

SOUTH AFRICA / JUDGMENT

Sizani v Mpofu N.O and Another (2804/2019) [2020] ZAECHGHC 88 (18 August 2020) [2020] ZAECHGHC 88

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe, M.S. Rugunanan

CASE / FILE NUMBER

2804/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
CASE
NO: 2804/2019
Date
heard: 06
August 2020
Date
delivered: 18
August 2020
In

the matter between: NONTUTHUZELO
PORTIA SIZANI
Applicant
and
THE

DIRECTOR OF PUBLIC
PROSECUTIONS: EASTERN
CAPE
Second
Respondent

JUDGMENT

LOWE, J

INTRODUCTION

[1] This is a review in which Applicant seeks the following relief:

“(a) Reviewing and setting aside the First Respondent’s ruling on 17 August 2018 to invoke the provision of Section 342A(3)(d) of the Criminal Procedure Act, 1977 (Act 51 of 1977), and to declare the Defence case closed in Case No. CCC1/105/2012: The State v Nontuthuzelo Portia Sizani, which was being heard by the First Respondent in the Specialised Commercial Crimes Court, Port Elizabeth.

(b) Reviewing and setting aside First Respondent’s mero motu order on 29 March 2019, after having convicted Applicant on various counts, to cancel Applicant’s release on warning and to fix bail instead, in Case No. CCC1/105/2012: The State versus Nontuthuzelo Portia Sizani, which was being heard by First Respondent in the Specialised Commercial Crimes Court, Port Elizabeth.”

No order of costs was sought by any of the parties at the end of the day.

[2] The matter was opposed by Second Respondent, First Respondent abiding the decision of this Court.

[3] Something should be said about the extensive reference in the affidavits (particularly by Applicant) to matters of a legal nature, indeed “submissions” in the form, on occasion, almost of if Heads of Argument. Whilst there sometimes should be a brief summary of the legal points to be relied on in limited matters, generally legal argumentative matters should be left to counsel[1].

THE HISTORY:

[4] This matter has a long and tortured history which can be briefly stated for the purposes of this review.

[5] Applicant was charged with a number of offences in the Specialised Commercial Crimes Court, the case being enrolled for the first time on 13 December 2012. The trial itself only started before First Respondent on 18 August 2014. The trial ran in fits and starts for 42 court days until eventually, on 23 February 2016, the State’s case was closed. The matter was then postponed to 26 July 2016 on which date an application for the discharge of Applicant in terms of section 174 of Act 51 of 1977 was brought. The State conceded that certain of the charges faced by Applicant should be dismissed but argument was addressed in respect of the remaining charges. On 29 July 2016 First Respondent dismissed Applicant’s application in respect of these remaining charges.

- [6] The matter was thereupon postponed to 21 November 2016. On that date Applicant brought an application for the recusal of First Respondent on the basis of his perceived bias, in the High Court.
- [7] The recusal application was dismissed.
- [8] On 14 August 2018 the Defence started its case, Applicant testifying and being cross-examined until 17 August 2018.
- [9] On that day Applicant drew to the Court's attention that in its view the issue of the so-called "CV's" of 16 "Practitioners" was relevant, whose role played a part in the charges against Applicant, but which documents had not been produced by the State or introduced into evidence. It was alleged that the relevance of such documents had been raised by the State in the cross-examination of Applicant and that Applicant needed to have sight of those before deciding how to continue with her defence.
- [10] Prior to this and during the trial, and First Respondent having ordered the State to produce further documentation, some additional 3669 pages were produced. These did not contain the disputed CV's, relevant to the employment history of the 16 practitioners said to be relevant to the defence. It was alleged that these were being withheld to the prejudice of Applicant's defence.
- [11] The Defence then and on 17 August 2018 applied for these from the bar, the Court being asked to make an order accordingly.
- [12] The State in answer told the Court:

"Your Worship other than what I can say at this stage I can only enquire from SIU Department of Education if they have CV's. I don't know whether they do have and what explanation they will give us. So at this stage I cannot address the court concerning the CV's."

The State's case is in the files that we got at the Department of Education there were no CV's. Not one of the 16 had CV's in their files. And those files were emptied Your Worship. There is nothing left. Other than my undertaking to, depending on the court's order, and me consulting with persons, the police, the SIU at this stage, I don't know what they are going to tell me concerning those CV's. But as I say the State's case is we got all the files. They were emptied and there were no other additional CV's in those files. Whether there is another file I have no idea Your Worship."

