REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 35303/2008

DATE: 2009-11-26

In the matter between

DIRECTOR OF PUBLIC PROSECUTION Applicant

and

DITEKO MODISE AND ANOTHER Respondent

J U D G M E N T

LAMONT, J: This is an application to review decisions made by the 1st respondent (hereafter referred to as the Magistrate). He refused to allow the State the opportunity of leading the testimony of expert witnesses. The 2nd respondent (hereafter referred to as the accused) was charged with 13 counts of *crimen injuria*. A material allegation which was required to be proved was that the accused had sent many short message

service (sms messages) which contained criminally injurious words. During the course of the trial the State sought to lead the evidence of one Miller. He is a Captain in the South African Police Services stationed at the High Tech Project Centre Detective Services head office. He has been employed by the police service for some 17 and a half years and has received training in forensic cellphone examination and analysis.

Cellphone investigation involves the extraction of information from a cellphone handset and sim cards in a forensic manner. This examination and extraction of information is conducted with the help of hardware and software programs on the computer. Once the information is extracted it cannot be altered from the moment it is captured onto the system which creates the report.

In the course of the investigation Captain Miller received a variety of bags containing cellphones. He opened the bags and took photographs of the cellphones. Once he had taken the photographs he switched on the phones at the computer using the relevant hardware so as to examine them. At the point when he was to deal with this evidence at the trial there was an objection made on behalf of the accused in the following terms:

> "I must object, it would appear that this witness is now going to give expert evidence from stuff he has extracted, data he has extracted, I have no certificate in terms of the Act by this witness where he certifies his information so the evidence he is going to give now in my view would be inadmissible".

Record page 461.

Crisply put the objection was that if Section 212(4) of the Criminal

Procedure Act 51 of 1977 (the Criminal Procedure Act) had not been complied with then the witness was not entitled to be called at the trial to orally give expert evidence as the facts he found and the opinions he formed. The ruling made by the Magistrate was that the witness could not give the evidence as he had not furnished that affidavit. His view was that it was compulsory for there to be such an affidavit as it was of vital importance for the accused to have knowledge of the particular facts relied upon as well as the opinions and reasoning of the expert. That in his view should all have been set out in the affidavit. If this was not done the witness was not entitled orally to give the evidence.

The reason why the section was required to be complied with in the view of the magistrate was accordingly to enable the accused to prepare himself adequately for trial by in advance knowing and understanding the evidence which was to be presented at the trial. The accused would not have a fair trial without the relevant affidavits having been furnished to him, so the magistrate reasoned.

Similar reasoning was applied to an objection raised in regard to the proposed evidence of the same witness and one Pillay concerning electronic data. The State did not provide the document required by Section 15(4) of the Electronic Communications and Transactions Act 25 of 2002. Applying the same reasoning the witnesses were not permitted to provide oral evidence of the facts and matters they discovered as well as the opinions which they proposed to give.

Section 212(4) of the Criminal Procedure Act provides:

"212(4)(a). Whenever any fact established by any

examinational process requiring any skill:-

(i) in biology, chemistry, physics, astronomy, geography or geology.
(ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics.
(iii) in computer science or in any discipline of engineering.
(iv) in anatomy or in human behavioural sciences.
(v) in biochemistry, metallurgy, in microscopy, in any branch of pathology or intoxicology; or
(vi) in ballistics in the identification of fingerprints or palm prints or in the examination of disputed documents is or may become relevant to the issue at criminal proceedings a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette and that he or she has established such fact by means of such an examinational process shall upon its mere production at such proceedings be *prima facie* proof of such fact provided that the person who may make such affidavit may in any case in which skill is required in Chemistry, Anatomy or Pathology issue a certificate in lieu of such affidavit in which event the provisions of this paragraphs shall *mutatis mutandi*s apply to such certificate.

(b) Any person who issues a certificate under paragraph A and who in such certificate wilfully states anything which is false shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury".

Section 15 of the Electronic Communications and Transactions Act no 25 of 2002 provides:

"15. Admissibility and evidential weight of data messages.

(i)

(ii) In any legal proceedings the rules of evidence must not be applied so as to deny the admissibility of a data message in evidence –

(a) on the mere grounds that it is constituted by a data message orif it is the

(b) best evidence that the person adducing it could reasonably be expected to obtain on the grounds that it is not in its original film.

1. Information in the form of a data message must be given due evidential weight.
2. In assessing the evidential weight of a data message regard must be had to
   (a) The reliability of the manner in which the data message was generated, stored or communicated.
   (b) The reliability of the manner in which the integrity of the data message was maintained.
   (c) The manner in which the originator was identified and
   (d) Any other relevant factor.
3. A data message made by a person in the ordinary cause of business or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law the rules of a self regulatory organisation or any other law or the common law admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

The magistrate appears to have regarded compliance with the sections in question as being mandatory in that on his view of the sections they created expert notice provisions similar to the provisions in civil litigation requiring litigants to provide opposing litigants with expert notices (See for example Rule 36(9) High Court Rules) failing which the expert evidence could not be orally led at trial.

It is this question which must be considered. The starting point of the enquiry is found in Section 161 of the Criminal Procedure Act which

provides:

> "161
>
> (1) A witness at criminal proceedings shall except where this Act or any other law expressly provides otherwise give his evidence *viva voce*.
> (2) In this Section the expression *viva voce* shall in the case of a deaf and dumb witness be deemed to include gesture language….."

The words of the Section which require emphasis in my view are "shall, except where this Act…expressly provides otherwise".

Every witness in terms of Section 192 of the Criminal Procedure Act is both competent and compellable unless expressly excluded. Section 192 provides:

> "192. Every person not expressly excluded by this Act from giving evidence shall subject to the provisions of Section 206 be competent and compellable to give evidence in criminal proceedings".

It is immediately apparent that the Criminal Procedure Act provides for witnesses to give evidence orally at trials. The only time witnesses are not required to give evidence orally at trials is when for some particular reason their evidence is either not admissible or may be given in some alternative manner. The sections in question (Section 212 of the Criminal Procedure Act and Section 15 of the Electronic Communications and Transactions Act) in their terms are designed to and do allow evidence in the form of the facts and opinions contained in a document which complies with the section in question to be admitted in evidence at a trial notwithstanding that the person who listed the facts and formed the opinions in the document is not called as a witness.

This is the key which unlocks and solves the problem. The documents are not designed to be expert notices containing information designed to inform opposing parties of what the evidence to be led at the trial is. These sections are specifically designed to enable the state to avoid the need to lead the evidence of a witness by way of producing him and then leading *viva voce* evidence. The facts and mattes in a document are the evidence. The evidence is admissible if the provisions of this section are complied with. Nothing more is required. The section enables the state to easily produce evidence which will generally be of a formal and uncontested nature and to place same in documentary form before a court without the need to call the witness. The advantage for the state is immediately apparent. It does not have to send its experts to a variety of courts countrywide to give evidence which generally is uncontested with the concomitant waste of money and time. In addition the expert becomes free to perform other work. These sections allow limited resources to be properly and adequately used.

The error made by the Magistrate is in characterising the document contemplated by the sections as a document required to be produced prior to the witness being allowed to give oral evidence at a trial. The true nature of the document is that it contains the very evidence which is admissible and that it has particular weight even although no *viva voce* evidence has been led to establish the truth of the facts or opinions under oath.

It does not follow that the mechanisms put in place to enable the production of evidence create a notice provision which if it is not complied with carries the sanction of dissolving the right to call a witness.

The state has the right to choose the form in which the evidence is to be given. It is the right of the state to choose to provide the evidence either orally or by way of producing the document contemplated by these sections.

There are other sections in the Criminal Procedure Act available to the defence to assist it to overcome the prejudice it suffers if it is unable to continue with the trial immediately. Prejudice is irrelevant to the interpretation of the sections.

The only remaining issue is whether or not it was permissible for the state to bring the matter on review at a time prior to the conclusion of the trial. The court while it has the power to review administrative action piecemeal generally will not do so. Only in exceptional circumstances or where injustice will occur will a piecemeal review be permitted. See for example *Wahl House v Additional Magistrate Johannesburg* 1959(3) (SA) 113 at 120, *Tuesday Industries (Pty) Ltd v Condor Industries (Pty)Ltd and another* 1978(4) (SA) 379 (T) (at 382D-E), *Hlope v Judicial Service Commission and Others* 2009 (4) All SA 67 SGHC.

In my view, there are exceptional circumstances in the present matter. The principal issue in the trial cannot be decided without the evidence of Messrs. Miller and Pillay. This being so there is no sense in directing the matter to continue and thereafter allowing appropriate action to be taken. It appears to me that a much more sensible course is to review the decisions made at the present time and allow the trial to follow its normal course thereafter.

In my view, the rulings made by the Magistrate were wrongly made

and ought to be reviewed and the review should be exercised now. I have amended the Notice of Motion dated 3 September 2009 in terms which the state finds agreeable and appropriate in the present matter and which I believe to be proper orders in the present matter. I make an order in terms of paragraphs A, B, C, D and E of that Notice of Motion as amended by me.