REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

High Court Ref No: **0404576**
Magistrate's Serial No: **530/2004**
Case No:
27/172/2003

In the matter between:

PAUL TAYLOR Applicant

and

THE STATE Respondent

Coram: YEKISO J

Delivered: 24 October 2005

Summary:
Plea and sentence agreement in terms of section 105A of the Criminal Procedure Act 51 of 1977: Procedure to be followed once plea and sentence agreement is disclosed to the judicial officer – judicial officers, in determining whether the accused is a party to the plea and sentence agreement not to be limited to the provisions of sub-section (6)(a) – judicial officers need to go further than that as for an example, seeking confirmation of signature of the agreement and sentence imposed.

REVIEW JUDGEMENT DELIVERED: 24 OCTOBER 2005

YEKISO, J

[1] This matter concerns a referral for review of plea and sentencing proceedings held in the regional court, Cape Town arising from a plea and sentence agreement concluded between the accused and the Prosecuting Authority. The accused seeks to have the proceedings reviewed on a number of grounds set out in a document referred to as a notice of review ostensibly drawn by the accused in person. The grounds on which the accused seeks to have the proceedings reviewed and set aside are restated in paragraph [6] of this judgment. The proposed review is at the instance of Mr Paul Taylor who was the accused person in the plea and sentencing proceeding sought to be reviewed. Although Taylor, for all practical purposes, is the applicant in the matter under review, I shall throughout this judgment, refer to him as the accused.

[2] On 29 March 2004 and pursuant to a plea and sentence agreement ("the agreement") referred to in the preceding paragraph and concluded in terms of section 105A of the Criminal Procedure Act, 51 of 1977 ("the Act"), the accused was convicted of 14 counts of theft of a total amount of R

499,079.21 allegedly stolen from Spier Properties (Pty) Ltd and/or Gregory Lister. At the time of the alleged commission of the offences, the accused was employed by the complainant, Spier Properties (Pty) Ltd, as an accountant.

[3] Section 105A referred to in the preceding paragraph was inserted into the Act by section 2 of the Criminal Procedure Second Amendment Act, 62 of 2001 and came into operation on 14 December 2001. A schedule to the Charge Sheet in the regional court indicates that the offences of which the accused was convicted were committed during the period 19 September 2002 and 4 March 2003. Arising from these charges, the accused appeared for trial in the regional court, Cape Town on 29 March 2004. In accordance with the plea and sentence agreement, the accused was sentenced to five (5) years imprisonment. In addition to the sentence so imposed, the accused was ordered to pay the complainant compensation in an amount of R 300,000.00. The accused was legally represented throughout the proceedings.

[4] On 2 December 2004 and under cover of a “Review Case” form (Form J4), signed by Ms P Naidoo, regional magistrate, Cape Town, the

accused caused the record of the plea and sentence proceedings to be referred to this Court, ostensibly for review, on basis of a number of grounds set out in paragraph [6] of this judgment. The record of the proceedings was accompanied by further documents purporting to be a notice of review, an affidavit setting out the basis of the accused's complaint and a further document purporting to be heads of argument.

[5] Once the record, together with the accompanying documentation came before me, I noted that the proposed review was not an automatic review contemplated in section 302 of the Act, as the accused was legally represented throughout the proceedings, nor a review in terms of section 304(1) of the Act, as the proposed review was not at the instance of the magistrate who presided at the trial. A response by the magistrate to my query confirms that the proposed review is not at her instance but that of the accused.

[6] Be that as it may, the accused seeks to have the plea and sentence proceedings reviewed and set aside on a number of grounds set out, as it were, in his notice of review and these are:

"1. The learned magistrate erred or misdirected himself and/or failed to

ensure and protect the constitutional and legal rights of the applicant and failed to ensure due and proper process and procedure *"inter alia"* in that:

2. He failed to ensure that the procedure at the trial was just, fair, reasonable and that it complied with all the accepted principles of justice and equity. In particular, he failed to ensure that the applicant was fully informed of all his rights and the consequences of the section 105A agreement he had entered into prior to the conviction and sentence in terms thereof.
3. He failed to ensure that the accused was adequately represented and fully and correctly informed of the consequences of the section 105A agreement, including the loss of any right to appeal against the sentence imposed in terms thereof.
4. He failed to ensure and protect the against the incorrect, inaccurate and misleading advice given to the by his legal representative and in particular, those relating to the section 105A agreement, its consequences and the effects of any subsequent direct imprisonment."

[7] Having noted that the proposed review neither falls in the categories of a review in terms of section 302 nor section 304(1) of the Act, I addressed a letter to the magistrate, Ms Naidoo, who presided in the accused's trial, ascertaining from her specifically on what basis the matter was being referred to this Court for review. I also elicited comment from her on the accused's grounds for the proposed review. The magistrate's

brief response is that once she was informed of the plea and sentence agreement, she followed the procedure set out in section 105A(6)(a) and (8) of the Act and concluded the trial on that basis. The magistrate confirms in her response that the proposed review is not at her instance but at the instance of the accused in person.

[8] I similarly addressed a letter to the Director of Public Prosecutions inviting comment from that institution as regards the procedure adopted by the accused in initiating the proposed review and, in particular, whether in his or her view, there are any irregularities *ex facie* the record or any other ground warranting a review of the matter. I am grateful to *Ms Tsheole* of the office of the Director of Public Prosecutions for her incisive comment in this regard. *Ms Tsheole* comments that she could not discern any irregularities *ex facie* the record or any other ground warranting the review of the proceedings or a review of the plea and sentence agreement itself. She further notes in her comment that the accused, together with his legal representative, appended their signatures to the agreement and so did the state prosecutor, who had authority to conclude the agreements of this nature on behalf of the Prosecuting Authority, also sign the agreement.

[9] Annexed to the letter from the Director of Public Prosecutions are the affidavits of Godfrey Reed, the attorney who represented the accused at trial, an affidavit by Colin Michael Greenwood, a senior state prosecutor authorized to conclude plea and sentence agreements on behalf of the Prosecuting Authority, and a further affidavit by Johannes Michiel De Kock Knipe, the prosecutor who dealt with the matter at trial. In these affidavits all the aforementioned officials dispute the accused's averments which form the basis of his complaint and any other conceivable irregularity either in the conclusion of the agreement itself or any irregularity in the proceedings themselves. In fairness to the accused, I directed that the affidavits by the aforementioned persons be forwarded to him at Goodwood Correctional Centre, where the accused is currently serving sentence, inviting him to comment on the contents of the affidavits by the aforementioned persons. The comment received from the accused does not take the matter any further. He merely persists with the averments contained in his founding affidavit.

[10] The plea and sentence agreement concluded between the accused and the Prosecution Authority is entitled "Agreement in terms of section 105A of Act 51 of 1977 (as amended)". The agreement is signed by

Colin Michael Greenwood, a senior state prosecutor, magistrate's court, Cape Town. The agreement is also signed by the accused in person and Godfrey Reed, the accused's legal representative at the time the agreement was concluded. The agreement consists of three pages. The last page is signed by each party to the agreement as well as the accused's legal representative whilst the first two pages have been initialed by all the parties involved. This agreement was later handed in as an exhibit and formed part of the record of the proceedings.

[11] Once the contents of the agreement were disclosed to the magistrate, she had to act in terms of section 105A(6)(a) and (8) of the Act. Sub-section 6(a) deals with an enquiry which should be conducted by the court to satisfy itself that the agreement was concluded by the accused freely and voluntarily, in his sound and sober senses, and without having been unduly influenced; that the accused confirms the facts and admissions set out in the agreement and that he has agreed to plead guilty. Sub-section (8) provides that the court has to satisfy itself that the sentence agreement is just before convicting and sentencing the accused. (See *S v Armugga & Others 2005(2) SACR 259* at 261i-j and 262a-b)

[12] Section 105A(6)(a) of the Act provides:

> "(6)(a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether –
>
> (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
>
> (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and
>
> (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced."

Section 105A(8), in turn, provides:

> ""(8) If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement."

This is the procedure the court has to follow once it has been informed of the conclusion of the plea and sentence agreement.

[13] What follows is what the record shows once the magistrate was informed of the conclusion of the plea and sentence agreement:

> "COURT: Firstly I want to ask you, have you entered into an agreement in

terms of this act?

ACCUSED: Yes Your Worship."

Further, in lines 24 to 30 at the same page of the record, the following is recorded:

"COURT: Do you understand the charge against you?

ACCUSED: Yes Your Worship.

COURT You are charged with 14 counts of theft and the ultimate amount involved is R4 999.79 (indistinct) and R59,21?

CHARGE: THEFT

ACCUSED: Yes Your Worship."

In lines 4 and 5 at p3 of the record the following is recorded:

"COURT: Your plea?

ACCUSED: Guilty."

And finally in lines 19 to 30 at p3 of the record and lines 1 to 4 at p4 of the record the following is recorded:

"COURT: Did you look at the statement that has been handed in?

ACCUSED: Yes your Worship.

COURT: And I'll have to ask you a few questions in connection with this statement. Do you confirm the contents of this agreement and all the admissions that you've made herein?

ACCUSED: Yes your Worship.

COURT: And you agree with all the facts of the case as disclosed here as to the manner in which you've committed these offences of theft?

ACCUSED: Yes your Worship"

COURT: And you entered into this agreement, freely and voluntarily in your sound and sober senses without having been influenced thereto?

ACCUSED: Yes your Worship."

The magistrate goes on to point out at page 5 of the record that she is satisfied that the sentence agreement is just and went on to impose the sentence in accordance with the sentence agreement.

[14] I have already made a point in paragraph [5] of this judgment that the accused's proposed review neither falls in the category of a review in terms of section 302 of the Act nor section 304(1) of the Act. The question which arises is, if the matter is not reviewable in terms of section 302 and section 304(1) of the Act, is the matter reviewable on any other ground? The action of the magistrate, in imposing the sentence as she did, constitutes a judicial function of a judicial officer contemplated in section 1(b)(ee) of the Promotion of Administrative Justice Act, 3 of 2000, so that, if the proceedings are susceptible to review, they are not reviewable in terms

of the Promotion of Administrative Justice Act. The judicial functions of a judicial officer of a court referred to in section 166 of the Constitution of the Republic of South Africa, 1996, are excluded from the definition of administrative action as defined in section 1 of the Promotion of Administrative Justice Act, so that if the matter is reviewable, it is not reviewable in terms of the Promotion of Administrative Justice Act.

[15] Section 24 of the Supreme Court Act, 59 of 1959 provides another possible statutory basis for review on specified grounds set out in that section. Section 24 of the Supreme Court Act provides:

> **"24 Grounds of review of proceedings of inferior courts**
>
> (1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are –
>
> (a) absence of jurisdiction on the part of the court;
>
> (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or s 17, 20 or 21 (insofar as it relates to the aforementioned offences) of ch 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the 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.

(2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts."

[16] It has been suggested by the legal commentators that the power of review conferred upon the High Court by section 24 of the Supreme Court Act should be interpreted in the light of the more comprehensive approach reflected in section 173 of the Constitution. (See Du Toit *et al*: *Commentary on the Criminal Procedure Act.* 30-2 [Service 34, 2005*]*. There has further been suggested that the grounds for review in criminal cases provided for in the Criminal Procedure Act and the Supreme Court Act compliment one another so that if the matter is not reviewable in terms of the Criminal Procedure Act, the alternative ground of review would be that provided for in section 24 of the Supreme Court Act.

[17] Section 173 of the Constitution provides as follows:

"173 Inherent power

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

The approach suggested in section 173 of the Constitution is indeed

comprehensive for it allows the exercise of the Courts' inherent power, taking into account the interests of justice, without being subjected to any form of statutory constraint.

[18] At the cost of repeating myself, the accused's basis of a complaint is that the magistrate, in broad terms, failed to ensure and protect the accused's constitutional rights. One would assume that the rights referred to in this complaint are the cluster of fair trial rights listed in section 35(3) of the Constitution which are in themselves by no means exhaustive. The accused's right to a fair trial in the instance of this matter would also include those rights contemplated in section 105A(6)(a) of the Act, which enjoins the judicial officer to follow the procedure set out in that section once there has been a disclosure of the existence of a plea and sentence agreement. The duty contemplated in subsection (6)(a) involves confirmation by the judicial officer if the accused is indeed a party to the plea and sentence agreement; admission by the accused that he admits the allegations in the charge sheet; that he has agreed to plead guilty and that the agreement was concluded freely and voluntarily in his sound and sober senses and without having been unduly influenced. All that has been said in this paragraph is exactly what the magistrate did as the

portions of the record cited in paragraph [13] of this judgment indicate.

[19] I would, however, add that the judicial officer, in enquiring into the conclusion of the agreement, need not limit himself/herself to the provisions of sub-section 6(a) of section 105A of the Act. One could go further to confirm with the accused the latter's signature on the agreement and that of his legal representative, if the accused is legally represented, and also confirm with the accused the sentence proposed and any condition attached thereto.

[20] As regards the procedure at trial, I cannot see how the proceedings and the procedure followed could be said not to have been just, fair, reasonable and how it failed to comply with the accepted principles of justice as the accused seeks to contend. The accused was represented by an attorney who had negotiated a plea and sentence agreement on his behalf. The signature of the agreement by the accused signifies consent on his part that he was satisfied with the terms and conditions of the agreement. Moreover the accused confirmed that he was aware of the contents of the agreement. Once the magistrate was satisfied that the

sentence proposed in the agreement was just, she proceeded to impose the sentence in accordance with the agreement. The accused cannot now, once the shoe starts pinching, begin to complain about the procedure followed at trial and the performance of his attorney. I cannot, on basis of what appears on record, conclude that the proceedings were irregular or in any way impeachable as the accused seeks to contend. As regards legal representation, there is similarly no indication on record to justify a conclusion, or even an inference for that matter, that the accused was not adequately represented.

[21] I have already made a point elsewhere in this judgment that I cannot imagine how the magistrate could have failed to protect the accused against any conceivable incorrect, inaccurate and misleading advice. The accused confirmed, in an open court, that he is a party to the agreement, that he was aware of the contents thereof and that he was not unduly influenced to conclude the agreement. I thus cannot find, be it on the basis of section 24 of the Supreme Court Act or on the basis of the approach reflected in section 173 of the Constitution that any of the accused's fair trial rights were violated nor could I find any gross irregularity in the proceedings under review.

[22] In my view the magistrate followed the prescribed procedure once the plea and sentence agreement was disclosed; that the accused was adequately represented and that there is nothing, *ex facie* the record, to suggest that the proceedings were in any way irregular. It is thus my view that the accused has failed to make out a case for the relief he seeks.

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N J YEKISO, J

I agree.

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A H
VELDHUIZEN, J