THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 883/2015

In the matter between:

ANDRIES VAN HEERDEN	**APPELLANT**
And	
THE REGIONAL COURT MAGISTRATE, PAARL	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	**SECOND RESPONDENT**
THE REGIONAL COURT PROSECUTOR, PAARL	**THIRD RESPONDENT**

Neutral citation: *Van Heerden v Regional Court Magistrate, Paarl* (883/2015) [2016] ZASCA 137 (29 September 2016)

Coram: Lewis, Tshiqi, Zondi and Van Der Merwe JJA and Makgoka AJA

Heard: 6 September 2016

Delivered: 29 September 2016

Summary: Criminal Law and Procedure – Review – whether there was an informal plea agreement between the appellant and the State – Disputes of fact arising from the respective versions not capable of resolution on the papers – State's version not far-fetched.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Salie-Hlophe and Goliath JJ sitting as court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Tshiqi JA (Lewis, Zondi and Van der Merwe JJA and Makgoka AJA concurring):

[1] The appellant, Mr Andries van Heerden, was charged in the Paarl Regional Court, under the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007, read with the provisions of s 51(1) of Criminal Law Amendment (Minimum Sentences) Act 105 of 1997 with the following: (a) one count of indecent assault; (b) five counts of sexual assault; and (c) one count of rape. In relation to the counts of indecent assault and sexual assault, it was alleged that he, on several occasions rubbed, massaged, kissed and pressed the complainants' penises towards his body without their consent. Concerning the count of rape, it was alleged that the appellant performed an act of sexual penetration on a 16 year old male, by sucking his penis. The provisions of ss 51 and 52 of Schedule 2 of the Minimum Sentences Act were applicable to the rape count in view of the fact that the complainant was 16 years old at the time.

[2] The appellant, who at all material times had legal representation, pleaded guilty to all the charges and his plea explanation in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the Act) was accepted by the State and he was convicted by the magistrate. The five counts of sexual assault were taken together for purposes of sentence and he was sentenced to a wholly suspended sentence of five years' imprisonment. For the indecent assault conviction, he was sentenced to three years'

imprisonment wholly suspended, and for the rape conviction, he was sentenced to five years' direct imprisonment. It was further ordered that his personal particulars be added onto the national register for sexual offenders (in terms of s 114 read with s 120(4) of the Children's Act 38 of 2005) as well as the national child protection register. He was further declared unfit to possess a firearm (in terms of s 103(1) of the Firearms Control Act 60 of 2000).

[3] With the leave of the trial court, the appellant appealed to the Western Cape Division, Cape Town against the sentence imposed by the regional court for the rape conviction and he concurrently lodged an application for the review of the criminal proceedings in terms of Uniform Rule 53. The plea of guilty tendered by the appellant was at the centre of the review application. The appellant contended that he pleaded guilty because his legal team had reached an agreement with the prosecutor, Ms Van Wyk, to the effect that if he pleaded guilty, Ms Van Wyk would not seek a custodial sentence and would actively support a non-custodial sentence; and that in breach of the terms of this agreement, Ms Van Wyk argued for a custodial sentence, thereby compromising his right to a fair trial.

[4] The Western Cape Division, Cape Town (to which I will refer, for convenience as the High Court), (Salie-Hlophe and Goliath JJ), dismissed the application for review but upheld the appeal against sentence and substituted it with a sentence of five years' imprisonment in terms of s 276(1)(*i*) of the Act. This appeal is against the dismissal of the application for review and is with the special leave of this court. It is opposed by both the prosecutor, Ms Van Wyk, and the Director of Public Prosecutions, Western Cape (DPP). They will, for the sake of convenience and except where the context requires otherwise, both be referred to as the State.

[5] It is not in dispute that before the s 112(2) statement was made and tendered to court, the appellant's legal team approached Ms Van Wyk with a view to reaching a plea agreement. It is also not in dispute that on 23 July 2013, a date on which the trial had been set down for plea and trial, negotiations with a view to reaching such an agreement took place between the parties. Their respective versions differ, however, on the critical issue: whether, during these negotiations, Ms Van Wyk did in

fact make any offer in exchange for his plea of guilty, or whether she had fostered a reasonable belief on the part of the appellant, that his plea would be reciprocated by Ms Van Wyk, and by virtue of which belief, the appellant tendered the plea of guilty to all the charges.

