

SOUTH AFRICA / JUDGMENT

Van der Merwe v S (A627/2011) [2015] ZAGPPHC 1107 (4 June 2015)

[2015] ZAGPPHC 1107**COURT**

North Gauteng High Court, Pretoria

BEFORE

Kubushi, Tsatsi

CASE / FILE NUMBER

A627/2011

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****CASE****NO: A627/2011****DATE:**

4/6/2015

In

the matter between:

MAGDALENA

ADRIANA VAN DER

MERWE

APPELLANT

and

THE

STATE

RESPONDENT

J

J U D G M E N T

HIARD

ON : 14 April 2015

JUDGMENT

ON : 04 June 2015

CORAM : KUBUSHI, J

: TSASI, AJ

KUBUSHI, J

BACKGROUND

[1] The appellants are appealing the judgment of the regional court magistrate, Pretoria. The first appellant, Phenster Production CC, is a close corporation and is a juristic person for purposes of this judgment. Magdalena

Adriana Van der Merwe ("Ms Van der Merwe"), the second appellant in these proceedings, is the sole member of the first

appellant and is as such representing the first appellant. Ms Van der Merwe is the second appellant in her personal capacity.

[2] Both appellants were at all material times, during the trial and in this appeal, represented by Adv IKlepper. The prosecution was initially led by Adv Bredent?amp and later led by Mr Ferreira until the matter was finalised. Mr Ferreira represented the respondent in the appeal hearing as well.

[3] Five counts were preferred against both appellants by the respondent. Three counts of active corruption in terms of s 1 (1) (a)

(i) of the Corruption Act 94 of 1992, the allegation being that Ms Van der Merwe gave Ms Thembi Sylvia Cecilia Buthelezi ("Ms

Buthelezi") and Mr Simon Vincent Khoza ("Mr Khoza") money which was not legally due but aimed to influence them; one count of conspiracy in terms of s 18 (2) (a) of the Riotous Assemblies Act 17 of 1956, the allegation being that the appellants conspired together with Buthelezi and Mr Khoza to commit the offence with which the appellants were charged with; and one count of fraud in that the appellants misrepresented to the Independent Electoral Commission ("IEC") that the first appellant consisted of previously disadvantaged individuals whereas it was not the case. The state alleged that all these offences were perpetrated against the IEC.

[4] The appellants pleaded not guilty to all the charges but were convicted of the three counts of active corruption and fraud. In convicting them for active corruption, the trial magistrate found that there was a generally corrupt relationship between the

appellants, Ms Buthelezi and Mr Khoza, in that the money given to Ms Buthelezi and Mr Khoza by Ms Van der Merwe was not legally due to them and was given to safeguard that the first appellant continues to receive contracts and tenders from the IEC.

- [5] The trial magistrate refused the appellants' application for leave to appeal the convictions but leave was granted on petition. The appellants are therefore before us appealing the convictions only.
- [6] The appellants were initially arraigned together with Ms Buthelezi and Mr Khoza. The two pleaded guilty and agreed to testify against the appellants. It is common cause that Ms Buthelezi and Mr Khoza were at the time of the commission of the offences employees of the IEC. Ms Buthelezi held the rank of Director of Marketing in the Communications Department. Her work entailed, amongst others, the power and duty to procure services and products for the IEC through tender and quotation procedures. Mr Khoza was appointed as acting Chief Director: Corporate Services Division. His work entailed, amongst others, the power and duty to manage procurement functions within the IEC.
- [7] It is common cause that during the duration of the trial Ms Van der Merwe was residing in New Zealand and flew in and out of the country in order to attend trial. She was released on her own cognisance and warned to attend court. On one occasion she failed to attend court and a warrant of arrest was authorised against her but held over pending the next court date. An enquiry into her failure to attend court was as a result held. The trial magistrate found her guilty of contempt of court and in passing sentence only warned and discharged her. The second appellant is appealing this conviction as well. I shall in this judgment refer to that appeal as 'the contempt of court appeal' in order to distinguish it from the main appeal.
- [8] At the hearing of the appeal, the appellants' counsel called for the dismissal of the main appeal on the ground that the record of appeal which required to be reconstructed, notwithstanding the reconstruction was insufficient for the adjudication of the appeal. This point in limine does not relate to the contempt of court appeal.

RECONSTRUCTION OF THE RECORD

- [9] It is common cause that some parts of the record of appeal before us have been reconstructed. The transcription of the record of the trial was incomplete with regard to two full days' evidence of one of the state witnesses, Ms Buthelezi, namely, the evidence of 17 and 18 September 2007, and on day's evidence of Ms Van der Merwe, namely, the evidence of 22 May 2009. In total the recording of evidence spanning two and half days was not recorded. Those parts of the evidence are lost. Leave to appeal having been granted to the appellants an appeal record had to be prepared and because of the lost evidence the record of the trial required reconstruction as well.

- [10] The appeal was initially enrolled for hearing on 9 April 2013 but had to be postponed due to the incomplete record. Difficulties were endured in preparing the appeal record because the incomplete trial record could not be reconstructed. Attempts were made on numerous occasions, unsuccessfully so, to resolve the issue of preparing and completing the appeal record in order for the appeal to continue. The attempts were unsuccessful because of lack of information to reconstruct the trial record. This caused the hearing of the appeal to be delayed for several years. Eventually, after a search of many months by the trial magistrate, and only on 15 January 2014 the trial magistrate found his notes on the trial.
- [11] On 10 April 2014, some approximately five years from the date the evidence was concluded, the parties converged in open court in an attempt to reconstruct the record of evidence. The parties available at such reconstruction were the trial magistrate, the prosecutor Mr Ferreira and the appellants' counsel Mr Klopper. Ms Van der Merwe did not attend. Both Mr Ferreira and Mr Klopper, due to the passage of time, did not have their notes on the trial. Mr Ferreira as already stated was not involved in the case at the time Ms Buthelezi testified. The reconstruction of the record as such depended solely on the notes of the trial magistrate. It is not in dispute that the notes of the trial magistrate on the evidence of Ms Buthelezi consisted of only six questions and six cryptic answers to those questions. It is also common cause that the trial magistrate read into the record not less than 109 questions and answers which he recorded on the morning of 22 May 2009 when Ms Van der Merwe was being cross examined.
- [12] The process followed by the trial magistrate in constructing the record was to read his notes into the record, a process which was objected to by Mr Klopper. Counsel preferred that the notes should be transcribed and handed to the defence and the prosecution for their own transcription. The parties would then after reconstructing the notes individually, converge again in court to reconstruct the record together. The trial magistrate did not accede to the process proposed by Mr Klopper. The notes were thus read into the record where after they were transcribed and sent to the parties for confirmation.
- [13] It appears from the record that Ms Van der Merwe, on behalf of both appellants, was not satisfied with the attempted reconstruction and in an affidavit deposed to on 9 July 2014 she set out the deficiencies she perceived to be in the reconstructed record. The deficiencies in the affidavit are similar to those raised by the defence when the appeal was argued before us.
- [14] The submission by the appellants is that notwithstanding the efforts done in trying to reconstruct the record, the appeal record contains deficiencies that were impossible to rectify and that, due to the lapse of time it would be difficult or impossible to reconstruct the trial record. According to Mr Klopper, the attempted reconstruction is insufficient for the court adjudicating the appeal to determine and obtain a proper view on what evidence was produced at the trial, especially from the all-important state witness, Ms Buthelezi. It was, thus, argued on behalf of the appellants that due to the incomplete record, the appeal in

respect of the convictions cannot properly be adjudicated and therefore the convictions and the consequent sentences must be set aside.

[15] The respondent, on the other hand, submits that the appeal should be proceeded with on the basis that as at 27 March 2012 the appellants filed their heads of argument and were prepared to proceed with the appeal. It was only when the respondent pointed out that there were certain shortcomings in the record that the initial appeal was not proceeded with. The appellants were then prepared to proceed with the appeal on the record as it stood. Mr Ferreira on behalf of the respondent contends that when the reconstruction took place Mr Klopper, for both appellants, was also present and placed it on record that he has no notes with which to assist in the reconstruction process. He can therefore not be heard to complain about the reconstructed record. According to Mr Ferreira, the defence of the appellants to the charges appears clearly in the record and the issues on appeal are highlighted in the heads of argument by the appellants and the respondent. The issues on appeal are clearly established from the available record. And, as such, the record has been reconstructed and the appeal should be proceeded with, so Mr Ferreira argued.

[16] The issue to be determined by this court, therefore, is whether the reconstructed record of proceedings in the trial court is adequate for the consideration of the appeal before us.

[17] In *S v Chabedi*[1] Brand JA said the following regarding the record on appeal:

'[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect record of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible, see *S v Collier* 1976 (2) SA 378 (C) at 379 A-D and *S v S* 1995 (2) SACR 420 at 432 b-f.

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'

[18] It is trite that a record of proceedings in the trial court forms the whole basis of the hearing by a court of appeal. For an appeal to be prosecuted effectively a proper record of the trial court proceedings must be placed before the appeal court. There can be no fair trial for an accused person if no proper record is provided.

[19] The question is not whether the parties themselves are satisfied about the record placed before the court of appeal, as Mr Ferreira in his argument wants to suggest, but whether the record is adequate for a proper adjudication of the appeal by the appeal court.

- [20] It is not in dispute that, in this instance, there is a large chunk of evidence that was lost and is irrecoverable. It is also common cause that except for the notes of the trial magistrate no other information is available to assist in reconstructing the lost evidence. Both the defence and the prosecution, because of the passage of time, do no longer have their notes on the trial.
- [21] To my mind, the appellants' submission that the reconstructed record is insufficient to determine a fair trial is correct.
- [22] In his submission before us, Mr Klopper contended that the record is insufficient for a proper adjudication of the appeal on the following grounds:
- [23] Firstly, the attempted reconstruction of the evidence of Ms Buthelezi given over a period of two days is totally incomplete. The attempted reconstruction of this evidence on 10 April 2014 indicates that the trial magistrate noted the total evidence of Ms Buthelezi as the sum total of only six short questions and six cryptic answers. According to Mr Klopper, it is highly improbable that the evidence of Ms Buthelezi which appears to have been contained in about 200 pages given over two full days would amount to only six questions and six answers. The reconstruction, therefore, is totally unsatisfactory and inadequate to determine the contents of Ms Buthelezi's evidence over those two days.
- [24] In comparison with the summarised evidence of Ms Buthelezi, the trial magistrate read no less than 109 questions and answers into the record on 10 April 2014 which he indicated he recorded during one morning (half a day) of the cross examination of Ms Van der Merwe on 22 May 2009. The recording of six questions and six answers over two days is clearly a totally insufficient recording.
- [25] The trial magistrate's reduction of Ms Buthelezi's evidence of two days into six short questions and six cryptic answers creates huge gaps in her evidence. The result is that an inference may be made that either the trial magistrate did not keep notes or did not apply his mind during the evidence or he totally ignored or disregarded the evidence.
- [26] Secondly, the summary of the evidence contained in the trial magistrate's judgment does not assist the situation. It is difficult to determine from the judgment whether the evidence was correctly summarised and properly adjudicated upon by the trial magistrate or whether all the evidence was considered.
- [27] Ms Buthelezi was allegedly involved in every single aspect of the charges against the appellants - she was the contact person. Her evidence is thus crucial in implicating the appellants in the commission of the offences. From the judgment it cannot be tested whether the trial magistrate correctly summarised her evidence. The transcribed part of Ms Buthelezi's evidence consists of approximately

350 pages (vol. 4 p1020 to vol. 5 p1365) and when the missing part of about 200 to 240 pages is considered, her whole evidence ought to have been contained in approximately 600 pages. All this evidence was summarised by the trial magistrate in only two pages (vol. 7 p1875 to p1877) of his judgment.

