IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 4561/18

In the matter between:

Gareth Prince	**Applicant**
And	
Mr J Groenewald NO	**First Respondent**
The Director of Public Prosecutions (Western Cape)	**Second Respondent**

JUDGMENT DELIVERED 12 DECEMBER 2018

BAARTMAN,J

[1] This is an application, in terms of Rule 53 of the Uniform Rules of Court: the applicant seeks the following:

(a) 'Reviewing and setting aside the proceedings and orders made by [the magistrate at Moorreesburg] (**the first respondent**) under case number 324/17.

(b) Staying the proceedings in Moorreesburg case 324/17 pending the determination of the Constitutional challenge in the Prince decision.'

[2] The first respondent, who has since left the bench, abides by this court's decision. The Director of Public Prosecutions, Western Cape (**second respondent**), has opposed the application. The applicant alleges that the proceedings sought to be reviewed and set aside were tainted by bias and gross irregularities. He amplified as follows: '*the [respondents'] failure to observe their constitutional duties and to stay impartial during proceedings was a vitiation of justice and destroyed the fairness of the proceedings'.* I deal with these and other grounds below. Conversely, the second respondent has alleged, among others, that the application is premature and bad in law. I deal with the grounds of opposition below.

Background

[3] On 27 July 2017, the police stopped the applicant in a routine road block at Moorreesburg. At the time, the applicant's wife, children, mother and grandmother were occupants in the vehicle. A police dog, trained in the detection of dagga, detected a substance concealed in the motor vehicle. The substance was contained in 613 capsules and 5x1 ml syringes. The police arrested the applicant on charges of dealing, alternatively possession of dagga in contravention of the Drugs and Drug Trafficking Act, 140 of 1992 (the Act). He was released on bail. The charge sheet lodged with the clerk of the court is not before us.

[4] On 27 September 2017, the applicant made his first court appearance; the matter was postponed to 26 October. I deal with the postponements leading to these proceedings in some detail below. The matter was postponed to 27 November on which date the

forensic report was available from which it was apparent that the substance at issue was dronabinol, not dagga as suspected.

[5] Therefore, the second respondent amended/substituted the charge sheet (**the new charge sheet**). He proffered charges of – count 1 – contravening section 5(b) of the Act read with section 13(f), and Part ll of Schedule 2 in that '[applicant] wrongfully dealt in dangerous dependence producing substance, to wit, 613 capsules and 5 syringes containing dronabinol'; alternatively possession of the substance in contravention of section 4(b) of the Act. In addition – count 2 – contravening 'section 22(1) of Act 101 of 1965 read sections 1, 9, 30, 31 and Schedule 6 of the Medicines and Related Substances Control Act, Act 101 of 1965' (**the Medicines Act**).

[6] It is not apparent from the record when the applicant received the new charge sheet. However, he indicated from the bar that he received it shortly before the 27 November proceedings. Mr Stevens SC, who appeared for the state, did **n**ot take issue with the applicant on that aspect. There is no indication that the new charge sheet was lodged with the clerk of the court. Pending the outcome of these proceedings, the criminal proceedings were provisionally withdrawn. I deem it necessary to deal in detail with the various postponements in court that gave rise to this application.

The first appearance: 27 September 2017

[7] On 27 September 2017, the applicant made his first appearance in court and elected to conduct his own defence. The prosecutor addressed the court and indicated that the applicant was involved in a 'Constitutional [Court] matter' to legalise the possession of dagga. 'The docket was sent to the DPP, and the decision was to proceed with the case.'

[8] The prosecutor further requested that the matter be postponed until 26 October as the applicant had 'approached him this morning and

that they decided to remand the case until 26/10'. However, the applicant requested that the matter instead be remanded to a date in March 2018. He motivated that request as follows: 'Section 5(b) Act 140/1992 was declared unconstitutional and [there] will be a judgment in March 2018.'

[9] The first respondent remarked that he was 'of the opinion that it is only the possession of dagga that was declared unconstitutional'. He postponed the matter to 26 October 2017.

The second appearance: 26 October 2017

[10] On 26 October, the prosecutor told the court that the *'DPP [has] decided that the [applicant] should be prosecuted, and the letter is attached as Exh. A.*' He requested that the matter be postponed to 27 November 2017 to allow for: '*further statements [to be] taken from the Lab and …for further investigation and will hopefully then be able to provide further particulars.'*

The court granted the request.

The third appearance: 27 November 2017

[11] On 27 November 2017, the prosecutor informed the court that he had provided further particulars to the applicant which indicate that it '*is not the usual type of substance and he needs further assistance in that regard.*' Nevertheless, the prosecutor indicated that he was ready to put the charges to the applicant. [It is not apparent from the record when the particulars were provided.]

