



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 8853/21

In the matter between:

MOTOYOO LANCE MOTIKENG

Applicant

And

REGIONAL MAGISTRATE, BEAUFORT WEST (MS MONI)

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,

WESTERN CAPE

Second Respondent

Coram: Justice V C Saldanha

Heard: 21 November 2022

Delivered electronically: 15 December 2022

JUDGMENT

VC SALDANHA J:

[1] This review application arose literally mid-stream in a criminal trial during the course of the State's case in the Beaufort West Regional Court. The basis of the application being that of alleged irregularities in the proceedings by the presiding magistrate, the Honourable Ms N Moni.

[2] The applicant, Mr Motoyoo Lance Motikeng, is one of two accused facing charges on two counts, one of which is the contravention of the Explosives Act 15 of 2003, and the other that of the contravention of the Immigration Act 13 of 2002. On 11 August 2020 both the applicant and his co-accused (Mr Kitso Mnguni), being legally represented, pleaded not guilty to both charges and the trial thereupon proceeded.

[3] On 26 May 2021 the applicant issued out review proceedings in this court. In the original Notice of Motion, he sought the following relief:

'First Irregularity:

- a) Reviewing and setting aside the Order of the First Respondent, handed down on 11 August 2020, at Beaufort West Regional Court under Case No: BSH93/2018, that the main trial proceed first, prior to considering whether a trial-within-a-trial should be held, to determine the admissibility of the evidence obtained pursuant to the search of the vehicle in Applicant's (and co-accused's) possession.
- b) Ordering that the Order to proceed with the main trial first, violated the Applicant's right to a fair trial in terms of Section 35(3) of the Constitution.

Second Irregularity:

- c) Reviewing and setting aside the Order of the First Respondent, handed down on 29 April 2021, at the Beaufort West Regional Court under Case No: BSH93/2018, that the consent obtained to search the vehicle in the Applicant's (and co-accused's) possession was valid, and therefore, not in violation of Sections 10 and 14 of the Bill of Rights, and also not in contravention of Section 22 of the Criminal Procedure Act, No. 51 of 1977.
- d) Ordering that the consent obtained was not informed consent and therefore, that the search was conducted in violation of the Applicant's fundamental Constitutional rights in terms of Sections 9, 10, 14 and 35(3) and (5);
- e) Ordering that the evidence obtained, violated the aforesaid fundamental Constitutional rights of the Applicant and therefore must be excluded as the admission thereof would be detrimental to the administration of justice.

- f) Ordering that any party opposing the relief sought be ordered to pay the costs of this application, jointly and severally.
- g) Granting Applicant further and/or alternative relief, as this Honourable Court deems meet.'

[4] In support of the relief, the founding affidavit was deposed to by a Mr Mitchell Andreas, the attorney of record for the applicant in the court a quo.

[5] On 30 June 2021 the Chief Clerk of the second respondent, the Director of Public Prosecutions, Western Cape, filed a Notice of Intention To Abide the decision of this Honourable Court in respect of the relief sought.

[6] The application was set down for hearing for 10 June 2022. On 6 June this court addressed a letter to the Chief Clerk of the second respondent, in which it advised her that the court had noted that the second respondent had filed a Notice of Intention To Abide. The court further stated that, in light of the nature of the relief sought by way of the review proceedings, the court required the second respondent to provide an Explanatory Affidavit as to why it elected to simply abide the decision of the court, in proceedings that had been brought midstream in the criminal trial. The second respondent's urgent responses were requested.

[7] On 8 June 2022 the second respondent filed an affidavit by a senior state advocate in its office, who had dealt with the matter, in which she set out the reasons for the second respondent's decision to abide the outcome of the review proceedings. In response thereto, and on the same day, the court addressed a further letter to the second respondent, which was copied to the Director of the second respondent, Ms N Bell. The court noted that the state advocate had failed to deal with the question as to whether it was appropriate and necessary, in the circumstances of the matter, that mid-stream in the criminal proceedings, interlocutory orders by the trial court were being sought to be set aside. The court also noted that, in the Explanatory Affidavit by the state advocate, of 8 June 2022, she concluded 'that the proceedings' should be 'set aside'. That notwithstanding, that such relief had not been sought by the applicant himself in the Notice of Motion. The court required of the state advocate to confer with Ms Bell, in her capacity as the Director of Public Prosecutions in the Western Cape, with regard to the matters

raised by the court. The court also confirmed that the state advocate concerned would personally attend the review proceedings on 10 June 2022.

[8] In response to the court's letter of 8 June 2022, the state advocate deposed to a further affidavit on 9 June 2022, the contents of which will be dealt with later in this judgment.

[9] At the commencement of the proceedings on 10 June 2022, in an engagement with the state advocate who attended on behalf of the second respondent, the court directed that the second respondent appoint an independent legal representative to represent the second respondent in the proceedings, and in particular, in light of the contents of the two affidavits and the various positions adopted therein.

[10] The second respondent was thereafter represented by the Office of the State Attorney, Cape Town, who filed, on behalf of the second respondent, a third 'Explanatory Affidavit' deposed to by the state advocate. The content of that affidavit will likewise be dealt with later in the judgment.

[11] On 28 July 2022 the applicant filed a Notice of Intention to Amend the Notice of Motion, in terms of uniform rule 28, and attached thereto an amended Notice of Motion. In the notice the applicant sought to amend the original Notice of Motion in the following manner:

i) By deleting prayers (b), (c) and (e), and by renumbering prayers (c) and (b).

ii) By inserting the following prayer:

'(c) Ordering that the proceedings in Beaufort West Regional Court, under Case No. BSH93/2018 be set aside and the matter is to commence de novo.'

iii) By numbering prayers (f) and (g) as prayers (d) and (e).

[12] In the attached amended Notice of Motion the relief sought was stated as follows:

'First Irregularity:

- a) Reviewing and setting aside the Order of the First Respondent, handed down on 11 August 2020, at Beaufort West Regional Court under Case No: BSH93/2018, that the main trial proceed first, prior to considering whether a trial-within-a-trial should be held, to determine the admissibility of the evidence obtained pursuant to the search of the vehicle in Applicant's (and co-accused's) possession.

Second Irregularity:

- b) Reviewing and setting aside the Order of the First Respondent, handed down on 29 April 2021, at the Beaufort West Regional Court under Case No: BSH93/2018, that the consent obtained to search the vehicle in the Applicant's (and co-accused's) possession was valid, and therefore, not in violation of Sections 10 and 14 of the Bill of Rights, and also not in contravention of Section 22 of the Criminal Procedure Act, No. 51 of 1977.
- c) Ordering that the proceedings in Beaufort West Regional Court, under Case No. BSH93/2018 be set aside and the matter is to commence de novo.
- d) Ordering that any party opposing the relief sought be ordered to pay the costs of this application, jointly and severally.
- e) Granting Applicant further and/or alternative relief, as this Honourable Court deems meet.'

On 28 May 2022 the applicant's counsel filed a Practice Note together with the applicant's heads of argument. Attached to the heads of argument was a bibliography in respect of the authorities it sought to rely upon, including the Constitution of the Republic of South Africa 1996. The applicant's counsel also attached copies of two decisions, *Mkhutyukelwa v The Minister of Police* 2017 JDR 1523 (ECM) (unreported) and *S v Enujukwu* (unreported, WCC Case No: A775/03, 9 December 2004), on which *inter alia* the applicant sought to base his case.

[13] The applicant had also filed with the application a copy of the record of the proceedings, which comprised three volumes, and which were also served on both the first and second respondents.

The proceedings in the court a quo

[14] It is necessary to provide the overall context to this application by way of no more than a thumb nail sketch of the proceedings in the court a quo. As indicated, the proceedings commenced on 11 August 2020 in the Regional Court, Beaufort West. After the accused pleaded, the prosecutor called one witness, Constable Neil Damon. His evidence was led in chief, he was cross-examined by the applicant's legal representative, Mr M Andreas, where after he was re-examined by the State, questions of clarity were put to him by the court, and no further questions were asked of him by either the applicant's legal representative nor the prosecutor. The matter was thereafter postponed on several occasions, and proceedings eventually resumed on 2 December 2020.

[15] On that day, Mr R Liddell, an advocate practising at the Cape Bar, appeared for the applicant on the instructions of Mr Andreas. At the commencement of the proceedings Mr Liddle brought an application for a trial-within-a-trial to be held, with regard to the admissibility of evidence that related to the search conducted by the state witnesses, Constable Damon and Sergeant Jooste, of the vehicle that the applicant and his co accused had been travelling in at the time of the incident, with particular reference to the charge under the Explosives Act. Constable Damon had already testified at that stage about the search and the subsequent discovery of explosives (several pipe bombs and detonators) in the vehicle, and its confiscation and the arrest of the two accused.

[16] In his motivation to the court for a trial-within-a-trial to be held on the admissibility of the evidence relating to the search, Mr Liddell addressed the court extensively on the evidence that had already been given by Constable Damon, and he also submitted written heads of argument. The major attack on the search was that the police officials had not obtained the 'informed consent' of the applicant and his co accused, and neither did the police officials have a 'reasonable suspicion' to have conducted the search. The State did not oppose the application and the magistrate ruled that a trial-within-a trial be held with regard to the admissibility of the evidence in respect of the search and seizure. The evidence of the first state witness, Constable Damon, was led again. The evidence of the second state witness, Sergeant Jooste, was presented and dealt with on 16 March 2021. The defence led no evidence in the trial-within-a-trial and the prosecutor and counsel for

the applicant thereupon addressed the court on the admissibility of the evidence relating to the search and seizure. The legal representative for accused no. 2 likewise addressed the court with regard to the admissibility of the evidence.

[17] The court handed down its ruling in respect of the trial-within-a trial on 29 April 2021, wherein the magistrate admitted the evidence relating to the search and seizure of the explosives found in the vehicle. The matter was then postponed for further trial. The applicant thereafter launched these review proceedings.

[18] This court is particularly mindful that these are interlocutory proceedings and that the State has not completed its evidence in the main trial; more importantly, that the ruling of the magistrate in the trial–within-a-trial is likewise interlocutory in nature.

The alleged first irregularity

[19] The applicant contended that the magistrate had committed an irregularity, on the basis that she proceeded to hear evidence in the main trial without first having ruled that a trial-within-a-trial be held prior to the first state witness testifying. In this regard the applicant contended that his fair trial rights, as provided in section 35(3) of the Constitution, were violated.

[20] It is appropriate that regard be had to the actual record of proceedings before the magistrate, with regard to the proper context in which the irregularity was alleged to have been committed. As indicated, both accused pleaded not guilty to the charges. Immediately after the applicant had pleaded not guilty, his legal representative, Mr Andreas, addressed the court and stated the following:

‘Your worship at this stage I would just like to add that I am not sure if I say (sic) it at this stage, but accused 1 dispute (sic) the admissibility of the search and seizure of those evidence. It is our humble submission that it was unconstitutionally obtained and that a trial-within-a-trial must be held in order to determine the admissibility of the search and seizure. It’s just the evidence that relates to the search of seizure of the items. As the court pleases, Your worship.’

[21] Immediately thereafter the magistrate recorded the plea by the second accused, Mr Nguni. The prosecutor thereafter indicated to the court that the first

state witness was present, who would testify on the merits of the matter. He also stated as follows:

'We took note of the objection of accused 1 against the admissibility of his evidence. So we are in agreement that it would be incumbent then for the court to rule that a trial-within-a trial be held. Your worship it refers rule(sic) regarding the indistinct(sic) of admissibility I think I can already call him in the trial-within-a-trial but he, there's not much that he can contribute in those aspects. If the court can just grant me a short adjournment that I can take [indistinct].'

[22] In response, the magistrate stated as follows:

'What I want to understand, first I don't know about the merits. If someone is going to come and say I object on the validity of the search, for it really means nothing, because a search, what happened before the search. Do you understand? And then you object on the search. Do you understand? Then I will be in a position to make a ruling, because right now, for instance, the police, if there was an authorised road block, or something, I don't know how this search came about. Do you understand? So like right now I am not in a position to just rule that there must be a trial-within-a-trial. It can't happen like that.'

[23] The prosecutor thereupon informed the court that the evidence which the State would lead, through its first witness, would be with regard to the search. The court thereupon informed him as follows:

'Well, I would suggest that you call that witness. Then I will hear that witness and then my decision would be based on what will be happening.

PROSECUTOR: I understand, Your Worship. Do I understand the court correctly; must we then proceed with the main trial or with the [intervention].

COURT: We must proceed with the main trial.

PROSECUTOR: As the court pleases.

COURT: We can't really go to a trial-within-a-trial yet. We don't even know what's happening. I don't know. I am in the dark. Let's proceed with the main trial.

PROSECUTOR: As the court pleases, Your worship. We then call Mr Neil Damon to the witness stand, Your worship.'

[24] Thereupon the witness, Constable Damon, was led by the prosecutor. Briefly stated, he testified that he, together with his fellow police officer Sergeant Jooste, was carrying out what he referred to as crime prevention duties along the N1 in Beaufort West, along the route to Johannesburg. He explained that it involved conducting stop and search operations on vehicles in the areas patrolled by them, such as in the town, in the hotspots and high crime areas. On 27 October 2017 they were patrolling the area near the weigh bridge along the N1, and stopped a vehicle to conduct 'just a routine check'. Constable Damon approached the driver's side, while Sergeant Jooste approached the passenger side. Constable Damon claimed that he introduced himself and asked the driver to produce his driver's licence, and informed him that they were doing a routine check. He thereupon asked him if they 'can search the vehicle. . .'. He claimed that in response, the driver, who he identified as the applicant (accused 1) said that there was 'no problem officer and then they let us do the search'. He and Sergeant Jooste proceeded with the search of the vehicle. Sergeant Jooste then called out to him in the following: 'Damon come and look here I found this and I recognise this paper. Then he showed me where he found it.' He then explained that on the passenger side, hidden under the mat, he found what appeared to be pipe bombs and detonators. They immediately stopped the search, and had the vehicle taken to the police station where the dog unit was called out. The dog unit from Mossel Bay responded, and the dogs reacted positively to the scent of explosives. They thereupon searched the vehicle further and found more explosives. The prosecutor then handed up a set of photographs in an album depicting the inside of the vehicle where the items were found. The album was handed in without any objection by either the applicant nor his co-accused. Constable Damon stated further that both the applicant and his co-accused denied that the vehicle and the explosives belonged to them, and said that it was a company vehicle and that they were merely the drivers of the vehicle.

[25] In cross-examination by Mr Andreas, Constable Damon was referred to Section 22¹ of the Criminal Procedure Act, and it was put to him that 'in relation to

¹**22 Circumstances in which article may be seized without search warrant**

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

22(a) if the person concerned consents to such a search for the seizure, for the article in question and (b), now I want to question you with respect to section 22(b), if you, on reasonable grounds, believed that an offence was committed. . . '. Constable Damon was asked whether they had any reasonable suspicion to pull the vehicle over and conduct the search. His response was that they did not have any reason to do so, but that they had asked the driver and he 'agreed that we can search the vehicle'. Constable Damon repeated that he did not have any reasonable suspicion of an offence by the applicant or his co accused to have conducted the search. In response Mr Andreas put to him:

'Now, there's case law to the effect. . .

MR DAMON: Ja, we didn't have any reasonable ground, but we did ask for, like I said, we asked their permission. So we did have no reasonable ground to stop the vehicle, like I said, or no suspicious vehicle(sic), or whatsoever.'

[26] In further cross-examination he repeated that he had asked the driver (the applicant) for permission to search the vehicle, to which he had acceded. It was then put to him by Mr Andreas as follows:

'MR ANDREAS: Besides the fact and this is also, our case law is clear with respect to that as well, that you must, there's also a duty on you to inform any occupant that you want to search the vehicle, of that he have (sic) the right to refuse to give consent to search, for the search to take place. Did you inform them of that specific right as well?

MR DAMON: Your Honour, I did not inform them. But they didn't refuse or. . . '

The only question asked in cross-examination by Mr Van Der Westhuizen, on behalf of the applicant's co-accused, was whether the explosives found were weighed in the presence of Constable Damon. There was no further re-examination. The court therefore put questions of clarity to Constable Damon, with regard to his recollection, if any, of certain of the provisions of the 'Police Act' with regard to the conduct of searches. The response was that he was not able to recall off hand the specific provisions of the Act, but that they did on a regular basis conduct such routine

(b) if he on reasonable grounds believes-

- (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and
- (ii) that the delay in obtaining such warrant would defeat the object of the search.'

checks and searches of vehicles. There was no further re-examination by the prosecutor, neither any questions that arose from that of the court by both Mr Andreas or the legal representative of the applicant's co-accused.

[27] The prosecutor thereafter informed the court that that was the only witness for the day, to which the court responded: 'I am going to, I am not going to, at this moment, to order the trial-within-a-trial. I am going to ask you to get that act and read that act before I proceed with this and I think it has to be something which is made available. Because I see lots of this applications. That means we only read (sic) Criminal Procedure Act. The Criminal Procedure Act, you have to read it together with the relevant act sometimes. So the three of you when we postpone this matter I want you to have read that act (sic)'.

[28] The magistrate continued and stated: 'I am not sure about the section. You have to read the act. It might be section 11 or 12 and 12 and 12, however, I am not sure about the sections. I haven't read it recently. So I want you to read the act and understand it. You will read it together with the Criminal Procedure Act and maybe we won't have this kind of applications any more if everyone who comes to this court understand what the police act says and what is the Criminal Procedure Act says (sic).' This elicited the following exchange:

PROSECUTOR: We will do that, Your worship.

COURT: I guess, oh, but, I guess all the witnesses are police officers. Can we take this matter to Oudtshoorn?

Mr Andreas: Your Worship, I don't have a problem to do that. . .'

[29] As indicated, when the matter eventually resumed some months later, counsel for the applicant applied for a trial-within-a-trial to be held in which the admissibility of the search and seizure was to be challenged. The prosecutor, as indicated, did not oppose the application and the magistrate immediately ruled that a trial-within-a-trial be held.

[30] In his address to this court, on the review, and in his heads of argument, he maintained that the first irregularity related to the magistrate's refusal to have immediately proceeded to a trial-within-a-trial prior to the evidence of Constable

Damon being led in respect of the charges. Counsel for the applicant persisted with that position in argument, even when this court pointed out to him that the magistrate had made it clear that a basis had to be established in order for her to consider whether a trial-within-a-trial should be held. Moreover, even during the course of the evidence of Constable Damon being led by the State and in cross-examination by Mr Andreas, no application had been brought by the defence for a trial-within-a-trial to be held at that stage. Counsel for the applicant then contended that Mr Andreas should at that stage have brought the application for a trial-within-a-trial to be held. There was moreover no indication on the record that the magistrate would not have entertained a properly motivated application, once the basis had been set on the evidence and in terms of the law.

[31] There was, in our view, clearly no irregularity committed on the part of the magistrate in refusing that a trial-within-a-trial be held even before any evidence was led on the charges. The magistrate was correct in her view that a basis had first to be established on the evidence, or the grounds for the challenge to the admissibility of the evidence in relation to the consent obtained by the police officers had to be clearly spelled out, for the holding of a trial-within-a-trial. In this regard, the authorities do not define a set procedure to be adopted by a court when considering at what point a trial-within-a-trial must be ordered. In *S v Daniels* 1995 (12) BCLR 1687 (C), Van Reenen J remarked to the effect that it is in essence a court-created concept:

‘Binneverhore en die prosedures wat daarop van toepassing is word nie deur wetgewing gereël nie. Dit is egter ’n goed gevestigde praktyk wat waarskynlik ontwikkel het uit die Hooggeregshof se inherente bevoegdheid om sy eie prosedures te reël. (Sien *S v Nieuwoudt* (3) 1985 (4) SA 510 (K); *S v Yengeni and Others* [1990 (4) SA 429 (K)] te 436H; Jerold Taitz *The Inherent Jurisdiction of the Supreme Court* te 6 9.)’

The court stated further:

‘Selikowitz R het in *S v Yengeni and Others* (2) (*supra*), na ’n ontleding van die toepaslike regspraak beslis dat die prosedure wat by binneverhore toegepas word geheel en al binne die domein van die verhoorregter is met inagneming van die vereistes van geregtigheid en billikheid. Soortgelyke standpunte word gehuldig deur Friedman R (soos hy toe was) in *S v*

Nieuwoudt (3) (supra) te 517E–F en Farlam WnR (soos hy toe was) in *S v Williams and Others* 1991 (1) SASV 1 (K) te 9e–f.’

In *S v Masakale and Another* 2009 (1) SACR 295 (W), the court quoted with approval the following from *S v De Vries* 1989 (1) SA 228 (A):

‘It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. In England the enquiry into voluntariness is made at “a trial on the voir dire” or, simply, the voir dire, which is held in the absence of the jury. In South Africa it is made at a so-called “trial within the trial”. Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue.’ (Own emphasis added.)

[32] The fact that the prosecutor acquiesced to the request by the applicant’s legal representative for a trial-within-a-trial to be held even before evidence was led, was entirely neutral. There was clearly no procedural irregularity by the magistrate in insisting that evidence be led on the main trial first, to establish the basis for the challenge to the admissibility of the evidence relating to search and seizure. The magistrate appeared alive to the challenge to the evidence of the search and seizure, and even requested the legal representatives to familiarise themselves with the relevant legal provisions relating to searches and seizures before she considered the holding of the trial-within-a-trial at the end of Constable Damon’s testimony. Moreover, as was apparent from the record of the proceedings, a trial-within-a-trial was subsequently held upon a fully motivated application by the applicant’s legal representative.

Second alleged irregularity.

[33] The relief sought under this heading in the amended Notice of Motion relates to the reviewing and setting aside of the order by the magistrate, with regard to the consent obtained by Constable Damon from the applicant for the search of the vehicle and the actual search thereof, as being a violation of Sections 10 and 14 of the Constitution and a contravention of Section 22 of the Criminal Procedure Act 51 of 1977. Again, as with the relief sought in respect of the violation of certain rights under the Constitution, as raised in the initial Notice of Motion and in the founding

affidavit by Mr Andreas in respect of the first irregularity, the applicant does not set out the basis of the alleged violation of his dignity in terms of Section 10 of the Constitution, neither that of his right to privacy under Section 14. More importantly, the applicant does not set out the basis on which it is alleged that the magistrate had committed any procedural irregularity in the proceedings in breach of his rights under Section 35(5) of the Constitution, that would warrant any intervention by this court. No complaint was raised at all with regard to the procedure adopted by the magistrate in conducting the trial-within-a-trial, and the manifest conduct of the magistrate from the record did not appear to give rise to any irregularity in the proceedings. The applicant seeks, however, to attack the magistrate's ruling on its merits as being a violation of his Section 10 and Section 14 rights under the Constitution, and also a violation of Section 22 of the Criminal Procedure Act.

[34] In this regard, and with reference to the record of the proceedings, it was repeatedly put to Constable Damon and Sergeant Jooste, who testified during the trial-within-a-trial, that they had failed to inform the applicant and his co-accused of their 'right to refuse the search'. During the cross-examination of Sergeant Damon it was also put to him, and to the court, certain extracts of the decision in *S v Enujukwu* (above) relating to the notion of 'informed consent'. Counsel for the applicant submitted to the magistrate that he was also relying on the views expressed by the authors Du Toit et al in the *Commentary of the Criminal Procedure Act* which he claimed 'refer to that the consent has to be informed consent (sic)'. The witness, Constable Damon, in response repeatedly stated that he was not aware of such a right that the applicant and his co-accused had to be informed that they have a right to refuse the search of the vehicle. He did, however, state that had the applicant or his co-accused withheld their consent to search the vehicle they would have simply told them to drive on. The witnesses, Constable Damon and Sergeant Jooste, were repeatedly admonished by counsel for the applicant during his cross-examination of them, for their failure to have acquainted themselves with what he referred to as the provisions of the Constitution, 'the Police Act' and the Criminal Procedure Act relating to searches, privacy and seizures.

[35] Counsel for the applicant, as well as his attorney, when conducting the cross-examination of the police officers in the court a quo, and likewise in their oral and

written submissions in the court a quo, and in the written heads of argument and oral submissions to this court on review, dismally failed to put the correct position in law as it presently stands with regard to the question of consent. That issue had been dealt with by Griesel AJ in the Supreme Court of Appeal in *S v Lachman* 2010 (2) SACR 52 (SCA), where that court rejected the contention that a search was unlawful because the police officer had failed to advise the appellant that he could object to the search. The SCA resoundingly found that the notion of 'informed consent' as contended for by the applicant's legal team was not sound in law. See in this regard paragraphs 36 and 37² of that decision .

[36] The decision in *S v Enujukwu* relied upon by the applicant's legal team was likewise dealt with in a decision of a full bench of this division, *S v Umeh* 2015 (2) SACR 395 (WCC), where the decision in *S v Enujukwu* was criticised. In this regard see paragraph 41.5 of that judgment.³ Further, the authors Du Toit et al deal with all

² '36. It was argued on behalf of the appellant that the State could not rely on the consent ostensibly given by the appellant because he was not advised, prior to the search, (a) that he could object to any search, or (b) that any article seized during the search could be used in evidence against him. The High Court held that this circumstance was "neither here nor there" and dealt with the argument as follows:

"As regards the second aspect [(b) above] it need merely be commented that it was obvious that if anything incriminating was found it would constitute evidence against him and would be used as such. As regards the first aspect [(a) above], counsel did not point to any provision requiring the police to advise a subject that it was open to him to refuse to allow a search to be undertaken. (It may be recorded that even if the appellant had refused consent for the desk to be searched, the ultimate result, the retrieval of the cellphone, would, for the reasons stated below, still have followed).

The issue of legal representation is relevant here as well. Had an attorney been engaged by the appellant he would have adopted one of two courses: after consultation with the appellant he would have advised him to consent to the search or he would have insisted on Buys obtaining a search warrant. In the latter event Buys would have adopted one of two courses. He would either have invoked s 22(b) and proceeded with the search and seizure on the basis that he had reasonable grounds to believe that a search warrant would be issued to him under s 21(1)(a) should he apply therefor and that the delay in obtaining the warrant would defeat the object of the search. Alternatively, he would have taken steps to secure the appellant's desk pending his return with the search warrant. The retrieval of the cellphone would have been the inevitable result.

I would record that in any event I would, in weighing up the competing considerations (as to which see eg *S v Hena and Another* 2006 (2) SACR 33 (SE)) have concluded that the admission of the evidence of the finding of the brown cellphone did not result in an unfair trial or bring the administration of justice into disrepute."

37. The High Court accordingly concluded that the evidence in question was correctly admitted. I agree with the above reasoning and share the conclusion arrived at by the High Court. I wish to add that no challenge was directed at the police conduct in order to establish whether, subjectively, they held the relevant belief, as contemplated by s 22(b), when conducting the search. Looking at the matter objectively, however, I am satisfied that, had such a challenge been advanced by the defence, the police conduct could have been justified on those grounds as well.'

³ '41.5 Furthermore, on the basis of the authority in *S v Lachman* 2010 (2) SACR 52 (SCA) the position of the court in *S v Enujukwu*, that the appellant had to be advised of his right to refuse to be searched, was clearly wrong. Griesel AJA in the *Lachman* matter held that it was not correct to argue that consent obtained was not reliable, because, firstly, the appellant in that matter had not been

of these cases on the very same page at 2-30J and very clearly point to the authority of the SCA decision in *S v Lachman*. Nothing could have been clearer regarding the correct legal position on the issue.

[37] Clearly an incorrect proposition in law was put to the state witnesses, and also to the magistrate in the court a quo, and was likewise repeated before us. It is ironic that an experienced counsel would derisively criticise the two police officers for their ignorance of the law (which he repeatedly stated was no excuse), yet at the same time launch these review proceedings (with the applicant's attorney deposing to the founding affidavit) on an incorrect position of law. More importantly, if the applicant's legal representatives were of the view that the position of their client was distinguishable from that in the matters of *S v Lachman* or *S v Umeh* (which, with respect, they appeared to have been blissfully unaware of), such contention should more appropriately be raised at the end of the trial in the magistrate's court should the interlocutory decision by the magistrate not be reconsidered as a result of all of the evidence and, if necessary, on appeal.

[38] With regard to the application of Section 22 of the Criminal Procedure Act, it was apparent that counsel for the applicant and his attorney had failed to appreciate the distinctions between Sections 22(a) and 22(b) of the Act. In this regard Section 22(a), on which basis the search was conducted by the two police officials (Constable Damon and Sergeant Jooste), is where a person 'consents to such search for and the seizure of the article in question', as opposed to the police having to have reasonable grounds to do so under Section 22(b), and without the consent of the person concerned. Once again, incorrect propositions in law were put not only to the witnesses but contended for in the court a quo, and likewise on review before us. In our view, there was simply no basis for the contention of an irregularity on the part of the magistrate under the alleged second irregularity.

Interference with incomplete proceedings.

advised that he could object to the search and, secondly, that any articles seized could be used in evidence against him. In the *Lachman* case Griesel AJA also confirmed the court a quo's view that there was not any provision requiring the police to advise a subject that it was open to him to refuse to allow a search to be undertaken.'

[39] In the heads of argument filed on behalf of the applicant it was contended that this review should be viewed through the legal prism of the Constitution and in particular Section 35 (3). The applicant also contended that the court should have regard to the provisions of Section 38 of the Constitution⁴ in accordance with which the applicant was entitled to assert that a right in the Constitution has been infringed or threatened and that a court may grant appropriate relief, including a declaration of rights. Moreover, counsel for the applicant contended in the heads of argument that the provisions of Section 39(2) of the Constitution were relevant. Once again, it is our respectful view that the applicants' reliance on the provisions of the Constitution with regard to his fair trial rights, do not justify an interference in criminal proceedings which are mid-stream, and more so where the applicant has failed to demonstrate any legal basis for the relief sought in this court on review. In the founding affidavit the applicant's attorney also contended that the review was based on the 'principle of legality', but in subsequent revised heads of argument claimed that reliance was placed on the provisions of Section 22(1)(c)⁵ and (d)⁶ of the Superior Courts Act 10 of 2013. The applicant has likewise failed to demonstrate that the magistrate committed a gross irregularity or acted in breach of section 22(1)(d) of the Superior Courts Act, in either of the alleged two irregularities complained of.

[40] The State Attorney on behalf of the second respondent belatedly, but more appropriately, referred to *Ferreira v Magistrate, Mr Koopman* NO 2020 JDR 1909 (ECG) in which the court referred to the often quoted decision of *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (AD) as one of the prevailing dicta on the issue:

'[21] . . . If, as appellants contend, the magistrate erred in dismissing their exception and objection to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is to appeal after conviction . . . Nor, even if the preliminary point decided against the accused by a magistrate be fundamental to the accused's guilt, will a Superior Court ordinarily interfere –

⁴ **'Enforcement of rights**

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. . . '

⁵ '[G]ross irregularity in the proceedings'.

⁶ '[T]he admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

whether by way of appeal or review – before a conviction has taken place in the inferior court.’ [Own emphasis added.]

[41] More importantly, the applicant has failed to demonstrate any exceptional circumstances for the matter to be reviewed mid-stream the criminal proceedings. See also the views expressed by De Kock AJ in *Bisschoff and Magistrate Jansen Van Rensburg and Others* (1581/2021) [2021] ZAFSHC 254 (28 October 2021) in which the court very usefully sets out the law as it presently stands in relation to the review of proceedings mid-stream in a trial⁷.

[42] In this division, Dolamo J in *William Frederick Jacobus Smith v A Immelman & 1 other* - Case No: 24387/11 remarked as follows:

⁷ ‘See: *Motata v Nair N.O. and another* 2009 (2) SA 575 (T) 578 H – I.

In *Motata v Nair N.O. and another* the following was stated by Hancke and Pickering JJ, relevant to reviews in *medias res*:

“(9) It is trite that as a general rule a High Court will not by way of entertaining an application for review interfere with incomplete proceedings in a Lower Court. As was stated in *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (AD) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before conviction has taken place in the Lower Court even if the point decided against the accused by a magistrate is fundamental to the accused’s guilt . . .”

[23] In *Mispha CC and another v The Honourable Regional Magistrate and others* 2647/2011 (15 August 2013) ECD, Grahamstown, delivered on 18 September 2013 the Full Bench held as follows as to Review in *medias res*:

“(46) Against this background our Courts are extremely reluctant to interfere with or allow the review of proceedings not yet completed in an inferior court. It has been said that a court will only do so in exceptional circumstances where serious injustice will otherwise result or where justice cannot be achieved in any other way. *Wahlhaus and others v Additional Magistrate Johannesburg* 1959 (3) SA 113 (A) at 119H – 120C, *Building Improvement Finance Co (Pty) Ltd (supra)* at 793F – 794A, *R v Marais* 1959 (1) SA 98 (T) at 101H, *Van Tonder v Killian* NO 1992 (1) SA 67 (T) at 74D – I, *Nourse v Van Heerden* 1990 (2) SACR 198 (W), *S v The Attorney General of the Western Cape, S v Regional Magistrate, Wynberg* 1999 (2) SACR 13 (C).”

[24] In *Adonis v Additional Magistrate Bellville and others* 2007 (2) SA 147 (C) at para [21] the following was stated:

“[21] It is generally accepted that this Court will not readily intervene in Lower Court proceedings which have not yet terminated unless grave injustice may otherwise result or where justice may not be obtained by other means. See: *Wahlhaus and others v Additional Magistrate Johannesburg* 1959 (3) SA 113 (A) at 119H to 120C, *Ishmael and others v Additional Magistrate Wynberg and another* 1963 (SA) 1 (A) at 5G to 6A, *Building Improvements Co (Pty) Ltd v Additional Magistrate Johannesburg and another* 1978 (4) SA 790 (T) at 793F – G.

[25] What has been overlooked by the Applicant is that the review of the orders granted in the Magistrate’s Court, Bloemfontein by the First and Second Respondents is in *medias res*. The question of review in *medias res* must be considered against such grave injustice as a result, if the Court were not to intervene at this stage, such as to materially prejudice the Applicant which cannot in due course be corrected on review or appeal.’

[52] The above is a correct exposition of the law on the review of a lower Court's decision. A High Court may exercise its inherent jurisdiction to review proceedings in lower Courts before the conclusion thereof in that Court, where grave injustice might otherwise result or where justice might not by other means be attainable. The question however is whether applicant's case is such as to justify an interference of the proceedings in the lower Court before their conclusion. In my view the conduct of the first respondent does not warrant the drastic steps of bringing this review application at this stage. His case has no special features as to bring it within the ambit of the authorities on this topic. Litigants must not be encouraged to believe that, by seeking the disqualification of a judicial officer they will have their case heard by another judicial officer who's likely to decide it in their favour.' (Internal footnote omitted.)

Lowe J, in *Ferreira v Magistrate, Mr Koopman* (above), concluded in that matter:

[27] In my view, no exceptional circumstances have been demonstrated to exist in this matter which would lead to serious injustice arising or which, if in fact justifying same, cannot be rectified in due course. Further and in any event, on what is before us, I am far from persuaded that any of the grounds referred to in Section 22 of the Superior Courts Act are in any way satisfied to say the least.

[28] In summary from what has been set out above, and that raised on the papers in this review, not only is a Review impermissible at this stage *in medias res*, but such as is advanced in this matter constitutes, at best, grounds for appeal in due course, not review, and in any event does not fall within Section 22 of the Superior Courts Act at all. The points raised go not to the method of the proceedings but to the result thereof, and will be matter for appeal in due course and not review.' (My emphasis)

That position applies with equal strength to the applicant's ill-fated review of the magistrate's conduct and decisions in this matter.

[43] As already stated, it was wholly inappropriate for the applicant to have brought these proceedings mid-stream the criminal proceedings in the court a quo. No exceptional circumstances were demonstrated, but more importantly, there was clearly no violation of the applicant's fair trial rights, nor was the applicant's contention in respect of the law relating to search and seizures supported by the existing case law and a proper reading of the relevant provisions of the Criminal Procedure Act.

The conduct of the second respondent.

[44] In the third affidavit filed by the senior state advocate on behalf of the second respondent, she claimed, for the first time, that when she had taken the decision to abide the outcome of these proceedings, and when deposing to the first two affidavits, she had not had access to the record of proceedings in the court a quo. That notwithstanding, counsel for the applicant confirmed that a full set of the proceedings had in fact been served on the office of the second respondent when the application was filed.

[45] In the first affidavit, the state advocate stated on behalf of the second respondent:

- '5. Having studied the contents of the file and consulted with the prosecutor seized with the matter in Beaufort West, second respondent was satisfied with the correctness of the facts stated in the notice of motion.
6. Respondent respectfully submits that the presiding magistrate erred in not ordering that the evidence regarding the admissibility of the search of the vehicle be heard in the form of a trial-within-a-trial.
7. Respondent further respectfully submits that the two police officers were inexperienced, contradicted each other on material aspects and were ignorant with regards to the law and applying the law in respect of search and seizure procedures.
8. Respondent had regard to the relevant case law and agrees that the Constitutional Rights of the Applicant were violated and that, due to the gross misdirection of the presiding magistrate, the proceedings should be set aside.
9. The above mentioned are the reasons why Respondent filed a notice to abide as set out in terms of the Uniform Rule 53.'

[46] It is not clear to this court on what conceivable basis the deponent to the affidavit could have arrived at the conclusions which she did, more especially since she claimed not to have had sight of the record of the proceedings of the court a quo. It was simply not a matter in which she could have merely had a consultation with the prosecutor who dealt with the matter in court a quo, in order for her to have satisfied herself as to the correctness of the facts stated in the founding affidavit.

She thereupon dismissed the evidence of the two police officials, who she claimed were 'inexperienced' and she likewise claimed that they had contradicted themselves on material aspects, and were ignorant of the law when applying it in respect of search and seizures. As already pointed out in this judgment, the police officers acted in accordance with the prevailing law. Significantly, Constable Damon had ten years' experience as a police officer, while Sergeant Jooste had thirty years. Moreover, the second respondent expressed the view that having had regard to the 'relevant case law' she agreed that the constitutional rights of the applicant had been violated due to a misdirection of the presiding officer and that the proceedings should be set aside'. Clearly there was absolutely no basis to seek the setting aside of the proceedings, given that the applicant and his co-accused faced a second charge. More importantly, the second respondent had likewise simply misconceived the merits of the review application.

[47] The second respondent was given a further opportunity to assist the court, with regard to the initial question that it raised as to whether it was appropriate that the review proceedings be brought mid-way in an ongoing criminal trial.

[48] In the second affidavit the state advocate referred to various consultations which she conducted with senior colleagues in the office of the DPP, who apparently confirmed that the second respondent should abide the decision. She also claimed that she had only become aware of the fact that there was a further unrelated charge the very morning on which she deposed to the second affidavit, after having received a copy of the charge sheet and the docket. It was once again inconceivable that the second respondent could have deposed to an affidavit without having had sight of the docket or the charge sheet in the matter, and yet having adopted the position that she did in the first affidavit.

[49] She further stated in the second affidavit that she did not deal with the question as to whether it was appropriate, mid-stream in an ongoing criminal trial, that an interlocutory order by the trial court was being sought to be set aside on review, as: 'I only had the dated case law of *Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another* 1959 (3) [SA 113] (A) and *Le Grange and Another v Loubser and Another* 1990 (2) SACR [202] (O)'. She then claimed that she had secured a more recent decision of *Sapat and Others v The Director:*

Directorate for Organised Crime and Public Safety and Others 1999 (2) SACR 435 (C) in which Davis J stated as follows at 439F-440A:

‘The issue of ripeness has been subject to careful analysis by the courts long before the introduction of the Constitution. In *Wahlhaus and Others v The Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) Ogilvie Thompson JA cited *Gardiner and Lansdown* with approval to the effect that

“while a superior court having jurisdiction in review or appeal will be slow to exercise any power whether by *mandamus* or otherwise upon the unterminated course of criminal proceedings in the court below, it certainly has the power to do so and it will do so in rare cases where grave injustice might otherwise result, or where justice might not by other means be attained” (at 120 B).

In *Ismail and Others v The Additional Magistrate, Wynberg* 1963 (1) SA 1 (A) at 5 Steyn CJ said:

“I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* . . ., where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate’s decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and the irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in unterminated proceedings in a court below, and should, generally speaking, confine the exercise of its powers to ‘rare cases where grave injustice might or a justice might not by other means be attained’.”

A proper consideration of the very case law she referred to, and the particular facts of the matter, did not dissuade her from the initial position adopted by the second respondent. She contended that she still was still of the view ‘that the Constitutional Rights of the Applicant were violated and that, due to the gross misdirection of the magistrate, grave injustice might result and agree (sic) with the relief sought’. Once again, it appears to this court that it was inconceivable that the second respondent had properly considered both the law and the merits of this review application.

[50] In the third affidavit filed by her with the assistance of the state attorney, she sought to explain the position adopted in the previous two affidavits. In that regard she pointed out that she had not had sight of the record of the proceedings in the court a quo. Strangely, she then contends that if the record confirmed the applicant's version, the second respondent would have difficulty to defend an appeal if the applicant and his co-accused were to be convicted at the end of the trial. That notwithstanding the incorrect position at law on which the applicant relied.

[51] It was only at the stage of the filing of heads of argument by the state attorney, and in his address to the court at the hearing of the matter, that the second respondent was of any assistance to the court in these review proceedings. The state attorney, to his credit, had thoroughly reconsidered the matter, and pointed out the lack of any merit in the review on the basis of any alleged irregularities on the part of the magistrate, as there was simply no basis for the claims and, more importantly, no procedural irregularity had been demonstrated in the proceedings in the court a quo. The state attorney had provided a substantive set of heads of argument before the court, which cogently demonstrated a lack of any merit in the relief sought by the applicant.

[52] In his amended Notice of Motion, as in his original, the applicant sought an order of costs against any party that opposed the relief.

[53] At the hearing of the matter the court requested of both counsel for the applicant and the state attorney to address it on the issue of costs. The state attorney pointed out that it had not sought an order of costs against the applicant, because it had not opposed the proceedings. The court pointed out to counsel for the applicant that the court was inclined to demonstrate its displeasure at the applicant's conduct, in bringing the review proceedings which were entirely devoid of merit and appeared nothing more than a stratagem at inordinately delaying the criminal trial. Counsel for the applicant had also rather opportunistically in his heads of argument latched on to the incorrect positions adopted by the state advocate in the various affidavits deposed to by her. The court was of the view that these review proceedings were tantamount to an abuse of legal process. On the other hand, the court also pointed out to the state attorney that the position adopted by the second respondent appeared to have been nothing more than a dereliction of duty, in having

failed to have properly considered the merits of the application, given the interests of justice and the unnecessary delay in the criminal trial as a result of the review proceedings. Moreover, the applicant and his co-accused faced serious charges relating to the alleged unlawful possession of explosives.

The court also expressed its opprobrium to counsel for the applicant, who in his address to the magistrate in the court a quo contended that the conduct of the two police officers demonstrated a need for them to be sent 'for training'. Those comments were without any merit given the incorrect legal position repeatedly put to the police officers by both counsel for the applicant and his attorney. Moreover, he accused them of a flagrant violation of the Constitutional rights of the applicant, and literally flew into an unwarranted tirade against the two police officers. There was, in my view, no need to have denigrated the two police officers in the manner which they were subjected to, both in cross-examination and in the comments by the applicant's counsel in his address to the court a quo.

[54] This court has seriously considered making an adverse order of costs against the applicant in favour of the second respondent, who has had to resort to the services of the state attorney at the behest of the court to assist it. However, given the position adopted by the second respondent in these proceedings, the court considers that it is not appropriate to do so, save to express its grave concern regarding the position adopted by the second respondent in simply seeking to abide these proceedings, the most unhelpful assertions in the various 'Explanatory Affidavits' filed on its behalf, and also the meritless application in which the conduct and decisions of the magistrate in the court a quo were sought to be impugned.

[55] In conclusion, the following order is made:

1. The application for the review and the setting aside of the proceedings before the Honourable Magistrate, Ms Moni, in the court a quo is dismissed.

V C SALDANHA

Judge of the High Court

T LE ROUX

Acting Judge of the High Court