APPEAL BY ACCUSED FOLLOWING CONVICTION AND SENTENCE IN TERMS OF SECTION 105A OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

Johannes Petrus Nel v S case no A352/07 (W)

1 Facts

The appellant was arraigned on a charge of theft, read with section 51 of the Criminal Law Amendment Act 105 of 1997, in the Boksburg Regional Court. It was alleged that during April 2003 he stole petrol to the value of R234 369,56 from Sasol Oil.

The appellant concluded a plea and sentence agreement in terms of section 105A of the Criminal Procedure Act in accordance with which he was convicted and sentenced to eight years imprisonment of which three years were suspended for a period of five years on the usual conditions.

The appellant, having obtained leave to appeal from the Witwatersrand Local Division, appealed against both the conviction and sentence to the same court.

2 Grounds of appeal

The appellant argued that:

- the magistrate did not ensure that he had a fair trial as directed by the Constitution, 1996;

- he was blindly led by his attorney and the investigating officer to enter into the plea bargain;
- the sentence imposed was too severe;
- the magistrate failed to properly take into account his personal circumstances, the possibility of his rehabilitation and other sentencing options.

The appellant argued in the alternative that the High 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 regional court for trial *de novo*.

3 Decision

The court per Moshidi J held that section 105A stood on its own and excluded the usual plea arrangements between an accused and the state. The prosecution and the courts must strictly comply with the provisions in the section. A court of appeal will be loath to interfere if the provisions have been complied with unless there are "glaring or ascertainable gross irregularities or a violation of the accused's constitutional rights to a fair trial".

The court found that the magistrate had complied with all the provisions of section 105A. The court explained that on questioning by the magistrate the appellant confirmed that he had entered into an agreement. The appellant confirmed the "contents and the admissions, as well as the factual allegations contained in the charge sheet". The court found it of great importance and relevance that the appellant confirmed that he entered into the agreement freely and voluntarily while in his sober senses and without any undue influence.

When the charges were put to the appellant he indicated that he understood the charges and pleaded guilty thereto. The magistrate then considered the plea and sentence agreement. The magistrate convicted the appellant and imposed the agreed sentence.

At sentencing the magistrate accepted that the appellant had a clean record and that section 51 of Act 105 of 1997 did not apply. The magistrate also considered the personal circumstances of the appellant that had been taken up in the agreement.

The appellant had legal representation throughout the proceedings. The magistrate nevertheless comprehensively explained to the appellant his "further" rights including the appeal procedure.

The agreement was signed by the appellant, his legal representative and the state advocate and properly authorised by the Deputy Director of Public Prosecutions. The agreement contains all the factual allegations against the appellant, the admissions made by the appellant, the appellant's personal circumstances and the details of the agreed sentence.

The court furthermore pointed out that it had been conceded in the heads of argument of the appellant, and by the attorney appearing for the appellant on appeal that:

- the proceedings in the court *a quo* was *ex facie* the record in accordance with justice;
- the Appellant's plea of guilty was properly noted and he was properly convicted by the court after he had freely and voluntarily pleaded guilty.

The court cited with approval the following dictum by Msimang J in *S v Armugga* 2005 2 SACR 259 (N):

> "(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;
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> (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;
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> (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."

The court pointed out that the appellant was specifically asked by the magistrate, and he confirmed that he entered the agreement freely and voluntarily without any undue influence brought to bear on him. There was also no evidence to suggest the contrary. The court furthermore held that the version that the appellant presented on appeal was never before the court *a quo*. There was accordingly only one agreed version before the court, and the magistrate was correct to convict and sentence thereon.

In dealing with the alternative argument by the appellant the court pointed out that the appellant did not refer the court to any authority in that regard and proceeded to discuss section 24 of the Supreme Court Act 59 of 1959. Section 24 provides as follows:

> "24. Grounds of review of proceedings of inferior courts
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> (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 –
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> (a) absence of jurisdiction on the part of the court;
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> (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 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;
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> (c) gross irregularity in the proceedings; and
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> (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."

The court held that there was authority for the suggestion that the word "review" in section 24 was used both in a wide and restricted sense. The court pointed out that the appellant essentially advanced bald and unsubstantiated arguments in support of his appeal. The appellant's main complaint was that the magistrate did not have regard to the Constitution in order to ensure that he received a fair trial, and secondly that the appellant was not a willing party to the plea and sentence

agreement. Yet, because no irregularity had been committed by the magistrate, and in view of the concession in the appellant's heads of argument, none of the grounds of review in section 24 applied.

However, the court referred to the view that section 24(2) allowed for any law, including the Constitution, to make exceptions to the grounds stated in section 24(1). Section 173 of the Constitution provides as follows:

> "173. Inherent power
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> 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 justices."

The court referred to *Magano v District Magistrate, Johannesburg (2)* 1994 4 SA 172 (W) where Van Blerk AJ, *inter alia*, held 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*. The court also referred to *S v Taylor* 2006 1 SACR 51 (C) where Yekiso J expressed the view that the approach suggested in section 173 of the Constitution is indeed comprehensive as it allows the exercise of the court's inherent power of review, taking into account the interest of justice, without being subjected to any form of statutory constraints.

In summation the court pointed out that the accused was represented throughout the proceedings in the court *a quo*. The court added that there was no indication the appellant's right to a fair trial in terms of section 35(3) of the Constitution, or any other rights, were not protected by the court. The magistrate complied with all the provisions of section 105A. There is no indication that the appellant was misled by his attorney and/or the investigating officer to enter into the plea agreement. The court indicated that the whole purpose of section 105A would be defeated if persons who entered faultless plea and sentence agreements could resile from such agreements at will, and not on any legal or constitutional basis.

The court accordingly did not find any grounds as envisaged in section 24 of the Supreme Court Act, or in section 173 of the Constitution, nor any gross irregularity in the proceedings which entitled the court to interfere and dismissed the appeal. Accordingly the appeal against both the conviction and sentence, or the review thereof, was dismissed.

4 Discussion

This case raises certain issues regarding formal plea and sentence agreements in terms of section 105A of the Criminal Procedure Act. These issues also have bearing on plea bargains that have long since been arrived at without statutory recognition and regulation (see *inter alia North Western Dense Concrete v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C)). In this note I discuss these issues. Where the South African authority does not provide adequate clarity I refer to American law for assistance where for many decades plea bargains have been a key element in the criminal administration and the subject of extensive scrutiny by the courts (see Palmer "Abolishing plea bargaining: An end to the same old song and dance" 26 *Am J Crim L* 505).

The first issue relates to when, or under what circumstances an accused is entitled to resile from an agreed conviction and/or sentence and have the proceedings set aside. The answer, I submit, depends on the nature of the legal relationship that comes into existence between the state and the accused.

In *Van Eeden v DPP, Cape of Good Hope* [2004] JOL 12916 (C) para 19 the court found it unnecessary to debate whether a plea agreement is better described as a contract or as an undertaking to which the state is bound under public law principles. However, the court did indicate that the state was bound to the plea bargain being an aspect of the constitutional right to a fair trial.

The court in *Nel* is correct in that the accused is also bound to the agreement in that an enforceable right inures to both the state and the accused not to have the terms breached by the other party. If either party to the agreement could unilaterally renege or seek modification of the terms of the agreement because of an uninduced mistake or change of mind, a plea agreement would be worthless.

As a matter of criminal jurisprudence a plea agreement is subject to principles of contract law insofar as its application insures that the parties to the contract receive that to which they are entitled (the Supreme Court of Appeals in *State v Myers* 204 W Va 449, 513 SE 2d 676, 1998 WL 809604, W Va, November 20, 1998 (No 25004)).

Yet, because the accused's entering into a plea agreement concerns the forfeiture of constitutional due process rights the concerns differ from and run wider than those of commercial contract law. During plea colloquy the parties must disclose all the material terms of the agreement and the court must verify that the accused understands these terms (see section 105A and the Court of Appeals in *US v Wood* 378 F 3d 342, 2004 WL 1737891, CA 4 (Va), August 04, 2004 (No 03-4427)). All plea agreements must be constitutionally acceptable and in strict compliance with mandated procedures (see *S v Sassin* [2003] 4 All SA 506 (NC) and *S v Solomons* (2) SACR 432 (C) under South African law, and *State ex rel Brewer v Starcher* 195 W Va 185, 465 SE 2d 185, 1995 WL 634309, W Va, October 27, 1995 (No 22966) under American law with regard to compliance with procedures).

The plea agreement does not become binding until the trial court has accepted and implemented the agreement. Any plea agreement is necessarily conditioned on the trial court's acceptance of the agreement (see Court of Appeals in *State v Darnell* not reported in NE 2d, 2003 WL 21246430, 2003-Ohio-2775, OHIO App 4 Dist, May 23, 2003(No 02CA15). Once the court has implemented the agreement the state and the accused are entitled to the respective benefits of the agreement and are bound to uphold their side of the bargains (see section 105A and the Court of Criminal appeals in *State v Moore* 240 SW 3d 248, 2007 WL 4146342, Tex Crim App, November 21, 2007(No PD-003-07)). The law requires courts to exercise judicial authority in considering, accepting or rejecting plea agreements (see section 105A and *US v Wood supra*).

Under American law the courts hold the government to a greater degree of responsibility than the accused for deficiencies and ambiguities in plea agreements (*US v Wood supra* and Court of Appeals in *US v Jordan* 509 F 3d 191, 2007 WL 4234735, CA 4 (Va), December 04, 2007(Nos 06-4258, 06-4264)). If the state commits errors in the drafting of the plea agreement, it will not be allowed to take advantage of those errors (see Court of Appeals in *State v Mares* 118 NM 217, 880 P 2d 314, 1994 WL 447879, NM App, June 16, 1994(No 14906)). The ambiguous terms will therefore be construed in favour of the accused (Supreme Court in *Keller v People* 29 P 3d 290, 2000 WL 1336018, 2000 CJ CAR 5341, Colo, September 18, 2000(No 99SC270) & the Supreme Court in *State ex rel Forbes v Kaufman* 185 W Va 72, 404 SE 2d 763, 1991 WL 64212, W Va, April 25, 1991 (No 19855)).

The American courts interpret plea agreements in light of the accused's reasonable understanding and expectation at the time he entered the agreement (see Court of Appeals in *US v Bunner* 134 F 3d 1000, 1998 WL 17352, CA 10 (Okla), January 20, 1998(No 97-5066); Court of Appeal in *US v Reyes* 313 F 3d 1152, 2002 WL 31840618, 02 Cal Daily Op Serv 12, 131, 2002 Daily Journal DAR 14, 325, CA 9 (Cal), December 19, 2002 (No 00-10128, 00-10275); *State v Mares supra*; *US v Lezine* 166 F 3d 895, 1999 WL 35610, CA 7 (III), January 28, 1999 (No 97-2571)). The courts first look at the plain wording of the agreement (*US v Bunner supra* and *US v Jordan supra*). If the agreement is unambiguous, and there is no evidence of the state overreaching, the courts enforce the agreement accordingly (*US v Jordan supra*). The American courts do not interpret the language so literally that the purpose of the agreement is frustrated and accordingly also consider terms implied by the agreement (*US v Bunner supra*). However, where an integration clause expressly disavows the existence of any understanding other than that set forth in the written agreement, a defendant may not rely on a purported implicit understanding (Court of Appeals in *In re Altro* 180 F 3d 372, 1999 WL 377763, CA 2 (NY), June 04, 1999 (Docket No 98-6165)).

Finally, with regard to the first issue, the accused cannot be held to a plea agreement if he did not come to the agreement freely and voluntarily, in his sound and sober senses and without having been unduly influenced (*S v Armugga* 2005 2 SACR 259 (N). See also *US v Wood supra* under American law). Fraud on the court or misrepresentation during the plea negotiations may also, depending on the degree of misconduct, convince a court to set aside the proceedings (*Brewer v Starcher supra*). Under American law the accused must also have reached the agreement intelligently (*US v Wood supra*). Alleged ineffective assistance of counsel could therefore establish cause for setting the finding aside under American law (see De Villiers "Ineffective assistance by counsel during plea negotiations: An agreement lost" 2006 *THRHR* 484 for a discussion of the right to effective assistance by counsel during plea negotiations under South African law).

This brings me to another issue to which I shall only refer to briefly in this case discussion. Attorney for the appellant argued that the magistrate had to ensure that the accused had a fair trial as directed by the Constitution. In summation, the court held that there was no indication that the appellant's right to a fair trial in terms of section 35(3) of the Constitution was not protected. Other South African courts have also frequently brought section 35(3) to bear on the rights of an accused with regard to plea agreements (see for example *Van Eeden v DPP, Cape of Good Hope supra* and *Van Eeden v DPP, Cape of Good Hope* [2004] JOL 12916 (C)).

A section 105A plea and sentence agreement connotes that the accused relinquishes his right to go to trial in return for charging and/or sentencing considerations by the prosecution. With a plea agreement the result of a plea negotiation is presented to the court for approval or rejection in accordance with the governing rules. It is not a trial, and the right of an accused to a fair trial in terms of section 35(3) does therefore not apply.

But does this mean that the Constitution does not mandate that an accused has to be treated fairly when executing a plea bargain? Surely the Constitution cannot require that an accused be treated fairly at trial where an accused is convicted and sentenced when found guilty, but does not require that an accused be treated

fairly when convicted and sentenced in terms of a plea and sentence agreement. The answer lies in the correct interpretation and application of the right to "freedom and security" in section 12 of the Constitution.

Unfortunately the Constitutional Court confused the issue when it specifically dealt with the interaction, first between sections 11 and 23 of the Interim Constitution, and later between sections 12 and 35 of the Constitution, 1996 (sections 11 and 23 are the rights to "freedom and security" and the "criminal procedure rights" in the Interim Constitution. Sections 12 and 35 are the corresponding rights in the Constitution, 1996).

In *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 BCLR 1 (CC) Chaskalson P on behalf of the majority held that the primary though not necessarily the only purpose of section 11(1) was to ensure the protection of the physical liberty and physical security of the individual. However, the majority did accept that section 11(1) had a residual content and that it may, in appropriate cases, protect fundamental freedoms not enumerated elsewhere in the Bill of Rights (see paras 173 and 174 of the judgment).

In *De Lange v Smuts NO* 1998 3 SA 785 (CC) the Constitutional Court read section 12(1) in much the same way as it read section 11(1) in *Ferreira v Levin*. The court held that the right to freedom and security of the person primarily protected an individual's physical integrity. The right to freedom functions as a "residual right, and may protect freedoms of a fundamental nature – especially procedural guarantees – not expressly protected elsewhere in the Bill of Rights" (794 para 16ff).

The Constitutional Court had therefore erected a conceptual wall between the "right to freedom and security" in section 12 and the rights of persons once detained, arrested or accused in terms of section 35. This prevents due process seepage from section 12 to section 35. However, despite this unfortunate interpretation and application of section 12 of the Constitution by the Constitutional Court, plea bargains are not specifically catered for in section 35. Section 12 can therefore be activated when issues regarding plea bargains are adjudicated. Section 12 accordingly ensures procedural fairness when an accused enters into a plea bargain.

The last issue concerns section 173 of the Constitution, 1996, read with section 24(2) of the Supreme Court Act raised by the appellant. I submit that the High Court cannot use section 173 to interfere with a right (here section 12) that is already provided for in the Constitution (however, see also *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 2 BCLR 167 (CC)). The power in section 173 must be exercised in a manner consistent with the Constitution (see also *S v Pennington* 1997 10 BCLR (CC) para 23). Because of the operation of section 12 there is in any event no need to invoke section 173.

Further to this, the power in section 173 must be used sparingly (see *Parbhoo v Getz NO* 1997 10 BCLR 1337 (CC) paras 4 and 5 and *Pennington supra* para 22). In *Parbhoo* the court used its powers in terms of section 173 to resolve an extraordinary situation pending the enactment of legislation and the promulgation of rules of procedure. The Court made the point that the power related to the process of court arises when there is a legislative *lacuna* in the process (see also the separate dissenting minority judgment by Moseneke DCJ in *South African Broadcasting Corporation Ltd v National Director of Public supra* with which Mokgoro J concurred in a separate dissenting minority judgment).

5 Conclusion

I find on a consideration of the principles involved no reason that the appeal or review must succeed. Fortunately, the doubtful interpretation and application of sections 35(3) and 173 of the Constitution did not affect the outcome of the appeal under discussion. I therefore submit that the appeal and review of both the conviction and sentence were correctly dismissed.

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