



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: Yes |

Date: 01/06/21

Signature: [Signature]

APPEAL CASE NO: A145/2017

COURT A QUO CASE NO: SS31/2015

DATE: 22nd February 2021

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

- and -

LOUW HEIN N.O. AND OTHERS

Respondent

JUDGMENT

Khumalo AJ and Mokgoatheng J:

- [1]. This is an application for the review and setting aside the ruling of the First Respondent Louw Hein in his capacity as the Regional Court Magistrate to exclude the evidence of a certain Warrant Officer David Xolile Mabena made on 31 October 2018 and to exclude downloads extracted by the said

Warrant Officer from the cellular phone of the sixth respondent as inadmissible.

- [2]. Further, the Applicant seeks an order to review and set aside the procedure followed by the First Respondent from 29 to 31 October 2018 during the criminal trial of the second to the sixth respondents under case number RC1-110-2015 to either exclude and/or find as inadmissible the evidence of Warrant Officer David Xolile Mabena referred to above.
- [3]. Applicant further seeks an order directing the First Respondent to permit the Applicant to recall Warrant Officer David Xolile Mabena for purposes of cross-examination, and to afford the further respondents to cross examine him, if they elect to do so and for the State to re-exam him, if it elects to do so and to further direct the First Respondent to either determine the admissibility of the evidence of Warrant Officer Mabena at the end of the trial, or during the application for a discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977.
- [4]. Applicant alleges that the ruling impugned contravenes the provisions of section 166 of the Criminal Procedure Act, 51 of 1977 as amended and is accordingly unlawful. It is further alleged that the exclusion of W/O Mabena's evidence and the ruling that the extracts of the downloads pertaining to the sixth respondent's cellular phone were inadmissible, were without any factual and or legal basis and in so doing the First Respondent violated the State's right to a fair trial.
- [5]. The First Respondent presided over a criminal trial under case number RC1/110/2015 and the deponent to the applicant's founding affidavit Ms. Erasmus prosecuted on behalf of the State.
- [6]. On 31 October 2018, the First Respondent made the decision to exclude evidence relating to the downloads extracted by W/O Mabena from the cellular phone of the sixth respondent. This application was initiated on 8

January 2020 which is approximately a period of 14 months after the ruling was made.

- [7]. The primary question that arises in this matter is whether it is appropriate for this court, at this stage, to entertain a review of a ruling made by a lower court in the course of criminal proceedings that are yet to be finalised.
- [8]. 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. In WAHLHAUS AND OTHERS v ADDITIONAL MAGISTRATE, JOHANNESBURG AND ANOTHER 1959 (3) SA 113 (A) at 119G, it was stated that 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. 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 (and I might add, reviews) are not entertained piecemeal."

- [9]. In ISMAIL AND OTHERS v ADDITIONAL MAGISTRATE, WYNBERG AND 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 p 119, 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 uninterminated 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)."

- [10]. It has been stressed that underlying the reluctance of the Courts to interfere in uninterminated proceedings in a lower court is the undesirability of hearing appeals or reviews piecemeal. See: **S v THE ATTORNEY-GENERAL OF THE WESTERN CAPE; S v REGIONAL MAGISTRATE WYNBERG AND ANOTHER** 1999 (2) SACR 13 (C) at 22 e-f; **NOURSE v VAN HEERDEN N.O. AND OTHERS** 1999 (2) SACR 198 (W) AT 207 D-E; and **S v WESTERN AREAS LTD AND OTHERS** *supra* where, at 226B Howie P stated:

"Long experience has taught that in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal,

Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course."

- [11]. All the above *dictum* apply similarly to an application brought by the State where it seeks to review and set aside a decision of a lower court before the conclusion thereof as in this particular matter.

- [12]. Taking all the above *dictum* in matters of similar nature, the question then is, is the case of the Applicant one of those rare cases that this court's interference can be justified at this stage of the unterminated proceedings and if it does not will result in grave injustice.

- [13]. A brief background is that the second to sixth respondents are charged in the Regional Court with one count of theft of crates of ammunition, one count of contravening section 31 (1) read with sections 1, 103, 120, 121 of the Firearms Control Act 60 of 2000, in the alternative to count 1 and 2, contravening section 13(1) of the National Conventional Arms Control Act 41 of 2002 and one count of theft of bullet proof vests. The second to fourth respondents face an additional charge of fraud.

- [14]. The second and third respondents were members of the South African National Defence force ("SANDF"). The fourth defendant is the son of the third respondent. Fifth Respondent was a co-owner of Dave Sheer Gun shop and the Sixth Respondent a manager at the gun shop.

- [15]. The events that led to the arrest of the second to the sixth respondents' arrest arose between 2008 and 2013. The summary of the allegations against them are that they stole and traded in ammunition belonging to the SANDF.

- [16]. W/O Mabena of the Directorate of Priority Crimes Investigations ("DPCI") was apparently tasked with performing downloads from the cellular phone of the Sixth Respondent and on 12 September 2013, he deposed to a statement in terms of section 213 of the Criminal Procedure Act, 51 of 1977 (the "CPA").
- [17]. The investigating officer in the Criminal trial a W/O Ngwenya apparently collected the exhibit bags from the DPCI SAP 13 for safe keeping at the military Police SANDF exhibit store. Neither W/O Mabena's statement nor the downloads from the sixth respondent's cellular phone were initially filed in the docket by W/O Ngwenya nor were the documents provided as part of the docket to all the respondents.
- [18]. The trial of the second to sixth respondents commenced in November 2016 and they pleaded not guilty to all the charges and tendered no plea explanation.
- [19]. The State alleges that around June/July 2017, some six months after the commencement of the trial, counsel for the sixth respondent telephonically advised the Prosecutor that W/O Mabena performed the downloads on the sixth respondent's cellular phone which allegation was confirmed by W/O Ngwenya.
- [20]. On 4 July 2017, Counsel for the sixth respondent argued that the failure to provide downloads and W/O Mabena's statement infringed his client's right to a fair trial.
- [21]. It was only during May 2018 that the fifth and sixth Respondents legal representatives were provided with the statement of W/O Mabena and the extracts of the downloads that he was in possession of.
- [22]. On 29 October 2018, W/O Mabena was called as a witness and the fifth and sixth respondents objected to his evidence being led and contended

that his evidence would render the trial unfair owing to the delay in discovering the witness's statement and the extracts of the downloads he performed.

- [23]. After argument, first respondent permitted W/O Mabena to give evidence in chief but refused to accept into the record the extracts of the sixth respondent's downloads when the prosecutor attempted to hand the document in as part of W/O Mabena's testimony.
- [24]. After completion of W/O Mabena's evidence in chief, but before cross-examination, first respondent entertained further arguments from the parties and found that the evidence of W/O Mabena and the downloads will render the trial of the second to the sixth respondents unfair and excluded W/O Mabena's evidence and made the ruling that the document containing the extracts of the downloads was inadmissible.
- [25]. The above are the decisions and or rulings that are being impugned in these proceedings.
- [26]. Applicant argues that first respondent's the exclusion of W/O Mabena's evidence, the failure to permit his cross examination and the finding that the extracts of the downloads made from the sixth respondent's cellular phone are inadmissible is a gross irregularity which justifies this Court's intervention and submits that it is one of those rare cases alluded to earlier where grave injustice might otherwise result.
- [27]. The review is premised on the provisions of section 22 (c) and (d) of the Superior Courts Act, 10 of 2013:

"Grounds for review of proceedings of Magistrates' Court

- (1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-
 - (a) absence of jurisdiction on the part of the court;

- (b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) Gross irregularity in the proceedings; and
- (d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

[28]. The First, Firth and Sixth Respondents oppose the application.

