REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO 46746/2010

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

....
DATE SIGNATURE

In the matter between

JOHANN GEORG NIEHAUS **APPLICANT**

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **FIRST RESPONDENT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

THE PROSECUTOR: CASE 2SH155/2000 IN THE REGIONAL COURT FOR THE REGION OF THE SOUTHERN TRANSVAAL HELD AT JOHANNESBURG, COURT 12 **THIRD RESPONDENT**

THE PRESIDING MAGISTRATE: CASE 2SH155/2000 IN THE REGIONAL COURT FOR THE REGION OF THE SOUTHERN TRANSVAAL HELD AT JOHANNESBURG, COURT 12 **FOURTH RESPONDENT**

J U D G M E N T

WEPENER J:

[1] The applicant brings an application for review and for an order to stop the prosecution currently pending before a Regional Magistrate in the court for the Region of Southern Gauteng held at Johannesburg alternatively, to review the judgment of the Regional Magistrate, who refused the applicant an acquittal pursuant to the provisions of s 174 of the Criminal Procedure Act 51 of 1977('the CPA') and to declare the trial 'unfair'.

[2] The first respondent is the Minister of Justice and Constitutional Development in his official capacity. The second respondent is the National Director of Public Prosecutions in his official capacity. The third respondent is the prosecutor in the court a quo and the fourth respondent is the presiding magistrate in the court below.

[3] Both first and fourth respondents have filed notices in which they indicate that they abide by the decision of this court.

[4] The applicant filed a large number of documents from time to time, which documents are sometimes difficult to place in perspective as many 'filing notices' with documents attached, which are not paginated, are before us. Nevertheless, I will deal with this matter on the basis of the argument presented to us. I must add, that because the first and fourth respondents failed to file affidavits it is contended by the applicant in heads of argument that their actions should be regarded 'as having abandoned' opposition to the relief sought. The argument was not advanced during the hearing. However, there is no merit in this submission. The fact that the Minister and the Presiding Magistrate stay out of the fray and abide by the judgment is, in my view, most appropriate.

[5] There is also an affidavit by Mr Dicker, a Deputy Director of Public Prosecutions for South Gauteng in which he states that the second and third respondents oppose the application for the reasons set out in the affidavit of the third respondent Mr Nel, the prosecutor in the matter. The second and third respondents filed their answering affidavits out of time and ask for condonation thereof. The applicant opposed such condonation for reasons that are not clear and appear to be technical. During argument the opposition was abandoned and Mr Steenkamp requested the court to take the complete record before it into account.

[6] All material is now before us and in so far as the applicant seeks condonation for the filing of a voluminous supplementary affidavit and the second and third respondents seek condonation for the filing of an opposing affidavit out of time, such was granted during the hearing as it would be in the interests of justice to hear the matter and to have regard to all issues placed before us (see *Pangbourne Properties Ltd v Pulse Moving CC* 2010 JDR 1414 (GSJ)). There is a voluminous supplementary affidavit filed by the applicant who, by and large, attacks the evidence of witnesses and I will not deal with each of the allegations made by the applicant but deal with them generally. In these circumstances, and in order to understand the basis of the review, as there are long narratives of occurrences in the court below and evidence of what witnesses or the prosecutor or the magistrate said from time to time, with no specific conclusions regarding thereto, we called on Mr Steenkamp, appearing on behalf of the applicant, to indicate clearly what the issues are which he intends arguing. During argument Mr Steenkamp, confirmed that which he stated in his amended practice note dated 25 July 2012. In it, it is stated:

> ‘*7 State of trial in regional Court:*
> *1 The State closed its case*
> *2 The accused/applicant has been found not guilty and acquitted on 58 (fifty eight) counts of the charge sheet in terms of section 174 of the Criminal Procedure Act whereon the state tendered no evidence*

3 The state is in possession of all the applicant's files that it seized and removed. The applicant/accused is in a predicament to proceed with its defence as the state is in possession of all his files and notes. The applicant/accused is required to conduct and proceed with his defence on the copies of the docket that was supplied by the state to the defence. Full legal argument will be presented at the hearing of this application if required.

4 The State is in contempt of an order of the High Court Of South Africa (Transvaal Provincial Division) under case number 36143/99 and persists therein.

5 The trial court has apparently attached no value to the said order of the said High Court.

6 The Law Society of the Transvaal (Law Society of the Northern Provinces) is in contempt of an order of the trial court to furnish copies of documents in its possession that can prove the innocence of the accused/applicant and persists therein.

7 Only one expert, Deleeuw Swart, a chartered accountant employed by the Law Society of the Transvaal (Law Society of the Northern Provinces) testified in a trial within a trial in the case. He testified that he conducted an investigation specifically towards fraud and theft. He testified that the accused/applicant has done nothing wrong and is therefore innocent. The trial court apparently refused to take his testimony in consideration when it refused the accused's/applicant's second application under section 174 of the Criminal Procedure Act. It is the accused's/applicant's view that it is unfair and detrimental to the administration of justice to recall Swart to repeat his testimony. Full legal argument will be presented at the hearing if required.

8 The state witnesses contradicted themselves in testimony and where more than one was called on the same charge they contradicted each other on material aspects.

9 The state did not specify which witness was called on which charge.

10 Most of the complainants distanced themselves from the charge sheet.

11 The second and third respondents did not react to the applicant's request for a court date in terms of the Practice Manual of this Honourable Court.'

[7] Also in the heads of argument one finds the following:

'*2 The application is furthermore, also being supported by a fully summarised evaluation of the facts as they were submitted by the prosecuting authority during the trial of the matter, this once again in the view of the applicant does not support any of the allegations in the charge sheet and with reference to the particular charges in mind at all.*

4 It must be emphasized herein that during the trial a number of state witnesses were called, as well as an independent auditor attached to the law society who in principle was supposed to be a complainant who has testified that after further investigations it was found that the applicant has done nothing wrong and is therefore innocent of the charges against him. It is in this light and status of the matter that the honourable court a quo refused to dismiss the matter wholly against the applicant. It must be born in mind once again that this evidence was wholly undisputed by the prosecuting authority. It is the view of the applicant that the honourable magistrate should have in the interest of justice and common fairness dismissed all the charges as they stood against the accused.'

[8] From the above it is clear that there is an attack on the veracity of the witnesses' evidence and the evaluation of the evidence by the presiding magistrate.

[9] Indeed, during the hearing, Mr Steenkamp further limited the argument in support of the review to an argument that the continuation of the trial would be unfair by virtue of the cumulative effect of the following issues:

1. The age of the applicant, he now being 62 years of age;
2. The fact that the trial commenced 13 years ago – but that is incorrect as the matter commenced in 2002. The matter has been before the courts for 10 years;
3. That there was no *prima facie* case at the end of the State case which required an answer by the applicant;
4. A witness, Mr Swart, said in evidence that he could find no untoward conduct on the part of the applicant;
5. The prosecutor stated that he did not oppose the discharge of the applicant;
6. The prosecutor did not oppose the review proceedings launched by the applicant.

[10] The application is brought under, inter alia, the following circumstances:

1. The matter has been protracted and has been heard from time to time over a period of some years. The applicant has appeared more than ninety eight times since his arrest.
2. The investigation file of the counts against the accused consists of some thirteen lever arch files.
3. The matter was postponed from time to time as a result of a bail application brought by the applicant.
4. Delays were caused as a result of an appeal against an order for return of documents.
5. Applications for further and better particulars were brought by the applicant.
6. Extensive cross examination of State witnesses took place.
7. Various applications were brought by the applicant after the close of the State's case, including this review.

8. It is common knowledge that there is an absence of a running roll in the magistrates' court, which hampers the expedient finalisation of cases.
9. A delay occurred as a result of an application launched by the applicant for a separation of trials and the unavailability of the attorney appearing for the applicant.
10. Delays occurred because of illness of various parties participating in the trial.
11. Twenty one of the appearances occurred prior to the commencement of the trial of the applicant.
12. It took 4 years for the State to close it's case.

[11] Some postponements were at the State's request for, inter alia, the tracing of State witnesses as well as a number of inevitable postponements occurred due to illness and an operation undergone by the third respondent. Obviously a large number of postponements were due to the court days having come to an end. Be that as it may, the State's case was closed during September 2006 and the applicant sought a discharge pursuant to the provisions of s 174 of the CPA. This was partially successful but refused regarding the majority of counts against the applicant. The applicant brought a second application for a discharge during 2009. During the time since 2006 when the State's case was closed, the applicant also approached the National Director of Public Prosecutions to stop the proceedings against him. These representations were unsuccessful. The delays that occurred since 2006 were all as a result of the conduct and actions by the applicant. Neither his age nor the delays can support the argument that the applicant is not receiving a fair trial.

[12] Nothing turns on this issue particularly as the State's case has been closed and the further conduct of the matter is in the hands of the applicant.

