Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case number: SS116/07

In the matter between:

THE STATE

versus

M MTAKATI AND 9 (NINE) OTHERS

REASONS FOR ORDER IN TERMS OF S147 OF THE CPA

NDITA, J:

[1] The accused persons in this matter are facing the following counts:

1. Robbery with aggravating circumstances;
2. Robbery with aggravating circumstances;
3. Murder;
4. Attempted robbery with aggravating circumstances;
5. Attempted robbery with aggravating circumstances;
6. Robbery with aggravating circumstances;
7. Robbery with aggravating circumstances;
8. Attempted murder;

9. Attempted murder;

10. Attempted murder;

11. Attempted murder;

12. Unlawful possession of firearms;

13. Unlawful possession of ammunition.

The trial commenced on 25 February 2009 and the court was constituted of the presiding judge and two assessors, Mr D Grootboom and Mr L R Godla, a local attorney and director of the legal firm, Godla & Partners Inc.

[2] After the trial had continued for six (6) terms and two months, Mr Godla in a letter received on 2 March 2011, advised the court that he is no longer able to continue as an assessor as he undertook to so serve on the understanding that the trial would be finalised within the estimated period of two terms, and that because the trial has continued for an additional six terms, his legal practice and livelihood had been severely compromised. It is necessary to refer to a portion of Mr Godla's letter:

"After the first two terms lapsed I was concerned for my legal practice since I am a practicing attorney and director of Godla and Partners Inc. I however elected to continue to serve as an assessor for two more terms on the basis that it is indeed a criminal matter which may take sometimes a little longer than what management at any high court may honestly predict.

The matter has now run for more than four terms and approximately two years. My legal practice and livelihood has been compromised to the extent that:

1. *Complaints have been laid against me with the Law Society in relation to my commitment as an Assessor.*

2. *Magistrates constantly complain about my unavailability for matters which are on the court roll for me to attend but for my commitment as an Assessor.*
3. *Clients demanding myself to attend to their matters have withdrawn their clientele but for my commitment as an Assessor.*
4. *Income at Godla and Partners Inc. Has been severely affected to the extent that we are sometimes not able to:*
   (a) *Pay staff salaries*
   (b) *Pay office rent.*
   (c) *Pay instalments on business vehicles.*
   (d) *Pay personal bonds of houses.*
   (e) *Pay finance instalments on personal vehicles.*

   ...

I furthermore wish to refer My Lady to the S v Jaipal 2005 (1) SACR 215 (CC) which confirms the importance of giving due regard to the dignity, status and needs of assessors less an irregularity may be sited promoting the idea of an unfair trial. The latter being applicable insofar as my present circumstances affects my dignity, personal status and personal needs so as to bring into question my commitment first and foremost as an assessor and member of of the Honourable Court which may cause the present trial irreparable harm.

It is also my humble contention that the decision in S v Khumalo and Others 2006 (9) BCLR 1117 (N) supports my advancement of the above circumstances as constituting such as to have myself to be excused in the opinion of yourself Honourable Justice Ndita from further assessor duties in this matter as myself having become "unavailable to act as an assessor" under the present conditions and circumstances."

[3] It is trite law that an accused person has the right to have the trial completed before the court as it was composed at its outset. The letter from Mr Godla therefore brought to the fore the question of the applicability s 147 of the Criminal Procedure Act 51 of 1977. The section provides as follows:

"***147 Death of incapacity of assessor***

(1) If an assessor dies or, in the opinion of the presiding judge, has become unable to act as assessor at any time during a trial, the presiding judge may direct -

(a) That the trial proceed before the remaining member or members of the court; or

(b) That the trial start de novo, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as an assessor

[4] The contents of the letter were brought to the attention of the both counsel for the defence and the state. On 3 March 2011, I invited all parties to make submissions regarding Mr Godla's supposed inability to further assess in the criminal trial in an open court.

[5] The case for the prosecution was that the unfortunate impact of the trial on Mr Godla's legal practice and livelihood is regrettable, however, there is judicial harmony that a mere desire to be discharged on compelling personal grounds does not amount to inability to act as envisaged in section 147 (1). Furthermore, Mr Godla's letter revealed no more than compelling personal grounds. Mr Barnard, who represented accused no 1 submitted that it would not be competent for this court to release Mr Godla on the basis of the reasons advanced as the law is clear that he must be unable to act. All remaining counsel shared this view. However, Mr Van Rensburg who appeared for accused no 3, submitted that although the assessor undertook to serve well aware of the possibility of undue delays, when regard is had to

his very delicate circumstances, it would be undesirable to force him to continue serving as such. Mr Base, who represented accused no 8 was of the opinion that the decision in **Gqeba**, *infra*, does pave the way for the court to declare Mr Godla incapable of functioning as an assessor in the circumstances. Mr Oosthuisen, who represented accused no 10, aligned himself with the submissions already made relating to the legal position but added that it was undesirable to continue the trial with Mr Godla under the circumstances. All defence counsel were *ad idem* that should the court find that the assessor is unable to serve; it would violate the accused's right to a speedy trial if the proceedings were to start *de novo*.

