IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A352/07
DPP REF NO: JAP 2007/0397

In the matter between:

NEL, JOHANNES PETRUS Appellant

and

THE STATE Respondent

J U D G M E N T

MOSHIDI, J:

[1] Mr Johannes Petrus Nel ("the appellant") was charged with theft, read with s 51 of Act 105 of 1997, in the Boksburg Regional Court. The charge sheet alleged that the appellant stole 70 538 litres of premium petrol valued at R234 369,56, from Sasol Oil, between 3 and 4 April 2003.

[2] The appellant was legally represented at all material times. The appellant concluded a plea and sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977 ("the Act"), in terms of which he pleaded guilty and was sentenced to 8 years' imprisonment of which 3 years imprisonment were suspended for a period of 5 years on the usual conditions.

[3] The current appeal, with the leave of this Court, is directed at both the conviction and the sentence.

[4] The provisions of s 105A of the Act, which came into operation on 14 December 2001, permit the prosecuting authority and the accused, with legal representation, to enter into a plea and sentence agreements. S105A of the Act provides as follows:

> "***105A Plea and sentence agreements***
>
> *(1) (a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of —*
>
> *(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and*
>
> *(ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty—*
>
> *(aa) a just sentence to be imposed by the court; or*

(bb) the postponement of the passing of sentence in terms of section 297(1) (a) ; or

(cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297(1) (b) ; and

(dd) if applicable, an award for compensation as contemplated in section 300.

(b) The prosecutor may enter into an agreement contemplated in paragraph (a) —

(i) after consultation with the person charged with the investigation of the case;

(ii) with due regard to, at least, the—

(aa) nature of and circumstances relating to the offence;

(bb) personal circumstances of the accused;

(cc) previous convictions of the accused, if any; and

(dd) interests of the community, and

(iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding—

(aa) the contents of the agreement; and

(bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

(c) The requirements of paragraph (b) (i) may be dispensed with if the prosecutor is satisfied that consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could—

(i) cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative; and

(ii) affect the administration of justice adversely.

(2) An agreement contemplated in subsection (1) shall be in writing and shall at least—

(a) state that the accused, before entering into the agreement, has been informed that he or she has the right—

(i) to be presumed innocent until proved guilty beyond reasonable doubt;
(ii) to remain silent and not to testify during the proceedings; and

(iii) not to be compelled to give self-incriminating evidence;

(b) state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused;

(c) be signed by the prosecutor, the accused and his or her legal representative; and

(d) if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement.

(3) The court shall not participate in the negotiations contemplated in subsection (1).

(4) (a) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then—

(i) require the accused to confirm that such an agreement has been entered into; and

(ii) satisfy itself that the requirements of subsection (1) (b) (i) and

(iii) have been complied with.

(b) If the court is not satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall—

(i) inform the prosecutor and the accused of the reasons for non-compliance; and

(ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned.

(5) If the court is satisfied that the agreement complies with the requirements of subsection (1) (b) (i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court.

(6) (a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether—

(i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
(ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and

(iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.

(b) After an inquiry has been conducted in terms of paragraph (a) , the court shall, if—

(i) the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into; or

(ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or

iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand,

record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor.

(c) If the court has recorded a plea of not guilty, the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(7) (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to

consider the sentence agreement.

(b) For purposes of paragraph (a) , the court—

(i) may—

(aa) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and

(aa) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; and

(ii) must, if the offence concerned is an offence—

(a) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act 105 of 1997); or
(b) for which a minimum penalty is prescribed in the law creating the offence,

have due regard to the provisions of that Act or law.

(8) If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.

(9) (a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.

(b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may—

(i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or

(ii) withdraw from the agreement.

(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b) (i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.

(d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b) (ii), the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(10) Where a trial starts de novo as contemplated in subsection (6) (c) or (9) (d) —

(a) the agreement shall be null and void and no regard shall be had or reference made to—

(i) any negotiations which preceded the entering into the agreement;

(ii) the agreement; or

(iii) any record of the agreement in any proceedings relating thereto, unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admission so recorded shall stand as proof of such admission;

(b) the prosecutor and the accused may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts; and

(11) (a) The National Director of Public Prosecutions, in consultation with the Minister, shall issue directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this section and any directive so issued shall be observed in the application of this section.

(b) The directives contemplated in paragraph (a) -

(i) must prescribe the procedures to be followed in the application of this section relating to—

(aa) any offence referred to in the Schedule to the Criminal Law Amendment Act, 1997, or any other offence for which a minimum penalty is prescribed in the law creating the offence;

(bb) any offence in respect of which a court has the power or is required to conduct a specific enquiry, whether before or after convicting or sentencing the accused; and

(cc) any offence in respect of which a court has the power or is required to make a specific order upon conviction of the accused;

(ii) may prescribe the procedures to be followed in the application of this section relating to any other offence in respect of which the National Director of Public Prosecutions deems it necessary or expedient to prescribe specific procedures;

(iii) must ensure that adequate disciplinary steps shall be taken against a prosecutor who fails to comply with any directive; and

(iv) must ensure that comprehensive records and statistics relating to the implementation and application of this section are kept by the prosecuting authority.

(c) The National Director of Public Prosecutions shall submit directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this section.

(d) Any directive issued under this subsection may be amended or withdrawn in like manner.

(12) The National Director of Public Prosecutions shall at least once every year submit the records and statistics referred to in subsection (11) (b) (iv) to Parliament.

(13) In this section 'sentence agreement' means an agreement contemplated in subsection (1) (a) (ii)."

These provisions specifically exclude the usual plea arrangements between an accused person and the State, standing on their own. (cf. *S v Mlangeni* 1976 (1) SA 528 (T).) The prosecuting authorities and trial courts are expected to adhere to strict compliance of the provisions. If this occurs, a Court of Appeal will be reluctant to interfere in the outcome unless there are glaring or ascertainable gross irregularities or a violation of the accused's constitutional rights to a fair trial.

[5] The grounds of appeal, which are largely irrelevant in view of the plea and sentence agreement, can be paraphrased as follows: that the Magistrate did not ensure that the appellant had a fair trial in accordance with the Constitution; that the appellant was blindly led in by his attorney and the investigating officer to enter into the plea-bargain; that the sentence imposed was too harsh, the Magistrate having failed to consider properly the appellant's personal circumstances, his chances of rehabilitation, and other sentencing options.

[6] In short, the appellant, in this appeal, advances a completely fresh version which was never tested in evidence in the court below.

[7] A proper and careful reading of the proceedings in the court below reveal that the Magistrate in fact complied with all the provisions of s 105A of the Act. In questioning by the Magistrate, the appellant confirmed that he had entered into the agreement, Exhibit "A". The appellant also confirmed the contents and the admissions made in the agreement, as well as the factual allegations contained in the charge sheet to which he pleaded guilty. What is of great importance and relevance to the present appeal is that the appellant confirmed that he entered into the agreement freely and voluntarily whilst in his sober senses, and without any undue influence. The charges were put to

the appellant. He told the Magistrate that he understood the charges and pleaded guilty thereto. The Magistrate then considered the contents of the agreement and, in particular, the agreement to plead guilty and the sentence to be imposed. The Magistrate then proceeded to formally convict the appellant and imposed the agreed sentence. In imposing the sentence, the Magistrate considered and accepted that the appellant had a clean criminal record, and further, that the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 were not applicable. The Magistrate also considered the appellant's personal circumstances as contained and agreed upon in the agreement. In spite of the fact that the appellant was legally represented by Mr D Human throughout the proceedings, the Magistrate, nevertheless comprehensively explained to the appellant his further rights, including the appeal procedure.

[8] The agreement itself, concluded on 10 March 2006, shows that it was signed by the appellant, his legal representative, Mr Human, the State Advocate, and properly authorised by G L Roberts SC, the Deputy Director of Public Prosecutions. It contains all the factual allegations of the charge against the appellant, the admissions of the appellant, the personal circumstances of the appellant, and the particulars of the agreed sentence.

[9] In my view, there was in essence no misdirection at all in the implementation of the provisions of s 105A of the Act on the part of the court below. In fact, in the present appeal, appellant's heads of argument contain the following:

> "*It is conceded that the proceedings in the court a quo was, ex facie the record in accordance with justice, more particularly in that the appellant's plea of guilty was properly noted and he was properly convicted by the court a quo after he had freely and voluntarily pleaded guilty.*"

In argument before us today, Mr Jessie Penton, an attorney, who appeared for the appellant, in my view, correctly repeated this concession.

[10] In *S v Armugga and Others* 2005 (2) SACR 259 (N), the court was faced with an identical situation, save that the appeal there was directed against the sentence only, imposed pursuant to a plea and sentence agreement between the accused and the public prosecutor in terms of s 105A of the Act. After extensive comparison and review of the plea bargain procedures in some foreign jurisdictions, as well as the purpose of section 105A of the Act. Msimang J held, *inter alia*:

> "*(a) … It has always been contemplated that the right of appeal in those cases would be a limited one and that the appellants in those cases would be granted relief only in exceptional circumstances. The position can be equated with the position of an appellant who is convicted on his plea of 'guilty' and thereafter appeals against the very same conviction … that such exceptional circumstances were not revealed in the present appeals;*
>
> *(b) … that the appellants seem to have misconstrued the very nature*

and essence of plea bargaining. Plea bargaining can be defined as the procedure whereby the accused person relinquishes his right to go to trial in exchange for a reduction in sentence. As the term itself connotes, the system involves bargaining on both sides, the accused bargaining away his right to go to trial, in exchange for a reduced sentence and the prosecutor bargaining away the possibility of a conviction, in exchange for a punishment which he felt would be retributively just and cost the least in terms of the allocation of resources. In the process of bargaining, numerous assumptions were made and mistakes were bound to happen;

(c) further that, provided a party was found to have acted freely and voluntarily, in his or her sound and sober senses and without having been unduly influenced when concluding a plea bargaining agreement, the fact that the assumptions turned out to be false, does not entitle such a party to resile from the agreement."

