Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Coram: Veldhuizen, J *et* Henney, J

[*REPORTABLE*]

CASE NO: 20899/14

In the matter between:

WAYNE ANTHONY WICKHAM	Applicant
And	
THE MAGISTRATE, STELLENBOSCH	First Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
ANNIKA SLABBERT	Fourth Respondent

JUDGMENT: 14 OCTOBER 2015

HENNEY, J:

Introduction

[1] This is an application wherein the applicant seeks an order:

1.1 reviewing and setting aside the conviction and sentence imposed by the First Respondent on the Fourth Respondent in the Magistrate's Court Stellenbosch on 19 September 2014 under case no: A125/2014;

1.2 remitting the matter to the Magistrate's Court at Stellenbosch for hearing *de novo* before another presiding officer;

1.3 directing the Second Respondent and the Magistrate who presides in the resumed proceedings to permit the Applicant to adduce evidence in aggravation of sentence, including, but not limited to:

1.3.1 the applicant testifying in aggravation of sentence and providing an oral victim impact statement and/or;

1.3.2 the applicant submitting to court a written victim impact statement; and

1.4 directing the Second Respondent, in the event of a conviction in the resumed proceedings, to place before the court evidence of the aggravating circumstances relevant to the offence, including, but not limited to, the evidence of the accident reconstruction experts, Prof T P Dreyer ("Dreyer") and Mr S Bezuidenhout ("Bezuidenhout"), who have compiled these reports, dated 31 October 2012 and 12 August 2013 respectively, in respect of the collision.

[2] Adv Webster SC appeared for the Applicant. Adv Downer SC together with Adv Galloway appeared for the Second Respondent. There was no appearance for

the First and Third Respondents and they abided the decision of this court. Adv Botha appeared for the Fourth Respondent.

Background

[3] On 10 February 2012, the Applicant's 18 year old son, Cole, was a passenger in a vehicle driven by the Fourth Respondent. The vehicle driven and owned by the Fourth Respondent, a Toyota Yaris ("Toyota"), with registration number [CA……..], at or near Nietvoorbij Farm on the R44, collided with a stationary motor vehicle, a Ford Sapphire ("Ford") with registration number [CL……..]. Apart from the Applicant's son and the Fourth Respondent, there were 4 other persons in the vehicle. As a result of the collision, the Applicant's son was injured and subsequently passed away. An occupant, one Jan-Hendrik Matthee, in the Ford, into which the Fourth Respondent's car collided was also injured and later died. The Second Respondent charged the Fourth Respondent in the Magistrate's Court at Stellenbosch with 2 counts of culpable homicide arising out of the incident.

[4] The Fourth Respondent entered into a plea and sentence agreement with the Second Respondent in terms of the provisions of section 105A of the Criminal Procedure Act 51 of 1977 ("the Act") on both counts. In the plea and sentence agreement the Fourth Respondent admitted that she was negligent based on the fact that while she was driving, she was chatting with her friends and did not give the necessary attention or keep a proper lookout for other vehicles on the road. She then suddenly noticed a stationary vehicle, the Ford , in front of her vehicle, parked

on the road surface. She attempted to swerve and tried to stop, but the presence of vehicles in the neighbouring lane prevented this.

[5] As a result of this, she collided with the Ford. She further admitted that the Applicant's son, Cole, as well as Jan-Hendrik Matthee, the driver of the Ford, sustained several injuries which resulted in them passing away. She admitted that a reasonable person in her position would have foreseen that he/she might cause a collision should he/she not take the necessary care. She further admitted that had she given the necessary attention and kept a proper lookout, she could have avoided the collision and that she thus caused the death of the deceased unlawfully and negligently.

[6] In the sentencing agreement between the parties, Second and Fourth Respondents agreed on the following aggravating factors:

1) Two persons lost their lives due to the Fourth Respondent's negligence: Cole Anthony Wickham, who was a young man in the prime of his life, and Jan-Hendrik Matthee, who was a married man with a family.

2) The effect of the Fourth Respondent's negligence had a negative effect on the lives of the families of the deceased.

3) Several other persons (in the vehicle of the accused and the deceased) were exposed to danger, due to the negligence of the accused.

4) The prevalence of crimes where the use of a motor vehicle plays a role, i.e. collisions and the death of road users, are increasing in the jurisdiction of the court.

5) The Second and Fourth Respondents agreed on the following mitigating factors:

(a) The Fourth Respondent is 23 years old and has passed Grade 12 at school. She has obtained a BA degree in Social Dynamics (2009 – 2011) and a post graduate diploma in marketing (BCom 2012), as well as a further post graduate diploma in 2013.

(b) She is employed as an Accounts Manager at a marketing agency and earned R8 970,00 per month. She is single and has no children. She had no previous convictions.

(c) She received psychiatric treatment as a result of the incident and the guilt she carries in that her conduct led to the death of two people. She also developed post traumatic depression and almost stopped her studies. Her psychological recovery was delayed due to several blaming messages and comments put on her Facebook page by the family and friends of the deceased, to the extent that she eventually shut her page down.

(d) She admitted the seriousness of the crimes and has remorse and thus pleaded guilty. Her remorse is such that she still has to this day (day of sentence) strong feelings of guilt.

[7] The Second and Fourth Respondents agreed that both charges be taken as one for the purposes of sentence and the court imposed a sentence of eighteen (18) months' correctional supervision in terms of the provisions of Section 276(1)(h) of the Act, subject to certain conditions which I omit because it is not relevant to the issues to be decided. In addition to this sentence a further sentence of a fine of Ten thousand rand (R10 000,00) or twelve (12) months' imprisonment, which sentence was wholly suspended for a period of three (3) years on condition that the accused is not convicted of culpable homicide in respect of which negligent driving of a motor vehicle is an element, committed during the period of suspension. It is common cause that the Applicant was informed by the Second Respondent about the fact that it intended to enter into a plea and sentence agreement with the Fourth Respondent. The Second Respondent also informed the Applicant of and gave him a copy of the proposed Plea and Sentence Agreement.

The Applicant's Complaint

[8] The Applicant, in representations made to the Second Respondent and in this court, argued that the Plea and Sentence Agreement was unjust and not in the interests of justice on the following grounds:

a) That as parents of Cole, they objected to the proposed plea and sentence agreement;

b) That it failed to address the extent of the negligence on the part of the Fourth Respondent, and to properly acknowledge the speed at which the Fourth Respondent had driven and the severity of the collision; and

c) That the personal circumstances of the Fourth Respondent had been over-emphasized, particularly if regard was had to the fact that she had not shown any remorse or accepted the seriousness of her actions.

[9] The Applicant further states that they pertinently stated at the time, when the court was called upon to consider whether the proposed sentence was in the Plea and Sentence Agreement and before it be accepted by the court, that it was their request that at least he or his wife be granted the opportunity to address the court on the devastating consequences the conduct of the Fourth Respondent had on the family and would continue to have for the rest of their lives.

