Summaries

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AYRES AND ANOTHER V MINISTER OF CORRECTIONAL SERVICES AND ANOTHER 2022 (2) SACR 123 (CC)

Constitutional law — Legislation — Validity — Drugs and Drug Trafficking Act 140 of 1992, s 63 — Power of Minister to amend schs 1 and 2 to Act — Improper delegation of original legislative power — Breach of separation-of-powers doctrine — Court already having declared section invalid to extent it delegates such power to Minister and court a quo ought to have abided by precedent.

Constitutional law — Courts — Precedent — Doctrine manifestation of rule of law which is founding value of Constitution.

Court — Precedent — Status of — Doctrine manifestation of rule of law which is founding value of Constitution —

The applicants applied for leave to appeal directly to the court against a judgment of the High Court in which it had dismissed the applicants' challenge to the constitutional validity of s 63 of the Drugs and Drug Trafficking Act 140 of 1992 (the Act). They had been found in possession in November 2014 of a substance known as MDMA and were arrested. Before pleading to the charge they applied to the High Court for an order declaring s 63 of the Act, as well as the reference to MDMA in part III of sch 2 to the Act, to be inconsistent with the Constitution and invalid. They argued that the power to include, delete or otherwise amend substances listed in the schedules to the Act was a plenary legislative power and, when that power was exercised by a member of the executive, that constituted a breach of the doctrine of separation of powers. The High Court rejected the argument and held that it was permissible for Parliament to delegate the power it had delegated to the Minister of Health in the present case, and accordingly dismissed the application with costs of two counsel. It did not deal with the judgment of the Constitutional Court in Smit [*] despite the averment made by the applicants that their attorney had sent the respondents a copy of the judgment in that matter to bring it to the attention of the judge. The High Court's reasoning and finding that s 63 of the Act was constitutional were in direct and irreconcilable conflict with the binding precedent of the Constitutional Court in Smit.

Held, that, the doctrine of precedent was not simply a matter of respect for courts of higher authority, but a manifestation of the rule of law itself, which in turn was a founding value of our Constitution. Accordingly, the doctrine should have meant that the declaration of invalidity in Smit would have informed the High Court's decision in the matter. (See [16] – [17].)

Held, further, that, although the High Court was wrong in concluding in its judgment that s 63 was constitutional, it did not issue a declarator in this regard. It simply made an order dismissing the application. It was nevertheless settled law that an appeal lay against the order of a court and not against the reasons underpinning the order, and the order granted by the High Court in respect of the merits was correct, even if the reasons provided by that court were not. The application ought to have been dismissed because, once the Constitutional Court had declared legislation invalid, it was not competent for the High Court to make the order that the applicants wanted, as such an order had

already been made by the Constitutional Court. Accordingly, leave to appeal on the merits had to be refused. (See [18].) The court, however, upheld the appeal against the costs order.

S V GUMBO2022 (2) SACR 131 (GJ)

Fundamental rights — Fair trial — Language — Right to be tried in language that is understood — No effort made to enquire of Zimbabwean national whether he understood English — In interests of justice that he be granted leave to appeal against convictions and sentence.

Indictment and charge — Charge — Putting of charge to accused — Only one of three charges put to accused — Prosecutor informing court that not necessary to do so, as accused's legal representative had explained charges to him — Effect of.

The accused applied for leave to appeal against his sentence imposed in a magistrates' court for three counts of fraud. It appeared that, at the trial, the prosecutor informed the court that the services of an interpreter were not necessary, whereas there was no indication from the accused or his legal representative that the accused, being a Zimbabwean national, was able to follow the proceedings in English. It appeared furthermore that after the prosecutor had put the first charge to the accused, and before the accused answered, the prosecutor intervened and informed the court that he and the legal representative of the accused had agreed that it was not necessary for the two remaining charges to be put to the accused, since his legal representative had already explained them to him. After the legal representative confirmed to the magistrate that he had indeed explained the charges, the magistrate asked the accused whether he understood all three charges, and he then pleaded guilty to all of them.

