IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A280/2021

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

..... 2022-09-05.....
SIGNATURE DATE

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG, PRETORIA — **APPELANT**

And

THATO MOLEFE — **FIRST RESPONDENT**

ZENZILE NDABA — **SECOND RESPONDENT**

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 05 September 2022.

JUDGEMENT

PHAHLAMOHLAKA AJ.

INTRODUCTION

[1] This is an appeal against the judgement and order by the Learned Regional Magistrate at Vereeniging dated 29 September 2019 whereby the two Respondents were found not guilty and discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (CPA).

[2] This appeal is in terms of Section 310 of the CPA on the question of law in that the Learned Magistrate ruled that the evidence of search and seizure was inadmissible, thereby acquitting the respondents. Section 310 the CPA provides as follows:

"when a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the Attorney-General or, if a body or a person other than the Attorney-General or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law."

BACKGROUND

[3] The respondents were charged with the following offences:

3.1 Contravention of section 3(b) and section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992; and

3.2 Contravention of section 3 and section 90 of Act 60 of 2000.

[4] The charges were put to the appellants and the both pleaded not guilty to all the charges. The prosecutor called one witness, warrant officer Andre Van Schalkwyk but before he could conclude his testimony, the State applied for a trial within a trial to determine the validity of the search warrant and the admissibility of the evidence obtained as a result of the search warrant. After the trial within a trial, the Learned Regional Magistrate found that the search warrant was invalid and therefore the evidence regarding the search and seizure was consequently inadmissible. The prosecutor informed the Learned Magistrate that, that was the only evidence at the disposal of the state and he closed the State's case. The respondents were discharged in terms of the provisions of section 174 of the CPA, and the prosecutor did not oppose the acquittal of the respondents.

[5] On 13 October 2020 the appellant filed a request for the Learned Magistrate to state a case wherein the appellant raised the following questions of law, which the Learned Magistrate responded to on 17 October 2020.

5.1 Did the regional court magistrate properly deal with the application of section 21 and 23 of the CPA to the proven facts?

5.2 Did the regional magistrate have jurisdiction to make a finding that the search warrant is invalid, despite the search warrant not having been set aside by a high court?

5.3 Did the regional court magistrate properly deal with all the legal issues, in particular, the application of section 35(5) of the Constitution regarding admissibility of evidence?

5.4 Did the regional court magistrate properly interpret the judgment in ***S v Malherbe 2020***[1] and apply it to the facts before him?

[6] The appellant now appeals against the ruling of the magistrate in the trial within a trial, not to admit evidence seized during the search and subsequently the acquittal of the respondents in terms of section 174 of the Criminal Procedure Act[2].

[7] There are three aspects raised by the appellant as misdirection on the part of the Learned Magistrate and they are:

7.1 That the Learned Magistrate erred in not ruling that the evidence was inadmissible in terms of section 23(1) (a) of the CPA;

7.2 That the Learned Magistrate erred by not admitting the evidence in terms of section 35(5) of the Constitution[3].

7.3 That the Learned Magistrate erred by incorrectly interpreting and applying the decision of ***S v Malherbe.***[4]

RESERVED QUESTIONS OF LAW

[8] At the commencement of the proceedings counsel for the appellant informed the court that the appellant was abandoning its argument regarding section 23 (1) (a). The only issues for determination by this court are therefore, whether the Learned Magistrate erred by not admitting the evidence in terms of section 35(5) of the Constitution and whether the learned magistrate properly and correctly interpreted ***S v Malherbe.***

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[1] (1) SACR 227 (SCA).
[2] Act 51 of 1977
[3] 108 of 1996
[4] Supra 2020(1) SACR 227 (SCA)

THE LEGAL POSITION

[9] Section 35(5) of the Constitution provides as follows:

"Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice"

[10] Mbatha JA said the following in ***Malherbe*** *supra* at paragraph 9:

"The magistrate should have held that the search warrant was issued unlawfully and was invalid. On that basis none of the material seized under the warrant would have been admissible."

EVALUATION

[11] From the facts of this case, it is not in dispute that warrant officer Van Schalkwyk was in possession of a defective search warrant when he, together with his colleague searched the premises and ultimately arrested the respondents. Van Schalkwyk did not bring it to the attention of the respondents that he was in possession of search warrant which was bearing a wrong address. Van Schalkwyk's behaviour when effecting the arrest leaves much to be desired.

[12] The question is whether evidence obtained under those circumstances should be declared admissible, despite Van Schalkwyk behaving in the manner in which he did. More so, Van Schalkwyk did not properly explain the Constitutional rights to the respondents during their arrest. I am of the view that the Learned Magistrate correctly found that the evidence found in that manner should not be admissible.

[13] The respondents' rights are protected in terms section 35(5) of the Constitution which provides that the evidence can only be admissible if it will not render the trial unfair or otherwise be detrimental to the administration of justice.

[14] Counsel for the respondents correctly argued that our courts have followed a process of two stage enquiry in determining the admissibility of evidence in terms of section 35(5) of the Constitution. He further argued that in all cases where the courts excluded evidence in terms of section 35(5), it was because police's actions were egregious and they acted in bad faith and with a flagrant and deliberate disregard of the Constitutional rights of the suspects.

[15] In ***S v Mthembu***[5] the evidence was excluded because the suspect was tortured. Cameron JA said the following in paragraph 32:

'the notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if (a) it renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where the admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused."

[16] In ***S v Tandwa and Others***[6] statements made by accused 6 were excluded because he had been assaulted. Counsel for the respondents referred to ***S v Lachman***[7] *and* ***Dos Santos and another v The State***[8], among others. It is my view that all the authorities referred to herein supports the Learned Magistrate's decision of declaring the evidence obtained when the search was conducted inadmissible. It is apparent that the admission of evidence obtained in the manner in which it was, when the search was conducted would have the effect of rendering the trial unfair to the respondents.

[17] This brings me to the aspect of the proper interpretation of the ***Malherbe*** judgment. The principle in the said judgment is that the magistrate should have held that the search warrant was issued unlawfully and therefore invalid. In this case it is common cause that the search warrant was invalid and that much was conceded by the appellant. In terms of ***Malherbe*** judgment on the basis that the search warrant was invalid, the court held that the material seized under the warrant would have been inadmissible.

[18] Counsel for the respondents correctly argued that our courts have to follow a process of a two stage enquiry in determining the admissibility of evidence in terms of section 35(5) of the Constitution. That, in all cases where the courts excluded evidence in terms of section 35(5) of the Constitution, it was because the police

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[5] 2008(2) SACR 404 (SCA)
[6] 2008(1) SACR 613 (SCA)
[7] 2010 (2) SACR 52 (SCA)
[8] 2010 (2) SACR 382(SCA)

conduct was egregious and they acted in bad faith and with flagrant and deliberate disregard of the constitutional rights of the suspect.

[19] In this case, the Learned Magistrate in my view was correct in holding that the evidence of the material obtained at the premises was inadmissible. The Leaned Magistrate therefore correctly interpreted the ***Malherbe*** judgment. In any event, the Constitutional rights of the respondents were flagrantly and deliberately ignored when they were not informed, firstly, of the existence of the search warrant but most importantly, about their rights as suspects.

[20] Even if the court were to find the Learned Magistrate misdirected himself, which I find he did not, the appellant has an elephant in the room. After the Learned Magistrate made his ruling, the state prosecutor without provocation, closed the State's case. In my view, the issues raised by the appellant are therefore moot.

[21] Counsel for the appellant argued that the State did not have any other remedy but to close the State's case after the magistrate had made a ruling regarding the search and seizure. That argument is unfortunately without merit and inherently baseless.

[22] I cannot find any authority that provides that the State cannot review the decision of a magistrate under the similar circumstances of this case, although parties are discouraged to take matters on review whilst the trial is ongoing. This is a classical case where the State could have reviewed the decision of the Learned Magistrate.

[23] I agree with counsel for the second respondent that the appellant wants this court to assist it in reopening its case but it does this under the veil of an application in terms of section 310 of the CPA.

CONCLUSION

[24] In light of the aforesaid I am of the view that the appellant has not made out a case for the relief sought. Consequently, the appeal should fail.

[25] In the result I make the following order:

The appeal is dismissed.

K PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT

I AGREE

PD. PHAHLANE
JUDGE OF THE HIGH COURT

JUDGMENT RESERVED ON	: 16 March 2022
FOR THE APPELLANT	: ADVOCATE MASHUGA
INSTRUCTED BY	: DPP, GAUTENG, PRETORIA
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DATE OF JUDGMENT	: 05 SEPTEMBER 2022