



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. 5725/2022

In the matter between:

CORNELIUS AXEL JOHANNES VAN ZYL

APPLICANT

and

MAGISTRATE SMITH N.O.

1ST RESPONDENT

MAGISTRATE'S COURT HARRISMITH

MRS KOLOBI

2ND RESPONDENT

CONTROL PROSECUTOR HARRISMITH

DIRECTOR OF PUBLIC PROSECUTIONS

3RD RESPONDENT

FREE STATE: BLOEMFONTEIN

CORAM:

MOLITSOANE, J et MAJOSI, AJ

JUDGMENT BY:

MAJOSI, AJ

HEARD ON:

29 APRIL 2024

DELIVERED ON:

20 MAY 2024

- [1] The applicant seeks an order in terms of Uniform Rule 53 to review and set aside an order by the First Respondent under case number 872/2020. The applicant further seeks the matter to be struck off the roll and should not be re-enrolled unless the third respondent has applied her mind to certain 18 files to which I will refer to later in this judgment.
- [2] In preparation of this matter, it was noted that no heads of argument were filed by the applicant as required by this court's practice directives. Due to the nature of the proceedings, the interest of the minor children and that the applicant's first appearance in the district court being the 14th of October 2020, it was agreed that verbal arguments be heard notwithstanding the failure by the applicant to file its heads. No opposing papers were filed and to that end, we were provided with a Notice to Abide as filed by the state attorney on behalf of all the respondents on the 1st of December 2022.
- [3] The Applicant first appeared in the Harrismith Magistrate Court on the 14th of October 2020 on the said charges and after numerous postponements and pre-trials, a final pre-trial was held on the 1st of August 2022. The matter was certified trial ready for two days with the provision that the defence be provided with unobscured pages of certain prescribed medication and invoices contained in pages 62,74,75,76 and 490 of the further particulars and an amended charge sheet.¹
- [4] On the first day of the trial being the 22nd of September 2022, the presiding officer's attention was drawn to the fact that the defence had not timeously received the said documents. and it was also submitted that the prosecution was served with a notice in terms of section 342A of the Criminal Procedure Act 51 of 1977 as amended on the 16 of September 2022² for the court to investigate the state's failure to comply with the pre-trial directives as issued by court and such may be construed as an unreasonable delay. Counsel for the

¹ Indexed bundle P 222 – 230, Transcribed record of proceedings of 1 August 2022.

² Ibid P 82 -83, Transcribed record of proceedings for 22 September 2022.

applicant however placed on record that they only received same on the 19 of September 2022 after several failed requests. It was asserted that the state's failure to furnish the further particulars timeously amounted to an unreasonable delay in the proceedings and their preparation for trial and that a further postponement must be refused and that the matter must be struck off the roll.³

- [6] The second respondent objected to the matter being struck off the roll and indicated that though it was agreed that the defence would be provided with the above-mentioned pages and a revised charge sheet, there were no timelines set in that regard. She further indicated that the said pages consisted of invoices and receipts of medication sourced for the minor children and that the complainant would use the originals in court⁴ and this cannot be seen as an unreasonable delay.
- [7] She contended that the revised charge sheet did not in any way affect any of the elements of the charges that the applicant was facing but simply amounted to the actual wording of the maintenance order being amended so it may substantially comply with the order made by the High Court. Though she acknowledged that it was only sent on the 19 of September 2022, she attributed the delay to lack of electricity in Harrismith itself as the power outage persisted for three weeks.⁵ Furthermore, that the delays in the matter can mostly be attributed to the Applicant as various postponements were granted to him to obtain the services of various attorneys and advocates, consultations and the current legal representative appearance in court which amounted to about ninety postponements⁶ and only three of the postponements can be attributed to the prosecution and the complainant due to contracting the COVID 19 and a family bereavement.
- [8] After hearing the submissions of the parties, the application to have the matter struck off the roll was dismissed and the matter was rolled to the 23 September

³ Ibid P 156- 158.

⁴ Ibid P 166.

⁵ Ibid P167 -169.

⁶ Ibid 168, line 3,10 and 20.

2022 for trial and the state to provide the defence with the original documents of the said pages and address any concerns raised. The state and the defence were also directed to address the court about the desirability of converting the trial into a maintenance enquiry in terms of section 41 of the Maintenance Act considering the best interests of the child, any defence raised by the accused and whether there was a deterioration of the accused financial services.