Held, that, in the circumstances where no effort had been made to enquire of the accused whether he understood English, and the accused was asked to plead to all the charges at the same time, while the other charges had not been formally put to him by the prosecutor, leave to appeal against the convictions had to be granted, in the interests of justice. It followed that leave to appeal against sentence also had to be granted. (See [7].)

Application for leave to appeal against sentence imposed in magistrates' court for fraud.

Order: Leave to appeal against convictions and sentence is granted.

S V ROHDE 2022 (2) SACR 134 (WCC)

Bail — Pending application for leave to appeal to Constitutional Court from decision of Supreme Court of Appeal — SCA confirming conviction, but reducing sentence — High Court granting order that notice to report be suspended, resulting in interim order of indeterminate duration — Need for time lines to be set for lodging of appeal and sanctions to be imposed which safeguarded applicant's rights and placed him in same position he was when notice to serve sentence within 48 hours was imposed, and also protected state's right to consider stance on quest for bail.

The applicant had been convicted in the High Court of the murder of his wife and was sentenced to 20 years' imprisonment. He was given leave by the Supreme Court of Appeal to appeal against his conviction and sentence. After an application for bail pending the leave to appeal was dismissed, bail was subsequently granted on condition that, in the event of the appeal failing, the applicant was to hand himself over within 48 hours of being notified that he needed to serve his sentence of imprisonment. In the event, the appeal was successful only in respect of the

sentence being reduced to 15 years' imprisonment, and the condition of bail requiring him to report became operative. This led to him bringing a bail application pending an application to the Constitutional Court for special leave to appeal against the decision of the Supreme Court of Appeal. The application was brought on 8 October 2021 and stood over from the urgent duty roll for determination on the following court day, namely Monday 11 October 2021. The court granted an order by agreement between the parties that the notice to report was suspended and that the applicant would not be arrested pending the determination of the matter which was to stand over for determination after the weekend. The original notice of motion was subsequently amended to seek the recusal of the judge who was to preside over the determination of the application when it was discovered that it was going to be the same judge who had tried and sentenced the applicant. The applicant's legal representatives based their application for the recusal on a reasonable perception or apprehension of bias on the part of the judge in question.

The court considered the 10 grounds upon which the application for recusal was brought and dismissed each one of them and then proceeded to consider the effect of the suspension of the order to report.

The court held that the suspension of the notice 'pending the determination of this matter' suggested that the order was interim in nature, but there was no set time line as to when any party could expect finality. The matter stood over so that the further conduct thereof could be decided by another court, whereafter the applicant amended the notice of motion and sought to postpone the matter *sine die*. The result was an interim order of indeterminate duration. (See [74].) There was no indication of when the application to the Constitutional Court would be lodged, which resulted in a situation where the entire issue of bail would be held over indefinitely. Without repercussions for non-compliance with set-down directives it was possible that there would be no finality. (See [76].)

The court held that, given the suspension of the order, a specified time line had to be set down which safeguarded both the applicant's pursuit of liberty and

placed him in the position he was during the 48-hour period after service of the notice to report, but by the same token served the interests of the respondent to consider its stance on the applicant's quest for bail pending his application to the Constitutional Court for special leave to appeal against the judgment of the Supreme Court of Appeal, and having that heard in a set time frame and with sanctions, should the application not be proceeded with accordingly. The applicant could not, as a convicted accused, dictate the process for the court to consider whether he should be granted his liberty or not, especially as he was equipped with a suspension of an order to undergo direct imprisonment without specified sanctions, should he not adhere to the time frames set down. (See [91].) The court accordingly dismissed the application for recusal and the application for the postponement of the bail application *sine die*, and postponed it for hearing on 11 November 2021. Should the applicant not proceed with the bail application, he was to report to the police station in question within 48 hours to serve his sentence of 15 years' imprisonment. (See [90].)

S V SN 2022 (2) SACR 149 (EC)

Child — As victim of crime — Child victim of two rapes committed by her uncle — Importance of interests of children who were victims of crime or abuse being addressed prior to conclusion of trial — Court accordingly making 'Therapy Order' providing for counselling sessions for child with reports to court on six-monthly basis.

