In the High Court of South Africa
(Eastern Cape Division)

Case No CA 247/2001
Delivered:

In the matter between

SISEKA SIYOTULA — Applicant

and

THE STATE — Respondent

JUDGMENT

JONES J:

This matter, which is a part-heard criminal trial, has been submitted to us on special review by the regional magistrate before whom it is being heard. There is no provision in the Criminal Procedure Act 51 of 1977 which lays down a procedure for the review of a part-heard criminal matter, but we have inherent jurisdiction to deal with such a case (see the cases collected in *S* v *Nqubane* 1995 (2) SA 811 (T) 812 G and *S* v *Ndala* 1996 (2) SACR 218 (C) 224 a-e).

I shall summarise the facts, most of which are recounted by the regional magistrate in his submission of the matter on review.

1. The accused is charged with five counts of contravening certain provisions of the Corruption Act 94 of 1992, and five counts of defeating or obstructing the ends of justice. In addition there are certain alternative charges.

2. The proceedings commenced on 29 February 2000 in the regional court in Port Elizabeth.
3. The trial has been lengthy. Its length made it necessary to postpone it from time to time. Eighteen witnesses have testified thus far, including the accused who is still under cross-examination.
4. The accused's home language is isiXhosa. An interpreter was used throughout the proceedings.
5. During August 2001 it came to the magistrate's attention that an interpreter who had officiated at the trial for the past eight days, one Mr James, was not an official interpreter and he had not been sworn in as a casual interpreter in terms of rules 68(3) or 68(5) of the magistrates' courts' rules.
6. Three witnesses testified during the period when James acted as interpreter. They are the state witnesses Le Roux and Steinhous, and the accused.
7. The magistrate administered the oath to Le Roux and Steinhous. Le Roux gave evidence in Afrikaans and Steinhous in English. James interpreted their evidence from Afrikaans and English into isiXhoza.
8. James swore the accused in as a witness. He testified in isiXhosa. James interpreted his evidence from isiXhosa to English.

These facts reveal two irregularities. The evidence of Le Roux and Steinhous

is properly before the court. They were duly sworn as witnesses and they gave their evidence directly in English and Afrikaans. But its interpretation to the accused into isiXhosa was irregular. This is because it was interpreted by an interpreter who was not appointed as an official interpreter and who had not taken the prescribed oath for casual interpreters. See *S* v *Nqubane supra* and *S* v *Ndala supra.*

The second irregularity relates to the evidence of the accused. It goes further than irregular interpretation. The interpreter was not only unsworn and hence not competent to interpret. He was also not competent to administer an oath to a witness. His administration of the oath to the accused was irregular. The accused's evidence is not sworn evidence. Indeed, it is not evidence at all. It must be disregarded. See *S* v *Naidoo* 1962 (2) SA 625 (A).

The question is what to do about these irregularities. Must the entire proceedings be set aside? If not, what is the proper manner to proceed?

Counsel offer different solutions to the way forward. The accused's attorney, Mr *Lindoor,* submits that the irregularity is of such a nature that the trial should commence *de novo* before a different magistrate. He relies in particular on the decisions in the *Ngubane* and *Ndala* cases *supra.* Mr *Gounden* for the prosecution argues that provided that the irregularity is properly cured it does not on the facts produce an unfair trial, or a miscarriage of justice, or any prejudice to the defence. He proposes that the admissible evidence already

given by Le Roux and Steinhous should be re-interpreted to the accused in open court, and that he be given the opportunity of submitting their evidence to further cross-examination once that has been done. As far as the accused's evidence is concerned, it is patently inadmissible and must be disregarded entirely. It should be struck from the record and the defence case should then proceed in the normal course.

It goes without saying that if a trial is conducted in a language which the accused does not understand, and if the proceedings and the evidence are not interpreted to him so that he can understand them, there has not been a proper trial. This happened, for example, in *S* v *Mafu* 1978 (1) SA 454 (C) where the proceedings were set aside because evidence had not been fully and properly interpreted and the accused had not understood it. But this is not necessarily the result in every case in which there has been irregular interpretation. This is illustrated in *S* v *Naidoo supra.* In that case the Appellate Division held on the facts that evidence had been irregularly placed before the jury because it had been given in the Tamil language through an unsworn interpreter, and was not admissible. It then considered the rest of the evidence to see whether or not the jury would inevitably have reached a verdict of guilty even if the irregularly interpreted evidence had not been placed before it, because, if a conviction would unquestionably have resulted in any event, the irregularity would not produce a miscarriage of justice. Only after an enquiry of this nature had been conducted, and only after the Court was unable to conclude that a conviction would inevitably have followed

without the inadmissible evidence, did the Appellate Division set aside the proceedings on the ground of the irregularity. The question is always: did the irregularity produce a miscarriage of justice? In some cases, the very nature of the irregularity compels the answer yes. In other cases, as in *Naidoo*'s case, the answer will depend on the facts.

