IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

Case No: REV 17/2023
18/202319/2023 & 20/2023
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
DATE: 13/4/2023
SIGNATURE:

In the matter between:

THE STATE

V

PILATE JONAS **ACCUSED & OTHERS**

REVIEW JUDGMENT

M.G PHATUDI J

[1] This matter conflates 4 applications referred to this court for automatic review in terms of S.304 of the Criminal Procedure Act 1977, as amended. ("The Act")[1]. It appears from the record and the submissions made that each of the accused in the *court a quo*, were charged with the offences in contravention of S.49 (1) (a) of the Immigration Act, 2002[2].

[1] Act 51 of 1997
[2] Act 13 of 2002.

[2] These cases, new as they were in the Polokwane District Court, were struck off the roll on 21 November 2022 by learned Magistrate Ms J.C Ungeer. In doing so, she recorded the following notes on the charge sheet: -

"No affidavit attached – no *prima facie* case- struck off the roll"

In some instances she recorded that: -

"No affidavit – The Commissioner of Oath (*sic) is defective – matter struck off the roll".

[3] It appears further from the record that according to the public prosecutor, Ms Mukosi, the presiding officer (Ms. Ungerer) demanded the S.212 affidavit that was issued on behalf of the Department of Home Affairs (DHA) that she failed to hand up, which led to the matters affected being struck off the roll. This decision, is confirmed in the letter dated 12 January 2023 addressed to the Acting Senior Magistrate (Mr T.S Netshiozwi) penned by the said magistrate.

[4] A reading of the relevant letter reveals that all those matters involving the alleged "illegal immigrants" who appeared in that court without the S.212 affidavit not being attached to the charge sheet as a *prima facie* evidence against the accused, would be liable to be struck off the roll. On the 21 November 2022, a few matters were brought in that court (Court B) without the requisite "DHA" affidavit/s, or where the same were presented in court, but were defective.

[5] From what I understand to be the presiding officer's reasoning for her action, is that it appears that an "agreement" was reached amongst such stakeholders as the local Magistrates, Public Prosecutors, Home Affairs department and South African Police Services (SAPS) representatives that no cases would be enrolled in respect of which the accused are "illegal immigrants" in circumstances that the said S.212 affidavit is either not attached or if attached, is defective.

Furthermore, the public prosecutors, were on the other hand, reluctant to have such cases withdrawn for fear of reprisals of not having scanned such matters for compliance before initiating prosecution in order to establish whether or not there exists a *primia facie* case against the offender.

[6] The "agreement" to which reference is made, it appears, stems from the minutes of the relevant stakeholders' meeting held in Polokwane on 18 August 2022. In this meeting, a wide range of issues in regards to the District Court (Polokwane) and Case Flow Management ('CFM') were hammered out, importantly, under Item 6.8 thereof, where S.34 of the Immigration Act, were generally considered and or adopted.

Crucially, on the agenda were cases that were either withdrawn or struck of the roll as the immigration officers attached to the department of Home Affairs (DHA) did not adequately prepare dossiers for alleged offenders, or "DHA affidavits were inchoately attested as cogent or *prima facie* evidence required for S.212 purposes.

The pro-forma form utilized by the DHA was also not spared criticism. It was also expected that the J15 form should have been attached to the said affidavit prior to commencement of prosecution.

THE ISSUE:

[7] The crisp issue is whether the decision of the presiding officer in striking off the matters before her did not constitute a failure of justice?

LEGAL FRAMEWORK:

[8] In order to place the present inquiry into perspective, I consider it apposite to refer briefly to the authority of this court to review criminal cases emanating in the lower court pursuant to S 304 (c) (iii) and (v) of the Act. Paraphrased, this section

provides *inter alia, that,* If, upon considering the proceedings *a quo*, it appears to the trial Judge that the said proceedings are not in accordance with justice or doubt exists that they are in accordance with justice, he/she shall obtain from the presiding officer concerned, reasons for convicting the accused and for sentence imposed, if any

8.1 However, *in casu* the matters brought before the court for judicial review, had not progressed to a point of conviction when they were struck off the roll for the reasons advanced by the trial court.

This is probably because the review cases from the lower courts enjoy priority with registrars, Judges, and office of the Director of Public Prosecutions. (DPP)

8.2 The practice and tradition adopted over many decades, which has become trite, is that the Judge considers the record in chambers, as in the instant cases, and if the Judge is of opinion that justice has prevailed signs a certificate to that effect. Should he/she entertain doubt whether or not justice prevailed the Judge directs an enquiry to the trial Magistrate to furnish the reasons for the court's decision, and thereafter lay bare the trial record before the reviewing Judge for decision on the issue at hand.

