



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO.

632/2020

In the matter between:

LINDILE ERIC MKHIZE

Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

THE DISTRICT MAGISTRATE NAIDOO

Second Respondent

JUDGMENT

RUGUNANAN J

[1] Before us is a review application initiated in a notice of motion dated 30 January 2020. The review is in terms of section 22 of the Superior

Courts Act 10 of 2013 read with rule 53 of the Uniform Rules of Court. It emanates from part-heard proceedings in the Magistrates' Court, Makhanda (Case No. B 667/2018) in which the applicant, who appears before the second respondent as presiding magistrate, is charged with the offence of dealing in drugs.

- [2] In the main, the applicant seeks to review and set aside the trial proceedings presided over by the second respondent. Alternatively, an order is sought (i) that the only witness who testified with regard to the evidence of a search and seizure, be recalled for further cross-examination; (ii) that the similar fact evidence led by the prosecution during the trial, be struck from the record; and (iii) that, in respect of the evidence of similar fact (and presumably the trial-within-the-trial¹), the second respondent be directed to provide reasons for 'allowing the impugned evidence as admissible'. The applicant, in addition, seeks a costs order against any of the respondents opposing the application.

Background

- [3] On 2 May 2018 while driving a motor vehicle on the national road on the outskirts of Makhanda (formerly Grahamstown) the applicant was stopped by two police officers, Sergeant Frans and Sergeant Brooks. Following a search of the vehicle and the seizure of an enclosed package containing mandrax and cash amounting to R137 000, the applicant was arrested. In the course of the proceedings before the magistrate a trial-within-a-trial was held for determining the admissibility of the evidence relating to the search and seizure.

¹ The relief couched in the notice of motion is nebulous

- [4] Sergeant Frans, who arrested the applicant, testified as to the admissibility of such evidence. He believed that a search warrant would be issued to him in terms of section 22(b)(i) and (ii) of the Criminal Procedure Act 51 of 1977 if he applied therefor but that the delay in obtaining it would defeat the object of the search.
- [5] Although the applicant, who was throughout the proceedings legally represented, did not testify, it was contended on his behalf that the search of the vehicle was rendered unlawful because it was conducted without his consent and as a consequence, the evidence adduced in the trial-within-a-trial was inadmissible.
- [6] The magistrate ruled in favour of the admissibility of the evidence without giving reasons but indicating nonetheless that they would be furnished in a judgment upon conclusion of the main trial.
- [7] In the course of the matter proceeding on the merits in the main trial, Sergeant Frans and Sergeant Brooks testified. At some stage the prosecutor made an application for the leading of similar fact evidence from one Sergeant Cornelius regarding the *modus operandi* of the applicant in the commission of a similar offence in Knysna when he was arrested at a police roadblock after a search and seizure of a package containing mandrax. Notwithstanding objection, the application was granted though, due to a deficiency in the record (as pointed out below) it is unknown if the magistrate gave reasons, save for applicant's averment that she did not. The State however closed its case once the magistrate had ruled the evidence of similar fact to be admissible.

- [8] It is against this background that the present review proceedings are pillared on the statutory grounds of bias, gross irregularity and the admission of inadmissible or incompetent evidence.²
- [9] It bears mentioning that the record of the proceedings in the trial court does not contain the transcript of the evidence indicating the stage at which similar fact evidence was introduced – nor does it contain the evidence of the trial-within-the-trial. Neither of the parties took issue with this deficiency and argued the matter on the set of affidavits filed in this court.
- [10] Given the failing in the record (and the applicant’s founding affidavit – as to which see below) it is no surprise that an attempt is made in his heads of argument to introduce and elucidate factual detail both as to the trial-within-the-trial and the ruling on the evidence of similar fact as an indication of the case which is to be put forward on review.
- [11] Heads of argument do not constitute evidence given under oath.³ They are merely persuasive comment by the parties with regard to questions of fact or law and offer no substitute for affidavits. Parenthetically, heads of argument were not drawn by applicant’s counsel who appeared before us, hence this censure is not attributed to her.
- [12] What is obvious from the record is that the applicant terminated the mandate of his erstwhile legal representative and secured further representation from an alternate firm of attorneys with senior counsel being instructed to assume conduct of the trial.

