IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE 27/9/13 SIGNATURE

CASE NO: A326/2013

DATE: 7/2/2014

IN THE MATTER BETWEEN

ITUMELENG DAVID MASAKO	APPLICANT
AND	
MAGISTRATE BEN VAN SCHALKWYK	1ST RESPONDENT
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	2ND RESPONDENT
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3RD RESPONDENT

JUDGMENT

PRINSLOO, J

[1] In this review application, which came before us in terms of the provisions of rule 53 of the Uniform Rules of Court, the applicant, a practising advocate,

appeared on his own behalf and Ms Marriott appeared for the second respondent. The other two respondents did not feature before us as opposing parties and appeared to abide the decision.

Introduction and background

[2] In very broad terms, it can be said that during 2005 the applicant was a prosecutor in Pretoria magistrate's court J where cases involving alleged reckless and negligent driving, drunken driving and related charges were heard.

Complaints by two of the accused who had to appear in this court about the alleged unlawful conduct of the applicant, came to the attention of the then senior public prosecutor and other authorities with the result that, during 2006, the applicant was charged with two counts of corruption, two counts of fraud and two counts of theft based on the allegations made by the two complainants. There were also alternative charges.

[3] For purposes of this review application, it is not necessary to analyse the evidence led during this lengthy trial that followed upon the charges having been laid against the applicant as the accused. The actual charges were also not included in the record which was lodged by the applicant. I do, however, consider it appropriate to sketch, in very broad and general terms, a concise summary of the evidence led during the trial which came before the first respondent in the Pretoria North regional court.

[4] At the outset, I make a few remarks about the procedural history of the case. This is summarised in what I consider to be an opposing affidavit filed by the first respondent regional court magistrate in September 2012 after the rule 53 review application was lodged by the applicant in August 2012.

According to the allegations made in this affidavit of the first respondent, the case was transferred from the Pretoria magistrate's court to the Pretoria North regional court 2 on 12 May 2006. On that date the magistrate postponed the matter to 12 August 2006 to obtain proper instructions from the Director of Public Prosecutions. Then followed a number of postponements. These were, as far as I can gather, mainly initiated by the applicant. There were times when the case had to be postponed because the attorney whom the applicant said he had instructed and paid was absent. On another occasion there was no interpreter and on occasion the applicant was also absent. I do not consider it necessary to mention all the details of all the postponements. At one point the applicant also asked for certain documents to be disclosed and, in the end, the trial only commenced before the first respondent on 13 July 2009.

In his comprehensive judgment, the first respondent also remarks that the case was transferred to Pretoria North because the applicant was well-known in the Pretoria magistrate's court. It appears that this may have been done on the instructions of the Director of Public Prosecutions. At one stage the applicant

suggested that he was not going to have a fair trial because the first respondent and the prosecutor were both white. The first respondent then postponed the case for two months to afford the applicant an opportunity to prepare an application for the recusal of the first respondent but on the next trial date the applicant indicated that he was not proceeding with such an application and that he was satisfied to proceed with the trial before the first respondent.

[5] It also appears from the opposing affidavit, *supra*, and the judgment, that the applicant pleaded not guilty at the commencement of the trial but did not disclose the basis of his defence. He appeared to comfortably conduct his trial without experiencing the difficulties which one may sometimes expect to come the way of a lay litigant. According to the remarks made by the first respondent in his judgment, and according to the record, the applicant boasted on occasion that he has a Masters degree in law and also a Masters degree in music and was busy with a second Masters degree and that he was quite capable of training prosecutors and magistrates because of his superior knowledge of the law.

According to the opposing affidavit, the applicant also, in June 2009, and about a month before the trial commenced, objected to the jurisdiction of the Pretoria North regional court. This objection was overruled. Details of the objection and the reasons for overruling it, do not appear from either the opposing affidavit or the judgment. Before us, neither counsel raised any argument relating to the jurisdiction of the Pretoria North regional court. The issue is not mentioned at all

in either the notice of motion or the founding affidavit of the rule 53 review application. The applicant's lengthy heads of argument, running into some 75 pages, contain no reference to the question of jurisdiction.

[6] I turn, very briefly, to a short overview of the evidence. The first complainant, also the first state witness, was Mr Mpho Malangeni who appeared in the traffic court J on a charge of reckless driving on 5 May 2005. He was also represented by a Legal Aid attorney, Ms Moodly. At one point the applicant, then the prosecutor, was asked what the fine would be upon conviction and he said R1 500,00. The case was postponed so that Malangeni could get the money because he wanted to pay the fine. On 12 September 2005 Malangeni told his lawyer that he wanted to pay the fine. She left, Malangeni met the applicant in the latter's office, counted out the money and gave it to him. He asked for a receipt and the applicant gave him a document which was exhibit "C". Later he showed this document to his cousin, Andrew Lebisi, who said that it was not really a receipt and Lebisi went to court in order to confront the applicant. He also determined that according to the clerk of the court only R800,00 had been paid towards the fine. In cross-examination, Malangeni stuck to his guns. It was put to him by the applicant that the money was handed over to a paralegal, assisting in court J, one Thabo Mabetoa but it was only R800,00 and Thabo went to pay the money in at the clerk of the court. This Malangeni denied.

Lebisi also testified and corroborated the evidence of Malangeni in some material aspects. When he confronted the applicant, the latter first said that he would give him a receipt or "slip" and later said that he was feeling sick and would be postponing all his cases on a particular day. Later, when he was again asked for the "slip" he asked Lebisi whether the latter thought that he was corrupt and if so, Lebisi could go to complain to the "highest authority". Lebisi confirmed that the records indicated that only R800,00 had been paid.

The second complainant and third state witness was Happy Fanka Baloyi. He also had to appear in J court and the summons mentioned that he could pay an admission of guilt fine of R1 500,00. He got to court on 9 December 2005. He spoke to the applicant and told him that he could only pay R500,00 and asked for a reduction, which the applicant refused. Later the applicant approached him, asked where the R500,00 was and Baloyi handed the money over to the applicant. The applicant asked when he would bring the balance of R1 000,00 and no fixed date was determined. The case was postponed to 23 December 2005. Baloyi reported this to his employer who told him to get a receipt for the R500,00. He went back to the applicant and asked for the receipt. The applicant stored his own telephone number on the cell phone of Baloyi. The number was also mentioned by the first respondent in his judgment. When Baloyi went back to court on 23 December 2005 the applicant was absent. There was another prosecutor. The magistrate also raised the question of an admission of guilt. He said that he had already paid R500,00 and thought that he would meet the applicant to arrange for

payment of the balance. This may have started the investigation which ultimately led to the applicant being charged. The case against Baloyi was withdrawn in January 2006. Baloyi stuck to his guns in cross-examination and insisted that the applicant had taken his R500,00.

[7] Pieter Willem Coetzer was a fellow prosecutor in court J at the relevant time. I do not intend summarising his evidence. The fact is that the perceived irregularities were discussed with him by the then senior prosecutor, Mr Lagaraba. Lagaraba also testified. He said that when he fixed an admission of guilt amount the prosecutor cannot alter or change the amount. He confirmed that Coetzer came to him in December 2005 with Baloyi who reported that he had paid the applicant R500,00. He also related the issue of the applicant having fed his telephone number into Baloyi's cell phone. Nobody approached him to reduce the admission of guilt amount that he had fixed. He also said that it would not be permissible for the applicant to give the money to the paralegal to go and pay in at the clerk of the court. Both Coetzer and Lagaraba said that they saw the applicant's cell phone number on Baloyi's phone. That is when further steps were taken. This evidence corroborated that of Baloyi.

The applicant's version that he gave Malangeni's money (only R800,00) to the paralegal Thabo to go and pay in was repudiated by Thabo who also testified. He said he never received the money from Malangeni and only went along with Malangeni who himself paid the amount to the clerk of the court.

[8] The charges levelled against the applicant were based on the complaints by Malangeni and Baloyi. The first three counts related to the complaint by Malangeni and counts 4 to 6 related to Baloyi's complaint. Count 1 was one of fraud, count 2 corruption and count 3 theft. Then count 4 was fraud again, 5 corruption and 6 theft.

[9] What is of importance for purposes of this review application is that the applicant, as accused, at the end of the state case, applied for his acquittal in terms of the provisions of section 174 of the Criminal Procedure Act, Act 51 of 1977. As part of the application, the applicant delivered a lengthy address to the court. The prosecutor delivered an address in opposition to the application and the applicant replied. Relevant authorities were quoted to the first respondent by both sides. The first respondent, when giving his judgment in deciding the application, held that there was not enough evidence in respect of counts 2 and 5, the two corruption charges, in respect of which he could convict and he acquitted the applicant on those two charges but refused the application for acquittal in respect of the other four charges.

In my view, it is quite clear from the first respondent's judgment, that he applied his mind properly to the application. He indicated that he came to his conclusion after reading the evidence, presumably the available transcript of the evidence of

the state case. He also referred to the case of *S v Mpetha and Others* 1983 4 SA 262 (CPD) at 265D-G where the following is said:

> "However, it must be remembered that it is only a very limited role that can be played by credibility at this stage of the proceedings. If a witness gives evidence which is relevant to the charges being considered by the court then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled 'while rejecting one portion of the sworn testimony of a witness to accept another portion'. See *R v Kumalo* 1916 AD 480 at 484. Any lesser test than the very high one which, in my judgment, is demanded would run counter to both principle and the requirements of section 174."

[10] What is plain in my view is that the learned regional magistrate (the first respondent) properly applied his mind before exercising his discretion when deciding the section 174 application. He read the evidence again, he duly considered the addresses from both sides and the authorities quoted, he quoted more authority when giving his judgment and he clearly weighed up the different charges against the requirements of the section 174 test. This led to his finding,

which I have mentioned, namely an acquittal in respect of counts 2 and 5 and a refusal of the application in respect of the other four charges.

[11] This judgment was already granted on 24 May 2010. The trial then continued and the applicant offered the defence evidence, which I have already briefly summarised.

[12] On 1 March 2011 the first respondent started giving his judgment. It was a lengthy and, in my view, well reasoned judgment. However, I specifically refrain from expressing a view on the correctness thereof. To do so, would be unnecessary, and perhaps improper.

[13] While the first respondent was in the process of handing down his judgment, he was interrupted by the applicant to indicate that he was not feeling well and that there were also other family problems relating to the welfare of his son. The handing down of the judgment was then interrupted until 21 April 2011 when the judgment was concluded and the applicant convicted on counts 3 and 6, the two theft charges. This has to do with the monies which Malangeni and Baloyi alleged were unlawfully taken from them by the applicant. The applicant was acquitted on the fraud charges, counts 1 and 4.

[14] As I understand the record, the sentencing of the applicant only took place more than a year later, on 21 August 2012. On a reading of the record, it seems to me

that the first respondent properly applied his mind to all the relevant circumstances. The applicant, as accused, was sentenced to eighteen months imprisonment on each count. The sentence was wholly suspended for five years on condition that the applicant was not convicted of an offence involving dishonesty committed during the period of suspension. Again, I refrain from expressing a view as to the correctness or appropriateness of the sentence imposed. The first respondent also, in terms of section 103 of Act 60 of 2000, declared the applicant fit to possess a firearm.

[15] There was no application for leave to appeal.

[16] On 31 August 2012 the applicant, in terms of rule 53, launched an application for the reviewing and setting aside of "the proceedings before the first respondent ... in which the first respondent convicted the applicant of two counts of theft and sentenced him to eighteen months imprisonment suspended for five years".

[17] On 13 September 2012 the second respondent filed a notice of intention to oppose and the first respondent's "opposing affidavit" to which I have referred was dated 7 September 2012 and evidently filed with the clerk of the court on 25 October 2012.

The relief sought by the applicant

[18] On 15 January 2013 the applicant filed an "amended notice of motion in terms of rule 53".

[19] It is convenient to quote the prayers in this notice of motion:

"(a) That the proceedings before the first respondent under Pretoria North case no SH2/138/2006 in which the first respondent has convicted the applicant of two (2) counts of theft and sentenced him to 18 (eighteen) months imprisonment suspended for 5 (five) years, be reviewed and set aside;

(b) That the review application is brought in terms of the common law read with section 33 of the Constitution of the Republic of South Africa 1996 ('the Constitution') on the grounds that it constitutes administrative action, and on the basis that it constitutes the exercise of public power which is in breach of the requirements of the rule of law;

(c) That the conviction and sentence of the applicant in those proceedings be reviewed and set aside on the basis that the magistrate failed to apply his mind to the relevant issues in accordance with the 'behest of the statute (section 174 of the Criminal Procedure Act 51 of 1977) and the tenets of natural justice';

(d) That it be declared that the decision of the first respondent to convict and sentence the applicant to be inconsistent with the Constitution and, therefore, unlawful, irrational and invalid;

(e) That the costs occasioned by any opposition to this application for review be paid by the respondent who opposes it;"

There is also a prayer for alternative relief.

[20] The founding affidavit is a relatively concise affair. It runs into some 7½ pages. The first four pages are devoted to background details. It also appears from these details that the applicant made representations to the Director of Public Prosecutions and to the national prosecuting authority (presumably to avoid the prosecution) but in December 2007 the Director of Public Prosecutions decided to continue with the prosecution and in December 2008 it was decided that the applicant should stand trial.

[21] The main thrust of the applicant's case appears from paragraphs 12 to 14 of the founding affidavit. There is an allegation that the presiding officer, when trying an unrepresented accused, should ensure that the accused fully understands his rights concerning cross-examination and the adducing and challenging of evidence as well as the rules of procedure and evidence. In his opposing affidavit, the first respondent points out that the applicant cross-examined all the witnesses over a lengthy time. It did not appear that he was lacking the skills and ability to

conduct his case. He himself put it to some of the witnesses that he was the best prosecutor in South Africa. He has a Masters degree in law as well as in music and is also busy with his second Masters degree in law. At one stage he mentioned that he is so learned that he can train judges and magistrates. He also represented accused persons in the regional and magistrate courts. All this appears from the record. As I have already mentioned, the first respondent also alluded to this in his judgment. This argument was not developed in any way in the applicant's lengthy heads of argument presented to us for the hearing neither did he place any emphasis thereon during the hearing. Ms Marriott also argued that she could find no basis for this complaint when studying the record. I find myself in respectful agreement with this submission.

[22] In paragraphs 12.1 and 12.2 of the founding affidavit the applicant states:

> "12.1 The trier-of-fact should avoid giving away (*sic*) to irritation or demonstrating a hostile attitude towards a recalcitrant accused who refuses to accept legal representation at state expense.
>
> 12.2 The magistrate in this case failed to conduct himself in an open-minded, impartial and fair manner. This is demonstrated by the way he treated me as an accused person, his judicial questioning on state witnesses and his impatience towards me as an accused person and his direct and indirect judicial intervention entry into the arena. All this occurred prior to the section 174 of the Criminal

Procedure Act 51 of 1977 and after the unfair ruling of this provision (section 174)."

No details of such alleged hostile conduct are mentioned, either in the founding affidavit or in the heads of argument neither were details in support of this argument relied upon during the hearing before us. On a general reading of the record, I was left with the impression that the first respondent showed remarkable restraint throughout in the face of conduct on the part of the applicant which may well have amounted to contempt of court. An example can be found at pp343 to 344 of the record where the first respondent tries to persuade the applicant to continue with his argument in reply before judgment was handed down in the section 174 application. I quote an extract from these pages:

"COURT: Continue. You should continue.

ACCUSED: You never said that to her. Why does she get the preferential treatment?

COURT: Sir she had a brief ... (intervenes)

ACCUSED: You know what you will appear one day I will be having my magistrate, I will deal with you accordingly. Do not think what comes around what goes around comes around. It will dawn. Sooner or later. Magistrate has taken sides with you and you are talking nonsense.

COURT: I do not take sides with anybody sir. Continue with your argument?

ACCUSED: Are you still asking that I am starting with my argument or what?

COURT: No I said continue.

ACCUSED: But it is a reply.

COURT: Yes continue with the reply the reply argument ..."

[23] Paragraph 13 of the founding affidavit reads as follows:

"13. After the close of prosecution's case, I applied for an acquittal on all counts, in terms of section 174 of the Criminal Code. The first respondent acquitted me on count 2 and 5 (main counts and their alternatives of corruption) and not on fraud and theft charges (3 and 6). This resulted in a contradicted and confusing order or verdict. The confusion is brought about the fact that 'no evidence' was given a vague or ambiguous meaning. To crown it all, the honourable magistrate promised to give reasons later, and this was not done."

[24] I have already dealt with the way in which the section 174 application was handled by the first respondent and will not embark upon unnecessary repetition. I also see no indication in his judgment on the section 174 application that the first respondent undertook "to give reasons later".

[25] Part of paragraph 14 of the founding affidavit reads as follows:

> "During judgment the court on its own amended the charge-sheet, and made a finding that the amount stolen by me is R700,00 and not R1 500,00."

This deals with the fact that the evidence indicated that although Malangeni gave the applicant R1 500,00, the records demonstrated that R800,00 was paid in with the clerk of the court, leaving the amount found to be stolen to be R700,00. It is common cause that the first respondent amended the figure downwards accordingly and he confirms it during the course of his judgment. In his opposing affidavit he also says when dealing with this issue:

> "... I therefore amended the amount which a court is entitled to do. See section 86(1) of the Criminal Procedure Act. The amount is reduced. There could be no prejudice."

In my view, this action taken by the first respondent is in line with the requirements of section 86(1). This argument was not developed with any force before us during the hearing.

Conclusionary remarks

[26] The main thrust of this review application is aimed at the first respondent's decision taken at the end of the section 174 proceedings. This much was confirmed by the applicant during the hearing and also evidenced by the wording of prayer (c), *supra*, of the notice of motion, asking for the conviction and

sentence to be reviewed and set aside "on the basis that the magistrate failed to apply his mind to the relevant issues in accordance with the 'behest of the statute (section 174 of the Criminal Procedure Act 51 of 1977) and the tenets of natural justice'".