8.3 In the present instance, however, it was the decision of the court below in striking off the roll the matters alluded to, that triggered the present review process.

[9] Section 304 (2) (c) (iii) and (v) of the Act do, in my view, clothe and confer wide powers upon the reviewing Judge to rectify the decisions of the lower court in respect of certain matters before it, upon conviction or sentence. Here, as already shown, the inquiry is on a different scope, namely, that of striking off the criminal matters before it for want of the S.212 affidavit not being attached.

Furthermore, the ambit of S.304 (4) of the Act to which considerable reliance was placed in bringing the impugned decisions before the reviewing Judge, is even far broader than subsection 2 (c), above.

9.1 The aforegoing proposition is grounded upon S.304 (4) which refers to "all cases in lower courts" where, for instance, non-reviewable sentence was imposed, and then brought before the reviewing Judge in "any manner' and in respect of which proceedings were "for any reason" not in accordance with Justice.

9.2 By parity of reasoning, and with reference to case law, one therefore takes the view that a High Court has inherent power to invoke its authority to intervene in any decision, such as the one before me, when **the interests of justice** inevitably demand the Judges' intervention. This power, had in the past been invoked *mero motu* to come to the assistance of an aggrieved accused person[3]

[10] The above stated observation also finds refuge in the case of S v MAFU[4] where the court stated that:-

"But, where the interests of justice clearly require the intervention of this court, we will not hesitate to exercise the powers conferred by sec. 98 (4)."

[11] Apart from the above mentioned considerations, there are grounds upon which review of proceedings of a Magistrate's court as laid down in S.22 (1) of the Superior Court's Act, 2013[5] confirm this court's power to review. This court possesses power, therefore to review the proceedings of "all such courts" as envisaged in S21 (1) (b) and S.22 (1) of the Superior Courts Act, 2013.

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[3] Brandfort garage v R 1954 (2) H 162 (O), see also, S v Rothman 1990 (1) SACR 170 (O)
[4] 1966 (2) SA 240 (EC) at 241 per Eksteen J.
[5] Act 10 of 2013. See 22 (1) ought to be read together with provisions of S.21 (1) (b) of this Act.

[12] What remains for consideration presently is to enquire whether or not the presiding magistrate was correct in striking off the roll matters as she did.

DISCUSSION:

[13] It is plain that the reasons for striking off the roll the criminal cases (Immigration Offences) before the trial court were the alleged non-compliance with the so-called "DHA affidavits", namely, S.212 affidavits which from the "agreement' purportedly concluded with the mentioned stakeholders, were required to be annexed to the charge sheet (form J15) before initiating prosecution of the charges against the offenders.

13.1 This then calls for a brief scrutiny of S.212 of the Act and to analyse whether or not it has a bearing on the trial proceedings at issue. This section provides, among other things, a variety of ways or manner of proof of certain facts by affidavit or certificate in criminal proceedings, which shall be prima facie proof of such issue or facts.[6]

13.2 The Acting Senior Magistrate (Netshiozwi) who referred the matter to this court for review, sought to obtain the court's view, whether the "agreement" which seemingly the presiding officer *a quo* decided to strike off the relevant cases off the roll, was lawful or not

The learned Magistrate's conduct had apparently left the prosecution authorities and the magistracy in this district, in particular, in legal uncertainty and disarray.

[14] The written submission received from the Acting Senior Magistrate concerned seems to suggest that the premise upon which the trial

[6] I consider it unnecessary to quote the provisions of S.12 as it is couched on extremely lengthy terms and for divergent purpose for application at criminal trials.

magistrate decided to have the matters at issue struck off the roll, was an "anomaly" in our law. This is because, so the submission went, the essentials of the charge are covered in terms of S.84 (1) of the Act as follows:

ESSENTIALS OF CHARGE:

"84 (1)
Subject to the provisions of this Act and of any other law relating to any particular offence a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the alleged offence have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge."

14.1 The provisions of this section are, to my mind, crystal clear and lacks ambiguity. It is completely to me obscure why the *court a quo* insisted that the "HAD affidavit, *in casu*, S.212, must of necessity be attached to the charge sheet as part of the "evidence" or a *prima facie* proof of the offence in circumstances where the trial has not as yet commenced in earnest. S84 (1) does not require an inclusion of S.212 affidavit in order to found a *prima facie* case against the accused.