- [13] First Respondent took the view that he would not make such order, as he had already ordered production of documents, and accordingly refused the order sought by Applicant.
- [14] The Defence, clearly frustrated, submitted as follows in addressing the Court and responded to by the prosecution:

[The Defence]: “Our position is the following Your Worship. We don’t accept the absence of the CV’s which is relevant documents here and we say that the absence of the CV’s are frustrating the accused in the exercise of her constitutional right to properly challenge evidence and to present evidence in support of her case.

Therefore, the situation is the following. We do not intend to call any further witnesses premised on the evidence presently at hand. That is in absence of the CV’s. If we got the CV’s our position with regards to the calling of witnesses may well change. But now that we don’t have the CV’s and Your Worship has dismissed the application to order the State to direct to produce those CV’s we are not in the position to proceed with the defence case. We have now reached a stalemate situation.

To postpone the matter is going to serve no purpose because the matter is not going to resolve itself. If the defence closes its case it would be seen as an acceptance by the defence of the status quo and we are not prepared to accept the status quo. We accepting what Your Worship’s ruling is but we are not accepting the status quo. That is the State has not provided us with those CV’s.

So, this matter is now going to be unnecessary delayed which is prejudicial to the accused and to the State. And it seems that we have now reached the situation where the court will have to consider acting in terms of Section 342A (3)(d) which reads that, subsection (d) reads:

...

That is one of the possibilities the court can consider. We are not urging the court to do that but it seems that that would be a way to conclude these proceedings. But from the defence side in the absence of relevant documents with us being hampered in the execution of our constitutional right we are refusing to close our case.

So, perhaps my Learned Friend may want to consider the possibility of the court implementing that section. It is a thought. That will be within the discretion of the court. For the rest I have no other submissions to make to the court. Thank you Your Worship.

PROSECUTOR Your Worship at this stage I cannot address the court on that issue. I wasn’t expecting this application and I have never dealt with something like this before. So, I will have to go and read up and see what the section says and what remedies there are when such a situation arises. I cannot from my experience just address the court concerning that issue.

COURT So you have never come across a challenge of Section 342A?”

[15] The matter was then adjourned to enable the prosecutor to consider her position and consult colleagues – on resumption the prosecutor responded as follows:

“PROSECUTOR I have now just consulted the section itself Your Worship. As I say I have never heard of such an application before where the defence does not know which way to go concerning whether to close their case or to call further witnesses. However Your Worship in terms of this section it appears that the court can close the case of either the State or the defence, in this case the defence, if the court finds that there was unreasonable or there is unreasonable delay.

The fact that the matter is Your Worship if I look at the specific section Your Worship 342A, and more specifically, subsection (4)(a)

“An order contemplated in subsection (3)(a) where the accused has pleaded to the charge and an order contemplated in Section (3)(d)” (which is then the one applicable here) “shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State as the case may be has given notice beforehand that it intends to apply for such an order.”

Your Worship other than that I cannot say what happened before court here the defence can argue that point, that the CV's are not here. They can do that in addressing the court at the end of their case when the right time comes. Other than that I cannot say anything. I would suggest maybe Your Worship that Your Worship consider granting the defence an opportunity to reconsider their position concerning whether they want to call witnesses or not. And if they do decide not to call witnesses on the next occasion that we then be ready to address the court on condition that the State is then given sufficient notice concerning what they intend to do on the next occasion. But other than that I cannot take it further Your Worship.”

[16] The Defence then responded as follows:

“MR WESSELS Yes, that is quite clear. So a postponement is not going to assist in any way. In fact, it will just cause further prejudice for both the accused and the State. But the court must separate the address on the merits from what we dealing with now. We must dispose of this. We must get finality. We must get the cases closed and then we can talk about when and where we will address on the merits. We must fuse the two issues.

So, at this stage it is just simple that or quite clear that we going nowhere. So, the court has a discretion here and the court may well want to implement that discretion. That is all.”

[17] The Magistrate then ruled as follows:

“R U L I N G

I have carefully looked at the submissions that have been made by both the State and the defence and the court has applied its mind in that respect and in the absence of any reason other than the one that has been advanced by the defence the court is of the view, and particularly that the defence has indicated that it has made up its mind that it's not – its stance on the position it has made the court if of the view that it has to use its discretion.

And based on that reason now the court is invoking the provision of Section 342A (3)(d) of the Criminal Procedure Act 51 of 1977 and declares the defence case closed.”