[10] He further stated that on 3 July 2014, he, together with his attorney, met with Adv Galloway of the offices of the Director of Public Prosecutions ("DPP"). He once again voiced his objections to the Plea and Sentence Agreement. Adv Galloway expressed her misgivings about taking the case on trial and obtaining a conviction in the absence of a plea and sentence agreement. Applicant said he disagreed and indicated that there was a strong case to prove reckless conduct on the part of the Fourth Respondent. Applicant said, based on the contents of the docket, the recklessness of the Fourth Respondent is based on the following:

10.1 A Constable Rinquest said that he had ascertained from the passengers of the Ford (stationary vehicle) that the Toyota driven by the Fourth Respondent had approached at speed.

10.2 The Fourth Respondent had explained to the police that she had not seen the Ford in the road ahead of her. She attempted to apply brakes but the vehicle collided with the rear of the stationary vehicle.

10.3 Although the police could not discern whether the Fourth Respondent had been under the influence of alcohol, he found a Smirnoff Storm bottle in the right rear door of the vehicle.

10.4 Constable Rhodes, who also attended the scene, had been advised by the occupants of the Ford after they had left the vehicle "*toe kom 'n voertuig vinnig in hulle rigting aangejaag en stamp hulle voertuig in die linker kantse baan*".

10.5 The same Constable Rhodes had been advised by the Fourth Respondent that she had not seen the vehicle in the road ahead of her and had tried to brake, but had to swerve, and had struck the Ford from behind. Rhodes was also unable to determine whether the Fourth Respondent had been under the influence of liquor but confirmed that he found an empty Smirnoff Storm bottle in the right rear door of the vehicle.

10.6 The Applicant also referred to a statement of the wife, Theresa, of the other deceased. She stated that the second deceased had been the driver in the Ford. He had stopped at the road side, passengers had left the vehicle, leaving

the deceased behind the wheel, with the engine running, the driving lights and hazards activated.

10.7 The Applicant further contends that the Second Respondent in concluding the Plea and Sentence Agreement ignored crucial evidence, relating to the likely dynamics of the collision, certain expert accident-reconstruction witnesses, which experts he had made available to the prosecution with a view to assisting them in their case.

10.8 The Applicant contends that both experts, Dreyer and Bezuidenhout concluded that prior to the collision the Fourth Respondent had driven her vehicle well in excess of the prevailing speed limit of 80km/h. According to the Applicant, Dreyer concluded that the likely speed of the Toyota at the time of the collision with the Ford had been approximately 130km/h on the basis of the coefficient of friction of 0,5[1]. Applying unrealistically conservative friction coefficients of 0,4 and 0,3, he determined the respective speeds of the Toyota driven by the Respondent at the time of the impact to have been 118 km/h and 102 km/h.

10.9 Bezuidenhout on the other hand found the coefficient of friction utilized by Dreyer to be conservative and concluded that the speed of the Toyota at the time of the collision might have been as much as 163km per hour based on the same calculations of Dreyer but utilizing a different coefficient of friction.

[1] A **coefficient of friction** is a value that shows the relationship between the force of **friction** between two objects and the **normal force** between the objects (*https://simple.wikipedia.org/wiki)*.

10.10 The Applicant with the help of the experts took steps to determine the actual coefficient of friction of the roadway in question and after certain tests were conducted on the road surface of the scene. After determining the actual coefficient of function to be 1.00 and utilizing it in certain calculations it was indicated that the speed of the Toyota prior to the collision was between 147 and 155km per hour.

10.11 The Applicant asserted that as a result of these expert calculations as well as eye-witness accounts it was clear that the Toyota that was driven by the Fourth Respondent had been driven at a speed well in excess of the speed limit prior to the collision. The Applicant alleges that it is also clear from the reconstruction that the section of the roadway had been well illuminated by proper lights and that the approach to the stationary Ford vehicle would have offered the Fourth Respondent a clear and unimpeded for a considerable distance of 200m. The measurements and the width of the roadway also indicated that there would have been sufficient space for the Fourth Respondent to safely overtake the Ford had she kept a proper lookout.

10.12 The Applicant alleged that in the light of the above, the facts established that the Fourth Respondent had been reckless or at least in the alternative grossly negligent in the manner in which she drove. He further alleged not only did she drive at a speed well in excess of the speed limit, she also failed to keep a proper look out whilst driving an overloaded vehicle, in circumstances in which she had ample opportunity to have avoided colliding with the Ford.

[11] According to the Applicant these significant aggravating factors, as well as the Fourth Respondent's lack of demonstration of remorse, should have been placed before the court dealing with this matter as they would have impacted significantly on the sentence the court would have imposed. It had been incumbent on the prosecutor dealing with this matter to have placed these matters before court. However, in the proposed plea and sentence agreement there had been no reference at all to the speed at which the Toyota was travelling before the collision, or to the Fourth Respondent's failure to demonstrate remorse to the family of the first deceased.

[12] The Applicant submits that he had been engaged through his legal representatives with the prosecutor at an early stage and had done so continuously until the court proceedings on 19 February 2014, wherein the Fourth Respondent had been convicted on the basis of a plea and sentence agreement.

[13] During this time of interaction with the prosecuting authorities, he had made available the reports of the reconstruction experts and had offered their testimony as state witnesses and he also made himself available to testify. Following a protracted investigation, the Second Respondent eventually made a decision on 26 October 2013 to prosecute the Fourth Respondent on two charges of culpable homicide, alternatively, reckless / negligent driving.

[14] On 9 April 2014 he was contacted by a prosecutor at Paarl Regional Court to enquire whether he and his wife would find a plea and sentence agreement to be a suitable mechanism for disposal of the proceedings. The Applicant made it clear to

the prosecutor who contacted him that they did not approve such a course of action. Despite their objections it became apparent that the plea and sentence agreement was being pursued and the Applicant's attorney arranged to meet with the prosecutor in order to further advance these objections.

[15] The Applicant submits that he objected to such measures for the following reasons. No reference at all was made in the proposed agreement to the speed that the Fourth Respondent had travelled prior to the accident. Furthermore, the sentence proposed and eventually imposed was nothing more than a slap on the wrist in circumstances where their son had lost his life and the plea and sentence agreement did not take into account the seriousness of the offence and the manner in which it had been committed. Furthermore, at that stage the Fourth Respondent had not taken responsibility for her actions (and up to this point has still not done so) and that no effort had been made to contact him and his wife regarding their son's death, which had led them to having to find his body in the Stellenbosch morgue through their own efforts. This prompted the Applicant and his wife to make written representations to the Second Respondent wherein they expressed their opposition to the proposed plea and sentence agreement on the grounds as set out earlier.

[16] The Applicant and his wife made a further request that at least one of them be granted the opportunity to address the court that would be dealing with the plea and sentence agreement on the devastating consequences the conduct of the Fourth Respondent had had on their family and the rest of their lives, when it considered whether the sentence in the agreement was fair and just. Despite an initial

understanding between the Second Respondent and the Applicant that the latter would draft a victim impact statement stating his and his wife's objections to the plea and sentence agreement, they were advised on 1 September 2014 that the Second Respondent had taken a view that the Applicant's representations were not in accordance with the facts in the docket and that their objections as set out in the affidavit would not be attached to the section 105A agreement for consideration. On this point the Second Respondent stated that the statement did not qualify as a proper victim impact statement, and it suggested that the Applicant be available to testify should the court wish to hear them. This statement was never received by the court and did not form part of the plea and sentence proceedings. The Applicant was also not given an opportunity to testify at the proceedings.

