REPORTABLE

CASE NO: 19047/19

In the matter between:

SIMLINDILE HANS Applicant

AND

THE DISTRICT COURT MAGISTRATE, CAPE TOWN 1ST Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 2ND Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD Respondent

Coram	:	D M THULARE AJ
Judgment by	:	THULARE AJ
Adv. for Plaintiff	:	Adv. H Scholzel

Instructed by	:	Mr Anthony Brinato Matthews Gess Incorporated Attorneys 021 422 5333
Adv. for Respondent	:	Adv. Wayne Erasmus State Attorney 021 487 7197/7199
Adv. For 3rd Respondent	:	Adv. Thabo Ntela State Attorney 021 487 7151
Date/s of hearing	:	10 December 2019
Date of Judgment	:	4 March 2020

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

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JUDGMENT DELIVERED: 4 MARCH 2020

THULARE AJ

[1] This was an urgent application to review the decision of the magistrate to postpone the hearing of applicant's bail application for a period of more than seven (7) days contrary to the provisions of section 50 (6) (d) of the Criminal Procedure Act, 1977 (Act No 51 of 1977) ("the Act"). The applicant was substantially successful and his bail application was finalized on 6 November 2019.

[2] The issue to be decided was costs.

[3] The applicant was arrested on 4 October 2019 in Langa. He made his first appearance before the magistrate of Cape Town on Monday 7 October 2019. The Public Prosecutor submitted that the applicant was charged with an offence under schedule 6 of the Act and that the State was opposed to him being granted bail. The applicant was represented by a different legal representative. By agreement between

the parties, the matter was postponed by the magistrate for a formal bail application to 12 November 2019.

[4] The applicant changed lawyers. He was made aware by new lawyers that according to their view, his matter was postponed contrary to section 50 (6) (d) of the Act and as a result his further detention was unlawful. The applicant's current lawyers approached the Senior Magistrate responsible for the Criminal Court in Cape Town on 23 October 2019 to advise him of their view. The meeting agreed that the lawyers should cause the requisition of the accused for a new date to be determined for the bail hearing of the applicant.

[5] The applicant's lawyers obtained the necessary forms from the Clerk of the Court for purposes of completion by a Senior Public Prosecutor who is the only person who could authorize the requisition. The attorney had no power to authorize a requisition. The attorney could not refer the magistrate to any authority for the magistrate to intervene. On Thursday 24 October 2019 the applicant's lawyer made attempts to requisition him from prison for a court appearance the next day. The Prosecutors in Cape Town refused to requisition the applicant. In pursuit of their determination, the applicant's lawyer thereafter hand-delivered to the prosecutors a written request of the requisition of the applicant for 28 October 2019 so that a new bail application date can be fixed for hearing within that week. In this request they also indicated that should requisition not be confirmed, they will bring an urgent application to the High Court. No confirmation came forth and the urgent application was launched on 28 October 2019.

[6] They prayed for a *rule nisi* calling on the respondents to show cause on Friday 1 November 2019 why the following terms should not be made a final order:

1. That the magistrate's decision on 7 October 2019 to postpone the bail application to 12 November 2019 be reviewed and set side.

2. That the respondents be directed to take the necessary steps to ensure that the applicant's bail application be heard before the return date of the *rule nisi.*

3. That failing to hear the bail application before the return date, the applicant be released from custody and warned to appear on 12 November 2019 at Cape Town Magistrates' Court 16 and to remain in attendance until his name is called.

4. That the terms above operate with immediate effect as interim relief, pending the return date.

5. Ordering the respondents to pay the applicant's costs, the one paying the other to be absolved, on an attorney and client scale.

6. Further or alternative relief as the court may deem fit to grant.

[7] Salie-Hlophe J granted the order with a return date as 1 November 2019. The applicant was requisitioned for 31 October 2019 but no arrangements were made for the docket or the investigating officer to be at court on that date. The prosecutor who attended to the matter in court was only informed that morning to attend to the matter. The investigating officer had no knowledge of the matter being before court that day. At the insistence of the applicant's attorneys to have a copy of the charge sheet ready in order to be informed of the correct charge and its schedule, the public prosecutor consulted with the investigating officer telephonically. The applicant proceeded with his

bail application. The Prosecutor was not ready to present its case in opposition and the matter was postponed to 6 November 2019.

[8] On 1 November 2019 Salie-Hlophe J directed the respondents to ensure that the bail application was heard on 4 November 2019. The *rule nisi* was extended to 5 November 2019. On 4 November 2019 the investigating officer was only available at 10H00. When he arrived after 10H00, it only came to his attention then that the applicant was not brought to court from prison. No arrangements had been made to secure the applicant's attendance. The applicant was eventually brought to court at 13H00 and the matter could only be attended to just before 15H00. The matter was rolled over to the 5th for argument and to the 6th for judgment.

[9] The approach to costs was expressed in *Ferreira v Levin NO and Others* 1996 (2) SA 621 (CC) at para 3 as follows:

> "[3] The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even the second principle is subject to the first."

In my view, the nature of the office of magistrate and prosecutor respectively as well as the applicant; the conduct of the magistrate, the prosecutor and the applicant as well as the nature of the proceedings are relevant considerations for the cost order in this matter.

[10] The applicant made his first appearance, was charged and was informed of the reason for his detention to continue [section 35 (1) (e) of the Constitution of the Republic of South Africa (the Constitution)]. The magistrate had to order that the applicant be detained unless, having been given a reasonable opportunity to do so, adduced evidence which satisfied the court that exceptional circumstances existed which in the interests of justice permitted his release [section 60 (11) (a) of the Act].

[11] Section 50 (6) (d) (i) provides as follows:

> "50 Procedure after arrest
>
> (6) (d) The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not consistent with any provision of this Act, if-
>
> (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;"

[12] The law requires an arrested person to be brought before a lower court as soon as reasonably possible to ensure court oversight and to enable a bail application to be brought [*Mashilo v Prinsloo* 2013 (2) SACR 648 (SCA) at para 11]. The law requires that a postponement for bail proceedings or bail application, where necessary, before a period not exceeding seven (7) days at a time. As a general rule, in my view, the detention of an accused person for a period exceeding seven (7) days at a time for bail proceedings or for bail application is unlawful when it is reasonably possible to proceed with or hear the bail application. This is objectively justiciable.

[13] The implication is that, for such postponement to be lawful, it must be based on reasonable grounds [*Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (AD) at page 579E-I]. The magistrate should have information sufficient to exercise a judicial discretion to decide whether to postpone in extension of the limits, which give impetus to the expeditious determination as regards the detention of an arrested person. The magistrate was required to properly apply her mind to the question of the necessity for the continued detention in order to get sufficient information or evidence to reach a decision on the bail application. The postponement of bail proceedings or bail application was unlawful unless it was necessary, and that decision was entrusted by statute to the magistrate, who had the sole and exclusive power to determine whether in her opinion the prerequisite fact, to wit, that she had insufficient information or evidence at her disposal to reach a decision on the bail application, existed [*Minister of Law and Order v Dempsey* 1988 (3) SA 19 (AD) at 34A-B].

[14] What is required of a magistrate is an honest exercise of a judicial discretion. A magistrate's decision cannot be impeached unless the court is satisfied, in all the circumstances of the case, that she did not properly apply her mind to the matter. In my view, it was not proper for the magistrate to postpone the bail application because of the agreement between the parties. The statutory prerequisite fact for postponement of bail proceedings or bail application, in the circumstances, was the magistrate's opinion that she had insufficient information or evidence to reach a decision on the bail application. Amongst other factors, in the light of that agreement to which the applicant was a party, as the basis for the postponement, one was unable to conclude that the magistrate

acted *mala fide* or for an ulterior motive. The period of postponement remain shockingly inappropriate. The law as it stands already made inroads into the right of the applicant to apply for bail at his first appearance. The limits on that inroads by the legislature should be respected.

[15] In *Mashilo, supra,* at para 13 Tshiqi JA as she then was said:

> "The legislative purpose in extending the 48 hours, if it is interrupted by a weekend, appears to me to be fairly obvious. It is because the logistics of ensuring an appearance before the court over a weekend are difficult. Put differently, it is difficult to co-ordinate police, prosecutorial and court administration and activities over a weekend. This was especially true at the time that the legislation was introduced. It continues to be true today."

Against that background, it cannot be that the goalposts for a bail hearing continue to be shifted by the lower courts as a result of the logistical and co-ordination challenges even on weekdays. The first appearance of the applicant was on a Monday. Managerial preference for specialized bail application courts, and the consequent overcrowding of court rolls in those courtrooms, should not be allowed to trump the constitutional rights of those detained who seek an audience with a court, to challenge the lawfulness of their continued detention within the prescribed limits.