[18] Applicant's case deemed to have been closed, argument on the merits proceeded on 19 November 2018, and Applicant was found guilty on certain of the charges on 29 March

2019. Having previously been released on her own recognisances she was now released on bail pending sentencing. This Review Application was then launched on 26 September 2019.

[19] At the hearing hereof the parties settled the issues arising from prayer (b) and it became unnecessary to deal any further therewith.

THE REVIEW:

[20] This all led to this review.

[21] It was argued, in summary, that the Magistrate having closed Applicant's case acted procedurally incorrectly having regard to the provisions of S342A (3)(d) of Act 51 of 1977 (the CPA), that this caused Applicant extreme prejudice justifying a review and setting aside thereof (with consequent effect on the entire trial which would have to be set aside), and that this review should be heard in medias res notwithstanding that sentencing proceedings were to follow shortly.

[22] In *Motata vs Nair NO and Another*

[2] the following was stated by Hancke and Pickering JJ, relevant to reviews in medias res:

"[9] It is trite that as a general rule a High Court will not by way of entertaining an application for review interfere with incomplete proceedings in a lower court. As stated in Wahlhaus & others v Additional Magistrate, Johannesburg & another 1959 (3) SA 113 (AD) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point decided against the accused by a magistrate is fundamental to the accused's guilt. At 119H–120A Ogilvie Thompson JA (as he then was) stated as follows:

'It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper

case, grant relief – by way of review, interdict, or mandamus – against the decision of a magistrate's court given before conviction. (See *Ellis v Visser and Another* 1956 (2) SA 117 (W) and *R v Marais* 1959 (1) SA 98 (T), where most of the decisions are collated.) This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (6th Ed., vol. I p.750) state:

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

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's court."

At 120D, the learned Judge continued:

"[T]he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps a fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction. (See too the observation of Murray J at pp 123–124 of Ellis case supra.) As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

[10] In *Ismail & others v Additional Magistrate, Wynberg & Another* 1963 (1) SA 1 (A) the following was stated at 5H–6A:

"I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959

(3) SA 113 (AD) at p119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply

defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in untruncated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained.' (*Wahlhaus's case*, supra at p120)."

[23] In *Wahlhaus and Another v The Additional Magistrate, Johannesburg* supra the following was stated at page 119:

"If, as appellants contend, the magistrate erred in dismissing their exception and objection to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is to appeal after conviction... Nor, even if the preliminary point decided against the accused by a magistrate be fundamental to the accused's guilt, will a Superior Court ordinarily interfere – whether by way of appeal or review – before a conviction has taken place in the inferior court."

[24] Also at 119 the court continued:

“[B]y virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict or mandamus – against the decision of a magistrate’s court before conviction. (See Ellis v Visser and Another 1956 (2) SA 117 (W), and R v Marais 1959 (1) SA 98 (T), where most of the decisions are collated.) This, however, is a power which is to be sparingly exercised ...”

[25] In *Mispha CC and Another v The Honourable Regional Magistrate and Others* [3], I for the Full Bench held as follows:

“[46] Against this background our Courts are extremely reluctant to interfere with or allow the review of proceedings not yet completed in an inferior court. It has been said that a court will only do so in exceptional circumstances where serious injustice will otherwise result or when justice cannot be achieved in any other way. Wahlhaus and Others v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) at 119H – 120C; Building Improvements Finance Co (Pty) Ltd (supra) at 793F – 794A; R v Marais 1959 (1) SA 98 (T) at 101H; Van Tonder v Kilian NO 1992 (1) SA 67 (T) at 74D-I; Nourse v Van Heerden 1999 (2) SACR 198(W); S v The Attorney-General of the Western Cape, S v The Regional Magistrate, Wynberg 1999 (2) SACR 13(C).

[47] The principle that a High Court will be slow to review uncompleted criminal proceedings is well illustrated in *Wahlhaus* (supra) where the following appears:

“Nor, even if the preliminary point decided against the accused by a magistrate be fundamental to the accused’s guilt, will a Superior Court ordinarily interfere – whether by way of appeal or by way of review – before a conviction has taken place in the inferior court. (See Lawrance v A.R.M. of Johannesburg, 1908 TS 525, and Ginsberg v Additional Magistrate of Cape Town, 1933 CPD 357). In the former of these two cases INNES, C.J., said at p. 526:

“This is really an appeal from the magistrate’s decision upon the objection, and we are not prepared to entertain appeals piecemeal.

If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter”.