The Ruling

[6] After hearing submissions from both the defence and the state, and carefully considering all the relevant factors as well as the applicable law, I made a direction in terms of s 147 (1) (a) of the Act and reserved the reasons thereof. I herewith provide my reasons for the ruling.

The Law

[7] An assessor is appointed by a judge in terms of section 145 (2) of the Act and can only be discharged if he/ she, in the opinion of the presiding judge becomes unable to act as assessor at any time during the trial. The principles upon which the application of s 147 is predicated have been the subject of numerous judicial dicta. More particularly the meaning of the word "unable" as envisaged in the relevant proviso, has also been considered and explained by the courts. In **S v Gqeba** 1989 (3) SA 712 the court held that the

term was wide enough to cover physical and mental inability. It was further held that severe emotional distress if prolonged might render an assessor unable to act, but a mere desire to be discharged on compelling personal grounds does not amount to inability to act unless the trial judge forms an opinion that the assessor is incapable of functioning as such. The Appellate Division (as it then was) considered the meaning of this term in **S v Malindi and Others** 1990 (1) SA 962 A, and held as follows :

"The word "unable" in the context of s 147 (1) conveys to my mind an actual inability to perform the function of acting as an assessor. Such an inability could derive from an inherent physical inability or mental condition or possibly also a situation which physically prevented the assessor from attending the trial such as for example indefinite detention here or in the foreign country. "

Similarly, in **S v Matji** 2004 (1) SACR 261, the court reiterated that where an assessor exhibits a lack of interest, it cannot be said that he is unable to act.

[8] The consistent approach of the courts to the release of an assessor is understandable as the issue of an accused having his case considered by a properly constituted forum is crucial and conflated with the right to a fair trial. Indeed it would be most undesirable to have assessors willy-nilly deciding to be excused from trial when it suited their purpose to serve. Neither should an accused be unnecessarily deprived of the benefits and safeguards arising out of a trial with a judge and two assessors. However, this issue is not only a matter of form, but also of substance as well because two assessors can overrule a judge on the merits. Each matter should of course be decided on its merits. In the present matter, it is not a question of Mr Godla willy-nilly deciding to excuse himself, the substantive reasons he has submitted clearly

demonstrate that a lot of injustice will result to this person, legal firm and clients whose cases he cannot attend to. For all it is worth, Mr Godla has, to his detriment served far more than the estimated duration of the trial. That to his credit shows commitment. It is not only a question of his compelling personal reasons but also about justice being denied or delayed to numerous clients whose cases he cannot attend.

Analysis

[9] Mr Godla intimated that his incapacity to continue serving arises from an error in the assessment of the trial duration. Whilst an assessor is entitled to rely on such assessment by the State, (which is expected to have all the information necessary to make a proper and informed estimate of the period for which a trial is likely to run), it has become common knowledge that criminal trials have surprise twists and turns which usually have an impact on their duration. After all, the State in this matter provided only an estimate, albeit unreasonable, given the fact that the accused are facing thirteen counts arising at different scenes and are represented by ten different counsels. Notwithstanding the estimate, nothing precluded the assessor from seeking further information, for example, the number of witnesses the prosecution intends to lead, and whether there is a likelihood of holding trials within a trial before agreeing to serve.

[10] Mr Godla's letter clearly demonstrates that due to the compelling circumstances he has alluded to in his letter, his commitment to the trial as a

member of the court is questionable and may negatively impact on the trial itself. To this end, he states that:

"*The latter being applicable insofar as my present circumstances affects my dignity, personal status and personal needs so as to bring into question my commitment first and foremost as an assessor and member of the Honourable Court which may cause the present trial irreparable harm.*

This brings to mind the question of whether in the circumstances such a person is able to apply his mind fully to the facts and the evidence tendered.

[11] Section 35 (3) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides that every accused person has a right to a fair trial. In my view, the substantive right to a fair trial demands from a trier of facts a complete presence of the mind and being alive to the facts presented at trial. Whilst the *dicta* referred to above reflect a commitment by the courts to the strict enforcement of procedural safeguards aimed at ensuring a fair trial, it is in my mind doubtful that in the circumstances of this case, the accused's right to a fair trial will be better served by the continued presence of an assessor whose commitment to the trial is questionable.

[12] Kentridge AJ in **S v Zuma** 1995 (2) SA 642 (CC) at 651 para 16 said:

"The right to a fair trial ... is broader than the specific rights set out ... It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force... section 25(3) has required criminal trials to be conducted with ... "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions".

[13] When regard is had to the notion of basic fairness and justice, I am not of the view that an assessor who lacks commitment to a trial is capable of

delivering justice to an accused. This renders him incapable of functioning as such. Whilst acknowledging that there has been consistency in judicial decisions that the word "unable" relates to the assessor's physical and mental inability, I am of a firm view that the dictum in **Zuma**, *supra*, justifies that the scope of section 147 include eventualities such as inability of the part of an assessor to deliver justice. In my opinion, Mr Godla is unable to act as an assessor due to his inability to deliver justice to the accused in these proceedings. Thus, I made the direction that the assessor in this matter was unable to continue with the trial.

Directions regarding further conduct of the proceedings

[14] I have indicated earlier on that all the accused persons, through their counsels indicated that should the court declare that Mr Godla is unable to continue acting as an assessor, starting the proceedings *de novo* would be a violation of their right to a speedy trial. It is so that nothing much turns on the consent of the accused persons that the trial continue in the absence of Mr Godla, save to indicate that they had been consulted. Such consent does not cure defects in the proceedings, if any. (See **S v Price** 1955 (1) SA 219 AD at 223 D). The state on other hand left it to the discretion of the court to consider whether it would be in the interest of justice to direct that the trial start *de novo* or that the proceedings should continue with the remaining assessor.

[15] The main consideration at this stage is whether the continuance of the trial with only one assessor sitting threatens the accused persons' right to a fair trial. Tshabalala J in **S v Khumalo** 2006 (1) SACR 447 extensively

considered the limitation of an accused person rights to a fair trial where one assessor is unable to continue serving and at page 160 *b* -461 *b* held thus:

"To my mind, the fact that there is only one assessor should not be a threat. Section 146 (1) provides thus:

'A judge presiding at a criminal trial in a superior court shall-

(a) where he decides any question of law, including any question under paragraph (c) of the proviso to section 145(4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision;

(b) whether he sits with or without an assessor, give the reasons for the decision or finding of a court upon any question of fact;

(c) where he sits with assessors, give reasons for the decision or finding of the court upon the question referred to paragraph *(b)* of the proviso to s 145 (4);

(d) where he sits with assessors and there is a difference of opinion upon any question of fact or upon the question referred to in paragraph (b) of the proviso to section 145 (4), give the reasons for the decision or finding of the member of the court who is in the minority or where the presiding judge sits with only one assessor of such an assessor.'

...

This obligation is even more pressing, imperative and crucial in the case like the one we are dealing with where there were two assessors at the beginning of the trial. It is on these reasons that the accused (and even the superior court) will have material from which it will ascertain whether the trial Court overlooked important material or misdirected itself.[1]

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[1] S *v Masuku and Others* Above fn 32 at 912H. In this case, the Appellate Division (as it then was) had to reconsider the question of extenuating circumstances because of the failure of the trial Court to give reasons for its majority finding on extenuating circumstances. Again in S *v Kalogoropoulos* 1993 (1) SACR 12 (A), the trial Judge failed to give reasons for the decision or finding of he majority of the court upon the question of fact. Two assessors had reached different verdicts to those reached by the Judge on all but one count. The Appellate Division (as it then was) had to consider the appellant's defence afresh in the light of the evidence on record.

The supposed threat against the right to fair trial cannot be said to be invasive in the circumstances of this case. I emphasize here that if the Judge does not agree with the assessor, reasons of such findings will be recorded and the defendants will be in a better position to ascertain the nature of the proceedings and reasons for all conclusions on the facts and the law. This cannot be said to be more invasive the infringement on the accused right to a fair trial if it is balanced against the competing societal interest in promoting the efficient combating of crime".

[16] It is so that the trial has now been running for 200 days and a total of 60 witnesses have given evidence. The accused persons have been in custody awaiting trial for approximately three years. They were refused bail. Like in the **Khumalo** case, I too, am of the view that on the facts of this case, there is no glaring disproportion in allowing a trial which has dragged on for such a long time to proceed with one assessor. On this basis, I directed that the proceedings should continue in the presence of one assessor, Mr Grootboom.

NDITA; J