IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no. 16165/18

In the matter between:

KELLY MALIZANA First Applicant

THANDOWANI NKOMO Second Applicant

HOWARD MBOTO Third Applicant

VICTOR MBANDA Fourth Applicant

MASITHEMBI BONGANI Fifth Applicant

and

THE MAGISTRATE OF THE REGIONAL COURT
FOR THE REGIONAL DIVISION OF STRAND, WESTERN CAPE
First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE DIVISION Second Respondent

JUDGMENT DELIVERED ON 25 JUNE 2019

SHER, J (Goliath DJP concurring):

1. This is an application for leave to appeal the judgment and order which we handed down on 13 May 2019, in terms of which we dismissed an application to

review the refusal by the regional magistrate of Strand to recuse herself from proceedings which are pending before her, in which the applicants are facing trial on charges of kidnapping, assault and murder. The basis for the review was that the applicants had an apprehension that the magistrate was biased against them.

2. We provided detailed reasons for our judgment and order and for the purposes of this application it is not necessary to traverse these in any detail. By way of summary, we were of the view that although the magistrate had frequently intervened in the proceedings and had asked numerous questions of the witnesses by and large these interventions fell within the ambit and scope of her functions as a presiding officer. Although she did at times go beyond what was required or expected, her interventions were primarily aimed at clarifying aspects of the evidence which were unclear and ensuring that the rules of evidence and procedure were properly complied with.

3. In addition, we noted that there appeared to be a personality clash between the magistrate and the applicant's former counsel, who no longer represents the applicants, and the magistrate had cause to object to his behaviour on a number of occasions. Although most of the objections were aimed at making sure that he did not put incorrect propositions to witnesses or did not elicit confusing or irrelevant evidence, he appeared to have caused the magistrate offence for reasons which are not clear from the record, and on more than one occasion she remonstrated with him. This resulted in tension between them and impatience on the part of the magistrate, who at times took over aspects of the questioning rather than letting it flow naturally.

4. Ultimately however, we were of the considered view that as at the time when the review had been lodged the applicants had not been subjected to an unfair trial, nor would the reasonable, objective and informed observer conclude that the magistrate was biased against them or that she would not ultimately bring an impartial and fair mind to bear on her determination of the matter.

5. In the circumstances we were of the view that this was not one of those instances where the interests of justice required that we should intervene. In this regard it is well established that save in rare or exceptional cases, where a failure

of justice would otherwise occur, a higher court will not interfere with uncompleted criminal proceedings before a lower court.[1]

6. Consequently, when the application for leave to appeal was filed we asked counsel to address us on whether the order which we made remitting the matter to the magistrate was an appealable one. In this regard the general principle is that a judgment or order will be appealable if, notwithstanding its form, it is final in substance or effect, definitive of the rights of the parties and substantially dispositive of the issues concerned.[2]

7. According to this formulation it clearly cannot be said that the judgment we arrived at or the order which we made pursuant thereto was appealable. It was not final in effect in any way, nor dispositive of the charges which the applicants are facing, nor was it definitive or their rights in respect thereto. All that it did was to remit the matter to the magistrate in order that the trial might be completed. Thereafter the applicants will nonetheless be able to exercise the rights they always had in regard to any possible appeal or review which may be warranted.

8. The applicants have rightly pointed out that these commonly accepted attributes of what renders a judgment or order appealable are not cast in stone and the courts have adopted a flexible and pragmatic approach, which is more concerned with doing what is appropriate in the particular circumstances rather than adhering rigidly to the classic formulation on the grounds of principle.

9. As Nugent JA aptly remarked in *NDPP v King*[3] often when the question arises whether an order is appealable what is being asked is not whether it is capable of being corrected, but rather whether it should be corrected in isolation, at that moment in time, before the proceedings have run their course. Whilst on the one hand it is desirous that every decision should be capable of being corrected forthwith, in the event that it is wrong, before it results any adverse consequences, on the other hand the resultant delay and inconvenience which might occur if every decision is subject to appeal might in itself not be in the

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[1] *Wahlhaus & Ors v Additional Magistrate, Johannesburg & Ors* 1959 (3) SA 113 (A) at 120A-B; *Ismail v Additional Magistrate, Wynberg* 1963 (1) SA 1 (AD) at 6G-H.

[2] *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A) at 532J-533A.

[3] *NDPP v King* 2010 (2) SACR 146 (SCA) at paras [50]- [51].

interests of justice.[4] As a result not every decision should be allowed to go on appeal, particularly where its resolution might not result in a resolution of the proceedings as a whole, or the principal underlying issue or dispute.

10. Therefore, the SCA has held[5] that in adopting a flexible and pragmatic approach to a consideration of whether or not to grant leave to appeal aspects such as the moment when the appeal is being sought and the extent and effect of any prejudice which might eventuate were leave to appeal to be granted, including the effects of delay and inconvenience to the parties, witnesses and the court a *quo* etc and the desirability of avoiding piecemeal appeals, should also be taken into account.

11. As we have pointed out the trial in which the applicants are embroiled is almost complete. The state's case was closed more than a year ago and first applicant has already testified. All that remains is for the remaining applicants to put forward their case, whereafter the magistrate will be in a position to deliver her judgment.

12. In my view, having regard to all the circumstances, including the stage the proceedings are at, it would not be in the interests of justice[6] to allow a further appeal at this point. To do so would delay the conclusion of the trial for a further year at least and in the event that the appeal were to be unsuccessful could possibly result in yet another appeal after the ultimate conclusion of the proceedings, whenever that might be. This is a highly undesirable state of affairs.

13. The applicants complain that the potential prejudice they would suffer should they not be granted leave to appeal is 'severe' as they would have to continue in a trial before a presiding officer who they believe to be prejudiced against them, and they would be judged on the basis of the 'inadequate and incomplete' cross-examination and presentation of their case by their former counsel.

14. To my mind there is little merit in these submissions. Any inconvenience or prejudice which the applicants believe they might continue to suffer is capable of

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[4] *Id* at para [51].

[5] *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) at para [17].

[6] *S v Western Areas Ltd & Ors* 2005 (5) SA 214 (SCA) at para [20]; *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation* 2018 (6) SA 440 (SCA) at para [27]; *Director-General, Dept of Health & Ano v Islam & Ors* [2018] ZASCA 48.

being remedied, in the event that the applicants are convicted, by way of a further appeal or, in the event that the circumstances are warranted, even a further review, once the magistrate has handed down her final judgment. Of course, there may be no need for any of this in the event that the applicants are acquitted.

15. As far as their complaint in relation to the inadequate presentation of their defence is concerned, now that they have fresh legal representation nothing prevents the applicants from applying to the magistrate for the relevant witnesses to be recalled in order that they might be subjected to such further cross-examination as may properly be allowed. In fact, to my mind this is a further reason why the matter should resume before the magistrate as soon as possible, instead of being sent off on appeal at this point in time. Even though the trial commenced more than two years ago there is a far greater chance that the witnesses will still be available at this point in time.

16. Furthermore, to allow an appeal at this point could create an unfortunate precedent whereby any accused who wished to avoid facing trial could simply resort to the stratagem of launching a frivolous challenge on the grounds of alleged bias, knowing that, although there was no merit in it, because such a challenge would be appealable it could be utilised to frustrate and delay the proceedings to such an extent that the accused might ultimately never be brought to justice. In my view, to allow an appeal at this point would fundamentally undermine the principle that a higher court should generally not intervene in uncompleted proceedings before a lower court, save in exceptional circumstances, where the interests of justice require it.

17. In the result, I am of the view that, as in the case of orders which have been made by appellate courts[7] in similar circumstances, the application for leave to appeal should be struck from the roll.

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[7] *Cronshaw & Ano v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (AD); *Van Niekerk & Ano v Van Niekerk & Ano* 2008 (1) SA 76 (SCA); *Cipla Agrimed* n6.

M SHER

Judge of the High Court

I agree, and it is so ordered.

P GOLIATH

Judge of the High Court