

SOUTH AFRICA / JUDGMENT

Sibiya and Another v Magistrate for the Regional Division of Northern Cape and Another (301/2019) [2020] ZANCHC 5 (28 February 2020) [2020] ZANCHC 5

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Chwaro

CASE / FILE NUMBER

301/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

CASE

NO: 301/2019

In

the matter between:

MICHAEL
JOEL
SIBIYA
First Applicant
TEBOHO
RONY
NOE
Second Applicant
and
MAGISTRATE
FOR THE REGIONAL DIVISION OF
NORTHERN
CAPE, MR M VIEWE N.O.
First Respondent
NATIONAL
DIRECTOR OF PUBLIC PROSECUTIONS
Second Respondent

CORAM:

MAMOSEBO J et CHWARO AJ

JUDGMENT

CHWARO AJ:

INTRODUCTION

- [1] The applicants are arraigned before the Regional Court, Upington on two charges, being theft of an amount of R60 000-00 and money laundering relating to such amount. The on-going criminal proceedings before the first respondent remain adjourned pending the final determination of this review application brought in terms of section 22 (1)(c) of the Superior Court Act, No. 10 of 2013.
- [2] The applicants contend that the prosecutor in charge of the criminal proceedings has committed a gross irregularity which infringes on their rights to fair trial as expounded in section 35(3) of the Constitution by deliberately withholding important information from their legal representative prior to them tendering their respective pleas and formal admissions in terms of section 220 of the Criminal Procedure Act 57 of 1977, (“the CPA”).
- [3] In the notice of motion filed in support of their application, except for the usual costs order, the applicants seek relief in the following terms:
- “1. That the criminal proceedings before the first respondent, under Upington Regional Court Case No. RC75/2015, against the applicants are reviewed and set aside in their totality on the ground of gross irregularity;*
2. That the National Director of Public Prosecutions or his duly authorised representative is called upon to decide whether or not to reinstate the same criminal charges afresh against the applicants before another magistrate;
3. In the event of the National Director of Public Prosecutions or his duly authorised representative deciding to reinstate the criminal charges against the applicants afresh before another magistrate, then the State is not to rely on any admissions made by the applicants during the course of the criminal proceedings before the first respondent and during the current review proceedings.”
- [4] The application is opposed by the second respondent and the first respondent abides the decision of this Court.

BACKGROUND

- [5] The applicants were summoned to appear before the Regional Court, Upington to face two charges, to wit, theft of an amount of R60 000-00 which belonged to a person unknown to the state and money laundering relating to the said amount. At all times material hereto, the applicants were legally represented by Mr A.V. Mjila, an attorney from Mjila & Partners, (“Mr Mjila”). The matter was remanded several times until the above-mentioned charges were formally put to them on 8 April 2016.
- [6] Prior to the hearing of the matter before the first respondent on 8 April 2016, the applicants’ attorneys were provided with the contents of the police docket, which included an affidavit deposed to by an employee of PostNet and pointing out affidavits which were deposed to by the applicants.
- [7] The applicants contend that soon after having pleaded to the charges and made admissions in terms of section 220 of the CPA, the public prosecutor, Adv. J.T. Bakamela (“Mr Bakamela”) handed over a copy of a document to their attorney, Mr Mjila. This document was a standing order issued by the South African Police Service. The relevant portion of the standing order for purposes of this review application reads as follows:

“Paragraph 7: Unclaimed property

- (3) A member shall not appropriate, for his own use, property [of any description] which may be found by him and or her, whether he or she is on or off duty. If property handed in by him or her remains unclaimed, he or she may not receive it in his capacity as finder”.
- [8] Part of the admissions made by the first applicant in terms of section 220 of the CPA was to the following effect:

“10. I admit that I was the passenger on a vehicle driven by my colleague or accused number 2 when I instructed him to stop the vehicle after I have noticed cash amounts or money lying outside the entrance along the road as per chargesheet outside the entrance of the Kalahari Mall.

11. I further admit that the total amount I picked up was R60 000.00 of which we shared it equally with my colleague or co accused”.

- [9] A portion of the section 220 admissions made by the second applicant read as follows:

“10. I admit that I was the driver of the vehicle when my colleague or accused number 1 [when he] picked up the cash amounts as per chargesheet [at] the entrance of the Kalahari Mall.

11. I further admit that the total amount my colleague or accused number 1 picked was R60 000.00 of which we shared it equally”.

