IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A538/2013

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

12/8/14
DATE SIGNATURE

14/8/2014

In the matter between:

SONDAGA SAMUEL MALATJI	**First Applicant**
MAHOI SARAH MALATJI	**Second Applicant**
MASEBE LEKHURA CTRADING AND PROJECTS CC	**Third Applicant**

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**First Respondent**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Second Respondent**
THE PROSECUTER IN CASE NUMBER: 111/117/2011; SPECIALISED COMMERCIAL CRIME COURT FOR THE REGION OF GAUTENG	**Third Respondent**
THE PRESIDING MAGISTRATE CASE NUMBER: 111/117/2011 HELD AT THE REGIONAL COURT THE HON. MR. D JACOBS	**Fourth Respondent**

Heard: **9 MAY 2014**
Delivered: **14 AUGUST 2014**

JUDGMENT

A.A.LOUW J

Introduction

[1] The three applicants stand trial in the Regional Court, specialised commercial crime court, Pretoria. There are two charges of fraud with an alternative theft charge to the second charge.

[2] They pleaded not guilty. They were and are represented by an attorney Mr. Steenkamp.

[3] After nine witnesses have given evidence and other affidavit evidence have been handed in (+- 800 pages of record) the state closed its case.

[4] The applicants made a s174 application. Both Steenkamp and Mr. Janse van Rensburg for the State argued on the basis of detailed heads of argument contained in the record.

[5] The court granted the s174 application partially. The second and third applicants were found not guilty on charge 1 and the application was refused in respect of the first applicant on charge 1 and all three applicants on charge 2.

[6] It is against this decision that there is now a review application before us.

[7] Apart from the exceptional nature of such an application, the relief sought is also difficult to understand. The prayers read:

> *"1. Review the judgment of the Regional Court under case number: 111/117/2011 for the Region of North Gauteng as conducted at the Specialised commercial crime Court, the Regional Court of Pretoria in refusing, alternatively not upholding the applicants formal application in refusing the applicant's application in dismissing the charges as stated hereinafter against the applicants.*
>
> *2. Set same aside and uphold the applicants' objection to the refusal in allowing irrelevant and unprocedurally presented evidence in the trial matter against the applicants."*

[8] From the language used, the poor wording of prayers 1 and 2, it is difficult to comprehend what is sought.

[9] If the import of prayer 1 is that the total s174 order have to be set aside, then of course it operates against the second and third applicants who have been partially discharged.

[10] Then in terms of prayer 2 the above has to be set aside and we are called to "uphold the applicants' objection to the refusal in allowing irrelevant and unprocedurally presented evidence in the trial matter against the applicants."

[11] It is trite law that the refusal of a discharge is an interlocutory order and not appealable.

[12] Unless irregularities in the trial are alleged there is no possibility of review of the refusal of an application for discharge.[1]

[13] Case law makes it clear that it is only in the case of gross irregularity and in the most exceptional circumstances that such relief will be granted. Only an irregularity which in fact led to a failure of justice, in contradistinction to potential prejudice, justifies the setting aside of proceedings.[2]

[14] The High Court should be reluctant to interfere at an early stage before the trial concluded in the trial court.[3] In *Ismail* it was held as follows:

> *"Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and*

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[1] See Hiemstra *Criminal Procedure* (issue 6) p22 -78 (1)
[2] *See State v Gaba* 1985(4) SA 734 (A) at 750 G-H
[3] *Ismail and Other v Additional Magistrate, Wynberg and Another* 1963(1) SA 1 (A) and *Sita v Olivier NO* 1967(2) SA 442 (A)

> *should be maintained. A Superior Court should be slow to intervene in unterminated proceedings in a court below, and should, generally speaking confine the exercise of its powers to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained' (Wahlhaus's case, supra at p. 120).*[4]

[15] If there exists an irregularity the question should always be answered if the irregularity would have the effect that the trial be rendered unfair especially in the light that the applicants formed the perception that there was an infringement of their right to a fair trial.[5]

[16] As a general rule no appeal against any order made during a criminal trial may be brought before the accused has been convicted and sentenced. The inherent jurisdiction of the High Court to review proceedings should be exercised sparingly.[6]

[17] The judicial pronouncement sought to be appealed against must be final in effect. It must thus not be susceptible of alteration by the court appealed.[7]

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[4] At 5H – 6A
[5] *S v Wise* 1975(1) SA 597 (RA) at 599 E – F
[6] *Wahlhaus & others v Additional Magistrate and another* 1959(3) SA 113 (A) at 120 A – B
[7] *R v Adams & others* 1959(3) SA 753(A) ; *S v Western Areas Ltd & others* 2005 (1) SACR 441 (SCA) at paras 20 and 28

