IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINSIAL DIVISON)

DELMAS

1987-04-02

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

RULING IN RESPECT OF SECOND REPORT OF DR JOUBERT

VAN DIJKHORST, J.: I make the following ruling:

In respect of paragraph 6 of the second report of Dr W.A. Joubert, I make a ruling similar to that which I have made in respect of the third report.

His first report is admitted.

My reasons for this decision I will file later.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELMAS

1987-04-02

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHER

RULING ON ADMISSIBILITY OF THIRD REPORT OF DR JOUBERT

VAN DIJKHORST, J.: I make the following ruling:

The third report of Dr W.A. Joubert is inadmissible and so are all direct or indirect references to it.

I do not rule on the previous two reports of Dr Joubert as I have not yet heard argument thereon.

Reasons will be given later.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINSIAL DIVISION)

DELMAS

1987-04-02

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

ORDER ON APPLICATION FOR RECUSAL

VAN DIJKHORST, J.: I make the following order:

The application *in toto* is dismissed.

My reasons will follow later.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISON)

DELMAS

1987-06-04

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

RULING ON LIFTING OF EMBARGO ON THE EVIDENCE OF WITNESS IC.22

VAN DIJKHORST,R. : I was seen by Advocate Beckerling and Advocate Pretorius, the defence counsel in S v ASHWELL ZWANE AND SEVEN OTHERS which is at present being heard by GROSSKOPF, J. in Johannesburg. They saw me in connection with the lifting of the embargo which I have placed on the evidence of the witness IC.22.

The embargo on that witness's evidence, that is the evidence of IC.22, is hereby lifted. This means that Volume 120 of the evidence may be made available. It is to be available only for the two defence counsel in that case and for Advocate Du Toit and for Advocate Van Zyl for the State and for the eyes of the Court.

Urgd

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IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC. 482/85

PRETORIA

1987-08-04

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

J U D G M E N T

VAN DIJKHORST, J.: Defence counsel applied for an order that the State make available for their inspection the witness statements in Docket MR 285/08/84. The State opposed this application.

This docket was opened on a complaint by accused no. 3 about events on 28 November 1984 at his residence. These events do not form part of the facts upon which the State relies in the indictment. When certain State witnesses were (20) cross-examined in this case these events, at which they were present, were dealt with and a dispute arose about the date thereof. At the time this docket was not in the possession of counsel for the State. Defence counsel informed me that the representatives of the accused had attempted to obtain insight in it in order to elicit possible material for cross-examination therefrom but, not having the number of the docket, had been unable to locate it. When accused no. 3 testified more than a year later, counsel for the State had obtained the docket and put the statement of accused no. 3 (30)

to him in cross-examination. Defence counsel thereupon brought this application.

Upon my enquiry the State informed me that the prosecutor had refused to prosecute on that docket as long ago as 11 December 1984 and that the last entry in the docket was made on 28 December 1984. We were informed that the docket contains statements of persons who were involved in the events at the residence of accused no. 3. We were not informed of the names of these persons, whether their statements were taken as statements of witnesses or of suspects and whether (10) they testified before this court.

Defence counsel, probably foreseeing that a direct approach would come to grief, asked me to approach the matter on the assumption that a subpoena duces tecum had been issued and served on the station commander of the police station where the docket was opened and as if an objection to production was being dealt with. He described State counsel as mere custodians of the docket. Counsel for the State conceded that the matter could be dealt with on that basis but still contended that the docket with its contents now formed part of their (20) brief and was therefore privileged. This creates an anomalous situation. Possession of documents as part of a brief raises defences over and above those available to the station commander (and his mere custodian). In view of this conflict I am unable to deal with the matter on a hypothetical basis and have to deal with it factually.

The facts are that counsel for the State obtained this docket as part of their preparation for the cross-examination of accused no. 3 and, I presume, all other witnesses to be called by the defence and who may have made statements (30)

relating/....

relating to the events in November 1984. The statements by witnesses, even though they or some of them may have been suspects at the time, are now held as part of the State's brief and as such they are privileged. R v STEYN 1954 (1) SA 324 (A) 332 A-C; S v ALEXANDER 1965 (2) SA 796 (A) 812 E. See also R v LEIBRANDT & OTHERS 1947 (3) SA 740 (Spec. Crim. Court) and INTERNATIONAL TOBACCO CO. S.A. LTD v UNITED TOBACCO CO (SOUTH) LIMITED 1953 (3) SA 879 (W) 881 D.