[29]. The issue before us as in *Gounden and Another v Noncebi NO 2018(2) SACR* is rather crisp and is determinable on the point of principle articulated above. It is for the applicant to justify the interference by this court in the trial continuing in the lower court. If it fails to do so, then it is not necessary to enter into the merits of the ruling under challenge. Put differently, if the applicant does not meet the standard to demonstrate why the review should be determined now, before the trial is concluded, that is the end of the matter. If they do satisfy the prerequisites then the court is to interrogate the exclusion of the evidence of W/O Mabena and the refusal to admit the documents of the extracts of the downloads performed by him on the cellular phone of the sixth respondent.

[30]. The question that arises is what standard must the applicants meet in order to overcome this first hurdle? At a minimum, exceptional circumstances must be shown before a high court may interfere with a decision of the magistrate's court given before conviction in accordance with this principle as it endured over the course of time (see *Wahlaus & Others v Additional Magistrate, Johannesburg & Another 1959 (3) SA 113 (A)* at 119H-120B). In *Motata v Nair NO & Another 2009 (1) SACR 206 (T)* at 119, the test was narrowed down even further. It was held in *Motata* that it is only in 'rare' cases where grave injustice might otherwise result or where justice might not by other means be obtained that the high court should exercise its inherent power to interfere. It was explained that "... underlying the

reluctance of the courts to interfere in unterminated proceedings in a lower court is the undesirability of hearing appeals or reviews piecemeal".

- [31]. In essence the applicant has put forward the reason as being an exceptional circumstance justifying a review at this stage: namely that the evidence of W/O Mabena and the extracts of the downloads he performed, which forms the subject matter of this review application, completes the chain of events in the criminal case.
- [32]. Further the Applicant alludes to the fact that some of the respondents have intimated an intention to apply for a discharge in terms of section 174 of the CPA when the State closes its case, alternatively if the first respondent makes an order that the State's case is deemed closed in terms of section 342A of the CPA. Applicant argued that should the review be successful, but after the respondents have applied for, and possibly being granted a discharge in terms of section 174 of the CPA, then there would be a serious miscarriage of justice as potentially guilty persons would have been set free. The applicant would have to utilise public funds to follow the protected appeal process with the risk of witnesses later becoming either unavailable or losing interest in the matter.
- [33]. I am not convinced that the above makes for a case that this court should interfere. Firstly the case of the applicant is not "rare" and neither are the circumstances in which the ruling was made. In the applicant's own argument, it certainly would be open to appeal the final decision of the magistrate or the First Respondent in this case. The fact that it will have to utilize public funds to follow a protected appeal process with all the risks attached does not make this case rare or unique and therefore deserving of this court interference at this stage. The criminal justice system, by its very nature is by and large conducted with the utilization of public funds. It is therefore not a rare or special occurrence.

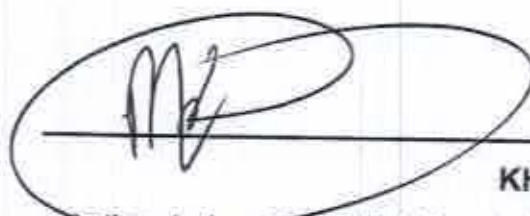
[34]. The applicants accordingly fail the test as defined in *Motata*.

[35]. Accordingly, I am not persuaded that this is a matter in which this court ought to invoke its inherent power and engage in a review of the ruling which the first respondent made. It follows that this application must fail. This renders it unnecessary for this court to engage in the merits on the correctness of the ruling.

[36]. In the light of the above, I am of the view that this court need not deal with all the other issues raised between the parties during argument.

The following order is therefore made:

- a) the application is dismissed;
- b) the applicant is directed to pay the fifth and sixth respondents' costs.



KHUMALO MP

*Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

I agree,



MOKGOATLHENG RATHA

Judge of the High Court of South Africa