IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Review number: 5274/2019

In the matter between:

MICHAEL ANDRIES FIVAZ REIMERS Applicant

and

NATIONAL PROSECUTING AUTHORITY Respondent

HEARD ON: 30 NOVEMBER 2020

CORAM: MBHELE, J et MATHEBULA, J

JUDGEMENT BY: MATHEBULA, J

DELIVERED ON: 03 DECEMBER 2020

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[1] The applicant launched an application for the review and setting aside of an admission of guilt fine dated 11 April 2019. The centrepiece of his case is that he is entitled to a relief because the signing of the written notice without an explanation constituted to gross irregularity in the proceedings.

[2] The facts are largely common cause and simple. On 9 March 2018 the applicant was involved in a motor collision at Minnaar Street, Vaalpark, Sasolburg. On 11 March 2018 he reduced his version of the events to writing before the investigating officer. It was apparent to him that he was already a suspect in connection with an alleged charge of reckless and negligent driving. It is common cause that he was ultimately charged and summoned to appear in court as an accused person. Between 18 November 2018 to 11 April 2019 he appeared in court on seven (7) different occasions. At all material times he was represented by an attorney L. Nolte ("Nolte"). During this period he made written representation to the Senior Public Prosecutor for the withdrawal of the charge(s). It was declined. I pause to add that it is not the decision of the Senior Public Prosecutor in this regard that the applicant seek to review and set aside.

[3] On 11 April 2019, the Public Prosecutor assigned to prosecute the matter to wit I. Maklein ("Maklein") approached Nolte and gave him an option to remove the case from the roll and the applicant pay an admission of guilt fine. On the instructions of the accused and probably as per advise by Nolte the matter was finalised on the basis of the offer made by Maklein. The applicant most probably satisfied with the outcome, proceeded to sign the document titled "written notice and the setting of admission of guilt ito of section 57 of the Criminal Procedure Act 51 of 1977 for a case already on the roll where the accused has not yet pleaded". He paid the fine of R 1 500.00 as agreed.

[4] The review application is predicated on the allegations that he was not informed about the consequences of paying the fine in relation to the criminal record against his name. As stated in the papers, the fact that he has a criminal record has serious implications for him. The applicant is a high ranking business executive employed by a multi-national corporation. Part of his many duties is to travel across many countries in furtherance of his employment obligations. He avers that he may lose his job purely because of the existence of the criminal record.

[5] In amplification of his case the applicant relied on a number of decided cases where the court set aside the payment of the admission of guilt fine and resultant conviction. Perhaps at this stage a short detour which should not detain us long pertaining to this matter is appropriate. It is common cause that the applicant was represented by a practising attorney. It appears that he had the authority to negotiate payment of the admission of guilt fine. The legal principles governing attorney and client relationship were summarised by Khumalo J in **Britz v Matloga** as follows:

> **"However, as it was agreed by the courts, an instruction to an attorney to sue or defend a claim may include the implied authority to make compromises/concessions provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interest."[1]**

The court reiterated the general principle that the client is bound by the attorney's action flowing from the authority given to him. The

[1] **2015 JDR 0638 (GP) at para 33**

proviso is that the attorney exercises the authority in good faith and in the best interest of the client.

[6] The narrow issue raised by the applicant is that Nolte did not inform him of the consequences thereof. It is not the case of the applicant that in the exercise of his authority, Nolte did not do so in good faith and in his best interest. At best the allegation is that it was an oversight on his part. There is no affidavit filed deposed to by Nolte that he did not explain this aspect and the reason(s) for such an omission. In my view such failure to file a confirmatory affidavit does not take the case for the applicant closer to any measure of success.

[7] In **S v Cedras**, a case referred to by the applicant, Rose Innes J summed up the legal position as follows:

> **"In such cases the question must always be whether there are considerations of equity and fair dealing which compel the Court to intervene to prevent a probable failure of justice. There must be evidence before the Court showing the likelihood of such inequity should it not intervene. A Court must be satisfied that the admission of guilt was probably mistaken or incorrect and the accused or other person deposing on oath on his behalf must give a satisfactory explanation as to how the admission of guilt came to be mistakenly or erroneously made."[2]**

The **Cedras case supra** was cited with approval and applied in **S v Price**[3] and **S v Tong**[4] which cases are relied upon by the applicant. The pre-requisite for the court to intervene is anchored on preventing any favour of justice.

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[2] **1992 (2) SACR 530 (C) at 531j -532a**
[3] **2001 (1) SACR 110 (C)**
[4] **2013 (1) SACR 346 (WC)**

[8] At the outset the applicant avers that the application is not an attack on the legal system. However, there are worrisome aspects that contradict his assertion. He laments the issue that he was not present when Maklein and Nolte discussed the fixing of the admission of guilt fine. It is an accepted rule of practice that, as the Prosecutor, she cannot approach him directly without the permission of Nolte. There is nothing untoward that she approached Nolte not him. The second issue relate to the role of the Prosecutor in a criminal matter. As the *dominus litus* she is well positioned to fix such fines instead of engaging in a protracted trial. It cannot be held against her that choosing to fix a fine is indicative of a weak case against the accused person (in this case the applicant). That is how the legal system operates.

[9] I broached it with counsel for the applicant whether the conduct to be reviewed can be attributed to Nolte and his reply was an emphatic no. Although he thinly submitted that it was the prosecutor whose conduct resulted in an irregularity, he conceded that it is not the case of the applicant on the papers. Therefore, there is no merit in the entire application.

[10] In the founding papers the version of the applicant is incorrect and not credible. The applicant avers that he did not have sight of the notice in terms of section 57 of the Act 51 of 1977. He confirms that the document does not indicate that upon payment of the fine, he will have a criminal record against his name[5]. When it was brought to his attention that his version cannot hold waters, he changed tack. He only lamented that very specific portion not having been

[5] **Par 47 of the Founding Affidavit on page 15 of the Paginated Papers**

brought to his attention[6]. The circumstances surrounding him appending his signature are unexplained. In that regard the applicant is less than candid with the court by not tendering evidence for one to conclude that his admission of guilt was mistakenly or incorrectly made as laid down in the decided cases he relied upon.

[11] The notice referred to above was argued by the applicant. He is a well-educated person, occupying a high position and well exposed to implications of signing documents. I do not intend repeating the contents of the document. The most fatal for his case is that he confirms acting voluntarily in paying the admission of guilt fine, his rights were explained including the consequence of payment of admission of guilt as stated in the document. There can be no talk that he genuinely made a mistake. On the evidence before me the inescapable conclusion is that the application must fail.

[12] This matter has its origin in criminal law. In that branch of the law the issue of costs rarely arises as on to be decided by the court. Although I found against the applicant, it cannot be said that he brought a frivolous application before court. Clearly he had a *bona fide* case which unfortunately did not pass the muster of the requirements set by the courts. It will be fair that each party bears own costs.

[13] I propose the following order:

13.1 The application is dismissed with no order as to costs.

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[6] **Par 6.4 of the Replying Affidavit on page 104 of the Paginated Papers**

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M. A. MATHEBULA, J

I agree and it is so ordered

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N. M. MBHELE, J

On behalf of applicants:	Adv. W J Prinsloo
Instructed by:	Peyper Attorneys
	BLOEMFONTEIN
On behalf of respondent:	Adv. R J Nkhahle
Instructed by:	State Attorney
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