[13] As set out before, the review is, in the main, based on the allegations that the magistrate should have discharged the applicant. The reasons therefore, it is argued in the heads of argument (although not seriously advanced before us), were that documents seized and used against the applicant should not have been used as a result of an order of the North Gauteng Provincial Division which ordered the return of the documents. However, the order issued by Roux J has been appealed against in the sense that a notice of application for leave to appeal has been filed. The filing of a notice of application for leave to appeal suspends the operation of the order of Roux J.

[14] Thereafter these documents were kept by a representative of the second respondent, Mr G Nel. During 2001, the following arrangement was made:

> ‘*[37] AD PARAGRAPH 9.4:*
> *At that stage the appeal against the order to return the seized documents was already noted and the documents were already in storage at our offices. It is trite law that the filing of a notice for an application for leave to appeal suspends the operation of a court order. I was not involved in dealing with the appeal itself. Shortly after I received the matter for prosecution a meeting was called between myself, Mr Steenkamp, the Applicant, Agrella’s attorney, the curator for Agrella and a female DSO investigator. At the stage the investigation had been completed and all the relevant statements and documents were already in the investigation file/docket. This meeting took place if memory serves me well in 2001. The original purpose of the meeting was to allow Agrella’s curator access to the documents (pending the appeal against the court order) in the presence of all the parties. For this purpose I arranged that the documents, contained in various boxes, be brought to my office. However, I then used the opportunity to discuss the position relating to the documents with the parties present. I informed the parties that I have been informed that there were problems in obtaining the record of the proceedings for the purposes of the appeal. As an interim measure I suggested that all the parties could have controlled access to the documents which were at that stage kept at our offices in Visagie Street, Pretoria. There was no objection to this arrangement by any of the parties. The boxes with documents were again removed from my office after the meeting. As stated previously, I deny perusing, using or copying of the documents at any stage. However, during the application for further particulars the Applicant then again requested that the seized documents be handed over. The Court concluded that he had no jurisdiction to make such an order. As far as I am aware, the Applicant did not take any further steps to enforce the original court order concerning the seized documents and as far as I was concerned the original arrangement of controlled access to the documents was still in place.*
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> *[38] The arrangement between the parties was confirmed on record on 9 October 2002 (see Record Vol. 1 pages 17-21 and paragraph 10.1 of the Consolidated Document containing the application for further particulars and reply thereto). The existence of such agreement was never disputed by the Applicant.*

> *[39] During 2003 letters were drafted to Messrs Felix Gay (curator of Hersh International Consultants (Pty) Ltd, Johan Blignaut (curator of Louis Agrella's insolvent estate) and TJH Potgieter (curator of the insolvent estate of Slabbert & Visser Inc). Copies of the letters attached hereto as "GJN 1", "GJN 2" and "GJN 3". Both Messrs Gay and Blignaut responded in writing (see "GJN 4" and "GJN 5" attached hereto) and both parties suggested that the documents be retained at our offices until finalisation of legal actions and proceedings.*
>
> *[40] I can state categorically that I did not peruse, use or copy any of the seized documents at any stage of the proceedings. The documents that were relied on and/or handed in during the trial formed part of the investigation file (docket) received by me from the original IDSEO investigators/prosecutors, namely Desiree Meyer and/or Grant Buchler. Since the DSO had been disbanded I am informed that the documents were stored in containers.*
>
> *[41] I am of the view that the issue of the handing back of the original seized documents is merely ancillary. The essential issue is that there was a standing arrangement, from as early as July 2001, that the Applicant could gain access to the seized documents. Applicant did not exercise his right to access the seized documents but appears to have been only concerned with the return thereof as per the original court order.*'

[15] The question of the return of documents is therefore ancillary and has no bearing on the merits of the trial before the magistrate. The applicant can have access to the documents for purposes of preparing his defence, if such access is required.

[16] I have already shown that there was no transgression of the order of Roux J because of the noting of the appeal.

[17] The third respondent stated under oath that these documents which were '*handed in by the various witnesses were in fact those that would have been in their possession due to the nature thereof e.g. copies of the actual contracts, agreements and payments made (deposit slips).*'

[18] It has not been shown that the documents that were handed in were obtained as a result of an illegal seizure and which formed the subject matter of the order of Roux J. Even if these documents were indeed only obtained as a result of the seizure (which it has not been shown) the order of Roux J was suspended when the application for leave to appeal was filed. An attack on the use of the documents is consequently premature, at least until the appeal against that order has been disposed of.