- [10] The applicants felt aggrieved by the conduct of the prosecutor to have made a copy of the standing order at what they perceived to be the late stage and after their pleas and admissions were already placed on record. In this regard, Mr Mjila successfully sought a postponement of the matter and subsequently instructed counsel to assist the applicants.
- [11] An application was duly made before the first respondent to withdraw the admissions made by the applicants as they felt that their rights to fair trial were being compromised by what they considered to be a deliberate withholding of relevant information by the prosecutor, which information, if it could have been availed earlier, would have influenced their decision making in relation to the formal admissions in terms of section 220 of the CPA. The applicants contended that their trial was being conducted by ambush.
- [12] The applicants requested the first respondent to refer the matter to this court as a special review. The first respondent declined the invitation. Evidence of at least two state witnesses has been led thus far.

CONTENTIONS BY THE PARTIES

- [13] The applicants contend that the conduct of Mr Bakamela, as the prosecutor, to allegedly withhold furnishing them with a copy of the standing order until their pleas and admissions in terms of section 220 of the CPA were placed on record amounts to a gross irregularity which vitiates the fairness of the trial in its entirety.
- [14] To this end, the applicants argue that Mr Bakamela failed in his duties to act in a manner befitting his office and consonant with the code of conduct for public prosecutors in that by 7 April 2016, when he was consulting with the state witnesses, he knew of the existence of the standing order which was going to be brought to court on 8 April 2016 but nonetheless, failed to inform Mr Mjila about it and its contents.
- [15] The applicants further submitted that their contention that the prosecution conducted a trial by ambush was given credence by the pronouncement allegedly made by the first respondent to that effect during the course of the criminal proceedings.
- [16] The second respondent had taken a preliminary point to the effect that the launching of this review application is premature and thus the application ought to be dismissed outrightly on this point alone. This objection has its basis on the fact that though the first respondent made rulings on the applications made by the applicants relating to the leading of evidence on the standing order and the withdrawal of section 220 admissions, no reasons have been pronounced as yet and thus a review application will be based on second-guessing the first respondent's rulings.
- [17] The preliminary point was abandoned by Ms Olivier during her oral submission before us. In my view, this was the correct stance given the fact that the challenge mounted by the applicants is not directed at the rulings made by the first respondent but simply on the alleged gross irregularity committed by the prosecutor.

- [18] On the merits to the applicants' case, Mr Bakamela contends that during the course of his consultation with the state's witnesses on 7 April 2016, he was informed about the existence of the police standing order regulating the conduct of police officers regarding the handling of items found. He had no sight of that document prior to this date nor was he aware of its existence. He requested the investigating officer to provide him with a copy of the standing order on the following day.
- [19] On 8 April 2016 and whilst in court, the investigating officer provided him with a copy of the standing order. He perused same and immediately shared a copy with Mr Mjila. In his view, this demonstrated his bona fides and willingness to provide the defence with information as expected of him. He denies any improper conduct on his part and contends that the applicants, being members of the SAPS themselves, ought to have been aware of the standing order in question.

ISSUE FOR DETERMINATION

- [20] Having outlined the brief factual background above, it is my considered view that this Court has to determine whether the conduct of Mr Bakamela constitutes a gross irregularity vitiating the incomplete criminal proceedings to an extent of being reviewed and set aside.

CONDUCT OF PUBLIC PROSECUTORS

- [21] Section 32(1)(a) of the National Prosecuting Authority Act, No 32 of 1998, ("the NPA Act") makes provision for the general conduct of public prosecutions. It provides as follows:

"A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."

- [22] Section 22 (6) of the NPA Act makes provision for the promulgation of a code of conduct. In this regard, a set of rules regulating the conduct of public prosecutors under the employ of the second respondent are contained in "The Code of Conduct for members of the National Prosecuting Authority" which was published on 29 December 2010.
- [23] These set of rules provide for, amongst others, prosecutors to always display a sense of fairness, professionalism, impartiality and even-handedness in their dealings with members of the public and practitioners. They must uphold the spirit and purport of the Constitution in general and be mindful of the right to fair trial for accused persons, both unrepresented and those who are represented by always providing relevant information in their possession to assist the accused persons in the preparation of their defences.
- [24] The above legislative provisions and the code of conduct for prosecutors were recently scrutinised in *Van der Westhuizen v S*[1] and after having considered comparative international instruments applicable to prosecutors, the court stated the following:

“[I]t would therefore, for example, not be necessary for a prosecutor to draw attention to a specific witness's statement favourable to the accused in the dossier made available to the defence, for he who runs may read; but the prosecutor would be obliged to inform the defence that a particular witness, who has not given a statement, might to the defence's advantage be consulted, and why, and also to assist, where necessary, in making such a witness available; and the prosecutor would also be obliged to furnish the defence with a document which is not in the dossier, which favours the accused's case or which is destructive of the State case, which the prosecutor believes or ought reasonably to believe is not in the possession of the defence. But the prosecutor's obligation is not to put the information before the court”

- [25] The above dictum confirms the role of a prosecutor in a criminal trial in as far as the disclosure of information at the disposal of the state and which might assist the accused to make proper and informed decisions in the preparation of his trial.
- [26] Since there is a stark dispute between the applicants and the prosecutor about what actually happened prior to the discovery of the standing order in court on 8 April 2016, this Court has to invoke the well-known Plascon Evans rule which holds that final relief may be granted in motion proceedings upon considering the facts set out by the applicant in

its founding affidavit which are admitted, together with the facts set out by the respondent in its answering affidavit.[2] In this exercise the respondent's version is to be accepted unless it is so improbable that the court is justified in rejecting it on the papers alone.

- [27] The applicants have not provided any serious and unassailable version to demonstrate that the prosecutor deliberately withheld the standing order with a view to mislead them into making admissions under circumstances explained in the record. The conjecture and assumptions that the prosecutor might have known about the contents of the standing order prior to his consultation on 7 April 2016 is not borne out by facts.
- [28] The record and evidence presented in this application clearly indicate that as soon as the prosecutor was able to peruse the standing order that was furnished to him by the investigating officer on 8 April 2016, he immediately shared its contents with the applicants' legal representative. The applicants' legal representative then sought a postponement to apply his mind on the matter.
- [29] Similarly, the applicants have not placed any facts before this Court to substantiate their contention that Mr Bakamela's earlier request to Mr Mjila to secure admissions from them was a ruse which was intended to stifle their rights to a fair trial.
- [30] The applicants' suggestion that the first respondent indeed confirmed that the state was conducting a trial by ambush is not borne out by the record. On perusal of the record, it is apparent that an objection that was made on behalf of the applicants towards the evidence of Constable Andrew on the standing order was not sustained and a ruling was made by the first respondent to allow such evidence.

- [31] Similarly, the first respondent made a second ruling rejecting an application made on behalf of the applicants to withdraw their section 220 admissions. In my view and without gravitating towards the merits of the on-going criminal trial, these rulings are not consistent with the alleged remark which the applicants seek to attribute to the first respondent and relating to a trial being conducted by ambush.
- [32] It is a settled principle of our law that a review court can only interfere with the proceedings of an on-going criminal trial in exceptional cases[3]. The rationale for this salutary principle of our law is to be found in the need to avoid a piecemeal adjudication of disputes[4].
- [33] This principle has recently been narrowed down to be only applicable in cases where grave injustice might otherwise result or where justice might not by other means be obtained.[5] In my view, the applicants have not demonstrated that their case falls within the category of cases referred to in the above authority.

CONCLUSION

- [34] Having duly considered the principles enunciated in the authorities referred to above, it is my considered view that the prosecutor did not commit any gross irregularity entitling the applicants to a review of the entire incomplete criminal proceedings. Consequently, the application must fail.
- [35] The general principle in litigation is that costs must follow the result unless there are other considerations which a court, in the exercise of its judicial discretion, considers meritorious to deviate from this default position.
- [36] In my view, the applicants have not made out any extraordinary case deserving a consideration of the Biowatch[6] principle to avoid the costs of this application. Resultantly, costs must follow the result.

ORDER

- [37] In the result, the following order is made:

1. The application is dismissed with costs.

O.K.CHWARO

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M.C.MAMOSEBO

JUDGE OF THE HIGH COURT

DATE OF HEARING:

17 February 2020

DATE OF JUDGMENT:

28 February 2020

APPEARANCES:

Counsel for the Applicants: Adv. F. Petersen

Instructed by:

Mjila & Partners

Kimberley

Attorney for the Second Respondent: Ms M.P.Olivier

The State Attorney

[1] 2011 (2) SACR 26 (SCA) at para 13

[2] Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A)

[3] See Wahlaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119H-120B

[4] Gounden and Another v Noncebu N.O and Others 2018(2) SACR 186 (KZP) and S v Western Areas (Pty) Ltd and Others 2005

(5) SA 214 (SCA) at para 20

[5] See Motata v Nair N.O. and Another 2009 (1) SACR 206 (T) at 119,

[6] Principle enunciated in Biowatch Trust v Registrar, Genetic Resources and Other 2009 (10)BCLR 1014 (CC)

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Prepared on 13 October 2026 · Esheria