

SOUTH AFRICA / JUDGMENT

Sithole v S (A149/2010) [2012] ZAGPJHC 158 (12 September 2012)

[2012] ZAGPJHC 158**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Satchwell

CASE / FILE NUMBER

A149/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**REPORTABLE****SOUTH GAUTENG HIGH COURT****JOHANNESBURG****CASE NO: A149/2010****DATE:12/09/2012****In****the matter between:**

AMON

MAGEBA

SITHOLE.....Applicant

and

THE

STATE.....Respondent

Neutral

citation: Sithole v the State

Coram:

SATCHWELL J

Heard:

7 June 2012

Delivered:

12 September 2012

Summary:

On appeal, the appeal court mero motu referred the matter back to the trial court to enable the appellant to apply for a special entry in terms of the provisions of section 317 of the Criminal Procedure Act (CPA) “on the basis of the failure of the learned judge a quo to call Vusi Xaba as a witness in terms of the provisions of section 186 of Act 51 of 1977” – inappropriate procedure to invoke the “special entry” provisions of section 317 of the CPA where the matter is on appeal and the possible irregularity appears from the appeal record – such alleged irregularity can be dealt with on appeal, with or without amendment of the notice of appeal – where the prosecution declines to call a listed state witness from whom they have taken a statement and the defence in turn declines to call this person as a witness, it is clear that neither prosecution nor defence consider that this person would advance their cases if called as a witness – in such circumstances both prosecution and defence would be obliged to challenge the credibility and reliability of the person if called as a witness – for a trial judge to exercise powers in terms of section 186 of the CPA and call such person as a witness it would lead to an absurd and frivolous result as contemplated in section 317 – accordingly no special entry recorded.

JUDGMENT

SATCHWELL J:

INTRODUCTION

- [1] The appellant was convicted on 21 February 2008 of the murder of his wife Lungile Goodness Sithomo and the attempted murder of his brother, Vusi Xaba. He was sentenced on 27 November 2008 to serve terms of 16 years and 4 years imprisonment respectively, the sentences to run concurrently. The appellant was granted leave to appeal against both convictions and sentence.
- [2] At the hearing of the appeal before the full bench in the North Gauteng High Court, one of the appeal judges mero motu raised the question whether there was an irregularity in the proceedings by reason of the failure of the trial court to “call the witness Vusi Xaba to testify” in terms of section 186 of the Criminal Procedure Act (CPA). Pursuant to this query,

the appeal court granted leave to the appellant to apply to the trial court for a special entry in terms of the provisions of section 317 of the CPA “on the basis of the failure of the learned judge a quo to call Vusi Xaba as a witness in terms of the provisions of section 186 of Act 51 of 1977”. The appellant has now made such an application.

THE TRIAL

- [3] The appellant was charged with the murder of his wife and attempted murder of his brother, Vusi Xaba. The evidence was that the appellant’s wife was shot by his firearm held in his hand, once in the head, once in the chest and once in the abdomen. The brother was shot once in the right shoulder.
- [4] The defence was that the accused was trying to commit suicide by reason of his belief that his wife was unfaithful to him. While he was attempting to shoot himself, there was a struggle with his wife. While the struggle continued three shots were fired from the appellant’s gun into his wife’s body, killing her. Similarly, in the course of this struggle, one shot hit his brother.
- [5] The list of state witnesses included the brother of the accused, Mr Vusi Xaba, who was both the complainant in the attempted murder charge and a witness to the shooting of the appellant’s wife. The state did not call Mr Xaba as a witness. The investigating officer gave evidence that a statement had been taken from the brother which document I did not see. At the close of the state’s case, the appellant’s brother was made available to the defence¹ who also elected not to call him as a witness.
- [6] In the trial judgment,² I concluded that:

“[i]t is quite clear that Vusi Xaba has made a statement, but that he did so reluctantly and in the presence of the accused, his brother. It is a reasonable inference that the state saw no purpose in calling the witness who was not going to support the case against the accused. As far as the accused is concerned his brother is known to him. He knows where his brother lives. The brother was available as a witness and indeed was consulted. It is probably a reasonable inference to assume that the brother was not going to support the accused’s version. The point is that this court does not know and cannot speculate...Accordingly I then draw no inference at all either against the accused or against the state from their individual and separate failures to call the important eyewitness...”³

PROCEDURE FOLLOWED – SECTION 317 INAPPROPRIATE

- [7] Sections 316 to 319 of the CPA are concerned with procedures for appeals from the High Court. It has been commented that the retention of the ‘special entry’ provisions in section 317 are somewhat “anachronistic” in that this procedure was introduced when and assisted in the administration of justice prior to 1948 after which time fully fledged appeals from the High Court became possible.⁴

- [8] In both standard writings on criminal procedure, Hiemstra's Criminal Procedure and Du Toit's Commentary on the Criminal Procedure Act, it is suggested that the "special entry" provisions of section 317 have "little right to exist when the irregularity appears from the record" and "[w]hen the irregularity appears on the record it is unnecessary to use the process..."⁵ and "[w]hen the irregularity appears on the record, it is unnecessary to use the process in terms of section 317, because the irregularity can simply be raised as grounds for appeal in the appeal under section 316. ..." ⁶
- [9] In *Sefatsa & others v Attorney-General, Transvaal, & another*⁷ the following was stated:
- "...Section 317(1) provides for the making of a special entry relating to an irregularity or illegality in the proceedings at a trial... The special entry procedure is designed to furnish an accused who has been convicted with a ground on which he can appeal against his conviction, in the same way as, say, an alleged lack of sufficient evidence would constitute a ground on which he can appeal. The procedure is a useful, or perhaps even necessary, one when the irregularity or illegality complained of is discovered only after the conclusion of the trial. The procedure need not, however, be followed when the irregularity or illegality appears from the record of the case, for in such an event the irregularity or illegality can be made on the ground of an appeal under s 316 of Act 51 of 1977. (See e.g. R v Nzimande supra at 775A - D.) Sections 316 and 318 therefore both contemplate an appeal against a conviction. They do not provide for different remedies, but merely for different ways of bringing an appeal before the Court, the one (under s 316) based on a point of law or fact which appears on or arises from the record of the case, and the other (under s 318) on an irregularity or illegality in the proceedings at the trial. But, as I have indicated, an irregularity or illegality in the proceedings which appears from the record can be made a ground of appeal in an appeal as contemplated in s 316." (my emphasis)*
- [10] In *S v Masoanganye*⁸ the court further held that:
- "The argument is no doubt correct provided the special entries were proper special entries as envisaged by section 318. They are, however, not. As was explained in Staggie v The State (38/10) [2011] ZASCA 88 ...the only purpose it serves today is to record irregularities that affect the trial that do not appear from the record. ...the so-called irregularities relied did not qualify because they all concerned an attack on rulings made by the court during the proceedings and they do not relate to irregularities that affect the trial that do not appear from the record."*
- [11] Clearly, the "special entry" provision is not a process directed to a different result other than the hearing of an appeal. It is a procedure which enables an accused to raise alleged irregularities in the trial not apparent from the record to be heard by an appeal court. Such irregularities could otherwise not be considered by an appeal court because they do not appear from the record. Accordingly, the irregularities envisaged in section 317 tend to cover matters which only become apparent after the conclusion of the trial and which are not apparent from the trial record. They range from inadequate interpretation facilities, where there was a breach of the attorney-client relationship and the evidence so obtained was used against the accused,⁹ where there was the removal of an assessor by the presiding judge for reasons that were not debated in open court¹⁰ or where there was the failure of the prosecutor to disclose discrepancies in a witness's statement.¹¹ The purpose of the "special

entry” provision remains to permit such issues to be determined by an appeal court where they cannot initially be raised on appeal simply because they do not appear on the record.¹²

[12] In the present case, it is apparent from the record that neither the prosecution nor the defence nor the court called the brother, Mr Xaba, as a witness notwithstanding that he was the complainant in respect of the count of attempted murder and a witness to the shooting of appellant’s wife. This was discussed at page 10 of my judgment as quoted above.

[13] The appellant has been granted leave to appeal against both convictions. He is currently exercising his appeal rights. It was in the course of the hearing of his appeal before a full bench of the High Court, that one of the judges raised the question of a “special entry” resulting in the referral back to this court for determination whether a ‘special entry’ should be made. With respect, I think the incorrect procedure was proposed and then ordered by the appeal court. As was said by the Appellate Division in *Sefatsa supra*, this issue should have been dealt with on appeal.

[14] Although every application for leave to appeal “must set forth clearly and specifically the grounds upon which the accused desires to appeal”,¹³ in the light of the accused’s right to appeal, which is guaranteed by section 35(3)(o) of the Constitution, judges may

allow the matter to be argued. The court may raise points which appear from the record, even if such points are not alluded to by the accused or counsel.¹⁴ There is no reason why the appellant cannot amend the notice of appeal where there is no prejudice. Furthermore, the appeal court

will allow a broadening of the scope of an appeal, especially in respect of a fundamental issue which was fully ventilated in the

court below. As was held in *Legal Aid Board v The State and Others* 2011 (1) SACR 166 (SCA)

“[16] ...But as this court has previously held, it will not necessarily consider itself bound by the grounds upon which leave has been granted. If this court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant consideration of it, it will allow such ground to be argued. [with reference to S v Sefatsa & others 1988 (1) SA 868 (A) at 877A-D; Douglas v Douglas [1996] 2 All SA 1 at 8j-9a.] [17] This does not mean that the court will always be free to enlarge the issues whether mero motu or at the request of the parties.[with reference to Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 24C-D.] The question of prejudice may arise... [19] In my view, the postponement and subsequent application satisfactorily addresses any prejudice (actual or potential) that the other parties may assert. The question that the LAB now seeks to raise was actually part and parcel of its case before Borchers J and is basic to the adjudication of the appeal. That being so, it appears to me fitting to broaden the scope of the appeal. To do otherwise would be to ignore a fundamental issue that was fully ventilated in the court below. That may well constitute not just a fruitless exercise but also one divorced from reality.”

- [15] In the result, I am somewhat at a loss to comprehend why this issue was not dealt with at the appeal hearing or why the appeal was not postponed to enable the appellant to amend his notice of appeal if the appeal court had thought that necessary.
- [16] Whatever the outcome of this application for a special entry to be noted, all issues will still remain to be adjudicated by the appeal court. The appellant can still amend his notice of appeal.
- [17] However, the matter has been referred back to me and I comply with the order.

SPECIAL ENTRY

- [18] Section 317 of the CPA permits an application for a special entry to be made on the record stating that proceedings are alleged to be irregular or not according to law. Such special entry shall be made “unless the court is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court”.
- [19] Section 317 does not permit the trial judge to enter into the question of the alleged irregularity itself.¹⁵ Accordingly, I make no comment on the provisions of section 186 of the CPA.
- [20] The discretion of the trial judge is limited to a refusal of such special entry where the application is not bona fide or leads to an absurd or frivolous result or the granting of the application would amount to an abuse of the court’s process.¹⁶
- [21] This application for a special entry is made at the instance of the appeal court and must therefore be presumed to be made bona fide.
- [22] I must determine whether such special entry would in this matter “lead to an absurd or frivolous result”. In *S v Cooper and others* 1977 (3) SA 475 (T) the court outlined what is meant by such a result:

“...In the context of this section, the “frivolous” in its ordinary and natural meaning connotes an application characterized by lack of seriousness, as in the case of one which is manifestly insufficient, and the word “absurd” connotes an application which is inconsistent with reason or common sense and unworthy of serious consideration. These words have been used

according to the decided cases in respect of pleadings and actions which were obviously unsustainable or manifestly groundless or utterly hopeless and without foundation... In order to bring an application within this description, there should be present grounds upon which the Court could found an opinion that an application is clearly so groundless that no reasonable person can possibly expect to obtain relief from it. The Court should be slow in coming to such a conclusion and this quality must therefore appear as a certainty and not merely on a preponderance of probability...”¹⁷

- [23] Clearly the brother, Vusi Xaba, was integral to the events which resulted in the death of the appellant's wife and the shooting of himself. He was not only the complainant to count two but an eye witness to the killing of the appellants' wife which was count one. In the trial judgment, I described the brother as 'a very important eye witness' and 'an available witness'. In explanation of my description of the brother, I noted that there were only three people present at the scene of the crime, namely the deceased wife, the accused and the brother of the accused/complainant in the attempted murder count. As such, he was a "...very important eyewitness...[as] he was shot on the day in question...[,]he was shot by the accused's gun...[,]the accused took him to hospital... [and] he was present at the time of the shooting of the deceased."18
- [24] However neither the prosecution nor the defence elected to call him as a witness nor sought to rely upon his evidence.
- [25] Since the brother had made a statement to the South African Police (in the presence of his brother, the then suspect), both the prosecution and the defence had full knowledge of the contents of his statement to which he had deposed under oath. Neither could be in any doubt as to the version of events to which the brother had originally committed himself.
- [26] When the prosecution revealed that it would not call the brother as a witness and closed its case, it was apparent that the brother, Mr Xaba, was not a witness upon which the prosecution sought to rely. There are many reasons why the prosecution would make such a decision. I do not speculate but can only conclude that the prosecution took the view that Mr Xaba would not assist the state's case. Mr Xaba was made available to the defence as a witness.
- [27] When the defence revealed that it would not call Mr Xaba as a witness and closed its case, it was apparent that Mr Xaba was not a witness upon which the defence sought to rely. There are many reasons why the defence would make such a decision. I do not speculate but can only conclude that the defence took the view that Mr Xaba would not advance the appellant's case.
- [28] In leading the evidence of the investigating officer that Mr Xaba had made a statement to the South African Police, the scene was set for a challenge to Mr Xaba if he gave evidence and deviated therefrom. This could be one basis for either the prosecution or the defence to challenge the credibility and reliability of Mr Xaba if he gave evidence.
- [29] When either the prosecution (or the defence) is confronted with the evidence of a witness called by the defence (or the prosecution) with whose evidence there is disagreement, then that evidence can be challenged in a number of ways. The credibility of the witness is called into question. The reliability of the witness's observations is disputed. In short, it is the responsibility and duty of one side to attempt to persuade the trial court that such a witness cannot be relied upon and that his or her evidence should be disbelieved or disregarded.

- [30] In this case, neither party wished to rely upon the evidence of Mr Xaba. Neither wanted to call him as their witness. If he had been called by the prosecution and he had testified to the version which the prosecution had expected from his statement, then the defence would have attempted to destroy his reliability. If he had been called by the prosecution and he had not adhered to the version which had been expected from his statement, then the prosecution would have challenged him as a perjurer or, at the least, as a contradictory and unreliable witness. If he had been called by the defence and had not adhered to the statement he had made, then the prosecution would have challenged him on the same basis.
- [31] In summary, Mr Xaba was a witness whom neither the prosecution nor the defence wanted to give evidence and both parties would, quite rightly, have done their best to destroy his credibility and the reliability of his evidence. The court would have been left with nothing – no evidence upon which it could rely.
- [32] It is my view that a special entry in this case would indeed lead to an absurd and frivolous result as envisaged in Cooper supra and that “no reasonable person can possibly expect to obtain relief from it”.

ORDER

In the result an order is made as follows:

The application is dismissed with costs.

DATED AT JOHANNESBURG ON THIS ___ DAY OF ____ 2012

SATCHWELL J

JUDGE OF THE HIGH COURT

APPEARANCES

APPELLANT: B Roux SC

Instructed by van der Westhuizen Attorneys, Johannesburg

RESPONDENT: J Cronje

Instructed by the State Attorney, Pretoria

1 Who was represented by Advocate Meiring at the trial as well as by Advocate Kolbe SC at sentencing.

2 Having discussed the three judgments in R v Bezuidenhout 1954

(3) SA AD.

3 At page 10 of my trial judgment, case no CC226/2006 which was handed down on 21 February 2008.

4 Hiemstra Criminal Procedure at 31-29; “The purpose of a special entry is to record an irregularity that does not appear from the record (S v De Vries 2012 (1) SACR 186 (SCA) par [29]). Special entries are an anachronism dating from the time when the right of appeal in criminal cases was severely restricted (Staggie v S (38/10)

[2011] ZASCA 88 (27 May 2011), quoted in S v Masoanganye 2012 (1) SACR 292 (SCA) par [9].”

5 Hiemstra Criminal Procedure at 31-29.

6 Hiemstra Criminal Procedure at 31-29.

7 1989 (1) SA 821 (A) 843H–J.

8 2012 (1) SACR 292 (SCA) para 9 - 10.

9 S v Mushimba 1977 (2) SA 829 (A). See further S v Naidoo and others

[1974] 3 All SA 611 (A).

10 S v Malindi & others 1990 (1) SA 962 (A).

11 S v Xaba 1983 (3) SA 717 (A).

12 See further an irregularity arising from assessors sharing an office with the prosecutor and investigating officer (Felthun v S

[1999] JOL 4624 (A)) and a misunderstanding between the accused and his counsel with the result that the accused was mistakenly advised to plead guilty and the subsequent failure to place the facts which would have proved that applicant was in fact not guilty before the court (The State v Mofokeng

[1962] 3 All SA 480 (A)).

13 Section 309B(3)(a) of the CPA.

14 See Hiemstra Criminal Procedure at 30–35.

15 See S v Botha 2006(1) SACR 105 SCA.

16 See Bezuidenhout v DPP

[2008] JOL 21177 (SCA) at [15] which held that ‘An entry must be made unless the court to whom application is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.’

17 At page 476; See further Colman J in S v Shepard and Others, 1969 (3) SA 72 (W) at 74-75 where it was held that there would be an abuse of the process of the court if it would lead to an appeal devoid of prospects of success.

18 At 6 of my trial judgment.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2012/158.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/sithole-v-s-unknown-topic-agpjhc-2012--6a3ea5213b1caa91298175d2>

Prepared on 10 October 2026 · Esheria