[27] The section 174 decision was challenged more than three years after it was made. It is difficult to understand what is to become of the rest of the trial which ran its full course even if the section 174 decision were to be reviewed and set aside as requested.

[28] It is worth mentioning, in passing, that the refusal of discharge in terms of section 174 is an interlocutory order and not appealable – see the discussion in Hiemstra's *Criminal Procedure* (loose leaf edition) at 22-78(1) to 22-79. The learned author also points out that there is no possibility of review of refusal of an application for discharge unless irregularities in the trial are alleged – *Ebrahim v Minister of Justice* 2000(2) SACR 173 (W) at 175f-h.

I have already dealt with the "irregularities" as alleged in the founding affidavit. Of course, in the present case, no review application was launched at the time when the section 174 decision was taken.

[29] In support of his argument attacking the first respondent's section 174 decision, the applicant relied heavily on the judgment in *S v Lubaxa* 2001 4 SA 1251 (SCA).

In this case, a gang of seven men was charged with the murder and subsequent robbery of a young couple in their home in Port Nolloth. The trial ran its full course and it seems that one of the accused was acquitted on all charges whereas others were convicted on the two counts of murder and robbery and some also on lesser charges such as theft. Sentences ranged from life imprisonment to shorter periods of imprisonment. The appellant in that case was one of those convicted of the murder and robbery charges and sentenced to two terms of life imprisonment amongst other sentences. The trial court granted the appellant leave to appeal to the Supreme Court of Appeal against the convictions and sentences.

In that case, all the accused applied to be discharged in terms of section 174 but the applications were refused. "0ne of the grounds of appeal, and indeed the principal reason why leave to appeal was granted, is that the trial court is said to have misdirected itself by refusing to discharge the appellant at that stage of the trial." – See the judgment at 1254H-I.

At 1254J-1255B the learned Judge of Appeal says the following:

> "The refusal to discharge an accused at the close of the prosecution's case entails the exercise of a discretion and cannot be the subject of an appeal

(Hiemstra *Suid-Afrikaanse Strafproses* 5th ed by Kriegler at 825). The question that is raised in this appeal against the conviction, however, is whether section 35(3) of the Constitution, which guarantees to every accused person the right to a fair trial, has removed that discretion. If it has, and the trial court was bound as a matter of law to discharge the appellant in the interest of a fair trial, then the failure to do so would amount to an irregularity which may vitiate the conviction."

At 1256I-1257A, the learned Judge of Appeal says the following:

"I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution of there is no possibility of a conviction other than if he enters the witness-box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is, in my view, a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence."

In that case, such a state of affairs was found to have existed and the appeal succeeded to the extent that the convictions and sentences with regard to the main counts were set aside.

The present case is clearly distinguishable from what happened in *Luxaba*. Quite apart from the fact that there was no review application at the conclusion of the

section 174 proceedings in that case, it clearly appears from my brief summary of the evidence, and from remarks made by the learned magistrate (first respondent) in his lengthy judgment, that this is not a case where there was "no possibility of a conviction other than if he enters the witness-box and incriminates himself". It appears clearly from my summary of the evidence and from the remarks made by the first respondent during the course of his judgment, that the state presented strong evidence against the applicant in the form of the complaints of Malangeni and Baloyi and supporting and corroborating evidence by the other witnesses referred to. The circumstances under which the Supreme Court of Appeal found a breach of the rights that are guaranteed by the Constitution to have been present in Lubaxa, do not exist in the present case. Reliance by the applicant on Lubaxa is therefore, in my view, misplaced.

[30] Finally, it is useful to add that a review of this nature, in as much as it may qualify to be entertained by a court, is not governed by the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The first respondent is not an organ of state (see the definition in section 239 of the Constitution, 1996) and his decision did not amount to "administrative action" as defined in section 1 of PAJA. See, generally, Harms, *Civil Procedure in the Superior Courts* at B-372 to B-373.

Conclusion

[31] In view of the aforegoing, I have come to the conclusion that the application must fail.

Costs

[32] Ms Marriott indicated that she was not asking for a costs order against the applicant in the event of the application being unsuccessful. In the circumstances I will not grant such a cost order.

The Order

[33] I make the following order:

The application is dismissed.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

N MASANGO
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

A326-2013

HEARD ON: 20 September 2012
FOR THE APPLICANT: In Person
FOR THE RESPONDENT: Ms N P Marriott
INSTRUCTED BY: