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

CASE NO:**AR155/12**

In the matter between:

TRACY-ANNE PRETORIUS	**FIRST APPLICANT**
TYRONNE HOFLAND	**SECOND APPLICANT**
BONZILE CHUTSHELA	**THIRD APPLICANT**
TRAVIS BAILEY	**FOURTH APPLICANT**
SENZELE DLEZI	**FIFTH APPLICANT**

and

THE MAGISTRATE, DURBAN	**FIRST RESPONDENT**
THE STATE	**SECOND RESPONDENT**
J P VAN DER VER VEEN	**THIRD RESPONDENT**

JUDGMENT

KRUGER J:

[1] The Applicants, by way of Notice of Motion, supported by affidavits, seek an order in the following terms:

1. That the criminal proceedings conducted before the First Respondent in the Durban Magistrate's Court under Case No. 23/14444/10 wherein the Applicants were convicted of contravening Section 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992 (dealing in dagga) on 4th April 2011 be reviewed and corrected or set aside.

2. That the Second Respondent may reinstate proceedings in respect of the same charge in terms of Section 324 (c) of the Criminal Procedure Act 51 of 1977.
3. Further and/or alternative relief.
4. Costs of suit in the event that the application is opposed.

[2] Initially the application was brought on behalf of the first two Applicants only. However, on the day of the hearing, the remaining three applicants sought leave to join in the proceedings and made common cause with the arguments advanced on behalf of the first two Applicants. This application was not opposed and was duly granted.

[3] The relief sought was opposed by the Second Respondent. The First Respondent elected to abide the decision of this Court. The Third Respondent initially elected to oppose the application but later also decided to abide the decision of this Court. However, as an officer of this court, he elected to furnish an affidavit placing before the Court certain facts to explain his involvement in the conduct of the defence of the Applicants in their trial before the First Respondent. This affidavit was responded to by the First and Second Applicants who also filed certain supporting affidavits attested to by persons mentioned and/or implicated by the Third Respondent in his affidavit. As a result of the counter-allegations made by the First and Second Applicants, the Third Respondent filed a further affidavit. The Applicants initially objected to the filing of this affidavit. However, on the day of the hearing, the Applicants withdrew their objection and the Third Respondent's further affidavit became part of the proceedings.

[4] The Applicants, all represented by the Third Respondent, duly instructed by attorney Sarah Pugsley, pleaded not guilty to a charge of dealing in dagga. At the end of the State's case, an application in terms of Section 174 of the Criminal Procedure Act was made. In his submissions to the Court *a quo*, the Third Respondent challenged the constitutional validity of the charge against the Applicants. He accordingly applied to have the charges set aside. The Magistrate correctly ruled that the Magistrate's Court did not have the power to rule on Constitutional issues and dismissed the application. She also informed the Applicants that such application ought to be brought to a higher court at the appropriate time. The application in terms of Section 174 was also refused. The Applicants thereafter elected not to testify and the defence closed its case. As a result, the Applicants were all convicted. The Applicants now seek the relief as hereinbefore mentioned. It is important to note that the Applicants have not been sentenced as yet. Sentencing has been postponed pending the outcome of this application.

[5] In **Wahlhaus and others v Additional Magistrate, Johannesburg and another 1959 (3) SA113 (AD)**, the Court held that the inherent jurisdiction of the High Court to review proceedings in lower courts prior to the conclusion thereof in that Court, should be exercised only where:

> "grave injustice might otherwise result or where justice might not by other means be attained. … (the power of a superior court to interfere before proceedings have been finalized in the lower court) is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of

this power; for each case must depend upon its own circumstances". (at page 120).

[6] In **Nourse v van Heerden NO and others 1999 (2) SACR 198 (WLD)**, Wunsh J held (at 207 D-E):

"The reason why applications to interfere with proceedings in a court below are entertained in only exceptional cases is the avoidance of a piecemeal appeal or review; it is generally desirable to wait for the proceedings to be completed before a higher court is asked to interfere. The argument loses some of its force … where the effect of the application, if successful, will be to terminate the proceedings altogether."

