IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/13746

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

12-March-2019 .....

Date **K. La M Manamela**

In the matter between:

NATHANIEL STEMELA Applicant

and

MAGISTRATE MOALUSI First Respondent

THE STATE Second Respondent

Date of Hearing : 07 March 2019
Date of Judgment : 12 March 2019

JUDGMENT

MANAMELA, AJ

Introduction

[1] The applicant is an accused in criminal proceedings in the Regional Court for the Regional Division of Johannesburg Central, Protea (the Criminal Court) presided over by the first respondent (the Magistrate). The Magistrate dismissed his special plea or point in *limine* at the beginning of the criminal proceedings in the Criminal Court. The applicant had sought disclosure of some information and documents from the second respondent. His charges in the Criminal Court relate to provisions of the Domestic Violence Act 116 of 1998. He now seeks, in terms of this application, the review and setting aside of the Magistrate's decision on his special plea or point in *limine*. The application is opposed by the second respondent and the Magistrate is abiding the decision of this Court.

[2] On the other hand, the State or second respondent seeks an order for the striking of the review from the roll, with costs. Primarily, the second respondent's ground of opposition is that the review is premature and ought to have awaited the completion or outcome of the proceedings before the Criminal Court.

[3] The matter came before us on 07 March 2019, whereat Mr N Riley appeared for the applicant and Mr JG Wassermann for the second respondent. Actually, the matter was enrolled for hearing on 28 February 2019 and was postponed to 07 March 2019 due to the unavailability of Mr Riley. In accordance with the practice of this Division, both parties have filed written heads of argument. This judgment was reserved after we listened to and considered oral and written submissions by counsel.

[4] Also, the record of the proceedings before the Criminal Court, filed together with other documents in the matter, as required by Uniform Rule 53, provided a background to the

submissions. Next, I will briefly reflect some of the issues in the background of this matter to the extent I consider warranted by the determination sought in this matter.

Brief background

[5] The applicant is married to Sibongile Stemela (Mrs Stemela). It appears from the facts in this matter that not everything between Mr Stemela (i.e. the applicant) and Mrs Stemela is cordial. For, in or about 04 November 2003, Mrs Stemela obtained an interim protection order against the applicant. The interim order was served on the applicant on 09 November 2003. It was followed, during February 2004, by a final order after a hearing in terms of the provisions of the Domestic Violence Act. According to the applicant, he was not served with a copy of the final order. He considers this to be contrary to the provisions of the Domestic Violence Act.

[6] The State or second respondent brought charges against the applicant alleging that he breached or contravened the terms of the final order by his conduct towards Mrs Stemela on or about 16 November 2015. The latter had apparently laid a complaint to that effect.

[7] Subsequent to the complaint, the applicant appeared in the Kliptown Magistrates' Court on 08 January 2016 to face the criminal charges, but the matter was struck off the roll, due to the fact that no original documents (in the form of the final order) were in the Court file. It appears that contemporaneous with the striking the Kliptown Court directed that the matter only be re-enrolled for hearing with permission of the Director of Public Prosecutions.

[8] On 15 February 2017, the proceedings before the Criminal Court, now sought to be reviewed and set aside by the applicant, commenced. The applicant entered a plea of not guilty to the charges and tendered no plea explanation. After his plea, the applicant raised the issue of the absence of the original return of service and final order by way of a special plea. It was submitted on his behalf that the proceedings before the Criminal Court cannot proceed before the original documents are furnished to the applicant.

[9] The Magistrate dismissed the special plea or objection at an adjourned hearing on 03 March 2017 and delivered, what I consider, a detailed ruling in this regard. The Magistrate ruled that there was no provision to the effect that an original return of service should be disclosed to an accused person. She added that the State may, despite the absence of an original, still prove that the order was brought to the attention of the accused (i.e. the applicant). This, obviously, meant that the prosecution of the applicant had to proceed in the Criminal Court. However, it appears, the applicant requested an adjournment of the proceedings before the Criminal Court to launch this review. I consider the respective parties' cases in the review, next.

Applicant's case

[10] The applicant's case is premised on the provisions of section 6 of the Domestic Violence Act, which read in the material point:

> "(1) ...
> (2) If the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter and-
> *(a)* consider any evidence previously received in terms of section 5 (1); and

(b) consider such further affidavits or oral evidence as it may direct, which shall form part of the record of the proceedings.

(3) …

(4) The court must, after a hearing as contemplated in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

(5) Upon the issuing of a protection order the clerk of the court must forthwith in the prescribed manner cause-

(a) the original of such order to be served on the respondent; and

(b) a certified copy of such order, and the original warrant of arrest contemplated in section 8 (1) *(a)*, to be served on the complainant.

