



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

CASE NO.: 3728/2023

Regional Court No. RCK 15/2023

REPORTABLE

In the matter between: -

PROMISE UCHECHUKWU

Applicant

and

J GOVUZA

First Respondent

**THE DIRECTOR OF PUBLIC
PROSECUTIONS, EASTERN CAPE
Respondent**

Second

REVIEW JUDGMENT

NORMAN J:

[1] This is a review application wherein the applicant, a foreign national, in possession of an asylum seeker permit, seeks an Order reviewing and setting aside the criminal trial proceedings held on 21 July 2023, before the first

respondent, a Regional Court Magistrate sitting in Mdantsane, in the province of the Eastern Cape. The review is premised on the provisions of section 22 (1) and (2) of the Superior Courts Act No.10 of 2013 (“the SCA Act”). The primary challenge levelled against the criminal trial by the applicant is that a gross irregularity occurred during the proceedings. As a consequence of such irregularity, the applicant contends, he did not enjoy a fair trial. Mr Daubermann appeared for the applicant. The respondents decided to abide the decision of this court.

[2] The applicant’s grounds for review are as follows:

[9] The causes of action on which the Applicant relies are three-fold, namely:

- [i] The Applicant did not admit, in his plea, that “Tik” is “a **dangerous** dependence-producing substance”, the First Respondent could not have been satisfied that the Applicant is guilty of the offence to which the Applicant pleaded guilty and the First Respondent, accordingly, misdirected himself in convicting the Applicant on the basis of the plea.*
- [ii] The peremptory requirements of Section 105A of the CPA were not complied with in casu, which non-compliance constitutes a gross irregularity in the proceedings.*
- [iii] The Applicant did not receive a fair trial in that the legal practitioner who represented him at his trial was incompetent.”*

Salient facts

[3] The State preferred the following charges against the applicant and his co-accused, Ms Sikade:

“That the accused are guilty of the crime of contravening section 5(b) read with section 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 (read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997) Dealing in Drugs.

In that the accused did upon or about 18 March 2023 and at or near N2 near Komga motors in the regional division of the Eastern Cape the accused did wrongfully and unlawfully deal in –

[5(a)] ...

[5(b)] a dangerous dependence producing substance as listed in Part 2 of Schedule 2 of the said Act, to wit, 5 x Pkts of Tik weighing 487.15grams and valued at +/-R63 000 or

[4] Both Ms Sikade and the applicant were represented by the same legal practitioner, Mr Njenge. At the commencement of the trial the state withdrew the charges against Ms Sikade. The charge was put to the applicant. He pleaded guilty to the charge. A statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 (“the CPA”) confirming the plea of guilty was read into the record. The statement also dealt with the circumstances under which the arrest took place. The state accepted the facts contained in the statement. The first respondent, upon having satisfied himself that the applicant confirmed the contents of the statement and his signature, ruled as follows:

“On the basis of the statement which the accused has made, the Court is satisfied that he admits all the elements of the offence with which he is charged.

Accordingly, the accused is convicted as charged. That is of contravening section 5 (b) of Drug and Drug Trafficking Act 140 f 1992.”

[5] During sentencing, the first respondent dealt with the seriousness of the offence, the personal circumstances of the applicant, the effects that the drug “*Tik*” has on black communities especially the youth. He found that imposition of a fine was not an appropriate sentence given the seriousness of the offence. He found that there were substantial and compelling circumstances justifying a departure from the imposition of the minimum sentence of 15 years. In the result he sentenced the appellant to undergo ten (10) years imprisonment. The court made no order in terms of section 103 of Act 60 of 2000. He declared the applicant automatically unfit to possess a firearm. He further directed that the “*Tik*” be forfeited to the State.

[6] The following remarks made by the first respondent are important for the purposes of the discussion relevant to these proceedings:

"If the State and if the defence wanted to have a valid... Let me say from the outset, that that agreement does not bind me. That agreement does not bind me. I will look at the circumstances and look at the offence. I will then decide whether their submission is correct.

If the defence wanted a binding agreement, they should have entered into a formal plea agreement in terms of section 105A and if that were to be the situation, both, a number of people were to be consulted. And the matter would have been brought before me. I would have had to look at it and then decide if the so proposed would be just. If I feel that it was just, I will then continue with it. And if I felt that it was not just, I will say, as far as I am concerned, that sentence does not fit the offence committed." (my underlining)

Discussion

[7] It is necessary to set out the procedure to be followed by the state when it wishes to enter into a plea and sentence agreements with accused persons as provided in section 105A of the Criminal Procedure Act 51 of 1977.

[8] Section 105A provides:

"105A. Plea and sentence agreements

(1)

(a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of—

(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and

(ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty—

(aa) a just sentence to be imposed by the court; or

(bb) the postponement of the passing of sentence in terms of section 297(1)(a); or

(cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297(1)(b); and

(dd) if applicable, an award for compensation as contemplated in section 300.

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

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

(ii) with due regard to, at least, the—

(aa) nature of and circumstances relating to the offence;

(bb) personal circumstances of the accused;

(cc) previous convictions of the accused, if any; and

(dd) interests of the community, and

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

(aa) the contents of the agreement; and

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

(c) The requirements of paragraph (b)(i) may be dispensed with if the prosecutor is satisfied that consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could—

- (i) cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative; and
 - (ii) affect the administration of justice adversely.
- (2) An agreement contemplated in subsection (1) **shall be in writing** and shall at least—
 - (a) state that the accused, before entering into the agreement, has been informed that he or she has the right—
 - (i) to be presumed innocent until proved guilty beyond reasonable doubt;
 - (ii) to remain silent and not to testify during the proceedings; and
 - (iii) not to be compelled to give self-incriminating evidence;
 - (b) state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused;
 - (c) be signed by the prosecutor, the accused and his or her legal representative; and
 - (d) if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement. (my emphasis)
- (3) The court shall not participate in the negotiations contemplated in subsection (1).
- (4)
 - (a) The prosecutor shall, **before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into** and the court shall then—
 - (i) require the accused to confirm that such an agreement has been entered into; and
 - (ii) satisfy itself that the requirements of subsection (1)(b)(i) and (iii) have been complied with.
 - (b) If the court is not satisfied that the agreement complies with the requirements of subsection (1)(b)(i) and (iii), the court shall—
 - (i) inform the prosecutor and the accused of the reasons for noncompliance; and
 - (ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.(my emphasis)
- (5) If the court is satisfied that the agreement complies with the requirements of subsection (1)(b)(i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court.
- (6)
 - (a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether—
 - (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
 - (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and
 - (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.
 - (b) After an inquiry has been conducted in terms of paragraph (a), the court shall, if—
 - (i) the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into; or
 - (ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or
 - (iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand, record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor.
 - (c) If the court has recorded a plea of not guilty, the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.
- (7)
 - (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.
 - (b) For purposes of paragraph (a), the court—

- (i) may—
 - (aa) *direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and*
 - (bb) *hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; and*
 - (ii) *must, if the offence concerned is an offence—*
 - (aa) *referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act 105 of 1997); or*
 - (bb) *for which a minimum penalty is prescribed in the law creating the offence, have due regard to the provisions of that Act or law.*
- (8) *If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.*
- (9)
- (a) *If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.*
 - (b) *Upon being informed of the sentence which the court considers just, the prosecutor and the accused may—*
 - (i) *abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or*
 - (ii) *withdraw from the agreement.*
 - (c) *If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.*
 - (d) *If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b)(ii), the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.”*

[9] It appears from the record that at the beginning of the proceedings the prosecutor did not divulge the agreement between the state and the defence and he proceeded to put the charge to the applicant. It was during mitigation of sentence and in addressing the minimum sentence of 15 years as provided for in section 51 (2) of the Criminal Law Amendment Act 105 of 1997, that Mr Njenge disclosed to the court, for the first time, that there was a “plea bargain” with the state. He further disclosed that the agreement was that the appellant would pay a fine in the amount of R100 000.00. The fine, according to the parties, would deter the applicant from committing similar offences. The oral agreement on the fine and the amount thereof was confirmed by the public prosecutor.

[10] The procedure adopted by the prosecutor is not consistent with the provisions of section 105 A (4) (a), which makes it peremptory that the plea and sentence agreements must be disclosed to the court before the accused is required to plead.

[11] Section 105A makes no provision for oral plea and sentence agreements. Most importantly the Director of Public Prosecution must authorise the prosecutor concerned to negotiate and enter into such agreements. The reason for that is not far to find. Criminal courts are courts of record. Everything that takes place must be recorded. The Director of Public Prosecutions (“DPP”) who is in charge of prosecutions within his or her jurisdiction must be made aware of agreements in order for him to consider numerous factors, amongst others, the gravity of the offence, the propriety of the proposed sentence; the impact thereof on the interests of society and the implications of such agreements on the criminal justice system. Otherwise any prosecutor may negotiate and enter into agreements without the DPP’s knowledge or authority.

[12] In ***S v Boumpoutou***¹, the Court found that the fact that a prosecutor had agreed to a sentence not in compliance with the Immigration Act meant that he exceeded the scope of his authority, and his actions were accordingly not authorised for the purposes of s 105A of the Criminal Procedure Act 51 of 1977 (“the CPA”) . It found that the agreement was therefore void and set it aside in its entirety. The matter had to be tried *de novo* at the discretion of the Director of Public Prosecutions.

¹ S v Boumpoutou 2022 (2) SACR 594 (WCC)

[13] The Legislature in section 105A (2) employed the words “*An agreement contemplated in subsection (1) shall be in writing.*” A public prosecutor who concludes oral plea and sentence agreements is acting outside the provisions of section 105 A . His or her actions undermine the purpose for which the provision was enacted, being to ensure that those accused persons who wish to plead guilty and enter into agreements with the state on plea and sentence are afforded an opportunity to do so speedily without compromising the justice system. It is for that reason that the prosecutor must ensure that those agreements are concluded in writing for the court to consider and for the agreements to form part of the record. Non – compliance with the provisions of section 105 A (2) renders such agreements void.

[14] There are various matters that the prosecutor must have regard to when entering into the agreement. They are ,amongst others, the nature of and circumstances relating to the offence, accused’s personal circumstances, previous convictions of the accused, if any; and interests of the community². The prosecutor may only enter into the agreement after consultation with the investigator. It is not possible to consider all those matters where there are oral and informal agreements concluded contrary to the provisions of section 105 A. The procedure adopted by the prosecutor was accordingly irregular and rendered the agreement void. It follows therefore that the first respondent correctly rejected the oral sentence agreement.

[15] It appears that the applicant’s legal representative was not *au fait* with the process sanctioned by section 105A and he believed that the plea agreement

² Section105A (1)(b)(i) and (ii)

was binding on the court. He stated, *inter alia*, in the confirmatory affidavit filed:

“ [5] I confirm, in particular:

[i]...

[ii] that I lost sight of the provisions of Section 105 A (Section 105 A) of the Criminal Procedure Act, no. 51 of 1977, and verily believed that, because of the Plea Agreement, the First Respondent was obliged to sentence the Applicant to the agreed fine of R100 000, and

[iii] that prior to Applicant pleading guilty to the charge, I informed him that if he enters into the Plea Agreement and pleads guilty to the charge pursuant thereto, the First Respondent would sentence him to the agreed fine of R100 000.”

[16] That belief is not an excuse because, as a legal practitioner, he was obliged to familiarise himself with the provisions of the CPA, and in particular section 105A ,before subjecting his client to the plea and sentence agreement process. His ignorance of the provisions of section 105 A and the assurances he gave on the sentence influenced the applicant to plead guilty to the charge. Therein lies the unfairness of the trial³.

[17] The applicant, also relied on the fact that in the section 112 (2) statement he never admitted that “*Tik*” is a dangerous dependence – producing substance as defined in section 1 of the Drugs and Drug Trafficking Act No. 140 of 1992 and therefore the first respondent could not have been satisfied that the applicant was guilty of the offence to which he pleaded.

[18] In the supplementary heads of argument filed after the hearing, with the leave of the court, Mr Daubermann, argued that “*Tik*” is a colloquial name for methamphetamine. He submitted that methamphetamine is not included in Part II of Schedule 2 to the Drugs and Drug Trafficking Act and is accordingly not a “*dangerous dependence – producing substance*”. He contended that the

³ S v Tandwa and Others (538/06) [2007] ZASCA 34; [2007] ZASCA 34; 2008(1) SACR 613 (SCA) (28 March 2007) para 7

conviction based on the dangerous dependence producing substance was irregular.

[19] The charge preferred against the applicant was based on the provisions of section “5 (b), a dangerous dependence producing substance as listed in Part 2 of Schedule 2 of the said Act, to wit 5pkts of Tik weighing 487.15 grams and valued at R+63 000.00”. In his plea the applicant stated:

“ 1.

On or about the 18 March 2023 and at or near N2 Komga Motors , I did wrongfully and unlawfully contravene the provisions of section 5 (b) read with Section 1,13,17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992, (read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 by dealing in a dependence producing substance , to wit 5x packets of Tik weighing 487, 15g at R63 000.00”

[20] The plea demonstrates that the applicant admitted that he contravened section 5 (b) by “*dealing in a dependence producing substance*”. That was not what he was charged with. The state charged him with dealing in a dangerous dependence producing substance as listed in Part 2 of Schedule 2 of the Drugs Act. The prosecutor confirmed this charge when addressing court. According to the applicant “Tik” is “Methamphetamine” listed as an undesirable dependence producing substance under Part III of Schedule 2. The state categorised it as a dangerous dependence producing substance. It may be prudent for the state to use both the colloquial and real name of the substance in order for it to formulate proper charges. An example of that is “cannabis” is listed in the Schedule 2 Part III but in brackets (dagga) is inserted. What these discrepancies point to is that there was no meeting of minds between the state and the applicant on the plea itself. It follows that the oral agreement purportedly reached in these circumstances was of no force and effect.

