REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: AR101/2011

Case No: 5582/2010

In the matter between

Basheer Sayed **First Applicant**

Somcharee Chulchumphorn **Second Applicant**

and

Levitt NO **First Respondent**

The National Director of

Public Prosecutions **Second Respondent**

JUDGMENT

Delivered on: 25 June 2012

STEYN J

[1] This is a criminal matter, which is part heard, and at an advanced stage of the proceedings, since the applicants have been convicted on various counts of the Organised Crime Act,[1] the Sexual Offences Act[2] and the Immigration Act.[3] It has

1 Act No. 121 of 1998.
2 Act No. 23 of 1957.
3 Act No. 13 of 2002.

been found that they managed an enterprise through a pattern of racketeering activities that relate to foreign females being used as prostitutes and that the applicants were living of the earnings of prostitution.[4] This court is satisfied that the matter is properly before it and that this court should exercise its review powers which include its inherent jurisdiction.[5]

[2] As a general rule, the review of unterminated criminal proceedings is a power which is sparingly exercised and only in exceptional circumstances.[6] The rationale for such an approach is obvious since the remedy against a wrong decision is to appeal after the case has been concluded. Steyn CJ in *Ismail and Others v Additional Magistrate, Wynberg and Another*, *infra* has emphasised that courts will exercise such exceptional review powers in limited circumstances:

> *"As to the second ground 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*

4 The judgment, as per pages 70-85, shows that the applicants have been acquitted on counts 2, 16 and 17 and found guilty on counts 1,3-7,10-15 and 18-21. Counts 8 and 9 were withdrawn by the State.

5 See *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucouralas and Another* 1979 (2) SA 457 (W) and the statement of Botha J at 463A, emphasising that a court will exercise its inherent jurisdiction whenever justice requires it to do so.

6 See *McIntyre and Others v Pietersen and Another* 1998 (1) BCLR 18 (T) at 20F-G; *Moodley and Others v NDPP and Others* 2008 (1) SACR 560 (N).

> *pointed out in* Walhaus and Others v Additional Magistrate, Johannesburg and Another *1959 (3) SA 113 (A) at 119, 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 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 otherwise result or where justice might not by other means be attained."*[7]

(My emphasis)

It is trite that an applicant who wants to succeed with a review of unterminated proceedings should make out a case that he/she would suffer irreparable prejudice if the trial is allowed to proceed to conclusion.[8] In addition to the aforesaid, an applicant should show that a complaint falls within one of the grounds of review as stipulated in section 24 of the Supreme

7 *Ibid* at 5g – 6a.

8 *Walhaus and Others v Additional Magistrate, Johannesburg and another* 1959 (3) SA 113 (A); *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A); *Key v Attorney General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC); *Levack and Others v Regional Magistrate Wynberg and Others* 1999 (4) SA 747 (C) at 754.

Court Act.[9] Section 24 of the Act provides for the following grounds:

> *"(a) Absence of jurisdiction on the part of the Court;*
> *(b) Interest in the cause, bias, malice or the commission of the offence of corruption on the part of the presiding judicial officer;*
> *(c) Gross irregularity in the proceedings;*
> *(d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."*

[3] In the present matter the applicants, in main, relied on the following irregularities,[10] which they consider to be so gross that the proceedings fall to be reviewed and set aside:

(i) An *ad hoc* interpreter was used who had not been sworn, nor was any enquiry conducted into the interpreter's competency and ability to interpret from Thai into English; and

(ii) The record reflects that the interpreter used, was not fluent in English, and at times the court could not understand what was said, in addition to the aforesaid the record reflects that it was equally difficult to understand what was said by the interpreter; and

9 Act No. 59 of 1959.
10 See founding affidavits of both applicants, at pages 5-22 of the record.

(iii) The *ad hoc* Thai interpreter was used by the State counsel, the second respondent, to consult with the State witnesses who testified at the trial; and

(iv) The first respondent, had difficulty in communicating with the interpreter in Court, even in an instance as simple as administering the oath; and

(v) The aforesaid irregularities impacted adversely on the fair-trial rights of the applicants.

Ms Hemraj SC, assisted by Ms Bheemchund, strongly argued that the irregularities complained of, tainted the entire proceedings before the court and that the convictions ought to be set aside as grossly irregular. Ms Hemraj has comprehensively listed extracts from the record in her heads of argument, which show that the court ought to have been alarmed by the quality of the translations by the interpreter, but failed to question her competency even though the interpreter at times asked that the matter be simplified. It was argued that interpreters are duty bound to accurately translate what is said by each witness, and not just convey the import of the evidence as is claimed by the first respondent.

Mr Khuzwayo, who acted on behalf of the second respondent, submitted that the court ought to view the applicants' belated objection with extreme caution as it is conveniently raised in view of their convictions. He placed reliance on the fact that the first respondent and the second respondent are highly experienced officers of court and have no reason to lie. Mr Khuzwayo was however at pains to direct us to any part of the record that shows that the learned magistrate has sworn the casual interpreter or conducted an enquiry into her competency. He was referred to the appearances as per the charge sheet, which indicated that on 2 October 2008, 11 December 2008, 12 December 2008 and 12 January 2009, that Mr P Twala acted as the interpreter. The Thai interpreter's name appears on the record for the first time on 7 August 2008 and thereafter on 3 January 2009. Whilst it is most likely that the casual interpreter would have been sworn on these dates no swearing was conducted on the said dates. Mr Khuzwayo elected to use lines 18-20, at page 130, where it is recorded as follows:

> *Court:* *The interpreter has taken an oath to interpret to the best of her ability*

Mr Zwane: Yes.

He concluded in submitting that it would not be in the interest of justice to order that the trial should start de novo since the witnesses have gone back to their country of origin.

Legal Framework:

[4] Section 6(2) of the Magistrates' Court Act[11] places a duty on the presiding officer to call a competent interpreter to translate evidence into a language that is understood by the accused.[12] The section should be read together with the provisions of the Constitution of the Republic of South Africa, 1996, more specifically section 35(3) which reads as follows:

> *"Every accused person has a right to a fair trial, which includes the right —*
>
> *a) to be informed of the charge with sufficient detail to answer it;*

11 Act No. 32 of 1944.

12 See Section 6(2) of the Magistrates' Court Act, reads as follows:

> *"(2) If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not."*

(i) to adduce and challenge evidence;

k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;"

In terms of section 35(4) of the Constitution the rights referred to above should be made clear to an accused person in a language that he/she understands. Inasmuch as it is of fundamental importance to receive legal representation it is important to understand and follow the evidence, because without such understanding the right to a fair trial would be meaningless and non-existent. Furthermore if an accused, in an adversarial system, cannot understand the language used, then his/her participation in the trial would be compromised.

The Magistrates' Courts Rules in addition provide for an oath or affirmation to be taken by an interpreter upon entrance into office. The Rules, however, distinguish between *ad hoc* interpreters and interpreters permanently employed by the Department. Subrule 68(3), read with 68(4) and 68(5) provide for the oath to be administered to a casual interpreter.

[5] It is common cause that at the time when the matter was

heard in the regional court in Durban, Ms Buttemer, a Thai citizen, was used as an *ad hoc* interpreter during the trial proceedings. Accordingly the provisions of Rule 68 of the Magistrates' Court Act should have found application read with section 6 of the Magistrates' Court Act and read with the constitutional rights as provided for in the Constitution. This means that an oath or affirmation should be taken before a presiding officer and be administered in the prescribed manner and recorded on the record, provided that the Court, using the services of the casual interpreter, is satisfied that the interpreter is a competent interpreter.[13]

[6] I shall now turn to the grounds of the application and the responses of the respondents. It is necessary to quote verbatim from the answering affidavit filed by the first respondent, since I consider it relevant in deciding upon this review:

> *"1.5 It is conceded further that rule 68(4) of the Magistrates' Courts Rules of Court requires the presiding officer to endorse upon the record that the oath has been taken by the casual interpreter, and the record is silent in this regard.*
>
> *1.6 Notwithstanding the above I can state that I would not*

13 For a discussion of the role of interpreters, see Du Toit et al 'Commentary on the Criminal Procedure Act' Revision 45 (2010) at 22-18C to 22-18D.

have commenced the trial without ensuring that the casual interpreter was properly sworn in either by myself or by another judicial officer. In this regard the affidavit by the interpreter attached hereto and marked 'Annexure A' fortifies this assertion that I did swear her in.

1.7 It is conceded further that the record is littered with instances where the interpreter could not immediately understand the gist of what she was required to interpret and asked that the matter be simplified. She always however, in my respectful opinion, managed to sufficiently convey the import of what she was required to interpret.

1.9 It should be borne in mind that the acoustics in the court room are not ideal. On many occasions the court lacked ventilation and air-conditioning. In summer the temperature soars to unbearable levels and doors have to be opened to obtain some relief. On those occasions noise from the general public throughout the building affects the ability to hear correctly and also the recording. This can be found in the many instances of 'inaudible' recorded by the transcribers.

The interpreter, in order apparently to protect her identity, for her own safety, wore a headscarf throughout the proceedings, exposing only her eyes. Naturally this distorted her normal speech, making it difficult for others to hear her, and must also have affected her hearing.

1.11 Notwithstanding the above I will abide by the decision of the Honourable Court."[14]

(My emphasis)

14 See pages 499 and 500 of the record.

[7] The second respondent filed not only an answering affidavit but also a supplementary affidavit. The relevant part of the supplementary affidavit reads as follows:

> *"4.*
>
> *. . .*
>
> *This matter was first heard in the Regional Court in 2008 i.e. four years ago and when I deposed to the Answering Affidavit I had forgotten some of the details. After continuously applying my mind and reflecting back into the matter I clearly recall that the enquiry in terms of section 6(2) of the Magistrates' Court Act and the swearing in of the interpreter were in fact duly also conducted in the Regional Court. This is confirmed by the record on page 222 lines 18-20.*
>
> *5.*
>
> *The fact that I did not mention this fact in my Answering Affidavit was an honest error as this matter started about (4) years ago. I submit that the matter would not have proceeded without the swearing in of the interpreter and without conducting the enquiry in terms of section 6(2) of the Act."*[15]

(My emphasis)

[8] The supplementary affidavit of the second respondent states that she erroneously forgot to mention that the swearing in of the interpreter was duly conducted in the regional court. When the content of the second respondent's answering

15 See supplementary affidavit page 3.

affidavit[16] is considered it shows that she positively states that the swearing in was conducted in the district court, implying that the district court record would serve as proof that the interpreter was duly sworn. The answering affidavit reads as follows:

> *". . . . . I can solemnly confirm that the enquiry in terms of section 6(2) of the Magistrates' Court Act 32 of 1944 as to the interpreter's English language competency and the subsequent swearing of the interpreter were duly conducted during the early stages of the accused district court appearances . . . . . [T]ranscripts before court only relate to the accused appearance in the Regional Court, therefore the enquiry in terms of section 6(2) of the Magistrates' Court Act and the swearing in of the interpreter will not appear from the transcripts before court."*[17]

(My emphasis)

Evaluation of the Applicants' grounds

[9] I shall now deal with the proceedings before the regional court and the regularity of the proceedings. At first, was any inquiry conducted into the Thai interpreter's competency and was she duly sworn by the Court *a quo*?

16 See answering affidavit at page 526.
17 See page 526 of record.

The record is not endorsed and does not show that any enquiry was conducted into the competency of the interpreter. The learned regional court Magistrate states in his affidavit that he would not have commenced the trial without ensuring that the *ad hoc* interpreter was properly sworn either by himself or another judicial officer. This, in my view, is not a positive averment that refutes the applicants' allegations. I shall deal with the aforesaid statement in two parts. Firstly, whether the learned Magistrate would have commenced the trial without the interpreter being sworn. It cannot be expected of a review court or an appeal court, tasked with considering the regularity of the proceedings before a lower court, to take into account the integrity of each and every presiding officer and what he/she would normally do in court. Such an exercise would detract from the duties of a review court and in itself would be subjective in nature.

The transcribed record is of paramount importance when a determination has to be made whether a procedure followed, was regular and in accordance with justice. It is for this very reason that the prescribed enquiry should be conducted and

recorded on the record. Simply put to determine whether a court has exercised its discretion properly, in this instance, whether Ms Buttemer should have been appointed as a competent interpreter, this court has to consider the appropriateness of the enquiry, looking at the questions asked and the answers given. If this was done it would have been an easy task to determine that the said interpreter was not only competent to interpret from Thai into English but that she was sufficiently conversant in both of the languages.

To merely accept that a procedure was followed as argued by Mr Khuzwayo, in the absence of any record that was so endorsed, would be unjust and has the potential to cause a severe injustice.

[10] Secondly, reliance is placed by the first respondent on another presiding officer conducting the enquiry and the swearing in. I fail to see how the learned Magistrate would have determined whether the interpreter was duly sworn by another presiding officer if the record does not reflect such a procedure or enquiry. It has been noted that no other presiding officer's name is mentioned in the answering affidavit. I agree with the

views of Yekiso J, in *Saidi*,[18] that it cannot be accepted that a procedure, which is not borne out by the record was followed purely on the presiding officer's *ipse dixit*.[19]

This Court in the absence of any enquiry to analyse or consider is at a disadvantage to determine that the interpreter utilised, was suitably qualified and competent to have acted as a casual interpreter. The record most certainly does not show that she was sufficiently conversant in English.

Admissibility of 'unsworn evidence'

[11] Our Courts have consistently held that only evidence of sworn witnesses[20] would be considered as admissible evidence.[21] It is also trite that only admissible evidence can be accepted as evidence, which places an obligation on presiding officers to determine, for example, whether youthful witnesses understand the nature of the oath before administering the

18 2007 (2) SACR 637 (C) at 644 g-h.
19 *Ibid* at 644g-h.
20 See section 162 of the Criminal Procedure Act, No. 51 of 1977.
21 See *S v T* 1973 (3) SA 794 (A) at 796 G-H; *S v Vuma Zonke* 2000 (1) SACR 619 (C); *S v Bezuidenhout* (2002) 4 All SA 451 (SCA); *S v B* 2003 (1) SA 52 (SCA); *S v Sikhipa* 2006 (2) SACR 439 (SCA); *S v Swartz* 2009 (1) SACR 452 (C) at para 15.

oath. In *S v Lin*[22] the court held that interpreters are to a certain extent witnesses[23] and accordingly an interpreter has to be sworn like any other expert witness.[24]

[12] The affidavit of the first respondent, seemingly suggests that the interpreter's inability to understand what should be interpreted, should be excused since the interpreter was entirely covered with a scarf, exposing only her eyes which must have led to her speech being distorted and her hearing being affected. *Ex facie* the record there is however no application by the State to disguise the identity of the interpreter for reasons of safety as described by the learned Magistrate. In *casu* there is order that such exceptional conduct was allowed in order to protect the safety of the interpreter. The mere fact that the court allowed the interpreter to wear a headscarf, disguising her identity begs the question whether her identity was ever revealed in an open court when she was sworn in. A mere consideration of the general oath that should have been administered serves as sufficient proof

22 [2010] 1 All SA 358 (W).
23 See *S v Naidoo* 1962 (2) SA 625 (A) at 632G.
24 The Court held in *Lin*, supra, that it is *"logical to accept the passage in which Wigmore describes the interpreter as 'a kind of witness'. …. [T]he witness being examined is saying something not perhaps understood by the Court or the Court recorder."* (At para 35).

that the identity of the casual interpreter should have been revealed and made known to the public. It reads as follows:

> *"I – (Full name) do hereby swear/truly affirm that I shall truly and correctly to the best of my ability interpret from the language I may be called upon to interpret from in the proceedings of _____ held in the Magistrates' Court of _____ into either of the official languages and vice versa: So help me God/The declaration is true."*

I shall now turn to the applicants' ground of review that the interpreter could not speak English fluently and that they had great difficulty in understanding what she was saying when she interpreted, and that her interpretation from Thai into English was inaccurate.[25]

[13] On the hand the learned regional magistrate concedes that the record is littered with instances where the interpreter could not immediately understand the gist of what she was required to interpret and on the other hand he claims that the interpreter managed sufficiently to convey the import of what was to be interpreted. It is difficult to establish from the record what brings the presiding officer to this conclusion that the interpreter was conveying the import of what was said by

25 See founding affidavit, pages 9-10.

Thai-speaking the witnesses. Without a due proficiency and understanding of the Thai language, it cannot be said that she sufficiently conveyed the import of what was required to be interpreted.[26] It goes without saying that when one determines whether an interpreter is fairly and accurately interpreting what is said by every witness in court that it requires a proficiency and understanding of the language used by the witnesses.[27] Failing the ability to speak the language, there exists another method to determine the accuracy of what was said and that is to inquire into what was said by the witnesses, by using the services of a qualified Thai interpreter who would have compared the transcribed record with the audio recording.[28] It is common cause that no such enquiry was conducted in this instance.

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26 This case needs to be distinguished from cases wherein intermediaries are used since they are permitted to convey the general purport of any question asked to a child witness. (See s 170A(2)(b). I am also mindful of what is stated in *S v Booi and Another* 2005 (1) SACR 599 (B) at para 25:

> *"An intermediary must specifically undertake to convey correctly and to the best of his or her ability the general purport of what is being said to and by the witness, before she or he begins to help the witness. An intermediary needs to be reminded or cautioned that his or her role in court is, generally speaking, just as important as and similar to that of an interpreter. He or she is an interpreter of a special kind. This is in line with Rule 61(1)-(2) of the Uniform Rules and especially Rule 68(1)-(50 of the Magistrates' Courts Rules which applies to the court* a quo*."*(My emphasis)

27 See *S v Mponda v S* [2004] 4 All SA 229 (C) at para 34 where it is observed by Binns-Ward AJ, as he then was, that presiding officers should formally satisfy themselves as to the relevant expertise of the casual interpreter.

28 See *S v Lin* [2010] 1 All SA 358 (W) at 362a-c, where the Court made use of qualified interpreters to evaluate the services of the Mandarin interpreter.

[14] The first respondent also relied on the content of Annexure "A" in support of his contention that he had sworn the interpreter. The annexure reads as follows:

> *"1.*
>
> *". . . I am a Thai female*
>
> *2.*
>
> *During the year 2008 I went to the Thai Embassy to update my drivers licence details, I met Mr Jeerasak Pomsuwan who worked at the Thai Embassy, He noticed that I have my College Degree B.S.C. and that my English was good. He wanted to know about my English. I informed him that I thought* (sic) *Primary School children in an English School. Mr Jeerasak requieired* (sic) *my help as he stated that in KwaZulu-Natal the police and court wanted some one* (sic) *to assist with translation from Thai to English and vice versa; I agreed to assist.*
>
> *3.*
>
> *Soon after I was contacted by the police who picked me up from home and took me to court. I remember going to "L" Court in Durban and I met the Magistrate Mr Levitt. The Magistrate told me to stand in the box. He asked me if I know what it is to be sworn inn* (sic)*. I said to him that I saw in T.V. programme. The Magistrate then explained to me what it is and then I repeated after him with my hand raised So help me God. I clearly remember doing this. This is all I wish to state at this stage."*

The aforesaid statement which was deposed to on 24 August 2010, is silent on any enquiry conducted by the learned

Magistrate into the casual interpreter's ability and proficiency to translate from English into Thai, and *vice versa*. I have noted that the interpreter fails to refer to any date on which she was sworn. Neither her nor the first respondent stipulates what was explained to her before she took the oath, or that she had understood the nature of the oath.

This case has demonstrated that it is not merely sufficient to be bilingual or fluent in a language, an interpreter should be able to have a basic understanding of the legal process, since it is expected of an interpreter to translate exactly what was said and if the translation is improper, due to a lack of understanding, it would result in evidence being distorted. This court need not decide upon this issue, since there was no enquiry conducted.

[15] In my view the irregularities that occurred during the trial has a direct bearing on the findings of the Court *a quo* and directly impacted on the fairness of the trial. There is no doubt that the participation of the applicants in the trial was compromised and that their rights had been violated.

[16] Given the irregularities that occurred in this matter, the question remains whether all of the proceedings before the court *a quo* should be set aside or whether only some of the evidence should be set aside.[29] It is evident that the test that should find application is whether the irregularity produced a miscarriage of justice. In *Siyotula* the Court held:

> *"Prejudice in this context means prejudice in the conduct of a party's case. If that kind of prejudice may reasonably result, the proceedings must be set aside. The court does not balance this prejudice against other kinds of potential hardship, such as the inconvenience, delay, and wasted expense suffered by the parties if the matter must commence* de novo. *These considerations cannot cancel out the prejudicial effect of an unfair trial. Nothing can do that.*
>
> *The question therefore is whether there is any reasonable possibility of prejudice to the accused if*
>
> *(a) the evidence of Le Roux and Steinhous is interpreted to the accused in open court by an official interpreter; and*
>
> *(b) the evidence of the accused is declared inadmissible and struck from the record with the result that the defence case will commence afresh."*[30]

(My emphasis)

[17] In my view the irregularities complained of are real and not

29 See *S v Siyotula* 2003 (1) SACR 154 (ECD).
30 *Ibid* at 159c-f.

speculative or premature.[31] It impacts on the evidence adduced before the regional Court and the fact that the evidence was considered as admissible evidence when it should have been regarded as inadmissible evidence. It is for this very reason that the matter cannot be referred to be heard by the first respondent, since he has knowledge of the inadmissible evidence and has already delivered a judgment based on such evidence.[32] For the aforesaid reasons I am convinced that the applicants have made out a case to have the proceedings before the first respondent reviewed and set aside, since the irregularities cannot be cured without prejudicing the applicants.

[18] In the result the following order is made:

i) The proceedings before the court *a quo* is set aside and it is directed that the trial commence *de novo* before another regional Magistrate.

ii) The second respondent is ordered to pay the costs of the application.

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31 Cf. *S v The Attorney-General of the Western Cape*; *S v The Regional Magistrate, Wynberg and Another* 1999 (2) SACR 13 (C) at 25j-26b.

32 See *R v Mabaso* 1952 (3) SA 521 (A).

iii) The costs in para (ii) above shall include those consequent upon the employment of two counsel.

_____

Steyn J

Nkosi J: I agree

_____

Nkosi J

Steyn J: It is so ordered.

Date of Hearing:	31 May 2012
Date of Judgment:	25 June 2012
Counsel for the applicants:	Adv P Hemraj SC with Adv K Bheemchund
Instructed by:	DMI Attorney c/o Mornet Attorneys
Counsel for the respondents:	Mr Khuzwayo
Instructed by:	The State Attorney: KZN