[6] The appellant's version on what transpired during the negotiations is set out in an affidavit attested to by Ms Steenkamp, his attorney at the time of the trial. Ms Steenkamp's version is that the discussions took place at Ms Van Wyk's office in the presence of her then candidate attorney, Mr Gonzales and Mr Van der Berg, the appellant's counsel. Mr Van der Berg proposed that the appellant would plead guilty to all the charges, in exchange for an agreed non-custodial sentence, and more specifically a sentence in terms of s 276(1)*(h)* of the Act, and requested that a plea agreement between the State and the defence be reached on such terms. Ms Van Wyk stated that she would be amenable to such an agreement, but raised two issues: first, that any agreement would be subject to the approval of the parents of the minor complainants (the parents); and second, that she doubted that the appellant's wish for a speedy resolution would be met if the plea proposal were to be submitted to the DPP, because of delays and counter-proposals. Instead, so Ms Steenkamp alleges, Ms Van Wyk proposed a plea agreement on an informal basis, stating that such was not unusual in her court, and that the magistrate had in the past accepted what the respective parties proposed as an appropriate sentence.

[7] The so-called 'informal plea agreement' proposed by Ms Van Wyk would, according to Ms Steenkamp, merely require that she refrain from seeking a custodial sentence, but support a non-custodial sentence. She said that because the appellant's legal team was not comfortable with the fact that such an informal agreement would not be binding on the magistrate, they insisted that Ms Van Wyk should give a more tangible assurance, on record, of the State's acquiescence to the proposed sentence, to which she agreed.

[8] Following these negotiations, according to Ms Steenkamp, a plea agreement was reached between the appellant's team and Ms Van Wyk on the following terms:

(a) The appellant would plead guilty to all the charges and thus relinquish his constitutional rights to go to trial;
(b) In exchange for the appellant's plea of guilty, but subject to the approval of the parents, the State undertook, when going on record;
(i) Not to seek a custodial sentence;
(ii) Not to oppose the appellant's request for a sentence in terms of s 276(1)(*h*) of the Act; and
(iii) To support the aforesaid non-custodial sentence, including that she would place on record that the sentence met with the approval of the parents.

[9] After the agreement was reached, Ms Van Wyk left her office to take up the matter with the parents, who were present within the court's precinct, while the appellant's legal team remained behind. Sometime thereafter she returned and announced that the parents were agreeable to the terms of the plea agreement. Thereafter the prosecutor and the defence team went to the magistrate in chambers and informed her that an informal plea agreement had been reached between the appellant and the State.

[10] In order to bolster the appellant's version that there was an agreement and that even the magistrate was aware of it, Ms Steenkamp makes reference to an entry made by the magistrate on the record of the trial proceedings on 23 June 2013 which reads: 'Pleit ooreenkoms tussen Staat en verd'[1]– which she says was written by the magistrate after they had spoken to her. This entry, according to Ms Steenkamp would not have been entered on the record by the magistrate if she was not told by the State and the defence that an agreement had been reached. She says that although the matter was set down for plea and trial on the day of the alleged agreement, it was postponed in order for the plea to be prepared and finally tendered in court.

[11] The State's version on what occurred during the negotiations differs materially from the appellant's version and is contained in an affidavit attested to by Ms Van

[1] Which may be directly translated: 'Plea agreement between State and def'.

Wyk. She denies that the discussions pertained to an informal agreement, and that the alleged agreement was concluded. She further disputes the terms alleged. She states that she was approached to consider a formal agreement in terms of s 105A of the Act for a non-custodial sentence in terms of s 276(1)*(h)* of the Act. She dismissed the proposal immediately due to its inappropriateness and also pointed out that where an accused is charged with rape, she was not authorised to conclude an agreement in terms of s 105A, without the authorisation of the DPP.

[12] She admits that she went to speak to the parents of the complainants but states that it was at the request of the appellant's counsel who requested her to approach them and hear their views on the proposed non-custodial sentence. The parents, so states Ms Van Wyk, indicated that they were not really concerned about the sentence the court imposed as long as the appellant acknowledged that he performed the indecent acts on their children. After she relayed the parents' stance to appellant's counsel, the defence counsel again tried to persuade her to enter into a formal plea and sentence agreement to which she again stated that she was not authorised to do so and that the appellant should plead. Counsel then asked what guarantee was there that the magistrate would impose a non-custodial sentence. In response she informed him that they could not decide the issue of sentence on behalf of the magistrate and she suggested that they should approach her in chambers and inform her of counsel's proposal as well as the attitude of the parents.