[18] The applicants' main complaint seems to be that cross-examination of the state witness Dr Pilusa was allowed. In an opposing affidavit filed herein the prosecutor denies that he cross-examined any state witness including Pilusa. It is undesirable that counsel should find himself in a position where he has to make such a statement under oath. It is a judgment left best for the court to make. As set out hereunder I am of the view that there was cross-examination. If the prosecutor had followed the prescripts of s190 of the Criminal Procedure Act namely to first have the witness declared hostile before posing the relevant questions, there would have been no problem. The learned writers of *Suid-Afrikaanse Strafproses* state:

> *"'n Party mag nie die geloofwaardigheid van 'n eie getuie aanveg nie tensy die hof hom vyandiggesind verklaar het."*[8]

[19] As appears from p700 – 714 of the record there were two aspects on which the third respondent posed questions to Pilusa with the sole aim of attacking his credibility. These pages comprise the third respondent's total "re-examination", but it was not re-examination at all.

[20] The first aspect is that Pilusa was asked to identify a statement he had made to the police and then put critical questions to him to apparently show contradictions between that statement and his evidence in court. The statement was then handed in as exhibit "V". A prosecutor would only do that if he wanted to highlight contradictions. The questions were not wide-ranging and it is impossible to determine what effect this will have on the body of

[8] Kruger *Hiemstra Suid-Afrikaanse Strafproses* (7th edition) p518

evidence as a whole. Apart from the transcription there is also documentary evidence running up to exhibit "AA" which are not before us.

[21] The second aspect relates to telephone calls that Pilusa made to the first applicant in the period January – June 2012. After the third respondent had first elicited an answer from Pilusa that he had not contacted the first applicant many times but only twice or thrice, it was put to him that his cell phone records had been checked and that there were at least 70 telephonic contacts between Pilusa and the first applicant. After Pilusa was rather evasive, on questioning by the court he stated that he does not dispute the calls.[9]

[22] Not content with this answer the third respondent went so far as to obtain two postponements to prove the telephone conversations between Pilusa and the first applicant. The record shows that in terms of a s205 summons cell phone records comprising 1133 pages were obtained. A postponement was then sought to 22 November 2012 for Ms Fourie of Vodacom to testify about these records. At the end of the day it appeared that although she could testify about thousands of numbers she did not know who made the calls and who received the calls. This was purely as a result of a mistake by the third respondent for not having requested disclosure of the ownership of certain cell phone numbers in terms of the s205 summons. The court then reluctantly granted a further postponement to 20 February 2013

[9] See record p 713 lines 15 - 25

when this aspect was proved by affidavits from different cell phone service providers.

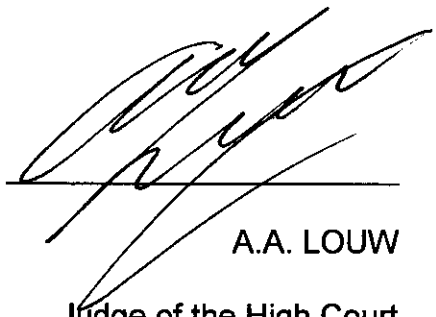
[23] All of this trouble was taken by the third respondent in order to discredit the first applicant. This is made clear from the motivation provided by the third respondent for these postponements as well as from the written argument in opposition to the s174 application. I quote from p 29 of this argument of the third respondent:

> "(8.) *During the cross examination of Dr Pilusa the State formed the opinion that there was contact between Dr Pilusa and accused number 1. The State then requested cell phone records and the result was astonishing. The State afforded Dr. Pilusa the opportunity to explain but he insisted that there was at most a few conversations. It is submitted that it is abundantly clear that there is a long relation between accused number 1 and Dr Pilusa and that Dr. Pilusa was undoubtedly protecting accused number 1."*

[24] What effect the evidence about these two aspects namely the witness statement and the telephonic contacts, had on the body of evidence as a whole is impossible for me to determine. As stated above there is a substantial volume of viva voce and documentary evidence. I certainly cannot find that the questioning about these two aspects amounts to a gross irregularity which will inevitably lead to an unfair trial.

[25] Thus at this stage there is no reason for this court to interfere. I make the following order:

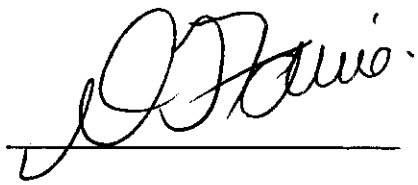
1. The application for review is refused.
2. The case is referred back to the presiding magistrate for finalisation thereof.



A.A. LOUW

Judge of the High Court

I agree



D.S. FOURIE

Judge of the High Court

For the Applicants :

Instructed by :

For the Respondents :

Instructed by :