[7] The test was clearly defined by Hlophe ADJP (as he then was) et Griesel J in **S v The Attorney-General of the Western Cape; S v Regional Magistrate, Wynberg and another 1999(2) SACR 13 (CPD) at 22 E-F** as follows:

"For purposes of the review application, the proper approach, in our view, is to consider whether the Applicant has made out a case for departing from the general rule that it is undesirable in criminal proceedings to entertain appeals and/or reviews before the trial has been concluded. To put the same test in different terms: is this one of those rare cases where grave injustice might otherwise result if we do not interfere before criminal proceedings have been finalized or where justice might not by other means be attained?"

[8] I turn now to consider the allegations of "grave injustice" that would justify this court's interference in the proceedings in the Court *a quo*.

[9] The specific ground of review is that the Applicants "did not receive a fair trial in accordance with their fundamental right to legal representation in terms of Section 35 (3) (f) of the Constitution, Act 108 of 1996 and Section 73 of the Criminal Procedure Act 51 of 1977". In this regard the Applicants have alleged that they did not have proper, effective and competent legal representation in that:

(a) The Third Respondent "failed to identify the Constitutional challenge on which he based our entire defence, at the outset of the trial and to argue same as a point in *limine* prior to the hearing of evidence".
(b) The advice given by the Third Respondent, namely that the Applicants would be acquitted on the basis of the Constitutional challenge, alternatively will be successful on appeal – did not constitute competent legal representation as envisaged in Section 35 (3) (f) of the Constitution and rendered the trial unfair; and
(c) The Third Respondent "never obtained our versions on the merits which, in fact, provide a complete defence to the charge".

[10] The Applicants have averred that the Third Respondent failed to take the basic steps which relate to consultation and advice on how the defence would best be conducted. In this regard the First Applicant has alleged that she was "never invited to give the Third

Respondent my full version of events" and that the Third Respondent "never consulted at all with Accused 2 and 3" – the Third and Fifth Applicants.

[11] The thread which weaves its way throughout the version of the Applicants is that the Third Respondent had already decided that the Constitutional attack on the charge would succeed (even if on appeal if necessary). As a consequence he failed to consult with the Applicants and take proper instructions from them. Had he done so, he would have realized that some of them, if not all the Applicants, had a valid defence to the charge. The issue relating to the timing of raising the Constitutional challenge was only introduced after consultation with the Applicants new legal representatives. The same applies to the criticisms of the Third Respondent's representation of the Applicants in the Court *a quo*. I will return to this aspect later in the judgment.

[12] Section 35(3) (f) of the Constitution provides:

> "(3) Every accused person has a right to a fair trial, which includes the right –
> … to choose, and be represented by, a legal practitioner, and to be informed of this right promptly."

[13] The leading case, in my opinion, relating to the right to legal representation as envisaged in Section 35(3) (f) of the Constitution, is **State v Halgryn 2002 (2) SACR 211 (SCA)**. Harms JA (as he then was) held, at paragraph 14 -

> "The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. ..... Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. ..... The Court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect ..... The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited."

[14] In answer to the Applicants allegations that he failed to consult properly or adequately with the Applicants and that he failed to invite the First Applicant (or all of them) to state their full version of events, the Third Respondent alluded to the fact that he spent approximately 40 hours in consultation with the Applicants (albeit not all of them at the same time). He also referred to the numerous instances where he, upon returning to his home at the end of the day, found the First Applicant on his premises wanting to discuss matters. No mention of

this was made by the First Applicant in her founding affidavit. In fact none of the Applicants (or their said attorney) provided full details of all the consultations held with the Third Respondent. Casual reference is made, in passing, in the founding affidavit, to the odd consultation which in the Applicants' opinion was merely to reinforce the belief that the Constitutional challenge would succeed. There are also allegations that the Third Respondent opposed any suggestion of obtaining a second opinion.

[15] In their affidavit in reply to the Third Respondent's allegations, the Applicants, although denying 40 hours of consultation, appeared to recall many more consultations and the contents thereof than those alluded to in their founding papers. The First Applicant also conceded meeting with the Third Respondent – although she does not confirm or deny that they were at the Third Respondent's home. She also casually mentions these as "informal meetings".

