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THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 16116 /24

In the matter between

J[...] T[...]

Applicant

and

**THE REGIONAL MAGISTRATE
SOMERSET WEST**

First Respondent

**THE DIRECTOR OF PUBLIC
PROSECUTIONS WESTERN CAPE**

Second Respondent

Coram: Wille et Lekhuleni, JJ

Heard: 14 February 2025

Delivered: 19 March 2025

JUDGMENT

WILLE, J:

INTRODUCTION

[1] The applicant is currently an accused person in a part-heard criminal trial. The first respondent is the judicial officer in the lower court in charge of and presiding over this criminal trial. A member of the second respondent is the prosecutor in this criminal trial.¹

[2] The first respondent, the judicial officer presiding over the case in the lower court, takes no part in these review proceedings. The trial is still ongoing. The prosecution has presented evidence and closed its case.²

[3] After that, the applicant brought an application to be discharged at the end of the prosecution's case. The first respondent found the applicant had a case to meet on the evidence presented. Thus, the first respondent dismissed the application for the applicant's discharge after the prosecution had closed its case and reserved the main reasons for her findings to be given in her leading judgment.³

OVERVIEW

[4] The applicant seeks an order to:

- (a) Review and set aside the first respondent's decision to dismiss the application for the applicant's discharge.
- (b) To discharge the applicant and effectively acquit the applicant.
- (c) Alternatively, the first respondent's ruling should be reviewed and set aside, reserving the reasons for her ruling to be dealt with in her leading judgment.

¹ This application is opposed by the Director of Public Prosecutions, Western Cape.

² The applicant has yet to testify, call witnesses or close his case.

³ This following the provisions of section 174 of the Criminal Procedure Act, Act 51 of 1977 ("CPA").

- (d) Alternatively, the first respondent should provide reasons for not discharging the applicant within thirty days of the order of this court.
- (e) Finally, the respondents are to pay the costs of the review application jointly and severally, the one paying the other to be absolved.⁴

[5] In summary, the applicant contends for the position that the first respondent erred as a matter of law and made an incorrect decision and not that the first respondent committed an irregularity in arriving at her decision. The applicant was charged with one count of sexual assault and two counts of attempting to commit a sexual offence. The applicant pleaded not guilty to all the charges preferred against him. The complainant is the applicant's granddaughter, a minor at the time of the alleged offences.⁵

THE REVIEW GROUNDS

[6] The applicant has seemingly now abandoned his contentions that were chartered following the law dealing with administrative reviews regarding specific targeted legislation.⁶

[7] In summary, the matter is brought before us under the rubric of one of the following review grounds:

- (a) Absence of jurisdiction on the part of the court.
- (b) Interest in the cause, bias, malice or corruption by the presiding judicial officer.
- (c) Gross irregularity in the proceedings.

⁴ On what basis is the first respondent is liable for costs is challenging to understand.

⁵ The offences allegedly occurred in 2014 and 2020 respectively.

⁶ The Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

- (d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.⁷

[8] The sole basis for the review application at the instance of the applicant is that the first respondent committed a gross irregularity by failing to discharge the applicant after the prosecution had closed its case.⁸

[9] Alternatively, the complaint is that the first respondent did not give detailed reasons for refusing the application for the discharge, and the recording that detailed reasons would be provided later in her leading judgment amounts to an irregularity.⁹

SECTION 174 OF THE CRIMINAL PROCEDURE ACT

[10] The applicable legislation provides as follows:

‘...[If], at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty...’¹⁰

CONSIDERATION

[11] The applicant is effectively asking this review court to find him not guilty. It is so that an appeal and a review are both ways of reconsidering a decision. An appeal is when the incorrect result is achieved on the facts or the law.¹¹

[12] It is trite that a review is not concerned with the decision's merits but solely about whether it was arrived at through the correct decision-making process or whether an incorrect procedure was followed in reaching the court's decision. The first respondent's ruling on the discharge application was because of the intervening

⁷ Sections 21 and 22 of the Superior Court's Act, Act 10 of 2013 ("HCA").

⁸ This, to me, is an out-and-out ground for an appeal.

⁹ Again, this may be grounds for appeal once the criminal trial has been concluded.

¹⁰ Section 174 of the CPA.

¹¹ *Tikly v Johannes* NO 1963 (2) SA 588 (T) at 590 G-H.

legislation of a discretionary nature. I say this because the applicable legislation determines that the court ‘may’ discharge an accused person and render a finding of no guilty.¹²

[13] Even on a liberal approach to the interpretation of this discretion afforded to the first respondent (in circumstances such as these), it is challenging to understand on what basis the finding by the first respondent is subject to any judicial review.¹³

[14] I say this for several reasons:

- (a) There is no final inalterable prejudice against the applicant, given the failure to discharge the applicant after the closure of the case for the prosecution.
- (b) The first respondent may acquit the applicant upon finalising the proceedings and applying the test for a final judgment on the merits.
- (c) The ‘complaints’ raised are grounds for appeal should a conviction be returned against the applicant.
- (d) Thus, any appeal or review is manifestly premature.¹⁴

[15] Moreover, any application for a discharge in terms of this specified legislation is interlocutory by its very nature. This is so because once the prosecution rests after presenting its case (and despite a finding that a *prima facie* case was made against the applicant), the applicant may still lead evidence, which may cause the judicial officer to decide that the applicant falls to be acquitted. Alternatively, the applicant may close his case without giving evidence, and if the court finds no evidence against him, the court may still return a verdict of not guilty.¹⁵

¹² It may be that this discretion is extremely limited, which will be discussed later in this judgment.

¹³ The finding was interlocutory and “partially” discretionary by nature.

¹⁴ The review application is *in medias res*.

¹⁵ The test to be applied at the conclusion of the trial is a different and discrete test

[16] Thus, a finding by a judicial officer dismissing an application for a discharge in terms of this intervening legislation is not reviewable, even if the exercise of this partial discretion was found to be incorrect. What must be demonstrated is an irregularity on the part of the judicial officer.¹⁶

[17] The mere assertion by the applicant that the finding by the judicial officer was not to his benefit does not mean, absent any other features, that the decision was incorrect, irregular or 'grossly' irregular.¹⁷

[18] It is the second respondent's submission that the arguments raised supporting the application for review are based on the submissions that the first respondent did not apply the relevant legal principles applicable when evaluating the evidence presented. This is not a ground for review.¹⁸

[19] By contrast, the applicant contends that the first respondent did not follow the legal guidelines following our decided jurisprudence and irregularly (at best for the applicant) exercised her judicial discretion incorrectly.¹⁹

[20] The primary argument by the applicant is that there were shortcomings in the complainant's evidence, which established the possibility that the allegations against him might be untrue. Thus, it is contended that the only possibility for the applicant's conviction would be if the applicant elected to testify or call witnesses.²⁰

[21] I say this because to establish this as a genuine irregularity worthy of consideration, the applicant's contentions are solely underpinned by an analysis of the credibility of the witnesses for the prosecution. It cannot be said there was 'no evidence' on which a reasonable man acting carefully might convict.²¹

¹⁶ Van Aswegen v District Magistrate Atlantis and Another 2024 JDR 2129 (WCC) at paragraphs [29] - [30].

¹⁷ Again, this may in time manifest as a ground of appeal.

¹⁸ The applicant contended that the first respondent's finding was wrong.

¹⁹ This discretion may be "limited" as discussed later.

²⁰ The application is contended for the applicant's right against self-incrimination.

²¹ S v Mpetha 1983 (4) SA 262 (C) at 266H.

[22] The trial court must indulge in the exercise of limited judicial discretion. Guidelines for the exercise of this discretion concerning this type of judicial discretion have been eloquently illustrated as follows:

‘...It seems to me that the rule is clear, namely, that if at the close of the case for the Crown the evidence against the accused, or against one or more of the accused, is not such that a reasonable man might convict upon it, the Judge had a discretion whether or not to discharge. He is quite entitled to refuse to discharge if he considers that there is a possibility that the case for the Crown may be strengthened by evidence emerging during the course of the defence...’²²

[23] Sometime after this, our jurisprudence was further ‘developed’ by formulating and suggesting a two-staged approach to be considered when evaluating the discharge of an accused person after the closure of the case by the prosecution. Although I do not agree with this two-stage test or approach (which has since been overruled), what was stated was the following:

‘...The position can be summed up as follows: At the close of the State case, when discharge is considered, the first question is: (i) Is there evidence on which a reasonable man might convict; if not, (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge, and the accused should be placed on his defence...’²³

[24] Thus, what emerged that is helpful is that once the trial court established *prima facie* evidence linking the applicant with the commission of the alleged offences, credibility would only become a consideration once (and if) the evidence was of such a ‘poor quality’ that no reasonable person could accept it.²⁴

²² R v Kritzinger 1952 (2) SA 401 (W) at 406-A.

²³ S v Schuping 1983 (2) SA 119 (B) at 120 -121 & S v Lubaxa 2001 (2) SACR 703 (SCA).

²⁴ S v Mpetha 1983 (4) SA 262 (C).

[25] Following an objective analysis of the evidence in this case, no finding could reasonably be returned against the poor quality of the evidence presented by the prosecution. Thus, we are left with the applicant's criticisms about the credibility of the complainant's allegations to the limited extent that it is reasonably possible that the accused may be innocent.²⁵

[26] Undoubtedly, this does not meet the threshold test for a judicial review. I say this because the merits or demerits of the impugned finding play a limited role (if any). After all, the application is by its very nature interlocutory and premature. The applicant's entire case is based on the contention that the first respondent made an incorrect decision and not that the first respondent committed an irregularity in arriving at her decision.²⁶

[27] Further, no irreparable prejudice would result should the trial proceed to finality because the applicant may be acquitted in the final trial process. Put another way, if a conviction followed, the complaints raised may manifest as grounds for an appeal.²⁷

[28] In addition, the applicant complains about an infringement of his right to a fair trial. These complaints must be viewed in the context of the fact that the trial process regarding the applicant has not yet been completed. The position in our law concerning this issue has been eloquently formulated as follows:

*'...Once again, it is our respectful view that the applicant's reliance on the provisions of the Constitution with regard to his fair trial rights does not justify interference in criminal proceedings which are mid-stream, and more so where the applicant has failed to demonstrate any legal basis for the relief sought in this court on review...'*²⁸

²⁵ This is not a ground for a review.

²⁶ These are arguments to be pursued by way of an appeal process.

²⁷ These complaints may manifest in due course as grounds of appeal.

²⁸ *Motikeng v Regional Magistrate Beaufort West and Another* 2023 JDR 0119 (WCC) at paragraph [39].

[29] Many significant trial rights exist and find application in our criminal and procedural law. One of the most important ones is the presumption of innocence. A failure by the prosecution to mount sufficient evidence at the closure of its case gives an accused person an opportunity to escape having to be put on his or her defence.²⁹

[30] It is trite that the threshold test of evidence presented and thus required by the second respondent at the closure of its case to avoid the applicant's discharge was considerably lower than the standard the second respondent has to meet to secure the applicant's conviction (if any).³⁰

[31] This threshold test relating to the discharge of an accused after the closure of the case for the prosecution has been consistently applied by our courts over many years. However, it is the exception to this test, which calls for an approach of the caution of a chameleon.³¹

[32] The exception in our procedural law is that a court may discharge an accused when the evidence presented by the prosecution is of such a poor quality that no reasonable man acting carefully could convict thereon.³²

[33] What this exception may permit is a limited probe into the issue of the credibility of the evidence presented. In my view, this is where the difficulty lies, as this 'credibility' exercise does not strictly fall within the remit of a judicial officer at the stage when the prosecution has closed its case.³³

[34] Thus, this discharge device in our law is just a sentinel against the conviction in the face of *spurious* evidence presented by the prosecution. Harm may occur when this procedural mechanism is used as a device by an accused person to attempt either to:

²⁹ This is not the case that we have been presented by way of this review,

³⁰ This is common cause between the parties.

³¹ Lubaxa 2001 (2) SACR 703 (SCA) at paragraph 11.

³² S v Schwartz 2001 (1) SACR 334 (W).

³³ This is an area of vigorous academic debate, especially where there is more than one accused.

- (a) Impermissibly persuade a judicial officer to embark on pre-mature credibility findings regarding the evidence presented by the prosecution and/or,
- (b) Impermissibly gain a window into the judicial thought process of the judicial officer so that an accused person may tailor his or her defence case accordingly under the camouflage of simulated review proceedings.³⁴

[35] I will now deal with this second aspect of the review piloted by the applicant. In a final throw of the dice, the applicant sought complete and comprehensive reasons from the first respondent as to why the discharge application was refused.³⁵

[36] The first respondent gave the following ‘reasons’ for the refusal of the discharge application:

‘...there is evidence that the accused committed the offence in the charge...’³⁶

[37] The second respondent contends that reserving full reasons for a decision when interlocutory findings are made during a criminal trial is a regular occurrence and does not amount to an irregularity, gross or otherwise.³⁷

[38] In summary, the first respondent communicated to the applicant that sufficient evidence implicated the applicant in committing the alleged charges as preferred against him by the prosecution. The fact that the applicant is unsatisfied with the reasons provided does not, *per se*, indicate an irregularity, grossly or otherwise. This is especially so when detailed reasons will be given in the leading judgment.³⁸

[39] What I say is impermissible under the guise of review proceedings is an analysis of the judicial officer’s detailed reasons for refusing the applicant’s

³⁴ This is precisely what the applicant is attempting to do.

³⁵ The applicant is “testing the waters” regarding the strength of the case for the prosecution.

³⁶ In my view, this is more than adequate.

³⁷ With this, I agree.

³⁸ Again, this may manifest as a ground of appeal in the fullness of time.

discharge application. I say this because this would constitute an interim evaluation of the available evidence under the guise of review proceedings. Any such detailed assessment would, in essence, amount to appeal proceedings, *in medias res*, which would be legally impermissible and to which the applicant is not entitled at this stage.³⁹

[40] It is also not for this court, *in medias res*, to now evaluate the evidence presented by the prosecution, except in limited circumstances in the category of the discharge procedure, which I have styled as an 'exception' to the standard method to be followed.⁴⁰

[41] The arguments chartered by the applicant are based on the facts relating to the findings made by the first respondent. It is legally impermissible for this review court to re-consider the merits of the evidence as presented thus far, as this would amount to a premature appeal of the first respondent's factual findings.⁴¹

[42] For this reason, I will not engage with the factual findings or evidence presented in the lower court. The applicant's defence is a bare denial, and he advances a possible motive for implicating him with the offences preferred against him by the prosecution. Self-evidently, it is not for this court to engage in any manner with these defences raised under the guise of review proceedings.⁴²

[43] Undoubtedly, we are dealing with out-and-out issues about credibility, which a trial court is best suited to decide on after hearing all the available evidence. Against this background, it is challenging to understand how the interim finding against the applicant amounts to an irregularity, let alone a gross irregularity. In addition, there is no final inalterable prejudice to the applicant should the decision stand.⁴³

³⁹ In terms of section 309 (1) (a) of the CPA.

⁴⁰ This is what may occur ultimately in the appeal process.

⁴¹ This would amount to an appeal *in medias res*.

⁴² This is an issue to be decided upon by the trial court.

⁴³ The applicant may even be acquitted upon the conclusion of the trial proceedings.

[44] Put another way, the applicant will not suffer irreparable prejudice if the trial proceeds in that he may be acquitted. Besides, even if a conviction was to follow, the complaints raised may constitute grounds for appeal.⁴⁴

[45] Our jurisprudence has established a longstanding principle that a reviewing court will sparingly interfere with the 'as-yet-uncompleted' proceedings in a lower court. This principle was eloquently illustrated as follows:

*'...The learned authors of Gardiner and Lansdown (6th ed., vol. I p. 750) state: While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained...'*⁴⁵

[46] Undoubtedly, this is not such a rare case. Instead, in my view, the applicant is impermissibly attempting to utilise the discharge provisions as a mechanism or tool to gain insight into the strengths and weaknesses of the case for the prosecution to tailor his evidence from now on or to assist him with his decision on whether or not he should testify in his defence and/or call witnesses. This is not the purpose for which the discharge provisions were designed.⁴⁶

COSTS

[47] The applicant sought a cost order against those respondents in the event of their opposition to the application. The second respondent opposed the application. Although the application exhibited some features of a civil review, it was, in essence, a 'criminal' review. I say this because one of the remedies contended for was the applicant's acquittal. In these circumstances, there should be no order as to costs.⁴⁷

⁴⁴ This application by the applicant is premature.

⁴⁵ *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119.

⁴⁶ This is legally impermissible.

⁴⁷ I have a discretion when it comes to issues of costs.

CONCLUSION AND ORDER

[48] Given the circumstances of the matter, the first respondent's conduct did not and does not amount to an irregularity, gross or otherwise. Thus, the following order is granted:

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

WILLE, J

I agree.

LEKHULENI, J