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

REPORTABLE

CASE NO: 17662/2022

In the matter between:

THEMBINKOSI KHULEKANI RUDOLF JIYANA	Applicant
And	
THE REGIONAL COURT MAGISTRATE	
(COMMERCIAL CRIMES COURT 7, BELLVILLE)	First Respondent
DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent

Bench: P.A.L. Gamble & C.M.J. Fortuin, JJ.

Heard: 25 August 2023.

Delivered: 6 September 2023.

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Wednesday 6 September 2023.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. The applicant was formerly an attorney of this court, duly admitted as such in 2002, who was struck from the roll on 6 December 2013. The circumstances surrounding the applicant's removal from the roll related to serious trust fund defalcations, amidst allegations of theft and fraud. The applicant did not oppose his removal from the roll.

2. As is customary in matters of this sort, the applicant was required to surrender to the erstwhile Cape Law Society (CLS) all of the files in his practice. The CLS thereafter appointed an attorney, Mr. Sirkar of Herold Gie Attorneys, Cape Town, as a curator to handle those files further and, it appears, Mr. Sirkar took possession thereof in August 2013. In an affidavit filed in the criminal proceedings referred to hereunder, Mr. Sirkar says that he informed the applicant in September 2014 that he was entitled to access the files then in his possession by prior arrangement but that the applicant never took up that offer.

3. Mr. Sirkar goes on to point out that in October 2016 he was contacted by the landlord of the applicant's former office premises and, after investigation, Mr. Sirkar found a collection of the applicant's client files and papers in the ceiling of the office. At a later stage, says Mr. Sirkar, he was contacted by the second respondent (the State) and asked to make hard copies of the file contents available to it as the applicant had requested same as part of his defence. Mr. Sirkar undertook to do so upon payment of the cost of copying.

4. In October 2018 the applicant applied to the Legal Practice Council (LPC) for readmission to the roll of attorneys, believing that he had suitably mended his ways and was then a fit and proper person to practice as such. The LPC informed the applicant that it would oppose any such application in light of the fact that there were criminal charges laid in 2014 which were still pending against him arising from the aforesaid defalcations.

5. In December 2020 the applicant was arraigned before the first respondent (the Regional Magistrate) on multiple charges of theft, fraud and forgery. These related to two specific clients, Ngubane & Co and a Ms. Makiwane, whose monies the applicant had allegedly stolen from his trust account. The forgery charge related to the falsification of a document which was intended to cover up the alleged theft.

6. The applicant has yet to plead to those charges, now almost 3 years later. The main reason therefor is that in February 2021 the applicant sought further and better particulars from the State under s87 of the Criminal Procedure Act, 51 of 1977 in relation to the allegations made in the charge sheet. That request sought production of seven files in the Ngubane matter and five files in the Makiwane matter.

7. The State responded to the applicant's request for further and better particulars on 26 March 2021, informing him that 4 files in the Ngubane matter and 3 files in the Makiwane matter were in storage at the offices of Herold Gie attorneys and could be viewed there. The State said that there was no record of the remaining files requested by the applicant. The State went on to allege that the files could be perused at the attorneys' offices and if required, scanned copies thereof could be provided upon tender for the cost thereof. Evidently, Mr. Sirkar did not have the remaining files requested and the State could thus not pass them on to the applicant. The State subsequently made the contents of these 7 files available to the applicant in electronic format: it said that the cost of providing hard copies running to in excess of some 14 000 pages (of the order of R14 000) was prohibitive.

8. There then followed a toing and froing regarding a demand for hard copies of the seven files produced and delivery of the remaining five files which the State said Herold Gie did not have. Eventually the applicant brought a substantive application in October 2021 for further and better particulars, which included a demand for the outstanding files and also for hard copies of all the files. This application was opposed by the State and after affidavits had been exchanged the

matter was argued before the Regional Magistrate on 8 April 2022. By that stage, it appears that Mr. Sirkar had discovered a further two files which were handed to the State and ultimately made available to the applicant.

9. On 31 May 2022 the Regional Magistrate dismissed the application for further and better particulars and found that the particulars already furnished to the applicant by the State were "*precise, clear, concise and reasonably sufficient to ensure that the applicant/accused know (sic) and understand the case he has to meet and to properly prepare and present his case*." The Regional Magistrate further found that the State was within its rights to furnish the further particulars in electronic format, given the prohibitive cost of making hard copies in the face of austerity measures which face the courts.

10. The applicant then gave notice that he intended taking the Regional Magistrate's interlocutory ruling on review and the criminal proceedings were put on hold while this process was advanced in this Court. The review application, brought in terms of s22(1)(b) of the Superior Courts Act 10 of 2013, was only launched five months later in October 2022. Eventually it came before this Court on 25 August 2023.

11. In the notice of motion filed in this review the applicant asked for the order of the Regional Magistrate of 31 May 2022 to be set aside, that the State be directed to file further and better particulars in the form of hard copies of all the files relating to the Ngubane and Makiwane matters, that the criminal trial be heard by a different magistrate and that the Regional Magistrate and the State be ordered to pay the costs of the application jointly and severally.

REVIEW *IN MEDIAS RES*

12. When the matter commenced before this court we requested Mr. Masuku SC to address us on the principal which has emerged from the well-known

decision in Wahlhaus[1] and the various other cases which have followed it. It came as a matter of some surprise to us when we read the parties' heads of argument that neither side had considered whether the matter was properly before this court.

13. Mr. Masuku confessed that he was not familiar with Wahlhaus but said that he understood the principles involved. At the conclusion of the hearing Mr. Masuku was afforded the opportunity to file a post-hearing note on the Wahlhaus approach and late on Friday 1 September 2023, such a note was emailed to the Court. The note does not raise anything new on the law and counsel accepted that the Wahlhaus approach was applicable to the present matter.

