

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 45/2021

Reportable: NO

Of Interest to other Judges: YES

Circulate to Magistrates: NO

In the matter between:

PHEANE EDWIN SODI

Applicant 2/ Accused 3

BLACKHEAD CONSULTING (PTY) LTD

Applicant 2/ Accused 4

THABANE WISEMAN ZULU

Applicant 3/ Accused 11

ELIAS SEKGOBELA MAGASHULE

Applicant 4/ Accused 13

and

THE STATE

Respondent

In re:

THE STATE

versus

NTHIMOTSE MOKHESI	Accused 1
MAHLOMOLA JOHN MATLAKALA	Accused 2
PHEANE EDWIN SODI	Accused 3
BLACKHEAD CONSULTING (PTY) LTD As represented by accused 3	Accused 4
DIAMOND HILL TRADING 71 (PTY) LTD As represented by Lindikhaya Mpambani	Accused 5
605 CONSULTING SOLUTIONS (PTY) LTD as represented by Michele Antia Mpambani	Accused 6
SELLO JOSEPH RADEBE	Accused 7
MASTERTRADE 232 (PTY) LTD	Accused 8
ABEL KHOTSO MANYEKI	Accused 9
ORI GROUP (PTY) LTD as represented by accused 9	Accused 10
THABANE WISEMAN ZULU	Accused 11
SARAH MATAWANE MLAMLELI	Accused 12
ELIAS SEKGOBELA MAGASHULE	Accused 13
NOZIPHO BELINA MOLIKOE	Accused 14
THABISO MAKEPE	Accused 15

JUDGMENT

CORAM: NAIDOO, J

HEARD ON: Heads of Argument filed for consideration in Chambers

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 11h00 On 16 September 2022.

[1] Four separate applications for leave to appeal against the judgment in this matter, handed down on 28 March 2022, served before me, having been brought by Applicant 2, Pheagane Edwin Sodi (Sodi) and Blackhead Consulting (Pty) Ltd (Blackhead) (accused 2 and 3) in one application, the latter being represented by Sodi, applicant 3 (accused 11), Thabane Wiseman Zulu (Zulu) and the third application by applicant 4 (accused 13), Elias Sekgobela Magashule (Magashule). The applications are opposed by the respondent (the state). The applicants assailed the judgment on various grounds which, although similar in some respects, differed as a result of the orders granted against each. By arrangement with the parties, they each filed Heads of Argument for consideration of the applications in Chambers, as is the practice in this Division. As reflected in the Heads of Argument, Sodi, Blackhead and Magashule were represented by Adv LM Hodes SC, with Adv (Ms) T Govender and Zulu was represented by Adv SS Maakane SC, with Adv AN Tshabalala. The respondent (the state) was represented by Adv N Cassim SC, with Adv (Ms) S Freese and Adv (Ms) T Ngubeni. As the grounds upon which each

applicant assails the judgment differ, it would be prudent to set out those grounds separately.

SODI AND BLACKHEAD

[2] The applicants in this matter filed their application for leave to appeal outside the time allowed by the Uniform Rules and consequently filed an application for condonation, supported by the attorney representing the applicants. He explained fully that the papers were timeously drawn by counsel and sent to his email address but seemed to have ended up in his “junk mail” folder, which he did not immediately detect. He rectified the error upon discovering same and the papers were filed two days out of time. The state took no issue with the late filing of the application for leave to appeal and stated that no prejudice was suffered by such late filing. I, therefore, see no impediment to granting condonation for the late filing of the application. To the extent necessary, such condonation is granted.

[3] The applicants assert, in essence, that the court erred in:

3.1 finding that they selectively underlined the wording of Regulation 8(2) of the Regulations pertaining to the State Capture Commission (SCC), and thus glossed over the qualification therein that such statements must be self-incriminatory. The Regulation in fact provides that *any* statement made by a witness (at the SCC) are not admissible against that witness in criminal proceedings. The import of the Regulation must be considered against the terms of reference for the SCC;

3.2 not considering, dealing with or following the order of Judge President Musi at the pre-trial hearing in this matter on 3 November 2021), who ordered that the applications concerning the issues raised by the applicants must be heard prior to the trial. The effect of that order is that any argument to the contrary would be subject to the application of *res judicata*;

3.3 finding that section 85 of the Criminal Procedure Act 51 of 1977 (the CPA), which related to an objection to a charge was the appropriate

mechanism for the applicants to challenge the charges brought against them at the trial. This rendered the judicial case management process nugatory;

3.4 finding that the court was called upon to decide the application in a vacuum, and that the trial court was the correct forum to decide declaratory relief, whereas this court was in as good a position as trial court to decide the issues before it.

[4] In opposing the application, the state contended that:

4.1 the court correctly held that the applicants' challenges in respect of their fair trial and constitutional rights are to be raised and determined by the trial court;

4.2 the court correctly exercised its discretion in finding that the application brought by the applicants ought not to be determined at this stage;

4.3 the interpretation that the applicants seek to ascribe to Regulation 8(2) is absurd and impermissible, and the determination of such an interpretation can only be undertaken by the court hearing the criminal trial, after a challenge to the admissibility of such evidence is raised in that court;

4.4 JP Musi made no order that the issues raised by the applicants must be determined before the trial, as he was not permitted in law to fetter the discretion of another judge to grant declaratory relief or not. The contention of the applicants that JP Musi had already determined the matter is incorrect, as the record of proceedings before him shows otherwise;

4.5 He merely ordered the postponement of the matter to 21 and 22 February 2022 and nothing further. He indicated all the objections raised could be dealt with once all the papers had been filed. He further indicated that the judge hearing the interlocutory could determine whether the objections were to be dealt with during trial or at the preliminary stage.

4.6 the applicants' contention that the court found that section 85 of the CPA was the appropriate mechanism to challenge the charges against them is incorrect. The court stated that the law provides for preliminary objections, raised by an accused, to charges against him as provided for in section 85.

ZULU

[5] Zulu challenges the judgment on the basis that the court erred in:

5.1 not granting the relief he sought, more especially in view of his reliance on section 27 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA);

5.2 not finding that the respondent's deliberate non-compliance with section 27 of PRECCA renders all charge based on that Act and all alternative charges thereto incompetent or invalid and that the relief sought should have been granted in consequence thereof;

5.3 finding that the preliminary issues (raised by the applicant) can be raised as a special plea in the main trial.

[6] I pause to note that on 23 May 2022, Zulu filed a Supplementary Notice of Appeal, in terms of which he sought to add a further ground of appeal. This was not done with the leave of the court, or apparently, with the consent of the state. No explanation was forthcoming from him regarding this step, which can only be described as irregular, or why it was necessary. To this end, no application for condonation was filed nor an application to amend his Notice of Appeal. There is no obligation on this court to entertain such a document which, in my view, constitutes an abuse of the Rules of Court and court processes, and I will deal no further with it.

[7] In its opposition to Zulu's application, the state contends that:

7.1 the court considered the nature of the relief and concluded that the relief sought was declaratory in nature, which called for the court to exercise its discretion in such a case;

7.2 the court found that the issues raised were in the nature of being hypothetical, abstract or academic and that it was called upon to decide the application in a vacuum, without all the evidence to be led by the state being put before it;

7.3 even if the state admitted that there was non-compliance with section 27 of PRECCA, another court cannot find that such admission amounted to a concession that the state was obliged to comply. A proper interpretation thereof can only be embarked upon by the trial court;

7.4 the court's finding that the charges faced by Zulu under section 34 of PRECCA are the third alternative to the charge of fraud and that it would be inappropriate to deal with it at this stage, is correct;

7.5 the court did not hold that the applicant's contentions regarding the state's non-compliance with the provisions of PRECCA can only be raised as a special plea.

MAGASHULE

[8] Save for certain grounds, the rest of the grounds of appeal are the same as those raised in the Sodi application. The additional grounds raised in this application are that the court erred in:

8.1 not dealing with the state's striking out application in respect of the applicant's Founding and Replying Affidavits, in spite of submissions made to dismiss the state's striking out application. Magashule's application was very similar to that brought by Sodi and Blackhead, and the court dismissed the state's application in respect of the latter accused with costs;

8.2 not deciding upon the declaratory relief sought in the Notice of Motion, relating to the state's non-compliance with section 27 read with section 34 of PRECCA, and in not declaring that accused 13 (Magashule) was not an "executive authority" as defined in the Public Finance Management Act 1 of 1999 (PFMA);

8.3 not declaring Ms Cholota was never a state witness, alternatively that she is a defence witness, and that the state's conduct in respect of Ms Cholota is *prima facie* prosecutorial misconduct;

8.4 not granting the remaining prayers in the Notice of Motion.

[9] The grounds for state's opposition to the Magashule application are the same as in the Sodi and Blackhead application, in respect of the state's non-compliance with section 27 of PRECCA, this court's failure to comply with the order of the JP at a case management meeting, the court's finding in respect of section 85 of the CPA, and its finding that it was called upon to consider this application in a vacuum. It is not necessary to repeat it here. With regard to the additional grounds set out above the state contends that:

9.1 the court correctly exercised its discretion with regard to the declaratory relief sought, and dismissed the application;

9.2 the court correctly held that the relief sought by the applicant in respect of Ms Cholota was moot and/or academic, as she was to be charged as a co-accused. Granting the declaratory relief would serve no purpose.

9.3 the hearing of an appeal was not necessary in respect of the court's omission to make an order in respect of the state's striking out application against Magashule. It was implicitly considered and dealt with by the court when the Sodi and Blackhead was determined, which application was dismissed with costs; The court is empowered in terms of Rule 42(1)(b) to vary any patent error or omission in its order.

[10] Counsel for the applicants and the state correctly set out the test applicable to an application for leave to appeal. For the sake of completeness, I repeat the legal position as it currently stands. Section 17 of the Superior Courts Act 10 of 2013 regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

“(1) Leave to appeal may only be given where the judge or judges

concerned are of the opinion that

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;”

(my emphasis and underlining)

[11] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(1), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, Bertelsmann J held that:

“It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion....The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

[12] The Mont Chevaux decision was cited with approval in a number of cases, one such matter being *Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8 June 2017)*, a decision emanating from this Division, where my brother Daffue J echoed the remarks of Bertelsmann J at paragraph 5 and remarked that “There can be no doubt that the bar for granting leave to appeal has been raised...The use by the legislature of the word “only” emphasized supra, is a further indication of a more stringent test.”

The Full Court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016)* also cited Mont Cheveaux with approval.

[13] The judgment sets out comprehensively the reasons for the court’s findings in respect of each application, and I do not intend repeating those reasons here. Preliminary litigation prior to the commencement of a criminal trial has been strongly discouraged by the apex court of this country, as well as the Supreme Court of Appeal. The legal position has been fully set out in the judgement, and it is also not necessary to repeat it here. One of the grounds of appeal is that JP Musi, who dealt with a case-management hearing, “ordered” that the preliminary issues being raised by the applicants be heard and determined prior to the trial. A perusal of the transcript of those proceedings indicates this not to be the case.

[14] The civil applications that were heard on 21 and 22 February 2022, were not launched at the time of the case management hearing on 3 November 2022, so it defies logic that the case- management judge would order another judge to determine the issues. The transcript of the proceedings on 3 November 2022 does not support the applicants’ contentions. The court simply adjourned the matter for the applicants to ventilate the issues and objections they raised. The court did not order, nor could it permissibly so order, that the court hearing the applications was obliged to hear and determine the issues. The order that JP Musi made at the case management hearing can be found on p 692 of the papers at lines 11 -19 and reads:

- the matter against the accused is postponed to 21st February 2022.
- All natural persons are warned to be in this court again at 9am, the

morning of 21 February 2022.

- With regard to the objections, the applicants to file their notices of motion on 19 November 2020 (sic).
- The State then to answer by the 7th of December.
- The applicants to reply on the 15th of December 2021”

The state correctly pointed out that the case management judge provided an opportunity for the applications to be heard, and indicated that the judge hearing the applications will decide if the issues raised by the applicants should be heard before the trial or at the trial (refer to P673, lines 6 – 13). That is the discretion that this court exercised. There is, consequently, merit in this contention, which is not based on correct facts.

[15] The applicants’ contentions in respect of the state’s non-compliance with the relevant provisions of PRECCA, have been dealt with in the judgment. The applicants’ contentions that such non-compliance on the part of the state must result in those charges being quashed, are untenable as the contraventions of the provisions of PRECCA relate to the third alternative to the charge of fraud. The admissibility of the evidence can only be decided by the trial court, which will decide on whether the charges have been validly proffered against the applicants, after hearing arguments and/or evidence in this respect. All the other issues raised as grounds of appeal by the applicants have been dealt with in the judgment.

[16] The contentions raised by Zulu have likewise, been dealt with in the judgment. His only complaint is the non-compliance by the state of section 27 of PRECCA. The contentions in this regard are untenable for the same reasons I set out in respect of the Sodi and Blackhead application.

[17] The relief sought in the Magashule application was purely declaratory, and for the reasons set out in the judgment it was not appropriate for the court to have determined the application at this stage. With regard to the state’s striking out application against Magashule, it was indeed an oversight on the part of the court in not including the court’s order in respect of that striking out application. The submissions made in respect of this application were indeed taken into account, and

the court had intended to dismiss the application to strike out brought against Magashule, with costs

[18] As correctly pointed out by the state, Rule 42 does make provision for the order to be corrected, which the court will do, without the need for that aspect to be decided on appeal. The relevant provision is Rule 42(1)(b), which reads thus:

1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a)

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or” omission;

[19] With regard to all three applications for leave to appeal, I am satisfied that the applicants did not meet the threshold required for such applications, namely that another court would come to a different conclusion. If regard is had to the established legal position regarding preliminary litigation in respect of matters pending in a criminal court, it is clearly not in the interests of justice for this matter to be delayed in the manner that it has been. It was contended in the Sodi and Magashule applications that the test for appealability has been extended, and that the interests of justice is the standard that underpins all such applications.

[20] While in the case referred to by the applicants, namely *City of Tshwane v Afriforum 2016(6) SA 279 (CC)*, the court was dealing, in the extract quoted, with the appealability of interim orders, I am in agreement with the principle that the interests of justice should be the standard that underpins all judicial considerations and orders that a court makes. The constitutional imperative that trials should begin and be finalised expeditiously refers not only to the interests of accused persons, but also those who complain. The latter are equally entitled to expect that their complaints will be brought to court and determined to finality, speedily and expeditiously. In this matter, the complainants are the general citizenry of South Africa, on whose behalf

these prosecutions have been instituted. It is in the public interest and in the interests of preserving public confidence in the proper functioning of the criminal justice system that the trial in this matter should commence without undue delay. In my view, the current applications have no merit and to grant such applications would not serve the interests of justice.

[21] A further matter that requires mention is the filing by Sodi and Magashule, of Volume 2, Part 4 of the State Capture Report. Correspondence between the legal representatives of these applicants and the state has been filed, indicating that there was agreement reached between the parties to bring this report to the attention of the court. The letter, dated 3 May 2022, from BDK Attorneys, representing Sodi and Blackhead, to the State Attorney representing the state gives a clue as to the purpose of filing this report. The attorneys assert that the state referred in its consolidated practice note, in the main application, to Part 1 of the Report of the State Capture Commission. They quote the relevant portion of that practice note which cites p803 of the report to say that *“accused no. 4 made payments amounting to millions of rand to the ANC after receiving contracts from government, including the Asbestos project contract with the Department, Acting Chief Justice Zondo says that this matter, and two others referred to in the same context need to be prioritised by the NPA”*

[22] They then assert in para 4 of the letter that the state’s express reference to Part 1 of the SCC Report opens the way for further portions of the Report to be brought to the attention of the court. In para 5, the attorneys assert that the state’s argument that Sodi did not make any self-incriminating statements at his attendance at the SCC is factually incorrect, as is borne out by Part 4 of the Report, and a plain reading of the transcripts, which no doubt had a bearing on the judgment. They then seek permission to send the letter and Report to the court.

[23] The State attorney responded the next day, in which they disagree that that Part 1 of the Report had any bearing on the judgment. They further assert that the Report and recommendations flowing therefrom constitute an opinion and have no evidential value in a criminal trial, but that they will not object if the attorneys wished to bring the Report to the attention of the court. The State Attorney further pointed

out that any self-incriminating statements by Sodi cannot be used against him due to the protection afforded him by the constitution, the SCC Regulations and the common law. The State Attorney pointed out that they rely on extrinsic evidence and not the Report to prove a *prima facie* case against Sodi. The State Attorney also requested BDK Attorneys to point out which portions of the Report they rely on to contend that Sodi made self-incriminating statements. No response to this request appears to have been forthcoming, or if there was a response, it was not brought to the attention of the court.

[24] The Table of Contents of Part 4, Volume 2 of the Report reads

“The Free State Asbestos Project Debacle.....292

The Free State R1 Billion Housing Project Debacle.....456”

The Report commences on p 265 and concludes at p547. The leave of the court was not sought to introduce what is new evidence, which did not feature in the hearing of the main applications. No indication whatsoever was given to the court of which portions of this Report are relied on or how it advances the case of the applicants. It is trite that there is no obligation on a court to trawl through reams of documents to establish what a party relies on.

[25] The applicants have lost sight of the fact that the court specifically refrained from dealing with or pronouncing upon the merits of the state’s case for the reason that it would be the subject of criminal proceedings in the trial court. The reference to Part 1 of the Report by the state does not make any mention of how the information contained on p803 was obtained, and had no bearing on the issues that were considered in the judgment. Part 1 of the Report was not taken into consideration in the judgment. This much is obvious, even on a cursory reading of the judgment. Therefore, the contention that the appellants were entitled to place this portion of the Report before this court is misplaced. Part 4, Volume 2 of the Report has no bearing on the judgment in this matter and was not considered in the current applications. This is exactly the kind of evidence that must serve before the trial court in order for

arguments and/or evidence to be heard in order to determine the relevance or otherwise of the Report.

[26] Victor Nkhwashu Attorneys Inc, representing Magashule, wrote an almost identical letter on the same day, to the State Attorney as BDK Attorneys did and received the same response the next day. It is not understood what relevance this Report has to Magashule's case or which portion thereof is being relied on, as no indication has been given. The only paragraph of this letter that was different from the letter by BDK Attorneys is para 5, where they allege that Part 4 of the Report demonstrates that there is no criminal case against their client (Magashule) capable of successful prosecution. It must be borne in mind that Magashule did not testify at the SCC, and Part 1 refers to Sodi. Without any further explanation, it makes no sense for Magashule to have forwarded this Report to the court as it does not appear to have any bearing on the issues he raised in the main application. My comments relating to the role of the Report on the judgment also apply in respect of the Magashule application.

[27] In my view, Part 1 of the Report played no part in this court's deliberations and consideration of the issues in the application, and serve no purpose, other than to unduly burden the already voluminous papers. Additionally, Part 4, Volume 2 of the Report plays no part in the judgment in respect of the applications for leave to appeal.

[28] Consequently the following orders are made:

28.1 The application for leave to appeal brought by Pheane Edwin Sodi and Blackhead Consulting (Pty) Ltd is dismissed with costs, such costs to include the costs of two counsel;

28.2 The application for leave to appeal brought by Thabane Wiseman Zulu is dismissed with costs, such costs to include the costs of two counsel;

28.3 The application for leave to appeal brought by Elias Sekgobela Magashule is dismissed with costs, such costs to include the costs of two counsel.

S NAIDOO J

On behalf of Applicants 2/

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