THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1362/16

In the matter between:

THE STATE **APPELLANT**

and

NKOKETSANG ELLIOT PILANE **RESPONDENT**

Neutral Citation: *The State v Pilane* (559/16) [2017] ZASCA 71 (1 June 2017)

Coram: Cachalia and Wallis JJA and Molemela, Gorven and Mbatha AJJA

Heard: 3 May 2017

Delivered: 1 June 2017

Summary: Witnesses in criminal trial: administration of the oath: may be administered by interpreter: s 165 of Criminal Procedure Act 51 of 1977.

ORDER

On appeal from North West Division of the High Court, Mahikeng (Hendricks J and Djaje AJ sitting on appeal from the regional court).

1 The appeal is upheld.
2 The order of the high court is set aside.
3 The conviction and sentence imposed by the regional court are reinstated.
4 The matter is remitted to the high court for the appeal to proceed on the merits.

JUDGMENT

Molemela AJA (Cachalia and Wallis JJA and Gorven and Mbatha AJJA concurring):

[1] Mr Nkoketseng Elliot Pilane (the respondent) was convicted of rape in the Rustenburg Regional Court (the regional court) and sentenced to 10 years' imprisonment. The respondent subsequently appealed to the North West Division of the High Court (Hendricks J and Djaje AJ) (high court). The high court found that insofar as the oath taken by the three witnesses for the state was administered by the interpreter and not the judicial officer, it had been done irregularly. It consequently considered the evidence of such witnesses to be unsworn and therefore inadmissible. It held that by allowing the court interpreter to administer the oath, the regional court had committed

an irregularity that vitiated the proceedings. It consequently set aside the conviction and sentence imposed by the regional court.

[2] Aggrieved by the high court's decision, the Director of Public Prosecutions (DPP) subsequently applied to this court for special leave to appeal, on a question of law in terms of s 311 of the Criminal Procedure Act 51 of 1977 (CPA), against the high court's judgment. Special leave to appeal was granted on a limited basis. The point of law to be decided upon was identified as 'the interpretation of s 165 of the CPA: the swearing in of witnesses by an interpreter ─ does that constitute a proper administration of the prescribed oath?'

[3] The crisp issue to be decided is whether the fact that the witnesses testifying against the respondent were sworn in by the interpreter at the regional court constituted a proper administration of the prescribed oath. If it did not, then the evidence must be treated as unsworn.

[4] In dealing with the point of law raised in this matter, it is important to examine a few applicable sections of the CPA. Section 161 provides that unless otherwise provided in any other section of the CPA or in terms of any other law, a witness shall give evidence orally at criminal proceedings. Section 162 requires a witness to testify under oath and stipulates how the oath must be administered. It provides as follows:

'162 *Witness to be examined under oath:-*

(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:-"I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God."

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.'

[5] In terms of s 163, a witness who objects to taking the prescribed oath or who does not consider it binding on their conscience shall instead make an affirmation

prescribed in that section. Section 164 makes provision for a judicial officer to admit the evidence of a witness who is unable to understand the import of the oath or affirmation if that judicial officer has admonished the witness to tell the truth.

[6] The key provision, s 165 of the CPA, provides as follows:

'Oath, affirmation or admonition may be administered by or through interpreter or intermediary

Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary *or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be*.' (My emphasis.)

[7] The high court did not refer to s 165 in its judgment. Counsel for the respondent pointed out that the text of s 165 that was referred to the high court during the appeal hearing was as set out in a leading text-book which, at the time, had omitted the words *'or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.*' Once s 165 is read with the inclusion of the words '*or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be',* it is plain that this is a procedure expressly authorised by the CPA*.* It also accords with long-established practice in criminal courts at all levels throughout South Africa.

[8] It is common cause that in this case the oath was administered to the witnesses by the interpreter in the presence of the judicial officer, as appears from the following passages in the record:

'Court: Full names and surname?

Witness: ….

Court: Let her take the oath.

Interpreter: Sworn in, Your Worship.'

The part relating to the complainant's resumption of her evidence after an adjournment is captured as follows in the transcript:

'Court: The witness is still under oath.
Interpreter: Confirmed, Your Worship.'
The same procedure was followed in respect of the other witnesses.

[9] Counsel for the respondent contended that the high court had correctly relied on this court's judgment in *Matshivha v The State*[1] in concluding that the oath had not been properly administered. *Matshivha* dealt with the admissibility of the evidence of a young witness. This court dealt comprehensively with the interpretation of s 162 read with s 164. No reference whatsoever was made to s 165 or to the involvement of an interpreter in the swearing in of a witness in that judgment. *Matshivha* is thus distinguishable. The high court's reliance on that judgment was therefore misplaced.

[10] The respondent's counsel also submitted that the administration of the oath can only take place in the presence of the judicial officer if the latter is aware of the content of the oath being administered by the interpreter. He argued that before the oath is administered, the responsibility resting on the shoulders of the judicial officer is to satisfy himself or herself that the witness who is about to testify does not fall into the category of those who may, instead of being sworn in, affirm in terms of s 163 or are admonished as contemplated in s 164. This, so the argument went, could be done by posing certain questions to the witness. He further submitted that the judicial officer must first ask the witness whether they have any objection to taking the prescribed oath and then enquire whether they regard the oath as binding on their conscience.

[11] The difficulty with this interpretation is that it imposes a burden on the judicial officer that is not a requirement in the CPA. Section 163(1) of the CPA contemplates that it is the witness who will raise an objection they may have to taking the oath. In the absence of objection, the oath may simply be administered and the court accepts that the witness regards the oath as binding on their conscience. None of the provisions of the CPA stipulate that the administration of the oath must ordinarily be preceded by any enquiry on the part of the judicial officer. The enquiries suggested by counsel are

[1] *Matshivha v The State* [2013] ZASCA 124; 2014 (1) SACR 29 (SCA).

sometimes made before the oath is administered, but it is not a defect in the proceedings if they are not made.

[12] Another contention advanced by the respondent was that s 165 enables the judicial officer to administer the oath through the interpreter, but does not authorize the judicial officer to instruct the interpreter to administer the oath on his own. This contention lacks merit, as it simply disregards the words 'or by the interpreter' in the last part of s 165. It was also submitted that an interpretation that accepted that an interpreter has the authority to administer the oath is flawed, as it is tantamount to the judicial officer abdicating his responsibility to an interpreter. As authority for this submission, counsel relied on the following remarks made by this court in *Motsisi v The State:*[2]

'The duty to ensure that a witness has properly taken the oath, affirmation or admonition is imposed on a presiding judicial officer. It is the judicial officer who has to be satisfied that the witness comprehends what it means to speak the truth. The fact that a judicial officer may utilise the services of an interpreter or an intermediary or a registrar of the court to communicate with a witness does not relieve the judicial officer of the duty to perform this function, but what it does is that it provides the judicial officer with a means of utilising the assistance of these functionaries to perform his or her functions. Their vital role is limited to ensuring, because of their skill, "that questions by the court to the child [witness] are conveyed in a manner that the child [witness] can comprehend and that the answers given by the child [witness] are conveyed in a manner that the court will understand"'.

[13] Those remarks pertained to the enquiry that a court must embark upon prior to admonishing a witness as contemplated in s 164. When read in their proper context, they do not support the respondent's argument. The provisions of s 164 are not applicable in this matter. To the extent that counsel also purported to rely on this court's judgment in *S v Machaba & another*,[3] that case dealt with the provisions of s 162. The provisions of s 165 were not referred to at all in that matter. Counsel's reliance on o*biter dicta* made in a different context is equally misplaced.

[2] *S v Motsisi & others* (513/11) [2012] ZASCA 59 (2 April 2012) at para 15.
[3] *S v Machaba & another* [2015] ZASCA 60; 2016 (1) SACR 1 (SCA) at para 8 & 9.

[14] Where a witness testifies through the interpreter, the interpreter is empowered to administer the oath if the judicial officer so prefers and if the interpreter does so in the presence or under the eyes of such judicial officer. In doing so, judicial officers are not abdicating their responsibilities; they are doing what is permissible in terms of the CPA. The phrase 'in the presence or under the eyes of the presiding judge or judicial officer' reflects the legislature's intention to ensure that the process unfolds under the observation of the judicial officer. As correctly mentioned in *S v Mahlaba & others,*[4] s 165 complements s 162 by extending the authority to administer the oath, affirmation and admonition to sworn interpreters[5] and intermediaries, if witnesses that are about to be examined testify through them. The swearing in of witnesses under those circumstances constitutes a proper administration of the prescribed oath.[6]

[15] For all these reasons, it follows that the appeal must succeed. The merits of the appeal were not considered by the high court, as it took the view that there was no admissible evidence. Consequently, the conviction and sentence imposed by the regional court must be re-instated and the case remitted to the high court for a hearing of the appeal on the merits.

[16] In the result, I grant the following order:

1 The appeal is upheld.

2 The order of the high court is set aside.

3 The conviction and sentence imposed by the regional court are reinstated.

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[4] Unreported judgment of FSHC, Case No 42/2015, delivered on 24 May 2016.

[5] Interpreters who are in the employ of the Department of Justice are sworn in upon taking their appointment. Rule 61 (1) of the Uniform Rules of Court provides that evidence be given in a language which the court or a party or its representative does not understand must be interpreted by a competent interpreter who has taken an oath 'to interpret faithfully and to the best of his ability in the languages concerned.' The oath for interpreters who execute their functions at the Magistrates' Court is provided for in Rule 68 of the Magistrates Courts' Rules. Evidence of a witness who testifies through an interpreter that has not been sworn is inadmissible. See *S v Naidoo* 1962 (2) SA 625 (A); *S v Kwali* 1967 (3) SA 193 (A).

[6] *S v Maloma* (No A376/2015) [2015] ZAGPPHC 496 (11 June 2015).

4 The matter is remitted to the high court for the appeal to proceed on the merits.

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M B Molemela
Acting Judge of Appeal

Appearances:

For Appellant:	N J Carpenter (prepared heads)
	J Neveling (appeared)
	with him D G Jacobs)
Instructed by:	National Director of Public Prosecutions, Mmabatho
	National Director of Public Prosecutions, Bloemfontein
For Respondent:	J Engelbrecht SC (with him M Augoustinos)
Instructed by:	S C Mosito Attorneys
	c/o D C Kruger Attorneys, Mahikeng
	Symington & De Kok Attorneys, Bloemfontein