[13] They, according to Ms Van Wyk, then approached the magistrate in chambers and appellant's counsel informed the magistrate of the kind of sentence they were seeking and the fact that she had spoken to the parents who had also informed her of their attitude to the proposal. Ms Van Wyk then confirmed during the discussions with the magistrate that she had had a discussion with the parents, but the magistrate in response informed them that she did not want to be involved in their discussions, but had noted what counsel has told her. Ms Van Wyk denies that she supported a non-custodial sentence during their discussions or that she agreed to not ask for a non-custodial sentence or that she had been asked by the defence to support a non-custodial sentence in open court. She also denies that they informed the magistrate

that an agreement had been reached, and states that the magistrate's annotation on the record (para 10 above), was wrong.

[14] The parties' respective versions on what transpired on the day the appellant tendered his plea of guilty also differ. Ms Steenkamp's version, on the one hand, is that the appellant's counsel had prepared a formal plea explanation which she showed to Ms Van Wyk. She informed counsel that the magistrate usually required detailed factual admissions to accompany the plea and the plea explanation was then redrafted on counsel's laptop, to Ms Van Wyk's satisfaction, printed out and duly signed. The appellant then pleaded guilty to all the charges and his plea explanation was formally handed into court and he was duly convicted of all the charges, after which, the matter was postponed for sentencing.

[15] On the date of the sentencing, counsel addressed the court on sentence and requested a sentence in terms of s 276(1)*(h)* of the Act. However, when Ms Van Wyk addressed the court, she did not support the sentence requested by appellant's counsel and did not inform the court that she had discussed the issue of an appropriate sentence with the parents. She instead made submissions in aggravation of sentence. Ms Steenkamp states that directly after the adjournment, counsel confronted Ms Van Wyk about her alleged breach of her undertaking, to which she stated that there was nothing to be concerned about as she had merely addressed the magistrate in the manner she did to appease the parents, who were present in court.

[16] Ms Van Wyk, on the other hand, admits that a plea was tendered by the appellant but denies that it was consequent to a plea agreement. She also denies that counsel for the appellant confronted her about the alleged breach after the court had adjourned on that day.

[17] Plea bargaining is well recognised in South African criminal procedure and its efficacy in appropriate cases has long been accepted. (See *North Western Dense Concrete CC & another v Director of Public Prosecutions (Western Cape)* 1999 (2)

SACR 669 (C); *Van Eeden v The Director of Public Prosecutions, Cape of Good Hope* 2005 (2) SACR 22 (C) para 19; and *S v DJ* [2015] ZASCA 151; 2016 (1) SACR 377 (SCA) para 17.) It is a complementary procedure that is not meant to supplant the standard procedure for pleas of guilty under s 112 of the Act, and the established practice of accepting pleas of guilty on the basis of bona fide consensus reached, remains applicable. (See *Steyl v National Director of Public Prosecutions & another* (unreported, GP case no 27307/2013 (9 June 2015) paras 50-51.) The procedure is a fundamental departure from our adversarial system and it helps ease the considerable pressure on the courts by making it possible for cases to be negotiated and settled by the parties 'outside the court' (see A Kruger *Hiemstra's Criminal Procedure* (Service 6, (2013) at 15-6). Nonetheless, there are two independent systems of negotiation within the South African criminal justice system (*Steyl v NDPP* (above) para 51), namely: (a) under statute (*S v Esterhuizen & others* 2005 (1) SACR 490 (T); *S v Armugga & others* 2005 (2) SACR 259 (N) at 265b) and (b) informally (*S v EA* 2014 (1) SACR 183 (NCK). Great importance is placed on the independence of prosecutors in either system (see M E Bennun 'The Mushwana Report and prosecuting policy' 3 *SACJ* (2005) 279, and the authorities and sources referred to therein). Statutorily negotiated agreements are regulated under s 105A[2] of