[28] Thirdly, from reading the trial magistrate's judgment (vol. 7 p1884) he refers to contradictions by the cardinal state witness, Ms Buthelezi and came to a conclusion that the contradictions were not material. He does not deal or make mention of the contradictions. It can therefore not be ascertained from the reconstructed record whether such contradictions were dealt with properly in order to come to the conclusion that they were not material. For example one of the major discrepancies which the trial magistrate did not deal with is Mr Khoza's evidence when he testified that when it was decided to put out a tender for postage, he went to a meeting with Ms Buthelezi and Ms Van der Merwe where the tender was discussed, but Ms Buthelezi's evidence is that during that time Ms Van der Merwe was not in town but in Kwa-Zulu -Natal which is common cause. The trial magistrate's judgment does not deal with this discrepancy at all.

[29] On the issue of the heads of argument raised by Mr Ferreira in his argument, Mr

Klopper asserts that the heads of argument were prepared on the basis of what was before court and does not in any way substitute the missing evidence from the record. The evidence is lost and the heads of argument cannot fill the gaps, so he argued.

[30] I am in agreement with the submissions by Mr Klopper and have to conclude that the reconstructed record before us is insufficient for a proper determination of a fair trial. The defects in the reconstructed record are so serious that a proper consideration of the appeal is not possible. Consequently, my opinion is that all the convictions and the resultant sentences stand to be set aside.

THE CONTEMPT OF COURT APPEAL

TSATSI, AJ

[31] This was an appeal against the judgment of the Pretoria Regional Court (the court a quo), in terms of which the second appellant was convicted of contravening section 170 of the Criminal Procedure Act ("the Act") which was "contempt of court". The court a quo warned and discharged the second appellant without imposing a fine or ordering a sentence of direct imprisonment. The second appellant

appealed with permission being granted after petition to this Court.

[32] The events giving rise to the charge of contempt of court upon which the second appellant was convicted and sentenced are summarized thus: the state instituted charges 1,2,and 4 of active corruption,3 of conspiracy and charge 5 of fraud against the first and second

appellants around July 2011. The first appellant is a close corporation owned by the second appellant. It too? the state about

four years to prepare the charges. The second appellant appeared in the court a quo on warning even though she was living in New Zealand since 2003. The state was finally ready to proceed with the trial around August

2006. Such proceedings continued until July 2008. The second appellant failed to attend court from 21 July 2008 to 31 July 2008 because she could not travel to South Africa due to her alleged medical condition, heart disease. The warrant for the second appellant's arrest was issued but suspended to late 2008. This was due to the fact that the medical doctor of the second appellant indicated that she would be able to travel to South Africa in December 2008.

[33] On 8 December 2008 the second appellant appeared in court and an inquiry into her failure to attend the previous court proceedings was held. In her defence the second appellant produced medical certificates and reports as proof that she was medically unfit to

travel to South Africa, at the time in question. The said medical certificates indicated that she suffered from a heart problem.

Notwithstanding evidence placed before the court a quo the second appellant was convicted of contempt of court. As part of her sentence the court a quo ordered the second appellant to hand over her passport prohibiting her to travel to her home in New Zealand. She approached this court on an urgent basis to set aside the order of the court a quo. She succeeded in her application and the decision of the court a quo of ordering her to hand over her passport was set aside.

[34] Subsequent to the decision of the court a quo to order the second appellant to hand over her passport, the latter made an application to the court a quo to have the learned magistrate recuse himself. The basis of the second appellant's recusal application was that the learned magistrate was biased against her. The learned magistrate refused to recuse himself.

[35] The main issue in this appeal was whether or not the second appellant was in contempt of court when she failed to appear in the court a quo due to a medical condition, a heart problem. The underlying question being whether or not the medical certificate produced by the second appellant failed to disclose the reason why the second appellant could not fly to South Africa to attend her court proceedings.

[36] The second appellant was found guilty of contempt of court in terms of s 170 of the Criminal Procedure Act. The section provides as follows:

"(1) An accused at criminal proceedings who is not in custody and who has been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

- (2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings so adjourned, issue a warrant for his or her arrest and, when he is brought before the court, in a summary manner enquire into his or her failure to appear or so to remain in attendance and, unless the accused satisfies the court that his or her

failure was not due to fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months."

- [37] Section 170 deals with the failure of an accused person in a criminal trial to appear after an adjournment or to remain in attendance and the procedure followed once he or she is in attendance. It should be noted that the provisions of the Criminal Procedure Act, relating to the procedure which shall be followed in respect of an enquiry referred to in s 170 of the Criminal Procedure Act, applies mutatis mutandis in respect of an enquiry where an accused fails to attend or remain in attendance when in terms of s 72 (4) he or she is warned to appear; or when summoned to appear in terms of s 55 (2); or when on notice in terms of s 56 (5); or when released on bail in terms of s 67 (2).
- [38] On appeal the second appellant's counsel submitted that the court a quo misdirected itself by convicting the second appellant of being in contempt of court by failing to accept the medical report provided by the second appellant simply because the investigating officer questioned the correctness thereof, even though no contrary evidence was placed before the court. Counsel submitted further that there was abundant uncontested evidence placed before the court a quo that the second appellant was medically unfit to take arduous long flights from New Zealand to South Africa and vice versa due to a heart condition. Counsel for the second appellant argued that a reasonable and acceptable explanation of why the second appellant was not in court on the day she failed to appear in court was placed before the court a quo. In addition to the medical reports and certificates that she produced in the court a quo, she also deposed to an affidavit explaining why she did not attend court on the day in question.
- [39] It was submitted on behalf of the respondent that it was required of the second appellant to satisfy the court a quo that her failure to appear in court was not due to any fault on her part. A further submission on behalf of the respondent was that

the medical certificates produced did not comply with the requirements of the documentary evidence. It was submitted that the circumstances under which the said medical certificates were issued, the language used and the mistakes contained, including the

reasons

provided for the second appellant's absence created more questions than answers. It was further submitted by counsel for the respondent that the medical certificates indicated that the "event" took place in December 2007 but the second appellant was able to travel to South Africa in March 2008. She then failed to appear in July 2008.

[40] A further submission on behalf of the respondent was that she failed to appear on the date the matter was postponed to and therefore s 170 read with s 169 and s 55 of the Criminal Procedure Act came into operation.

[41] The submission by the state that the medical certificates produced by the second appellant did not comply with the requirements of the documentary evidence and therefore constituted hearsay evidence was misplaced. It is my view that the court a quo did not make such a finding. From the reading of the judgment of the court a quo it is clear that it accepted the medical certificates into evidence. What, however, the court a quo was not satisfied with was the contents thereof, that is, the explanation provided by the doctors in the said medical certificates.

[42] There is no indication in the court a quo's judgment that it did not accept the medical certificates. In its judgment the court a quo stated as follows:

"The first document handed by the accused, the general practitioner, were very much questionable because he is not a cardiologist, he is not a specialist in heart disease and the way he, the content of the report to this court and to the State as well, it was not in detail, it was scanty. And the further documents handed to this court, I am not going to refer to them one by one, I must say unless maybe the writers thereof, the authors thereof testified under oath, maybe the court may have come to a different conclusion. I must say - I am not saying the authors thereof tried to mislead the court, but they do not indicate exactly that the accused was a person who was not in a position to fly to South Africa not even one document before me states that. He does not explain exactly why the accused could not fly."

"I do not want to repeat word by word what the advocate for the State has said about these reports. I am persuaded to unfortunately to agree with him that these reports are very much unhelpful. They do not say much: they do not explain exactly why you were not in court. I have to come to the conclusion that you deliberately stayed in New Zealand because you felt aggrieved." (my emphasis)

[43] It is common cause that in the enquiry conducted in terms of s 170

(2) of the Criminal Procedure Act, the court a quo was not satisfied with the explanation offered by the second appellant as to why she did not appear in court on the date and time

to which the proceedings were adjourned and consequently, convicted her of contempt of court.

- [44] Section 170 (1) of the Criminal Procedure Act obliges an accused person, when a case has been adjourned, to appear at the place and on the date and time to which the case in question was adjourned and to remain in attendance until the court adjourns or he or she is excused.
- [45] When an accused person who was not present in court on the date and time at which the case was adjourned next appears in court, a summary enquiry into the reason for his or her absence must be held.
- [46] Section 170 (2) of the Criminal Procedure Act enjoins the accused to satisfy the court that his or her failure to appear in court was not his or her fault. The accused bears the onus of explaining his or her failure to attend but need only satisfy the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part. See *S v Singo* [2002] ZACC 10; 2002 (2) SACR 160 (CC) para 23. In that judgment the principle was discussed in relation to s 72 of the Criminal Procedure Act but it applies as well in respect of a 170 (2) of
- [47] It is not in dispute that the second appellant provided the court with an affidavit explaining why she was not in court on the day in question. It is also not in dispute that besides the affidavit in which she set out the reason why she did not appear in court on the day in question, she also provided the court with medical certificates from two doctors, Dr Pieter Vosloo and Dr Else Seligmann. Both doctors in their respective medical certificates states that they examined the second appellant and concluded that she was not fit to travel. The medical certificates were handed in, in support of her explanation set out in the affidavit. The court a quo was, however, not satisfied by this explanation because according to the court the information contained in the medical certificates was 'scanty' and 'does not explain exactly why the second appellant could not fly to South Africa'.
- [48] It is my view that the court a quo was wrong to have come to such a conclusion because the explanation is explicitly stated in the respective medical certificates. The reason stated was that the second appellant could not fly was because she suffered from a heart problem. The court a quo was also wrong to not accept the explanation of Dr Vosloo simply because he was not a cardiologist. The explanation provided by the two doctors, in my opinion, is reasonable and acceptable and the court a quo should have accepted it. The onus placed upon the second appellant was merely to satisfy the court a quo that there was a reasonable possibility that her failure to appear was not due to her own fault.
- [49] The trial court ought to have found that the second appellant did provide a reasonable and acceptable explanation for her absence and that she was as a result not in contempt of court.
- [50] There was merit in the appeal against the contempt of court conviction. I am of the view that the court a quo erred in finding the second appellant guilty of contempt of court.

[51] In the premises the following order is made:

1. The first and second appellants' appeal against all the convictions succeeds.
2. The order of the trial court is set aside and substituted by the following order:
"The first and second accused are found not guilty on all counts and are discharged."
3. The second appellant's appeal against the conviction of contempt of court succeeds.
4. The order of the trial court is set aside and substituted with the following order:

"The accused is found not guilty of contravening section 170 of the Criminal Procedure Act 52 of 1997 and is discharged."

E.K. Tsatsi

‘ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered,

E.M. Kubushi

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:

Adv.J C Klapper

Instructed by:

PIETERSE A CURLEWISS INC.

Pretoria

On behalf of the respondent:

Adv J M Ferreira

DIRECTOR OF PUBLIC PROSECUTIONS

Presidential Building

[1] 2005 (1) SACR 415 (SCA) paras 5 and 6.

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