14.2 A glimpse at the record reveal (Rev20/2023) for instance, the degree of turbulence with which the Presiding Officer, Ms Ungerer, engaged the Public Prosecutor in the course of the trial proceedings. What follows is a summary of the impugned proceedings held on 21 November 2022 involving the accused *in casu*: -

Prosecutor:

“Your worship, the affidavits are inside the ……”

[Intervene].

Court:

“You better give me the affidavits now or there is going to be a big (sic) problems or do not give me the affidavits, …… I am just going to say, no affidavit attached.?

Prosecutor:

“Your Worship, I am informed that the affidavit is part of the evidence.

Court:

“How do you know they are illegal ma’am?”

Prosecutor:

“Through the 212.”

Prosecutor:

“Your Worship, that is (sic) the instructions from the SPP (Intervene)

Court”

“Where is your brain?”

“Where is, who are you, Are you the prosecution?

Prosecution:

Yes, your Worship……."

"Your worship, may I have a short adjournment, so…[Intervene]

Court:

"No, without it you do not even have a *prima facie* case against them…...your matters are struck off the roll, you are free to go….."

"So basically, you did not give me the affidavits so I wrote that you did not give me the affidavits, and that is why they are struck off the roll."

[15] The record[7] reveals a disturbing unedified conduct on the part of the presiding officer which is unbecoming of a judicial officer against the public prosecutor, to say the least.

[16] The trial court, without any sound legal basis decided to strike off the roll matters which could have simply been either postponed or removed from the roll so as to enable the prosecution to formulate a proper charge in conformity with S.84 (1) of the Act, should the state sought to proceed with the prosecution.

[17] The decision the learned Magistrate took was, with all respect, not only legally untenable, but irregular.

[18] The charge/s as framed did not, in my view, require the S.212 affidavit made by the DHA, as "evidence" of commission of the statutory offences contempleted in S.49 (1) of the Immigration Act, 2002.

[7] Pp1-5 Record. (Rev. 20/2023)

Once the charge's fulfilled the *essentialiae* envisaged in S.84 (1), that would have been sufficient to provide adequate particularity for the accused to plead to the charges preferred against them.

[19] This court in the unreported case of **David Dzambukeri v The State**[8] Semenya J (as she then was) after analysing the common principles of *nullum crimen sine lege* and *nullum poena sine lege* as amplied in S.35 (3) and as entrenched in the Constitution Act, 1996[9], with reference to S.49 (1)(a) of the immigration Act, stated that:

"[7]

…… my understanding of the words "in contravention of this Act" as they appear in Section 49, is that they presuppose that there are certain specific Section in the Act that prescribes the manner in which entry into, remaining in and departure from the Republic is to be done. In line with the principles laid down in Milton above, it follows that those sections will, therefore, be what is referred to as the description of the Act or omission that is prohibited."

[20] The learned Judge went on to hold further that:

'[9]
In bringing the principles laid down in Milton with regard to what constitute a statutory offence within the ambit of this case, it is evident that section 49 (1) (a) of the Act is what is referred to as the formal pronouncement that anyone who enters, remain or departs from the Republic in a manner that is prohibited elsewhere in the Act, shall (sic) commit a crime

[8] Rev case no; 175/2017 delivered 18.04.2018
[9] Act 108 of 1996, as amended

Section 9 of the Act on the other hand, would be what is referred to as the description of the prohibitation clause."

I concur with this reasoning.

[21] However, had the trial *court a quo* decided to strike off the matters before it on grounds that (1) the charge/s do not disclose an offence as envisaged in S.84 (1), or (2) that the charge sheet itself was formulated devoid of the principles enunciated in Dzambukeri's case above, the position would be somewhat different and free from criticism.

The decision of the presiding officer in doing so, was clearly wrong, and this court is, therefore, at large to intervene.

The view I take of the matter is that S.212 affidavit required to be a precursor to initiate prosecution, should not arise since that could have been be part of the evidence the prosecution would rely on. This, in any event, is not an issue that a presiding officer should determine early in the trial proceedings, needless to mention, where these cases were still new or the trial roll. Whether or not there is a *prima facie* case against the accused, is a question relevant at the close of the state's case pursuant S.174 of the Act.

[22] It could furthermore, not be conceivable to argue as the trial magistrate seems to suggest, that the S.49 (1) charge as put, unless not in conformity with S.84 (1), and the principle espoused in Dzambukeri's case above, would have been at variance with the principle stated in S v LAVHENGWA[10], in regards to S. 25 (3) (b) – "the right to be informed with sufficient particularity of the charge[11] conversely, the charge/s if brought in line with the said principles, would not have justified the presiding officer's conduct to quash the charges put to the accused.

[10] 1996 (2) SACR 453 (W) at 482 (f) (Full Bench)
[11] S25 (3) (b) of the Interim Constitution Act 200 of 1993.

Furthermore, to allow a presiding officer access to the charge/s upon which the prosecution relies before commencement of the trial is procedurally wrong for the following considerations. First, it might leave an impression that the presiding officer has prematurely obtained knowledge of the evidence the state intends to adduce against the accused and, therefore, he/she is, as a result, prejudiced.

Second, it might lead to the impression that the presiding officer's, vision is already clouded with a dust of conflict, and descended into the arena, which would be irregular and thus renders the trial unfair within the context of S.35 (3) of the Constitution.

[23] Additionally, a magistrate court, being a creation of statute, within which magistrates exercise their judicial powers, duties and functions, cannot do so and arrogate upon itself such authority or power not expressly bestowed by the enabling legislation. A reading of the entire Criminal Prosecutor Act 1977, as amended, provides in S.342A (3) (c) the procedure as to when a Magistrate is empowered to strike criminal cases of the roll.

UNRESONABLE DELAY IN TRIALS

[24] Section 342 (1) of the Act provides that:

"A court before which criminal proceedings are pending shall be investigate any delay in the completion of proceeding's which appears to court to be unreasonable and which could cause substantial injustice to the prosecution, the accused or his or her legal adviser, the state, or a witness."

The question whether the delay is unreasonable, depends upon a wide variety of tests laid down in S342A (2) (a) – (i) thereof. Its purport is to provide a procedural framework to eliminate unreasonable delays that could arise during criminal proceedings and to establish a mechanism which militates against such delays.

[25] That said, the cases before the trial court were, moreover, new on the trial roll and it was also the accused's first appearances in that court. I am unable to find justification as to why the trial court deemed it fit to have those matters struck off the roll without regard to the provisions of S. 342A (2) (a) – (i) of the Act. What, however, remains pertinent is that S212 alone could not have been an adequate basis upon which those matters under consideration could be struck off the roll. There was simply no alleged "unreasonably delay" in the prosecution of the charge/s concerned.

The presiding officer, therefore, committed an irregularity which vitiated the proceedings' brought under the present review.

25.1 In a case on all fours with the present instance,[12] this court (Naude-Odendaal J) held, and correctly so, in my view, that the presiding officer in that case erred by calling for the S212 affidavit to be attached to the charge sheet, which plainly constituted the state's case before actual trial. This was irregular S.212 affidavit becomes relevant during criminal proceedings, after a charge is put, accused pleaded to the charge, and prosecution is commenced with.

[26] Now, a word on the nature of and the enforceability or otherwise of the "agreement" concluded by the stakeholders referred to in the preceding paragraphs [5] and [6] of this judgment. Whatever the said "agreement" was genuinely intended by the parties to redress, it could not have by any figment of imagination been ground to supersede the provisions of S.342A.

[27] On a semblance of the aforegoing considerations the following order would issue:

ORDER

[12] The state v Senzo Zibanda % Others, review applications under case no: 12/2023 heard with 13,14 & 15/2023, delivered 14.03.2023

[1] **The decision of the Magistrate *a quo* to strike from the trial roll cases in REV 17/2023; REV 18/2023; REV19/2023 and REV20/2023 on 21 November 2022, is reviewed and set aside.**

[2] **The matters referred to in (1) above, are referred to the Director of Public Prosecutions, Limpopo, to decide whether or not to re-instate prosecution against the accused, and whether the said cases are to start *de novo* before a different presiding officer**

[3] **The registrar of this court (Criminal Section) is ordered to forthwith forward a copy of this judgment to the Chief Magistrate Limpopo with a direction to bring it to the attention of all District Courts in Limpopo.**

M.G. PHATUDI
JUDGE OF THE HIGH COURT LIMPOPO DIVISION,
POLOKWANE

I agree.

M. NAUDE- ODENDAL
JUDGE OF THE HIGH COURT, LIMPOPO DIVISION,
POLOKWANE