The accused pleaded guilty to the rape of his 10-year-old niece on two occasions, two days apart. After the child's father, the accused's brother, found out what had happened, he stabbed the accused. The community also assaulted him, resulting in his hospitalisation for 14 days. The court found that there were substantial and compelling circumstances which warranted a deviation from the imposition of life imprisonment. It remarked further that the interests of children, where they were the victims of crime or abuse, had to be addressed prior to the conclusion of the trial, in order to ensure that the wellbeing of an abused child was taken into account by the trial court. That would pave the way for those children to grow and become emotionally, mentally and physically strong future members of society. If nothing was said about the child victim, other than condemning the unlawful act itself, the child would go back home with no support from the justice system. (See [28].) The court accordingly made a 'Therapy Order' that the child should undergo counselling at the Department of Social Development and that the guardian of the child had to ensure that the child attend the sessions. The social worker tasked with the therapy sessions could exercise their discretion in mandating further sessions as required by the best interests of the child concerned. The social worker also was required to file progress reports with the court every six months. (See [52].) The accused was sentenced to 25 years' imprisonment.

FANOE AND ANOTHER V THE STATE 2022 (2) SACR 166 (ECMK)

Trial — Separation of trials — When to be ordered — Section 157 of Criminal Procedure Act 51 of 1977 — Fourteen accused charged under Prevention of Organised Crime Act 121 of 1998 — In respect of two of accused (applicants), no common purpose alleged by state in their participation in scheme — Applicants would suffer severe prejudice by being joined in trial — Application for separation had to be granted.

The two applicants had been indicted to stand trial on charges under the Prevention of Organised Crime Act 121 of 1998 (POCA), the main count being money-laundering in contravention of s 4 of POCA. The first alternative count was that of assisting another to benefit from the proceeds of unlawful activities in contravention of s 5, and the second alternative count was the acquisition, possession or use of proceeds from unlawful activities in contravention of s 6. They brought an application for the separation of their trials from those of the other 12 accused who were charged in the same matter, one of whom was facing 27 counts. They contended that they would suffer prejudice by sitting through a protracted trial, day in and day out, in which they would not participate, since lengthy and detailed evidence would be traversed which had absolutely no bearing on their guilt. The respondent on the other hand contended that there was a real likelihood that the prosecution would suffer irreparable harm, should a separation ensue, because of its 'inability to place the whole picture in one trial before the presiding judge' and that 'part of that picture include[d] the response by the accused persons to allegations that implicate[d] them as the state's case unfold[ed] or during the presentation of the defence cases'. The applicants also placed emphasis on the delay which had preceded the commencement of the trial, and that they anticipated further delays.

Held, that it was trite that when consideration was given to an application for separation, the point of departure was that multiple trials ought to be avoided where possible. (See [25].)

Held, further, the delays were not in themselves a reason to grant a separation, and neither was the contention that the state's case was not strong. Perhaps the most meritorious reason to argue for a separation was the probability of serious financial prejudice to the applicants, both with respect to the potential costs associated with the employment of both senior and junior counsel, and the prospective dire consequences of a lengthy absence from running a not insignificant community-serving business concern, with the real prospect of the permanent loss of valued clients and the harm associated with that. (See [27] – [28].)

Held, further, that POCA cases, particularly those relating to racketeering enterprises, were generally distinguishable in applications for separation such as the present. That, however, was not the end of the matter, as scenarios under the auspices of POCA were also distinguishable *inter se*, and each case had to be considered on its own merits. (See [31].)

Held, further, that it appeared that the applicants were excluded from any meetings or any planning regarding the overall scheme and the summary of substantial facts did not take the state's case any further on the issue of common purpose. In the final analysis, for the applicants to remain in a joint trial, so that the court could determine the roles played by various other co-accused and the circumstances surrounding the commission of independent offences, in order to holistically consider respective degrees of blameworthiness, when there were no allegations of common purpose, even remotely, would be far more prejudicial to the applicants than any prejudice which the respondent may suffer through calling a bare minimum number of witnesses at a separate trial. It would also not be in the interests of justice to detain the applicants any further in what was anticipated to be a very lengthy trial. (See [47] – [48] and [51].) The application for the separation of the trials had to be granted.

S V TM 2022 (2) SACR 184 (GP)

Bail — Application for — Onus — Effect of amendments to Criminal Procedure Act 51 of 1977 by Act 75 of 1995 — Section 60(11) of CPA — Applicant required to prove facts establishing exceptional circumstances — Onus not discharged when statement read into record not in affidavit form and not signed by applicant, but by his attorney.

The appellant was charged in a magistrates' court on a charge of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was 15 years old at the time and the offence fell within the ambit of sch 6 to the Criminal Procedure Act 51 of 1977. He was legally represented and brought an application to be admitted to bail. An 'affidavit' which was placed before the court was signed on behalf of the appellant by his legal representative, but not by him. After the legal representative read the statement into the record, the court only put the following to the appellant: 'Your legal representative has indicated that he has signed on your behalf.' The appellant answered in the affirmative.

Held, that there was a 'true onus' on an applicant in cases where s 60(11) applied, to prove facts establishing exceptional circumstances, and the discharge of the onus was a central consideration in such applications. The appellant could not, and did not, discharge the onus resting on him when a statement, which was not on affidavit, was read into the record on his behalf. (See [7].)

Held, further, that the magistrate had erroneously accepted the statement as evidence and considered the bail application. This constituted a gross irregularity in the proceedings, irrespective of whether the application was granted or dismissed

and effectively rendered the proceedings a nullity, as there was no bail application in terms of s 60(11)*(a)* before the court. It would be an injustice if the matter were not referred back for a bail application to be heard and it would be prudent to require that another presiding officer decide the bail application. (See [9] – [10].)

S V NTHOESANE 2022 (2) SACR 188 (FB)

Trial — Presiding officer — Unavailability of to continue with trial — Part-heard trial — Magistrate having retired, but unwell and unclear when he would be able to return — In circumstances, setting-aside of proceedings and commencement de novo before other magistrate preferable where accused had been in custody for eight months.

In a matter submitted on review it appeared that the trial of the accused was part heard before a magistrate who had retired from active service on 31 March 2022 and, prior to his retirement, he was suffering from an illness from which he had not yet recovered. The acting senior magistrate suggested that the High Court set aside the trial proceedings, since the accused was in custody awaiting finalisation of his trial.

Held, that it was not altogether clear whether the magistrate would recuperate to such an extent that he would be able to return to finalise the trial, but in all probability he would not be able to return and dispose of the matter. The problem was that the accused had been in custody for almost eight months. It would be in the interests of justice to make an order setting aside the proceedings rather than postponing the matter until the magistrate became available again. The proceedings were accordingly reviewed and set aside, and it was ordered that the proceedings commence de novo before another presiding officer as soon as possible. (See [5], [8] and [9].)

S V MABASO 2022 (2) SACR 191 (KZP)

Trial — Irregularity in — What constitutes — Presiding officer failing to give accused opportunity to testify or close case after trial-within-trial — Proceedings halted before conviction — Proceedings set aside, and fresh trial ordered.

Trial — Irregularity in — What constitutes — Presiding officer failing to make ruling on trial-within-trial — Proceedings halted before conviction — Proceedings set aside, and fresh trial ordered.

In a matter submitted for special review it appeared that there was a trial-within-a-trial in the magistrates' court, but at the end of such the accused was not given an opportunity to either testify or close his case, and the magistrate failed to make a ruling on it. It was only during argument on the merits that it was realised that the accused had not testified, and that the magistrate had failed to give a ruling. The proceedings were then stopped and sent on special review.

Held, that there had been two irregularities that had been committed, but that, as the magistrate had not yet pronounced on the accused's guilt or otherwise, there had not been a failure of justice. However, if the proceedings were to proceed, then the irregularities were likely to cause prejudice to the accused. The proceedings accordingly had to be set aside and the trial had to commence de novo before another magistrate. (See [7] – [8].)

S V BROWN 2022 (2) SACR 194 (NCK)-

Sentence — Several offences — Globular sentence — When appropriate — Unlawful discharge of firearm in public built-up area in contravention of s 120(7) of Firearms Control Act 60 of 2000 — Maximum sentence of five years' imprisonment prescribed — Court improperly imposing globular sentence of six years' imprisonment for attempted murder in contravention of s 121, read with sch 4 to Act — Sentence altered to six years' imprisonment on first count and three years' imprisonment on second count, ordered to run concurrently.

The appellant was charged in a regional magistrates' court with one count of attempted murder and one count of discharging a firearm in a built-up area. He was convicted on both counts and sentenced to six years' imprisonment, the court taking both counts together for purposes of sentence. On appeal against the sentence,

Held, that the court could not find that, in weighing the factors influencing sentence, taken into account by the court a quo, the court had misdirected itself. However, the court should not have taken the different counts together for sentencing purposes, as six years' imprisonment on the second count was not a competent sentence, since it exceeded the maximum sentence prescribed by the Firearms Control Act 60 of 2000, namely five years' imprisonment in terms of s 121 read with sch 4, for a contravention of s 120(7). (See [9] – [11].) The sentence was accordingly amended to provide for a sentence of six years' imprisonment on the first count and three years' imprisonment on the second count, ordered to run concurrently. (See [27].)

MINISTER OF POLICE V LEBELO 2022 (2) SACR 201 (GP)

Arrest — Unlawful arrest — Period of detention — Further detention after court appearance in which bail of R1000 granted — Plaintiff unable to pay bail — Amount of bail could not be said to be so obviously high as to render grant of bail illusory — Inability to pay not forseeable by police, however, and defendant not liable for full duration of plaintiff's detention after bail granted — Plaintiff awarded damages of R100 000.

The appellant appealed against a judgment of the High Court which had held that he was liable for the wrongful arrest and detention of the respondent for the full period of his detention for a period of 101 days. The plaintiff was awarded damages in an amount of R500 000. On appeal the main issue was whether the detention after the plaintiff was granted bail of R1000 (after 16 days of detention), which he was unable to pay, resulting in his detention for 101 days, had been correctly taken into account in determining the damages, it being clear that the initial arrest was unlawful.

Held, at the risk of appearing insensitive or removed from reality, the amount of R1000 could not be said to be obviously so high as to render the grant of bail illusory. The plaintiff had not suggested what amount he would have been able to afford and, if one had careful regard to his testimony, he seemed to suggest that he was unable to afford anything, except the most paltry sum. He was not entitled to bail, on such terms, and, in any event, he had not filed a replication and on his particulars of claim no reference was made to the fact that he had been granted bail but could not afford it. (See [90] – [91].)

Held, further, on the evidence before the court, the plaintiff had been afforded the assistance of legal representation at state expense, and his representative appeared at court on four separate occasions, after which he withdrew. There was no explanation for his withdrawal, but at his first appearance the bail had been set in the amount of R1000 after he stated that he was unable to afford R2000. In these circumstances the harm complained of, namely

the further period of detention, was too remote and was interposed by a bail hearing and the setting of bail. It was also highly unlikely that the arresting officer could have foreseen, when effecting the plaintiff's arrest, that the plaintiff would be unable to secure his release on bail because he was unable to afford the amount of R1000, and the defendant was not liable for the period of detention after the 16 days of detention. (See [115] – [118].)

Held, further, that no evidence had been led as regards the circumstances of the plaintiff's arrest, but it required little imagination to appreciate that it must have been a traumatic experience for him. He undoubtedly felt confused and afraid, and he impressed the trial judge, who had the opportunity of observing, as a vulnerable and marginalised member of society. She correctly placed emphasis upon his personal liberty and the importance of an appropriate award to assuage his impugned dignity. Having regard to his personal circumstances, an appropriate award would be one of R100 000. (See [132] – [133].)