IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 31/8/16 SIGNATURE

6/9/16

CASE NO: A665/2014

In the matter between:

ISMAIL ESSOP	First Applicant
AHMED HUSSAN LIMALIA	Second Applicant
and	
THE MAGISTRATE, COMMERCIAL CRIMES COURT, PRETORIA	First Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG	Second Respondent

JUDGMENT

MOTHLE J

A. Introduction

1. This is an application for a review of a ruling by the Regional Court Magistrate *("the Magistrate")* of the Commercial Crimes Court in Pretoria. The Applicants are on trial, charged with various counts of theft of funds kept in trust (trust funds) as well as contravention of the provisions of the Attorneys Act 53 of 1979, allegedly committed during their period of practice as attorneys.

2. The ruling which is under attack, relates to the provisional admission of hearsay evidence during the presentation of the State's case, on the understanding that the State would call additional witnesses to corroborate such evidence. The State closed its case without calling some of the witnesses.

3. The Magistrate, ruling on the application for discharge in terms of Section 174 of the Criminal Procedure Act, 51 of 1977 ("*CPA*"), dismissed the application and stated, amongst others, that she took into account all the evidence as at that point.

4. The Applicants, whose turn it is to present their defence in the criminal trial now contend that they are unable to decide on the evidence necessary for their defense. They further contend that there is uncertainty whether the Magistrate has, in her ruling dismissing the section 174 application, included the provisionally admitted hearsay evidence which has not been corroborated by the witnesses not called. She did not specify as such in dismissing the 174 application. The applicant now come on review to this Court, as the Magistrate stated that she is *functus officio* and cannot revisit her decision.

5. The Magistrate has adjourned the criminal trial proceedings to enable the Applicants to prosecute this review application in the High Court.

B. Background

6. Both Applicants are each charged with two counts as follows:

6.1 One count of theft relating to general deficiencies in the trust accounts, *alternatively* 30 counts of theft for the First Applicant. The Second Applicant is also charged with 23 alternative counts of theft;

6.2 They are each charged with one count of contravening Section 83(9) read with Section 78(4) of the Attorneys Act, 53 of 1979, i.e. failure to keep proper accounting records.

7. In launching the review proceedings the Applicants in essence seek the following relief:

7.1 That the proceedings before the Magistrate in the Commercial Crime Court should be reviewed and set aside on the grounds that the said Magistrate as well as the prosecution committed an irregularity;

7.2 That an order should be issued, permanently staying the prosecution of the Applicants; and

7.3 A cost order.

8. The hearsay evidence in this case emanates from the evidence of the state witness Petrus Wessels Pieterse who testified on his forensic report. The report contained sworn statements of trust creditors of the law firm of the Applicants. These sworn statements were submitted to the Fidelity Fund in support of the trust creditors' claims against the law firm.

9. During the presentation of Pieterse's evidence, the Applicants objected to the admissibility of the statements as hearsay evidence. The Magistrate, exercising her discretion in terms of section 177 of the CPA, then ruled that the hearsay evidence is provisionally allowed in terms of Section 3(3) of the Law of Evidence Amendment Act, 45 of 1988.

10. It was expected of the State to call the trust creditors whose sworn statements appeared in the evidence of Pieterse, to testify in corroboration of such statements. Some of these trust creditors were called whilst others were not called.

11. When the State closed its case, the Magistrate did not expressly give a final ruling in regard to the hearsay evidence that she had provisionally admitted. Even in her ruling on application by the Applicants for discharge in terms of Section 174 of the CPA, the Magistrate did not specifically deal with the provisionally admitted hearsay evidence, including in the instance where the trust creditors were not called as witnesses to corroborate Pieterse's evidence relating to the sworn statements.

12. In dismissing the application for discharge in terms of Section 174 of the CPA, the Magistrate made the following remark:

"I will give full reasons at the end of the trial, but at this stage I find that the State's evidence that has been presented that includes also circumstantial evidence on all charges proves a prima facie case upon which this Court may convict the accused."

13. The Applicants contend that their rights to a fair trial in terms of Section 35 of the Constitution are being infringed, in that they are unable to prepare their defence properly and decide on the kind of evidence they need to present in support of their case.

14. The prosecution on the other hand contends that on the basis of its analysis of the evidence up to the end of the State's case, there is indeed a *prima facie* case which the accused must meet, based on amongst others, circumstantial evidence. It is further contended for the prosecution that during the presentation of the evidence of Pieterse, the Applicants had ample opportunity to challenge such evidence including that which was provisionally allowed as hearsay and are therefore in a better position to can decide what evidence to present, without necessarily forcing the hand of the

presiding officer in giving its reasons at this stage. It is contended further that the irregularity alleged by the Applicants is not gross irregularity which would justify the intervention of the High Court at this stage of the criminal proceedings.

15. The question before this appeal court is whether in not making a final ruling on the provisionally admitted hearsay evidence at the end of the state's case, the Magistrate committed an irregularity which vitiates the criminal proceedings in that court.

C. *Legal principles*

16. Section 22 of the Superior Courts Act 10 of 2013 provides:[1]

"22 Grounds for review of proceedings of Magistrates' Court *[sic]*

(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;

[1] This section replaces section 24 of the repealed Supreme Court Act 59 of 1959.

(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."

17. Section 22(1) as stated above provides for the *substantive* basis on which the review should be grounded. The notice filed by the Applicants is in terms of Rule 53 which provides for the *form* that the application should take and the *procedure* it should follow.

18. This review application is grounded on section 22 (1) (d), as it raises the Magistrate's ruling on the admissibility of hearsay evidence.[2]

19. The common law principles as well as the provisions of Section 3 of the Law of Evidence Amendment Act, 45 of 1988 *("Act 45 of 1988")* relating to hearsay evidence has been considered and dealt with in a line of court decisions and such principles are trite and need not be repeated.

[2] Rowe v Assistant Magistrate, Pretoria 1925 TPD 361.

20. The issue in this appeal is not on the admissibility of the hearsay evidence, but rather the effect of provisionally admitted hearsay evidence on the accused at the end of the state's case. It is an issue that was considered in ***S v Molimi and Another***[3] ***and S v Molimi***[4] by Supreme Court of Appeal *("SCA")* and the Constitutional Court respectively, *("Molimi')*

21. In Molimi, the appellant stood trial in the High Court with three other persons and were convicted of various counts including murder and robbery. The appellant was convicted on the basis of statements obtained from his co- accused. The admissibility of both statements were was contested in the trial court on the grounds that they were not freely and voluntarily made. After a trial within a trial, both statements were admitted as evidence. The trial court also admitted the statements against the appellant on the basis of their probative value and that it was in the interest of justice to do so.

22. The appellant challenged his conviction in the SCA on the grounds that the two statements ought not to have been admitted against him because of their hearsay character. The

[3] 2006 (2) SACR 8 (SCA).
[4] 2008 (3) SA 608 (CC).

SCA set aside some of his conviction and upheld others on the basis that there was no prejudice and the fairness of the trial has not been compromised.

23. At the heart of the issue before court was the effect of provisional admission of evidence by presiding officers, with a view to making a final ruling at the end of the entire trial and in the final judgment. Section 177 of the CPA provides:

"***Court may defer final decision***

177. *The court may at criminal proceedings defer its reasons for any decision on any question raised at such proceedings, and the reasons so deferred shall, when given, be deemed to have been given at the time of the proceedings.*"

24. The SCA in that case expressed its view on provisional rulings relating to admissibility of evidence thus:

> "*Provisional rulings (relating to hearsay evidence) may be prejudicial to an accused. It conflates the admissibility of the evidence with its weight and may leave an accused unfairly in a state of uncertainty.*"

25. This view is supported by the Constitutional Court when it held in paragraph [42] that:

"When a ruling on admissibility is made at the end of the case, the accused will be left in a state of uncertainty as to the case he is expected to meet and may be placed in a precarious situation of having to choose whether to adduce or challenge the evidence."

26. The ruling of the Constitutional Court is that failure by a presiding officer to timeously make a ruling on the provisionally admitted hearsay evidence may prejudice the accused case and offend their right to fair trial as enshrined in Section 35(3)(i) of the Constitution.

27. I am thus of the view that the principle set out by the Constitutional Court in the *Molimi* case, properly construed, implies that in every instance where hearsay evidence has been provisionally admitted during the State's case, it cannot be assumed that failure to call corroborative witnesses automatically implies that such evidence is not admitted or is automatically excluded. The fact that the evidence may be admitted on a different ground such as in the interest of justice, makes it necessary for a presiding officer to make a pronouncement timeously in that regard, at least before the

accused presents his/her or its case in defence against the admitted evidence.

28. There is therefore a duty on the presiding officer in a criminal trial, where a decision has been taken to provisionally admit hearsay evidence, to make a ruling in that regard, at least at the end of the State's case where it would be clear that no further evidence will be presented to corroborate that hearsay or that the court intends to admit such hearsay for a different reason, such as in the interest of justice.

D. Evaluation of evidence

29. It is clear *in casu* that the Magistrate did not pronounce either way in regard to the provisionally admitted hearsay evidence when she ruled on the 174 application for discharge. She did not indicate whether the State, having closed its case, and having not called all the trust creditors to testify in support of the provisionally admitted hearsay evidence, that such is admissible or inadmissible. Section 3(3)(c) of Act 45 of 1988, permits the Court to admit hearsay evidence in the interest of justice, even in situations where the maker of the

statement has not been called to testify and corroborate such evidence.

30. It remains unclear on the record whether the Magistrate in saying: "*I find that the State's evidence that has been presented*" includes the provisionally admitted hearsay evidence which has not been corroborated by the trust creditors.

31. Having regard to the principle established by the Constitutional Court in Molimi, I am of the view that the Applicants are justified in demanding a definite or final ruling from the Magistrate at this stage of the proceedings. It cannot be assumed that the provisionally admitted hearsay evidence relating to trust creditors who have not been called to testify is or is not admitted. The Magistrate may still finally admit such evidence in the interest of justice as provided in section 3 (3) of Act 45 of 1988. However, she has to provide a clear ruling and give reasons to enable the Applicants to prepare for their defense. Failure to do so will be prejudicial to the Applicants and may in fact infringe their Constitutional rights to fair trial.

32. It is my view that failure by the Magistrate to make a final ruling on the provisionally admitted hearsay evidence is not such an

irregularity that would have the effect of vitiating the proceedings, to the extent that the entire proceedings must be declared invalid and set aside. The failure to make a ruling on the provisionally admitted hearsay evidence in this instance may have an effect on the Magistrate's decision on the section 174 application for discharge. It would neither justify nor sustain an order for permanent stay of prosecution as contended by the applicants. It is the decision on the section 174 application that needs to be set aside and considered *de novo* in light of the failure to pronounce finally on the provisionally admitted hearsay evidence.

E. ISSUE OF COSTS.

33. In their notice of motion, the Applicants pray for a cost order against the Magistrate as well as the prosecution. This review application has been set down in the Criminal Appeals Court, where in practice the question of costs does not arise.

34. Counsel for the First Applicant persisted with the prayer for costs while counsel for the Second Applicant shared the concern of the Court that in the Criminal Appeal Court, cost orders are in practice not considered.

35. In provisionally admitting the hearsay evidence, the Magistrate did not specify on which authority she took that decision. It seems she was clearly acting in terms of the provision of Section 177 of the CPA. However the Magistrate did not consider and follow the Constitutional Court ruling in *Molimi.* Under these circumstances it can hardly be argued that her conduct amounts to gross irregularity and that she should consequently be mulcted with a cost order.

30. *In casu*, the Applicants have not demonstrated that the Magistrate and/or the prosecution acted irregularly such that their conducts in those proceedings deserve censure in a form of a cost order. Save to state that the Applicants have not succeeded to make out a case for a cost order; thus I do not propose to deal with the question whether cost orders should be part of review proceedings brought in the Criminal Appeal Court. No sufficient case was made to justify consideration and determination of this question by this Court.

31. In the premises I make the following order:

1. The decision by the Magistrate to dismiss the application in terms of Section 174 of the CPA is hereby set aside;

2. The matter is referred back to the Magistrate to:

   2.1 consider and pronounce her ruling on the admissibility or otherwise of the provisionally admitted hearsay evidence, and, if such hearsay evidence is finally admitted, state fully the grounds upon which such evidence is admitted;

   2.2 reconsider her decision in terms of the application for discharge made by the accused in terms of Section 174 of the CPA; and

   2.3 Subject to her ruling, to continue the trial in the normal course.

3. There is no order as to costs.

S.P. MOTHLE
Judge of the High Court
Gauteng Division
Pretoria.

I agree

J G RAUTENBACH
Acting Judge of the High Court
Gauteng Division
Pretoria.

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For the Respondent:	**Adv. G. Janse Van Rensburg**
Instructed by:	**Director of Public Prosecution** **Gauteng Division** **Pretoria.**