It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict, or mandamus – against the decision of a magistrate’s court given before conviction. (See *Ellis v Visser and Another*, 1956 (2) SA 117 (W), and *R. v Marais*, 1959 (1) SA 98 (T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (6th ed., vol. I p.

750) state:

‘While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the uninterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. . . . In general, however,

it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.’

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates’ courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly, the prejudice, inherent in an accused’s being obliged to proceed to trial, and possible conviction, in a magistrate’s court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate’s decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction (see too the observation of MURRAY, J., at pp. 123-4 of Ellis’ case, supra). As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal.” (At 119 F – 120 D)

[49] In *Adonis v Additional Magistrate, Bellville and Others* 2007 (2) SA 147 (C) at paragraphs [21] and [22] the following appears:

“[21] It is generally accepted that this Court will not readily intervene in lower court proceedings which have not yet terminated, unless grave injustice may otherwise result or where justice may not be obtained by other means. See Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119H – 120C; Ismail and Others v Additional Magistrate, Wynberg, and Another 1963 (1) SA 1 (A) at 5G – 6A; Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg, and Another 1978 (4) SA 790 (T) at 793F – G; Levack and Others v Regional Magistrate, Wynberg, and Another 1999 (4) SA 747 (C) (1999 (2) SACR 151; [1999] 3 All SA 374) at 754A – F (SA).

[22] Intervention on review will be justified in the case of a gross irregularity which has caused, or is likely to cause, prejudice to the applicant. See the *Building Improvements* case (supra) at 792H – 793C. In *Rynders v Bankorp Ltd t/a Trust Bank and Others* 1995

(2) SA 494 (W) it was held that a magistrate’s court did not have the power to grant an ex parte application for the provisional liquidation of a close corporation. According to MacArthur J (at 497B – D) the grant of such an order constituted an irregularity which caused the applicant ‘substantial wrong’ in that he was confronted with all the consequences of a provisional liquidation order. This entitled the applicant to take the magistrate’s decision on review, despite the fact that he might have failed to exhaust his remedies in the magistrate’s court.”

[26] In *Van Tonder v Kilian NO and Another*

[4] the facts are well summarised in the headnote as follows:

“The applicant stood trial in a regional court on a charge of culpable homicide, arising out of a motor vehicle collision in which two people were killed. The State alleged that the accident was caused by the applicant’s negligence as he had driven on the wrong side of the road at an inopportune moment and that the collision had taken place there. The applicant, who denied

being negligent and also denied that the collision had taken place on his wrong side of the road, intended to call an expert witness who would, as a result of conducting certain investigations, testify that the accident had probably occurred on the applicant’s

side of the road. This expert drew up certain maps and charts and, when the applicant’s counsel attempted to put the contents thereof to a State witness, the State argued that it did not admit the points or measurements on the maps. The presiding

magistrate (first respondent), despite being informed by the defence that they intended calling the expert witness to testify in respect of the sketches and charts, ruled that cross-examination on the documents would not be allowed as the documents had not been properly placed before the court. When a further State witness, one S, who had been the driver of another motor vehicle involved in the collision and who had sued the applicant in a civil action for damages, testified, the applicant wished to show that S had alleged a contradictory version of how the accident had happened in his pleadings, and accordingly wished to refer to such pleadings and if necessary hand them in as exhibits. The court a quo refused this request as well, ruling that the pleadings had not been properly certified. The applicant thereupon brought the instant application for the review and setting aside or correction of the rulings made by the first respondent.”

[51] The court on review held that the Magistrate had committed a misdirection which had materially prejudiced the applicant in the continuation of the trial which could not after conviction be corrected on review or appeal. The rulings were thus set aside in an interim review. The court having considered Wahlhaus (supra) held as follows:

“Ek is die mening toegedaan dat hierdie Hof nou moet inmeng. My redes is die volgende:

1. Die voortsetting van die verweerder se saak, soos ek gesê het, word gekniehalter as gevolg van ‘n wanopvatting van die betrokke gesag en prosesreg.
2. Dit moet oorweeg word of die onreëlmatigheid na ‘n moontlike skuldigbevinding op hersiening of appèl gekorrigeer kan word. In casu kan dit nie; indien die verhoor op die vertolking van die hof a quo hervat word, sal die applikant se getuies, eers moet getuig voor die betrokke Staatsgetuies gekruisvra word, met die gepaardgaande benadeling. Inding die applikant nie die dokumentasie aan die Staatsgetuies stel nie, sal hy nie sy pligte, waarna in Smith v Small (supra) verwys word, nakom nie. Indien die applikant die reëlins aanvaar en as gevolg van die wanvoorligting nie sy getuies roep nie, bestaan die risiko dat op hersiening na skuldigbevinding die hof nie in ‘n posisie sal wees om die wesenlikheid van die benadeling te kan oorweeg nie.

3. In hierdie saak bestry die Prokureur-generaal nie die meriete van hierdie aangeleentheid nie en namens die eerste respondent word dit nou ook nie bestry nie. Geen betoë in verband met die meriete word voorgelê nie. In 'n neutedop en in die lig van die omstandighede van hierdie saak kan die betrokke advokate – heeltemal tereg – nie die reëlins of besluite van die eerste respondent ondersteun nie.
4. Die wanvoorligting is nie net op 'n voorlopige of interlokutêre punt van toepassing nie. Dit tref die kern van die voortsetting van die applikant se saak en sy regte as beskuldigde word in 'n wesenlike mate tot niet gemaak.
5. In al die omstandighede van hierdie saak sal dit verkeerd en gekunsteld wees om die gevolge van gemelde wesenlike wanvoorligting nie nou te korrigeer nie.” (At 74H – 75E)”

[27] In essence however Second Respondent has conceded in argument that this review should be heard now and decided prior to the proceedings

continuing. Whilst we are not bound hereby, the attitude of Second Respondent is most relevant[5].

[28] The question must be considered against such grave injustice as may result were we not to intervene at this stage, such as to materially prejudice Applicant which could not, after sentence, be corrected on review or appeal.

THE MATERIAL IRREGULARITY ALLEGED:

[29] The main issue is whether First Respondent acted in a manner such as to constitute a gross irregularity in closing Applicant's defence in terms of the provisions of Section 342A (3)(d) of the CPA.

[30] The background to this ruling has been set out above as also the First Respondent's short reasons for having done so.

[31] Section 324 of the CPA provides as follows:

“342A Unreasonable delays in trials

- (1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.
- (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
 - (a) The duration of the delay;
 - (b) the reasons advanced for the delay;
 - (c) whether any person can be blamed for the delay;

- (d) the effect of the delay on the personal circumstances of the accused and witnesses;
 - (e) the seriousness, extent or complexity of the charge or charges;
 - (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
 - (g) the effect of the delay on the administration of justice;
 - (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
 - (i) any other factor which in the opinion of the court ought to be taken into account.
- (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
- (a) refusing further postponement of the proceedings;
 - (b) granting a postponement subject to any such conditions as the court may determine;
 - (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;
 - (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
 - (e) that-
 - (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
 - (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or [Date of commencement of para. (e): to be proclaimed.]
 - (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

- (4)(a) An order contemplated in subsection (3) (a), where the accused has pleaded to the charge, and an order contemplated in subsection (3) (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.
- (b) The attorney-general and the accused may appeal against an order contemplated in subsection (3) (d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply mutatis mutandis.
- (5) Where the court has made an order contemplated in subsection (3) (e)-
- (a) the costs shall be taxed according to the scale the court deems fit; and
- (b) the order shall have the effect of a civil judgment of that court.
- (6) If, on notice of motion, it appears to a superior court that the institution or continuance of criminal proceedings is being delayed unreasonably in a lower court which is seized with a case but does not have jurisdiction to try the case, that superior court may, with regard to such proceedings, institute the investigation contemplated in subsections (1) and (2) and issue any order contemplated in subsection (3) to the extent that it is applicable.
- (7)”

[32] The provisions of Section 342A are clearly peremptory and must be strictly interpreted as recently pointed out in *Mokoena v S* [6]:

“[5] In its judgment, the high court, pointed out that it was common cause that neither the defence nor the State had applied for an order in terms of the above section, and that neither of the parties had given notice of their intention to seek such an order. However it rejected the argument by the appellant, that the refusal by the magistrate to grant a postponement and the grant of an order in terms of s 342A(3)(d) of the Act, in the absence of the requisite notice, vitiated the proceedings. This was despite the high court finding that the provisions of s 342A must be strictly interpreted in view of the serious consequences of such an order and its effect upon the right to a fair trial as envisaged in s 35(3) of the Constitution.

- [6] In this respect the high court erred because in terms of s 342A(4)(a) no order shall be issued in terms of 342A(3)(d) unless exceptional circumstances exist and all other attempts to speed up the process have failed, and the defence or the State as the case may be, has given notice beforehand that it intends to apply for such an order as provided for in s 342A(4)(a) of the Act. The requirements of s 342A(4)(a) are clearly peremptory. Thus, the defect in these proceedings was that the regional court magistrate acted mero motu in terms of s 342A(4)(a) in the absence of any notice given beforehand by the State that it intended to apply for such an order. Because the application of the provisions of s 342A(4)(a) may have far reaching consequences, it is essential that proper notice as required by the section be given to the

other party so as to enable such party to prepare in advance.

- [7] Although the magistrate stated when the matter was postponed for further hearing in June 2014, that it was a final postponement for the defence to secure its remaining witness to testify on the video footage, the magistrate did not refer to s 342A, nor did the State give notice that it intended to rely on this section. It was only when the regional court magistrate made the ruling that the provisions of s 342A were referred to for the first time. The magistrate purported to deal with the requirement of notice by stating that the defence had accordingly been made aware of the fact that the matter was finally postponed, and that the provisions of the section therefore came into effect. This quite obviously did not constitute the requisite notice in terms of the section.
- [8] In this context it must be stressed that there is a significant difference, between the situation, as in the present case, where the magistrate warns a party that this will be a final adjournment of the matter and the situation where that party is given notice in terms of the section. In the latter instance, the magistrate will be asked to make an order that the case of that party is closed. In the former situation the affected party still possesses an election whether to close their case or not, and may decide not to close his or her case and lead additional evidence not related to the issue that caused the delay, whereas in the latter situation, that election is removed and placed in the hands of the magistrate. It should be made clear that s 342A(4)(a) requires the State or a party to give notice. A magistrate may not do so.”
- [33] It is clear from the record that, whilst Applicant’s Counsel invited the Court’s and prosecution’s attention to Section 342A of the CPA, neither Applicant nor the prosecution gave notice of intention to apply for the order contemplated in Section 342A (3)(d). As the magistrate could not do so *mero motu* his ruling constitutes a technical gross irregularity
- [34] The Magistrate’s additional reasons for the ruling do not cure this clear irregularity.
- [35] The question is then whether such technical irregularity constitutes a failure of justice as referred to in Section 309(3) of the CPA.
- [36] The answer is clear as the refusal of Applicant’s request for access to the 16 CV’s as referred to, if they existed, and this supported in fact by the prosecution, precluded further potential consideration by the Defence of the need to utilise same in Applicant’s defence and very potentially led to the exclusion of material evidence – a failure of justice in the sense required clearly resulted. This discloses sufficient prejudice, at this stage, such as to justify the review being heard in *medias res*.
- [37] Second Respondent’s further arguments fall to be rejected in the light of *Van der Walt v S* [7] both as to the right to a fair trial and the argument that this would have made “no difference” to the result. The latter argument misses the issue entirely as pointed out in *Van der Walt (supra)* [8].

[38] In the result the review must be upheld. Neither party sought a costs order agreeing that each party pay their own costs. The issue in prayer (b) falls away.

THE ORDER

[39] It is accordingly ordered that:

1. The review is upheld.
2. The order of First Respondent, in terms of Section 342A (3)(d), to close the defence's case, is set aside and as a consequence necessarily the convictions are set aside.
3. The matter is referred to the Director of Public Prosecutions, Eastern Cape, to decide whether the Applicant should be re-arraigned.
4. In the event that the Applicant is re-arraigned, the trial must be before a different Regional Magistrate.
5. Each party shall pay their own costs.

M.J. LOWE

JUDGE OF THE HIGH COURT

RUGUNANAN, J:

I agree.

M.S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant:

Adv J W Wessels

Instructed by:

Roland Meyer & Co Attorneys, Port Elizabeth

c/o McCallum Attorneys, Grahamstown

Obo Second Respondent:

Adv H Bakker

State Attorney, Port Elizabeth

c/o Mabece Tilana Inc., Grahamstown

- [1] Quartermark Investments (Pty) Ltd v Mkhwanazi & Another 2014 (3) SA 96 SCA [13] and [20]; Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another 2016
- (1) SA 78 (GJ).
- [2]
- [2008] ZAGPHC 215; 2009
- (1) SACR 263 (TPD) at paragraphs 9 and 10
- [3] Case No.: 2647/2011, 15 August 2013, ECD Grahamstown (delivered on 18 September 2013).
- [4] 1992
- (1) SA 67 (T)
- [5] Walhaus (supra) at 120 C.
- [6] 2019 (2) SACR 355 (SCA) at [5]-[8].
- [7] (CCT180/19) ZACC19 21 July 2020 [22-23] and [27-30]
- [8] [27-30]

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