In EUROSHIPPING CORPORATION OF MONROVIA v MINISTER OF AGRICULTURAL ECONOMICS & MARKETING & OTHERS 1979 (1) SA (10) 637 (C) 648 H FRIEDMAN, J. stated:

> "Of course it is not the mere fact that a document is part of an attorney's brief that renders it immune from discovery as an attorney's brief can contain material which is not privileged. The description of a document as being part of the brief means that it is privileged, having come into existence for the purpose of advising the client in regard to litigation or as constituting a communication between a client and his legal advisers with regard to pending or contemplated litigation." (20)

I respectfully agree with the first sentence. Cf R v DAVIES & ANOTHER 1956 (3) SA 52 (A) 58 F-H and PHIPSON On Evidence 13th Edition paragraph 15.13. I however hold the view that the second proposition is too narrowly stated. Thus stated all notes made by attorneys and counsel of consultations with witnesses not for the purpose of advising the client but to enable them to lead their evidence would be subject to disclosure. So would all working papers of the legal team, witness statements and reports of expert witnesses created or obtained by the legal team to attain a successful end to (30)

pending litigation. That the Learned Judge did not intend this result is clear from pages 650 D to 651 A of the report.

The ambit of the concept "brief of the legal adviser" is wider. It includes all documents brought into existence for the purpose of advising or assisting the client in regard to litigation or constituting confidential communications between a client and his legal adviser with regard to pending or contemplated litigation.

The problem in our case arises from the fact that the witness statements were obtained by the police not for the purpose of this case but in the course of their investigation of an unrelated complaint. Nevertheless they were taken with a view to possible criminal litigation for use by the State. The fact that the State did not use the statements in the litigation originally envisaged by the police but now utilises them in this litigation does not make them any less part of the brief of the prosecutor. This applies equally to such statements as there may be of witnesses who have already given evidence. The possibility exists that they may be recalled in which event the statements might be useful to the State.

The approach that the statements of witnesses in the docket form part of the State's brief despite the fact that the docket became part of the brief after some witnesses had given evidence about the events giving rise to its opening and that statements by those witnesses may form part of the docket, necessarily leads to the conclusion that an obligation rests upon the State to disclose to the Court any material discrepancy between such statements and the evidence in court. R v STEYN 1954 (1) SA 324 (A) 337 A-B; EX PART MINISTER VAN JUSTISIE IN RE S v WAGNER 1965 (4) SA 507 (A) 515 B;

S v XABA 1983 (3) SA 717 (A) 728 E to 729 A.

The fact that the statements were taken in another case upon a complaint only obliquely related to the case before us and not for the purpose of our case does not alter the position. Counsel for the State's duty to disclose material differences exists nonetheless.

The fact that the said docket forms part of the State's brief is therefore a conclusive answer to the application. There is, however, further ground upon which the application has to fail. It was common cause that the docket, while the matter was still being investigated by the police and considered by the prosecutor, was privileged. This privilege exists for reasons of public policy. R v STEYN supra 335; S v B & ANOTHER 1980 (2) SA 946 (A) 952 F; EX PARTE MINISTER VAN JUSTISIE IN RE S v WAGNER supra 515 (A); S v ALEXANDER & OTHERS supra 811 G.

The issue between State and Defence was, however, whether the closing of the docket after the certification nolle prosequi thereon by the public prosecutor terminated the privilege. There is no reason to distinguish in this respect between witness statements taken by a client or his attorney for the purpose of civil or criminal litigation and statements taken by the police for the purpose of a contemplated criminal prosecution. S v B & ANOTHER supra 952F; R v STEYN supra 335 E. If the rule once privileged always privileged applies it is applicable to both.

In respect of communications between a legal adviser and his client the privilege commonly referred to as professional privilege has the requirement of confidentiality as its basis. This is not the case where witnesses are interviewed and

their statements taken, as in most cases the information is intended to become public knowledge through testimony in open court and as this privilege against disclosure exists even where there is no legal representative involved and the litigant acting in person takes witness statements for his use in court. R v STEYN supra 334 B.

The basis of the privilege against disclosure of witness statements is therefore not the confidential relationship between legal representative and client or the confidentiality of the statement. The privilege is founded on the fact that (10) to permit the enforced disclosure of witness statements would open the door to unscrupulous adversaries to tamper with their opponent's witnesses, to manufacture evidence or to create fictitious disputes on points not covered by the witness statements. This would clearly be against public policy.

All these considerations fall away after the final conclusion of the case. By this I mean the disposal of the matter on appeal as the possibility of a reopening exists up to that stage. In R v STEYN supra 335 A it was decided that the privilege exists until at least the conclusion of the appeal. (20) The question whether the privilege existed beyond that date was left open.

Prima facie public policy does not require that witness statements obtained in litigation which has been finally disposed of or abandoned should be kept under wrappers. Is the rule once privileged always privileged in conflict with this view or does it only have limited application? PHIPSON On Evidence 13th Edition paragraph 15.19, after stating the general rule once privileged always privileged, reports that it has been held that this principle only applies where the (30)

parties/....

parties and the subject matter are the same or where the communications are between solicitor and client. The authority given by the learned author is THE COUNTRY COUNCIL OF KERRY v THE LIVERPOOL SALVAGE ASSOCIATION 38 Ir LT 7 (CA) a report not available to me. HOFFMANN & ZEFFERTT, South AFrican Law of Evidence 3rd Edition, 207 note 13 state that there are no qualifications to the rule once privileged always privileged. Yet the statement is made in the section dealing with communications between legal adviser and client. SCHMIDT Bewysreg 2nd Edition 543 also states the rule unqualifiedly and in (10) the context of both legal adviser and client and statements by third parties. There is support for the view that the rule applies also to statements by third parties in ESTATE BLIDEN v SARIF 1933 CPD 271, 274. In this case SUTTON, J. held the contrary view of WILLS On Evidence 202 and PHIPSON On Evidence 6th Edition 204 to be incorrect. In JACOBS v MINISTER VAN LANDBOU 1975 (1) SA 946 (T) 954 F BEKKER, J. quoted with approval a statement that privilege attaching to a document continues after the end of any litigation for which the document was brought into existence. A well reasoned (20) judgment on the extent of the rule once privileged always privileged is found in EUROSHIPPING CORPORATION OF MONROVIA v MINISTER OF AGRICULTURAL ECONOMICS & MARKETING & OTHERS supra 642 A to 644 G. The Learned Judge, after dealing with the English authorities, concluded that the rule is unlimited. One of the English cases dealt with was CALCRAFT v GUEST 1898 1 QBD 759 (CA). It was held in that case that proofs of witnesses and rough notes of evidence used in defence of an action which was disposed of more than a century before (and between different parties, of whom one was a predecessor (30)

in title of the plaintiff) remained privileged.

A similar conclusion was reached in HASLAM FOUNDRY & ENGINEERING COMPANY v HALL 1887 3 Times Law Reports 776 (QBD) on the continuing privilege of confidential notes and reports by witnesses and scientific advisers of their proposed evidence in a previous action. See also HOBBS v HOBBS & COUSENS 1959 (3) AER 827; BULLOCK v CORRY 1878 (3) QBD 356; PEARCE v FOSTER 1885 15 QBD 115 at 119 on the general rule of once privileged always privileged as applied to materials for briefs in previous cases. (10)

I find no reason to differ from the authorities mentioned. My prima facie view on the necessity of such a rule in circumstances such as the present is therefore irrelevant. The law is that witness statements made for the purpose of litigation, whether civil or criminal, and therefore privileged retain that privilege despite the fact that that litigation is finally concluded or abandoned. The witness statements in docket Mr 285/08/84 are therefore privileged despite the fact that the prosecutor refused to prosecute thereon.

The application is dismissed. (20)

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1987-08-31

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

AMENDMENT OF BAIL CONDITIONS

VAN DIJKHORST, J. : The conditions of bail of accused no. 10 are amended in the following respect:

That leave is granted for him to attend the course (10) for the DMS Diploma in Industrial Relations at Damelin Management School on Mondays and Thursdays from 19h00 to 21h00 starting on Thursday, 3 September 1987 until the conclusion of that course.

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COURT ADJOURNS UNTIL 1 SEPTEMBER 1987.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1987-08-27

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

O R D E R

VAN DIJKHORST, J. : In accordance with paragraph 2 of the conditions of bail, accused no. 14, Pelamotse Jerry Tlhopane is granted permission to visit the Vaal for the period 29 and 30 August 1987, subject to the following conditions:

1. He reports at Orlando police station between 06h00 and 09h00 on 29 August 1987 immediately before leaving for the Vaal.
2. He reports at Sebokeng police station immediately on arrival in the Vaal and thereafter between 18h00 and 21h00 on 29 August 1987, between 06h00 and 09h00 on 30 August 1987 and again immediately before his departure from the Vaal on the same day.
3. He reports at Orlando police station as usual between 18h00 and 21h00 on 30 August 1987.
4. During his visit to the Vaal he limits his movements to House 2078 in Zone 13, Sebokeng, the home of

Mr Lerapedi/...

Mr Lerapedi in Zone 11, Sebokeng, the home of Mr Mokgotla in West Street, Evaton, the Presbyterian Church in Adams Road, Evaton and his reports to the Sebokeng police station.

5. He does not enter the residential areas of Boipatong, Bophelong or Sharpeville during the abovementioned period.

6. All other conditions of bail stand and are strictly to be adhered to.

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1987-08-31

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

JUDGMENT ON ADMISSIBILITY OF DOCUMENT

VAN DIJKHORST, J. On 5 February 1987 I ruled that EXHIBIT CA1 a publication called UDF Update, the UDF Information Bulletin, Volume 2 no. 3 of November 1986, could be put to accused no. 10 in cross-examination. My reasons are set out at pages 8 678 to 8 680 of the record.

When Mr Jacobs attempted to cross-examine accused no. 19 on EXHIBIT CA1 Mr Bizos again raised an objection. He approached the matter from a different angle. As the previous ruling was interlocutory, the matter will be looked at afresh.

The new argument is that the State can rely on Section 69(4)(c) of the Internal Security Act, 74 of 1982, only during the course of the case for the prosecution and not during the case for the defence, unless the document is otherwise admissible. For example, if the witness identifies the document and makes it his own. The argument is that

on/...

on the strength of Section 69(4)(c) the document proves itself and that can only be done during the State case. Reference is made to Section 150 and Section 151 of the Criminal Procedure Act, 51 of 1977, which determine the conduct of proceedings in criminal cases. The prosecution must lead its evidence first.

In support of his argument that Section 69(4)(c) can only assist the State during the case for the prosecution, Mr Bizos argued that otherwise the State might still hand in documents during its reply at the end of the case and in (10) fact at any stage up to judgment.

I will first give some background and thereafter set out what I see as the correct approach.

The State case was closed on 22 October 1986. EXHIBIT CA1 was only published thereafter in November 1986 and could therefore not have been produced by the State before its case was closed. This fact indicates the distance in time between the period covered by the indictment and the date of the said publication and immediately the question arises how this can then be relevant. Matters put to a witness in (20) cross-examination should be relevant. This means that they must tend to prove or disprove the case of one of the parties. This may, inter alia, be done indirectly by impeaching the testimony of the witness by confronting him with a document which casts doubt on his version of the facts. A document can do that if a nexus is shown to exist between it and the witness. That nexus exists if the document is authentic and relates to the witness. Its authenticity can be proved through identification thereof by the witness or it may be accepted as authentic by reason of a statutory provision. (30)

Its relationship to the witness may be admitted by the witness or may be statutorily created. An example of the former is a previous inconsistent statement which the witness identifies as his own. Where there is no nexus, as in the case of statements by third parties for which the witness cannot be held vicariously responsible, the document is irrelevant and cross-examination thereon will not be allowed.

Examples of instances where documents need not be identified by a witness or proved to be authentic prior to their use in court, are documents discovered by the adversary (10) in a civil case (Supreme Court rule 35(10)), documents of which a Court may take judicial notice, for example Government Gazettes, when such documents are admitted by the adversary, and where such documents are by statute made admissible upon their mere production. Of the latter class there are a number apart from those found in the Internal Security Act, 74 of 1982. (See Schmidt Bewysreg second edition page 323 and 362, HOWARD AND DECKER WITKOPPEN AGENCIES AND FOURWAYS ESTATES (PTY.) LTD. v DE SOUZA 1971 (3) SA 937 T 940))

In the ordinary course of events the UDF Update of (20) November 1986 for the publication of which accused no. 19 is not responsible and which came into being long after his arrest, would have no nexus at all with this accused and would therefore be irrelevant and cross-examination thereon would be inadmissible.

Section 69(4)(c) of the Internal Security Act, 74 of 1982, has, however, created such a nexus between publications of a certain type and accused persons of a certain class in respect of offences in terms of that Act. Such documents are clearly no longer irrelevant when an accused person (30)

of that class is cross-examined. Should the contents, prima facie deemed to be correct against such an accused, tend to prove or disprove the matter in issue, an accused person of that class may be cross-examined thereon. For that purpose the document may be placed before the Court, as no. 19 falls in the class of persons mentioned and EXHIBIT CA1 is a type of document referred to in the Section.

What weight, if any, such document will have at the conclusion of the case, need not and cannot now be decided. As this ruling is of an interlocutory nature, the parties are (10) at liberty to argue the interpretation of the said section and the effect of this document afresh at the conclusion of the case.

Cross-examination of accused no. 19 on EXHIBIT CA1 is allowed.

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IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC. 482/85

PRETORIA

1987-11-05

THE STATE

versus

PATRICK MABUYA BALEKA & 21 OTHERS (10)

O R D E R

VAN DIJKHORST, J.: The following amendment is granted to the conditions of bail of accused no. 10, Bavumile Herbert Vilakazi and accused no. 15, Serame Jacob Hlanyane: In accordance with paragraph 2 of the conditions of bail both of them are granted permission to visit the Vaal for the period 6, 7 and 8 November 1987 subject to the following conditions:

1. They depart to the Vaal on 6 November 1987 after the Court's sitting and report at Sebokeng Police (20) Station on their arrival in the Vaal on the same day and thereafter between 06h00 and 09h00 on 7 November 1987, between 18h00 and 21h00 on the same day, between 06h00 and 09h00 on 8 November 1987 and again immediately before their departure from the Vaal on the same day.
2. They report at Jeppe Police Station as usual between 18h00 and 21h00 on 8 November 1987.
3. During their visit to the Vaal they limit their movements to houses 592045 and 552041 Zone 3, (30)

Residensia/...

Residensia, the house of Mr Ramotshesha in Hamilton Road, Evaton, the Evaton cemetery and their reports to the Sebokeng Police Station.

4. They do not enter the residential areas of Boiphatong, Bophelong or Sharpeville during the abovementioned period.

5. All other conditions of bail stand and are strictly to be adhered to.

Lubbe Recordings/Pretoria/MCL

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1987-11-27

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

JUDGMENT ON APPLICATION FOR BAIL

VAN DIJKHORST, J.: On 25 November 1987 accused no. 19, accused no. 20 and accused no. 21 again applied for bail and I reserved judgment on this application. I have considered the matter from all angles. It would be inopportune to set out reasons for my decision as those may rightly or wrongly influence the parties in the further conduct of this case and could possibly create the wrong impression that issues in this case have been finally decided.

The three accused have to convince me that there has been a material change in the situation since my previous judgment. I have not been so convinced.

The application is dismissed.

Lubbe Recordings/MCL/Pta

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1987-11-27

THE STATE

versus

PATRICK MABUYA BALEKA AND 21 OTHERS

AMENDMENT OF BAIL CONDITIONS IN RESPECT OF ACCUSED NOS. 5 AND 13

VAN DIJKHORST, J.: The following amendment is brought about to the conditions of bail of accused no. 5 and accused no. 13.

As from 28 November 1987 accused no. 5 is to report to the John Vorster Square police station instead of to the Jeppe police station.

As far as accused no. 13 is concerned, from 28 November 1987 to 15 January 1988, accused no. 13 is to report to the Nigel police station instead of to the Hillbrow police station and from 16 January 1988 accused no. 13 will again report to the Hillbrow police station.

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COURT ADJOURNS UNTIL 18 JANUARY 1988.