

IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)

Case No: 1518/2021

Reportable:NO

Circulate to Judges: YES

Circulate to Magistrates: YES

Circulate to Regional Magistrates: YES

In the matter between:

MVULENI ELVIS MSHUDULU

Applicant

and

THE REGIONAL COURT MAGISTRATE KIMBERLEY,  
NORTHERN CAPE

1<sup>st</sup> Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,  
NORTHERN CAPE

2<sup>nd</sup> Respondent

Coram: Lever J et Chwaro AJ

JUDGMENT

Lever J

1. This is a review in which applicant seeks to review a decision of the trial Magistrate before the finalisation of the relevant criminal trial. By way of a brief background, the applicant faces 9 charges in the Regional Magistrates Court, Kimberley. The charges include, *inter alia*, corruption, an attempt to defeat the ends of justice, corruption with an alternative charge of extortion and assault with intent to do grievous bodily harm (assault GBH). The incidents on which these charges are based date back to as early as May 2015 but appear to extend up to 2017.

2. The applicant pleaded not guilty to all the charges and the matter proceeded to trial. During the evidence in-chief of the first witness called by the prosecution, the prosecution wanted to introduce recordings of certain telephonic conversations the said witness had recorded of himself and the applicant. The defence objected and motivated for the procedure of a trial-within-a-trial to be followed. The trial Magistrate ruled that it was not necessary to follow the procedure of a trial-within-a-trial. After the recordings were played in court the applicant moved for the matter to be postponed so that the present application to review the decision not to follow the procedure of a trial-within-a-trial could be launched. The trial was duly postponed for that purpose.

3. The applicant on the 23 July 2021 filed a Notice of Motion and supporting affidavit seeking a review under the provisions of Rule 53 of the Uniform Rules of Court. The first respondent (the Magistrate) has not opposed the application and abides the decision of the court. The second respondent, the DPP Northern Cape opposes the application and has filed an answering affidavit. The applicant has filed the reconstructed record of the relevant proceedings in accordance with Rule 53(3). The applicant has indicated that he does not intend to amend his Notice of Motion. The applicant has not supplemented his founding affidavit. Nor has the applicant filed a replying affidavit. Nonetheless, the applicant has elected to proceed without filing a replying affidavit or supplementing his founding affidavit.

4. The only substantive grounds raised by Mr Nel, who appeared for the applicant, to review the said decision not to follow the procedure of a trial-within-a-trial is that the recording is not the original recording and that the recording is not authentic.

5. Mr Nel approaches the matter on the basis that the question to be determined by this court on review is whether such recording is documentary evidence or real evidence. Mr Nel has referred this court to the relevant authorities on that question.

6. Mr Nel contends that the recording must be treated as documentary evidence and that such recording is not real evidence. Accordingly, Mr Nel submits that the party that wishes to introduce such documentary evidence must, over and above the

general requirements for admissibility, establish that it is the original recording and that it is authentic in the sense that it is what it purports to be.

7. Mr Cloete, who appeared for the second respondent, approached the matter on the basis that this court must ask itself one question. Namely, can it be said that the decision of the magistrate not to hold a trial-within-a-trial will result in an irreversible and serious failure of justice?

8. Mr Cloete submitted that it would only be if the answer to that question was 'yes' that the applicant should succeed in his application.

9. Mr Cloete conceded that this court could, even where proceedings in the Magistrates court had not yet terminated, interfere and review such proceedings, in order to prevent an otherwise irreversible and serious failure of justice.

10. However, Mr Cloete submitted on the authority of *WALHAUS v ADDITIONAL MAGISTRATE, JOHANNESBURG*<sup>1</sup> that the High Court will only interfere in the unterminated proceedings in a Magistrates Court where exceptional circumstances have been established. Mr Cloete also referred this court to the matter of *GOUNDEN & ANOTHER v NONCEBU N.O. & OTHERS*<sup>2</sup> to demonstrate that the applicant is required to establish that there is a basis for the High Court to interfere in criminal proceedings that have not yet terminated in the Magistrates court. Further, that the minimum requirement for the High court to interfere in such manner would be 'exceptional circumstances'. In the event of the applicant failing to establish the aforesaid requirements, that would be the end of the matter.<sup>3</sup>

11. Mr Cloete maintained that the applicant would have to establish these exceptional circumstances before the court would be justified in proceeding to the question postulated by Mr Nel, i.e. whether the recording was documentary or real evidence. Mr Cloete maintained that the applicant had not set out or established

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<sup>1</sup> 1959 (3) SA 113 (A) at 199E-120H.

<sup>2</sup> 2018 (2) SACR (KZP) at paras [13] and [14].

<sup>3</sup> Gounden., above at para [13].

exceptional circumstances and irreparable harm as a pre-requisite for this court to interfere at this stage of the proceedings.

12. In my view, Mr Cloete is correct, the applicant must establish both exceptional circumstances and irreparable harm before this court will interfere in criminal proceedings that have not yet terminated in the lower court. More especially consider the question postulated by Mr Nel as to whether the recording is to be treated as 'documentary evidence' or 'real evidence'.

13. The applicant in his affidavit in support of his application for review does not set out or establish exceptional circumstances for this court to intervene before the completion of the trial in the Magistrate's court.

14. The applicant in relation to irreparable harm only makes the following contention in his founding affidavit:

"4.4 I am advised that the admission of evidence without hearing all the relevant evidence during a trial-within-a-trial in circumstances where the admissibility thereof is disputed will cause irreparable harm to my case which I will not be able to rectify during an appeal."

15. There is no attempt to elaborate and identify or explain the irreparable harm that could not be rectified on appeal in the said founding affidavit.

16. The Magistrate clearly acted within her discretion in deciding whether a trial-within-a-trial process was called for on the facts of this particular case.

17. It is clear from the record of proceedings that the Magistrate has not yet decided on whether the relevant recordings are admissible or not.

18. The question of the authenticity of the recordings can be properly tested in cross-examining on this aspect and the leading of any other witness called to establish its authenticity, including the applicant.

19. Similarly, the question of whether the recorded conversations took place or not, is also an issue that can appropriately be tested in cross-examining the witness concerned and adducing relevant evidence to counter that of the State.

20. As is set out above, no irreparable harm that applicant will suffer if this court does not intervene at this stage has been set out in applicant's founding affidavit with any degree of particularity.

21. In these circumstances, the applicant has not established the minimum basis required for this court to intervene before the proceedings in the Magistrate's court have been concluded. Accordingly, the review stands to be dismissed.

22. In regard to costs, both the applicant and the second respondent agreed that this was not a matter in which costs should be awarded to or against one of the parties. I agree that this is the appropriate approach on the facts of this case.

In the circumstances the following order is made:

1. The application is dismissed.
2. There is no order as to costs.

Judge Lawrence Lever  
Northern Cape Division, Kimberley

I agree

Acting Judge Chwaro  
Northern Cape Division, Kimberley

**APPEARANCES:**

APPLICANT: Adv IJ Nel oio Van Den Heever Attorneys

RESPONDENT: Adv JJ Cloete oio Office of the Director of Public Prosecutions

Date of Hearing: 09 May 2022

Date of Judgment: 20 May 2022