(6) The clerk of the court must forthwith in the prescribed manner forward certified copies of any protection order and of the warrant of arrest contemplated in section 8 (1) *(a)* to the police station of the complainant's choice."

[I added underlining for emphasis]

[11] The applicant says that the State or second respondent ought to provide proof of service of the final order on him. It is added that even a certified copy would suffice in this regard. It is not very clear whether the applicant's case is that the final protection order was not served on him. This is so, despite the Court's enquiry to Mr Riley at the hearing. There was no unequivocal answer. But what is crystal clear is that the applicant wants to hold the second respondent to full compliance with the impugned provisions of the Domestic Violence Act, as he interprets or understands its relevant provisions.

[12] The record or papers reflect that the second respondent did produce a certified copy of the proof of service of the final order. But, the applicant rejected the copy, among others, on the ground that, the dates reflected on the certified copy preceded the issuing of the final order and, in fact, corresponds with the dates of the interim order. The proof of service was certified in January 2016 and the applicant also considers this "highly irregular". At the hearing of this matter Mr Riley made submissions to the effect that the document referred to as proof of service of the final order actually relates to the interim order or has no relevance to the final order. There were, also, submisions to the effect that although the applicant was present in court when the final order was granted, he was not aware of the terms of the final order. I asked in this regard why a transcript of the proceedings wasn't acquired to which Mr Riley responded by saying he did not have instructions in this regard.

[13] In the sum, it is submitted on behalf of the applicant that, the Magistrate's decision, dismissing the applicant's objection, is erroneous and constitutes gross irregularity in that through proper application of her mind she would have upheld the point in *limine,* alternatively, special plea and acquitted the applicant of the charges. The Magistrate's decision is also said to be infringing upon the applicant's Constitutional rights, including "the right of protection from prosecution". I am not certain that I am aware of the existence of such a right, but understand it to refer to the right to fair trial, as enshrined in section 35 of the Constitution of the Republic of South Africa, 1996.[1]

[1] Section 35(3) of the Constitution reads: "Every accused person has a right to a fair trial, which includes the right - (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried; (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

Second respondent's (or the State's) case

[14] The Second respondent raised, in this review, two points in *limine* or preliminary objections. The first objection is with regard to the condition of the papers filed by the applicant. According to the second respondent the papers are incomplete. In terms of the view I take on the matter, I do not consider it necessary to rule on this objection. Besides the second respondent did not seem completely impeded by its complaint in responding to the applicant's case. Also, I did not get the impression that Mr Wasserman, appearing for the second respondent, was in any way hampered in making his submissions in opposition to the relief sought by the applicant.

[15] The second objection goes to the root of the applicant's review application. It is submitted that the review is stillborn in the face of the uncompleted proceedings before the Criminal Court, unless grave injustice is established by the applicant, which is not available by other means.[2] And the review has to fall into one of the grounds under section 22 of the Superior Courts Act 10 of 2013.[3] Further, it is submitted that a party seeking the review ought to make out a case that he or she would suffer irreparable harm if the trial was to be allowed to proceed. Also, the ruling by the Magistrate is only interlocutory or interim, and,

---

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court."

[2] See *Levack and Others v The Regional Magistrate, Wynberg & Another* 1992 (2) SACR (C).

[3] Section 22 of the Superior Courts Act reads: "(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are— (*a*) absence of jurisdiction on the part of the court; (*b*) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer; (*c*) gross irregularity in the proceedings; and (*d*) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence. (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

therefore, subject to reconsideration during the trial or later and the review may be rendered futile should the applicant be acquitted. The State may still adduce evidence, including *viva voce* evidence regarding existence or service of the final order. It is also submitted that the applicant is actually in a stronger position with regard to the proceedings before the Criminal Court. He has already pleaded to the charges and, therefore, the State cannot simply withdraw the charges, but has to proceed with the trial, including closing its case without the necessary evidence, which would entitle the applicant to apply for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977.[4] Ultimately it is submitted that the Domestic Violence Act does not provide for the relief sought by the applicant. I will deal with submissions by both parties jointly with consideration of the applicable legal principles.