[12] The applicant told the court that he *'had some queries and did not know if it must be a point in limine.*' He further indicated that he was *'not sure what the state wants to do – the charge sheet is not the same as was given to him earlier*.' He further indicated that he would object to the charge sheet should charges be put to him that day.

[13] In response, the prosecutor replied that *'it was the decision of the DPP to charge the [applicant] with this offence'*. He further informed the court that he had already changed the charge sheet.

[14] The applicant responded by requesting a postponement to January 2018 to approach the High Court '*for a staying of proceedings'.* The matter was postponed to 29 January 2018 for plea.

The fourth appearance: 29 January 2018

[15] On 29 January 2018, the proceedings were mechanically recorded. The prosecutor started as follows:

> *'As far as the amendment of the charge sheet is concerned, the state is under the impression that at least before plea the state is dominus litus and that I can change or add the charges against an accused. …I must admit that in 25 years as a prosecutor, I believe this is the first time that an accused objected to any charge that I put in court to him…*
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> *I believe there is no ground for any objection if I study section 85 and further it is provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the grounds upon which he bases his objection, provided further that the requirement of such notice may be [waived] and the court may, on good cause shown, dispense with such notice, or adjourn the trial to enable such notice to be given.*
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> *I can only confirm that [to] my surprise this morning with regard to [the applicant] objection to the charges put to him. The state never received any notice of his intention to object to the charges. [the applicant] indicated to the court that he did not apply for a stay of the prosecution because of a defect in the state's case or the state's charges, but I believe the reason why he did not apply for the stay of prosecution is because this particular charge would not fall under the*

same or in the same scope of other charges for which [the applicant] already applied for a stay of prosecution….

…I am not sure precisely what, but he indicated that drunobinol is not listed in schedule 3, I believe that would have been applicable if the state would have proceeded in terms of the possession of dagga…'

[16] The applicant responded as follows:

'…my objection to what he is doing is because what the prosecutor attempts to do is to substitute a charge and he is not allowed to do it.

…The prejudice in this particular case… is acute. If the prosecution were to continue with charging me with dealing in dagga he would have to acquit me, because the law clearly say dronabinol is not illegal in terms of part 3 of schedule 2 of the act. …The fact that dronabinol is exempted in terms of part 3…and considered a dangerous depending-producing substance, in terms of another schedule of the act, casts doubt and I am entitled to the benefit of that doubt. The state is not entitled to correct that after they have put the charge to the accused. …What the state seeks to do is illegal…'

[17] The first respondent made common cause with the prosecutor as follows:

'…you said in 25 years you have never had an objection against a charge and in 40 years I never had one....'

[18] The first respondent then indicated that he would have to consider the authorities to which the applicant had referred and requested the full citation of the authorities. He concluded:

'So therefore, I am not, at this stage, going to give a judgment on this application for the objection against the charge.'

[19] The prosecutor resisted and alleged that the applicant had not given notice of his intention to object to the charges as envisaged in

section 85 of the Criminal Procedure Act 51 of 1977 (**the CPA**). It was all downhill thereafter. The applicant insisted that he had given adequate notice. The prosecutor insisted on an opportunity to consider the authorities the applicant had referred to and to address the court. He emphasised that *'there was no time this morning to prepare for this application.'* (my emphasis)

[20] Surprisingly, the first respondent agreed and ordered as follows:

'I am fully [in agreement] with the prosecutor at this stage. There was no notice. (interjections from the applicant) I am going to order now, [applicant] and if you want to hear it or not, it is an order of this court now and if you don't want this court to order, then you can go to the high court. This court orders you to give that such notice for the prosecutor in terms of section 85 that you are going to object to the charge sheet. That is an order of this court.'

[21] All bets were off, the applicant expressed his disgust as follows:

'But the notice has already been given. The act doesn't state that the notice has to be written…you cannot override the law. It would seem that the court is extremely prejudice towards the state. (despite the first respondent protesting the applicant continued) You seem to be bending over in favour of the state…I must say that's how it looks, especially from my side.'

The fifth postponement: 26 February 2018

[22] Amid much confusion and protestation, the matter was postponed to 26 February 2018 for the ordered notice to be given. On that date, the second respondent confirmed that the applicant had given notice and that he had replied. The first respondent had received both; the applicant addressed the court while the second respondent opted not to. The first respondent found against the applicant 'your objection against the charge sheet is denied'.

[23] The applicant indicated his intention to bring this application. The first respondent postponed the criminal proceedings to 26 March 2018. However, he indulged the applicant as follows: '*You can arrange with the prosecutor to be excused from appearing on 26 March then, until there is clarification about this application of yours*.'

Discussion

[24] It is against that background that the applicant felt 'obliged to approach the high court'. The applicant launched this application on 14 March 2018. It is apparent, from the lengthy extract above, that on 27 November 2017 the applicant first gave notice of his intention to object. He stated clearly that the substance allegedly possessed had changed. Therefore, initially he obtained a postponement to apply for the stay of proceedings. He did not bring that application. Similarly, the applicant knew on 26 October that the state would provide particulars once the forensic report was available. That does not mean that he knew that the charge might be amended/substituted. He appeared in person.

[25] On 29 January 2018, the prosecutor asserted his right as *dominus litis* to change the charge sheet. He said '*my surprise this morning with regard to [the applicant's] objection to the charges put to him.'* The first respondent heard both parties before concluding: '*I am not, at this stage, going to give a judgment on this application for the objection against the charge*.'

[26] The prosecutor, after the fact, sought to rely on technicalities and insufficient preparation time to deal with the application. It is correct that section 85 of the CPA provides for notice as follows:

'85 Objection to charge

…(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground –…

Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.'

[27] Presiding officers should be circumspect not to create an impression that they have prejudged a matter or that they are siding with either party. In this court, the applicant has repeatedly referred to the manner in which he was addressed. It was clear, early on, that the respondents possibly felt intimidated by the applicant. Therefore, they indicated that in their careers, 25 and 40 years respectively, they had not encountered a similar objection. Moorreesburg is a rural town in the Western Cape. The applicant is well versed in the legislation and authorities applicable in this matter – and flaunts it. I accept that he was a first for the respondents.

[28] However, that cannot justify the first respondent's turnabout from reserving judgment to ordering that notice be given. It unfortunately left the applicant convinced that the first respondent was biased against him. Nevertheless, he rose to the occasion, gave the notice and took advantage of a further opportunity to address the court. It is apparent from the record that the respondents had no idea how to handle 'the novel' objection.

[29] The applicant initially asserted that the charges, relating to dagga, should be stayed pending the outcome of the Constitutional court's judgment[1]. The respondents disagreed that the proceedings should

[1] *Minister of Justice and Constitutional Development and Others v Prince*; *National Director of Public Prosecutions and Others v Rubin*; *National Director of Public Prosecutions and Others v Acton and Others* [2018] ZACC 30.

be stayed. In appropriate circumstances, it may be necessary for the presiding officer to express a view that favours either party. Nevertheless, one must ensure, irrespective whether the accused/party is legally represented, not to create the impression of siding with one party. Nothing more need be said about this relief; judgment was delivered on 18 September 2018. The point is moot.

[30] The applicant insisted, in argument in this court, that the state should have charged him with all the relevant prohibited substances as the exact substance would only be determined after analysis. However, so the submission went, the state elected to only rely on charges relating to dagga and must proceed on that basis. The invitation for the state to throw the book at him was fortunately not accepted. When the initial charge sheet was formulated, the only objective evidence available, the sniffer dog trained in detecting dagga justified only charges relating to dagga. The state is obliged, when instituting any prosecution, to act with reasonable and probable cause[2]. Charging the applicant with all the relevant prohibited substances, in the circumstances of this matter, would have fallen foul of that obligation. So too, would continuing with charges related to dagga despite a forensic report indicating another substance.

[31] Kriegler J[3] said the following about 'the charge':

'[18] …The word 'charge' is ordinarily used in South African criminal procedure as a generic noun to signify the formulated allegation against an accused. That is how it is defined in s1 of the Criminal Procedure Act 1977 and how it is used throughout that statute. Used as a verb it bears no defined or precise meaning in the Act nor in criminal procedure terminology. It therefore comes as no surprise

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[2] Nel v Baloyi 2005 JDR 0804 (T) at para 20; *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) at para 5.
[3] Sanderson v Attorney -General, Eastern Cape 1998 (1) SACR 227 (CC) at para 18-19.

that the precise meaning of the word 'charged' as used in s25(3)(a) of the interim Constitution has elicited judicial debate. Corresponding provisions in other human rights instruments have likewise required analysis. Those cases illustrate that 'charged' can be interpreted very narrowly, so as to refer to formal arraignment or something tantamount thereto, or broadly and imprecisely to signify no more than some or other intimation to the accused of the crime(s) alleged to have been committed….

In the context of s25(3)(a) and the preservation of the individual's protection against unfair criminal proceedings it can safely be accepted that 'having been charged' includes appearing in the dock for the formal remand of a criminal case.'[Notes omitted]

[32] Scott JA[4], with reference to the meaning of 'charged' in s 2(4) of the Prevention of Organised Crime Act 121 of 1998 (**POCA**), said (where the state added charges of racketeering before authorised to do so):

'[12]…where the word 'charged' in s2(4), to borrow from the language of Kriegler J in Sanderson, 'falls along the continuum of possible meanings of the word'. In my view …once the prosecution is authorised in writing by the National Director there can be no reason, provided the accused has not pleaded, why the further prosecution of the accused on racketeering charges would not be lawful, even if the earlier proceedings were to be regarded as 'tainted' and would be invalid. …

Indeed, until an accused has pleaded the state would be at liberty to withdraw the charge and recharge the accused once the authorisation had been granted. But such an exercise would serve no purpose and I can see no reason why it should be necessary.'

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[4] National Director of Public Prosecutions v Moodley (263/08) [2008] ZASCA 137 (26 November 2008)

[33] On any interpretation, the applicant was charged with offences relating to dagga when he made his first appearance in court. It is common cause that the applicant did not plead to the charges proffered against him. He had been in possession of the new charge sheet for some time and was entitled to have access to the content of the police docket[5]. In the circumstances of this matter, withdrawing the charge only to reinstitute it would deny the applicant his right to a speedy trial.

[34] This case exposes the danger of informally and casually conducting proceedings. Inevitably, there are loose ends and no way to tie them up. Therefore, the prosecutor resorted to technicalities. He should have requested the postponement to prepare argument before he argued. In the circumstances of this matter, it was form over substance, in the extreme, to have required formal notice of the objection. The applicant's indignation was justified. The first respondent regained composure, gave a reasoned ruling and leaned in favour of the applicant with the concession that he be excused from court, making arrangements with the prosecutor until he had clarity about the process of this application.

[35] Can one infer bias in these circumstances? The test is objective[6]:

'[45] …it appears that the test for apprehended bias is objective and that the onus of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. …

…the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the

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[5] *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC).
[6] *President of the Republic of South Africa and Others v South African Rugby Football Union* and Others 1999 (4) SA 147 (CC) at para 45.

question and obtaining thereon the required information…[The] test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude'"(footnotes omitted)

[36] I am persuaded that the circumstances of this matter do not establish bias. Instead, they expose the undesirability of veering between formal and informal conduct. The presiding officer must give direction of the process to be followed in proceeding.

Conclusion

[37] This court has in its supervisory role over proceedings in the lower court 'among many ample powers' the power to 'remit the case to the magistrate's court with instructions to deal with any matter in such manner as it may think fit[7]'. Against the above background, I have considered that the proceedings in the magistrate's court are incomplete. It is settled law that as 'a general principle Courts are reluctant to interfere in interlocutory proceedings of lower courts prior to the conclusion of criminal proceedings[8]*.'*

[38] The proper approach to apply is still as set out by Hlophe ADJP (as he then was) and Griesel J in *S v Attorney-General, Western Cape*; *S v Regional Magistrate, Wynberg, and Another* 1999 (2) SACR 13 (C) at 22(E)–(F):

'…the proper approach …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

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[7] *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) at para 13 and *S v Steyn* 2001 (1) SA 1146 (CC) at para 20.
[8] *Levack and Others v Regional Magistrate, Wynberg, and Another* 1999 (4) SA 747 (C) at 754 A-D and the SCA appeal (same parties) 2004 (5) SA 573 (SCA) at para 27.

might otherwise result if we do not interfere before criminal proceedings have been finalised or where justice might not by other means be attained?'

[39] I have also considered that the magistrate has left the bench. This matter will proceed before another presiding officer. The applicant has not pleaded to the charges proffered against him. He will have an opportunity to obtain further particulars before pleading to the charge. The applicant will have an opportunity to take the first respondent's decision on appeal/review once the criminal proceedings are finalised. I make no finding in respect of the merits of the ruling. The applicant in his heads of argument submitted that 'these proceedings be set aside but that the [second] respondent reserve the right to reinstitute.'

[40] As indicated above, that route would only delay an already delayed trial. I am persuaded that this is not one of '*those rare cases*' militating for a deviation from the general rule. I, for the reasons stated above make the following order with which Thulare AJ concurred.

(a) The application is dismissed.

(b) The matter is remitted to the magistrate's court for the proceeding to proceed before another magistrate.

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BAARTMAN J

I concur.

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THULARE AJ