



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 118/16

In the matter between:

WAYNE ANTHONY WICKHAM

Applicant

and

MAGISTRATE, STELLENBOSCH

First Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**

Second Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Third Respondent

ANNIKA SLABBERT

Fourth Respondent

Neutral citation: *Wayne Anthony Wickham v Magistrate, Stellenbosch and Others*
[2016] ZACC 36

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J,
Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J.

Judgment: The Court

Decided on: 25 October 2016

Summary: Victims' Charter — victim impact statement — judicial
discretion — Section 105A — Criminal Procedure Act — CPA
— culpable homicide — right to participate

ORDER

The following order is made:

1. The application for leave to appeal is dismissed.
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JUDGMENT

THE COURT (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J)

[1] The applicant (Mr Wickham) seeks leave to appeal against a judgment of the Western Cape Division of the High Court (High Court), dismissing an appeal from the Stellenbosch Magistrates' Court against the conviction and sentence of the fourth respondent (Ms Slabbert) on a count of culpable homicide. Mr Wickham's son was a passenger in a car driven by Ms Slabbert and was killed in the car accident that gave rise to the charge against her. Underlying the application is the anxiety and distress caused to Mr Wickham by what he considers to be inadequate regard given to his concerns as a parental victim of the crime.

[2] The first respondent is the Magistrate, Stellenbosch (Magistrate). The second respondent is the Director of Public Prosecutions, Western Cape (DPP). The third respondent is the Minister of Justice and Constitutional Development.

[3] Mr Wickham initially instituted a direct application for leave to appeal to this Court (original application), which was dismissed. The reason was that it was not in the interests of justice to hear the matter at that time because the Supreme Court of Appeal, which had jurisdiction, had not yet been approached. Pursuant to this Court's

order, he applied for leave to appeal to the Supreme Court of Appeal through the High Court and another application was brought directly to the Supreme Court of Appeal. In both instances leave to appeal was denied.

[4] Having exhausted all avenues, Mr Wickham renewed his application to this Court. The facts remain substantially the same as in the original application.

Background

[5] On the evening of 10 February 2012, a car driven by Ms Slabbert collided with a stationary motor vehicle on the R44 roadway outside Stellenbosch. Mr Wickham's 18-year-old son Cole, his only child, was a passenger in Ms Slabbert's car. Cole suffered severe head injuries in the collision and died that night. The occupant of the stationary car, Mr Jan-Hendrik Mathee, also died as a result of the collision. On that terrible night, no one informed Cole's parents of his death. It was only after increasingly frantic efforts to contact Cole that the Wickhams eventually learned that their son was dead.

[6] Mr Wickham obtained reports from two accident reconstruction experts. Both experts concluded that Ms Slabbert had been speeding, and concluded that she had been driving at 147-155 km/hour while the posted speed limit was 80 km/hour. The reconstruction indicated that the roadway was well-illuminated and that Ms Slabbert would have had an unimpeded view for approximately 200 meters prior to the collision. In Mr Wickham's opinion, these were significant aggravating factors with respect to Ms Slabbert's sentence and demonstrated that she had acted recklessly or, in the alternative, with gross negligence.

[7] It was not disputed that Ms Slabbert had consumed a glass of wine before setting out and there was an empty bottle of alcoholic cider in her car. The car was also overloaded, carrying six persons in total, one of whom sat on the lap of the front seat passenger. In Mr Wickham's view, these factors also demonstrated Ms Slabbert's recklessness.

[8] The DPP charged Ms Slabbert with two counts of culpable homicide. Mr Wickham regularly engaged with the prosecution, making available the reports of the accident reconstruction experts and offering their testimony during the proceedings. Mr Wickham also made himself available to testify. Later the prosecutor contacted him to ascertain whether he would find a plea and sentence agreement to be appropriate. He opposed the intended agreement. When the prosecutor consulted the widow of Mr Matthee, she expressed her satisfaction with the agreement.

[9] On 2 May 2014, Mr Wickham's attorney met with the prosecutor in order to express Mr Wickham's objections to the plea and sentence agreement. On 30 June 2014, Mr Wickham submitted written representations to the DPP why the proposed sentence agreement was inappropriate. On 3 July 2014, Mr Wickham and his attorney met with Advocate Galloway at the offices of the DPP. He again voiced his objections to the plea and sentence agreement. Advocate Galloway expressed her misgivings whether a conviction could be obtained without the plea and sentence agreement. Mr Wickham disagreed and explained what he perceived as strong aggravating factors.

[10] On 25 June 2014, in response to Mr Wickham's request for an opportunity to address the court on the devastating consequences of Ms Slabbert's conduct, the DPP confirmed that Mr Wickham could draft an affidavit "stating his objections/view on the sentence" which would be attached to the plea and sentence agreement. On 1 September 2014, however, the DPP informed Mr Wickham that his affidavit would not be attached because it did not properly qualify as a victim impact statement. He suggested that Mr Wickham be available to testify should the court wish to hear him.

[11] The parties appeared before the Magistrate. The prosecutor placed on record that Mr Wickham was present in court and willing to testify. Mr Wickham's attorney stated that he represented the immediate family of the deceased and sought to hand up

the victim impact statement. The prosecutor contended that Mr Wickham had no standing and, unless the court exercised its discretion in terms of section 105A(7)(b)(i)(bb) of the Criminal Procedure Act (CPA),¹ was not entitled to hand up papers or address the court.

[12] Ms Slabbert's attorney agreed that Mr Wickham lacked standing and objected to the handing up of the victim impact statement. He contended that the document did not properly qualify as a victim impact statement because it was primarily a discussion of the merits and contained facts inconsistent with the factual matrix relied on by the State. The Magistrate concluded that Mr Wickham lacked standing and declined to accept the victim impact statement.

[13] Ms Slabbert subsequently entered into a plea and sentence agreement with the DPP in terms of section 105A of the CPA. Pursuant to the agreement, Ms Slabbert was sentenced to a fine of R10 000 or 12 months imprisonment, which was conditionally suspended for three years. She was also sentenced to serve 18 months correctional supervision. Ms Slabbert admitted her negligence in failing to keep a proper lookout for other vehicles on the road, and that a reasonable person in her position would have foreseen that she might cause a collision should she not take the necessary care. She further admitted that she could have avoided the collision had she kept a proper lookout. Finally, she admitted that she had negligently and unlawfully caused the deaths of Cole and Mr Matthee.

High Court

[14] Unhappy with the outcome, Mr Wickham applied to the High Court for an order setting aside the conviction and sentence of Ms Slabbert; remitting the matter to the Magistrates' Court at Stellenbosch for a new hearing before another presiding officer. Thus directing the new presiding officer and the DPP to permit Mr Wickham to adduce evidence in aggravation of Ms Slabbert's sentence, including testimony or a

¹ 51 of 1977

victim impact statement; and directing the DPP, in the event of a conviction, to place before the court evidence of the aggravating circumstances, including inter alia the evidence of the accident reconstruction experts.

[15] The High Court dismissed Mr Wickham's application on two principal grounds. First, that he lacked standing to have the plea and sentence agreement set aside. Second, that the Magistrate's failure to exercise his discretion in terms of section 105A(7)(b)(i)(bb) of the CPA on whether to hear Mr Wickham's evidence or his victim impact statement could not be reviewed at the instance of the applicant.

[16] On the first ground, the High Court held that prosecutors were obliged to give complainants an opportunity to make representations, but only where it was reasonable to do so in light of all the circumstances relating to the offence, as well as the interests of complainants themselves. Failure to consult with complainants or give them an opportunity to make representations where reasonable would be unlawful. In those circumstances, the complainant would have standing in terms the Promotion of Administrative Justice Act.² Here, however, the DPP entered into the plea and sentence agreement only after having given Mr Wickham an opportunity to make his voice heard, after having properly weighed the facts and circumstances and without any misconduct, indolence or ineptitude. In the High Court's view, Mr Wickham had been given a far more extensive opportunity to participate than most victims. He thus lacked standing to set aside the plea and sentence agreement.

[17] On the second ground, the High Court held that the Magistrate had correctly declined to exercise his discretion under section 105A(7)(b)(i)(bb) of the CPA.

[18] The High Court pointed out that victims are not party to criminal proceedings and have no automatic right to present evidence. It found that Mr Wickham's victim impact statement mostly discussed the merits, and contained facts inconsistent with the factual matrix agreed between the DPP and Ms Slabbert. The High Court held that

² 3 of 2000.

facts presented during the sentencing stage following a guilty plea must be premised on the factual matrix accepted by the State and the accused as set out in the plea. Once the DPP and Ms Slabbert had made the Magistrate aware of the factual inconsistencies in Mr Wickham's evidence, the Magistrate correctly refused to receive it. The High Court concluded that there was no irregularity in the Magistrate's conduct and his actions were not susceptible to review.

[19] The Court stated that it would have been preferable, however, for the Magistrate to have "exercised some degree of judicial maturity, civility and empathy" to allow Mr Wickham latitude to express his feelings at having lost his son, provided this could be done without infringing upon the rights of Ms Slabbert.³

In this Court

[20] Mr Wickham's submissions in this application are substantively the same as in the original application. He argues that the High Court's decision sets a precedent that will undermine victims' rights in terms of the Victims' Charter in future criminal proceedings. It therefore raises an arguable point of law of general public importance.

[21] In the original application to this Court the DPP opposed the application on two grounds. First, the conviction and sentence in a motor vehicle culpable homicide case raised neither a constitutional issue nor an arguable point of law of general public importance. Second, there were no reasonable prospects of success. There was no reason to think that a new trial would deliver a different result than the plea and sentence agreement, rendering Mr Wickham's application moot. Even assuming that a faster motor vehicle speed could be proven at trial, speed is not necessarily indicative or aggravating of negligence. The negligence here was Ms Slabbert's failure to keep a proper lookout, and the plea and sentence agreement reflected her culpability.

³ *Wickham v Magistrate, Stellenbosch and Others* [2015] ZAWCHC 152; 2016 (1) SACR 273 (WCC) at para 92.

[22] The DPP added that Mr Wickham’s rights as a victim of crime were adequately addressed by his extensive participation in the consultations and representations preceding the plea and sentence agreement. He now effectively seeks to dictate how the prosecutor should conduct the new trial sought. The *dominus litis* in criminal trials, however, is not the victim but the State. Even if Mr Wickham were granted a new trial, the DPP would still be free to conduct the trial in whatever manner he or she saw fit. Ms Slabbert opposed Mr Wickham’s application on similar grounds.

[23] Mr Wickham’s application substantively depends on the rights of victims contained in section 2 of the Victims’ Charter. The Victims’ Charter is a Charter of Rights adopted in terms of section 234 of the Constitution,⁴ which empowers Parliament to adopt Charters of Rights consistent with the Constitution. The introductory sentence to the rights in the Charter states that “the following rights, *as contained in the Constitution and relevant legislation*, will be upheld during your interaction with the criminal justice system”.

[24] Section 2 provides as follows:

“The right to offer information:

- You have the right to offer information during the criminal investigation and trial.
- The . . . prosecutor . . . will take measures to ensure that any contribution that you wish to make to the . . . prosecution . . . is heard and considered when deciding on whether to proceed with the . . . the prosecution. . . .
- This right means that you *can participate (if necessary and where possible) in criminal justice proceedings, by attending the bail hearing, the trial, sentencing proceedings and/or Parole Board hearing.*
- It means that you will have the opportunity to make a further statement to the police if you realise that your first statement is incomplete. *You may also, where*

⁴ Section 234 provides that: “[i]n order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.”

appropriate, make a statement to the court or give evidence during the sentencing proceedings to bring the impact of the crime to the court's attention."

[25] As seen and emphasised above, section 2 of the Victims' Charter confers a general "right to offer information during the criminal investigation and trial" and states that victims "can participate (if necessary and where possible) in criminal justice proceedings, by attending...the trial [and] sentencing proceedings". It also states that victims may "*where appropriate, make a statement to the court or give evidence during the sentencing proceedings to bring the impact of the crime to the court's attention*".

[26] In his papers Mr Wickham states that the Magistrate's rulings, in regard to both the victim impact statement and his proposed oral evidence, were grossly irregular and constituted a denial of his rights as a victim to participate in the proceedings. It is, however, clear from the language contained in section 2 of the Victims' Charter that these rights are not absolute. The Victims' Charter confers neither standing, nor an unqualified right to give evidence or hand up papers, nor a right to be heard on demand.

[27] A victim's right to participation in the sentencing proceedings in relation to the plea and sentencing agreement must be read with section 105A of the CPA, which deals specifically with plea and sentencing agreements and includes the rights of the victim to participate in the process. Relevant to the specific facts of this case are section 105A(1)(b)(iii) and section 105A(7)(b)(i)(bb) of the CPA, which the High Court took pains to analyse in depth before coming to the conclusion that it did.

[28] With regard to the above, quoting *Du Toit* the High Court noted that—

“Section 105A(1)(b)(iii) provides that a prosecutor may enter into an agreement contemplated in s 105A(1)(a) after affording the complainant (or his representative) an opportunity of making representations to the prosecutor. This requirement is qualified by the words 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.”⁵

It came to the conclusion that the prosecutor is obliged to give the victim an opportunity to make representations, but the prosecutor is not obliged to agree with the victim.

[29] Mr Wickham’s rights as a victim were duly addressed through the extensive participation that he was afforded by the prosecutor throughout the duration of the prosecution. There is no reason to disagree with the High Court’s reasoning and decision on this point.

[30] As to Mr Wickham’s right to place evidence before the court relating to aggravating circumstances in respect of the case, section 105A(7)(b)(i)(bb) of the CPA provides as follows:

- “(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”

[31] What is clear from this text is that the exercise of the victim’s right to place evidence before the court (either through a statement or by oral evidence) is wholly within the court’s discretion.

⁵ See above n 3 at para 52.

[32] The prosecutor gave Mr Wickham the opportunity to do this by requesting a victim impact statement which he undertook to attach to the plea and sentencing agreement. However, Mr Wickham prepared a victim statement which dealt with the merits of the case based on facts that were inconsistent with the factual matrix agreed upon by the State and the accused in the plea and sentencing agreement. As a result, his statement was not placed before the Court. In light of this, the prosecutor then offered Mr Wickham the opportunity to be present at the sentencing proceedings in order that he may be given an opportunity to adduce oral evidence.

[33] During the proceedings, the Magistrate was made aware of the factual inconsistencies with Mr Wickham's statement by the accused's attorney and exercised his discretion to refuse the statement. There is nothing on record to show that the Magistrate improperly exercised this discretion. The court proceedings leading to Ms Slabbert's conviction and sentence were lawful, proper and just.

[34] The loss of a child is a terrible and difficult one to bear. The situation the applicant finds himself in commands our sympathy and respect. We endorse the High Court's observation that the Magistrate of the trial court could have exercised some degree of judicial maturity, civility and empathy to allow Mr Wickham latitude to express his feelings at having lost his son, provided this could be done without infringing upon the rights of Ms Slabbert.

Order

[35] The application for leave to appeal is dismissed.