Applicable legal principles and the submissions (a discussion)

[16] The legal principles for determination of this matter are centrally located in the Appellate Division (as the Supreme Court of Appeal was previously known) of *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another*.[5] In *Wahlhaus v Additional Magistrate, Johannesburg*, the appellants sought to challenge a dismissal of an objection and exception by the magistrate and the Appellate Division held that if "the magistrate erred in dismissing their exception and objection to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision" and the "normal remedy against a wrong decision of that kind is to appeal after conviction", rather than "to bring the magistrate's

[4] Section 174 of the Criminal Procedure Act reads: "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."
[5] *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A).

decision under appeal at the present, unconcluded, stage of the criminal proceedings against them in the magistrate's court".[6]

[17] The *ratio* in *Wahlhaus v Additional Magistrate, Johannesburg* was followed in the full bench appeal judgment of the Eastern Cape Division in *S v Mathemba*[7] wherein the following remarks were made:

> "It has been recognised by the Courts that they are able to intervene in the proceedings of lower courts prior to the stage contemplated by s 304A in appropriate circumstances. The test is, essentially, whether grave injustice might ensue if a Court does not intervene. It is, in such cases, always stressed that intervention in part-heard proceedings is reserved for exceptional cases."[8]

[18] The *dicta* in *S v Mathemba* was applied in a full bench decision of the provincial division of Gauteng in *S v Masiya and Others*.[9] And recently in another full bench decision of the same Court, also cited by counsel for the second respondent, in *Motata v Nair NO and Another*,[10] the legal principle was confirmed as follows:

> "It is trite that, as a general rule, a High Court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a lower court. As stated in *Wahlhaus and*

---

[6] See *Wahlhaus v Additional Magistrate, Johannesburg* at 119D *et seq.*
[7] *S v Mathemba* 2002 (1) SACR 407 (E).
[8] *S v Mathemba* at 408(E).
[9] *S v Masiya and Others* 2013 (2) SACR 363 (GNP) at par 5.
[10] *Motata v Nair NO and Another* 2009 (2) SA 575 (T).

Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point decided against the accused by a magistrate is fundamental to the accused's guilt."[11]

[19] The common theme coming out of the abovementioned decisions and also recognised by the Supreme Court of Appeal, a few years ago, in *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others*[12] is that the Courts sitting at appellate level or with review jurisdiction ought not to entertain "piecemeal hearings and appeals".[13]

[20] However, the door is not completely shut for an applicant in this regard. For, as stated in *S v Mathemba* referred to above, the test is whether grave injustice might ensue if a Court does not intervene.[14] Further the intervention is warranted only in exceptional cases.[15]

Conclusion

[21] I have considered the submissions made by the parties against the abovementioned legal principles. It is my view that, no grave injustice or harm would befall the applicant should the proceedings before the Criminal Court proceed without the disclosure of the

[11] *Motata v Nair* at par 9.
[12] *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA).
[13] *South African Broadcasting Corporation v Democratic Alliance* at par 66.
[14] See par 17 above. See further *S v Mathemba* at 408(E).
[15] *S v Mathemba* at 408(E).

impugned documents. Also, there would not be any infringement of the applicant's rights, let alone his Constitutional rights. For the applicant is entitled to persist with its assertions that the provisions of the Domestic Violence Act were not complied with as part of its not guilty plea. This, the applicant may obviously do, without the documents being produced and would not, in my view, in any way prejudice the applicant's right to fair trial. Justice is not served by unreasonable demands and the-end-justifies-the means type of approach. Society expects that litigants use the rights available in terms of law in a reasonable and justifiable way: always. This application would thus fail.

[22] At the hearing of this matter, I asked Mr Wasserman whether his client was persisting with a prayer for costs to be awarded against the applicant in the event we were to dismiss the application. I asked the question as the matter was almost of a criminal law nature, but I wasn't suggesting that this Court was reluctant to make such an order. He mentioned that his client does not ask for a costs order against the applicant.

[23] This may well be so, but in the circumstances of this matter, I am convinced that a costs order would have been appropriate. In fact, I consider a punitive costs order to have been an appropriate. The applicant clearly unreasonably employed the rules of this Court and the law against very glaring lack of prospects of success. But, I will propose that no order as to costs be made, in view of the second respondent's adopted attitude.

Order

[24] Therefore, I propose the following order:

a) the application is dismissed, and

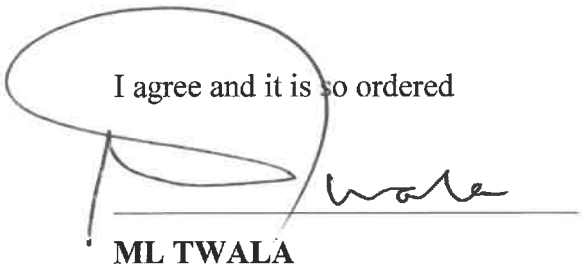
b) there will be no order as to costs.

K. La M. Manamela

Acting Judge of the High Court

12 MARCH 2019

I agree and it is so ordered



ML TWALA

Judge of the High Court

Appearances:

For the Applicant	:	N Riley
Instructed by	:	Steve Merchak Attorney Sandton, Johannesburg
For the First Respondent	:	Not participating in this review application
For the Second Respondent	:	JG Wassermann
Instructed by	:	Director of Public Prosecutions, Johannesburg