OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
.....	.....
SIGNATURE	DATE

CASE NO: 1772/2018

In the matter between:

HOOSEN MANSOOR FIRST APPLICANT

JOHANNES MISIBI SECOND APPLICANT

PETROS MZWAKHILE SITHOLE THIRD APPLICANT

VUZI RONALD MAGUBANE FOURTH APPLICANT

and

THE MAGISTRATE MS GREYVENSTEIN FIRST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS SECOND RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] This is an application by four accused individuals (the first to fourth applicants), accused of crimes of stock theft and related charges in the Volksrust Regional Court to have the court *a quo's* decision to refuse the applicants' application for discharge in terms of Section 174 of the Criminal Procedure Act 51 of 1977 ("**the CPA**") reviewed and set aside.

[2] The applicants are all represented by one attorney, Jaffer Attorneys and one counsel, Advocate Engelbrecht SC in the proceedings in the court a quo, and in this court. In the criminal trial there are however four more accused persons involved in the trial who did not join the

proceedings to review and set aside the court *a quo*'s ruling and they are represented by a different attorney, Mr L Joubert.

[3] Two of the co-accused pleaded guilty and are serving sentences and one of them testified in the state case against the applicants, and other four accused.

[4] The Regional Court's Magistrate gave reasons for her decision not to grant the Section 174 application for the discharge of the accused. These reasons can be found in the record of proceedings of the court *a quo*.[1] The judgment by the court *a quo* is well reasoned and makes sense.

THE GROUNDS RELIED UPON FOR REVIEW

[5] The applicants submitted that the Magistrate committed a gross irregularity by allowing evidence of admissions and confessions by the applicants without the applicants having been warned of their rights in terms of Section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("**the Constitution**").

[1] Page 873-881 of bundle

[6] It is further stated by applicants that the Magistrate took over the prosecution and guided the prosecutor on how to lead evidence as regards to the basis before allowing a witness to refresh his memory.

[7] Another submission made by the applicants is that the evidence gathered and obtained is of the nature referred to in **S. v Burger**[2] referring to an undesirable fusion of the SAPS and private investigators. It is stated that the South Africa is not a police state and persons' rights in terms of Section 35 of the Constitution are not to be flouted.

[8] A further point relied upon by the applicants is the fact that the magistrate initially ruled that certain evidence was admissible and thereafter reversed her decision to find that it was inadmissible. They state that it is humanly impossible for the trial court to distance itself from the inadmissible evidence and ignore the inadmissible evidence. It is stated that the inadmissible evidence read holistically has a prejudicial effect on the termination of the culpability.

THE POINT *IN LIMINE* RAISED BY THE SECOND RESPONDENT

[2] 2010 (2) SACR 1(SCA)

[9] The second respondent, in his opposing affidavit and heads of argument raised a point *in limine* and states that the applicants have not made a case for the relief they seek in their notice of motion. It is stated that a superior court, so the argument goes, will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below. Only in rare cases where grave in[3]justice might otherwise result, or where justice might not by other means be attained, will a superior court intervene in the proceedings of lower court. Especially having regard to the effect of such procedure upon the continuity of the proceedings in the court below, and the effect that redress by means of review or appeal will ordinarily be available after the trial in the court *a quo*.

[10] It is common cause that two of the accused have already pleaded guilty to the same counts and charges which have been proffered against the applicants. Four other accused represented by different legal representatives did not join the applicants' application to review and set aside the Magistrate's judgment. In these circumstances the second respondent submits it will not be proper to interfere with the unterminated proceedings before the Magistrate's Court.

THE LAW AND DISCUSSION

[3] **Wahlhauz v Additional Magistrate, Johannesburg and another** 1959 (2) SA 113 (A) at p 119

[11] In the case of **Wahlhauz and Others v. Additional Magistrate, Johannesburg**[4] the appellate division, as it then was, stated as follows:

"It is true that, by virtue of its inherent power to restrain illegalities in inferior Courts the Supreme Court may, in a proper case grant – by way of review, interdict , or mandamus- against the decision of a Magistrates Court given before conviction (See: Ellis v Vesser & another 1956 (2) SA 117 (W); R v Marais 1959 (1) SA 98 (T), where most of the decisions are collated) This, however, 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. The learned authors of Gardin and Lansdown (6 Edition, Vol 1, page 750) state:

While a Superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated cause of proceedings in a court below. It certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained… In general however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the

[4] *Supra*

continuity of proceedings in the court below, and to the effect that redress by means of review of appeal will ordinarily be available."

[12] The court held that the statement quoted above reflects the position in relation to unconcluded criminal proceedings in the Magistrates Court. In conclusion, the court held as follows:

"*Reverting to the facts of the present case, the petition fails to reveal any such special circumstances as rendered interference by the provincial division with the Magistrate decision necessary or even highly desirable. It will, of course, be open to appellants, if so advised and should they be convicted and thereafter appeal to raise at that stage, the contentions now advanced in petition. I accordingly refrain from expressing any opinion on the merits of those contentions. It is sufficient to say that nothing was put before us in argument to show that any grave injustice or failure of justice is likely to ensue if the criminal trial against appellants proceeds upon the charge sheet in its present form and as amplified by the further particulars furnished by the crown …the Court a quo was, in this Court's judgment, quite correct in refusing to entertain appellants petition.*"

[13] In the case of **Nourse v Van Heerden NO and others**[5] the court endorsed the principles laid out in the case of *Wahlhauz, supra,* and further held that:

" *…the requirements for interference is the avoidance of 'grave injustice' which overlaps another consideration which would be dealt with later in this judgment. The reason why applications to interfere with proceedings in a Court below are entertained only in exceptional cases where the effect of the application, if successful, would be to terminate the proceedings altogether.*"

[14] The second respondent then submits that the application for review is *premature* and appears to be an abuse of court process as the applicants are entitled to either institute proceedings for review or appeal in the event of being found guilty at the end of the case.

[15] The applicants, in their founding affidavit, have failed to point out what injustice they will stand to suffer if the criminal proceedings are allowed to run the course. Applicants' case is simply based on the fact that because of the two contradicting rulings made by the Magistrate regarding the admissibility of evidence the record of evidence is so

[5] 1999 (2) SACR 198 (W) at page 207

contaminated that it will be impossible for the Magistrate to distance herself from the inadmissible evidence and ignore the inadmissible evidence. In her judgment the Magistrate clearly stated:

"*The court has scrutinised the evidence placed before the court by the state, read with the admissions tendered by the accused persons and the version that was put to the different state witnesses in which the bases of their defence were disclosed during the trial. The court has carefully scrutinised the evidence and excluded evidence ruled to be inadmissible.*"[6] [Own emphasis]

[16] The Magistrate then turns and deals with certain evidence that was tendered and not objected to by the defence. Proper reasons are given by the Magistrate for dealing with inadmissible evidence and it does not appear to me that she misses the point at all.

[17] Turning to the private investigation objection, I cannot see any basis for that contention that would render the further proceedings herein of such a nature that it will prejudice the applicants, and I find that the Magistrate correctly dealt with the submission by applicants in this

[6] Page 874 of the record.

regard, and found that the facts of the Burger – case is distinguishable from the facts in applicants case[7]

[18] In the Burger matter the police officers (employed by the South African Police Service) were on "*sick*" leave and worked for a private investigator and thereby basically usurped the SAPS's role in the investigation to the effect that there is no difference between the SAPS and the private investigation company.

[19] BP Greyling was a SAPS reservist who investigated stock theft that came to his attention, and not as employee, or part of a private security firm, nor as a police official. Greyling's employees were also not private investigators, and were not employed by such an entity. They were also not trained private investigators or policemen. I therefore find that the Magistrate correctly rejected the submission and the conduct does not amount to a grave injustice or a gross irregularity.

[20] The Magistrate when she addressed the prosecutor on the utilising of the refreshment did not take over the prosecution. I cannot see that the little interference by the Magistrate amounts to a gross irregularity

[7] Page 876, line 8 to 25, and Page 877, line 1 to 7

which will render the balance of the trial unfair or which cannot be cured in a review or appeal after the trial has run its course.

[22] The evidence before the Magistrate, and the fact that the co-accused that pleaded guilty testified on behalf of the state, implying the other accused reached to the inevitable conclusion and reasonable inference that there is a reasonable possibility that the defence's evidence might supplement the state's case.

[23] In **State v Shupping and Others**[8] the court laid down the following principle:

"*At the close of the State case, when discharge is considered, the first question is*

(i) is there evidence on which a reasonable man might convict, if not;

(ii) is there a reasonable possibility that the defence evidence might supplement the State's case?

[8] 1983 (2) SA 119 (B)

If the answer to either of the questions is yes, there would be no discharge and the accused should be placed on his defence."

