

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 181/2012
182/2012

In the special review between:-

THE STATE

and

ERIC ALEX MAYONA

First Accused

GOODMAN DYANTYI

Second Accused

CORAM:

VAN DER MERWE *et* MOCUMIE, JJ

DELIVERED ON:

15 NOVEMBER 2012

SPECIAL REVIEW JUDGMENT

VAN DER MERWE *et* MOCUMIE , JJ

[1] This is a special review from the Magistrate Court, Welkom, in respect of case A633/12 and case A1155/12. This judgment will deal with both cases simultaneously, as the issues raised are the same.

[2] The Senior magistrate responsible for judicial oversight, Mr S Ferreira, apparently came across the two matters and was of the view that both contravention of section 1(1)(a) or (b) of

the Trespassing Act, Act 6 of 1959 (*“the Trespassing Act”*) and contravention of regulation 3.1.1 of the Mine Health and Safety Act, Act 29 of 1996 (*“the Mine Health and Safety Act”*) “are statutory offences with basically the same elements of the offence”. He was also of the opinion that charging the accused persons with both counts tantamount to a duplication of charges and inevitably duplication of convictions.

- [3] The accused in A633/2012 was charged and convicted of contravention of section 1(1)(a) of the Trespassing Act, being on premises without authorisation of the owner, commonly known as “trespassing” and contravention of regulation 3.1.1 of the Mine Health and Safety Act, being underground in a mine where machinery has been erected without authorised admittance.

- [4] The accused in A1155/12 was also charged and convicted of contravening section 1(1)(a) of the Trespassing Act and regulation 3.1.1 of the Mine Health and Safety Act as in the case of the accused in case A633/2012.

[5] Section 1(a) and (b) of the Trespassing Act:

(1) Any person who without the permission-

(a) of the lawful occupier of any land or any building or part of a building; or

(b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building."

[6] Regulation 3.1.1 of the Mine Health and Safety Act provides:

"3.1.1 No unauthorised person shall enter a mine or works or any shaft or place or building where machinery has been erected."

[7] We have since sought the opinion of the Director of Public Prosecutions (*"the DPP"*) Free State, in this regard. The opinion is well set out. Both Adv Hiemstra and Adv BG Claasens of the DPP, Free State, Bloemfontein office must

be commended for their sterling research work. We can only do justice by quoting it as is.

[8] The opinion reads as follows:

"The above-mentioned matters were sent on special review by the Acting Senior Magistrate of Welkom, Mr S Ferreira.

Two questions were raised:

1. Whether Regulation 3.1.1 of the Mine Health and Safety Act, Act 29 of 1996 is still in force.

1.1 A brief history of the Act and Regulations is required to respond to this question.

1.1.1 Over the years various pieces of legislation have been enacted to regulate the mining industry. These provisions, whether enacted in national legislation or in regulations, dealt with mining rights, health and safety, the specific minerals mined, and so forth.

1.1.2 The most recent and relevant Acts are the Mineral Act 50 of 1991, the Mine Health and Safety Act 29 of 1996, and the Mineral and Petroleum Resources Development Act 28 of 2002, as well as the Regulations enacted in terms thereof.

1.1.3 The particular regulation, regulation 3.1.1 was enacted under the Mine and Works Act 27 of 1956. The regulations were promulgated in Government Notice 992 in Government Gazette 2741 of 26 June 1970. (Hereinafter referred to as 'the 1970 regulations'.)

1.1.4 On January 1992 the Minerals Act 50 of 1991 commenced. In terms of Section 68(1) and Schedule to this Act, the Mines and Works Act of 1956, in terms of which the relevant regulation was promulgated, was repealed as a whole (except for certain non-relevant definitions).

- 1.1.5 However, Section 68(2) of the Minerals Act stated the following in respect of the Regulations promulgated in terms of the Mine and Works Act:

'(2) Any Regulation made under the Mines and Works Act 1956 (Act 27 of 1956), and in force immediately prior to the commencement of this Act, shall, notwithstanding the repeal of the first-mentioned by subsection (1), remain in force until amended or repealed under section 63, and any rule, notice, order, instruction, prohibition, authorization, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such regulation prior to the commencement of this Act, shall likewise remain in force'. (Own emphasis)

The 1970 regulations thus remained in force.

- 1.1.6 Subsequently, on 15 January 1997, the Mine Health and Safety Act, Act 29 of 1996 came into operation.
- 1.1.7 In terms of Item 4 of Schedule 4 of Act 29 of 1996 under the heading 'Transitional Provisions' the following is stated in respect of regulations:

*'4. Any regulation made or deemed to be made under the Minerals Act that relates to health and safety issues that can be regulated under this Act, may be amended under this Act and **remains in force** until repealed under this Act.' (Own emphasis)*

(Item 4 was later substituted by Section 46 of Act 72 of 1997. The substitution had no effect on the issue in question as the wording remained virtually the same.)

The reference to 'deemed to be made' was necessary because a large volume of existing regulations, including the 1970 regulations were in fact not made under this Act, but under its predecessors. This provision paved the way for the retention of the 1970 regulations despite amendments to various enactments which followed, which included the repeal of the Minerals Act of 1991.

1.1.8 In 2008, Section 34 of the Mine Health and Safety Amendment Act 74 of 2008 amended the Mine Health and Safety Act by the substitution of the expression '*Mineral and Petroleum Resources Development Act*' for the expression '*Minerals Act*' wherever it occurs in the Act. In the definitions of the Act, both 'Act' and 'Regulations' are defined and by virtue of the definitions clearly includes the 1970 regulations. The effect thereof is once again the confirmation and continued validity of the 1970 regulations.

1.1.9 Under Schedule 1 of The Mineral and Petroleum Resources Development Act of 2002, the whole Minerals Act 50 of 1991 (except for the definitions of 'precious metal' and 'unwrought precious metal' in Section 1 and Chapter XVI of the Mining Rights Act, 1967 and except the definition of 'Sunday' in and Section 9 of the Mine and Works Act, 1956) was repealed.

1.1.10 The 1970 Regulations do not appear to be expressly included or excluded in the Mineral and Petroleum Resources Development Act. However, if one has regard to Item 4 of Schedule 4 referred to above, it includes regulations deemed to have been made under this Act. See paragraphs 2.1.7 and 2.1.8 above.

There is therefore no reason to conclude that the 1970 regulations have been repealed or lapsed by virtue of the various amendments of the legislation.

1.2 There appears to be various Regulations under the Mine Health and Safety Act, which include the 1970 Regulations (which is referred to as the Mine Health and Safety Regulations (Minerals Act)) and further Mine Health and Safety Regulations in terms of GN 93 in GG 17725 of 15 January 1997.

1.3 In terms of Item 4, it was clearly the intention of the legislature to retain the 1970 regulations in operation until expressly repealed, especially if one takes into account the following:

On 2 July 2002 in GN 905 in GG 23584 the then Minister of Minerals and Energy Phumzile Mlambo-Nguka, in terms of Item 4 of Schedule 4 of the Mine

Health and Safety Act, 1996 repealed various regulations as per the schedule published in that notice. These included some of the 1970 Regulations, but the major part of it remained unaffected. Regulation 3.1.1 was not one of these repealed Regulations and thus remains in force in terms of Item 4 of Schedule 4 of the Mine Health and Safety Act, Act 29 of 1996.

In my view, the fact that the Minister deemed it necessary to expressly repeal part of the regulations is a clear indication that the regulations were still regarded as operative and that those not repealed, remains effective.

Any other interpretation would have the effect that a vacuum would be created in an industry where it is imperative for it to be closely regulated. Such a vacuum would have far reaching and possibly devastating consequences, including significant loss of life due to the absence of any regulations dealing with safety and health issues and mining standards. (Own underlining)

While it would have been preferable to have the continued existence of the regulations clearly and expressly provided for in the later legislation, the fact that its history is somewhat difficult to unravel cannot lead to the conclusion that they are no longer in operation.

2. The second query is whether Regulation 3.1.1 *supra* and Section 1(1)(a) or (b) of the Trespassing Act, Act 6 of 1959 will not lead to a duplication of conviction.

3.1 Regulation 3.1.1 reads as follows:

Chapter 3 GENERAL PROVISIONS

No unauthorised admittance

'3.1.1 No unauthorised person shall enter a mine or works or any shaft or place or building where machinery has been erected.'

3.2 Section 1(1)(a) or (b) of the **Trespassing Act** reads as follows:

- (1) Any person who without permission –
- (a) of the lawful occupier of any land or any building or part of a building; or
 - (b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied

by any person, enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

- 3.3 If one looks superficially at the basic wording of the regulation in comparison to the section, then certain words appear that would give the superficial impression that the prohibition is the same, words such as: - 'person' (may not) 'enter' (a certain area) 'land' 'building' 'mine' 'works' 'shaft' 'place'.
- 3.4 However one cannot just compare individual words. The legislation must be regarded as a whole, including the purpose and reason for existence of such legislation.
- 3.5 The mining industry is a different dynamic than the general prohibition against trespassing, regulated by a unique set of Acts and Regulations which are designed with a particular and specific purpose in mind. One of the most important pieces of legislation is the Mine Health and Safety Act and accompanying regulations.
- 3.6 The Health and Safety issues of a mine are of vital importance if one takes into account the dangerous and hazardous circumstances in which a mine functions, especially in respect of underground mining. The frequent reports of deaths in the mining industry and the occasional prominence given to fatalities suffered in mines attest to this fact.
- 3.7 The various Acts and regulations ensure that no mining is done without a permit, but more so that it is done in a safe manner. The extensive Mine Health and Safety regulations regulate responsibility, safety, protection, machinery, mining standards, competencies and so forth.
- 3.8 The essence of this Act and regulations is the Health and Safety of the Employer and employees of the mining industry. However, in order to be effective, the Act is applicable to employers, employees and non-employees alike. To interpret it otherwise will mean that a mine employee may for example not enter into a work area or smoke underground, but that a non-employee may do so with impunity, including smoking in an area with a high methane gas risk.
- 3.9 Regulation 3.1.1 refers to 'no unauthorised person'. This can include employees as well as non-employees. An

employee may be allowed on the mine premises, but he or she may not be authorised to enter an area where machinery is erected.

- 3.10 In section 102 of the Mine Health and Safety Act, the definition of 'machinery' is as follows:

'machinery means any engine, boiler and appliance or any combination of them, which is situated at a mine and used or intended to be used –

- (a) For generating, developing, receiving, storing, converting, transforming, transmitting or distributing any form of power or energy; or*
- (b) For conveying persons, material or minerals.'*

- 3.11 The authorisation in 3.1.1 bears directly to the training and competency of a person to be near the machinery. For example the persons who are to be conveyed underground do so by means of the cage (in layman's terms, the underground elevator) which is lowered down the shaft by the winding engine room. The winding engine driver controls the cables which run on the head gear installation to lower the cage down the shaft 'hole'.

- 3.12 The winding engine driver is trained and competent to do winding and this is regulated by Chapter 16 of the Regulations.

- 3.13 Similarly there are various persons in this chain with different functions and competencies.

- 3.14 In order to work underground (which is where the illicit miners operate) you must be trained in all the health and safety standards and regulations. You are then authorised to go into the cage (machinery) and proceed underground.

- 3.15 It must be borne in mind that there are employees, for example the payroll clerk who works in the office, who are allowed on the mine and in the office buildings, but not into the cage (for instance) to go underground.

- 3.16 The Trespassing legislation has a different effect and purpose in mind. It is not limited to mines and the health and safety issues unique thereto. The [legislation] prohibit any person who does not have permission (from certain persons – usually the lawful occupier, owner or person in charge of residential, farming or business premises) from entering any land or building.

Thus the fact that you enter through a gate onto farm land without permission of the owner of the farm, far from the house or buildings, is prohibited.

- 3.17 Similarly, if you enter the gate of a Mine or cut a hole into the perimeter fence to gain access to the Mine property, yet you are still far from the headgear or machinery (as per the definition) and this entry is gained without permission, then you are trespassing. Not only the integrity and safety of working areas and machinery is protected, but also the integrity of the whole property in the same manner as that of a farm.
- 3.18 If you are not caught immediately after this initial trespassing and you manage to proceed into a working area with machinery, or to enter the shaft area in order to gain access to the cage or in fact enter the cage, you become an unauthorised person entering not only the mine property in the broader context, but specifically an area where 'machinery is erected'. Only then does Regulation 3.1.1 come into effect.

When one bears in mind the general purpose of the two pieces of legislation and the regulations promulgated in respect of the mining industry, there is a clear distinction to be drawn. Depending on the circumstances and evidence, simple trespassing cannot cover all the blameworthy elements of a person proceeding into a working area and thereby endangering not only himself, but also all the legal employees of that mine, either by his intentional or reckless actions in promoting his illicit activities, or by his sheer ignorance of the dangers that he creates due to his lack of training and knowledge of safety issues." (Own underlining)

- [9] Having considered these two divergent views, the relevant provisions of the two legislations under discussion as well as relevant case law¹ referred to by the Senior Magistrate concerned, it is correct that:

¹ S v Long Distance (Natal) (Pty) Ltd and Others 1990 (2) SA 277 (A)

- 9.1 The two legislations are definitely not the same and not necessarily worded and phrased in the same way.
- 9.2 The preamble of the Trespassing Act, provides that the Act was promulgated to prohibit the entry or presence upon land and the entry of or presence in buildings in certain circumstances, and to provide for matters incidental thereto.
- 9.3 The Mine Safety and Health Act, as set out in its preamble was clearly promulgated to provide for protection of the health and safety of employees and other persons at mines and, for that purpose – to promote a culture of health and safety; to provide for the enforcement of health and safety measures; to provide for appropriate systems of employee, employer and State participation in health and safety matters; to establish representative tripartite institutions to review legislation, promote health and enhance property targeted research;
- to provide for effective monitoring systems and inspections, investigations and inquiries to improve health and safety; to promote training and human resources development; to regulate employers' and

employees' duties to identify hazards and eliminate, control and minimise the risk to health and safety; to entrench the right to refuse to work in dangerous conditions; and to give effect to the public international law obligations of the Republic relating to mining health and safety; and to provide for matters connected therewith.

9.4 It is also clear that although the regulations were repealed partly in July 2002 in General Notice 905 in Government Gazette 23584, the Minister of Minerals and Energy, in terms of item 4 of Schedule 4 of the Mine Health and Safety Act, did not repeal regulation 3.1.1. In our view there was no need to do so.

9.5 The elements that the State must prove in both counts are distinct from each other. For contravention of the regulations under the Mine Safety and Health Act the State must prove that the accused knowingly entered a place where machinery has been erected without authorisation. The Mine Health and Safety Act is clearly not about curbing loitering underground but was specifically designed to bolster the provisions of the Trespassing Act which are clearly not effective to

prevent unauthorised entry into areas of the mine premises where it was hazardous not only to the trespassers but even its lawful employees.

[10] In our law splitting and or duplication of charges is governed by s83 of the Criminal Procedure Act 51 of 1977 (*“the CPA”*).

The section provides:

“If by reason of any uncertainty as to the facts which can be proven or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.” (My own underlying)

[11] It is trite that there is no universally valid criterion for determining whether there is splitting of charges or for that matter duplication of charges. In **S v Davids** 1998(2) SACR 313 (C) the topic is discussed afresh and the most important decisions are usefully summarised. The courts over the

course of time developed two practical aids to decide whether duplication has occurred:

- (i) If the evidence which is necessary to establish the one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences (*R v Gordon* 1909 EDC 254 at 258 and 269. This can be called “the same evidence test”)
- (ii) If there are two acts, each of which would constitute an independent offence, but only one intent, and both acts are necessary to realise this intent, there is only one offence (*R v Sabuyi* 1905 TS 170). There is a continuous criminal transaction. This test is referred to as “the single intent test.”²

[12] The same approach was adopted in **S v Maneli** 2009 (1) SACR 509 SCA at para [8] where Streicher JA explained:

“One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime.”

² See **Hiemstra's Criminal Procedure** Service Issue 3, May 2010, A Kruger, 14-5.

- [13] Recently in **S v Dlamini** 2012 (2) SACR 1 (SCA) the court with reference to **S v Whitehead and Others** 2008 (1) SACR 431 (SCA) reiterated the very test referred to in **Maneli** above and held further that "...there is no all embracing formula. The various tests are mere guidelines-they are not rules of law, nor are they exhaustive. Their application may yield a clear result, but if not, a court must apply its common sense, wisdom, experience and sense of fairness to make this determination."
- [14] In applying the guidelines set out above each case must be decided on its own facts. In the present cases the accused pleaded guilty and were convicted on admissions contained in statements made in terms of section 112 of the CPA. In each of the present cases two factors are of particular relevance. First, in each case the accused was charged with trespassing underground in a mine, being the same place where the alleged contravention of regulation 3.1.1 took place. Second, in each case the accused declared that he entered underground in the particular mine with the intention to steal gold or gold bearing material and the prosecution

accepted the statement. Each accused was accordingly also convicted of attempted theft.

[15] In the particular circumstances of each of these cases the act of unauthorised entering underground in the mine constituted one continuous criminal transaction with a single intent. In our judgment therefore the conviction of contravention of regulation 3.1.1 in each of these cases amounts to an impermissible duplication of convictions and must be set aside.

[16] As indicated already, the essence of the crime of contravention of regulation 3.1.1 is the entering into a mine or other place where machinery has been erected. In neither case before us was this element admitted by the accused. For this reason also, the convictions of contravention of regulation 3.1.1 cannot stand.

[17] In the circumstances the following order is granted:

ORDER:

- 1. The convictions and sentences in respect of count 1 and 3 in A633/2012 are confirmed.**

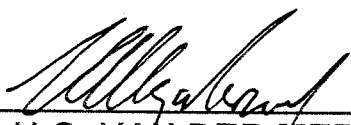
2. The conviction and sentence on count 4 in A633/2012 are set aside and substituted with the following:

"The accused is found not guilty and discharged."

3. The convictions and sentences in respect of count 1 and 2 in A1155/2012 are confirmed.

4. The conviction and sentence in respect of count 3 in A 1155/2012 are set aside and substituted with the following:

"The accused is found not guilty and discharged."


C.H.G. VAN DER MERWE, J
B.C. MOCUMIE, J