[2] Section 105A of the Act, which came into effect on 14 December 2001, provides in great detail how plea and sentence negotiations should take place and agreements reached. Subsection (1) provides:
'**105A Plea and sentence agreements**
(1) *(a)* A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of—
(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
(ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty—
(aa) a just sentence to be imposed by the court; or
(bb) the postponement of the passing of sentence in terms of section 297 (1)*(a)*; or
(cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297 (1)*(b)*; and
(dd) if applicable, an award for compensation as contemplated in section 300.
(b) The prosecutor may enter into an agreement contemplated in paragraph *(a)*—
after consultation with the person charged with the investigation of the case;
(ii) with due regard to, at least, the—
(aa) nature of and circumstances relating to the offence;
(bb) personal circumstances of the accused;
(cc) previous convictions of the accused, if any; and
(dd) interests of the community, and
(iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding—
(aa) the contents of the agreement; and
(bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

the Act. Their advantage is that once a plea has been accepted on a certain factual basis, the prosecutor is bound by the facts upon which the agreement has been reached and so is the court also bound to convict and sentence the accused on that factual basis. (See *North Western Dense Concrete CC & another v Director of Public Prosecutions* (above); and Megan B Rogers 'The development and operation of negotiated justice in the South African criminal justice system' (2010) 2 *SACJ* at 239).) Conversely, the disadvantage of entering into an informal plea agreement is that the prosecutor and accused cannot reach a binding agreement with regard to the facts and sentence to be imposed without the co-operation of the presiding officer. At most, the parties can reach an informal agreement in terms of which the prosecutor undertakes to *recommend* that a reduced sentence be imposed or undertakes not to motivate for a harsher sentence.

[18] The appellant alleges that the latter is the kind of agreement that was reached in this matter. The State on the other hand denies that the negotiations pertained to an informal agreement, and it also denies that pursuant to the negotiations, an agreement was ever reached. It further disputes the alleged terms of the agreement. There are thus factual disputes arising from the respective versions of the appellant on the one hand, and the State on the other. Counsel for the appellant confirmed, in response to a question posed by this court, that the appellant did not, in the high court request that the matter should be referred for oral evidence. He submitted that this was not necessary as the disputes could be resolved on the papers as they stand. He sought to persuade us to accept the appellant's version on the basis that it was more probable. When confronted with the trite principles applicable to the resolution of disputes of fact in motion proceedings, he was constrained to concede that motion proceedings are not designed to determine probabilities. In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (1) SACR 361 (SCA), this court once more emphasised the approach thus (para 26):

(c) The requirements of paragraph *(b)*(i) may be dispensed with if the prosecutor is satisfied that consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could—
(i) cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative; and
(ii) affect the administration of justice adversely.'

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits . . . which have been admitted by the respondent . . . together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (Footnote omitted.)

(See also *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635*; Fakie NO v CCII Systems (Pty) Ltd* [2006] SCA 54; 2006 (4) SA 326 (SCA) paras 55 and 56; *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma & another v National Director of Public Prosecutions & others* [2008] ZACC 13; 2009 (1) SA 1; 2008 (2) SACR 421 (CC) para 8-10.)

[19] The version of the State does not amount to a bare denial and is not palpably implausible, far-fetched or clearly untenable. Ms Van Wyk filed a comprehensive affidavit which outlines her version of what happened. She states that she was approached to consider a formal agreement in terms of s 105A of the Act in terms of which the parties would agree to a non-custodial sentence in terms of s 276(1)(*h*) of the Act. This proposal, according to her, she immediately dismissed out of hand due to the inappropriateness of the proposed sentence. She states that she pointed out that she was, in any event not authorised to conclude an agreement in terms of s 105A without the authorisation of the DPP.

[20] On the other hand, in support of his version that the agreement was indeed reached, the appellant sought to place reliance on the fact that Ms Van Wyk consulted the parents of the complainants. Ms Van Wyk's explanation for this (para 12 above) cannot simply be dismissed as palpably implausible, far-fetched or clearly untenable. As counsel for the State submitted, it is not unusual in criminal proceedings for a prosecutor to consult a complainant to appraise him or her of what is happening in a criminal matter. This, to my mind was a sensible precaution in this matter, particularly since the complainants had been minors when the offences where

committed. This, however, as counsel for the State argued, does not necessarily support, as the only reasonable inference, a conclusion that any agreement had been reached.

[21] The contention by the appellant that his version finds corroboration from the entry made by the magistrate on the record of the proceedings is not without its problems. Counsel for the appellant submitted that Ms Van Wyk in her affidavit, gave no explanation for this entry but simply made a bald denial and stated that it was 'wrong'. Counsel for the State submitted in that regard that the response was not a bald denial in the sense that Ms Van Wyk specifically states that the entry is wrong. I agree with the State that it is not possible to draw an adverse inference from Ms Van Wyk's response in this regard because she was not the author of the entry and there was no evidence that she was aware that the magistrate had made this entry until she was confronted with it through the appellant's affidavit during the review proceedings. The entry by the magistrate, as counsel for the State submitted, does not necessarily mean that the parties had concluded an agreement or that the parties had reached consensus on the terms thereof, but is open to other interpretations.

[22] For all those reasons, the appellant has not made out a case on the papers that there was an agreement between the State and the defence in this matter and what its terms were. Further support for this view is found in the manner in which the appellant's counsel conducted the matter when he addressed the court in mitigation of sentence. He simply addressed the court on the personal circumstances of the appellant and motivated for a non-custodial sentence in terms of s 276(1)(*h*) of the Act, but did not inform the magistrate that there was an agreement between the State and the defence. Thereafter, following the State's address in aggravation of sentence, but not in support of a non-custodial sentence as alleged, counsel for the appellant did not object nor did he in reply place on record, before the magistrate who had allegedly been informed of the terms of the agreement, that the State was reneging on the agreement. There is no satisfactory explanation by appellant's counsel for this material omission.

[23] Another avenue that was available to the appellant's counsel was that he could have requested the court to invoke the provisions of s 113 by informing the court that in light of the change of stance by the State, the appellant wished to change his plea of guilty to that of not guilty. A plea of not guilty can be recorded at any stage during the trial before sentence has been imposed. (See *S v Du Plessis* 1978 (2) SA 496 (C) at 548*;* Etienne du Toit et al *Du Toit: Commentary on the Criminal Procedure Act* (Revision Service 54, 2015) at 17-36.) The appellant's explanation on why his counsel did not invoke the provisions of s 113 of the Act is not that this option was not available to him but that he could not bear, physically, emotionally and financially, the tribulations of a protracted trial. This to my mind suggests that the appellant and his legal team weighed all of these options available to him and took a chance and pleaded guilty with the hope that he could get a non-custodial sentence. He cannot now allege unfairness of the trial simply on the basis of his own informed choice on how to conduct his trial.

[24] For all these reasons, the appellant did not make out a case on the papers that there was an agreement between the State and the defence. Regarding the argument based on quasi-mutual assent, the appellant has failed to show on the papers that the conduct of Ms Van Wyk led him reasonably to believe that there was an agreement. The appeal must accordingly fail.

[25] Although the Western Cape Division's order dismissing the application for review still stands, such an order was, with respect to that court, based on a misconstruction of the issues that it had to determine. When it sought to identify the basis for the review, it stated that (para 2):

'The application for review is solely based on an averment that as a result of negotiations between the prosecutor and the defence an agreement was reached to have imposed a non-custodial sentence upon pleading guilty.'

That was not the issue. The appellant did not state that such a sentence was guaranteed by the prosecutor. He specifically disavowed any suggestion that the alleged agreement was a formal agreement as envisaged in s 105A. The issue was simply whether Ms Van Wyk agreed not to seek a custodial sentence, which alleged agreement would have sufficiently enhanced the appellant's prospects of receiving a

non-custodial sentence. The court below also failed to have regard to the fact that the review was based on an alleged infringement of the right to a fair trial, and as a result failed to deal with that issue. Another error made by the court below was that it expressed a view that 'the law does not recognise the concept of a conditional plea of guilt.' Such a proposition not only flies in the face of s 105A, but also shows a lack of appreciation that such agreements envisage that an accused would plead guilty in lieu of some form of compromise made by the State. (See *North Western Dense Concrete CC & another v Director of Public Prosecutions* (above).)

[26] I accordingly make the following order:

The appeal is dismissed with no order as to costs.

_____

Z L L Tshiqi

Judge of Appeal

APPEARANCES

For the Appellant:	J van der Berg
	Instructed by:
	Terblanche Slabber Pieters Inc., Malbesbury
	Hill, McHardy & Herbst Inc., Bloemfontein
For the Second Respondent:	C van der Vijver
	Instructed by:
	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein