

SOUTH AFRICA / JUDGMENT

Siboniso and Others v S (SS163/2015) [2017] ZAGPJHC 204 (23 March 2017)

[2017] ZAGPJHC 204**COURT**

South Gauteng High Court, Johannesburg

BEFORE

M W Msimeki

CASE / FILE NUMBER

SS163/2015

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Source record**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA,****GAUTENG LOCAL DIVISION, JOHANNESBURG****CASE NO: SS163/2015****Not reportable****Not of interest to other judges****Revised.**

In the matter between:

SIBONISO, MIYA AND FOUR
OTHERS Applicants/Accused
and
THE STATE**JUDGMENT****MSIMEKI, J:****INTRODUCTION**

- [1] The trial, in this matter, commenced on 8 March 2017. The State called Mr Luybomir Borislavov Grigorov as its first witness. Mr Grigorov was accused 5 in the matter.
- [2] On 15 March 2017, while Mr Grigorov was still giving his evidence in chief, Mr Marais brought an application that the disclosure of the remainder of Mr Grigorov's statement be disclosed to the defence. The application was based on the fact that what Mr Grigorov had testified about up to that moment, according to Mr Marais, for accused 2, did not form part of Mr Grigorov's statement that the State had provided the defence with.

- [3] Mr Gcaba, for the State, enquired from Mr Marais if the issue could be argued by the parties in the presence of Mr Grigorov. Mr Marais's reply was that he did not mind. This, according to him, because Mr Grigorov had well been coached.
- [4] Irrelevant evidence, according to Mr Marais, had been tendered up to the time he stood up to bring the application on behalf of accused
2. The statement furnished to them by the State, according to him, inter alia, related to the Heidelberg case. Mr Marais's concern was that up to that time, they had not heard a word relating to what was furnished to them. If the evidence led up to that stage, according to him, was relevant, then they needed to see where the statement was from.
- [5] At this stage Mr Gcaba requested the Court to allow Mr Grigorov to leave the Court so that the issue could properly be attended to in his absence. The Court obliged and Mr Grigorov left the witness stand and waited outside.
- [6] Mr Guarneri, for accused 1, supported Mr Marais's application. Mr Guarneri submitted that there were instances in the

witness's evidence, where his client's name was mentioned but that they had no idea as to how they met about the van and the fitting of the blue lights. This, according to him, could not be regarded as a fair trial as it made a mockery of our judicial system. He, however, submitted that the witness could testify but he would require adequate time to consult with accused 1, failing which that would be trial by ambush. He specifically placed it on record that a fair trial consisted of the accused's right to challenge and adduce evidence. He submitted that his client's right to challenge the witness's evidence was severely infringed by the State's failure to give them Mr Grigorov's full statement.

- [7] Mr Marais referred to back in the days when the accused was only entitled to very limited information. The accused these days,

according to him, was entitled to all the statements. Whatever was recorded somewhere the accused were entitled to.

- [8] Mr Nkuna in his argument stated that the witness was not expected to rehearse. The nine pages that he had written while noting the witness's evidence did not contain what the witness's statement contained. He supported the submissions advanced by Mr Marais and Mr Guarneri.
- [9] Mr Van Wyk's submission was that the witness, perhaps, had not expanded on everything in his statement which was disclosed. The submission is correct. It often happens that the evidence goes beyond what the statement contains. This is normal. The witness may not disclose everything in the statement. Courts from time to time have been informed that the statement constitutes a summary of what the witness saw or knew. Surely, the policeman who takes the statement will decide how he will take the statement. The policeman, in writing down the statement, may decide to omit certain things. This happens daily.

[10] Mr Van Wyk submitted that the State did not supplement the disclosed statement with the relevant information. He, however,

regarded the evidence as relevant and that the State saw it in that light. This did not support Mr Marais's submission that

irrelevant evidence had been tendered by the State.

[11] Mr Van Wyk asked why the State did not provide them with the relevant evidence as soon as same became available. Mr Van Wyk was quick to answer himself when he said that the information might have come to the attention of the State during the consultation which Mr Gcaba had with Mr Grigorov.

[12] Mr Van Wyk submitted that it was possible that the information or evidence he was referring to could be forming part of the

statement they did not receive. This is highly speculative. I find nothing wrong with the State asking the witness to explain the

relationship between himself and accused 4. There would be nothing wrong with the request that the witness explain where and how the two met. Asking the witness to explain how each accused related to accused 4, in my view, does not warrant an order directing the State to disclose what the Court said the State does not have to disclose.

[13] Mr Van Wyk submitted that the State had reminded the witness about the white Ford Ranger. It appeared that the State, according to Mr Van Wyk, had put the answer in the witness's mouth. The Court directed that the relevant tape be listened to. This was done and Mr Van Wyk then asked for the Courts pardon for stating that the State had used the word "bakkie". The question had been: "Did accused 4 give accused 1 any other motor vehicle other than the GTI and the BMW?" The question was not even leading. One would have expected Mr Van Wyk to object to the question if same was leading. This, Mr Van Wyk did not do.

[14] Mr Van Wyk then submitted that the question indicated that the State had knowledge of the other motor vehicle. I fail to see how the question would result in an unfair trial.

[15] Mr Guarneri informed the Court about the numbering of the statements and how the witness's statement dated 9 January 2015 was numbered. He did not know if that was a result of a typographical error.

[16] Mr Marais informed the Court that A79 in the investigation diary related to Lucky Mokoena. He stated that there was an entry made on 16 February 2017-C30 stating that the charges were withdrawn against accused 5 and that his statement that was attached was marked A92. The defence, according to him, did not have A92. Mr Gcaba gave a plausible explanation for this when he responded. I shall revert to this later.

[17] Mr Van Wyk submitted that the State needed to place them in a position where they would be able to prepare for trial. They,

according to him, were receiving one curve ball after another. He supported Mr Marais's application that the required information

be supplied by the State failing which this would be a trial by ambush.

[18] Mr Gcaba requested Mr Marais to explain what he, Mr Marais, had been asking for. Mr Marais explained that he was moving an

application, which he could move at any stage, that the Court revisit its refusal to order the State to furnish Mr Grigorov's

remaining part of the main statement. I shall deal with the response and address shortly.

[19] Mr Nkuna asked how they would consult and prepare for trial without the required information. At this stage accused 2 raised his hand seeking the attention of Mr Marais. Mr Marais informed the Court that page 1 of the disclosed statement of Mr Grigorov, according to the accsed, dealt with the Sandton case. This, in my view, is neither here nor there.

[20] Mr Guarneri and Mr Marais were concerned about the fact that there appeared to be inconsistencies between the investigation diary and the contents of the docket. Mr Gcaba dealt with the confusion in his response and address which now follow.

[21] He bemoaned the fact that the defence Counsel were quick to raise aspects in Court which could very easily be dealt with by the parties outside Court. In case there were misunderstandings, he proceeded, the defence needed to contact the State for immediate

assistance. He gave as an example the issue of the confusion between the contents of the docket and the investigation diary regarding the numbering. He explained that he actually had wanted to explain how the confusion had come about but the Court was told about this even before he could explain to the parties.

[22] Mr Gcaba explained that he and the Investigating Officer agreed on how best the original docket could be preserved. He opened his own file and placed the statements therein. He came with his own way of numbering the documents. A79 that the defence complained about was in his own hand writing. This was to enable him to find the statements in his file fast and with much ease. He made his own notes, for instance. This was to enable him to identify the case that he intended dealing with.

[23] He explained that he sourced the original docket before and during the lunch hour. The defence Counsel, during the adjournment,

were shown the original docket. They were invited to check the original docket and statements against the investigation diary. The original statement did not have the A79 that the defence complained about. He complained that Mr Marais left them while he was doing the explaining. Mr Guarneri and Mr Nkuna, according to Mr Gcaba, remained behind to listen to the explanation. He managed to show them that there was a correlation between the investigation diary and the statement which he, in his handwriting, had marked A79.

[24] The statement he marked A79 was filed in the docket when Mr Grigorov became a State witness. The statement in truth and fact,

according to Mr Gcaba, had to be A92. He then changed A79 to A92 so that the statement be in line with what the docket contained. The decision to make Mr Grigorov a State witness had not yet been made and the statement, according to Mr Gcaba, could not be in the docket. The original statement, according to him, had no A79. He explained that this is the explanation which he had wanted to give to the defence outside Court. I, indeed, find the explanation plausible. This explanation, according to him, could not be given to Mr Marais who left before he could get it.

[25] Mr Marais then promised to take the issue up with the person who made the entry in the SAP5 which is the investigation diary. This, in my view, was the step in the right direction and was commendable.

[26] Mr Marais then advised the Court that he had difficulty with the fact that there was approximately a two year gap between entry C10 in the SAP5 dated 18 June 2014 and entry C11 dated 10 May 2016. Most entries, according to him, consisted of statements made in 2015 which then, according to him, meant that the entries, for two years, were missing. This, in my view, is neither here nor there.

[27] Mr Gcaba submitted that it had become routine for the defence to bring applications to the Court on matters that the Court had already adjudicated upon. For instance, he submitted, the Court had ruled on the issue which the defence wanted revisited. The submission, is indeed, correct. Mr Gcaba submitted that nothing had in fact changed to warrant an order that the issue be revisited.

[28] The submission that it is clear that the State is in possession of other statements or notes relating to what the witness testified about is not very helpful either. That the witness testified about things not disclosed in the statement, in my view, does not advance the defence submission.

[29] In *S v Bruiners en 'n Ander* 1998 (2) SASV 432 (SOKPA) at 437g-438a the Court said:

“Ek is van mening dat ten einde 'n Staatsgetuie te diskrediteer sover dit sy getuieverklaring betref, dit steeds 'n vereiste is dat daar 'n wesenlike afwyking deur die getuie van sy getuieverklaring moet wees alvorens 'n negatiewe afleiding gemaak kan word. Nie-wesenlike afwykings in 'n getuieverklaring sal nie noodwendig afbreuk doen aan die gehalte van 'n Staatsgetuie se getuienis as 'n geheel nie. Die doel van 'n polisieverklaring is om besonderhede van 'n misdaad te bekom sodat daar besluit kan word of die beskuldige vervolg moet word. Die getuieverklaring is nie om die getuie se getuienis in die hof vooruit te

loop nie. Dit is vergesog om van 'n getuie te verwag om in sy getuieverklaring reeds presies dieselfde weergawe te verskaf as wat hy in die ope hof gaan getuig. Sien in dié opsig die uitspraak van Cloete R in *Shabalala v Attorney-General, Transvaal and Another; Gumede and Others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) 1995 (1) SASV 88 op 625F-626A (SA) en 106b-g (SACR). (my emphasis).

[30] In *Gumede v Attorney-General, Transvaal* 1995 (1) SA 608 (TPD) at 625F-626A, Cloete J said:

“The proposal that the furnishing to an accused of copies of the statements of witnesses be prescribed as part of the procedure was considered by the Commission but rejected for several reasons.

Statements of witnesses are often taken down by inexperienced non-white and other police officials, or with the aid of an inexperienced interpreter, and mostly under difficult circumstances, and often at a stage upon which the alleged charge is still undetermined.’

(The affidavits filed by the respondents show that this is still the position.)

‘The result is that reliance cannot always be placed on the accuracy and completeness thereof. They are not intended to serve as official documents at court proceedings, but are taken down in the course and part of the police investigation into an alleged offence, and include everything that may possibly contribute to the identification of the offender, and thus often contain allegations which are irrelevant and not admissible as evidence. In *R v Steyn* 1954 (1) SA 324 (A) at 335, Greenberg JA drew attention to the difference between evidence given at a preparatory examination and statements made by witnesses to the police in connection with the investigation of a case, and added:

“(T)here is a serious possibility that statements made to the police, which are made in entirely different circumstances, may be far from constituting this accurate representation and through inaccuracies may be a target for cross-examination which, instead of revealing the truth, may obscure it.”

These considerations (if not all of the language used to express them) apply with equal force today. The Attorney-General says in his affidavit that: ‘Die oorgrote meerderheid van getuieverklarings word deur onervare polisie beamptes geneem en oorgetolk. Die polisiebeamptes is nie opgeleide tolke nie. Die verklarings is in baie gevalle onvolledig. Hierdie situasie gee noodwendig aanleiding tot beuselagtige en tydverkwistende kruisverhoor en stel die betrokke getuies in 'n besonder netelige posisie sou die verklarings sonder meer in alle gevalle blootgelê word.’ (my emphasis).

[31] Indeed, “...the purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness’s evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court”. (my emphasis). (See: *S v Bruiners en 'n Ander* (supra) at 434i-j).

[32] Mr Gcaba submitted that a witness cannot be expected to regurgitate what is contained in the statement. This is what our case law reveals.

- [33] The evidence thus far, according to Mr Gcaba, deals with how the accused and the witness came to know each other. It is, as it were, according to him, the introduction to what happened when they met. Apart from this, the statement and the viva voce evidence in Court, according to Mr Gcaba, will not be word for word. The submission is correct and supported by case law. Mr Gcaba further submitted that consultations bring clarity to certain aspects in statements which may not be very obvious or easy to follow and understand. These, in my view, are issues which need to be taken up with the witness concerned.
- [34] Policemen who take down statements quite often do not write everything the witnesses tell them. Witnesses do from time to time, during consultations, expand on or expatiate what they have said in their statements. It is Mr Gcaba's submission that in such instances, it indeed, would be derisory to expect the State each time a consultation revealed something new to it to keep on getting fresh statements from the witnesses to be forwarded to the defence. This would, in my view, amount to introducing strange procedures to the already accepted and existing procedure.
- [35] Mr Gcaba, correctly in my view, submitted that the accused's right to challenge the witness's evidence and to give evidence remained intact. This is, indeed so, because the witness is still giving evidence in the witness box. The accused have a right to challenge the evidence through their Counsel, cross-examining the witness as much as they want. They have their right to put their versions to the witness who is available to answer their questions. The Criminal Procedure Act 51 of 1977 ("the CPA") also makes provision for submissions to be made later in the case regarding the evidence of whatever witness who will testify in this case.
- [36] As I said in the previous paragraph, the defence has a right to take on a witness on issues that it is felt have not been dealt with or properly dealt with.
- [37] Mr Marais explained his earlier submission to the effect that irrelevant evidence was led by the State. He indicated that it was indeed relevant to testify about how the witness and the accused came to know each other but that they were not supposed to hear that in Court for the first time. I do not believe that this submission has merit. This aspect has been dealt with above. The accused have every right to challenge evidence by cross-examining the witness. The witness cannot be expected to say every conceivable thing in the statement. I again, have alluded to this already.
- [38] The submission that the only remedy which will assist and protect the accused is that the Court orders the State to discover

the full statement. If regard is had to what I said above, it then becomes clear that the submission lacks merit.

[39] Mr Guarneri, in his submission, felt that the content of the statement that had been made available to them needed to be read into the record. Not only is this, at this stage, impermissible it is also undesirable. The Court has to adjudicate the matter free from aspects which should not be made known to the Court unless the timing is right. There was also, in my view, no need for this.

[40] It is important to mention that Mr Nkuna, for accused 3, confirmed that Mr Gcaba, during the lunch adjournment, had explained

to them how the confusion referred to above had arisen. He found no discrepancies in Mr Gcaba's explanation. Save for insignificant

errors regarding A79 and A70, Mr Nkuna informed the Court that the information in the docket corresponded with the entry in the SAP5. Regarding the other aspects, Mr Nkuna informed the Court that he was in full agreement with Mr Marais's submission and that the accused would be experiencing and going through a trial by ambush unless the Court ordered full disclosure of the remaining part of Mr Grigorov's statement together with any other statements which the State has in its possession. "Any other statement" does not seem to mean anything because it does not identify a statement. The court has ruled on the disclosure of the remaining

part of the statement. Nothing warranting an order directing the State to so disclose the statement has, in my view, been demonstrated

on behalf of the accused. This application, in my view, should fail.

ORDER

[41] I make the following order:

The application is dismissed.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Counsel for the 1st Applicant/Accused: Advocate E. Guarneri

Counsel for the 2nd Applicant/Accused: Advocate J. P. Marais

Counsel for the 3rd Applicant/Accused: Advocate: L. S. Nkuna

Counsel for the 4th Applicant/Accused: Advocate R. Van Wyk

Counsel for the State: Advocate L. Gcaba

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