14. The *dictum* in Wahlhaus, in which the facts bear a striking resemblance to this matter, is to the following effect.

"If, as the 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. The practical effect of entertaining appellants' petition would be to bring the magistrate's decision under appeal at the present, unconcluded, stage of the criminal proceedings against them in the magistrate's court. No statutory provision exists directly sanctioning such a course. Sec 103(1) of the Magistrates' Courts Act (32 of 1944) – in contrast with secs. 103(2) and 104 conferring rights of appeal upon the Attorney-General - only confers a right of appeal on accused who is 'convicted of any offence by the judgment of any magistrate's court.' 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 - whether by way of appeal or by way of review - before a conviction has taken place in the inferior court. (See *Lawrence v A.R.M. of Johannesburg,* 1908 T.S. 525, and *Ginsberg v Additional Magistrate of Cape Town, 1933 C.P.D.357*). In the former of these two cases Innes, C.J. said at p. 526:

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[1] Wahlhaus and others v Additional Magistrate, Johannesburg and another 1959 (3) SA 113 (A) at 119D – 120A

> '*This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the appellant guilty, then let him appeal, and we shall decide the whole matter.'*

It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict or *mandamus* - against the decision of a magistrate's court given before conviction. (See *Ellis v Visser and another,* 1956 (2) SA 117 (W) and *R v Marais,* 1959 (1) SA 98 (T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised; for each case must depend on its own circumstances. The learning authors of *Gardiner and Lansdowne* (6th ed. vol 1 p750) state:

> '*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 proceedings in a court below, it certainly has the power to do so, and will do so in the rare cases where grave injustice might otherwise result or where justice might not by other means be attained… In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure on the continuity of proceedings in the court below and the fact that redress by means of review or appeal will ordinarily be available*.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts."

15. The principle thus enunciated in Wahlhaus is still good law and has not been supplanted by our constitutional jurisprudence. On the contrary, it has been endorsed by our highest courts. In Moyo[2] the Supreme Court of Appeal deprecated what has since been dubbed "the Stalingrad" defence designed to unnecessarily

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[2] Moyo and another v Minister of Justice and Constitutional Development and others 2018 (2) SACR 313 (SCA) at [156] *et seq*

delay criminal prosecutions, and referred expressly to the judgment of the late then Acting Chief Justice in Thint[3].

"[161] Under the present Constitution similar preliminary litigation in a criminal case was considered by Langa ACJ… [in Thint] and he said the courts –

> '*should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s35 (5) [of the Constitution[4]]. Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The court's doors should never be completely closed to litigants… If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s35 (5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned.' "*

16. The issue was further discussed as follows in Motata[5].

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[3] Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma v National Director of Public Prosecutions and others 2008 (2) SACR 421 (CC) at [65]

[4] S35(5) is part of the of the section in the constitution dealing with arrested and detained persons and reads – "*(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice*".

[5] Motata v Nair NO and another 2009 (1) SACR 263 (T) at [12]. See also Gounden and another v Noncebu NO and others 2018 (2) SACR 186 (KZP) at [14].

"12. It has been stressed that underlying the reluctance of the courts to interfere in unterminated proceedings in the lower court is the undesirability of hearing appeals or reviews piecemeal. See *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and another* 1999 (2) SACR 13 (C) at 22e-f; *Nourse v Van Heerden NO and others* 1999 (2) SACR 198 (W) at 207d-e; and *S v Western Areas Ltd and others* [2005 (1) SACR 441 (SCA)] where, in para 25, Howie P stated:

> 'Long experience has taught that in general it is in the interests of justice that an appeal await the completion of the case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time on issues which may not have arisen had the process of been left to run its ordinary course.' "

17. In order to succeed in this application the applicant must demonstrate that this is a "rare case" where the interests of justice demand that the application be granted. The founding affidavit is bereft of any allegations to this effect, not surprisingly because the applicant's legal representatives appear not to have been familiar with the principles relating to reviews *in medias res.* In the post-hearing note Mr. Masuku stressed that the Court ought nevertheless to have regard to the facts of the matter and determine that this is in fact such an exceptional case.

18. In this matter the documents sought by the applicant are not under the control of the State: they are lawfully in the possession of the curator. Moreover, as submitted by Mr. Knipe for the State, the documents in question are not intended to form part of the prosecution's case. Rather, it is the applicant who suggests he needs some of them to advance the defence case and sustain his acquittal.

19. Thus far the State has accommodated the applicant by procuring the documents from the curator and has made these available to the applicant in

electronic format. We were informed from the Bar that the applicant has been able to access the documents on his computer and he is thus able to view same. In my considered view, if the applicant wants to make hard copies thereof for the purposes of advancing his defence, that is his prerogative but it is most certainly not the duty of the State to do so.

20. Finally, the applicant was advised at any early stage of proceedings in the court below that he might view the source documents at the attorneys' offices. Evidently, that offer still stands. Having viewed the documents, whether in the electronic format furnished to him or at source in the attorneys' office, and being satisfied that there are documents which he might wish to adduce in evidence, the applicant still has the option to subpoena the curator *duces tecum* at the trial, thus placing the documents before the first respondent.

21. It follows that the application for review must fail. Given that the State was represented by a member of the staff of the second respondent, it is not necessary to make a costs order in this matter.

ORDER OF COURT

Accordingly it is ordered that the application is dismissed with no order as to costs.

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GAMBLE, J

I concur:

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FORTUIN, J

APPEARANCES:

For the applicant: Adv. T. Masuku SC
Instrcuted by Venfolo Lingani Inc
Cape Town

For the second respondent: Adv. J Knipe
Director of Public Prosecutions
Cape Town