**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 414/2017

In the matter between:

| | |
|---|---|
| **LANGSTONE REXSON GUMBI** | **FIRST APPELLANT** |
| **GEORGE SIBANDA** | **SECOND APPELLANT** |
| **MHLONGO MCGINA** | **THIRD APPELLANT** |
| **ALPHEUS MDAWANDE** | **FOURTH APPELLANT** |

and

| | |
|---|---|
| **THE STATE** | **RESPONDENT** |

**Neutral citation:** *Gumbi v The State* (414/2017) [2018] ZASCA 125 (26 September 2018)

**Bench:** Ponnan, Wallis, Mocumie and Molemela JJA and Mothle AJA

**Heard:** 31 August 2018

**Delivered:** 26 September 2018

**Summary:** Criminal Procedure Act 51 of 1977 – incapacity of judge after evidence but before judgment – trial must start de novo – requirements – s 215 read with s 214 – contemplates a witness-by-witness approach – not receipt of record of previous proceedings.

---

**ORDER**

---

**On appeal from**: Gauteng Division of the High Court, Pretoria (Potterill J sitting as court of first instance):

The appeal is upheld and the convictions and sentences are set aside.

---

**JUDGMENT**

---

**Ponnan JA (Wallis, Mocumie and Molemela JJA and Mothle AJA concurring):**

[1] The appellants were indicted on a multiplicity of charges before the Gauteng Division of the High Court, Pretoria. Although the offences were allegedly committed on 4 April 2007, the trial only commenced some seven years later, during August 2014, before Webster J. The evidence of several witnesses was led in the main trial, as also two admissibility trials. At the conclusion of the latter, Webster J provisionally admitted into evidence statements made by two of the appellants. The appellants testified in their defence and some called witnesses. Thereafter, both the prosecution and defence submitted written heads and were heard in argument, at the conclusion of which Webster J adjourned to consider his verdict. However, before a verdict on any of the charges had been determined, the judge became incapacitated due to illness leaving his final conclusions unpronounced.

[2] The prosecutor then lodged what was described as an 'application for special review' with the high court. It was there stated:

'10. The application seeks to obtain permission for a special review of the matter by two (2) judges in chambers.

11. These honourable judges are to consider whether or not, a judgment can be delivered in the absence of the presiding officer who heard the evidence during the trial and whether same can be done without the parties having to argue the matter again.

12. If the judges vested with the matter are of the view that they are unable to deliver a verdict that they make an order with regards the finalisation of this matter.'

[3] The judges (Jordaan and Potterill JJ), who considered the application, took the view that:

'2. From the outset it is trite that review judges sitting in chambers can never constitute a trial court; thus two judges cannot give a judgment as a trial court. These two judges were not seized with the trial and there is no procedure that authorises two judges to deliver a judgment pursuant to evidence being led.

. . .

4. We are of the opinion that in open court on 11 February 2016 a single judge can place on record that the State and all the accused, duly informed, consent that the trial start *de novo*. The *de novo* trial can then with consent of all the parties in terms of s 215 of the Act proceed on the evidence as recorded at the former trial. The arguments of the parties of the formal trial can stand or can be supplemented at the parties' request.'

[4] The matter came before Potterill J on 11 February 2016. What occurred on that day appears from the following extract from the record:

'Court: . . . So in the main we agree that the matter must start *de novo*. We cannot get to another conclusion. If the matter can proceed on the record as it stands, then I would be able to do it in this term. If not, if it cannot happen like that, then a new judge would have to be allocated to do it next term or whatever. So I do not know Ms Johnson is there any submissions from your side first of all?

