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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO**

Not reportable

CASE NO. CA&R4/2026

In the matter between:

THE STATE

and

S[...] N[...]

Accused

REVIEW JUDGMENT

Bands J and Laing J:

[1] This matter concerns unterminated criminal proceedings emanating from the Middledrift District Court, in which the accused pleaded not guilty to a charge of assault with intent to do grievous bodily harm. The complainant who was 15 years of age at the date of trial, gave evidence through a duly appointed intermediary. In the referral letter, the presiding officer records that the matter is being sent on “*special*

review” by reason of the fact that the complainant testified without the court having “administered his affirmation”. From the record, it appears that such realisation occurred during the complainant’s cross examination.

[2] It must immediately be said that on a perusal of the record of proceedings, the complainant was purportedly admonished in terms of section 164(1) of the Criminal Procedure Act, 51 of 1977 (CPA), same having been administered by the interpreter and intermediary in the presence of the presiding officer as provided for in section 165. Accordingly, the presiding officer’s reference to the lack of affirmation being administered (this being separate and distinct from an admonition), is somewhat confusing.

[3] In terms of section 162 of the Act, no person, subject to the provisions of sections 163 and 164, shall be examined as a witness in criminal proceedings unless he is under oath.

[4] Sections 163 to 165 of the Act provide as follows:

“163 Affirmation in lieu of oath

(1) Any person who is or may be required to take the oath and-

(a) who objects to taking the oath;

(b) who objects to taking the oath in the prescribed form;

(c) who does not consider the oath in the prescribed form to be binding on his conscience; or

(d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief,

shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:

'I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth'.

- (2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.*
- (3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.*

164 When unsworn or unaffirmed evidence admissible

- (1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.*
- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.*

165 Oath, affirmation or admonition may be administered by or through interpreter or intermediary

Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be."

[5] It is well established that the reason for giving evidence under oath (s 162), affirmation (s 163) or admonishment (s 164) is to ensure that the evidence given is reliable.¹ The evidence of a witness, in circumstances where he or she has not been

¹ 2013 (1) SACR 398 (SCA) para 4.

properly placed under oath, made a proper affirmation, or been properly admonished to speak the truth, lacks the status and character of evidence and is inadmissible.²

[6] Relevant to the above, the Supreme Court of Appeal, in *S v Raghobar*³ stated as follows:

“Section 192 of the Criminal Procedure Act declares generally that unless specially excluded, all persons are both competent and compellable witnesses. A witness is competent to testify if his or her evidence may properly be put before the court. If a child does not have the ability to distinguish between truth and untruth, such a child is not a competent witness. It is the duty of the presiding officer to satisfy himself or herself that the child can distinguish between truth and untruth. The court can also hear evidence as to the competence of the child to testify. Such evidence assists the court in deciding (a) whether the evidence of the child is to be admitted, and (b) the weight (value) to be attached to that evidence. The maturity and understanding of the particular child must be considered by the presiding judicial officer, who must determine whether the child has sufficient intelligence to testify and a proper appreciation of the duty to speak the truth. The court may not merely accept assurances of competency from counsel. The language used in all three sections is peremptory.”

[7] Where it is established that the child witness is able to distinguish between truth and untruths, which is a prerequisite for the oath, affirmation, and admonition, an enquiry into whether the witness possesses the required capacity to understand the nature and import of the oath, including its religious sanction, must be conducted. Should the latter enquiry yield a negative result, the witness must be admonished to speak the truth. Accordingly, it is only where the court finds that the witness lacks

² *S v Matshivha* 2014 (1) SACR 29 (SCA) para 10; and *Rammbuda v S* (156/14) [2014] ZASCA 146 (26 September 2014) para 7.

³ 2013 (1) SACR 398 (SCA) para 5.

capacity to understand the nature and import of the oath, as set out above, that triggers the court's need to admonish a witness to speak the truth in terms of section 164(1) of the CPA.

[8] In this regard, the court, in *S v V*,⁴ stated as follows:

"If s 164 is to be resorted to in order to procure the evidence of a child the court must first make the necessary finding that the child does not understand the nature and import of the oath. To make a finding entails an enquiry. The court must enquire and satisfy itself whether the child understands the oath and understands what it means to speak the truth... If the child does not, it cannot be admonished under s 164, it is an incompetent witness, whose evidence is inadmissible. The admission of such evidence is an irregularity which, in my opinion, constitutes a failure of justice per se. Compare S v Hendricks en 'n Ander 1995 (1) SACR 37 (C)."

[9] In the present matter, the following exchange, prior to the complainant giving evidence, appears from the record of proceedings:

"Court: How old is O[...]?"

Prosecutor: He is 15 years, Your Worship.

Court: Thank you very much. O[...] can you hear us?

Ms Mokoena (intermediary): I confirm I can hear Your Worship he cannot.

Court: Why is that ma'am?

Ms Mokoena: Because due to the headsets your Worship that are with the intermediary the witness is unable to hear and will only take questions when relate by the intermediary, Your Worship.

Court: Are you ready to proceed, ma'am?

Ms Mokoena: Yes, I am Your Worship.

Court: Thank you very much. We are about to begin then. Proceed Mr Potselo, sir.

O[...] N[...]: (admonished) [through intermediary] [through interpreter]."

⁴ 1998 (2) SACR 651 (C) at 652I-J and 653a.

[10] From the aforesaid, it is immediately apparent that the irregularity in the proceedings lies in the presiding officer's failure to enquire into the complainant's ability to: (i) differentiate between truth and untruth, relevant to his competency to give evidence; and (ii) understand the nature and import of the oath. Accordingly, absent the aforesaid enquiries, and the necessary findings relevant thereto, whatever admonition was purportedly administered to the complainant, fell far short of what is required by s 164 of the CPA. Essentially, the complainant, who was not assessed as to competency, was permitted to give evidence in the absence of an oath, affirmation, or admonishment. That being so, and as succinctly stated in paragraph [8] of *Rambuda* (supra): “[t]he testimony of the complainant thus lacked the status and character of evidence.”

[11] The presiding officer, albeit for different reasons, approached this court seeking a review of the proceedings before her, *in medias res*. Accordingly, s 304(4) of the CPA, upon which the presiding officer relies to place the matter before the High Court, is of no application as it does not allow for review proceedings prior to sentencing. By virtue of the High Court's inherent power to restrain illegalities in inferior courts, this court may, in a proper case, by way of review, interdict or *mandamus*, grant relief against the decision of a magistrates' court given prior to conviction.⁵

[12] As set out in *African Paper Products (Pty) Ltd and Another v Director of Public Prosecutions: Eastern Cape and Another*:⁶

⁵ *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) at 119G.

⁶ (250/2020) [2022] ZAECKMHC 90 (31 October 2022).

[20] *It is an established principle of our law that the High Court will not ordinarily, by way of appeal, review or mandamus, interfere with untermiated proceedings in a lower court. The court's power to interfere is exercised sparingly and only in those cases in which the court is satisfied that grave injustice may otherwise result or where justice might not by other means be obtained. The court's reluctance to interfere in untermiated proceedings stems primarily from (i) the effect that such procedure has upon the continuity of proceedings in the court below;⁷ (ii) the undesirability of hearing appeals and reviews piecemeal;⁸ and (iii) the fact that redress by other means, such as review or appeal, will ordinarily be available in due course.⁹*

[21] *In Wahlhaus and Others v Additional Magistrate, Johannesburg and Another (supra) the Appellate Division (as it then was) commented as follows at 120D:*

"[T]he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction... As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

[22] ...

[23] *In Ismail and Others v Additional Magistrate, Wynberg and Another,¹⁰ the court, in assessing what constitutes a gross irregularity justifying interference before conviction, stated:*

⁷ *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) at 119H – 120A.

⁸ *Motata v Nair and Another* 2009 (1) SACR 263 (TPD) at 267 at paragraph [12].

⁹ *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) at 119H – 120A.

¹⁰ 1963 (1) SA (A).

“I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (AD) at p119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate’s decision under appeal at a stage where no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in unterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to ‘rare cases where grave injustice might otherwise result or where justice might not be by other means attained.’ (Wahlaus’s case, supra at p120).”

[24] The aforesaid approach, as set out in Wahlhaus (supra) and Ismail (supra), was endorsed by the court in Motata v Nair NO and Another¹¹ and more recently, by the full bench of this court in Mispha CC and Another v The Honourable Regional Magistrate and Others.¹²

[13] In Magistrate, Stutterheim v Mashiya¹³ the Supreme Court of Appeal commented that:

“The higher courts have however emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity – where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the Constitution. At the same time, although the cases in which intervention has actually occurred are

¹¹ 2009 (1) SACR 263 (TPD) at paragraphs [9] and [10].

¹² Case No.: 2647/2011, ECD Grahamstown (as it then was) (delivered on 18 September 2013).

See also: Sizani v Mr Mpofu N.O. and Another, Case No.: 2804/2019, ECD Grahamstown (as it then was) (delivered on 18 August 2020).

¹³ [2003] 3 All SA 11 (SCA).

uncommon, this Court has refused to define or limit the circumstances in which intervention would be justified. The categories remain open.”

[14] Mindful of the aforesaid, it remains to be determined whether the proceedings under consideration fall to be reviewed and set aside, regard being had to the appropriate threshold as set out above.

[15] In the present matter, there can be no question as to the prejudice, inherent in the accused being obliged to proceed to trial and face a possible conviction upon the inadmissible evidence of the complainant (should the presiding officer erroneously take the complainant’s evidence into account), only to then have such conviction set aside on review or appeal, with the possibility of a retrial in due course. By the same token, should the presiding officer disregard the evidence of the complainant, which she would be bound to do in the circumstances, this may very well be prejudicial to the state’s case. Moreover, the prejudice to the complainant, all relevant witnesses, and the accused (should he elect to testify), in having to give evidence on more than one occasion, is self-evident. To allow the proceedings to continue in the Magistrates’ Court, in the face of a substantial irregularity as set out above, will likely result in grave injustice. This court is accordingly satisfied that the matter justifies the intervention of this court prior to conviction.

[16] Consequently, the following order is issued:

(a) the proceedings are set aside; and

(b) the matter is referred to the court *a quo*, to be commenced *de novo*.

I BANDS
JUDGE OF THE HIGH COURT

I agree.

JGA LAING
JUDGE OF THE HIGH COURT

Date delivered: 24 March 2026.