[19] The applicant further states:

> '*I have suffered irreparable harm in that all my files had been taken away by the prosecuting authority. I have no documentation left to use in my defence. I had and have to prepare my defence on the copies of documentation the prosecuting authority supplied to me in the copy of the docket that was supplied to me. The trial court is further assisting in allowing the prosecuting authority to ignore and contravene the order of the High Court.*'

This is refuted by the affidavit of the third respondent who sets out the arrangement regarding access to the documents as set out above.

[20] The applicant further complains in his affidavit that, according to him, the charge against him was compiled from the contents of the seized documents in contravention of the order of Roux J. If such was a contravention, which it was not, the State showed that it had a witness available, one Lynes, who '*was not only originally part of Hersch International, but also an agent in harvesting new clients for their schemes he therefore had knowledge of the identity of various clients. The applicant's suggestion that the identities of other clients (complainants) could only have been gleamed from the seized document does not hold water.*'

When this was pointed out to Mr Steenkamp, he did not persist in the argument.

[21] A further ground for review is the fact that the applicant summarises some of the evidence given by some of the witnesses at the trial. The applicant summarises the evidence and attacks the witnesses or, as in the case of one Swart, it is alleged that he said that 'he found nothing in his investigation that indicated fraud or theft'. That opinion is, of course, irrelevant as far as the court is concerned and the magistrate is obliged to consider all the evidence before him.

[22] Although it is trite that a High Court will review a lower court's decision if there is an irregularity which vitiates the lower court's decision (see *S v Khumalo* (110/12) [2012] ZAGPJHC 141 (22 August 2012)), this procedure is not to be followed where a magistrate makes a value judgment based on the evidence before him. Such a judgment is not an irregularity which entitles an

accused to review a decision not to discharge him. In such a case an accused may take a matter on appeal at the end of the case as a whole (*S v Lubaxa* 2001 (2) SACR 703 (SCA)). The magistrate was of the view that there was some evidence against the applicant which justified the refusal of the application for a discharge (see *Ebrahim v Minister of Justice* 2000 (2) SACR 173 (W) at 175A-C and G-H).

[23] The following passages in *Van der Merwe v National Director of Public Prosecutions and Others* 2011 (1) SACR 94 (SCA) at 101G-103C are also of relevance:

> *'[31] …*
> *In National Director of Public Prosecutions v King [2010 (2) SACR 146 (SCA) para 5] Harms DP said:*
>
> > *"Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation - a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges - and especially minimum sentences - have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'.[R v H; R v C [2004] UKHL 3 ([2004] 2 AC 134; [2004] 1 ALL ER 1269; [2004] 2 WLR 335; [2004] HRLR 20; [2004] 2 Cr App R 10; 16 BHRC 332) para 22 per Lord Bingham of Cornhill]. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution".*
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> And in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* [2008 (2) SACR 421 (CC) (2009 (1) SA 1; 2008 (12) BCLR 1197) para 65] Langa CJ said:
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> > *"I nevertheless do agree with the prosecution that this court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants."*
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> *In Key v Attorney-General, Cape Provincial Division, and Another [1996 (4) SA 187 (CC) para 13-14] Kriegler J emphasised that if evidence is tendered to which the*

accused objects, it is for the trial court to decide in light of all the circumstances of the case whether fairness requires the evidence to be lead or to be excluded.'

This happened in the matter under consideration and the trial court gave its judgment in this regard. Bertelsmann AJA continued in *Van Der Merwe*:

'[32] The same considerations must apply in this case. It was well established before the present constitutional era that a criminal trial is not to be conducted piecemeal, and that continues to apply today. An accused is not entitled to have the trial interrupted - or to have it not even begin - so as to have alleged irregularities reviewed by another court in the course of the trial. It is important to bear in mind that, while the Constitution guarantees to an accused a fair trial, that does not mean that the prosecution must satisfy the accused in advance that the trial will indeed be fair. It is the duty of the trial court to try a charge, and to ensure that the trial is fair, and, if it turns out that it was not, then any conviction that followed might be set aside. It might even turn out that the accused is acquitted, in which case the alleged irregularities will be irrelevant. Litigation of the kind that is before us falls squarely into the category of preliminary litigation that ought to be avoided and discouraged. As Davis J said in Sapat and Others v The Director: Directorate for Organised Crime and Public Safety and Others [1999 (2) SACR 435 (C) 433 C-F:

> *"For these reasons, I find that the essential purpose of applicants' notice of motion was directed to the constitutionality and hence admissibility of certain evidence which has been extracted by way of blood, semen and other samples. I consider that these questions should be determined by the trial court when appraised of the full factual context within which this evidence is sought to be admitted. In this way a correct balance between the right to due process and the imperative of crime control can be struck."'*

[24] This is a typical matter that must be completed before the magistrate and then, if the applicant is so disposed, to be taken on appeal if he is convicted.