[17] According to the Applicant he and his wife as victims were ultimately denied the right to participate in the plea and sentence proceedings before the First Respondent despite their eagerness to exercise their right to do so. During the proceedings on 19 September 2014, before the First Respondent, it was made clear from the outset that the First Respondent and his wife were opposed to the plea and sentence agreement. It was also placed on record by the prosecutor in court that the Applicant was present and willing to testify should the First Respondent exercise a discretion in terms of section 105A(7)(b)(i)(bb) of the Act. During the proceedings the Applicant's attorney made the First Respondent aware of his presence. He was given an opportunity to inform the court that he represented the victims of the accused in court and that he sought to exercise his client's rights in terms of the Victim's Charter and sought to hand in a victim impact statement on behalf of the Applicant.

[18] Both the prosecution as well as the Fourth Respondent's attorney were of the view that the Applicant had no standing in the proceedings and was not entitled to hand up papers or address the court. The Fourth Respondent's attorney took the view that he could not allow the affidavit to be handed in and that the document was not purely a victim impact statement but that the majority of the contents consisted of issues relating to the merits.

[19] The Applicant contends that the prosecution committed the following gross irregularities:

(a) Despite having a duty to do so, it failed to address in the plea and sentence agreement the significantly aggravating factor that the Fourth Respondent had travelled at an excessive speed significantly higher than the speed limit;

(b) It failed to attach the victim impact statement to the plea and sentence agreement after it had previously undertaken to do so.

(c) It adopted a view in the proceedings before the First Respondent which actively sought to exclude the Applicant's participation in the proceedings as a victim.

[20] In relation to the First Respondent, the Applicant submits that he committed the following gross irregularities during the proceedings:

(a) He decided that the Applicant had no *locus standi* to participate in the proceedings as a victim who had such a right in terms of the Victim's Charter;

(b) He failed to request sight of the victim impact statement despite being aware that the Applicant and his wife objected to the plea and sentence agreement, which resulted in him being uninformed of the impact of the crime on the victims.

(c) He failed to exercise his discretion in terms of section 105A(7)(b)(i)(bb) to hear the evidence of the Applicant or his wife despite being aware of the fact that they strongly objected to the sentence being imposed and the Applicant was present in court to testify.

(d) He concluded that the sentence agreement was just in the absence of hearing the objections and evidence regarding the impact of the crime on the victims, which meant he was not in a position to satisfy himself that the sentence was just.

[21] The Applicant further submitted that the Fourth Respondent's conduct in seeking to exclude the Applicant's participation in the proceedings was improper and misdirected. The Applicant further submits that the characterization by the Fourth Respondent of the victim impact statement that he sought to be handed in as consisting merely of issues relating to the merits and that it contained untruths was not an accurate portrayal thereof.

[22] The Applicant submits that the statement merely contains an expression of his outrage at the proposed plea and sentence agreement in the light of the enormity of the loss of their son and the devastating impact it had on their lives. This was part of an attempt by the Applicant to initiate a full and proper enquiry into the circumstances of the offence and in the light of these circumstances as indicated also to show that the propose sentence was wholly inadequate.

The Respondents' Case (Second and Fourth Respondents)

[23] Both the Second and Fourth Respondents contend that the Section 105A proceedings before the Magistrate were not irregular. The Fourth Respondent also raised the following points in limine. These are:

23.1 That the Section 105A proceedings are not reviewable;

23.2 That, in the event of the Court finding the Section 105A proceedings to be reviewable, the Applicant has no *locus standi* to bring this application (the Second Respondent also raised this point *in limine*); and

23.3 That the Applicant's failure to join Mrs Matthee, the widow of the other deceased, to these proceedings amounted to non-joinder.

[24] Mr Botha for the Fourth Respondent argued that for the court to find that the Applicant has *locus standi*, the Applicant would have to make out a case that he has a direct and substantial interest in the right that is the subject matter of the review. The difficulty according to Mr Botha that the Applicant has, is that if he has a direct and substantial interest in the issues involved and the order which the court might

make, so too would Mrs Matthee, the widow of the deceased in count 2. She should therefore have been joined as a party to these proceedings. I will deal with these aspects at a later stage, and also with the submissions made by Mr Botha with regards to these issues in section 105A proceedings.

The Respondents' argument regarding the merits of the application

[25] The Second Respondent contends that it became involved in this matter when the Applicant filed representations that Fourth Respondent be charged with murder in the High Court. He submits that after having considered the available evidence in the docket, the applicable case law and the representations made on behalf of the Applicant, it was decided not to accede to the representations to prosecute the Fourth Respondent on murder charges but rather to charge the Fourth Respondent on culpable homicide charges.

[26] It was later brought to the attention of the Second Respondent by the prosecutor in the lower court that negotiations in terms of Section 105A of the Act were being considered between the prosecutor and Fourth Respondent. As a result of this, in terms of the provisions of Section 105A(1)(b) of the Act both the Applicant and Matthee's widow were informed of the terms of the agreement.

[27] The Second Respondent denies that it or the First Respondent committed any irregularities and any submissions to that effect are without merit.

[28] Regarding the question whether the Fourth Respondent was reckless or grossly negligent, due to the fact that the Fourth Respondent drove at a speed in excess of the speed limit, the Second Respondent submitted the following:

a) 3 contradictory expert reports contained in the docket rendered proof of speed questionable.

b) No eye-witnesses indicated in their witness statements that the Fourth Respondent was speeding.

c) The Fourth Respondent did not and would not agree to include it as an aggravating factor. The prosecution were informed by the attorney of the Fourth Respondent that she had her own expert who disagreed with the state experts. As such, under the circumstances, speed could not have been included in the agreement.

d) The prosecutor's only choice was then, if it was thought to be important to prove speed, to abandon the plea agreement and proceed to trial, during which the contradictory experts could testify. The court's likely answer on this issue after a trial could not reasonably be estimated from the docket particularly in the light of the above.

e) Based on relevant case law and authority driving a vehicle at speed does not constitute gross negligence, let alone recklessness. Given the circumstances of this case, a finding that the Fourth Respondent was driving in excess of the speed limit would not have significantly affected the sentence even though it might be considered more aggravating than if she had not been speeding.

Such a finding however would ultimately not have been a weighty factor for the purposes of either conviction and sentence.

f) Given all the circumstances, the advantages to the prosecution, the victims and the public interests in securing a conviction and appropriate sentence and in avoiding a protracted trial and public acquittal convincingly outweighed the minor disadvantage of not testing the evidence regarding possible speeding.

[29] The Second Respondent argued that whilst the Applicant is of the view that the facts established recklessness or in the least gross negligence and that Fourth Respondent's negligence should have been expressed as such in the plea and sentence agreement, the fault required for culpable homicide is negligence and that it is not necessary or correct to express the element of negligence for the purpose of the charge or conviction in any other way.

[30] The Second Respondent further takes issue with the contention of the Applicant that the Fourth Respondent failed to demonstrate remorse to the Applicant and his family over the death of their son, Cole. According to the Second Respondent, the remorse that the Fourth Respondent exhibited in her plea and sentence agreement was manifested in many forms: she had to seek therapy, her studies were affected and she also pleaded guilty, and she did not seek to blame the deceased Matthee for parking on a public road at night or that his lights were off. According to Second Respondent the Fourth Respondent's apparent lack of remorse in her not directly contacting the Applicant or his family to inform them about his son's death, as contended by the Applicant, is without any foundation. This is

because this accusation of the Applicant ignores the fact that the Fourth Respondent and Cole were strangers who only met that evening. This alleged failure, given the facts and circumstances of this case, in any event remains a neutral factor which would not have played any significant role in the evaluation of remorse.

[31] Regarding the fact that the vehicle was overloaded, the Second Respondent argued that there was no evidence that this fact in fact contributed to the accident or that it should play a part in assessing the moral blameworthiness of the Fourth Respondent.

[32] In answer to the allegations that the Second Respondent failed to attach the victim impact statement to the plea and sentence agreement, the Second Respondent argued that the contents thereof contained inadmissible opinion evidence based on hearsay. Despite these facts being brought to the attention of the Applicant, he insisted that the statement be handed in. It was for this reason that the Second as well as the Fourth Respondent would not consent to its admission into evidence. The Second Respondent could therefore not legally attach the statement to the plea and sentence agreement in the face of the objections by the Fourth Respondent, even if it wanted to.

[33] The Second Respondent argues that in the absence of the statement which the Applicant wanted to present, the evidence admitted in the plea and sentence agreement relating to the impact the crime had on the victim, namely, that the lives of the families of the deceased were negatively affected by the loss of the deceased,

who was accurately described as a young man in the prime of his life, were placed before the court for consideration.

[34] The Second Respondent further argued that the Applicant's contention that significant evidence in aggravation was ignored is unfounded. The Second Respondent implored this court seized with the review to judge whether the trial court should have convicted the Fourth Respondent on the agreed basis and whether the agreed sentence is just.

[35] The Second Respondent referred to case law[2] involving more serious cases of culpable homicide involving motor vehicles where the courts properly considered under which circumstances custodial sentences would be appropriate. It was clear that only in cases involving negligence of a greater degree of seriousness than the present case, were custodial sentences considered to be appropriate.

[36] The Applicant, according to the Second Respondent, was not denied the opportunity of presenting a statement for the purposes of the finalization of the plea and sentence agreement, but due it's containing inadmissible content, it could not be used.

[37] The Second Respondent further contends that even if the First Respondent did exercise his discretion either to admit the statement of the Applicant or to hear his or his wife's evidence, the evidence relating to speed would not have altered the

[2] S v Nyathi 2005(2) SACR 273 (SCA); S v Naicker 1996(2) SACR 557(A); S v Mapipa 2010 (1) SACR 151 (ECG); S v Ndlanzi 2014(2) SACR 256 (SCA).

sentence, and the other additional factors relating to overloading, lack of demonstrating remorse and the attempt to show that the Fourth Respondent was reckless or grossly negligent are so utterly baseless that the Magistrate would inevitably have discounted them.

[38] Furthermore, the additional details that the Magistrate would have heard about Cole's character or qualities, the devastating effects the death of Cole had on his family, although relevant, could not affect the appropriate sentence, the Second Respondent argued. According to the Second Respondent the magnitude of the tragedy resulting from the negligence should not be allowed to obscure the nature of the crime which was that of negligence as pointed out in case law[3]. The court would inevitably have found the sentence to be just.

[39] The Second Respondent also contends that the Applicant has no general *locus standi* to seek to review the criminal proceedings in this matter. The Second Respondent relies on the dictum in *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521(A) at 533J – 534C). According to the Second Respondent, the Applicant has no such general interest in either the trial or the outcome thereof and cites the following as reasons for its view:

(a) Criminal litigation is conducted between the State and the persons accused. Applicant is not and has never been a party to the proceedings.

[3] S v Naicker at 560 f-g (*supra*).

(b) The litigation has been finalised between the parties who do have such a general locus standi;

(c) Applicant's general dissatisfaction and/or disagreement with the result of the trial which has been finalised do not afford him locus standi to seek to contest the merits of the result.

[40] Any *locus standi*, so the Second Respondent holds, that the Applicant may have is limited to the narrow issue of whether the prosecutor failed to afford him the opportunity to make representations to the prosecution in terms of Section 105A (1)(b)(ii) of the Act before entering into the plea agreement. The Second Respondent submits that he had ample opportunity to do so, he did so and such was seriously considered before entering into the agreement.

[41] The Second Respondent points out that the fact that the complainants or family members of deceased complainants do not have general *locus standi* to contest the merits of plea agreements is in accordance with the prosecutor's role otherwise in criminal proceedings. The prosecutor is dominus litis regarding what charge to prefer, what plea to accept and on what basis, what evidence to lead and what sentence to suggest to the court. According to the Second Respondent, the fact that it made a decision with which the Applicant does not agree is thus neither a gross irregularity nor grounds for review.

[42] The Second Respondent contends that the relief the Applicant seeks should for the above reasons advanced be therefore dismissed.

[43] Aside from raising the point that the Section 105A proceedings are not reviewable at the instance of the Applicant, as well as the fact that the Applicant has failed to join the widow of the second deceased, Mrs Matthee, the Fourth Respondent for reasons similar to that which were advanced by the Second Respondent, argues that the relief that the Applicant is seeking cannot be granted on the grounds advanced by him.

[44] The Fourth Respondent contends that the Section 105A proceedings are not subject to a review in the ordinary course in terms of the provisions of Section 302[4] of the Act, or a review as contemplated in terms of Section 304(4)[5] of the Act. It can also not be a review contemplated by section 22 of the Superior Courts Act, no 10 of 2013 which provides;

> *"22. Grounds for review of proceedings of Magistrates' Court.—(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;*

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[4] Section 302 - **Sentences subject to review in the ordinary course.**—(1) (*a*) Any sentence imposed by a magistrate's court—

(i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in **section 191 (2) (*j*)** of the Children's Act, 2005 (**Act No. 32 of 2005**)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

(ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the *Gazette* for the respective judicial officers referred to in **subparagraph (i)**,

(iii) . . . . . .

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.

[5] Section 304(4) - If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of **section 302** or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of **section 303** or this section.

(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.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

[45] Fourth Respondent submits that Section 22, read together with rule 53 of the Uniform Rules of Court, as was held in the cases of *Narodien v Andrews* 2002(3) SA 500 (C), at 506D-E; *S v Williams* 2005(2) SACR 290 (C), at p.296, par [23]; *S v Singh* 2013 (2) SACR 372 (KZD), at p.376 par. [20] clearly contemplates a review brought at the instance of one of the parties to the proceedings sought to be reviewed. This submission is underscored by the fact that the power to institute criminal proceedings as contemplated by section 179 of the Constitution vests in the National Prosecuting Authority, who is the only authority to institute and conduct criminal proceedings on behalf of the State. The Fourth Respondent as such is of the view that criminal litigation is conducted by the State against person(s) charged with a criminal offence and complainants (or their families) are not parties to criminal proceedings. For these reasons the Fourth Respondent further submits that Section 22 of the Superior Court's Act is not applicable.

[46] The Fourth Respondent further submitted that although it has been held in certain cases[6] that the powers of review conferred upon a High Court by Section 22 of the Superior Courts Act should be interpreted in the light of the more

[6] S v Taylor 2006(1) SACR 51 (C), at p 58, par. [16] – [17]; S v Salie 2007(1) SACR 55 (C), at p60 – 61, par. [12] – [13].

comprehensive powers in section 173[7] of the Constitution, there is a general reluctance by our courts to exercise their inherent powers to intervene, and that such inherent powers should be exercised sparingly and only in the most exceptional cases, where grave injustice would otherwise result[8].

[47] No such case, so the Fourth Respondent submits, has been made out by the Applicant. Fourth Respondent submits to the contrary there is a likelihood of a grave injustice to the Fourth Respondent, given the fact that the matter has already been finalized and she has served a substantial portion of her sentence. Alone on the grounds therefore that these proceedings are not reviewable, these proceedings fall to be dismissed.

[48] The Fourth Respondent also argued that the Applicant has no *locus standi*. Even if it is accepted for purposes of argument that the Applicant does have *locus standi* based on the provisions of section 105A(1)(b)(iii), he does not have *locus standi* to apply for an order to review and set aside the conviction and sentence. This is particularly so because the Applicant as complainant is not a party to these proceedings.

[49] The Fourth Respondent also argued that there was compliance by the Second Respondent with the provisions of section 105A(1)(b)(iii).

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[7] "***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."

[8] Sefatsa and Others v Attorney-General, Transvaal, and Another 1989 (1) SA 821 (A), at p.834E; S v Makopu 1989 (2) SA 577 (E), at p.578A; S v Bushebi 1996 (2) SACR 448 (NmS) at 451c; S v Ntswayi en 'n Ander 1991 (2) SACR 397 (C); Hansen v The Regional Magistrate, Cape Town, and Another 1999 (2) SACR 430 (C); S v Williams, supra, at p.297 – 299 par. [33] – [38].

[50] Section 105A(7)(b)(1) gives the Magistrate the discretion to hear further evidence or to receive a statement on behalf of the complainant or accused but does not entitle the complainant as of right to partake in the section 105A proceedings. Furthermore, the complainant's involvement is limited to presenting evidence as opposed, to partaking in, the Section 105A proceedings. The First Respondent's decision therefore not to hear evidence and to deny the Applicant's participation in the proceedings was not irregular and was clearly a correct decision.

[51] Issues for Consideration

The primary issues for consideration in this matter are the following:

(a) Whether the Applicant has the necessary *locus standi* to bring this application;

(b) Whether this matter can be subjected to review;

(c) Non-Joinder of Mrs Matthee.

Evaluation

[52] This court cannot better explain the purpose and underlying rationale of section 105A (1)(b)(iii) than the learned author's in *Du Toit et al Commentary on the Criminal Procedure Act.* At *15-12 – 15-13* they state:

> *"Section 105A(1)(b)(iii) seeks to promote victim participation in the course of negotiations aimed at reaching a plea and sentence agreement. This section also enhances the transparency of the process. See also Steyn 2007 SACJ 206 at 213 as well as the discussion by Lubbe & Ferreira 2008 SACJ 151 of the National Prosecuting Authority's policy and directives relating to post-Truth and Reconciliation*

Commission prosecutions. Quite apart from the fact that victim participation accommodates the victim's personal interests (like retribution), it is also true that the broader interests of the criminal justice system and society are served. In S v Sassin & others [2003] 4 All SA 506 (NC) Majiedt J said (at [11.4]): 'Affording victims a say in the plea bargaining process furthermore enhances transparency and lends credence to the adage that justice must manifestly be seen to be done.' Bekker 1996 CILSA 168 209 states:

'The other interests advanced by giving the victim a right to participate in the plea bargain are society's interests. Society benefits from victim participation in plea bargains in two ways. The first is that according to the victim the right to participate will result in more information being provided to the decision-maker. The second benefit which accrues to society from victim participation in plea bargains is that it promotes the effective functioning of the criminal justice system. The theory is that if victims are not consulted regarding the plea bargain and so feel irrelevant and alienated, they will not cooperate in reporting and prosecuting a crime. As a result, the system, which is dependent on them, functions less effectively. Therefore, making victims feel their contribution is critical, regardless of its actual value, will motivate the victim to continue to report crime and cooperate in its investigation and prosecution.'

Section 105A(1)(b)(iii) provides that a prosecutor may enter into an agreement contemplated in s 105A(1)(a) after affording the complainant (or his representative) an opportunity of making representations to the prosecutor. This requirement is qualified by the words 'where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant'. See s 105A(1)(b)(iii) and Watney 2006 TSAR 224 at 226. However, even in the absence of a formal invitation by the prosecutor, the complainant (or his representative) would be entitled to make representations which the prosecutor should not ignore. It should be emphasised, once again, that victim participation in the negotiation process is—especially in the context of present criticisms of our criminal justice system—an important step or process which can cultivate or strengthen society's acceptance of plea and sentence agreements as a method of avoiding a traditional adversarial trial."

[53] The Section 105A(1)(b)(iii) states:

*"(b) The prosecutor may enter into an agreement contemplated in **paragraph (a)**—*

(i) after consultation with the person charged with the investigation of the case;

(ii) …

(aa) …;

(bb) …;

(cc) …;

(dd) …

(iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding—

(aa) the contents of the agreement; and

(bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss."

[54] In my view the prosecutor seeking to enter into a plea and sentence agreement with an accused person must afford the complainant or his representative an opportunity to make representations but only where it is reasonable to do so and taking into account the circumstances relating to the offence and the interest of the complainant. This provision is peremptory subject to the proviso that it is reasonable to afford the complainant an opportunity to make representations to the extent where it is reasonable to comply with. The reason why I say so is because in terms of section 105A(4)(b), the prosecutor is required to satisfy the court that it has complied with the obligation placed on him or her in terms of section 105A(1)(b). This section reads:

"(4)(a) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then—

(i) require the accused to confirm that such an agreement has been entered into; and

(ii) satisfy itself that the requirements of subsection (1) (b) (i) and (iii) have been complied with.

(b) If the court is not satisfied that the agreement complies with the requirements of subsection (1)(b) (i) and (iii), the court shall—
(i) inform the prosecutor and the accused of the reasons for non-compliance; and
(ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.

(5) If the court is satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court."

[55] Should there therefore be non-compliance with Section 105A(1)(b)(iii), then the accused shall not be required to plead. The purpose of this provision is to ensure that the prosecutor has given the complainant an opportunity to make representations.

[56] In entering into a Plea and Sentence Agreement, at the pre-trial stage with an accused, the prosecutor or DPP performs an important public function or power in terms of the provisions of Section 105A, and in line with the broad mandate conferred upon it by Section 179(2) of the Constitution "*to institute criminal proceedings on behalf of the State, and to carry out the necessary functions incidental to criminal proceedings.*" As such, the entering into the plea and sentence agreement cannot be described along the same lines as 2 parties entering into a civil contract.

[57] In concluding the above agreement, the prosecution performs an administrative function. If there is a complaint that the prosecutor in exercising its public power or in performing its public function in terms of an empowering statute, in this case Section 105A, adversely affects the rights of any person, such decision in my view is subject to judicial review in terms of Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[58] In a case where a victim or complainant alleges that the prosecutor or Director of Public Prosecutions, in entering a plea and sentence agreement with an accused, did not afford them the opportunity to make representations or did not adequately consult with them, such failure to afford an opportunity to make representations or to adequately consult would be unlawful, where in the circumstances it was reasonable to do so and in such a case, the complainant or victim would have the necessary *locus standi* in terms of Section 1 of PAJA or in terms of the common law on the basis of the principle of legality.

[59] In *NDPP and Others v Freedom Under Law* 2014(2) SACR 107 (SCA) *at* 117 paras 28 – 29 it was held that:

> *"[28] The legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following dictum by Ngcobo J in Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3) para 49:*
>
> *'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'*

[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say 'currently' is because it is accepted that '(l)egality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner'."

[60] This case is clearly also not one of those exceptions to judicial review as set out in paragraph 1 of the PAJA.

[61] Due to the very nature of the plea bargaining process, wherein the prosecutor and the accused without the intervention of the court agree to a conviction and sentence, the legislature in order to promote transparency obligated the prosecution to afford the victim or complainant the opportunity to make representations. This obligation is placed on the prosecutor only where it is reasonable to do so. See *S v Sassin and others* [2003] 4 All SA 506 (NC) at pg 510 para 11.5, where Majiedt J (as he then was) said the following: *"The subsection under discussion contains an important proviso, namely "where it is reasonable to do so . . ."* The court it seems under the provisions of this section will not readily condone non-compliance with the provision, as is clear from the provisions of ss4 and 5 of s105A. Aside from section 105A, there are no other provisions in the Criminal Procedure Act placing such an obligation on the prosecution, for example, where there is an ordinary plea of guilty in terms of Section 112(1)(b) or 112(2) except a moral or ethical duty to inform them about the fact that an accused person pleaded guilty.

[62] I therefore agree with the submissions of the Second Respondent that the basis on which a complainant or victim would have *locus standi* is limited to the issue whether the prosecutor in section 105A proceedings failed to afford him or her the opportunity to make meaningful representations in terms of Section 105A (1)(b)(iii) of the Act before entering into the plea agreement. Failure to do so would in my view make the decision of the prosecution to enter a plea and sentence agreement in terms of Section 105A reviewable at the instance of the complainant or victim only on this limited ground.

[63] The Second Respondent is only obliged to give a victim or a complainant an opportunity, which in my view should be a meaningful one to make representations. It is not required that the complainant or victim or his representative should be in agreement with the prosecutor or Director of Public Prosecutions as to the precise nature of the plea or sentence agreement it intends to conclude with an accused. It often happens that complainants in criminal cases do not agree with a conviction and sentence imposed by a court. The plea and sentencing process in terms of section 105A, although also having as an objective the giving of victims a say in the plea bargaining process, serves the broader interest of the criminal justice system, where such agreements are entered into to broaden access to justice, to dispose of cases quicker and more cost-effectively, and to give effect to an accused's right to a fair, as well as a speedy, trial.

[64] In this particular case the DPP exercised its discretion to enter into a plea and sentence agreement properly. In *Minister of Police and Another v Du Plessis* 2014

(1) SACR 217 (SCA), NAVSA ADP with reference to other authorities made the following remark:

> *"[29] In Democratic Alliance v President of the RSA and Others 2012 (1) SA 417 (SCA) (2012 (3) BCLR 291; [2012] 1 All SA 243; [2011] ZASCA 241) this court, after a discussion concerning prosecutorial independence in democratic societies, quoted, with approval, the following part of a paper presented at an international seminar by Mr James Hamilton, then substitute member of the Venice Commission and Director of Public Prosecution in Ireland:*
>
> > *'Despite the variety of arrangements in prosecutor's offices, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all the parties involved in the criminal justice system. The prosecutor's duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects or accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed.'*
>
> *We should all be concerned about the maintenance and promotion of the rule of law. Given increasing litigation involving the NDPP, these principles cannot be repeated often enough. We ignore them at our peril."*

[65] The same principle in my view applies in a case like this where DPP and prosecutor, without misconduct, indolence or ineptitude, after having weighed up all the facts and circumstances as it should have and after having given the Applicant who was assisted by legal representatives the opportunity to make his voice heard. The procedure as set out in s105A cannot be used by victims as a means to interfere with the discretion of a prosecutor where it was exercised properly and in accordance with the law. And as NAVSA ADP rightfully said in the *Minister of Police v Du Plessis* (*supra*) at para [31] "*Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority*".

[66] In my view the proper time to bring such an application for review would be prior to the contents of such plea and sentence agreement being disclosed to the court. Once it is disclosed to the court, the complainant or victim would have a very limited right to institute review proceedings. Thereafter, he or she is not an active participant in the proceedings, because by that time in terms of s105A, he or she would have been given the opportunity to make representations and the court must have been satisfied in terms of ss4(a) or ss4(b) that there was compliance with the provisions of ss(1)(b)(iii).

[67] If there is non-compliance the contents of the plea and sentence agreement cannot be disclosed to court unless the prosecutor and the accused can satisfy the court of the reasons for non-compliance as required in terms of ss4(b)(i) or (ii). If there is compliance, the proceedings would solely be in the hands of the court and the prosecutor and the accused will only have a say in the proceedings where the court is not satisfied that the accused is guilty in terms of ss6 in which case the trial shall start *de novo* before another presiding officer or where the court is not satisfied in terms of ss9 that the sentence agreement is just, in which case the accused and the prosecutor will have to decide whether they wish to withdraw from the agreement or proceed *de novo* before another presiding officer. There is therefore strict judicial control over the content of the Plea Agreement as well as to whether the agreed sentence is just.

[68] Where the court is satisfied that the accused is guilty then the court may exercise its discretion as follows and may:

(a) Direct relevant questions, including questions about previous convictions of the accused, to the prosecutor and the accused;

(b) Hear evidence, including evidence or a statement by or on behalf of the accused or the complainant.

[69] On a conspectus of the evidence presented in this case, the Applicant has failed to show that the Second Respondent failed to afford him or his legal representative an opportunity to make representations. In fact, I have seldom come across a case where a victim or complainant had been given an opportunity to participate to the extent the Applicant was afforded an opportunity in this case. On this basis the Applicant failed to show it had the necessary *locus standi* to have the plea and sentence agreement set aside.

[70] I agree with the Fourth Respondent contention that this is not a review of the criminal proceedings in terms of section 302 or of 304(4). Section 302 and section 304(4) reviews in terms of the Act deal with the questions whether criminal proceedings before a Magistrate's Court were in accordance with justice or where an accused's right to a fair trial may have been infringed (See discussion in *Du Toit et al* (*supra*), under Section 304(4) and 304A at 30-18 – 30-22 as well as 30-24A – 30-24D). The type of review contemplated in these two sections is only open to an accused person and not to any other party involved in criminal proceedings, like a victim or complainant. These types of review are also only applicable after or, in exceptional cases, during the course of a criminal trial.

[71] In *S v Collard* 2007(1) SACR 522 (W), Moshidi J dealt with the conditions of a suspended sentence imposed on an accused to ameliorate the situation of a complainant, and, in doing so, considered the question of whether the accused would be prejudiced by the amendment of such conditions. At page 526 para [12] the learned judge held: "*As stated earlier, most review cases concerned the position of an accused, for the better or worse. There should be no reason not to extend such review, where there was no actual prejudice to the accused, to a complainant in a criminal case".* At para [13] he further held that "*the complainant in a criminal trial also has rights in terms of the Constitution ….*" He went on further to say that such right of review may be exercised in terms of Section 173 of the Constitution. (own underlining)

[72] In *Collard* there was a need to review the proceedings for the benefit of the complainant, where such proposed conditions would not result in actual prejudice to the accused. That case in my view however cannot be seen as authority for the position that a complainant in a criminal trial has a right to have criminal proceedings reviewed as a general rule. Certainly this can happen only on rare occasions, for the simple reason that a victim or complainant in a criminal trial is not a party to the proceedings.

[73] The next question to consider now is whether the First Respondent's failure to exercise his discretion in terms of the provisions of s105A(7)(b)(i)(bb) by not hearing evidence which included the evidence or statement by or on behalf of the Applicant or his representative is reviewable at the instance of the Applicant. In my view, for

the reasons that follow, the Applicant had no right to be called as a witness or to have this evidence presented.

[74] During the sentencing proceedings Mr Wille, a well-respected attorney of this court representing the Applicant attempted to hand in a victim impact statement. He conceded he had no *locus standi* to address the courts in terms of Section 105A. There was an objection due to the fact that it was not a pure victim impact statement due to the fact that most of what was contained therein consisted of issues regarding the merits of the case. Those facts were not consistent with the factual matrix agreed to between the prosecutor and the Fourth Appellant. In my view, one cannot fault the decision of the First Respondent, after it had been made aware of this, and after it had been addressed in court by the prosecutor and the Fourth Respondent not to hear the evidence of the complainant. He was correct also in not exercising his discretion in receiving this evidence in terms of ss7(1)(b)(iii)(bb) where he was made aware it was in conflict with the factual matrix agreed upon by the prosecutor and the accused.

[75] The Applicant made it difficult for the Magistrate to exercise his discretion in the manner requested. He was adamant during the proceedings before the Magistrate that all the evidence regarding the speed, the fact that the vehicle was overloaded, the possibility that the Fourth Respondent may have been under the influence of alcohol and that she did not have any remorse be presented to the Magistrate. Even in this court he insisted contrary to the authority and case law that the evidence be included. For this reason and the reasons that follow hereafter, the First Respondent did not improperly exercise his discretion in not calling the

Applicant to testify or in not admitting the "Victim Impact Statement". For the same reasons that follow the Second and Fourth Respondent's conduct in objecting to have the evidence admitted can also not be faulted.

[76] It is trite that the facts to be presented during the sentencing stage following on from a plea of guilty should be premised on the factual matrix as set out in the plea of an accused whether in terms of Section 112(1)(b) or in terms of Section 112(2). Once the State accepts the plea of an accused on the facts he had pleaded evidence cannot be presented by the State during the sentencing stage which contradicts such facts. See in this regard *S v Jansen* 1999(2) SACR 368(C) and *S v Khumalo* 2013 (1) SACR 96 (KZP). *Rampai J* in *S v Van Der Merwe and others* 2011(2) SACR 509 (FB) dealt with this point in a thorough judgment where he held at *[20]*: *"The sentence imposed on the appellants should have been premised on the factual foundation as set out in the plea explanation…."* and further *"But they did not merely plead guilty. They went a step further. They gave an elaborate explanation. Their explanation embodied the exclusive facts on which they pleaded. The respondent State accepted the plea"*. And further at para [21], "*In those prevailing circumstances the court a quo could not have approached the matter of sentence anyhow saves on those facts …*" See also *S v Thole* 2012(2) SACR 306 (FB).

[77] *Du Toit et al* at 17-26 after a discussion of various authorities and case law states "*By way of summary it can be said that the Section 112(2) statement as accepted by the State embodies "the exclusive facts" for purposes of sentencing (S v Thole (supra) at [10]), except insofar as there may be other facts not inconsistent*

with the factual matrix provided with the Section 112(2) statement (S v Khumalo (supra) at [11])."

[78] In my view the plea which forms part of the plea and sentence agreement in terms of Section 105A wherein an accused admits guilt based on a certain factual matrix as accepted by the State is in substance identical to a guilty plea tendered in terms of Section 112(2). What is of particular pertinence is the fact that, the accused person must be legally represented. By parity of reasoning therefore any sentence to be imposed after it had been agreed to should be consistent with the factual matrix as set out in the plea explanation, even more so in this case given that the accused and the prosecutor agreed to a specific sentence on the basis of a certain set of facts, whereas in the case of a Section 112(2) plea, the sentence is entirely left in the hands of the court.

[79] As such, the Magistrate could only have admitted the statement had it not been in conflict with the factual matrix agreed to between the prosecutor and the Fourth Respondent which was not the case. The facts thus accepted by the prosecution in this case was that the Fourth Respondent's negligence was based on her failure to keep a proper lookout and her conviction on two counts of culpable homicide was based on this fact. The court *a quo* during the sentencing proceedings was bound to accept that. It would in any event not have had the power either during the Plea or Sentencing stage to intervene if it had been made aware that there were facts that established that the Fourth Respondent was either reckless or grossly negligent. The only power it would have had to intervene would be to enter a

plea of not guilty if it was of the view that the Fourth Respondent did not admit all the elements of the offence charged in terms of ss6(b) of Section 105A. Any intervention therefore can only be for the benefit of an accused person. Such intervention cannot be to the detriment of an accused person, where a complainant/victim alleges that it does not agree with the facts upon which an accused's plea of guilty is based. In this case, on the facts presented, the court was satisfied that the Fourth Respondent admitted all the allegations in the charge and that she is guilty of the offences in respect of which the agreement was entered into. The complainant or victim does not have a right to intervene in such a process in terms of the provisions of Section 105A or any other provision in the Criminal Procedure Act. On this basis alone, there is no need for this court to decide whether the Fourth Respondent, based on the facts as alleged by the Applicant, was reckless or grossly negligent, or whether any of the circumstances and facts he presented either to the Second Respondent or to this court should have been considered.

[80] For the further reasons that follow, I am also of the view that the Second and Fourth Respondents were correct in objecting either to the Applicant giving evidence or him handing in the "Victim Impact Statement" with the contents he wished to place before court.

[81] Where the prosecution enters into a plea and sentence agreement with an accused person it fulfils a function incidental to the institution of criminal proceedings in terms of s179(2) of the Constitution, on behalf of the State, as said earlier on in this judgment.

[82] As the learned authors in *Commentary on the Criminal Procedure* Act, *Du Toit et al* at 1-2 correctly in my view point out "*There can be no fair and equal administration of the criminal justice system if prosecutions for crime are entirely left to the whim, initiatives or resources of individual victims concerned. This is one of the reasons why in our local criminal justice system it is possible for the prosecuting officials, in the exercise of their discretion to prosecute, to decide to proceed with the institution of a prosecution despite the victim's or complainant's wish to have the case withdrawn. Wider public interests are at stake. On the same basis the prosecuting officials may against the wishes of the victim refuse to institute a prosecution*".

[83] Similarly, as has happened in this case, the prosecuting authorities may decide to exercise their discretion to enter into a plea and sentence agreement, against the wishes of a victim or a complainant, where it is justified to do so. They do not act or perform their functions on the instructions or wishes of a victim or complainant; they act in the broader public interests after taking into account the interest of the victim/complainant, society, as well as the accused person.

[84] The victim/complainant is therefore not a party to the criminal proceedings. It is the State through the prosecuting authorities that institutes criminal proceedings against an accused person. A victim or complainant has no right therefore to demand to be heard during the criminal proceedings. Where the State during sentencing proceedings therefore legitimately exercises its discretion not to call a victim or complainant, such failure to do so would not be improper or make the proceedings irregular. Especially where the prosecutor of DPP gave them adequate

opportunity to make representations and where the prosecutor properly represented and placed the concerns and wishes of the victim before the court.

[85] Where, however, a court during criminal proceedings upon application by the prosecutor or accused refuses to hear evidence of a complainant, victim or any witness, such failure may lead to an injustice, to one of the parties, i.e. the State or the accused, in which case it may be reviewable.

[86] Similarly, the court is not obliged to call or exercise its discretion to call a victim or complainant upon his or her request as a witness, due to the fact that the complainant or victim is not a party to the criminal proceedings. They would have no standing due to the fact that the court is engaged in criminal proceedings.

[87] A criminal trial cannot be regarded as mere litigation between the State and an individual, but the exercise of a constitutional power by the State through the prosecuting authorities against an individual to account for an alleged crime committed against society. Another consideration as to why the application in this matter should not succeed is that it will also affect the rights of the family members of the second deceased who was not joined in these proceedings. They agreed and made peace with the plea and sentence agreement the Second and Fourth Respondents entered into. For these reasons also the actions and conduct of the First, Second and Fourth Respondent are not susceptible to it being reviewed by this court and they have therefore committed no irregularity.

[88] Conclusion

This court has been placed in a position to view all the evidence, even though it did not attach any weight to the allegations made by the Applicant regarding the question whether the Fourth Respondent was reckless or grossly negligent. And even if the Applicant did establish the necessary *locus standi* and even if the proceedings could be reviewed at his instance, I am in any event convinced that the Second Respondent's decision to secure a conviction based on the plea tendered by the Fourth Respondent was eminently reasonable and rational and cannot be faulted. The Second Respondent in my view clearly weighed up all the evidence and the substantive representations made by the Applicant which included the evidence presented by the Applicant regarding the alleged speed at which the Fourth Respondent had travelled before the collision. It is not disputed by the Applicant that this evidence was contradictory in nature. The experts were not in agreement as to the approximate speed the Fourth Respondent travelled. Moreover the most important witnesses, the eye-witnesses, emphatically said that the Fourth Respondent did not travel at an excessive speed.

[89] This fact was not disputed by the Applicant and, even if it was, it cannot be said that on the evidence placed before the Second Respondent it improperly exercised its discretion when he accepted the plea tendered by the Fourth Respondent. There is also no suggestion that the Second Respondent had an ulterior motive in accepting the plea as tendered by the Fourth Respondent.

[90] In assessing whether a just sentence was imposed, I am mindful of the fact that due to the Fourth Respondent's negligence, two persons have lost their lives. The Applicant and his wife have lost their son, a very young person, who had a bright future ahead of him. Whether they will ever be able to recover from the loss they have suffered only time will tell. It is perfectly understandable why they wanted a harsher sentence to be imposed on the Fourth Respondent.

[91] This has to be counter-balanced against the fact that the Fourth Respondent is also a young person. She has expressed remorse, regret and feelings of guilt for her actions. The mistake she made will haunt her for the rest of her life. Her remorse is genuine; this is clear from the evidence. It was and cannot be proven that her actions and conduct amounted to a wanton disregard for human life and that she did not care what happened. Even if that is how the Applicant feels, ordinarily, if such facts were proven it would have been a case where direct imprisonment would not have been inappropriate. Given the totality of the evidence placed before this court, and also given the fact that it was a sentence agreed to as a result of plea bargaining, this court is less inclined to interfere even if it would itself not have imposed the sentence as per the agreement. It should be borne in mind that it is the very nature of a plea bargain, that an accused would rather accept and agree to a sentence than take the risk of a court imposing a harsher sentence. Otherwise an accused could tender a plea in terms of section 112(2) and leave it to the court to sentence him or her.

[92] But having said that, in my view the Magistrate should have at least, with the necessary restraint and careful scrutiny so as not to infringe upon the rights of the Fourth Respondent, exercised some degree of judicial maturity, civility and empathy, to allow the Applicant or his wife some latitude give them the opportunity to express their feelings and resentment they had in having lost their son.

[93] In this regard, I align myself with the words of PONNAN JA in *S v Matyityi* 2011(1) SACR 40 (SCA) at 49 para 16 where the learned judge said:

> "*As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us as well to vindicate our collective sense of humanity and humanness".*

The learned judge further went on to say "*By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim."*

[94] A court should during the sentencing proceedings where possible strive to give victims of crime a voice, while ensuring, through efficient judicial control, that an accused right to a fair trial is not infringed or evidence is not led in conflict with the agreed factual matrix. The failure of the Magistrate to adopt such an approach in this case given the situation he was confronted with however does not result in the proceedings being irregular and does not in any way make the proceedings reviewable at the instance of the Applicant.

Joinder

[95] Given that the Applicant has no *locus standi*, there is no need to deal with the question of whether Mrs Matthee, the widow of the second deceased, needed to be joined.

[96] The Applicant has failed to make out a case that he is entitled to the relief he is seeking and as a result for the reasons given, the application falls to be dismissed. In the result I would make the following order:

[97] Order

The application is dismissed.

Costs

[98] Only the Fourth Respondent and the Applicant incurred costs. The Fourth Respondent seeks an order for costs. The Fourth Respondent argued she was justified to oppose this application because the order that was sought against her would have adverse consequences for her. Whilst I agree with this, given the fact that these proceedings result from a criminal prosecution, wherein the Applicant felt strongly about vindicating the rights of his and his family as victims, and also given the fact that this matter was of significant importance to the Second Respondent,

who did not incur any costs. I would therefore make an order that the Applicant and Fourth Respondent each pay their own costs.

_____

HENNEY, J

Judge of the High Court

I agree and it is so ordered.

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VELDHUIZEN, J

Judge of the High Court