

SOUTH AFRICA / JUDGMENT

Swanepoel and Another v S (23004/2021) [2021] ZAGPPHC 432; 2021 (2) SACR 374 (GP) (19 April 2021) [2021] ZAGPPHC 432

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

23004/2021

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23004/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between

MARCO SWANEPOEL 1st APPLICANT

STEPHEN MYLIE

2nd APPLICANT

And

THE STATE

Respondent

JUDGMENT

NYATHI AJ

INTRODUCT ION

- [1] The two applicants were charged with a co-accused, one Mr Piet van Zyl (now deceased, and erstwhile accused 1). 1st applicant was accused 2 and 2nd applicant was accused 3. They all were charged with the offence of performing restricted activities (dealing in rhino horn) without permits in contravention of the National Environmental Management Biodiversity Act, 10 of 2004 (NEMBA) alternatively, being in illegal possession of the said horns in contravention of regulation 41A (1) of The Gauteng Nature Conservation Ordinance 12 Of 1983.
- [2] As part of the preparations for trial the National Director of Prosecutions through its State Advocate Mr Mphaga, had made overtures
- to the applicants with the view to using them as State witnesses against van Zyl in terms of section 204 of the Criminal Procedure Act ("CPA"). The applicants had only provided witness statements implicating Van Zyl and had not been consulted by a
- prosecutor in preparation for a trial.
- [3] It is common cause that Van Zyl faced the bulk of the charges. The applicants had been arrested in a police trap that was authorised by the Directorate of Prosecutions. The undertaking by the state was not to prosecute the applicants for the illegal dealing in 8 Rhino horns in exchange for their evidence for the illegal dealing in 113 Rhino horns by the Van Zyl.
- [4] The trial was due to commence in the Regional Court in Pretoria on the 22 August 2017. However, a few days before that, Mr van Zyl ("van Zyl") was killed in what appears to be a robbery at his farm.
- [5] Van Zyl had been charged with about 108 counts whilst the applicants were charged only with the first two counts and the alternative
- counts thereto.
- [6] With the demise of Van Zyl, the National Prosecution Authority decided to proceed with the charges as laid out above against the two applicants. The matter has gone quite a long way in that as at the hearing of this application, the State and the Defence had already closed their respective cases.
- [7] The two applicants now approach this court seeking a permanent stay of the prosecution, alternatively an order setting aside the Director of Prosecutions ' decision to proceed with the case against the applicants as being unconstitutional and invalid. The applicants have previously made representations through their legal representatives without success.
- [8] The applicants made contentions that they had a contract with the State and a legitimate expectation not to be prosecuted as a result. They also felt aggrieved and suggested that their Constitutional rights and expectation for just administrative action by the State were infringed.

LEGAL PRINCIPLES APPLICABLE

[9] Section 204 reads as follows:

"(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor -

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness -

(i) that he is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and (b) the court shall cause such discharge to be entered on the record of the proceedings in question.

[10] An analysis of section 204 reveals the following points:

10.1 An accused person may be converted into a state witness [204 witness] and may testify against his fellow former co-accused.

10.2 Such a 204 witness will be required to testify frankly and honestly even if it means incriminating himself to the commission of the offence in question.

10.3 Such a 204 witness can be indemnified or discharged from prosecution for the same or similar offence once he / she has testified frankly and honestly.

10.4 A withdrawal of the case against an accused person for the purpose of testifying as a state witness is not final but conditional i.e., on condition they testify, do so honestly and frankly; to the satisfaction of the court and the court discharges him or her from prosecution.

10.5 A person who has not been discharged from prosecution may be prosecuted again for his or her role in the commission of the offence even when he /she was regarded as a 204 witness or testified as a 204 witness in court.

10.6 The self-incriminating evidence I statement obtained from a 204 witness can never be used against such a witness in the subsequent trial again him or her.

[11] Section 33(1) of the Constitution provides that "everyone has the right to administrative Action that is lawful, reasonable and procedurally fair" and (2) "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons".

CONCLUSION

[12] The essence of the complaint by the applicants is that:

12.1 They would not have a fair trial as they were initially promised to be used as 204 witnesses.

12.2 As a result, they forfeited their constitutional right to remain silent and not incriminate themselves, inter alia] as accused and

12.3 They disclose evidence which might be used against them in the trial against them.

12.4 Such evidence would not have been available to the state had they not been promised to be used as 204 witness.

[13] In S v Kuyler 2016

(2) SACR 563 (FB) Opperman AJ considered the nature and type of indemnity envisaged in section 204 to be a "hybrid phenomenon of contract and statute" flowing from an informal pre-trial contract between the State and the perpetrator for indemnity which rests on the power of the prosecuting authority conferred by the National Prosecuting Authority Act 32 of 1998. This is the power to institute criminal proceedings on behalf of the State and to carry out necessary functions incidental to instituting criminal proceedings. This in terms of statute, section 204 (2), if the court is of the opinion that the witness answered all questions frankly and honestly.[1]

[14] The procedure that is adopted when the prosecutor calls a section 204 witness is that he or she informs the court before the witness starts to testify. "The prosecutor must clearly indicate the offence in respect of which the witness will incriminate him- or herself"[2]. The court should then explain to the witness that he is obliged to answer all questions put, notwithstanding that the answer may be self-incriminating and that if he answers frankly

and honestly, he may be indemnified and discharged from prosecution regarding the offence in question.

[15] In the case of the applicants, they were not called to testify against their former co-accused due to his passing on before his trial could commence. Clearly the conditions enshrined in section 204 have not been met. The State being dominus litis exercised its powers to prosecute the applicants. The State may even decide to prosecute where a witness is refused indemnity after

testifying but failing to satisfy the threshold of frankness, honesty and self-incrimination discussed above.

[16] Since the applicants never gave evidence, their application is irrelevant, has no foundation in law and cannot succeed.

[17] The application is dismissed with costs.

J.S. NYATHI

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard: 02 March 2021

Judgment

delivered: 19th April 2021

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[1] Commentary on the Criminal Procedure Act - Du Toit et al.23-50G [service 60, 2018]

[2] Hiemstra's Criminal Procedure [issue 1] p23-50

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