



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

Review No: R155/2019
Magistrates Court Case No: 1121/15

In the review between:

THE STATE

versus

KINGSLEY OKAFOR

Accused 1

CAMELIUS CHIKA AMAECHI

Accused 2

THOMPSON THUNDE

Accused 3

CORAM:

NAIDOO J et RAMLAL, AJ

JUDGMENT:

NAIDOO, J

DELIVERED ON:

17 OCTOBER 2019

REVIEW JUDGMENT

- [1] The Magistrates Court referred this matter to us to review and order that the trial commence *de novo*. It is not a review in terms of sections 302, 304 or 306 of the Criminal Procedure Act 51 of 1977 (CPA). This matter is partly heard in the Magistrates Court, Harrismith. There are three accused in this matter who are charged, in the Harrismith Magistrates Court, with one count of fraud and 14 counts of contravening section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act), which relate to dealing in drugs. On each of the counts relating to dealing in drugs, the accused were charged in the alternative with contravening section 4(b) of the Drugs Act (possession of prohibited drugs). Counts 1- 4 related to accused 1, where count 4 was a charge of fraud, counts 5-11 related to accused 2, and counts 12 -15 related to accused 3. Accused 1 and 3 were initially represented by a Mr SS Nkabinde and accused 2 was represented by a Mr Gesi. At a later stage accused 1 and 3 were represented by Mr Ngcana.
- [2] The accused in this matter were arrested as a result of a project by the state targeting drug related activities. Although the offences were committed on different dates by each of the accused, the witnesses in respect of each matter were the same. By agreement between the parties, all three accused were tried together, as it was more convenient and also cost-effective for the accused persons. The accused pleaded not guilty to all the charges, and the trial proceeded. After the state led two witnesses, a trial-within-a trial was held, but appears not to have been completed. It is alleged that the state was about to close its case, when Mr Nkabinde withdrew as the attorney of record for accused 1 and 3. Mr Ngcana then placed himself on record as the representative of

accused 1 and 3 and a transcript of proceedings was ordered. That set the proverbial cat amongst the pigeons, as it was then discovered that the recording related to the trial proceedings was lost due to a change in the court recording system. This resulted in a flurry of frenetic activity as the court functionaries attempted to locate and retrieve the record.

- [3] After many attempts to retrieve the record were unsuccessful, the magistrate, prosecutor, Mr Ngcana, and Mr Gesi set about the task of reconstructing the record. This was achieved to a large extent, including the evidence led in the trial-within-a-trial. Mr Ngcana was clearly at a disadvantage as he was not involved in the proceedings prior to his placing himself on record, and appeared to rely on the magistrate, the prosecutor and Mr Gesi, who were involved from the outset. Mr Ngcana however raised certain issues arising from what Mr Nkabinde, the previous attorney for accused 1 and 3, had allegedly said. These issues were not clearly identified or specified in the record, but seemed to arise from what accused 1 and 3 instructed him. It is common cause that the accused, all foreigners and speaking in their respective languages, were not taking notes during the trial. Mr Ngcana advised the court that they relied purely on memory in raising those issues.
- [4] The magistrate heard further submissions from the prosecution and the defence. Mr Gesi and the prosecutor were of the view that the reconstruction of the record was adequate and sufficient for the trial to continue. They also expressed the view that setting aside the proceedings and ordering the matter to proceed *de novo* will be prejudicial to the state and accused 2, and urged the court to continue with the trial. Mr Ngcana, was of the view that the omission of Mr Nkabinde's submissions from the reconstructed

record caused serious prejudice to accused 1 and 3, as they were not able to instruct him properly and he was not able to give them “instructions”. I suspect that he meant that he was not able to advise them properly. He submitted that the matter should be sent on review for the proceedings to be set aside and for the matter to proceed *de novo*. The magistrate ultimately ruled that if the matter is not reviewed, serious prejudice would be occasioned to accused 1 and 3, and that they would be deprived of the right to a fair trial. The magistrate requested that the proceedings be reviewed and set aside, and that the court should order the matter to proceed *de novo*.

- [5] It is now a trite Constitutional imperative that courts must ensure that proceedings, including a trial, must be fair to all parties involved and must be finalised speedily and expeditiously. As I alluded to earlier, the record was reconstructed with all parties agreeing to the substantial accuracy and correctness thereof. The dispute arises in respect of certain submissions, allegedly made by Mr Nkabinde, the previous attorney of accused 1 and 3, regarding certain documents which were the subject matter of the trial-within-a-trial. The magistrate, the prosecutor and Mr Gesi have no notes in this regard, nor are they able to remember the submissions in question.
- [6] The issue of whether in a case, such as the present one, a court may set aside the proceedings and order the matter to commence *de novo* was considered in a number of matters. A distinction must be drawn between the situation where the matter was finalised and the accused was convicted and sentenced on the one hand, and that where the proceedings have not been finalised. In the former, the convictions and sentences were set aside on the ground of

procedural irregularities during the trial. Pertinent to this matter are cases where the proceedings were still partly heard in the Lower Courts and were sent on review to the High Court, due to missing records. About forty five years ago, in the matter of **S v Catsoulis 1974(4) SA 371 (T)**, some guidance was provided in respect of how a court should proceed where the record was lost in a matter that was partly heard. The headnote succinctly summarises the court's remarks as follows:

"Where the record of a part-heard criminal trial in a magistrate's court is lost there is no legal ground upon which a re-trial at this stage can be ordered either by the trial court or by the Supreme Court. In such a case the position is as follows: that the trial was, up to the stage that it had reached, a proper, valid trial and there is neither reason nor jurisdiction to declare the part-heard trial to be a nullity; that it is the administrative task of the magistrate and/or the clerk of the court to compile afresh a record of the completed part of the trial in any manner which is fair and as reliable as possible; that this embraces an administrative enquiry and action and has nothing to do with the trial as such; that at the resumption of the trial, after the record has been restored as well as possible, the magistrate is in terms of section 210 of the Criminal Procedure Act, 56 of 1955, entitled to recall any witness to give evidence, to lay his reconstructed evidence before him and to ask whether it tallies with the evidence which he originally gave at the trial. The witness will then be subject to cross-examination by the defence on his answers to the magistrate's questions on the correctness of the record and on the contents of his evidence against the accused. Thereafter the trial can take its normal course."

- [7] Some eleven years later, and at a time when the current CPA had come into operation, the court in **S v Matthys 1985(1) SA 209 (C)**, reiterated the findings of the court in Catsoulis. In the matter of **S v Mlotswa [220] JOL 15630 (W)**, the court undertook a detailed analysis of the numerous cases dealing with the issue of whether a

court should set aside proceedings and order a re-trial of the matter, and ultimately refused the request of the magistrate to set aside the proceedings and referred the matter back to the clerk of court to reconstruct the record. The court in Mlotswa expressed similar views to that in Catsoulis and Matthys regarding the referral of the matter back to the Magistrates Court for reconstruction of the record, and recalling witnesses to confirm the correctness of the reconstruction. [See also **S v Rakgoale 2001(2) SACR 317 (T)** and **S v Chokoe 2014(2) SACR 612 (GP)**]

- [8] In the present matter, the magistrate did not mention the prejudice that would be occasioned to the state and accused 2, nor did he extract from Mr Ngcana full details regarding the nature of the omission and how accused 1 and 3 would be prejudiced. In any event, where proceedings are still pending and have not been finalised, the trial magistrate does not become *functus officio* and the duty to ensure that a proper record of proceedings is kept and produced remains on him. The only dispute in this matter appears to be with regard to what was said during the trial-within-a-trial, The witnesses are police officials and there is no indication that they are not available to appear in court to verify the correctness of the reconstructed record in respect of the evidence they had previously delivered. The accused would of course then be able to cross examine these witnesses regarding their responses to questions posed by the magistrate.
- [9] There would then be nothing to prevent Mr Ngcana making the same submissions regarding admissibility of the documents forming the subject matter of the trial-within-a –trial. In any event, nothing prevents Mr Ngcana making application to the court for the recalling of the witnesses for the purposes of cross-examining

them in order to record their evidence regarding the admissibility of the disputed documents. In view of the fact that Mr Ngcana was not the attorney of record when the trial-within-a-trial started, it is unlikely that the court would refuse such an application. It must also be borne in mind that the state has not closed its case, the accused have not testified (which is their right should they so choose) and the court has not yet made a ruling in respect of the trial-within-a-trial. The state may also apply to recall such witnesses, on good grounds shown.

[10] In my view, the so-called dispute raised by accused 1 and 3 is not of such substance that it cannot be cured, firstly, by the witnesses' verification of the correctness of the reconstructed record and, secondly, by accused 1 and 3 making the relevant submissions they complain are missing. In my view, there is no reason to set aside the proceedings in this matter. To do so would not be fair and equitable to all parties involved in the matter, and it would certainly not be in the interests of justice.

[11] In the circumstances, the following order is made:

11.1 The magistrate's request for an order setting aside the proceedings is refused;

11.2 The witnesses may be recalled to verify the correctness of their evidence, as reconstructed, to hear the accused on the veracity of the reconstructed record, if necessary, and the trial may then proceed in the normal course.

S. NAIDOO, J

I agree.

A RAMLAL, AJ