IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: AR119/17

In the matter between:

MOGENDREN GOUNDEN First Appellant

NIRUSHA GOUNDEN Second Appellant

and

MS. NONCEBU N.O First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

MONOGRAN GOVENDER Third Respondent

ORDER

It is ordered that:

1. The application is dismissed;

2. The applicants are directed to pay the second respondent's costs of the application jointly and severally, the one paying the other to be absolved.

JUDGMENT

MAHABEER AJ (SEEGOBIN J concurring)

INTRODUCTION

[1] 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.

BACKGROUND

[2] The applicants are accused 1 and 2 in an ongoing criminal trial. In 2010, members of various arms of the South African Police Services conducted a search and seizure of their motor vehicle, residence, farm and salon business. The applicants were initially charged as follows:

Count 1: dealing in, alternatively possession of, mandrax;

Count 2: possession of cocaine;

Count 3: possession of ammunition; and

Count 4: corruption – giving a benefit (to) public offices.

[3] In 2012, the third respondent was charged along with the applicants and the following charges were added:

Count 5: dealing in, alternatively possession of, mandrax;

Count 6: contravention of section 22 A 9(a)(ii) of the Medicines and Related Substances Control Act , 1965 (read with section 250 of the Criminal Procedure Act, 1977; and

Count 7: money laundering.

[4] The trial commenced in the Verulam Magistrates' Court in February 2015. The first respondent was the presiding magistrate. At all times the applicants were legally represented.

[5] Early in the proceedings the applicants challenged the admissibility of evidence seized during the 2010 search and seizure on the basis that it was conducted without a search warrant and thus violated their constitutional right to privacy. The first applicant further alleged that he had been assaulted by police officers whilst the search and seizure was in progress. This precipitated a trial-within-a-trial. On 01 March 2016, the first respondent ruled against the applicants. The trial resumed and is currently in progress, the state having indicated at the outset that it intends calling approximately 75 witnesses.

[6] Some three months following the ruling, on 03 June 2016, the applicants instituted this application in which the following orders are sought:

> '1. Reviewing and setting aside the judgment of the first respondent delivered on 01 March 2016;
>
> 2. declaring the searches undertaken by the members of the South African Police Services on 29 March 2010 ………..to be inconsistent with the provisions of the Constitution and invalid;
>
> 3. declaring that the evidence obtained pursuant to the aforementioned searches are inadmissible at the trial of the appellants and the third respondent; <u>alternatively,</u>
>
> 4. remitting the matter to the first respondent to determine the admissibility of the evidence obtained pursuant to the aforesaid unlawful searches on 29 March 2010, such searches being declared to be inconsistent with the provisions of the Constitution and invalid;
>
> 5. directing that any such respondent who opposes this application pay the applicants' costs of suit, which are to include the costs consequent upon the employment of two counsel;
>
> 6. granting the applicant further and/or alternative relief.'

[7] By the time the review was argued on 08 December 2017, the applicants sought the following relief:

a) the review and setting aside of the ruling;

b) an order remitting the matter for the first respondent to determine the admissibility of the evidence;

c) costs in the event of opposition.

[8] The applicants' complaint in the review is that the first respondent committed a gross irregularity in ruling that the *onus* to prove the existence of a right to privacy and the violation thereof rested on the applicants. They contend that the first respondent conflated the *onus* in respect to the alleged unlawful search with the *onus* in regard to the alleged assault. In consequence of the first respondent's finding that the applicants had failed to discharge the *onus*, the evidence gathered in the course of the search was rendered admissible. The appellants contend that the ruling should be reviewed and set aside because they are subject to a lengthy and expensive trial, founded on inadmissible evidence, and they face financial distress.

[10] 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."

[11] The second respondent opposed the application.

[12] The third respondent participated in the review by submitting an affidavit and heads of argument in which he supports the case made out by the applicants. However, his contribution has not advanced the matter in any way.

THE ISSUE

[13] The issue before us is rather crisp and is determinable on the point of principle articulated in the introduction set out above. It is for the applicants to justify the interference by this court in the trial continuing in the lower court. If they fail to do so, then it is not necessary to enter into the merits of the ruling under challenge. Put differently, if the applicants do 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 admissibility of the evidence which was placed before the learned magistrate at the stage of the trial-within-a-trial.

[14] 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".

THE CASE MADE OUT BY THE APPLICANTS

[15] In essence the applicants have put forward one reason as being an exceptional circumstance justifying a review at this stage: *viz* that they are

suffering and will continue to suffer financial distress. A declaration of inadmissibility on the evidence would, according to the applicants, curtail the proceedings and, by extension, the impact on their finances. They rely on an excerpt from *S v Western Areas (Pty) Limited & Others* 2005 (5) SA 214 (SCA) at [26] in support of this contention:

> 'It is clear, however, that the general rule against piecemeal appeals in criminal proceedings could conflict with the interests of justice in a particular case. The possibility of such a conflict was recognised in *Wahlaus.* As an instance when such conflict might arise, this Court referred in that matter to the position where a law point is involved which, if decided in the accused's favour, would dispose of the criminal charge against him or a substantial portion of it. By that example I understand it to be implied that there would be no trial or a substantially shortened trial.'

This point, it was argued, is the "silver bullet" in the applicants' case. In other words, so the argument goes, interrupting the incomplete trial on a point of law relating to the rulings made would avoid the financial distress confronting the applicants in the interests of justice.

[16] We disagree with this proposition on two reasons. Firstly, the applicants' case is not "rare" and neither are the circumstances in which the ruling was made. The applicants accordingly fail the test as defined in *Motata*. Secondly, the following dictum in *S v Western Areas (Pty) Limited & Others* (at paragraph [27]) resonates in the context of this matter:

> 'It is in the public interest that alleged criminals be subjected to the criminal justice process and that the prosecution and defence cases be fully ventilated.'

The criminal justice process, by its nature, means that the expense accused persons incur when they elect to secure privately funded representation, or losing ones' employment, if relevant, may be harsh but is it contrary to the interests of justice or the public interest? We think not. Nor is the complaint of financial distress a point of law as envisaged in the paragraph from *S v Western Areas (Pty) Limited & Others*, which we quoted above.

[17] There is another reality which we must be mindful of in our assessment of where the interests of justice lie. Should the appellants succeed in the scant application they have lodged, it is likely to open the floodgates to innumerable similar reviews, entitling accused persons to a piecemeal determination of incomplete criminal proceedings. This would unduly burden the courts and it would conflict with the accused's and the states' right to a speedy trial. It would require higher courts to analyse evidence which served before a magistrate, in a fragmented manner. These are all undesirable consequences and would be in direct conflict with the interests of justice.

[18] Accordingly, we are 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 either before or after the trial-within-a-trial. 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.

COSTS

[19] As mentioned, the applicants persisted in claiming costs against the second respondent up to the stage of argument. Counsel for the applicants changed tack during argument by suggesting that no costs order should be made in accordance with the general practice in the Constitutional Court. This submission is, in our view, flawed. The trend against granting costs against parties who litigate in the furtherance of constitutional rights, pursuant to *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC), should not be open to abuse. Indeed, the Constitutional Court held that each case must be dealt with on its own merits. (see the analysis on costs undertaken in *Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited* [2017] ZACC 34 at paragraphs [20] – [23]).

[20] Ultimately, the review was ill-timed and ill-conceived from the outset and the applicants ought not to have pursued it. Costs must therefore follow the result.

[21] The third respondent's engagement in the review was superfluous, opportunistic and completely without merit. He is left with the burden of bearing liability for his own costs.

ORDER

[22] The order we make is:

a) the application is dismissed;

b) the applicants are directed to pay the second respondent's costs of the application jointly and severally, the one paying the other to be absolved.

MAHABEER AJ

I agree

SEEGOBIN J

Date of hearing	:	08 December 2017
Date delivered	:	15 December 2017

Appearances:

For the Applicants	:	Mr MW Collins SC
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For the Second Respondent	:	Mr R Naidoo
Instructed by	:	State Attorney – KwaZulu-Natal 6th Floor Metlife Building 391 Anton Lembede Street Durban
For the Third Respondent	:	Mr S Garbaran
Instructed by	:	Aradhana Dharamdaw and Samlal Garbaran Attorneys 40 Price Street Athlone Park Amanzintoti c/o VA Juggernath and Associates 1204 Salmon Grove 407 Anton Lembede Street Durban