[21] As aforementioned the plea and sentence agreement was revealed to the first respondent by the defence and the state after he had already convicted the applicant on his 112 (2) statement and the plea of guilty that he tendered. The actions of the state in this regard rendered the conviction irregular as it was contrary to the procedure laid out in section 105 A (4)(a). The conviction in this regard cannot stand because the plea of guilty, was part of a deal, and was inextricably linked to a promise of payment of a fine and not a custodial sentence.

[22] The error committed by the applicant's legal representative that the oral agreement was binding on the Regional Court Magistrate, the error committed by the prosecutor of concluding an oral agreement, the assurances given to the appellant that he would pay a fine, all those errors were unfair to the applicant who stated:

"[30] I would most definitely not have pleaded guilty to the Charge if I had known that the Plea Agreement was not binding on the First Respondent and that I was at risk of being sentenced to direct imprisonment without the option of a fine."

[23] In the United States of America where "plea bargains" are popular it is trite that a 'defendant' has no right to be offered a plea, nor a federal right that the judge accept it⁴.

[24] In **People v Robinson** , the Court of Appeals stated :

"The Court of Appeals examines critically even slight procedural deficiencies under criminal rule setting forth requirements for a plea allocution to ensure that the defendant's guilty plea was a voluntary and intelligent choice, and that none of the defendant's substantial rights has been compromised".⁵ When a defendant elects to a plea agreement, his role is not to "haggle" with the prosecutor by directing counsel during the negotiation process; his role is to decide whether to accept or reject the plea agreement that his counsel and the prosecutor ultimately reached.⁶

⁴ Missouri v. Frye, 132 S.Ct. 1399 (2012)

⁵ Fed. Rules Cr.Proc. Rule 11, 18 U.S.C.A.US v Yang Chia Tien, 720 F.3d 464 (2d Cir. 2013)

⁶ People v Robinson, 363 Ill. Dec.181,974 N.E.2d 978(App.Ct.4th Dist.2012)

- [25] Section 105 A provides the same safeguards to ensure that the agreement was entered into by the accused freely and voluntarily in his sound and sober senses and without having been unduly influenced⁷.
- [26] In the United States of America, a “plea bargain” is defined as a contract between the state and the defendant; when the state and the defendant knowingly and voluntarily enter into a plea bargain, they are jointly bound by the terms of that agreement once it is accepted by the trial court⁸. A plea agreement constitutes a contract between the state and a criminal defendant and is subject to the general law of contracts.
- [27] In **U.S. v. Sharma**⁹, the court decided that in evaluating whether a plea agreement was breached, the Court applies general principles of contract law, construing terms strictly against government as drafter, to determine whether government’s conduct is consistent with defendant’s reasonable understanding of the agreement.
- [28] These principles apply equally to the South African criminal justice system. Similarly, plea agreements are constitutional contracts which must be construed in light of the rights and obligations created by the Constitution.¹⁰ This fortifies the provisions of section 105 A that these agreements must be in writing because they are contracts whose terms, where breached, would have to be interpreted according to the general principles of contract law. It is for that reason that I find that in section 105 A there is no room for informal plea and sentence agreements.

⁷ Section 105 A (6) (a) (i)(ii)(iii)

⁸ Costilow v.State, 318 S.W.3d 534 (Tex. App. Beaumont 2010)

⁹ U.S. v Sharma, 703 F. 3d 318 (5 th Cir. 2012).

¹⁰ Smith v. Com.,400 S.W.3d 742 (Ky.2013), Constitution of the Republic of South Africa , 1996 , section 35 (3).

[29] Accused persons deserve to be charged with properly formulated charges that are consistent with the provisions of the law allegedly contravened. Prosecutors must only take steps that are sanctioned by law and by so doing they instill confidence in the criminal justice system.

[30] In the circumstances, all the errors highlighted above tainted the trial before the first respondent. For all the reasons set out above both the conviction and sentence cannot stand. At the hearing of the matter the court ordered the immediate release of the applicant who, as advised by his counsel, was in custody serving the sentence imposed. He was sentenced on 21 July 2023 and had served almost seven months of the sentence. It is for that reason that the matter is not being referred back to the Director of Public Prosecutions for it to be tried *de novo* at his discretion. However, the court will direct that this judgment be brought to the attention of the Director of Public Prosecutions by the Registrar.

[31] In the result I make the following Order:

31.1 Both the conviction and sentence imposed on the applicant at the trial that took place on 21 July 2023, at the Regional Court, Mdantsane, under case number RCK 15 / 2023 , before the first respondent , are reviewed and set aside.

31.2 The Registrar is directed to bring this judgment to the attention of the Director of Public Prosecutions, Eastern Cape.

T.V NORMAN
JUDGE OF THE HIGH COURT

I agree.

V. NONCEMBU
JUDGE OF THE HIGH COURT

Matter heard on : 06 February 2024

Judgment Delivered on : 20 February 2024

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For the RESPONDENTS : NO APPEARANCE
To abide the decision of the court