[11] I am, in respectful agreement with the applicable principles as enunciated by Msimang J above. In the present appeal, the appellant was specifically asked by the Magistrate and he confirmed that he entered into the agreement freely and voluntarily without any undue influence brought to bear on him. There was no evidence to suggest the contrary. The appellant's present version was never placed before the Magistrate. It is clearly an afterthought triggered apparently by the reality of a prison term. In my view, the court below had before it only one agreed version and was correct in convicting and sentencing the appellant as it did. On this ground alone, the current appeal must fail.

[12] I now deal with the alternative argument advanced on behalf of the appellant: that this Court, sitting as a Court of Appeal, should exercise its

inherent jurisdiction of review, set aside the conviction and sentence, and refer the matter back to the Magistrate's Court for a trial *de novo*. We were referred to no authorities in this regard by the appellant's attorney, who submitted that the appellant's version warrants such relief. Indeed, s 24 of the Supreme Court Act 59 of 1959 provides as follows:

> "*24. <u>Grounds of review of proceedings of inferior courts</u>*
>
> *1) The grounds upon which the proceedings of an inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are –*
>
> *(a) absence of jurisdiction on the part of the court;*
>
> *(b) interest in the cause, bias, malice or the commission of an offence referred to in Part I to 4, or section 17, 20 or 21 (insofar as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;*
>
> *(c) gross irregularity in the proceedings; and*
>
> *(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*
>
> *(2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts.*"

[13] There is authority for the proposition that the word "*review*" is used here both in the wide and restricted senses. See in this regard *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 114-116. *In casu*, the appellant essentially advances bald and unsubstantiated allegations in support of his appeal. His main complaint is that the Magistrate had no regard to the Constitution in order to ensure that he received a fair trial, and that the appellant was not a willing party to the plea and sentence agreement. Having established that the court below committed no irregularity at all, and in the light of the concession made in the appellant's heads of argument, none of the grounds of review under s 24 are present. It cannot be found that the court below had no jurisdiction to hear the matter, or that the Magistrate was biased, malicious or partial towards the appellant, or committed an offence under s 24(1)(b) of Act 59 of 1959, or that inadmissible or incompetent evidence was admitted or vice versa.

[14] However, this is not the end of the road for the appellant. The authors of the "*Commentary on the Criminal Procedure Act*", *Du Toit et al*, at 30-4 (Service 36, 2006), are of the view that s 24(2) of the Supreme Court Act 59 of 1959 allowed for any law, including the Constitution, to make exceptions to the grounds stated in s 24(1) of Act 59 of 1959. Further that the provisions of the Constitution were therefore not in conflict with s 24(1) of the Supreme Court Act. S 173 of the Constitution provides as follows:

"*173. Inherent power*

> *The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*"

In *Magano and Another v District Magistrate, Johannesburg and Others (2)* 1994 (4) SA 172 (W), Van Blerk AJ, held, *inter alia*, that a review by a Superior Court of a decision of an inferior court which was alleged to be an infringement of a fundamental right was of a wide-ranging nature and the type where the court could enter upon and decide the matter *de novo*. In *S v* Taylor 2006 (1) SACR 51 (C), where the Court dealt with a similar review, as in the present matter, Yekiso J expressed the view that the approach suggested in s 173 of the Constitution is indeed comprehensive for it allows the exercise of the court's inherent power, taking into account the interests of justice, without being subjected to any form of statutory constraint. See also *S v Salie* 2007 (1) SACR 55 (C).

[15] To sum up, in the present matter, the appellant enjoyed legal representation throughout the proceedings in the court below. There is no indication that the appellant's right to a fair trial in terms of s 35(3) of the Constitution or any other rights, were not protected by the court below. In fact, the record of the proceedings in the court below confirms the contrary in

all respects. The Magistrate complied and applied the provisions of s 105A of the Act, in all respects. There is no indication at all that the appellant was misled by his attorney and/or the investigating officer to enter into the agreement. As was stated in *S v Taylor*, *supra*: "*The accused cannot now, once the shoe starts pinching, begin to complain about the procedure followed at trial and the performance of his attorney.*" Indeed, the whole purpose of the provisions of s 105A of the Act will be defeated at great expense and wastage of resources, if accused persons who enter into procedurally faultless plea and sentence agreements were subsequently allowed to resile from such agreements at will, and not on any legal or constitutional basis.

[16] I conclude that I am unable to find, on a reading of the record and arguments advanced, that the proceedings in the court below were accompanied by any grounds as envisaged in s 24 of the Supreme Court Act 59 of 1959 or in s 173 of the Constitution, nor could I find any other gross irregularity in the proceedings entitling this Court to interfere. The appellant has failed to make out a case for any of the relief he now seeks. The appeal must fail.

[17] I make the following order:

The appeal against both the conviction and sentence or the review

thereof is dismissed.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT
WITWATERSRAND LOCAL DIVISION

I agree:

_____

D I BERGER
ACTING JUDGE OF THE HIGH COURT
WITWATERSRAND LOCAL DIVISION

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