IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No. : 7023/2008

In the matter between:-

NKOLA JOHN MOTATA Applicant

and

D NAIR NO First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

CORAM: HANCKE, J *et* PICKERING, J

HEARD ON: 3 JUNE 2008

JUDGMENT BY: HANCKE *et* PICKERING, JJ

DELIVERED ON: 11 JUNE 2008

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[1] This is an application for the review of a ruling made by the first respondent herein, the Chief Magistrate of Johannesburg, on 7 November 2007, during the course of a criminal trial in which the applicant stands accused of certain offences. The first respondent has elected to abide the decision of this Court whereas the second respondent, the

Director of Public Prosecutions (Witwatersrand Local Division) has opposed the relief sought herein.

[2] Applicant, a Judge of the High Court, was arrested in the early hours of 6 January 2007 consequent upon a collision allegedly involving the motor vehicle being driven by him and the boundary wall of a property belonging to a certain Mr. Richard Baird. On 26 September 2007 applicant appeared in the Johannesburg Magistrate's Court before the first respondent charged, on count 1, with drunken driving in contravention of s 65 (1) of Act 93 of 1996, as well as with certain alternatives thereto and, on count 2, with defeating or obstructing the ends of justice, alternatively, resisting arrest in contravention of s 67 (1)(a) of Act 68 of 1995.

To all these charges applicant pleaded not guilty, electing not to provide any plea explanation.

[3] The first witness called by the State was the aforesaid Mr. Baird. During the course of his testimony the State sought to introduce into evidence five video clips, allegedly recorded by Mr. Baird with his cellphone on the night in question. It is common cause that the video clips contain no visual images but are aural recordings which, so the State contends, constitute relevant evidence of applicant's condition and conduct at the scene of the collision.

[4] It appears from Mr. Baird's testimony that the data files relating to the video clips taken by him were stored on a so-called SD memory card in the cellphone. Later that same day Mr. Baird downloaded the video clips to his personal laptop computer thereby transferring the data from the SD memory card to the computer. On 20 August 2007, however, prior to the commencement of the trial, his cellphone had fallen and had been irreparably damaged. A digital camera with which Mr. Baird had allegedly also taken certain photographs on the night in question was allegedly stolen sometime early in September 2007. The relevant SD memory card was missing. Eventually, after the commencement of the trial, the five video files were copied from his laptop computer onto a memory stick and then onto a compact disc. A transcript of the contents of the five video clips was also made.

[5] The defence objected to the playing of the video clips in Court as well as to the introduction into evidence of the transcript. It was submitted by counsel who represented applicant at the trial that applicant's constitutional rights to a fair trial dictated that a trial-within-a-trial be first held in order to determine the admissibility of the video clips.

Having heard argument the first respondent ruled, on 25 October 2007, that "*there should be a trial-within-a-trial after which the Court will give a ruling on admissibility*."

[6] On 7 November 2007 the State proceeded to lead the

evidence of Mr. Baird in a trial-within-a-trial and again sought to introduce the five video clips and transcript into evidence. Once again the defence objected thereto, the gravamen of the objection being that the playing of the video clips and the introduction of the transcript, prior to the Court having ruled on their admissibility, would constitute a gross irregularity which would severely prejudice applicant and would, in effect, defeat the object of the trial-within-a-trial.

The first respondent, however, was not persuaded thereby and ruled that the "*State may play the recordings and deal with the transcript in the trial-within-a-trial in order that the Court may determine its admissibility after the trial-within-a-trial.*"

[7] At that stage the defence applied for, and was granted, a postponement of the trial in order to take the first respondent's ruling on review to the High Court. In due course the present application was launched in which applicant seeks the following order:

"1. That the ruling by the first respondent on the 7 November 2007 to the effect that the five (5) video recordings allegedly taken by Mr. Baird at the scene of the alleged crime be played in Court during the trial-within-a-trial to test their admissibility be reviewed and set aside;

2. That the first respondent be and is hereby ordered and directed to continue with a trial-within-a-trial without the video and audio recordings being played;
3. That pending finalisation of this review the respondents be and are hereby ordered, restrained and interdicted from proceeding with the criminal proceedings against the applicant in the Magistrate's Court Johannesburg under case no 63/968/07;
4. That the costs of this application be paid only by those respondents who oppose it."

[8] In his affidavit in support of the application, applicant contends that first respondent's decision to allow the State to play the recordings and to adduce the evidence of the transcript thereof constitutes a gross irregularity which is "*severely prejudicial*" to him in the conduct of his defence and which interferes with his constitutional right to a fair trial. He submits, *inter alia*, that the "*practical effect of watching and listening and observing the recordings in court by first respondent of contested evidence is to admit in advance evidence which may be self-incriminating and as such could be difficult to erase from the mind of first respondent even if*

he may theoretically rule it inadmissible at the end of a trial-within-a-trial." Applicant submits accordingly that the intervention of this Court is warranted at this stage of the proceedings to prevent a grave injustice being occasioned to him.

[9] It is trite that as a general rule a High Court will not by way of entertaining an application for review interfere with incompleted proceedings in a lower court. As stated in **WAHLHAUS AND OTHERS v ADDITIONAL MAGISTRATE, JOHANNESBURG AND ANOTHER** 1959 (3) SA 113 (A) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point decided against the accused by a magistrate is fundamental to the accused's guilt. At 119H-120A Ogilvie Thompson JA (as he then was) stated as follows:

> "It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief –

by way of review, interdict, or mandamus - against the decision of a magistrate's court given before conviction. (See Ellis v Visser and Another 1956 (2) SA 117 (W), and R v Marais 1959 (1) SA 98 (T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansdown (6th Ed., vol. I p.750) state:

'While a Superior Court having jurisdiction in review or appeal will be slower to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained … . In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrate's court."

At 120D the learned Judge continued:

"[T]he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps a fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction. (See too the observation of Murray J at pp 123 – 124 of Ellis case *supra*.) As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

[10] In **ISMAIL AND OTHERS v ADDITIONAL MAGISTRATE, WYNBERG AND ANOTHER** 1963 (1) SA 1 (A) the following was stated at 5H-6A:

"I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (AD) at p 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies. Although there is no

> sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in unterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained.' (Wahlhaus's case, supra at p120)."

[11] These principles have been applied in a number of later cases including **SITA AND ANOTHER v OLIVIER N.O. AND ANOTHER** 1967 (2) SA 442 (A) at 447E-F; **LOMBARD EN 'N ANDER v ESTERHUIZEN EN 'N ANDER** 1993 (2) SACR 566 (W) at 569 e-f; **S v WESTERN AREAS LTD AND OTHERS** 2005 (5) SA 214 (SCA) at 224D.

[12] It has been stressed that underlying the reluctance of the Courts to interfere in unterminated proceedings in a lower court is the undesirability of hearing appeals or reviews

piecemeal. See: **S v THE ATTORNEY-GENERAL OF THE WESTERN CAPE; S v REGIONAL MAGISTRATE WYNBERG AND ANOTHER** 1999 (2) SACR 13 (C) at 22 e–f; **NOURSE v VAN HEERDEN N.O. AND OTHERS** 1999 (2) SACR 198 (W) AT 207 D-E; and **S v WESTERN AREAS LTD AND OTHERS** *supra* where, at 226B Howie P stated:

> *"Long experience has taught that in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course."*

[13] The present case, however, so it was submitted on behalf of applicant, was indeed a case where this Court should not hesitate to interfere in the proceedings in the court a quo as a grave injustice would be occasioned to applicant should the video clips be played in court and the transcript introduced into evidence.

[14] Mr. Tokota, who with Mr. Matebese appeared for the applicant, submitted that it was clear from first respondent's reasons in ruling that a trial-within-a-trial be held that the purpose thereof was "*not to test the authenticity of the evidence but to determine the admissibility thereof.*" The alleged damage to the cellphone and theft of the digital camera gave rise, so it was submitted, to a reasonable suspicion that the recordings might have been manipulated, an issue, it was submitted, which had nothing to do with authenticity and which could only be determined by expert evidence. It was submitted further that in these circumstances the principles analogous to the testing of the admissibility of confessions were applicable. In particular, so it was submitted, it should be borne in mind that the purpose of a trial-within-a-trial is to insulate the enquiry relating to the admissibility of that evidence as a separate compartment of the main trial and distinct from the determination of guilt in the main trial. See: **S v DE VRIES** 1989 (1) SA 228 (A). It was submitted therefore that the playing of the video clips

would be tantamount to the trial court reading the contents of a confession, the inadmissibility of which was contested, prior to the determination of its admissibility. This, so it was submitted, with reference to **S v GABA** 1985 (4) SA 734 (A) at 749H-I, would gravely prejudice applicant.

[15] It is necessary first to deal with the submission that the authenticity of the recordings is not an issue to be determined at this stage of the proceedings. We have considerable difficulty in grasping the basis upon which it is suggested that the issue of the possible manipulation of the recordings is distinguishable from that of authenticity. If, after having been downloaded from the cellphone, the recordings were manipulated or tampered with they are, to that extent, no longer authentic copies of the original video clips. The issue of the possible manipulation of the recordings goes, in our view, straight to the heart of the issue of authenticity and cannot be divorced therefrom as applicant seeks to do.

[16] Apart from this the submission that the purpose of the trial-within-a-trial was "*not to test the authenticity of the evidence but to determine the admissibility thereof*" flies in the face of the submissions which were addressed to the first respondent in support of the application for a trial-within-a-trial to be held and in the light of the first respondent's reasons when ruling in favour thereof.

[17] In his submissions the defence counsel made a number of statements in which he referred to the issue of "*authenticity*". Certain of his submissions were as follows, namely:

> "The issue of originality and authenticity needs to be established up front";

"What we contend for is to be allowed to test the authenticity of the material prior to the Court ruling on its provisional admissibility";
"Let me demonstrate that authenticity and originality is in issue";
"The accused is being deprived of the opportunity to prevent the provisional admission of the evidence through his taking issue with the authenticity and the originality thereof";

> "Let's test the authenticity and the originality";
>
> "It is clear from the authorities that both the issue of originality and authenticity impact on the issue of admissibility";

"In the light of the aforegoing it is submitted that the admissibility of the video and/or tape recordings is to be decided inter alia with reference to its

originality and authenticity";

And, finally

> "Let's first decide the authenticity."

[18] In ruling that a trial-within-a-trial be held the first respondent restated the defence submissions, with respect correctly, as follows:

> "The defence has countered by requesting that the State not be summarily called to lead evidence in this manner but for the Court to determine the admissibility of the evidence only after its authenticity and originality has been determined in a trial-within-a-trial."

And

> "[T]he defence has objected to the admission of such evidence prior to the authenticity of the evidence and originality thereof being tested in the court."

[19] After various other references to the defence submissions

concerning the need to test both the authenticity and originality of the recordings prior to their admission into evidence the first respondent concluded by stating:

> "I am of the view that the objection by the defence for the State to tender evidence in the manner that it request is to be sustained and that the request by the defence for there to be a trial-within-a-trial to determine the issue of admissibility and also I read into that request for the court to answer the question: Is it safe for such evidence to be presented, determine that. Is it safe, and once you have determined that you can deal with the issue of admissibility at that stage. The ruling of this court is that there should be a trial-within-a-trial after which the court will give a ruling on the admissibility." (sic)

[20] In his later judgment in the trial-within-a-trial, in which he held that the State could play the recordings, he stated that his intention in holding a trial-within-a-trial was "*to safeguard*" applicant and to enable "*the defence and the court to test the weight, trustworthiness, caution, reliability and originality*" of the recordings. In our view, in the light of what is set out

above, it is clear that the reason for the holding of the trial-within-a-trial was indeed to test the authenticity and originality of the video clips prior to their admission into evidence.

[21] There has been considerable judicial debate concerning the prerequisites for admissibility in evidence of video and tape recordings. Ranged against the decisions in the Natal Provincial Division in the cases, in particular, of **S v SINGH AND ANOTHER** 1975 (1) SA 3 (N), and **S v RAMGOBIN AND OTHERS** 1996 (4) SA 117 (N) are the decisions in the Transvaal Provincial Division, in particular, in **S v BALEKA AND OTHERS** (1) 1986 (4) SA 192 (T) and **S v BALEKA AND OTHERS** (3) 1986 (4) SA 1005 (T), in which latter cases the **SINGH** and **RAMGOBIN** decisions were expressly disapproved of. See too **S v MPUMLO AND OTHERS** 1986 (3) SA 485 (E). In **S v NIEWOUDT** 1990 (4) SA 217 (A) Hefer JA pointed out that the difference in approach between these cases came down to the question of whether proof of the authenticity of a recording tendered in evidence was a

prerequisite for admissibility. Whereas in the **SINGH** and **RAMGOBIN** cases it was held that it was indeed a prerequisite, the contrary was held in the **BALEKA** cases on the grounds that a distinction must be drawn between the originality of a recording and the authenticity thereof, Van Dijkhorst J stating that, whereas originality affected admissibility, authenticity did not.

[22] In **S v BALEKA AND OTHERS** (3) *supra* van Dijkhorst J stated as follows at 1026 C-D:

> "It follows from what I have said above that I deal with tape recordings as I would deal with any other type of real evidence tendered where its admissibility is disputed. The test is whether it is relevant. It will be relevant if it has probative value. It will only have probative value if it is linked to the issues to be decided. That link will often have to be supplied by evidence of identification of voices on the tape, where the identity of a speaker is in issue. This proof of relevancy need only be prima facie proof. Consequently no trial-within-a-trial should be held on the question of admissibility…"

[23] In **S v MPUMLO** *supra* Mullins J stated at 490 h-i that a video film like a tape recording,

> "is real evidence as distinct from documentary evidence, and, provided it is relevant, it may be produced as admissible evidence, subject of course to any dispute that may arise either as to its authenticity or the interpretation thereof."

[24] In **S v NIEWOUDT** *supra* Hefer JA, although expressing at 231D the view that the approach in the **BALEKA** cases appeared to be more acceptable, left open the question whether it is necessary, for the admission in evidence of audio-tape recordings, to prove the authenticity of the tape recording. He proceeded, however, to deal with certain of the *dicta* in the Natal decisions. The English headnote of the report correctly reflects what was stated by the learned Judge at 232F-233B namely:

> "Even if it is accepted that proof of authenticity is a prerequisite for the admissibility of a tape recording, the recording cannot be excluded from the evidence solely on the ground that

> interferences appear in it. On the contrary, when it is borne in mind that the danger which has to be guarded against is the admission of a recording in respect of which there is a reasonable possibility that it is a distorted version of the reality, it is obvious that every "interference" has to be examined in order to determine whether such a possibility exists. But not every interference necessarily or even probably points to the absence of authenticity: it would be absurd, for example, to exclude a recording from which part of a conversation had been accidentally erased solely because of such defect. Naturally the evidential value thereof would, depending on the materiality of the missing part, be affected but there can be no objection to the admissibility of the recording where there is no suggestion of any lack of authenticity. The same applies to deliberate interferences."

[25] In the present case, despite the fact that the decision in **S v BALEKA AND OTHERS** (3) *supra* was binding on him, the first respondent, clearly alive to and motivated by the constitutional imperative of applicant's right to a fair trial, decided in the exercise of his discretion to hold a trial-within-a-trial. In doing so he has afforded applicant the safeguard

of having the authenticity of the recordings determined prior to their admission into evidence. This has rendered it unnecessary to decide whether or not proof of authenticity is in fact a prerequisite for the admissibility of the recordings and no more need be said thereanent.

[26] It will have been noted that thus far nothing has been said concerning the issue of originality. It is common cause that the recordings which the defence wishes to introduce into evidence are not the originals. In **S v SINGH AND ANOTHER** *supra* Leon J, with whom Hoexter J concurred, held at 333H that before the Court would admit tape recordings into evidence it had to be established that they were the original recordings. If sufficient doubt was raised by the defence to indicate that it was likely that they were not the originals and so not the "*primary and best evidence*", the Court had no alternative but to reject them.

[27] In **S v RAMGOBIN**, *supra*, however, Milne JP, although bound by the decision in **S v SINGH AND ANOTHER**,

supra, expressed certain reservations at 134E about the correctness of that decision in this regard. In doing so he referred, at 134J-135B, to certain American decisions where copies had been admitted on the grounds that they were, *inter alia*, as faithful as the originals. He stated, however, that in these cases the original was either produced or its absence was explained to the satisfaction of the Court, and the faithfulness of the copy was established by evidence other than the tape recording itself.

[28] In **S V BALEKA AND OTHERS** (1) *supra,* van Dijkhorst J observed that the learned Judges in **S v SINGH AND ANOTHER**, *supra* had not differentiated between originality and authenticity. As stated by him at 195H:

> "Originality is a requirement flowing from the so-called best evidence rule and is considered when admissibility is decided upon. Authenticity is not a question of admissibility, but of cogency and weight."

Van Dijkhorst J expressly disapproved of the dictum in **S v**

SINGH *supra* stating at 199G that in his view such recordings were real evidence to which the rules of evidence relating to documents were not applicable. He stated further at 199J–200A that, even were he to be wrong in that approach, secondary evidence of the contents of originals was admissible in circumstances where the originals were on the probabilities for all practical purposes unobtainable. Such secondary evidence could take the form of a copy. Whether it was trustworthy was for the Court to decide at the end of the case. In **S v BALEKA AND OTHERS** (3), *supra*, van Dijkhorst J reiterated the views expressed by him in the earlier case stating at 1025B that the requirement the recordings be the originals

> "flows from the equation of tapes with documents and the application of the best evidence rule to the former. I can find no ground or authority in our law for this approach."

At 1025C the learned Judge stated further:

> "I can see no objection to the use of a copy, provided the Court

is satisfied that it accurately reflects what was recorded."

[29] The defence has not objected to the admissibility of the recordings on the basis that they are copies and not originals nor, in our view, would any such objection have succeeded in the light of the decisions in **S v BALEKA AND OTHERS** (1) and (3) *supra*, decisions emanating from this Division which are binding on first respondent. Even on an assumption that **S v BALEKA AND OTHERS** (1) and (3) *supra* were wrongly decided there is much to be said for the approach of the American Courts referred to by Milne JP in **S v RAMGOBIN** *supra* at 134J, namely, that a copy may be admitted in cases where the absence of the original is explained to the satisfaction of the Court and the faithfulness of the copy is established by evidence other than the tape recording itself.

[30] That then brings us to a consideration of the submission by applicant's counsel to the effect that the principles analogous to the testing of the admissibility of confessions are

applicable to a matter such as the present with the consequence that the State is precluded from playing the video clips prior to the determination of their admissibility.

[31] In our view these submissions cannot be upheld. They are based on a wrong premise, namely, the equation of the contents of the recordings with the contents of a confession. As submitted by Mr. Van Zyl, who appeared for the State, the principles enunciated in the cases relied on by applicant, namely, **S v DE VRIES** *supra* at 233H-I and **S v MALINGA** 1992 (1) SACR 138 (A) at 141i-j have regard to trials within trials where the admissibility of confessions has been disputed on the basis that they were not voluntarily made and did not comply with the provisions of s 217 of Act 51 of 1977.

[32] No such issue arises here. It has not been contended that the contents of the recordings amount to an inadmissible confession or admission. Applicant has, in his affidavit, submitted that the evidence "*may be self incriminating*" and

that the recordings should therefore not be played prior to a ruling being made as to their admissibility. The fact that the contents of the recordings may incriminate the applicant does not, however, render them confessions to which the provisions of s 217 of Act 51 of 1977 are applicable.

[33] In **S v M** 2002 (2) SACR 411 (SCA) the following was stated at 432c-d:

> "Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say-so of a witness (see, for example, R v Jacoy (1988) 38 CRR 290 at 298) the reason being that it usually possesses an objective reliability. It does not 'conscript the accused against himself' in the manner of a confessional statement (R v Holford [2001] 1 NZLR 385 (CA) at 390). The letter in this case can be classified as real evidence of a documentary nature (notwithstanding the doubts which the Court a quo expressed). Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness-box). Schmidt Bewysreg 4th ed at 326,

Hoffman & Zeffertt The South African Law of Evidence 4th ed at 404, Cross & Tapper on Evidence 8th ed at 48."

[34] **S v RAMGOBIN AND OTHERS** *supra* is instructive in this regard. In that matter a trial-within-a-trial was held on the issue of the admissibility in evidence of certain audio and video tape recordings. Both the State and the defence adduced evidence of an expert witness and then closed their respective cases in the trial-within-a-trial. During the course of argument counsel for the State sought leave to reopen his case in the trial-within-a-trial in order to present evidence as to the accuracy of certain of the recordings as the defence had contended that the failure to lead such evidence resulted in the recordings being inadmissible in evidence. In this regard defence counsel relied in particular on the absence of any authenticating witness in relation to any of the tape recordings as well as to the absence of any evidence of the identity of the speakers. Counsel for the State indicated that he had not appreciated that it was necessary or appropriate for the purposes of the trial-within-a-trial to lead direct

evidence dealing with the accuracy of the tape recordings and that the accused were present and spoke at the meetings to which the tape recordings related and that what was said was sufficiently intelligible to be admissible.

Milne JP set out the views of counsel for the State at 177C:

> "It is certainly clear that the counsel for the State regarded the 'contents' of the tape recordings as being analogous to the 'contents' of a confession, and proceeded on the basis that it is only in exceptional cases (for example, where it is said that the contents of a confession were what the police told the accused to say) that the Court can even have regard to the contents of a confession when determining its admissibility."

These views, so Milne JP indicated, were erroneous and based, *inter alia* upon a misapprehension as to the law.

[35] Furthermore, the evidence is not tendered at this stage in order to establish the guilt of the applicant as was submitted by Mr. Tokota. The only issue at this stage is the authenticity

of the recordings, an issue which encompasses proof of reliability, veracity, originality and accuracy.

[36] It was submitted on behalf of applicant that the issue of the possible manipulation of the recordings can only be dealt with by way of expert evidence without reference to the contents of the recordings themselves. This submission, in our view, cannot be sustained.

[37] As submitted by Mr. Van Zyl examples abound of cases where judicial officers have deemed it expedient to listen to recordings during the course of a trial in order to determine their authenticity. See, for instance, **R v KOCH** 1952 (3) SA 26 (T) at 29H-30A; **R v BEHRMAN** 1957 (1) SA 433 (T) at 435A; **S v VEII** 1968 (1) PH H49 (A); **S v HOLSHAUSEN** 1982 (2) SA 699 (D) at 700A-B; **S v SINGH AND ANOTHER** *supra;* **S v RAMGOBIN AND OTHERS** *supra* and **S v MPUMLO AND OTHERS** *supra*.

[38] In **S v NIEWOUDT** *supra* Hefer JA stated as follows at 238D:

> "Daarenteen is ek nie bereid om 'n submissie wat Mnr. De Villiers op een stadium gemaak het (klaarblyklik sonder dat hyself veel geloof daarin gehad het) te aanvaar nie, nl dat daar slegs gelet moet word op wat die deskundige getuies se waarnemings was. Om te hoor watter woorde in hierdie soort opname voorkom, verg geen deskundigheid nie en 'n geregshof kan in elk geval nie sy funksie aan die getuies delegeer nie. Natuurlik moet ag geslaan word op die getuienis; maar uiteindelik is dit die Hof se taak om te bepaal wat die woorde is en deur wie hulle gebruik is."

[39] As stated by Hefer JA, where the authenticity of a tape recording is in issue in a case where the State wishes to tender the tape recording as evidence, the crucial question is whether the State has excluded the reasonable possibility of a false recording. In this regard the English headnote at 220F correctly reflects what was said by the learned Judge at 238G-I, namely:

> "That question has to be answered with reference to the cumulative effect of all available indications without the State being expected to exclude every separate factor which might count in favour of the

> accused/appellant. Therefore, where it is alleged that there is a strange voice on the recording (which would be an indication of the recording not being authentic) and the Court is not able to determine, from its own observations and with the aid of expert evidence, whether a strange voice does occur on the recording, the Court's aforementioned inability together with all other relevant facts should be considered as part of the totality of the evidence in order to determine whether the reasonable possibility of a false recording has been excluded." (Our emphasis)

[40] In the result we are satisfied that in order to determine the authenticity and originality of the recordings and hence their admissibility, the first respondent is entitled, and indeed obliged, to listen to the recordings. The various witnesses, including Mr. Baird, will be afforded the opportunity of testifying as to whether or not the recording accurately portrays the events. The defence case has not as yet been put to Mr. Baird. If it is the defence case that the recordings have in some way been manipulated or are not in fact an accurate portrayal of the events on the night in question or that the transcript of the video clips is incorrect this will no

doubt be raised with the State witnesses during cross-examination and appropriate evidence will be led in due course. Compare **S v RAMGOBIN AND OTHERS** *supra* where at 124D Milne JP stated:

> "If witnesses who testify as to the accuracy of the film or tape recording are not cross-examined, and/or the accused does not give any evidence to the effect that the recording is not accurate, that is clearly an important factor and may be a crucial one."

[41] The applicant has been afforded the protection of such evidence being led in the trial-within-a-trial. Should the recordings be found to be admissible in evidence the weight to be accorded thereto will still have to be determined by first respondent at the end of the case bearing in mind too that a ruling on admissibility in a trial-within-a-trial is interlocutory and may be reviewed at the end of the trial in the light of later evidence. **S v MKWANAZI** 1966 (1) SA 736 (A).

[42] Should they, however, be declared inadmissible then, in the

light of what we have said above, no prejudice will have been occasioned to applicant. The applicant complains, however, of the prejudicial effect of first respondent "*watching and listening and observing the recordings in Court*". Judicial officers are almost daily confronted with similar situations such as, for instance, where a confession provisionally held to be admissible is later excluded from evidence or where hearsay evidence provisionally admitted is later excluded. Their training equips them to disabuse their minds of such inadmissible evidence. As van Dijkhorst J put it in **S v BALEKA AND OTHERS** (1) *supra* at 196F:

> "To sort through contradictory and often false evidence and sort the wheat from the chaff is the daily task of the judicial officer. It is done in the case of viva voce evidence and can just as easily be done in the case of tape recordings and videos."

[43] In all the circumstances we are of the view that nothing has been put before us to show that any grave injustice or failure of justice is likely to ensue if the recordings are played in court in the course of the trial-within-a-trial. That being the

case there are no grounds upon which this Court may intervene at this stage of the proceedings in the court below. The application therefore falls to be dismissed.

[44] Applicant originally sought an order for costs against such of the respondents as opposed the application. This in turn led Mr. van Zyl to seek an order for costs against applicant in the event of the application being dismissed. Having regard to the fact that this is a criminal matter in which an accused is not usually saddled with costs, we are of the view that it is not appropriate to make any order as to costs. Cilliers, **Law of Costs** (Third Edition), par. 12.19 – 12.24.

[45] The following order is made:

1. The application is dismissed.

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S.P.B. HANCKE **J.D PICKERING**
JUDGE **JUDGE**

On behalf of applicant:	Adv. B.R. Tokota SC Assisted by: Adv. Z.Z. Matebese Instructed by: S. Ngomane Inc. PRETORIA
On behalf of second respondent:	Adv. Z.J. van Zyl SC Instructed by: The State Attorney PRETORIA