CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 180/19

In the matter between:

DANIE VAN DER WALT Applicant

and

THE STATE Respondent

Neutral citation: *Van der Walt v S* [2020] ZACC 19

Coram: Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Madlanga J (unanimous)

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 July 2020.

ORDER

On appeal from the High Court of South Africa, Mpumalanga Division (functioning as Gauteng Division, Pretoria, Mbombela Circuit Court) (hearing an appeal from the eMalahleni (Witbank) Regional Court), the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and replaced with the following:
   "The appeal against conviction is upheld and, as a consequence, the conviction and sentence are set aside."
4. The matter is referred to the Director of Public Prosecutions, Mpumalanga, to decide whether the accused should be re-arraigned.
5. In the event that the accused is re-arraigned, the trial must be before a different Regional Magistrate.

JUDGMENT

MADLANGA J (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the High Court of South Africa, Mpumalanga Division (functioning as the Gauteng Division, Pretoria), sitting at Mbombela on circuit. That Court dismissed an appeal against a judgment and order on conviction and sentence handed down by the eMalahleni (Witbank) Regional Court.

Background

[2] In 2016 the applicant, Dr Danie Van der Walt, an obstetrician and gynaecologist practising in the Witbank area, was convicted by the Regional Court of culpable homicide. The basis was that he acted negligently in the care of his patient, the late Ms Pamela Noni Daweti, after she had given birth, and that this negligence caused her death. He was sentenced to five years' imprisonment. He unsuccessfully appealed to

the High Court against conviction and sentence. The Supreme Court of Appeal refused special leave to appeal.

In this Court

[3] Before us the applicant seeks leave to appeal against conviction and sentence. Regarding conviction, he contends that the Regional Court handled the trial in a manner that infringed his fair trial rights, in particular, his right as an accused to adduce and challenge evidence, protected under section 35(3)(i) of the Constitution.[1] On sentence, he submits that the sentence is "shockingly inappropriate" and thus constitutes an infringement of section 12(1)(a) of the Constitution.[2]

[4] The fair trial challenge is based on three grounds. First, the Regional Magistrate decided the admissibility of various pieces of evidence for the first time in the judgment on conviction. This meant that, when the applicant elected not to testify, he did so without knowing the full ambit of the case against him.

[5] The applicant explains that the State's evidence comprised the evidence of three witnesses and a number of exhibits. He assumed that each exhibit (with the exception of those whose admissibility he contested) was admitted in evidence as it was handed up. To the applicant's surprise, the Regional Magistrate pronounced on the admissibility of all the exhibits only at the stage of handing down judgment on conviction. The Regional Magistrate admitted some exhibits but not others. The crux of the applicant's complaint is that the non-admission of some of the exhibits meant that the evidence elicited through cross-examination on them was also rejected. And he came to know this only at the stage of conviction. He submits that this is at odds with this Court's judgment in *Molimi*[3] where it was held that "[t]he right of the accused at all

[1] Section 35(3)(i) of the Constitution provides that "[e]very accused person has a right to a fair trial, which includes the right . . . to adduce and challenge evidence".

[2] Section 12(1)(a) of the Constitution provides that "[e]veryone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause".

[3] *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (5) BCLR 451 (CC). See also *S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305 (SCA) at para 18.

important stages to know the ambit of the case [she or he] has to meet goes to the heart of a fair trial".[4]

[6] Second, the applicant complains that, in addition to relying on the evidence of Dr Titus, an obstetrician and gynaecologist who was called as an expert witness by the State, the Regional Magistrate conducted her own research and – in reaching her decision – relied on medical textbooks not referred to in testimony. The applicant contends that, because these textbooks were not presented as evidence, he was denied an opportunity to challenge them and adduce controverting evidence. This constituted a contravention of his fair trial right protected by section 35(3)(i) of the Constitution.

[7] Third, he submits that he was convicted of culpable homicide "without there being any evidence as to an essential element of that offence: causation".

[8] On sentence, the applicant submits that a doctor convicted of culpable homicide arising from professional negligence cannot be treated like, for example, a driver whose negligent driving resulted in someone's death. He contends that in society doctors play the special role of providing access to health care services, a right enshrined in section 27(1)(a) of the Constitution.[5] Thus "[a] just approach to sentencing in these circumstances requires that a sentence of imprisonment be imposed only in the most serious cases of negligence", which degree must be determined in accordance with the views of the medical profession.

[9] On the first point, the State responds that once the applicant had contested the admissibility of certain exhibits, "the Magistrate interrogated the admission of all other exhibits applying legal requirements for admission". The Regional Magistrate's findings, continues the response, "appear to have been correct". The State maintains

[4] *Molimi* id at para 54.

[5] Section 27(1)(a) provides:

> "Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care".

that the applicant was also aware that adverse consequences follow a failure to testify, in that "the *prima facie* case of the State would be left to speak for itself". In addition, the State submits that this issue was raised on appeal before the High Court. It also makes the point that the High Court did take into account the evidence that the applicant is claiming was effectively rejected as a result of the rejection of certain exhibits. Having done so, that Court correctly came to the conclusion that – even with that evidence – the State had nevertheless proved its case beyond a reasonable doubt. Thus the evidence elicited through cross-examination on the rejected exhibits would have made no difference to the outcome. The State further contends that *Molimi* is not comparable to this matter as its facts are distinguishable.

[10] On the second point, the State submits that the Regional Magistrate's references to the literature that was not proven in testimony "merely fit in with the factual evidence of the [expert] witness", Dr Titus, and that it is this evidence which was the basis of the finding of guilt. Further, even if the medical literature had not been considered, this would not have made a difference to the applicant's case. Given that the applicant elected not to testify or tender any evidence, the expert testimony of Dr Titus was not disputed and thus constituted *prima facie* evidence of the applicant's negligent conduct.

[11] Regarding the third and final point on conviction, the State submits that the evidence of Dr Titus was sufficient in establishing causation, and that the correct test was applied.

[12] In relation to sentence, the State submits that the trial court exercised its discretion properly and, therefore, there is no basis for upsetting the sentence.

[13] On 2 January 2020, this Court issued directions calling upon the parties to file written submissions on whether:

(a) the Regional Magistrate's pronouncement at the stage of the judgment on conviction, on the admissibility of the exhibits, infringed the applicant's right to a fair trial in terms of section 35(3) of the Constitution; and

(b) on the assumption that the Regional Magistrate did rely on medical literature that was not introduced to the Court in testimony, that reliance infringed the applicant's right to a fair trial, in particular the right to adduce and challenge evidence protected by section 35(3)(i) of the Constitution.

[14] We have elected to decide this matter without an oral hearing.

Jurisdiction and leave to appeal

[15] The pronouncement on admissibility at the stage of the judgment on conviction and reliance on medical literature not proved in testimony implicate the right to a fair trial, in particular, the right to adduce and challenge evidence. The right to a fair trial "embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force".[6] In this sense, it is broader and more context-based[7] than pre-constitutional notions of trial fairness, which were based on non-compliance with formalities.[8] However, this is not to say that all procedural irregularities are sufficiently serious as to constitute an infringement of the constitutional right to a fair trial.[9] The Constitution requires all courts hearing criminal trials or criminal appeals to give content to "notions of basic

[6] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16.

[7] In *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 13, this Court held that "[i]n determining what is fair, the context or prevailing circumstances are of primary importance – there is no such thing as fairness in a vacuum".

In *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 133 Ackermann J said:

> "[I]t is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources – political, social, economic and human. . . . One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it."

[8] See *Shabalala v Attorney-General of the Transvaal* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 29.

[9] Consider, for example, *S v Mdali* 2009 (1) SACR 259 (C) at para 10, where the Court, considering a magistrate's failure to allow an accused to call a particular witness, held that this irregularity was "of a very serious nature and vitiated the proceedings". According to the Court, the magistrate had confused the principles of admissibility of evidence with the probative value of evidence. The proceedings were thus found not to have been "in accordance with justice", and the Court held that "the accused's constitutional right to a fair trial, and in particular his right to adduce and challenge evidence, was grossly violated".

fairness and justice".[10] In doing so, they must determine what types of irregularities are sufficiently serious to undermine an accused's fair trial rights. The question is: is the irregularity sufficiently serious as to undermine basic notions of trial fairness and justice? Based on this jurisprudence, the irregularities alleged by the applicant in this matter appear to be of a nature that – in a constitutionally impermissible manner – vitiated the fairness of the trial. That engages our jurisdiction.