[25] The applicant further complains (in his affidavit) that the magistrate allowed hearsay evidence. The rules regarding hearsay evidence have substantially changed since the introduction of the Law of Evidence Amendment Act no 45 of 1988 and a definitive answer regarding admissibility of such hearsay evidence, cannot be given in isolation. This is also so regarding the complaint that certain leading questions were asked. These matters should be argued at the end of the trial. The trial court, and later an appeal court, will be able to evaluate the complaints regarding these issues and the weight to be accorded to the evidence.

[26] After summing up the evidence of the witnesses and at p465 of the supplementary affidavit the applicant contended that his constitutional rights have not been respected. He refers to s 7, 8, 9, 10, 12, 21, 14, 34, 32, 33,

35(1), (2), (3), (5), 36 and 37 of the Constitution. Mr Steenkamp narrowed these allegations to an alleged unfair trial, based on the factors set out hereinbefore. The alleged contraventions of the Constitution are based on the selfsame arguments regarding the seizure of the documents or the criticism of the witnesses. It is said that the State did not respect, protect or promote the fulfilment of the Bill of Rights, especially, where the accused was involved. These words are parroted from the Constitution. The allegations are wide and can be considered by a court on appeal and I am of the view, that on the evidence before me, there is no merit in this submission. The issues highlighted by the applicant, are in my view, not of such a nature that there was a fundamental infringement of the rights pursuant to the provisions of the Bill of Rights.

[27] The penultimate issue that Mr Steenlamp asked us to take into account is the fact that the prosecutor did not oppose the application for a discharge before the magistrate. This submission is incorrect. The record clearly shows that the application was opposed, save for those charges on which the State did not lead evidence and on which charges the magistrate indeed granted the applicant a discharge. Other than that, the application was indeed opposed.

[28] Mr Steenkamp finally relied on the indications of the prosecutor that he did not intend opposing the review application. I am not convinced that the prosecutor's statement evinced a clear intention not to oppose the review proceedings. Even if he did, I am of the view that such indication to the magistrate does not bind the second respondent nor was such an indication an undertaking given to the applicant which can be said to form any basis upon which the respondents are estopped from opposing the review application. Mr Steenkamp could advance no basis why the respondents would be so estopped other than the fact that as officer of the court he is entitled to rely on what the prosecutor had said. He disavowed reliance on any suggestion that there was a binding agreement between the applicant and the State. I know of no other basis that would disentitle the State to oppose the review.

[29] The case before the magistrate is at such a stage that the applicant is now bound to present his version, if he so wishes. The evidence will be evaluated at the end of the matter. If the magistrate should commit any misdirection, the route to take is an appeal of the entire matter, not a piecemeal hearing at this stage.

'*A court will only in rare and exceptional circumstances intervene, on review, in uncompleted matters. Its power to do so is sparingly exercised particularly if regard is had to the fact that redress means of review or appeal will ordinarily be available to the accused in due course (Wahlhaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) at 119H-120E*)'- see *S v Ralo* [2012] JOL 29032 (ECG) at para 20. This is not such an exceptional case.

[30] The review is premature and has wasted quite a lot of time since 2006. The matter should proceed normally and the President of the Regional Court is requested to set the matter down in consultation with applicant or his legal representative, the Presiding Magistrate and the Prosecutor for such a period of time that the applicant's legal representative may indicate he requires to complete the case for the applicant, including argument, and also taking into account the views of the other parties. To this end the Registrar is requested to make a copy this judgment available to the President of the Regional Court and to draw his attention to this paragraph.

[31] In the circumstances, I propose that the review be dismissed with costs.

WEPENER J

JUDGE OF THE HIGH COURT
SOUTH GAUTENG

I agree, and it is so ordered.

SALDULKER J

JUDGE OF THE HIGH COURT
SOUTH GAUTENG

COUNSEL/ATTORNEY FOR THE APPLICANT:

APPLICANT'S ATTORNEYS:

COUNSEL FOR THE RESPONDENT:

RESPONDENT'S ATTORNEYS:

DATE/S OF HEARING: *30 August 2012*

DATE OF JUDGMENT: *4 September 2012*