In *Ngubane'*s case the accused, a Zulu speaker, had patently not understood the evidence because it had been conveyed to him in the Tswana language. As in this case, the case came on special review before conviction and sentence. Kirk-Cohen J had been given opinions by two members of the staff of the Director of Public Prosecutions, one suggesting that the trial should continue after the evidence already given was read over and interpreted to the accused in a language which he could understand, and the other suggesting that the proceedings be set aside. Kirk-Cohen J held that the constitutional right to a fair trial, which includes the right to be tried in a language which the accused understands or, failing this, to have the proceedings interpreted to him or her (section 25(3)(i) of the Constitution, Act 200 of 1993) is to be construed as meaning that the interpretation should take place simultaneously with the testimony being given by the witnesses, and it also presupposes and provides that the interpretation will be into a language which the accused fully understands and not into a language which he understands partially. Applying this interpretation to the facts of the case he preferred to set the proceedings aside and to order that the accused be tried before another magistrate if re-indicted. I do not believe that the judgment lays down as an

absolute rule that if the interpretation is not done simultaneously with the evidence being given that there is automatically a failure of justice. The learned judge explains that on the facts the alternative procedure could not overcome or cure the irregularity and considers that the alternative procedure, even if it is permissible, is undesirable. This is especially so where the accused is not represented (which, reading between the lines, was the position in *Ngubane*'s case). The potential for prejudice is that much greater where the accused is not represented, and the safer and wiser course is to begin again.

A similar conclusion was reached in the *Ndala* case *supra* where the accused was also not represented. The court considered that on the facts the irregularity could not be cured and hence that the proceedings should be set aside. Van Deventer J refused to sanction a procedure suggested by the magistrate in terms of which the evidence would be played back to and certified as correct by an official interpreter, especially where the evidence was not admissible because the interpreter at the trial had not been sworn and had administered the oath to the witnesses. There were also doubts expressed about the linguistic competence of the interpreter at the trial.

As I understand the principles set out in these authorities and the way in which they have been applied, there is no unfairness and no miscarriage of justice if the irregularity can be cured without prejudice to the parties. This is fortified by the approach of Kroon J in *S* v *Sibeko* (unreported, SECLD, Case

No CC 26/98). In that case it was discovered during the course of the trial that the evidence of a State witness, a Zulu speaker, had been interpreted through the medium of an unsworn interpreter. This interpreter must also have administered the oath to the Zulu speaking witness. Kroon J gave a ruling that the evidence was inadmissible and should be struck from the record. He ruled further that the evidence of the witness should recommence *de novo* through either an official interpreter or an *ad hoc* interpreter specially sworn for the purpose of the trial. This was a practical and sensible method of dealing with an irregularity that had arisen in the course of the trial, and it provided a solution that could not possibly have resulted in prejudice either to the prosecution or the defence. On the contrary, it was an effective way of dealing with the irregularity with the minimum of inconvenience, expense or delay to all concerned.

I believe that that is the kind of solution which should be sought in the present case if it is possible to do so. If it is not possible to do so because, on the facts, the accused might be prejudiced and a miscarriage of justice might occur there is no alternative but to set aside the proceedings.

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.

Although the evidence of Le Roux and Steinhous was given in languages which are not the accused's home language, this is not a case of evidence being given in a language which the accused did not understand as contemplated in section 25(3)(i) of the Constitution. The accused is a public prosecutor employed in the magistrates' courts in Port Elizabeth. He conducts cases everyday of his life in a language which is not his mother tongue. He is completely at home in the atmosphere of the courtroom. He is fully conversant will the terminology used in the courts, and is able to appreciate the importance of evidence given in court, and its relevance to a particular issue. He was present throughout the proceedings and he heard the evidence in the language in which it was given at the time when it was

given. English was the language of his choice for conducting cases and addressing the court. There can be no doubt that he understood the evidence of Steinhous.

I am satisfied that he also understood the evidence of Le Roux and I do not believe that there can possibly be incurable prejudice arising from the irregular interpretation of Le Roux's evidence from Afrikaans into isiXhosa. The accused says he is not fluent in Afrikaans, but this cannot mean that he does not understand evidence given in his court in Afrikaans. A considerable number of accused persons and witnesses who testify in his court and who are not Xhosa speaking probably choose the Afrikaans language. It could be more than 50%. The accused could not operate as a prosecutor in a busy magistrate's court in Port Elizabeth if he does not understand what they say, even if he is not proficient in speaking the Afrikaans language. This lack of proficiency in speaking is frequently encountered in the Eastern Cape and is met by a practice in terms of which practitioners who have little Afrikaans put their questions in English to Afrikaans speakers, who reply, if they so wish, in Afrikaans. The practice usually works. Everybody understands the proceedings. In cases where it does not work, or where an Afrikaans speaker thinks he might be prejudiced, an interpreter would be used. In this case, Le Roux's evidence was largely formal. He was the senior public prosecutor at the New Law Courts where the accused was then employed. His evidence in chief is confined to two incidents. The first was an occasion when a

policeman called Rademeyer came to his office with the witness Steinhous and told him of certain events which led to some of the charges against the accused. The content of the information is hearsay. It does not form part of the evidence in chief. Le Roux telephoned the Director of Public Prosecutions, and thereafter referred Rademeyer and Le Roux to the head of the corruption investigation unit of the South African Police Services. The second incident occurred on the following day when a person called Diedericks called on Le Roux's office with other information, and he was also referred to the corruption investigation unit. Cross-examination was primarily directed at the contents of Le Roux's statement to the police, the setting up of a police trap, and a suggestion that Le Roux may have had an improper motive to initiate charges against the accused. Le Roux's evidence was relatively short. The accused's attorney is fully conversant with the Afrikaans language. He understood Le Roux perfectly. He had access to his police statement in advance. He did not require an adjournment to take instructions to enable him to cross-examine. In the light of these circumstances I do not believe that the accused could conceivably have been prejudiced by the irregularity. If he did not understand a particular piece of evidence while it was being given, his attorney certainly did. Any possible misunderstanding of Le Roux's evidence can in these circumstances be cleared up by a subsequent re-interpretation through the medium of a competent sworn interpreter. It does not vitiate the trial.

The upshot is that this accused cannot be equated with the accused in *Ngubane's* case who understood the language of the interpreter only partially and who was not represented by an attorney who would have understood it completely. I am satisfied that the interpretation of the evidence of Le Roux and Steinhous by an unsworn interpreter does not in these circumstances constitute an irregularity which results in a miscarriage of justice or an unfair trial.

Naidoo's case and *Sibeko*'s case demonstrate that an accused is not necessarily prejudiced if evidence is presented against him which turns out to be inadmissible because the interpreter who administered the oath was not sworn. Does it make a difference if the *accused's* evidence turns out to be inadmissible for the same reason? The answer is probably yes in a case where the accused gives evidence and he is thereafter convicted. It is difficult to imagine a court finding that the case is so overwhelming that an accused would inevitably be convicted, regardless of whether or not he testified and regardless of what his evidence might be. But I can see no real prospect of prejudice in this case. Here, it is possible to strike the accused's inadmissible evidence from the record and to proceed with the trial from that point. In this event the previous "evidence" must be ignored entirely. It cannot even be used for purposes of cross-examination. It will be open to the accused to decide afresh whether or not to give evidence on his own behalf, or to call witnesses for the defence, or to do both, or simply to close his case. If he decides to testify again he might even be thought to enjoy the advantage of

having had a trial run. He may be able to anticipate and avoid some of the traps into which he may have fallen the first time round. Mr *Lindoor* does not suggest that the accused will be prejudiced because he will be inhibited from putting up before the same magistrate a different story from what he said before. That is like saying that the accused is prejudiced because he is denied the opportunity of committing perjury in the witness box. The law does not protect against that kind of prejudice. Mr *Lindoor* suggests only one area of possible prejudice. He suggests that the magistrate may already have formed an adverse impression of the accused as a witness and this may influence his evaluation of the accused's subsequent testimony. I do not believe that this realistically gives rise to a possibility of prejudice. There is no suggestion that the magistrate has indeed formed an impression of the accused's demeanour in the witness box, adverse or otherwise. The magistrate is an experienced judicial officer. He is able to disabuse his mind of the content of any inadmissible evidence placed before him, and to disregard any *prima facie* views he may have formed of the reliability and credibility of evidence already led.

I have come to the conclusion that the irregularity occasioned by the use of an unsworn interpreter is, on the facts, capable of being cured, and that in the circumstances of the case it does not produce unfairness or a miscarriage of justice.

There will be the following order:

1. The evidence given by the accused in this case is declared to be inadmissible and will be struck from the record.
2. The matter is remitted to the magistrate
    a. for the evidence of the witnesses Le Roux and Steinhous to be interpreted to the accused by a competent interpreter who has been duly sworn in as an interpreter; and for any further cross-examination, re-examination or examination by the court;
    b. for the further conduct of the trial.

RJW JONES
Judge of the High Court
5 April 2002

NEPGEN J: I agree.

JJ NEPGEN
Judge of the High Court.

PICKERING J: I agree.

JD PICKERING
Judge of the High Court.