[16] What is startling is the failure of the Applicant's attorney, Ms Pugsley, to provide the Court with full and precise details of what transpired during all the consultations as well as her involvement in the case. This despite having had two opportunities and having filed two affidavits in support of the application. As an officer of the court I believe that it is her paramount duty to fully disclose her involvement and to assist the Court. In this regard it is noted that the Applicants have also waived their attorney-client privilege. All that Ms Pugsley does is to confirm the two consultations referred to by the First Applicant (in her replying affidavit to the Third Respondent) which consultations were confirmed by her notes as annexures. This in contrast to the Applicants' version that there were more than two

consultations. These consultation notes are sketchy in character and do not even record who was present during the consultations.

[17] It appears from the papers that a consultation was held by the Third Respondent with the Second Applicant's mother and aunt. During this consultation the Third Respondent confirmed that given the circumstances the only defence he could raise was the "Constitutional challenge". It is further alleged that the question of obtaining a second opinion arose during this consultation. Once again, Ms Pugsley has failed to furnish the Court with her consultation notes or a confirmation of this important consultation.

[18] What is even more surprising is her failure to answer the allegations regarding the obtaining of a second opinion. Surely this is the duty of an instructing attorney and not that of the advocate who has been briefed to represent the accused. Even if the Third Respondent protested at the thought of having a second opinion it is, in my opinion, nonetheless the duty of the instructing attorney to act in accordance with her instructions. At best (and to the detriment of the Applicants) she has attested that it was only after conviction that she was instructed by the Applicants to obtain a second opinion.

[19] What clearly emerges from the Third Respondent's affidavit is that there were consultations with the Applicants and that incriminating details emerged therefrom. These included, *inter alia*:

(a) That the Third and Fifth Applicants were involved only in so far as supplying their manual labour. Indeed the details of

the extent of the dagga manufacturing operation necessitated the labours of more than one person.

(b) The involvement of Steven Cope.

(c) The financing of the operation and the details of how the profits were to be shared.

(d) The duration of the operation (approximately 12 months) prior to the Applicants' arrest and

(e) The letter which was written by the First Applicant to Steven Cope.

[20] All these allegations have not been denied by the Applicants.

[21] The Third Respondent's and Ms Pugsley's meeting with Steven Cope at Cape Town International Airport also raises some concerns. Why was it necessary for the legal representatives to meet with Mr Cope if as the Applicants allege, was solely for the purpose of trying to secure funds for the trial? Surely the First, Second or Fourth Applicants could have phoned Mr Cope in this regard. What was the contents of the letter written by the First Applicant to Steven Cope? Why was it necessary for the First Applicant, who has protested her innocence of the entire drug manufacturing operation, to write to Steven Cope? The probabilities favour the Third Respondent's version that:

(a) The meeting with Steven Cope was as a result of instructions from the First, Second and Fourth Applicants.

(b) Mr Cope was involved in the entire operation and wanted the assurance that he would not be implicated in the trial.

(c) The letter written by the First Applicant probably sought to reassure Steven Cope.

[22] Other details that emerge from the consultations that have not been denied are, *inter alia*,

(a) The possible seizure of the First Applicant's house as an instrument of the offence.
(b) The status of the First Applicant's children.
(c) The fact that the said childrens' father had instituted legal proceedings against the First Applicant and
(d) The problems encountered with her employers and clients as a result of her arrest.

[23] All these factors could not have emerged and could not have been within the knowledge of the Third Respondent unless there were full and proper consultations with the Applicants.

[24] Of importance is the allegation made by the Third Respondent in paragraph 40 of his first affidavit. He states:

"40.

Having established the circumstances around the consultations and my decision to run the trial as I did, I would like to draw the Court's attention to the fact that it was my professional opinion that given the fact that the accused had confessed to me and because they refused to plead guilty to the charges, I could only conduct their defence on the basis of the interpretation of the definition contained in the Drugs Act.

41.

I informed the accused that I could not run an affirmative defence as I could not mislead the Court …"

[25] These averments remain unchallenged.

[26] On the Third Respondent's version, which (in terms of the Plascon Evans Rule) must be accepted, I am satisfied that there was adequate and proper consultation between the Applicants and the Third Respondent and that given the circumstances, they agreed to follow the Third Respondent's advice and to conduct the trial accordingly. In this regard it must be noted that "misplaced reliance on the legal advice of their counsel given in the *bona fide* (albeit mistaken) pursuit of his professional mandate is not a ground for claiming that justice has failed. (**R v Matonsi 1958 (2) SA 540 (A) at 455 H to 456 D**; **S v Seheri en andere 1964(1) SA 29 (A) at 35 E-F**) Per Heher JA – **S v Daniels 2012 (2) SACR 459 (SCA) at 466 D-E**.