[24] In the unreported case of **Director of Public Prosecutions, Limpopo v. Maraba and others**[9] Makgoba held that:

"*[16] The dictum is S v Shupping and others, supra, was followed and with approval in S v Hudson and other 1998 (2) SA CR359 (W) the following principles were laid down:*

That section 174 of the Act afforded a judicial officer a discretion to discharge an accused or to refuse to do so. The discretion had to be exercised judicially and not capriciously, and the first consideration was whether there was evidence at the close of the State case on which a reasonable man might convict the accused, a factor which it was permissible to take into account, in granting or refusing an application for discharge, was whether there was a reasonable possibility that the defence evidence might supplement the State case.

[9] Case No. AA01/2016, dated 4 August 2016) at paragraph [16]

Further that an important consideration in determining whether there was a reasonable possibility that the defence evidence might supplement the State case was the content of any admissible confession of a co-accused of the applicant for discharge."

[25] *In casu* it is my opinion that the Magistrate has exercised her discretion judicially and there is no reason for this Court to interfere in the decision. What has also been taken into account by the Magistrate is that two of the co-accused to the applicants have already been pleaded guilty to the same charges that the applicants face. One of those accused who pleaded guilty was one of the state witnesses who presented evidence on behalf of the second respondent.

[26] The applicants have made admissions in terms of Section 220 of the Act that the cattle alleged to have been stolen were found in the first applicant's truck in contravention of the provisions of the Stock Theft Act, another important factor taken into account by the Magistrate in dismissing the applicants' application in terms of section 174 of the CXPA.

[27] In **S v Lubaxa**[10] the Supreme Court of Appeal had an opportunity to review previous cases on the provision of section 174 of the Act and had the following to say:

"*[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.*

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its 14 concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he

[10] 2001 (2) SACR 703 (SCA)

might incriminate himself. That is recognised by the common law principle that there should be "reasonable and probable" cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12.

[20] The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the

evidence of an accomplice might at times render it futile to continue such a trial that need not always be the case."

[28] In *casu* there are eight accused persons who jointly face the same counts in one trial. In line with the case of **S v. Shupping,** *supra*, there is a reasonable possibility that the defence evidence might supplement the state's case and the accused should be placed on their defences.

[29] The general rule in matters where a person is alleged to have committed a crime is that the person's innocence or guilt is to be decided by the Criminal Court. In the case of **Attorney General, Natal v. Johnstone and Company Limited**[11] Scheiner AJ held that:

"*Now there is no doubt that, in general where it is alleged by the Crown that a person has committed an offence, the proper way of deciding on his guilt is to initiate criminal proceedings against him; and where such proceedings have already been commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before*

[11] 1946 AD 256 at 261

granting such an order. In most types of case such an order would be entirely out of place."

[30] The applicants made admissions in terms of Section 220 of the CPA that the cattle allegedly stolen have been found on the first applicant's truck in contravention of the Stock Theft Act. Second and third applicants all had a role to play in the loading and transporting of these animals.

[31] With all that kept in mind, the Magistrate was of the opinion that the state adduced sufficient evidence upon which a reasonable man acting carefully could convict each one of the accused on the main and any one of the alternative charges.

[32] Even if it was not so, it was recently decided in **S v. Hudson & Another**[12]:

"*Section 174 of the Act afforded a judicial officer a discretion to discharge an accused or to refuse to do so. The discretion had to be exercised judicially and not capriciously, and the first consideration was whether there was evidence on which a reasonable man might convict. That even if there was no evidence at the close of the state*

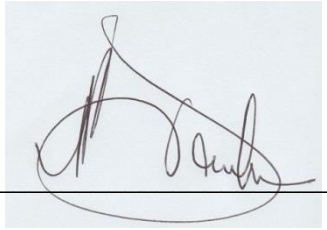
[12] 1998 (2) SA CR 359 (W)

case on which a reasonable man might convict the accused, a factor which it was permissible to take into account, in granting or refusing an application for discharge, was whether there was a reasonable possibility that the defence's evidence might supplement the state case. Further that an important consideration in determining whether there was a reasonable possibility that the defence evidence might supplement the state case was the content of any admissible confession of a co-accused of the applicant for discharge."

[33] In casu we are not dealing with a case where it can be said that a grave injustice will follow or a gross irregularity was committed.

[34] I am therefore not convinced by the applicants that I have the power to intervene with the incomplete proceedings in the Magistrate's Court.

[35] The application is accordingly dismissed with costs.



HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANTS:

INSTRUCTED BY:

REPRESENTATIVE FOR THE RESPONDENT:

INSTRUCTED BY:

DATE OF HEARING:

DATE OF JUDGMENT: