THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 102/2002
REPORTABLE

In the matter between:

Robert MATSHIKWE, Magistrate, Stutterheim
Appellant

and

Mbulelo Clement Erasmus MASHIYA Respondent

Before: Howie P, Schutz JA, Streicher JA, Cameron JA, and Mthiyane JA
Heard: 9 May 2003
Judgment: 30 May 2003

Magistrates' Courts – Higher courts' supervision of manner of functioning – Order that magistrate hear argument at specified time and give judgment an hour later – No case made out for such order – Order in circumstances unjustified

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JUDGMENT

CAMERON JA

CAMERON JA:

[1] The question in the appeal is whether an order a High Court judge issued directing a magistrate to hear argument in an opposed bail application by not later than 15h00 on the day of the order, and to give judgment an hour later, was in the circumstances of this case justified.

[2] The appellant is the district Magistrate at Stutterheim. The respondent, a medical doctor in private practice, is the district surgeon of Whittlesea. On Saturday 30 June 2001 he was arrested on a charge of raping his 17-year old stepdaughter. He was detained for two nights at the Stutterheim Police Station. When on the Monday he was brought before a colleague of the appellant, his attorney applied for bail. The prosecution requested but was refused a seven-day postponement of the proceedings.[1] Since the investigating officer was not before court, the matter was postponed to the next day.

[3] On the Tuesday the appellant (to whom I shall refer as 'the magistrate') presided. He, too, refused a seven-day postponement. So the bail hearing commenced. The

[1] Section 50(6)(d) of the Criminal Procedure Act 51 of 1977 permits a lower court to postpone a

investigating officer testified opposing bail. The prosecution closed its case. The respondent testified in support of bail. He also closed his case. The magistrate thereupon postponed the matter to Thursday 12 July – nine days later – 'for judgment'. The respondent's attorney, Mr Zuko Lwazi Tini, objected. The magistrate told him that the earliest date available was Wednesday 11 July – eight days hence. The respondent was to remain in custody.

[4] Mr Tini sought the advice of senior counsel. Thereafter he approached the magistrate in chambers, requesting him to re-call the matter. The magistrate refused. Undaunted, Mr Tini brought an urgent application in the High Court in Grahamstown. The order he sought was to compel the magistrate to hear argument and give judgment in the bail application.

[5] The application came before Pillay J on Thursday 5 July. He issued a rule nisi calling on the magistrate to show cause by 12h00 the next day why the order sought should not be granted. The order was faxed to the magistrates' offices, Stutterheim.

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bail application for up to seven days at a time if amongst other reasons it has insufficient information or evidence at its disposal to reach a decision.

There was no response. At about noon on Friday 6 July Pillay J granted the following order:

> 1. That the District Magistrate Stutterheim, Mr Matshikwe, be directed to hear the addresses [of the prosecutor and the defence attorney] by not later than 15h00 on 6 July 2001.
> 2. That the District Magistrate of Stutterheim, Mr Matshikwe, be directed to give judgment [in the bail application] by not later than 16h00 [on 6] July 2001.

[6] The order was faxed to Stutterheim and at about 12h50 the matter was called. The magistrate heard both parties' arguments, as the order directed. But he declined to comply with its second part. He stated that he was 'not in a position to decide and give a just decision':

> 'I want to evaluate the evidence and your submissions carefully and apply my mind to the matter. I will be able to give a well-considered judgment in this matter on 11/7/2001.
> The accused in custody.
> Court adjourns.'

[7] By now there was (as the appellant's counsel put it during argument) a considerable amount of 'needle' in the dispute. On Saturday Mr Tini went back to Grahamstown. Notwithstanding the proceedings still pending before the magistrate, he applied to the full bench of the High Court for the respondent's release on bail. He also applied for the magistrate to be committed to prison for contempt of court. The matter came before Kroon and Leach

JJ. They first directed that the Director of Public Prosecutions in the Eastern Cape be notified. Then on the Saturday evening they heard argument. There was no appearance for the magistrate. The DPP however appeared. He stated that on the basis of the record he was unable to contend that bail should have been refused. The judges considered that there were grounds to exercise the High Court's inherent jurisdiction to intervene in the uncompleted proceedings below. They granted bail of R4 000, subject to conditions – the respondent had to vacate the family home until the case was finalised; not contact the complainant or her mother; and report to the police weekly.

[8] The sole issue before us is the order Pillay J granted on Friday 6 July. The events of the Saturday do not show that the appeal is pointless because the respondent was released on bail. On the contrary, they show that the issues are live, since in releasing the respondent the full bench expressed the prima facie view that the magistrate had committed contempt of court in not complying with the order of Pillay J. The judges therefore issued a further rule nisi calling on the magistrate to show cause why he should not be committed to prison for contempt of that order, and why he should

not pay the costs of both the bail and contempt proceedings in the High Court from his own pocket (*de bonis propriis*) on a punitive scale. The fate of Pillay J's order, leave to appeal against which was granted by this Court, has a bearing on the subsequent order.

[9] The respondent himself has no further interest in the question and was not represented before us. In the interests of full argument, the Court approached the Johannesburg Bar for assistance, and its members Ms Kathree and Ms Cassette submitted written argument and appeared *pro amico*. (I shall refer to the Bar, albeit somewhat loosely, as 'the amicus'.) We are indebted to counsel for performing this task in the public interest, as well as for their valuable submissions.

[10] At the outset Mr de Bruyn for the appellant drew our attention to the practice direction in the Eastern Cape High Court requiring that two judges hear appeals and reviews from magistrates' courts.[2] He correctly characterised the application before Pillay J as necessarily entailing either an appeal from or a review of the magistrate's decision to postpone the question of bail (coupled

[2] See Rule 19(b) of the Rules of Practice in the Eastern Cape Division of the High Court of South

with an application for a mandatory order), and therefore contended that since the judge sat alone his order was incompetent.

[11] It would of course be unfortunate to decide a matter of such broad importance on so narrow and formalistic a ground. But in any event the Supreme Court Act provides that during court vacations one judge 'shall be competent to exercise all the powers, jurisdiction and authority of a court' of the division (except an appeal from a fellow judge).[3] Since the matter came up in vacation Pillay J was thus entitled to deal with it.

[12] So it is the substance of the order and not the technicalities of its provenance that we must deal with. Counsel for the magistrate made a radical attack upon the order, submitting that it was in principle invalid and irregular because it undermined the independence, dignity, effectiveness and functioning of the magistracy. He also contended that the order inhibited the right to a fair trial, by rushing the magistrate into a decision, and for the same reason infringed and inhibited women's rights, in that it could have led to a guilty and dangerous person wrongly being

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Africa, issued with effect from 1 May 2002 (in apparently identical terms to its predecessor),

granted bail. The amicus, in full and detailed submissions, defended the order, contending that the High Court has the power to grant a compulsory order (mandamus) to require a magistrate to dispose of a bail application urgently. Given the urgency of all bail applications, the magistrate had a duty to dispose of it as urgent – and justice therefore required that Pillay J issue the order.

[13] That the higher courts have supervisory power over the conduct of proceedings in the magistrates' courts in both civil and criminal matters is beyond doubt. This includes the power to intervene in unconcluded proceedings. This Court confirmed more than four decades ago that the jurisdiction exists at common law.[4] It subsists under the Constitution, which creates a hierarchical court structure[5] that distinguishes between superior and inferior courts by giving the former but not the latter jurisdiction to rule on the constitutionality of legislation and presidential conduct[6] as well as inherent power.[7] The Constitutional Court has emphasised the

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contained in H Erasmus *Superior Court Practice* D4-1 at D4-8.
[3] Supreme Court Act 59 of 1959 s 13(5).
[4] *Wahlhaus v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) 119-120.
[5] Constitution s 166; *S v Rens* 1966 (1) SA 1218 (CC) para 28; *S v Steyn* 2001 (1) SA 1146 (CC) para 15; *van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) paras 19ff.
[6] Constitution sections 167-170.
[7] Constitution s 173.

role of the higher courts in ensuring 'quality control' in the magistrates' courts, and the importance of the High Court's judicial supervision of the lower courts in reviewing and correcting mistakes.[8] This entails, as Chaskalson CJ has observed, that the higher courts can 'supervise the manner in which' the lower courts discharge their functions.[9] His general formulation echoes the provisions of the Criminal Procedure Act, which provides that in criminal proceedings subject to review in the ordinary course the High Court may, amongst many ample powers, 'remit the case to the magistrate's court with instructions to deal with any matter in such manner as' it may think fit.[10]

[14] The higher courts have however emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity[11] – where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the

[8] *S v Steyn* 2001 (1) SA 1146 (CC) paras 17, 19, 20 (Madlanga AJ, for the Court).
[9] *Van Rooyen* (above) 2002 (5) SA 246 (CC) para 24, per Chaskalson CJ for the Court.
[10] Act 51 of 1977 s 304(2)(c)(v).
[11] *Eliovson v Magid and Another* 1908 TS 558 per Innes CJ at 561: 'The case is a very special and peculiar one'. In *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357 at 360 Gardiner JP (Watermeyer and Jones JJ concurring) envisaged instances where a magistrate tried a case in the absence of the accused, or refused to allow the accused legal assistance.

Constitution.[12] At the same time, although the cases in which intervention has actually occurred are uncommon,[13] this Court has refused to define or limit the circumstances in which intervention would be justified.[14] The categories remain open.[15]

[15] A High Court challenge to a magistrate's decision to postpone judgment in a bail application is in this sense unprecedented. But in principle it falls well within the jurisdiction, and it cannot be doubted that the power to intervene in a suitable case exists. I did

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[12] *Levack and Others v Regional Magistrate, Wynberg and Another* 2003 (1) SACR 187 (SCA) para 27.

[13] In *Eliovson v Magid* (above) a magistrate ordered a 'futile' commission to take evidence in a foreign country that was clearly irrelevant to the issues he had to try. The High Court set aside his order and remitted the matter to the magistrate 'for judgment'. In *R v Willie Boon* 1912 TPD 1136, a magistrate convicted the accused on various charges, but after learning of his previous convictions purported to convert the trial from its commencement into a preparatory examination into more serious charges. An interdict was issued prohibiting him from doing so. In *Behrman v Regional Magistrate, Southern Transvaal and Another* 1956 (1) SA 318 (T), the court directed the magistrate to order that particulars of the charge be furnished to the accused. Similar orders were granted in *Essop v Regional Magistrate, Western Transvaal and Another* 1963 (1) PH H16 (T) and *Weber and Another v Regional Magistrate, Windhoek and Another* 1969 (4) SA 394 (SWA). In *S v Bailey and Others* 1962 (4) SA 514 (E), the magistrate refused an application to recuse himself midway through a criminal trial. The High Court intervened and substituted an order upholding the application for his recusal. In *Timol and Another v Magistrate, Johannesburg, and Another* 1972 (2) SA 281 (T) and *Raditsela v Senior Magistrate, Johannesburg and Others* 1986 (4) SA 559 (W) the High Court set aside rulings given by magistrates in the course of inquest proceedings. In the former case, the High Court instructed the magistrate to proceed with the inquest 'in the light of what has been said in this judgment'. In the latter it substituted its own ruling, which concerned the way in which examination and cross-examination of witnesses was to be permitted. In *Pitso v Additional Magistrate, Krugersdorp and Another* 1976 (4) SA 553 (T), the magistrate refused to permit an accused who mistakenly pleaded guilty because of a misunderstanding with his attorney to change his plea. This was set aside and the case remitted to another magistrate for trial. In *S v Memani* 1994 (1) SA 515 (W), a magistrate ordered that the accused's advocate, whom he had found guilty of contempt of court in the course of the trial, no longer be permitted to act for the accused. The High Court set aside the order, but recommended that the advocate withdraw from the case, and refused a mandamus requiring the magistrate to hear him (522G-523B).

[14] *Wahlhaus* (above) 1959 (3) SA at 120A; *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) at 5-6.

[15] In *Ismail* (above) 1963 (1) SA at 6C-D Steyn CJ suggested very broadly that a 'denial of justice in the sense that it deprived [accused persons] of any right or set in train prejudicial results which

not understand counsel for the magistrate to contest this. What he put in issue were the terms of the order, and the justification for its being issued when it was. In doing so he alluded to various factual assertions that were not before us. These included that the draft order faxed to the magistrates' offices in Stutterheim on the Thursday did not reach the magistrate (hence the lack of response), and that on the Friday the magistrate faxed his reasons for persisting in the postponement to the High Court (which apparently did not reach Kroon and Leach JJ). These assertions are not on record before us. More important, they were not before Pillay J, and the competency of his order must thus be determined without reference to them.

[16] During argument there was moreover speculation about possible reasons for the postponement and the magistrate's persistence in it. These embraced not only his personal circumstances (might he have had a medical condition requiring hospitalisation for a week?) but his professional position (was there a pile of outstanding judgments he preferred to surmount first?). It is not necessary to dwell on these possibilities. It is

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they could not avoid' might justify intervention.

evident that finalising an application for bail is always a matter of urgency. Though the accused may not be entitled to be released – since the Constitution permits bail only if the interests of justice permit[16] – he or she is certainly entitled at first instance to a prompt decision one way or the other.[17] And if bail is refused, the decision can be appealed. The right to a prompt decision is thus a procedural right[18] independent of whether the right to liberty actually entitles the accused to bail.

[17] Nevertheless, it is equally obvious that conscientious determination of bail applications – applying the 'good judgment'[19] they require – might demand reflection: overnight, or conceivably even longer. It is not desirable to try to lay down any general rule. Nor does the case require us to do so. It is not necessary to decide whether, given the proactive duties imposed on

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[16] Constitution s 35(1)(f): Everyone arrested for allegedly committing an offence has the right 'to be released from detention if the interests of justice permit, subject to reasonable conditions'.
[17] In *S v Steyn* (above) 2001 (1) SA 1146 (CC) para 17, the Constitutional Court observed that the structure of the court system requires that the bulk of judicial work be completed in the magistrates' courts 'as inexpensively and expeditiously as possible'.
[18] See regarding the importance of finalising criminal proceedings in general *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) and *Wild and Another v Hoffert NO and Others* 1998 (3) SA 695 (CC) para 29 (' presiding officers are duty bound to counteract all manifestations of unnecessary delay in bringing criminal cases to finality') and para 31 (' although they may be powerless to repair systemic faults, prosecutors and magistrates can do a great deal to ensure that the day-to-day business of their courts respects such a fundamental requirement of fairness'), per Kriegler J for the Court.
[19] *S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC) para 42, per Kriegler J for the Court.

magistrates during bail hearings,[20] an eight- or nine-day postponement could ever find justification, particularly when a postponement under s 50(6)(d) of the Criminal Procedure Act[21] has already been refused, and when evidence and argument are complete. Nor is it necessary to decide whether in this case – which Pillay J described as 'straightforward', and which the full bench, endorsing the attitude of the DPP, disposed of as such – a postponement of that length could possibly have been warranted.

[18] No final view is necessary because I shall assume in favour of the respondent that the circumstances at the time of Pillay J's order justified and demanded a prompt hearing and decision about the respondent's entitlement to bail.

[19] Even on this assumption, this particular order should not have been granted. The short reason is not that the order was intrinsically incompetent, as counsel for the magistrate contended. It is that no case was made out before Pillay J for subjecting the magistrate to the undignifying prescriptions as to time that the order contained. In reaching this conclusion I bear in mind that it is of course no indignity for a judicial officer to have a ruling

[20] *S v Dlamini* (above) paras 10 and 50.

reversed or overturned. All magistrates are subject to review and all judicial officers (bar those in the highest courts) are subject to correction on appeal.

[20] Nor does the supervision the higher courts exercise over the manner in which the lower courts conduct their business subject those courts to any intrinsic indignity. And the suggestion implicit in counsel's argument that an order interfering with the functioning of a lower court is incompetent because it infringes the magistrate's independence must be rejected. An order that a magistrate recuse himself midway through a criminal trial intrudes on his court in the most radical fashion imaginable by terminating his warrant to preside. Yet if the circumstances oblige, such an abrogation of judicial functioning would be justified.[22] I would add that counsel's invocation of *S v Pitje*[23] as authority for the proposition advanced is regrettable. There Steyn CJ, writing for the Court, upheld a conviction for contempt of court in the case of a black practitioner who objected to a magistrate's ruling that required him to sit at a separate table reserved for 'non-Europeans'. The basis for the conviction – that the magistrate

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[21] See note 1 above.

was empowered to enforce apartheid arrangements in his court – is not only obsolete, but the essential reasoning employed to reach the result repugnant to the Constitution. In these circumstances, the decision itself can no longer stand, and it must be overruled, and *Pitje*'s authority in any context terminated.

[21] Nor does the vice of the order lie in its impeding the magistrate's liberty 'to hear and decide'[24] the bail application, as was contended. Pillay J pointed out, and the amicus emphasised, that the order nowhere prescribed what decision the magistrate had to give. It required him to give his decision – whether by granting or refusing bail.

[22] For the same reason I do not think that the order by itself infringed the rights of any group, including women, who are entitled to protection under the Bill of Rights. On the given assumptions, the judgment the magistrate was ordered to deliver could as easily have refused bail wrongly as granted it unjustifiably. The potential violation of rights in either case would

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[22] *S v Bailey and Others* 1962 (4) SA 514 (E).
[23] 1960 (4) SA 709 (A).
[24] *The Queen in Right of Canada v Beauregard* (1987) 30 DLR (4th) 481 (SCC), adopted by a plurality of the Court in *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 70 and by the whole Court in *van Rooyen* (above) 2002 (5) SA para 19.

stem not from the order requiring that judgment be delivered, but from a bad judgment, which postponement would not improve.

[23] Counsel's radical attack upon the order as intrinsically incompetent must therefore fail. It is not necessary for us to decide whether an order instructing a magistrate to hear argument and to give judgment at times specified could ever be justified. What is clear, in my view, is that to prescribe so closely the manner in which a magistrate must go about exercising his or her jurisdiction would require very cogent justification. Had argument begun at 15h00 on Friday 6 July in compliance with the order, but took longer than expected, or raised difficulties that the 16h00 judgment deadline could not accommodate, the unwarranted restrictions imposed on the magistrate – and indeed on the parties – are clear to see.

[24] In previous cases of intervention the courts have set aside the magistrate's order entirely,[25] or directed that a specific order be granted,[26] or removed the case from the jurisdiction of the

[25] A commission to take evidence abroad in *Eliovson v Magid* 1908 TS 558; converting a criminal trial after conviction into a preparatory examination in *R v Willie Boon* 1912 TPD 1136.
[26] Directing the furnishing of particulars to the charges in *Behrman v Regional Magistrate, Southern Transvaal and Another* 1956 (1) SA 318 (T), *Essop v Regional Magistrate, Western Transvaal and Another* 1963 (1) PH H16 (T) and *Weber and Another v Regional Magistrate, Windhoek and Another* 1969 (4) SA 394 (SWA).

magistrate altogether.[27] The order granted in this case is unprecedented. That is not to say that unprecedented circumstances might not have warranted it. But they had not been shown to exist. Alternative courses of action were moreover open to Pillay J. All were less intrusive. He could simply have set aside the magistrate's order postponing the respondent's bail proceedings.[28] Or he could have done this in conjunction with an order directing the magistrate to hear argument with all expedition, and to give judgment as soon as practicable thereafter.

[25] Both courses of actions would have left the magistrate some leeway in complying, and subjected him to less constraint upon his independence, and to less indignity. Setting aside the postponement would have returned the respondent's bail application to the magistrate's current roll. Had he refused to deal with it, or postponed the matter again, the respondent could justifiably have approached the High Court to intervene by

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[27] *S v Bailey and Others* 1962 (4) SA 514 (E) (magistrate's order refusing recusal application substituted with order recusing himself), and *Pitso v Additional Magistrate, Krugersdorp and Another* 1976 (4) SA 553 (T) (accused permitted to change mistaken guilty plea to not guilty, and case remitted to a different magistrate for trial).

[28] Compare *S v Memani* 1994 (1) SA 515 (W) 522-3, where the court merely set aside the magistrate's order that the accused's advocate no longer be permitted to act in the trial.

assuming jurisdiction itself in his bail application. Those paths were also more likely to have avoided a fruitless confrontation.

[26] This conclusion makes it unnecessary to consider a further question, whether subjecting a magistrate to the higher courts' contempt jurisdiction is a constitutionally desirable or feasible way of enforcing an order as to the manner in which a magistrate's jurisdiction is to be exercised. This question was not argued before us, and I express no opinion on it.

[27] To summarise: even if the magistrate's postponement of the bail proceedings was unjustified and unreasonable, and the respondent was therefore entitled to a prompt decision on bail, no case was made out before Pillay J for subjecting the magistrate's conduct of the proceedings to the time specifications the order contained. These were in the circumstances unwarrantably constricting and demeaning to the magistrate, and the order must therefore be set aside.

[28] We were asked to order costs, including the costs of two counsel, against the respondent. However, as pointed out earlier, the only issue before us is the order of Pillay J on Friday 6 July. The magistrate was not cited personally when that order was

obtained. The first application was directed against the State. Though the draft faxed to Stutterheim on the Thursday did mention costs, the order issued the next day was without costs. The magistrate was cited personally only on the Saturday, in the twin applications for bail and for his committal for contempt. Those orders, though deriving from the order of Pillay J, are not before us. A costs order adverse to the respondent regarding the latter order thus seems unjustifiable. However, since no argument was directed to us on this point, a provisional order will issue, subject to any representations.

[29] The appeal succeeds. The order of Pillay J, academic as it has become, is set aside. There is no order as to costs. If either party wishes to direct submissions to the Court about the order relating to costs, they may do so within fourteen days from the date of this judgment.

E CAMERON
JUDGE OF APPEAL

HOWIE P)
SCHUTZ JA) CONCUR
STREICHER JA)
MTHIYANE JA)