- [9] On the 23rd of September 2022 instead of the parties addressing the court about converting the maintenance trial into an enquiry, counsel for the applicant raised the issue of the complainant's counsel (watching brief) carrying into court three crates filled 18 files and demanded access to same in preparation for trial as they implied that the state will be ambushing his client. The second respondent indicated to court that she is not aware of the contents of the files as far as she is concerned, she was already in possession of documents relevant to the charges that the Applicant was facing.
- [10] To that end, the first respondent stood the matter down for the second respondent to confirm the contents of the files and upon resumption of court, it was placed on record that the files pertained to complainant and applicant's litigation in other forums such as other criminal court cases, domestic violence proceedings and orders, affidavits in police reports and school reports. She further indicated to court that she does not intend using the said documents as they were not relevant to the charges that the accused was facing for arrear maintenance. Counsel for the defendant however, despite conceding that it is a simple explanation, argued that the 18 files were brought to court by the complainant to be utilized and that the prosecution has no idea what is happening in its case and alleged again that the accused rights to a fair trial are being infringed.
- [11] The First defendant after consideration, directed that the trial proceeds as the second respondent had indicated all information relevant to the charges were provided to the defence and the information contained in the crates are not relevant and may not be used in the criminal trial unless expressly applied for. The court also made a ruling that it had also not received any information to

consider converting the trial into a maintenance enquiry.⁷ After this ruling, it was then when counsel requested the matter to be remanded for the purpose of launching Rule 53 review proceedings in the Free state High Court.

- [12] The Applicant initially alleged that the obscured medical invoices on pages 62,74,75,76 and 490 were necessary to determine if an expert was to be instructed to verify if these were necessary and reasonable medical expenses and that by not having access to same before trial, prejudiced his preparation for trial purposes and his own assessment of medical costs. Furthermore, that the probabilities are high that the eighteen files are relevant to the current proceedings and that the watching brief attorney brought the files to court knowing fully well that it is relevant and did not assist the second respondent in re-assessing this new information.
- [13] The applicant also further alleged that the second had a duty to consider and discover all relevant evidence to allow accused persons to prepare for trial and must do so in the interest of justice and act in good faith to assist the court in making a just decision and her failure to properly consider the 18 files and her refusal to so made her conduct unlawful.⁸ To that end, *Van Der Westhuizen v S* 2011 (2) SACR 26 (SCA) was quoted in the founding affidavit as to the special role of the prosecutor.
- [14] The Applicant persisted with the argument that the court erred in making the ruling that the second respondent can apply to court to admit documents from the 18 files during the trial as same would render the trial unfair as the prosecutor indicated that the complainant wanted to refer to those documents during her evidence giving traction to their assertion that the eighteen files are relevant to the charges that the accused is facing. *Shabalala v Attorney General Transvaal* 1995 (2) SACR 761(CC) was quoted in the founding affidavit indicating that this will impact his right to a fair trial as the First respondent by making such a ruling, condoned a blanket privilege over the files.⁹

⁷ Transcribed record, P 200-201.

⁸ Founding affidavit, paragraphs 68 -72

⁹ Founding affidavit, para 83 - 90.

- [15] In my view, had the First respondent not allowed the second respondent to ascertain and verify the contents of the 18 files were before the trial proceedings commenced, that may have been deemed irregular if documents from those files would have been used during the trial. Even then, this does not take away the Applicants right to object to the usage of documents which they have not received as part of their further particulars bundle. The second respondent was given an opportunity to assess the contents of the files and deemed it irrelevant for the purpose of the charges that the accused was facing. It thus cannot be said that she acted unlawfully or did not consider any information that was at her disposal to assist the court in making a just decision.
- [16] Though assertions were made by the applicant that the complainant in the matter intends on using the said documents during her evidence, it is clear that the second respondent, as *dominus litus* exercised her discretion and indicated that same was not relevant. She placed on record that the documents in possession of the complainant pertained to proceedings in other courts involving the very same parties relating specifically to domestic violence, police affidavits and school reports. In my view, the *Van der Westhuizen* case is also distinguishable from this matter as the trial had actually commenced and the appellant alleged the state could have called additional witnesses to testify to his state of mind after he had shot and killed his three children and same may sketched him in a better light to the court and would have resulted in him not making admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 as amended. *In casu*, the trial had not even commenced and the said documents were already deemed irrelevant by the prosecution as other proceedings involving the parties do not relate to arrear maintenance.
- [17] The applicant's argument that the first respondent should have struck the matter from the roll is flawed for several reasons. Firstly, the prosecution had insight into the 18 files and made it known that it will not be used during the criminal trial. This in itself ought to have signaled to the Applicant and his counsel that the documents would not take the state case further for the purpose of proving the charges against the accused. The prosecution knew what the state case was all about and what it needed to prove the same, it could

not be expected that she must second guess what possible defence the applicant is going to raise. It would be absurd that if in a criminal case a complainant walks in court with some documents, which no nobody except the said complainant knows nothing about, then the accused should be entitled to have the said documents 'discovered'. The contention by the applicant that the prosecution was responsible for the delay herein is misplaced as the delay should be placed squarely at the door step of the applicant for insisting that the state should look into the 18 files which according to the state were irrelevant for the purpose of the trial.

[18] Now ideally, before the start of trial proceedings, a prosecutor should familiarize herself with the contents of the docket and consult with a complainant and if necessary, obtain further information or documentation relevant to prove the charges against an accused. If indeed she was confronted with 18 additional files, she ought to have consulted the third respondent for guidance as to whether the criminal case is to be pursued further, if further investigations are required and if the 18 files in possession of the complainant, would have any impact on their prosecution for arrear maintenance and if representations from the accused would be considered in that regard. This can be done at any stage before the trial commences. Although the second respondent's submission to court did not include her consulting with the third respondent, it is clear that she had a cursory look at the files and from that point on, determined that the evidence is irrelevant and would not be used during trial proceedings.

[18] Secondly, the Applicant herein had an indication from his own copy of the further particulars which documents would be used during the trial. Moreover, during the court proceedings on the 22nd September 2022, they indicated to court that they are ready to proceed to trial based on documents already in their possession were not asking for a postponement.¹⁰ They also confirmed that they were indeed provided with the original pages of 62,74,75,76 and 490. After receiving same, no mention was made that it would indeed be necessary to secure the services of an expert. The amended charge sheet was also received

¹⁰ Indexed bundle P164 -165, Transcribed record for 22 September 2022.

by them albeit late, on the 16th of September 2022. After the second respondent addressed court that the amendment to the charge sheet was at the request of the applicant to include the exact wording of the maintenance order and was inconsequential, no objection to the charge could be found in the proceedings signaling that this was not an issue. This in itself is indicative of the fact that the matter was ripe for hearing and no postponement was necessary.

- [19] Thirdly, the court's order on the 22 of September 2022 was specific as the parties were to address court as whether it would be in the interest of justice to convert the matter into a maintenance enquiry with due regard to possible defences contained in section 31(2) of the Act. The Applicant made no submissions in that regard as per the transcribed record. In the absence thereof, it is my view that the order that the matter should proceed, was thus justified in the prevailing circumstances.
- [20] The order made by the first respondent was purely interlocutory in nature and the review application was unnecessary as the court order made did not in any way take away the ordinary rights afforded to the Applicant to object to the usage of documentation which may not be relevant to the charge. In the recent Supreme Court of Appeal case of *Heidi Joubert v Pierre Joubert*,¹¹ it was stated that interlocutory orders do not have the final effect of disposing of a matter or a substantial portion of the relief claimed by parties but they (the parties) are still at liberty to prosecute and direct the court to any evidence and advance any argument they so wish during the trial.
- [21] The time that it took to have this matter started impacts not only the administration of justice but negatively affects the interests of the children. The presiding officer is enjoined to take control and case manage this matter and to ensure that it is dealt with expeditiously to its conclusion. Though it is uncertain as to what the status of this matter is on the court roll of Harrismith Magistrate's Court, the second and third respondents on their part, must ensure that this

¹¹ (285/2023) [2024] ZASCA 55 (19 April 2024) at paragraph 16.

matter is enrolled for plea and trial at the earliest available date as a preferent case on the court roll. Accordingly, the following order is made:

ORDER

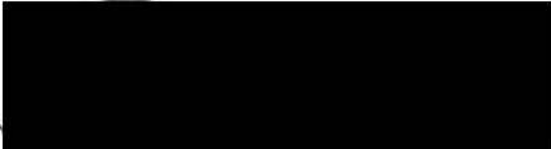
1. The application is dismissed;
2. There is no order as to costs.

I concur



MAJOSI O.R, AJ

pp



MOLITISOANE P.E, J

APPEARANCES:

On behalf of the Applicant

Instructed by:

Adv. Venter

c/o Venter Attorneys

Harrismith

On behalf of the Respondents

No appearances