Ms Johnson: As the court pleases M'Lady I acknowledge receipt of the communication. I do understand the communication. I also understand the predicament that both presiding officers were vested with in chambers and I appreciate it that it cannot proceed on special review. It is so that the trial can start *de novo* and the state obviously then would have no objection to the

trial starting *de novo*. That being said I have insight into the provisions of section 215 of the Criminal Procedure Act and in terms thereof the exact record together with all of the exhibits that had been provided for the special review, are in fact the proceedings of the entire trial. None of the parties had any objections to that entire record as well as all the exhibits being submitted for review, so I can see no reason why any of the parties should object, obviously that is their prerogative but I see no reason why they should object because in terms of section 215 that is exactly and only what we will be presenting to a presiding officer as though he or she were then dealing with the trial. So I have no objection that we proceed in that manner, as the court pleases.

. . .

Mr Geach: . . . I only came in afterwards and so I would like to study the record to see whether on behalf of accused 1, 2 and 4 I could properly agree to the matter going ahead on the record. For those reasons simply that the ruling should then simply be if any, that the matter start *de novo* before you, thank you M'Lady.

Court: Yes, Mr Dhlomo.

. . .

Mr Dhlomo: Yes, M'Lady I agree that the matter is to start *de novo*.

Court: Okay.

Mr Dhlomo: That is the submission that I can make.

Court: Okay. Mr Erasmus?

Mr Erasmus: M'Lady the only submission on behalf of accused 6 is that he supports the State's contention and the court's that the matter should be held *de novo* and the court should act in terms of [indistinct]. We have got no problem with the record that has been admitted at a certain stage during these proceedings [indistinct].

. . .

Mr Geach: . . . The problem is in light what my learned friends have to say there will be no objection but I cannot obviously bind the accused without, in all fairness, without having seen the record myself.

Court: I would then infer that I postpone the matter now for the trial to start *de novo*.'

. . .

Court: But can we now just ascertain I do not know if this is going to be a waste of time but let me now do it that way. Is that now just to start with the trial? In other words to ascertain if now we can proceed in terms of s 215 or that I will make a ruling if you can do it in terms of that?

. . .

Court: I suppose then I would not be able to exclude that if they want to bring a further address as new counsel. That is the only reason why I have not put my foot down.

Ms Johnson: If that is – if he then decides after he has now had the record that indeed he might want to bring a different application, we inform M'Lady timeously so that M'Lady does not then proceed to prepare a judgment on the admitted record. Would that then be fine?

. . .

Ms Johnson: So if you would indulge us then for a week. He will have the record by Tuesday. I will ask if he can indicate by Friday. All the parties will communicate to the registrar.

Court: Thank you very much.

Ms Johnson: And say either if he is going to come with a further submission or M'Lady he accepts the record, kindly proceed and prepare judgment. As the court pleases.

. . .

Court: The matter is then postponed to 14 March 2016 at 10:00. . . .'

[5] On 14 March 2016 the following occurred:

'Court: Thank you Mr Erasmus. Okay as I understood it this matter was last postponed so that Mr Geach could consider the record so that we then can proceed on the record or not. As far as I understood the other, with the help of the other accused the record as it stands was admitted and we could proceed on the record. Is that correct Mr Erasmus and Mr Dhlomo?

Mr Dhlomo: Indeed so M'Lady.

Mr Erasmus: Okay.

Court: I accept then Mr Shabangu with Mr Geach not being here and I also heard in chambers that he had informed you that he thought that you were going to come and note a judgment. Is that correct?

Mr Shabangu: That is correct M'Lady.

Court: I then accept that he then accepts the record in terms of section 215 and that there is no further argument that he wants to address to court. May I accept that?

Mr Shabangu: M'Lady can accept that, however I have no instructions whether he will have further comment . . . [intervenes]

Court: Well I mean if he wanted to come and note a judgment then I accept that he has nothing further to say. Yes, all right, so I will have to postpone this matter for judgment because then we are already for judgment. I have given, I am doing this in between my other work, so I will have to do it in recess. I do not know if counsel are available in recess.

. . .

Court: It will be a written judgment but obviously I will have to read it in. I may just ask you to consider that perhaps I do not read in the summary of all the evidence because it does make the matter so much longer. Just think and consider about it so long with your clients, otherwise I will read it all in and then also just please consider even interpreter must be available to interpret the judgment please otherwise I waste the interpreter's time. The matter is then postponed to 7 April 2018 at 10 o'clock. . . . It will then be for judgment.'

[6] On 7 April 2016 Potterill J delivered judgment in the matter. She convicted the appellants of three counts of murder, two of robbery with aggravating circumstances, two of attempted murder and one of malicious injury to property. On 22 August 2016 and before the appellants could be sentenced, their present counsel, who had since replaced counsel previously on record, applied to Potterill J for leave to appeal against the convictions. In dismissing their application for leave to appeal, the learned judge stated:

'[9] The circumstances set out in the application are that section 215 of the Act was not the correct procedure to adopt and because an incorrect procedure was utilised, this constitutes an irregularity that automatically gives the applicants the right to appeal. Section 215 of the Act only applies once the conditions of s 214 were complied with. The applications sets out a bold statement that the applicants would suffer potential prejudice. When I confronted counsel with this bold statement he in fact changed his stance and argued that there was actual prejudice. He could however not inform the court as to what the actual prejudice suffered was, in lieu of the reliance on a correct transcribed record. In the application on p16 the only reference to prejudice is that the applicants' bail has been [withdrawn]. No reason was provided as to why they did not apply for bail awaiting sentencing procedures.

[10] The State on the other hand has argued that this application is an abuse of process. In order for the court to grant the application for special leave it must ensure that the requirements of s 317 of the Act was met. This was not done. Section 215 is applicable if the original or prior proceedings were declared a nullity and the trial starts *de novo*. Section 214 is not applicable as the original proceedings was never part of any preparatory proceedings. It was the same persons upon the same charges where the prior trial had to start *de novo*.

. . .

[13] In the application before me there is no indication that there was a failure of justice because the accused were not guilty beyond reasonable doubt. Not a single assertion is made that the convictions are wrong. Logically no findings were made on demeanour as I had not

seen the witnesses; demeanour is in any event a tricky horse to ride. Rulings pertaining to the admissibility of the statements were given in a clear and unambiguous manner in the judgment. The reliance on *S v Mayisa* 1983 (4) SA 242 (T) reiterates the point that a matter will only be irregular if there is "'n ernstige onreg teenoor die beskuldigde tot gevolg sal hê indien dit nie gedoen word nie." I therefore find that the irregularity, if there was such, did not lead to the conviction or trial being unfair. Accordingly this does not constitute exceptional circumstances where an application for special leave must be allowed.'

[7] I accept unequivocally the argument that in a case such as this, through the fault of neither the prosecution nor the defence, great inconvenience and expense could be caused if the proceedings up until Webster J's incapacity were held to be aborted. Potterill J conceived that s 215 (read with s214) of the Criminal Procedure Act 51 of 1977 (the Act) found application and could be invoked to overcome the problem. A consideration of some importance is the difficulty in applying the language of the two sections to the facts of this case. I do not find it necessary to define the exact scope of those sections as I am satisfied that in applying it as she did, Potterill J misconceived the position and that the proceedings in convicting the appellants amounted to an irregularity.

[8] Section 215 seeks to place evidence given at a former criminal trial on exactly the same footing as that given at a preparatory examination. It reads:

'The evidence of a witness given at a former trial may, in the circumstances referred to in section 214, mutatis mutandis be admitted in evidence at any later trial of the same person upon the same charge.'

Section 214, in turn, provides:

'The evidence of any witness recorded at a preparatory examination –

(a) shall be admissible in evidence on the trial of the accused following upon such preparatory examination, if it is proved to the satisfaction of the court -

(i) that the witness is dead;

(ii) that the witness is incapable of giving evidence;

(iii) that the witness is too ill to attend the trial; or

(iv) that the witness is being kept away from the trial by the means and contrivance of the accused; and

(v) that the evidence tendered is the evidence recorded before the magistrate or, as the case may be, the regional magistrate, and if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness;

(b) may, if such witness cannot, after a diligent search, be found for purposes of the trial of the accused following upon such preparatory examination, or cannot be compelled to attend such trial, in the discretion of the court, but subject to the provisions of subparagraph (v) of paragraph (a), be read as evidence at such trial, if it appears from the preparatory examination record or it is proved to the satisfaction of the court that the accused or, as the case may be, the State had a full opportunity of cross-examining such witness.'

[9] Section 215 of the Act requires that the trial be of the same person upon the same charge. Logically therefore the section can only find application to a situation where the prior proceedings amount to a nullity and, in consequence, new proceedings are instituted. In that regard, it is important to distinguish between criminal proceedings and the trial as such, which is only a part of the entire criminal proceedings.[1] It having been accepted that the matter had to commence *de novo*, it was for the prosecution to decide whether proceedings should be instituted in respect of the same offences on the original indictment, amended if necessary, or upon any other charge.[2] The need for the prosecution to reconsider the indictment in this case was clear, given that one of the accused absconded during the trial and another was acquitted by Potterill J.

[10] Criminal proceedings in a superior court commence with the service of an indictment on the accused and its lodgement with the registrar of the court (s 76). In terms of s 105 the charge must be put to an accused by the prosecutor before the trial is commenced.[3] As soon as the charge is put to an accused he or she must plead to it. The plea determines the ambit of the dispute between the accused and the prosecution. It is only after the accused has pleaded to the charge that the *lis* is established between the accused and the prosecution.[4] It is the function of the prosecuting authority, not the court, to decide the charges upon which an accused should be brought to trial and the

---

[1] *S v Thomas* 1978 (1) SA 329 (A) at 334; *S v Swanepoel* 1979 (1) SA 479 (A) at
[2] See s 324 of the Act.
[3] The provisions of s 105 are peremptory. *S v Mamase* 2010 (1) SACR 121 (SCA) par 7.
[4] *S v Zuma* 2006 (2) SACR 69 at 74c; *S v Mamase* at par 6.

function in that regard extends up to the time when a plea is tendered and the decision has to be made whether the plea is to be accepted or not.[5] The acceptance of the plea by the prosecutor at the commencement of the trial is:

'a *sui generis* act by the prosecutor by which he limits the ambit of the *lis* between the State and the accused in accordance with the accused's plea. . . That the *lis* is restricted by acceptance of the plea appears from ss 112 and 113. The proceedings under the former are restricted to the offence "to which he has pleaded guilty" and the latter must be read within that frame.'[6]

In this case none of that occurred. Potterill J simply picked up where Webster J had left off. That was impermissible and the failure to follow the steps outlined above meant that no new trial was commenced and the proceedings were invalid from the outset. Nonetheless, it is desirable to deal with the approach of Potterill J to ss 214 and 215 of the Act.

[11] When the requirements of s 214 are satisfied and it is established that the witness is dead, incapable of testifying, too ill to attend the trial or being kept away from the trial by the accused, under subsection (a) the court has no discretion in regard to the admissibility of the evidence, which it must receive.[7] If the witness cannot be found after diligent search or cannot be compelled to attend the trial, subsection (b) gives the court a discretion. In this regard it is important to note that our courts have long recognised that the discretion must be exercised guardedly and in a way that will not be prejudicial to the accused.[8] The factors which should influence the judicial exercise of the discretion were summarised in *R v Stoltz*[9] as follows:

'The court should look at the nature of the evidence sought to be put in. If, for instance, it conflicts with other evidence in the case, if from cross-examination the evidence as recorded would seem to leave a doubt, and generally where from the nature of the evidence much would depend on the credibility of the witness, so that a jury should have an opportunity of judging for themselves thereon from the appearance and demeanour of a witness, the court should be very slow in admitting the evidence under this section.'

---

[5] *S v Cordozo* 1975 (1) SA 635 (T).
[6] *S v Ngubane* 1985 (3) 677 (A) at 683E-F.
[7] *R v Rautenbach* 1949 (1) SA 135 (A) at 143.
[8] See inter alia *R v Andrews* 1920 AD 290 at 294; *R v Dladla* 1961 (3) SA 919 (D).
[9] *R v Stoltz* 1925 WLD 38 at 39.

[12] On the face of the record, the enquiry postulated by s 214 was not undertaken by the learned judge.[10] One is accordingly left completely in the dark as to whether she purported to act under subsection (a) or (b) of s 214. It bears emphasis that the section contemplates a witness-by-witness approach. There was, moreover, no ruling by the learned judge in respect of the admissibility of the evidence of each witness or what factors weighed in the exercise of her discretion. What is more, the learned judge did not consider whether the proper exercise of her discretion required her to first peruse the evidence of each witness or to afford counsel a proper opportunity to address her in argument on the dangers presented by the receipt of the evidence of each such witness. After all, the fact that the evidence satisfies the requirements of s 214 is no assurance that the evidence must necessarily be relied upon. The other rules, such as those relating to relevance and opinion as well as the rules for evaluating the weight of the evidence still need to be applied. It was thus important for Potterill J to properly identify the dangers inherent in the receipt of the evidence and the extent to which those dangers could be reduced.

[13] It is clear that save as is otherwise expressly provided by the Act, evidence in a criminal trial is, in terms of s 161, required to be given *viva voce*. The section decrees that witnesses shall give their evidence *viva voce*, the only exceptions being those expressly permitted by the Act. Section 214 is one such exception. That section however does not authorise receipt of the record of the previous proceedings (including a host of documentary exhibits) upon its mere adduction. *S v Nzuza*[11] disapproved of the admission of evidence given at a preparatory examination as evidence at a subsequent trial, otherwise than in accordance with the provisions of the Act. Although judicial proceedings may be proved by producing a copy of the record of those proceedings,[12] such record does not, without more, constitute *prima facie* proof of any fact it contains.[13] It follows that as the evidence adduced before Webster J was not properly admitted under the Act, it did not constitute evidence against the appellants at

---

[10] See for example *S v Sexwale (2)* 1978 (3) SA 788 (T), where various decisions on the point are usefully collected.
[11] *S v Nzuza* 1963 (3) SA 631 (A).
[12] Section 235.
[13] *S v Machaba* 2016 (1) SACR 1 (SCA) para 27; *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) para 33.

the subsequent trial before Potterill J.[14] Even if the irregularities identified above in paras 9 and 10 could be overlooked, the result was that there was no evidence at all upon which the appellants could have been convicted.[15] What is more, neither the appellants nor their counsel could by their acquiescence validate the invalid procedure adopted by the learned judge in the present case.[16]

[14] It is manifest that convictions resulting from proceedings conducted in this way cannot stand. Where, as here, there has been such a gross departure from the established rules of procedure that the appellants have not been properly tried, this is *per se* a failure of justice (*S v Moodie* 1961 (4) SA 752 (A) at 758E-G). As the convictions were a clear miscarriage of justice, it is open to the prosecution to re-indict the appellants, if so advised. It is not for this court, as was suggested by counsel for the State, to remit the matter for trial afresh. Rather, it is for the State to decide whether it will re-indict the appellants.

[15] In the result, the appeal is upheld and the convictions and sentences are set aside.

_____

V M Ponnan

Judge of Appeal

[14] *S v Serobe* 1968 (4) SA 420 (A) at 426C-F.
[15] *S v Nzuza* 1963 (3) SA 631 (A) at 635H.
[16] *S v Nzuza* at 635H.

APPEARANCES:

| | |
|---|---|
| For Appellants: | A C Klopper |
| | Instructed by:<br>Moldenhauer Attorneys, Pretoria-North<br>Hill McHardy & Herbst Inc., Bloemfontein |
| For Respondent: | A Johnson |
| | Instructed by:<br>Director of Public Prosecutions, Pretoria<br>Director of Public Prosecutions, Bloemfontein |