

SOUTH AFRICA / JUDGMENT

Swart v Regional Magistrate Jonker and Another (2881/2018) [2022] ZAMPMBHC 53 (14 July 2022)

[2022] ZAMPMBHC 53

COURT

Mbombela High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

2881/2018

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Source record**THE****HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION, MBOMBELA MAIN SEAT****CASE****NO: 2881 / 2018**

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
14
July 2022
In

the matter between:

PETRUS
DANIEL
SWART APPLICANT
And
REGIONAL
MAGISTRATE JONKER
FIRST RESPONDENT
NATIONAL
DIRECTOR OF PUBLIC SECOND
RESPONDENT
PROSECUTIONS

JUDGMENT

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 14 July 2022.

[1] In this review application, the Applicant seeks this court's intervention in the criminal trial pending before the Regional Court in Piet Retief (court a quo), in terms of Rule 53 of the Uniform Rules. The First Respondent is the presiding judicial officer in that trial. In that trial, the Applicant faces a charge of rape in which his employee is the complainant. DNA samples were taken from him and evidence was led regarding the outcome after the same were compared to the DNA found in the swabs taken from the rape complainant. Two statements were presented in the trial; one indicating that the DNA in the swabs matched that of the complainant's boyfriend and another

indicating that it matched that of the Applicant. The forensic analyst testified that the reference to the complainant's

boyfriend was a mistake as he meant to make reference to the Applicant. Acting in terms of section 186 of the Criminal Procedure

Act 51 of 1977 (the Criminal Procedure Act), the First Respondent ordered that new DNA samples be obtained from the Applicant for comparison with the DNA obtained from the swabs, by a different forensic analyst. It is this decision that the Applicant seeks to have reviewed and set aside.

[2] The application is opposed by the Second Respondent for reasons that the Applicant failed to show that he would suffer irreparable harm unless an order setting aside the Magistrate's decision is granted and/or that the Magistrate's decision is not reviewable as he acted within his powers in terms of the Criminal Procedure Act.

[4] It is common cause that following the First Respondent's order referred to above, he clarified it further when he gave reasons for his decision saying he did not intend to have new evidence acquired and presented in a trial, but that the same DNA samples should be analysed by a different person and the results to be presented in a trial. If one looks at the trial record, this appears to have been a shift or change from the original order.[1] It is also common cause that the said analyses has been done and completed and the results have been disclosed to the Applicant's

legal representative but not yet introduced as evidence because of this application.

[5] I pause to indicate that the Applicant's predicament which resulted in him launching this review, is not the order as explained in the reasons and/or as carried out by the forensic analyst. His impasse was in the obtaining of new DNA samples as according to him, it would entail acquiring and presenting new evidence. He is not certain if he would have launched this application if the order was made in the format now explained and carried out.

[6] Just as Mr. Jungbluth (attorney representing the Applicant in the court a quo), put it on record when he addressed the First Respondent,[2]

"...the High Court will however exercise its inherent power to restrain illegalities in Magistrates Courts in rare cases where grave injustice may otherwise result or where justice might not by other means be attained." [My emphasis].

[7] I guess Mr. Jungbluth had in mind what was said in *Ismail and Others v Additional Magistrate, Wynberg and Another*,[3] by the Appellate Division when Steyn CJ said,

"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 untermiated proceedings in a 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.'"

[8] The Appellate Division referred to its earlier decision of *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another*[4] with approval where Ogilvie Thomson JA said,

"while a Superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the untermiated course of criminal 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."

[9] The question should therefore be whether justice could not by other means be attained if the trial was to be allowed to run its course. The temptation is great as it manifested itself in the heads of arguments by the Applicant and the Second Respondent, to approach the order of the court a quo as if this is an appeal. The interpretation of section 186 of the Criminal Procedure Act would be dealt by the court of appeal should that need arise in the future. For now, the question should be limited to whether the Applicant shall suffer irreparable harm if the trial was to run its course. Only if the grave injustice or irreparable harm is shown would this court be entitled to proceed and deal with the interpretation of and powers conferred on a trial court in terms of section 186 of the Criminal Procedure Act.

- [11] Contrary to showing grave injustice or irreparable harm, counsel for the Applicant submitted that should the Applicant be convicted of rape, he would appeal. In essence, he concedes that there is another avenue available in case the trial proceeds to the end and the court makes an adverse finding against him. In my view, that should be the end of the matter as justice can be attained even if the trial is allowed to run its course.
- [12] I am therefore unable to find that there would be substantial injustice or irreparable harm suffered by the Applicant in case the trial is allowed to run its course. Without pronouncing on the legality of the order made by the First Respondent, this is not one of those rare cases in which the “illegalities” taking place in the Lower Courts call for immediate intervention by the High Court. For this reason, the review application should fail.
- [13] As for the costs, I do not see any reason why costs should not follow suit. I am mindful that this application deals with the criminal trial proceedings of which no cost order would be made against a losing party, had the avenues available in the Criminal Procedure Act been utilised. However, this was not an appeal, but a review application in terms of Rule 53 that the Applicant chose as a means to attain his goals. In bringing the review application, the Applicant avoided the avenues availed to him by the Criminal Procedure Act, causing the Respondents, in particular the Second Respondent, some expenses in opposing it, which could have been avoided through the avenues

referred to above. Moreover, in the Notice of Motion, the Applicant asked for costs to be awarded in his favour in case of success.

Surely the opposite should apply in case of failure.

[14] For the reasons stipulated above, I make the following order.

[14.1] The application is dismissed with costs.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

FOR THE APPLICANT :

ADV. PF PISTORIUS SC

INSTRUCTED BY :

JUNGBLUTH ATTORNEYS

C/O KRUGER & BEKKER

ATTORNEYS

FOR THE RESPONDENT :

ADV. EN GAISA

INSTRUCTED BY :

STATE ATTORNEYS

: MBOMBELA

DATE HEARD :

12 JULY 2022

JUDGMENT

DELIVERED

: 14 JULY 2022

[1] See p. 250 of the paginated bundle.

[2] See p. 255 of the paginated bundle.

[3] 1963

(1) SA 1 (A) at p. 5G-H.

[4] 1959

(3) SA 113 (A) at p. 120B –C. See also *Jojwana v Regional Court Magistrate and Another* 2019 (6) SA 524 (ECM) para 8 where Tokota J (Mlomzale AJ concurring) held, “It is by now well established that, generally, a High Court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a lower court. 1 It has been stated that a superior court should be slow to intervene in unterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers E to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained'.

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Prepared on 10 October 2026 · Esheria