[16] Also, there is some degree of merit in the arguments advanced by the applicant. As to public importance, a determination of these issues is likely to serve as guidance to other courts, to the benefit of many accused persons who appear before them. It is thus in the interests of justice to grant leave to appeal on the attack that the applicant was denied a fair trial.

[17] With regard to causation, it seems to me that that the applicant merely takes issue with the sufficiency of the evidence of Dr Titus in establishing that aspect of the State's case. Also, this complaint does no more than to contest the application of settled principles on causation. That does not engage our jurisdiction, and will not be considered further.

[18] In the application for leave to appeal against sentence, reliance is placed only on constitutional jurisdiction.[11] This application does not engage our jurisdiction. This Court in *Bogaards* held that "absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this Court will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice."[12] The notion that doctors must receive special penal treatment lest section 12(1) of the Constitution be infringed is without basis. I

[10] *Zuma* above n 6 at para 16.

[11] Mention is made of an arguable point of law of general public importance. This is not substantiated and nothing more need be said about it.

[12] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) at para 42.

see no reason for an exception to be made where doctors are found, by competent courts, to be guilty of causing the death of people they were entrusted to care for.

[19] The applicant calls in aid section 27(1)(a) of the Constitution, the right of access to health care. This he does to advance the contention that doctors play an important societal role in providing this access. Therefore, continues the argument, this should be a weighty factor in sentencing them for the negligent killing of their patients. He goes so far as to use the jarring analogy of drivers who kill people as a result of the negligent driving of cars. He says the drivers are deserving of harsher sentences than doctors who kill whilst providing medical care. Well, the law demands of experts, including doctors, a higher standard of care where the conduct complained of relates to their area of expertise. In the words of Olivier JA in *Mukheiber*:

> "In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary lay person, and the Court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs."[13]

[20] The gut-wrenching truth is that those that die at the hands of doctors who act negligently are terminally denied that all important right, the right to life. For me then, it is a no-brainer which way the scale must tilt. There is simply no reason why the *Bogaards* principle should not apply.

[21] So, leave to appeal against sentence falls to be refused.

Fair trial

[22] The importance of respect for the right to a fair trial was highlighted by Nkabinde J who had this to say in *Molimi*:

[13] *Mukheiber v Raath* [1999] ZASCA 39; 1999 (3) SA 1065 (SCA) at para 32, with reference to *Van Wyk v Lewis* 1924 AD 438 at 444.

> "[T]he right to a fair trial . . . 'has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.' . . . More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy."[14]

[23] An accused is not at liberty to demand the most favourable possible treatment under the guise of the fair trial right.[15] A court's assessment of fairness requires a substance over form approach.[16] The State correctly submits that the question is accordingly whether the Regional Magistrate committed irregularities or deviated from the rules of procedure aimed at a fair trial, and if so, whether they were of the kind to render the trial unfair. *Zuma* is of assistance on the nature of irregularities that render a trial unfair in a constitutionally impermissible manner. Kentridge AJ held:

> "The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire—
>
> > 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.
>
> A court of appeal, it was said (at 377),
>
> > 'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept

[14] *Molimi* above n 3 at para 42.

[15] *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 43.

[16] *Zuma* above n 6 at para 16. See also *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) at paras 27-8.

> of justice which are the basis of all civilised systems of criminal administration".'
>
> That was an authoritative statement of the law before 27th April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."[17]

[24] I next deal with the applicant's complaints in the light of all the jurisprudence discussed above.

Admissibility

[25] Both parties accept that the Regional Magistrate pronounced on the admissibility of exhibits after the applicant had closed his case. This was when she handed down judgment on the question of guilt. Undeniably, a timeous ruling on the admissibility of evidence is crucial. It sheds light on what evidence a court may take into consideration and may even give an indication as to how much weight may be accorded to it. This enables an accused to make an informed decision on whether to close her or his case without adducing evidence or, where she or he does testify or adduce evidence, to adduce further evidence to controvert specific aspects of evidentiary material. Without a timeous ruling on all evidence that bears relevance to the verdict, an accused may be caught unawares at a stage when she or he can no longer do anything. *Ndhlovu*[18] is quite instructive. It concerned the admissibility of hearsay evidence through the court's exercise of discretion under section 3(1)(c) of the Law of Evidence Amendment Act.[19] Of importance was the stage at which: the prosecution *must* apply for the court's exercise of discretion on whether to admit hearsay evidence; and, the court *must* rule on the admissibility of that evidence. That, of course, is apposite to our context. Cameron JA tells us this:

---

[17] *Zuma* id.

[18] *Ndhlovu* above n 3.

[19] 45 of 1988.

> "[A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution must before closing its case clearly signal its intention to invoke the provisions of the Act, and the trial judge must before the State closes its case rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."[20]

[26] This Court in *Molimi*[21] approved of the *Ndhlovu* approach, holding that "[a] timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings is . . . a procedural safeguard"[22] and that—

> "when a ruling on admissibility is made at the end of the case, the accused will be left in a state of uncertainty as to the case he is expected to meet and may be placed in a precarious situation of having to choose whether to adduce or challenge evidence.
> . . .
> In order for it to be said that the applicant had a fair trial, he must first have known what the case against him was."[23]

[27] There is no question that the applicant was ambushed by the late pronouncement on the admissibility of the exhibits. Is this of no consequence as was suggested by the prosecution? It will be recalled that the prosecution makes the point that the High Court, in fact, did take into account evidence elicited through cross-examination on some of the exhibits. The applicant's complaint is that this evidence was effectively rejected as a result of the rejection of the affected exhibits. The prosecution opines that, having taken that evidence into account, the High Court correctly came to the conclusion

---

[20] *Ndhlovu* above n 3 at para 18.

[21] In *Molimi* above n 3 this Court dealt with a matter in which the admissibility of statements by certain witnesses against the applicant was considered for the first time only in the course of the judgment on merits, after he had testified. In that matter, the contention was that the trial court disregarded the rule governing the admissibility of hearsay evidence under section 3 of the Criminal Procedure Act 51 of 1977 and the approach as laid down in *Ndhlovu*. This Court found that the late admission of hearsay evidence against the applicant, after he had testified, was prejudicial to him and against the interests of justice.

[22] Id at para 41.

[23] Id at paras 42-3.

that – even with that evidence – the State had still proved its case beyond reasonable doubt. Thus, argues the prosecution, the evidence elicited through cross-examination on the rejected exhibits would have made no difference to the outcome.

[28] Of course, this misses the point. It fails to address a crucial issue, and that is this. The admission and rejection of evidence at the right time may influence the decision whether to close one's case without tendering any evidence. Nor can one ever guess with any degree of accuracy what impact evidence – if tendered – might have had on the outcome. The "no difference" argument is thus misconceived. It calls to mind the famous words of Megarry J in *John v Rees*:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."[24]

[29] In similar vein in *Qwelane* this Court held:

> "[T]he 'no difference' approach is generally anathema. Courts resist accepting that the right to a hearing disappears when it is unlikely to affect the outcome. This was elucidated in *Zenzile*:
>
> > 'It is trite . . . that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade *Administrative Law* 6th ed puts the matter thus at 533-4:
> >
> > > 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be

[24] *John v Rees; Martin v Davis; Rees v John* [1970] Ch 345 at 402D.

> kept strictly apart, since otherwise the merits may be prejudged unfairly.'"[25]

[30] Although said in the context of a fair hearing in administrative law, the application of this principle is equally – if not more – called for in a criminal trial. I am thus persuaded by the applicant's argument that his fair trial right was violated by the pronouncement on the admissibility of exhibits at the stage of deciding his guilt. Put differently, the late admission of exhibits constitutes an irregularity of a nature that vitiated the trial in a constitutionally impermissible manner.

Medical literature

[31] It is a principle of the law of evidence that an expert witness may rely on information in a textbook only if the following requirements stated in *Menday* are met:

> "[F]irstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field."[26]

[32] The State explains that the medical literature was provided by the expert assessor[27] to confirm the evidence of Dr Titus, in the same way that a court may refer to case law or academic sources in a judgment. The literature thus did not introduce new or different evidence; it merely confirmed the evidence of the expert witness. The applicant counters this by submitting that the judgment makes plain that the Regional Magistrate *did* rely on the literature. He draws attention to the fact that it appears from the judgment that, in assessing which opinions in the testimony of Dr Titus ought to be accepted, the Regional Magistrate was guided by whether those opinions accorded with the medical literature. As a result, notes the applicant, the Regional

[25] *Psychological Society of South Africa v Qwelane* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) at para 35.

[26] *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569G-H.

[27] During the trial the Regional Magistrate was assisted by an expert assessor.

Magistrate rejected some of those opinions because they were not supported by the medical literature. The applicant argues that, therefore, the medical literature played some role in persuading the Regional Magistrate that guilt had been established beyond reasonable doubt. Thus, concludes the applicant, the *Menday* requirements must be met. I agree.

[33] To the extent that, on this issue as well, the State took the view that the use of the textbooks made no difference to the decision on guilt, I can do no better than yet again to refer to *Qwelane*[28] and *John v Rees*.[29] Whether the applicant would have been able to challenge the textbook evidence successfully is not the question. The relevant question is whether the applicant had the opportunity to challenge the textbook evidence. The applicant was plainly denied that opportunity. Likewise, not knowing that such evidence would be relied upon, he was denied the opportunity – if so minded – to adduce controverting evidence. The right to challenge evidence requires that the accused must know what evidence is properly before the court. In the applicant's case, the medical literature relied upon was never adduced at all. This goes to the heart of a fair trial.

[34] The reliance on unproved medical literature thus infringed the applicant's section 35(3)(i) right. Like the late admission of exhibits, this constitutes an irregularity of a nature that vitiated the trial in a constitutionally impermissible manner.

Remedy

[35] In the circumstances, the applicant's conviction must therefore be set aside. The concomitant effect of this is that the sentence must also fall away. It could be argued that, if the sentence automatically falls away, as it does, it was not necessary to determine the application for leave to appeal against sentence. Ordinarily that is so. But the relief that I propose makes it prudent to avert the same argument being raised if

[28] *Qwelane* above n 25 at para 35.

[29] *John v Rees* above n 24 at 402D.

the applicant were again convicted and a sentence that he considers excessive were imposed.

[36] On the powers of a court of appeal, section 322(1)(c) of the Criminal Procedure Act[30] provides that "[i]n the case of an appeal against a conviction or of any question of law reserved, the court of appeal may . . . make such other order as justice may require".

[37] The applicant's conviction is not set aside on the merits. That is, it is not set aside on the basis that the applicant's guilt was not proved beyond a reasonable doubt. It is set aside on the basis that the Regional Magistrate committed irregularities whose nature was such that the applicant's fair trial right was infringed. A conviction under those circumstances cannot stand. Because the conviction is not set aside on the merits, justice requires that the matter be referred to the Director of Public Prosecutions, Mpumalanga, to decide whether the applicant should be re-arraigned. In the event that the applicant is re-arraigned, the ensuing trial must be before a different Regional Magistrate.

Order

[38] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and replaced with the following:

   "The appeal against conviction is upheld and, as a consequence, the conviction and sentence are set aside."
4. The matter is referred to the Director of Public Prosecutions, Mpumalanga, to decide whether the accused should be re-arraigned.
5. In the event that the accused is re-arraigned, the trial must be before a different Regional Magistrate.

[30] 51 of 1977.

For the Applicant:	S Budlender SC and I Cloete instructed by MacRobert Incorporated
For the Respondent:	E Leonard SC instructed by Director of Public Prosecutions, Gauteng