



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 2125/09

In the matter between:

FREDDY VELELO WITBOOI

1ST APPLICANT

ROSS KIRBY HENDERSON

2ND APPLICANT

ITUMELENG JACK MOROKO

3RD APPLICANT

AND

REGIONAL COURT MAGISTRATE: NC

1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION

2ND RESPONDENT

Coram: Tlaletsi J et Hughes-Madondo AJ

Date of hearing : 12 August 2011

Date of judgment : 26 August 2011

JUDGMENT

TLALETSI J

[1] This is an opposed application for review in terms of Rule 53¹. The applicants are seeking orders on the following terms:

- 1.1 The first respondent, Regional Magistrate S O Du Plessis' decision on 06 November 2009 not to recuse himself from the criminal proceedings in the Regional Court Kimberley under case no: RCO 190/1998 be reviewed and set aside;
- 1.2 The first respondent, Regional Magistrate S O Du Plessis is ordered to recuse himself from the case;
- 1.3 The conviction of the applicants under case no; RCO 190/1998 is hereby set aside and the case is referred to the second respondent to consider whether to prosecute them *de novo*;
- 1.4 Further and/or alternative relief;
- 1.5 Any of the respondents that opposes the application to pay costs jointly and severally, the one paying the others to be absolved.

[2] The application is opposed by the first respondent. Once again for

¹ Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa.

unexplained reasons, the second respondent who had served and filed a Notice to oppose the review application through the office of the State Attorney filed a notice to abide by the decision of this Court on the hearing of the application. One would ordinarily expect the second respondent, whose mandate is to represent and prosecute on behalf of the people of this country, to play an active role and assist this Court to arrive at a just decision. As reflected in the previous review judgment that I will refer to in the course of this judgment, the second respondent, to the surprise of that Court, withdrew from the proceedings at the commencement of the hearing.

[3] A brief historical background is apposite for the better understanding of the proceedings and the issues. In light of our decision, it shall not be necessary to set out a detailed chronology of events that led to this application.

3.1 The applicants appeared before the regional court on 12 April 1994 on fraud and theft charges. The applicants pleaded on 28 October 1999. After at least two postponements

3.2 The second respondent presented evidence from 15 November 1999 and closed its case during the period 06-07 February 2001.

On this occasion an application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977(“the CPA”) was made and was subsequently declined.

3.3 From 09 February 2001 the trial experienced several postponements for various reasons. However, on some of the appearances the applicants presented their evidence. The applicants’ cases were closed and reopened on different dates and occasions. The legal representatives of the applicants were also changed on no less than two occasions. During this period the applicants also brought applications for the recusal of the first respondent which were not successful.

3.4 On 10 February 2006 the first respondent delivered his judgment of the trial. He acquitted the applicants on some of the charges and convicted them on others. The trial was then supposed to proceed to sentencing proceedings.

3.5 On 01 February 2007 the applicants brought an application in terms of section 304A of the CPA in which they sought their trial be sent by the first respondent to this Court for special review. The application was declined by the first respondent.

- 3.6 After several appearances in the regional court the applicants launched a Rule 53 review application (“the first review application”) which was heard on 26 June 2008. They sought to review and set aside the first respondents refusal to recuse himself on five separate occasions during the course of the trial. They also made allegations of bias on the part of the first respondent as well as other alleged gross irregularities during the trial. The applicants sought orders similar to the ones sought in this application.
- 3.7 The Review Court (per **Majiedt et Olivier JJ**) delivered a detailed judgment on 01 October 2008 in which they dismissed the review application with costs.
- 3.8 The applicants sought and were refused leave to appeal by this Court on 10 October 2008.
- 3.9 The applicants, aggrieved by the decision of this Court, petitioned the President of the Supreme Court of Appeal for leave to appeal. Their Petition was dismissed on 15 January 2009 with costs.
- [4] On 31 July 2009 the applicant appeared before the first respondent represented by **Adv Claasen**. On this day another application for the recusal of the first respondent was launched. **Adv Claasen** handed up the following documents to support the application for recusal. An affidavit

by second applicant in the first review application; an affidavit by **Mr Horold Robertson**, an attorney who had been representing the second applicant during the trial and the first review application but withdrew as his attorney on 06 March 2009 when the matter was postponed to 31 July 2009; an affidavit by **Adv. Ferdinand Van Heerden** the advocate who represented first applicant and appeared for all three applicants in the first review application in this Court and the affidavit of the first respondent filed in opposition to the first review application. After the presentation of arguments by **Mr Claasen** as well as the public prosecutor in opposition of the application, the proceedings were postponed to 02 September 2009 and later to 06 November 2009.

- [5] On 06 November 2009 **Adv Cronje** appeared on behalf of the applicant. He proceeded with the application for recusal started by **Adv. Claasen**. The basis of the recusal application was in the main about an allegation by second applicant that he on one occasion during the trial, saw the first respondent in the office of the control prosecutor in the company of the public prosecutor and the investigating officer. This issue was one of the grounds on which the previous application for recusal was based and was refused by the first respondent. Furthermore, the same issue was one of the issues that was the subject of the first review application.

- [6] The applicants contended that because the first respondent, the public

prosecutor and the investigating officer had, (in their affidavits filed in the first review application) denied the allegations made by the applicants about the said meeting, the applicants had to obtain the affidavits of **Mr Robertson** and **Adv Van Heerden** to support their allegations. The second applicant alleged that after noticing the presence of the three in the control prosecutor's office a report to **Mr Robertson** was made in the presence of **Adv Van Heerden**. **Mr Robertson** thereafter in the company of **Adv Van Heerden** approached the first respondent in his chambers about the allegations. The first respondent is said to not have denied the allegation about the meeting, but merely indicated that he had only gone there to inform the public prosecutor that he was going to have tea. **Mr Robertson** and **Adv Van Heerden's** affidavits confirmed what the second respondent reported to them and that the matter was taken up with the first respondent.

- [7] The applicants requested that the first respondent should refer the issue to oral evidence as there were conflicting versions between the applicants and the first respondent and the prosecutor on the other hand. The second ground for recusal was that since the first respondent had deposed to an affidavit in opposition to the first review application, he had made himself a witness in the proceedings in which he is presiding and is not in a position to make any credibility findings in the criminal trial.

- [8] This application for recusal and referral to oral evidence was refused by the first respondent on the basis that, *inter alia*, the same issue that the applicants have raised has been decided by this Court in the first review application. It is this decision of the first respondent that the applicants are seeking to have reviewed and set aside and be accorded further relief set out above.
- [9] In this Court **Mr Cronje** who appeared on behalf of the applicants contended that the first respondent erred by not considering the merits of the application for his recusal. That the first respondent's version of the events of 8 December 2004 where he was alleged to have been in the same office with the investigating officer and the public prosecutor were in contrast with the version of second applicant as well as that of **Adv Van Heerden** and **Mr Robertson**. **Mr Cronje** submitted that the question remains, why would first respondent deny the incident in light of the affidavits of **Mr Robertson** and **Adv Van Heerden** in which they state that first respondent said that he merely went to that office to inform the public prosecutor that he was going to have tea.
- [10] **Adv Van der Walt** who appeared on behalf of first respondent made the following submissions. Firstly, that the issue that the applicants are raising is *res judicata* alternatively, that they are barred from raising it by the principle of *estoppel* because the issue was the subject of review

before the full bench of this Court and has been determined. The first respondent and this Court cannot revisit that decision. Secondly, that an objective, informed and reasonable person would given the history and circumstances of this case, not have reasonable apprehension that the first respondent would in the finalisation of the proceedings in the regional court be partial.

[11] In **Wahlhaus v Additional Magistrate Johannesburg** ² the court held that the High Court by virtue of its inherent power to restrain illegalities in inferior courts, 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. However, the High Court would be very reluctant to interfere with uncompleted proceedings except in exceptional instances where serious injustice would otherwise occur or where justice cannot be attained by other means.³ The rationale of this general rule is, among others, to avoid piecemeal finalisation of reviews or appeals from lower courts. It is important to state that the power to interfere is a discretionary power which will be considered in light of the facts and circumstances of each case.

[12] We pointed out to **Mr Cronje** that the affidavit of **Mr Robertson** was

² 1959 (3) SA 113(A) at 119H-120A

³ See also: **Building improvements Finance Co. (Pty) Ltd v Additional Magistrate, Johannesburg** 1978 (4) SA 790(T) at 793 F-H; **Herbstein & Van Winsen**: The Civil Practice of the High Courts of South Africa 5th Edition, Vol:2 (Juta) at 1270.

already in existence at the time when the first review application was argued. The said affidavit together with the replication by second applicant was presented to the Court. At the commencement of the hearing **Mr Van der Walt** moved an application for a postponement at the costs of the applicants for first respondent to be able to deal with what he referred to as new matters in the two documents. It is common cause that **Adv Van Heerden** asked for an adjournment to obtain instructions and on the resumption of the hearing withdrew the affidavit of **Mr Robertson** and the replication by second applicant. The matter was decided without these affidavits. In confirmation of these events, **Majiedt J** had the following to say:

“5.3 In summary therefore, as regards the affidavits before us;

(a) A supplementary affidavit of the [second applicant] was filed, not in the usual procedural manner and form as contemplated in Rule 53(4) (i.e. to supplement the original affidavit as a consequence of the record of proceedings having become available), but purely in response to allegations contained in [Public Prosecutor’s] (late) answering affidavit.

(b) The replying affidavits are to be regarded as pro non scripto for purposes of the hearing and this judgment since the applicants have expressly disavowed reliance on it.”

[13] One can safely say, without deciding the contents of the affidavit of **Mr Robertson**, the applicants had an opportunity to have the issues raised therein determined by the full bench of this Court. It is common cause that **Adv Van Heerden's** affidavit is merely confirming the averments made by **Mr Robertson** in his affidavit.

[14] **Mr Cronje** conceded that the full bench could have determined the issue but that the applicants are not precluded from raising the issue before the first respondent. In response to the submission that the affidavit relate to the same issue which was the basis of the previous review application and that the affidavit merely provided further evidence of the issue that has been determined. **Mr Cronje** submitted that the applicants are relying, for the basis of the recusal application, on the confrontation **Mr Robertson** made in the first respondent's office in the presence of **Adv Van Heerden**.

[15] I am of the view that it would not be proper to decide the issues raised in this review application at this stage. This is a case in my view, where there is evidence of piecemeal adjudication of the proceedings which process should not be countenanced further. The proceedings in the regional court are already at an advanced stage and it is only the question of sentence which has to be concluded.

[16] It would be in the interest of the applicants as well as the public to have

the pending proceedings completed. Failure to do so in the circumstances of this case has the potential of compromising public confidence in the criminal justice system. **Krigler J** in a unanimous decision of the Constitutional Court had the following to say in *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613.⁴

“[63] The result is most unfortunate. It is an established principle that the public interest is served by bringing litigation to a close with all due expedition. The law and the judicial process, in performing their vital conflict-resolution role, must provide a structure and mechanism whereby conflicts can be resolved and their consequent tensions can be relieved openly, fairly and efficiently. Delays and interruptions in the smooth course of litigation inevitably frustrate the proper performance of this role: justice delayed is justice denied. It is all the more true in criminal cases, particularly those involving serious charges where the stakes are high and tensions commensurately heightened. And, of course, while complainants, next-of-kin, other interested parties and the public at large have a material interest in having timeous closure, accused persons are constitutionally entitled to be tried with reasonable expedition.”

⁴ 2002(4) SA 613 (CC) at 647 e-g [para 63]; see also **Campus Law Clinic, University of Kwazulu-Natal v Standard Bank of South Africa (Ltd) and Another** 2006 (6) SA 103 (CC) at 113 e-g [para 23].

[17] Once the proceedings before first respondent are completed, the applicants have recourse to this Court by way of appeal or review where the entire proceedings would be considered holistically. Further and new grounds for either review or appeal may be raised at that stage which may included what would have happened during the sentencing proceedings.

[18] As pointed out the issue the applicants are raising has either been raised and determined or they had an opportunity for it to be determined by the full bench and they elected to withhold it. Having made an election the applicants should not be allowed to dictate that their issues be determined piecemeal. Finally, the criminal proceedings come a long way, having commenced during April 1994. There has to be finality at some stage.

[19] For the above reasons I am of the view that the applicants have not shown that there are exceptional reasons that warrant the exercise of the discretion to interfere in the uncompleted proceedings before the first respondent in their favour. I have deliberately avoided deciding the issues raised and left them for determination in future, if need be. However, since the applicants have not succeeded in the relief they sought, there is no reason why costs should not follow the result.

[20] **In the result I make the following order:**

“The application for review is dismissed with costs jointly and

severally the one paying the others to be absolved.”

L P TLALETSI

JUDGE

I concur.

W HUGHES-MADONDO

ACTING JUDGE

Appearances:

On behalf of the Appellant : Adv P R Cronje

Instructed by : Engelsman Magabane Inc.

On behalf of the Respondent : Adv Van Der Walt

Instructed by : Duncan & Rothman Attorneys