² Section 22(1)(b), (c), and (d) of the Superior Courts Act

³ *Maboho T and Others v Minister of Home Affairs* (833/2007, 1128/2007) [2011] ZALMPHC 4 (28 November 2011) at paragraph [13]

Recalling the State witness

[13] In raising this issue senior counsel addressed the magistrate stating that he had ‘just come on board’ and ‘that there are a couple of very important questions relating to the admissibility of the evidence’ adduced during the trial-within-the-trial.

[14] I pause to mention that Sergeant Frans relied on the provisions of 22(b)(i) and (ii) of the Criminal Procedure Act. The applicant did not testify, but in his founding affidavit the admissibility challenge is pegged on averments that he was not informed that he had a ‘right to refuse consent’ and that he never consented to the search of the vehicle driven by him. Two points need to be made: First, the right which the applicant arrogates to himself is not an attribute of section 22; and second, a plain reading of the section reveals that consent is not a jurisdictional prerequisite for triggering the operation of subsections (b)(i) and (ii). Furthermore, Sergeant Frans was not requested to comment on the applicant’s right to refuse consent.

[15] Gauging from the very brief address by senior counsel, the recalling of the witness appears to include a challenge directed at the admissibility of the evidence in the trial-within-a-trial. Applicant’s counsel did not specify the specific issues, nor any issues at all, which he intended to traverse with Sergeant Frans. This failing is similarly manifest in the applicant’s founding affidavit, more pertinently where he states:

‘The original attorney representing me did not ask all the right questions in the view of senior counsel and senior counsel felt the need to re-examine some of the comments that the witness Frans, made and pose questions to him which senior counsel believed should have been posed.’

[16] It is salutary for an applicant in motion proceedings to make out its case in its founding papers. From the foregoing, one cannot appreciate what exactly it is that the applicant conveys, except for deducing that this court ought to elevate and weigh the importance of his case on the pretext of what senior counsel believes to be relevant.

[17] Elsewhere in his founding affidavit, the applicant berates the magistrate for having given ‘a laconic, unhelpful and frankly meaningless judgment’. It does not lie in the mouth of the applicant to be scornful of the magistrate in such trenchant language, particularly where it can be stated without hesitation that the deficiency in his papers and his approach to this court is nothing more than an abuse of process. Subjective language by a layperson should never be allowed to attribute disrespectable reflections upon a judicial officer. Legal representatives acting for litigants in these circumstances should caution their clients accordingly; and choice of language by those employed to draft papers on behalf of their clients should be restrained and rarely, if ever, be couched with indignance.

[18] Other than averring that the magistrate was biased and that her refusal to recall the witness constituted a gross irregularity, no facts have been presented by the applicant which could inform the basis upon which this court should order that Sergeant Frans be recalled at the instance of defence counsel.

[19] Where issues of relevance have not been identified, this court is hamstrung to ask how did the magistrate’s ruling infringe the applicant’s asserted right to a fair trial to his detriment and prejudice. In circumstances where the applicant was present in court, remained silent and did not testify (it being his right to do so), the ruling by the magistrate had to be

made on her assessment of the evidence presented by the State.⁴ That much ought to be plain to the applicant, rendering his insistence on reasons a ruse. In the particular circumstances of this matter, the magistrate having indicated that reasons will be deferred does not lay a foundation for imputing bias.

[20] Moreover, a conclusion that the magistrate's ruling infringed the applicant's asserted right to a fair trial, cannot, without more, be drawn where no factual basis is laid for recalling the State's witness. In the context of the present proceedings the applicant's bare contention that he maintained silence on the advice of his erstwhile legal representative does not assist him to advance a case where none is made out in his founding affidavit. The absence of a properly motivated factual offensive (where the professed lack of consent does not appear to have been the issue in the trial-within-the-trial) renders the challenge on the ground of gross irregularity devoid of merit.

[21] The magistrate's refusal to allow the witness to be recalled – and by implication her ruling on the admissibility of the evidence – is interlocutory; and should new facts come to light at a later stage, it would be the duty of the trial court to reconsider the issue, and if necessary, overrule its own decision/s.⁵

Admissibility of similar fact evidence

[22] In his own words, the applicant avers that the evidence is 'of little help to the State'. It is therefore presumptuous at this stage for the applicant to assert that his character has been tainted, prior to the conclusion of the

⁴ Compare *S v Kato* 2005 (1) SACR 522 (SCA) at 529E, also *S v Boesak* 2001 (1) SA 912 (SCA) at paragraph [24]

⁵ Compare *S v Mkwana* 1966 (1) SA 736 (A) at page 742H-743A; also *Smith v S* (CAF10/13) [2013] ZANWHC 84 (11 December 2013) at paragraph [15]

trial proceedings. At that point the trial court, having heard all the evidence, would be required to make an assessment of what is after all a mosaic of proof with attendant credibility findings in respect of each of the participants. This much was properly conceded by counsel who appeared for the applicant in these proceedings, with the attendant concession that reasons, would be of no functional advantage in circumstances where only one version of events is extant.

The application for condonation

[23] The first respondent sought condonation for the late filing of its answering affidavit and filed an application on notice to the applicant on 10 March 2022. In an *ex tempore* judgment this court, *per* Bloem J, granted condonation. While it is unnecessary to traverse the merits of that application, the stance adopted by applicant's counsel who indicated that the application was opposed from the bar deserves comment.

[24] In the interval since the filing of the application for condonation, no opposing affidavit was filed let alone a notice to oppose. Despite this applicant's counsel endeavoured to address us on the merits of the applicant's opposition and persisted on the ostensible basis that to her knowledge and in her view it was an acceptable practice to adopt this approach.

[25] The approach is misinformed and is incorrect.

[26] Rule 6(5) of the Uniform Rules of Court stipulates time frames and provides clear procedural guidance on what a litigant must do in the event of being served with a notice of motion. Where proceedings are brought on notice (as was the case in this instance) an answering

affidavit must be filed within a reasonable time.⁶ In either instance, whether proceedings are launched on notice of motion or by notice, if a party intends to oppose, an answering affidavit or a notice in terms of rule 6(5)(d)(iii) must be filed. The rationale for an answering affidavit is simple. In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of a party's case should appear clearly therefrom.

[27] To have expected this court to entertain counsel's submissions from the bar would have been tantamount to supplanting the purpose of an opposing affidavit and sanctioning litigation by ambush.

Costs

[28] The usual rule is that costs follow the result. Save for the first respondent, the second respondent (although having filed an 'explanatory affidavit') made no appearance. For the first respondent it was contended that punitive costs should be awarded against the applicant in the event of a dismissal of the review application, and that the applicant's complaint about the delay in finalising these proceedings should be countered by his failure to have set the matter down for hearing notwithstanding the late filing of the first respondent's answering affidavit. We are not persuaded that the applicant should be visited with a punitive costs order for the reason that he acts on legal advice. In so far as the application for condonation (an indulgence) is concerned, it is appropriate that the first respondent pays the applicant's unopposed costs.

[29] In the circumstances the following order issues:

⁶ Erasmus Superior Court Practice, second edition, volume 2 at D1-83 [Service 6, 2018]

- (i) The review application is dismissed with costs, such costs to exclude the costs of the second respondent.
- (ii) The first respondent shall pay the applicant's unopposed costs in the application for condonation.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree

G. H. BLOEM

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

S. Cubungu
Instructed by
Griebenouw Inc.
c/o Netteltons Attorneys
High Street
Makhanda
(Ref: R. Hart)

For the First Respondent:

L. Montsho-Moloisane SC
Instructed by
The State Attorney
c/o Yokwana Attorneys
New Street
Makhanda
(Ref: N. Yokwana)

Date heard:

18 August 2022

Date delivered:

23 August 2022