[27] Paragraph 411 of the Uniform Rules of Professional Ethics of the General Bar Council of South Africa determines that where a client makes a confession to his counsel either before or during criminal proceedings, counsel should explain to the client the basis on which counsel may continue with the case, namely:

"Counsel may not in the proceedings assert that which he knows to be untrue nor may he connive at or attempt to substantiate a fraud or an untruth. He may appropriately argue that the

> evidence offered by the prosecution is insufficient to support a conviction and may take advantage of any legal matter which might relieve the accused of criminal liability.
>
> He may not, however, set up an affirmative case which he knows to be inconsistent with the confession.
>
> If the client, having been so informed, desires counsel to appear on the abovementioned basis, counsel should continue to hold the brief and act in accordance with the principles set out above. If the client desires counsel to give up the brief, counsel must do so."

[28] I am satisfied that the Third Respondent's conduct was in accordance with this Rule.

[29] The remaining ground of review relates to the alleged mistiming of the Constitutional challenge. In this regard the Third Respondent deemed it prudent to introduce the so-called Constitutional Challenge after the closure of the State's case. Whether he was right or wrong in this approach can hardly be described as incompetence. Indeed one must act on the assumption that a legal representative, entrusted with an accused person's defence, is indeed competent. One must also bear in mind the test set out in **S v Halgryn** (supra). Indeed it is always easy in hindsight to allege that an accused's defence was improperly conducted. This is precisely what Harms JA (as he then was) warned about in **S v Halgryn** (supra). Given the highly competitive nature of criminal practise one will often find another legal representative who will offer what he/she will undoubtedly term a

"better alternative". This of course is usually after an accused person has been convicted (as in casu) and/or sentenced. The Third Respondent was of the view that the defence would succeed, if need be on appeal. This view he formed after conducting research in respect of similar matters.

> "Where counsel relies (wrongly) on his view on precendential authority in his own court … the scope for determining that the trial was as a result, unfair, must necessarily be limited". – **S v Daniels** (supra).

[30] I am unpersuaded that the conduct of the Third Respondent resulted in an improper, ineffective or incompetent defence which would result in a grave injustice which would warrant a review and setting aside of the proceedings in the Court *a quo*, at this stage. I am of the opinion that given the circumstances outlined earlier in this judgment, the Applicants decided to take a chance on escaping conviction by relying on the "Constitutional challenge". Now that this has failed and as per their new-found legal opinion, is doomed to fail on appeal, it would not be in the interest of justice to allow the Applicants a further opportunity at escaping liability.

[31] A further consideration which arises is that it is clear from the affidavit of the Fourth Applicant that he has confessed his guilt. This begs the question how he could align himself with the submissions of the other Applicants in seeking a review. Counsel for the Applicants and the Second Respondent were requested to address the Court on the prospect of a separation of trials ensuing as a result of the "confession" of the Fourth Applicant. Assuming (purely for the

purposes of argument) that there is merit in the application on behalf of the First, Second, Third and Fifth Applicants, would it be prudent or in the interest of justice to set aside their convictions (on the basis of grave injustice) and order the trial to proceed in respect of the Fourth Applicant? Counsel could not provide any authority for this proposition. It would, for obvious reasons, not be prudent to order a separation of trials at this late stage. Surely if a grave injustice has been committed in the proceedings then the entire proceedings, including that relating to the Fourth Applicant must be set aside. In casu this would lead to an unfavourable situation for by his own "confession" the Fourth Applicant could not have been prejudiced by the proceedings.

[32] In the result, the application is dismissed with costs.

KRUGER J:

MOKGOHLOA J: I agree

DATE OF CAV:	1 November 2012
DATE OF JUDGMENT:	18 January 2013
FOR THE FIRST RESPONDENT:	Y Gangai
INSTRUCTED BY:	State Attorney
FOR THE 1ST & 2ND APPLICANTS:	S Mathews
INSTRUCTED BY:	Stowell & Co
FOR THE 3RD, 4TH & 5TH APPLICANTS:	P Rowan SC
INSTRUCTED BY:	Lourens de Klerk Attorney