a game. A judicial officer, as I have said, has a

duty in the interests of justice to seek and establish what the truth is, Where witnesses' testimony does not indeed accord with considerations of reasonableness, reality, common sense and of course the Court's own experience and intuition, then the presiding officer would be failing in his duty not to question such a witness to ensure that justice is seen to be done. In fact as this Court believe it cannot be said that where a witness gives such poor evidence and if he is not questioned by the Court, and that witness' evidence could go either way in favour of either party, may it be for the State or the defence, then that witness at all times would leave the Court with the belief that they could simply have conned, to put the word simply, in simple language, but effective language, have conned the presiding officer into believing his or her improbable or rather ridiculous version. That is what would happen. That would not only undermine the judiciary, but it will undermine the whole criminal justice system of this country if the integrity of the judiciary is so compromised. The Court wants to say that it believes that if the presiding officer fails to bring to the attention of such witness by proper, incisive enquiry of an erroneous belief that such enquiry may be deemed to reflect bias or lack of independence on the part of such presiding officer in common legal parlance entering the arena, then such witness or witnesses are, as I said, likely to believe or perceive at the end of the day that the Court naively accepted the credibility of their testimony despite its impropriety or shortcomings. They would indeed believe that they had duped the presiding magistrate. Surely such a belief or perception as I have said, is not in the interests of justice as well. In this Court's view, on the totality of the evidence in any event, other than that evidence that might have been elicited by the Court's questioning of such defence witnesses, the evidence otherwise by the State and of course having a consideration of the defence case would have made no difference to the final outcome of this Court's decision, and then in that regard therefore this Court does not believe that its questioning of any of the defence witnesses in so far as those aspects of the testimony which this Court found as being unreasonable would be a defining factor in its ultimate decision. Page 1392 Line 1 to 26 Page 1393 Line 1 -24 ANNEXURE "C" 1, 2 and 3 Telephone:

(031) 369 1154 Enquiries: Col ID. Rothman Cell: 084 555 6066 Facsimile:

(031) 369 1558 South African National Defence Force Legal Satellite Office Durban Army Support Base Durban P.O. Box 21096 Bluff 4036 27 May 2003 FAX TO: SAPS KZN HQ FAX NO: (031) 325 4746 ATTENTION: Provincial Commissioner Khanyile NO OF PAGES (Including this one): 3 APPOINTMENT TO DISCUSS MTUBATUBA CAS 88/1/03 - CONSPIRACY TO MURDER CASE

1. I would appreciate it very much if you could grant me an appointment to discuss, not the merits of above case, but the circumstances

surrounding it, and my concerns regarding misinterpretations and wrong conclusions drawn about it.

2. I would appreciate it very much if you could grant me this appointment anytime during the current week and, if possible, to have your legal advisor and Director Bevan of the Organised Crime Unit also present, I have discussed this case with Commissioner Ngidi as well and he can fill you in about it and be present as well if you wish it. 3. The background of this case is shortly as follows; (seen from our perspective)
 - a. On 9 May 2003 a Capt Mbata from Mtubatuba SAPS arrested two white officers namely, a Maj Bronkhorst and a Capt Goosen on a charge of conspiracy to murder, we later heard, a Maj Manekwane, 2IC of 121 SAI Bn.
 - b. A few days later a Rfn V.J. Sithole, working at 121 SAI Bn's transport section approached a Mrs Annette Krige, transport clerk, alleging that he made a false statement to the SAPS about the two accused officers and that it bothers him tremendously now that they are arrested.
 - c. She then sent him to my law officer working at the unit, namely Maj F.J. Labuschagne, who on my advice, took Rfn Sithole to the local magistrate to make his admission. This Magistrate sent him over to an independent SAPS member who took it down wherein Rfn Sithole apparently retracted his first statement and also linked the 10 to Maj Manekwane in a possible conspiracy agreement.
 - d. It seems that Rfn Sithole was then torn between the SANDF the SAPS members and were alternatively in the presence of both. He was eventually carted away by the SAPS and ended up in the 'Witness

Protection Programme' and we started hearing rumours that the SAPS had opened an intimidation and defeating the ends of justice -docket against the military legal officer, Maj Labuschagne and against Lt Col Van Ferfen, OC of 121 SAI Bn.

- e. " On 15 May 2003 at ± 13,15 Maj Labuschagne got a phone call from Rfn Sithole at his home who alleged that he is being kept at a place called "Jakaranda Lodge, Frederika Street, Pretoria', against his will and that he wants us to fetch him, He alleged that he called from a payphone near the lodge and gave the number as

(012) 331 0845.

- f. Rfn Sithole phoned Maj Labuschagne again at ± 15.00 that same day at his office at 121 SAI Bn and again on 16 May 2003 at ± 09.00 to Maj Labuschagne's office. (Maj Labuschagne's work telephone number is (035) 550 6772/6792 and his home number is (035) 550 3429.
- g. On 16 May 2003 in a spirit of trust and honesty towards the SAPS I phoned the KZN Prov Head of the Organised Crime Unit, a Dir Bevan at ext 4731 and told him about the phone calls. I requested him to find out what the story is and to establish what is going on with Rfn Sithole. In order to convince him about the truth of my story and to show our honesty and sincerity I gave him the address of the place Rfn Sithole alleges that he is being kept at. He undertook to come back to me and notwithstanding numerous phone calls to his office, I

never heard from this Director Bevan again.

- h. Because this whole case rests on Rfn Sithole's version 1 decided on 20 May 2003 to personally go to Director Bevan's office to find out what was going on. Maj Labuschagne, who was in Durban for medical examinations in order to deploy, if needed, to the DRC as part of a planned Peace Enforcement Operation if violence persists, accompanied me so that he can tell the story first hand to those who want to listen. Dir Bevan was not in and I went to Commissioner Ngidi's office where he was so kind as to listen to our story. Maj Labuschagne was in 'PT clothes for the medical examination and I explained the reason for it to Comm Ngidi.
- i. The bail hearing of the two accused was scheduled for Friday 23 May 2003 at Empangeni Regional Court. Bail was apposed and I attended as observer wrt the interests of the SANDF.
- j. You can imagine my surprise when the Investigating Officer, Capt Mbata, testified about the following:
 - i. That a General from the SANDF phoned and that he knew exactly where Rfn Sithole and his family were being kept under the witness protection programme and that if we are willing to go to such lengths in so short a time to find this out, then surely the witness's life is in danger.
 - ii. That Maj Labuschagne and Lt Col Van Eeden are suspects in an intimidation and defeating the ends of justice - investigation - and that the SANDF are currently and in great haste organising to get Maj Labuschagne out of the country in order to escape being arrested.
- k. The Magistrate, was very impressed by this and I am quite convinced that this led him to refuse bail to the two accused as he clearly did not believe our version and accepted the IO's version. It emerged later that he did so, despite having known Commissioner Ngidi for some number of years, that he went over Commissioner Ngidi's head to Director Bevan. The Court got the firm impression by the conduct and content of the testimony of Colonel Rothman that he, Colonel Rothman perceived almost every other member of the South African Police Services and the Department of Public Prosecutions as being biased, prejudiced and partisan in the interests of Captain Mbatha. In my view, this excuse was one of convenience rather than the reality. This perception of Colonel Rothman, however, is the very conduct portrayed by him and others when he approached Director Bevan who happened to be a white person of the white race. Colonel Rothman's letter, Exhibit F, paragraph 7 exposes such bias prejudice and lack of objectivity or impartiality in many respects on his part, and it perhaps might be prudent to expose those, where he says that: "Lieutenant-Colonel van Eeden (with his details) of the 121 SAI Battalion, Major Labuschagne legal officer, 121 Battalion, Major Bronkhorst, intelligence officer at 121 Battalion and Captain Goosen, transport officer at the same battalion have assisted the SAPS in this Province on numerous occasions and they deserve better treatment from the SAPS than they got so far. Facts should not be twisted and misrepresented, but given truthfully and fairly so that justice follows its proper course. You should probably realise by now that I keep our SOP (I am not sure what that means) WRT SAPS and SANDF investigations of crimes to the letter, that I never interfere in the merits of your cases, but that I take a tough

stand on the rights of SANDF members, be they black or white, and that I am convinced that we would be treated fairly by you and your senior officers, and that is why I would like an appointment with you to clarify this situation to restore relations which has not been slightly damaged by the investigating officer's testimony and actions in the bail hearing." entire evidence and of course the conduct that has been expressed by him, and of course his evidence when he referred to the magistrate concerned had to be white. At the end of the day, in so far as Colonel Rothman is concerned, the Court must express its deep regret, and indeed sadness, as to his conduct as a witness as well, especially if regard is had to his status and experience in the Defence Force. He is obviously a poor role model for people like accused 2. Page 1384-Line 17-26 Page 1385-Line 1 -26

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ANNEXURE"B"

REGIONAL MAGISTRATE'S REASONS FOR QUESTIONING DEFENCE WITNESSES

This Court believes that in this case the Court found that the testimony of most of the defence witnesses that on various occasions, and on various aspects gave evidence which did not accord, not only with the Court's sense of, inter alia, logic, probabilities, reality and reasonableness, and of course the Court's own perception of what legal principles and legal practice is all about, in that context. In this Court's view, such witnesses of the defence, in particular for example Annette Nel, even to that extent accused 2, undermined the experience, the intelligence and sense of logic and reasonableness of not only the counsel for the State, but also the Court by expecting the Court to simply believe any form of evidence despite its unreasonableness, its being illogical and just contrary to plain, simple sense of reality.

This Court must point out that a judicial officer is not a silent umpire, but a trier of fact to ensure that the truth has been told. A criminal trial is not a game. A judicial officer, as I have said, has a duty in the interests of justice to seek and establish what the truth is, Where witnesses' testimony does not indeed accord with considerations of reasonableness, reality, common sense and of course the Court's own experience and intuition, then the presiding officer would be failing in his duty not to question such a witness to ensure that justice is seen to be done. In fact as this Court believe it cannot be said that where a witness gives such poor evidence and if he is not questioned by the Court, and that witness' evidence could go either way in favour of either party, may it be for the State or the defence, then that witness at all times would leave the Court with the belief that they could simply have conned, to put the word simply, in simple language, but effective language, have conned the presiding officer into believing his or her improbable or rather ridiculous version. That is what would happen. That would not only undermine the judiciary, but it will undermine the whole criminal justice system of this country if the integrity of the judiciary is so compromised.

The Court wants to say that it believes that if the presiding officer fails to bring to the attention of such witness by proper, incisive enquiry of an erroneous belief that such enquiry may be deemed to reflect bias or lack of independence on the part of such presiding officer in common legal

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27 May 2003

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NO OF PAGES (Including this one): 3

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 - a. On 9 May 2003 a Capt Mbata from Mtubatuba SAPS arrested two white officers namely, a Maj Bronkhorst and a Capt Goosen on a charge of conspiracy to murder, we later heard, a Maj Manekwane, 2IC of 121 SAI Bn.
 - b. A few days later a Rfn V.J. Sithole, working at 121 SAI Bn's transport section approached a Mrs Annette Krige, transport clerk, alleging that he made a false statement to the SAPS about the two accused officers and that it bothers him tremendously now that they are arrested.
 - c. She then sent him to my law officer working at the unit, namely Maj F.J. Labuschagne, who on my advice, took Rfn Sithole to the local magistrate to make his admission. This Magistrate sent him over to an independent SAPS member who took it down wherein Rfn Sithole apparently retracted his first statement and also linked the 10 to Maj Manekwane in a possible conspiracy agreement.
 - d. It seems that Rfn Sithole was then torn between the SANDF the SAPS members and were alternatively in the presence of both. He was eventually carted away by the SAPS and ended up in the 'Witness

Protection Programme' and we started hearing rumours that the SAPS had opened an intimidation and defeating the ends of justice -docket against the military legal officer, Maj Labuschagne and against Lt Col Van Ferfen, OC of 121 SAI Bn.

- e. " On 15 May 2003 at ± 13,15 Maj Labuschagne got a phone call from Rfn Sithole at his home who alleged that he is being kept at a place called "Jakaranda Lodge, Frederika Street, Pretoria', against his will and that he wants us to fetch him, He alleged that he called from a payphone near the lodge and gave the number as

(012) 331 0845.

- f. Rfn Sithole phoned Maj Labuschagne again at ± 15.00 that same day at his office at 121 SAI Bn and again on 16 May 2003 at ± 09.00 to Maj Labuschagne's office. (Maj Labuschagne's work telephone number is (035) 550 6772/6792 and his home number is (035) 550 3429.
- g. On 16 May 2003 in a spirit of trust and honesty towards the SAPS I phoned the KZN Prov Head of the Organised Crime Unit, a Dir Bevan at ext 4731 and told him about the phone calls. I requested him to find out what the story is and to establish what is going on with Rfn

Sithole. In order to convince him about the truth of my story and to show our honesty and sincerity I gave him the address of the place Rfn Sithole alleges that he is being kept at. He undertook to come back to me and notwithstanding numerous phone calls to his office, I never heard from this Director Bevan again.

- h. Because this whole case rests on Rfn Sithole's version I decided on 20 May 2003 to personally go to Director Bevan's office to find out what was going on. Maj Labuschagne, who was in Durban for medical examinations in order to deploy, if needed, to the DRC as part of a planned Peace Enforcement Operation if violence persists, accompanied me so that he can tell the story first hand to those who want to listen. Dir Bevan was not in and I went to Commissioner Ngidi's office where he was so kind as to listen to our story. Maj Labuschagne was in 'PT clothes for the medical examination and I explained the reason for it to Comm Ngidi.
- i. The bail hearing of the two accused was scheduled for Friday 23 May 2003 at Empangeni Regional Court. Bail was apposed and I attended as observer wrt the interests of the SANDF.
- j. You can imagine my surprise when the Investigating Officer, Capt Mbata, testified about the following:
 - i. That a General from the SANDF phoned and that he knew exactly where Rfn Sithole and his family were being kept under the witness protection programme and that if we are willing to go to such lengths in so short a time to find this out, then surely the witness's life is in danger.
 - ii. That Maj Labuschagne and Lt Col Van Eeden are suspects in an intimidation and defeating the ends of justice - investigation - and that the SANDF are currently and in great haste organising to get Maj Labuschagne out of the country in order to escape being arrested.
- k. The Magistrate, was very impressed by this and I am quite convinced that this led him to refuse bail to the two accused as he clearly did not believe our version and accepted the IO's version.

It emerged later that he did so, despite having known Commissioner Ngidi for some number of years, that he went over Commissioner Ngidi's head to Director Bevan. The Court got the firm impression by the conduct and content of the testimony of Colonel Rothman that he, Colonel Rothman perceived almost every other member of the South African Police Services and the Department of Public Prosecutions as being biased, prejudiced and partisan in the interests of Captain Mbatha. In my view, this excuse was one of convenience rather than the reality. This perception of Colonel Rothman, however, is the very conduct portrayed by him and others when he approached Director Bevan who happened to be a white person of the white race. Colonel Rothman's letter, Exhibit F, paragraph 7 exposes such bias prejudice and lack of objectivity or impartiality in many respects on his part, and it perhaps might be prudent to expose those, where he says that:

"Lieutenant-Colonel van Eeden (with his details) of the 121 SAI Battalion, Major Labuschagne legal officer, 121 Battalion, Major Bronkhorst, intelligence officer at 121 Battalion and Captain Goosen, transport officer at the same battalion have assisted the SAPS in this Province on numerous occasions and they deserve better treatment from the SAPS than they got so far. Facts should not be twisted and misrepresented, but given truthfully and fairly so that justice follows its proper course. You should probably realise by now that I keep our SOP (I am not sure what that means) WRT SAPS and SANDF investigations of crimes to the letter, that I never interfere in the merits of your cases, but that I take a tough stand on the rights of SANDF members, be they black or white, and that I am convinced that we would be treated fairly by you and your senior officers, and that is why I would like an appointment with you to clarify this situation to restore relations which has not been slightly damaged by the investigating officer's testimony and actions in the bail hearing." entire evidence and of course the conduct that has been expressed by him, and of course his evidence when he referred to the magistrate concerned had to be white.

At the end of the day, in so far as Colonel Rothman is concerned, the Court must express its deep regret, and indeed sadness, as to his conduct as a witness as well, especially if regard is had to his status and experience in the Defence Force. He is obviously a poor role model for people like accused 2. Page 1384-Line 17-26 Page 1385-Line 1 -26

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