[16] The refusal of the prosecutors to assist the applicant's lawyers to get him back to court and his matter enrolled for a bail application was unlawful. When it relates to the deprivation of someone's freedom, two questions are important to consider. n *S v Coetzee and Others* 1997 (3) SA 527 (CC) at para 159 it is said:

> "[159] These are two separate questions. They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom."

In *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC) at para 42 and 43 it was said:

> "[42] The respondent's final argument is that the majority decision of the Supreme Court of Appeal was correct to conclude that the applicant's detention was justified by the series of magistrates' orders remanding him in custody. …
>
> [43] I cannot agree. The reasoning ignores the substantive protection afforded the right not to be deprived of freedom arbitrarily or without just cause contained in s 12 (1) (a) of the Constitution. That right requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of magistrates issued orders remanding the applicant in detention is not sufficient to establish that the detention was not 'arbitrary or without just cause'."

[17] The conduct of the prosecutors brought about the effect that the applicant was denied an opportunity to bring his bail application within the time limits prescribed by law, to which but for their conduct he was entitled. The effect was to sustain an illegality, in the sense of sustaining an improper postponement of a bail application. The conduct was irrational because it was not rationally related to the purpose for which the delegation to prosecute in criminal matters was given by the Director of Public Prosecutions, which includes to carry out necessary functions incidental to instituting

criminal proceedings and exercising those functions without fear, favour or prejudice [section 179 (2) and (4) of the Constitution].

[18] In *Pharmaceutical Mnfrs of SA: In re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) at 85 this requirement was expressed as follows:

> "[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by the Constitution for such action."

[19] None of the respondents filed any affidavits to respond to the application. Whether the conduct of the prosecutors was informed by a misguided attempt to cope with a heavy workload, sheer laziness, incompetence or *mala fides* remains unknown. What is clear is that the way that the prosecutors dealt with this matter caused the applicant to incur costs and to borrow from Counsel for the applicant's terminology 'and inexcusably inflated its costs by not adhering to the directions of the High Court'. A lackadaisical approach to a matter and a disregard of an order of a High Court, or lack of urgency to give effect to such an order by members of the National Prosecuting Authority is a serious threat to the rule of law. Rule by law of Prosecutors should not be countenanced.

[20] The management of a roll as well as the case management of a particular case in a court room is the ultimate responsibility of a magistrate in the lower court. Although the prosecution and the defence in this matter applied for the postponement, it was the magistrate's order that was authority for the detention of the applicant. Criminal proceedings are accusatorial in character, and the State, represented by the Prosecutor, is *dominus litis.* A bail application is inquisitorial in character and the prosecutor is not *dominus litis* in that application. It is the magistrate who should make a considered decision as to whether the bail proceedings or the bail application warranted a postponement or whether or not the applicant should be released on bail. The further detention of a person is in the power of the magistrate, and not the prosecution.

[21] Requisition of a person in detention is an established practice through which a clerk of the court or Registrar issues a document for such person's attendance at court on a determined date [*Ex parte Thukwane,* Case No. 15301/05 (TPD) at para 2]. It is an official authorization for the National Commissioner of Correctional Services to surrender a person detained on the strength of a warrant, with the object that the person be presented to a court on a date other than the one on the warrant of detention. It is a written authority and a person holding that official document is entitled to receive such a detained person from a correctional facility. A judicial officer may authorize a requisition for a person in detention for purposes of appearance before a court [*Ex parte Thukwane* at para 14].

[22] Like a warrant of arrest, the application is a simple one for a written authorization and in my view there is no reason that the procedure should be different from that envisaged in section 43 of the Act. Such application, submitted through and issued by the clerk of the court shall set out the reasons for such requisition with sufficient particularity to enable the magistrate to consider the application for such person to appear before the magistrate ahead of the date as determined in the warrant for his detention. The authority to issue the requisition is founded on information on oath that there were reasonable grounds to afford evidence as to the appearance of the detained person before a court [*Minister of Justice & Others v Desai NO* 1948 (3) SA 395 (A) at 401].

[23] When issued at the instance of a detained person or his or her legal representative, a copy of such an application should be served on the Director of Public Prosecutions or his delegatee, which delivery should happen before consideration by the magistrate. The *audi alteram partem* rule demand it. A magistrate looking at the application would decide on the urgency of the matter including whether it warrants a departure from other requirements and time periods. The magistrate may set an opposed application down for hearing if need be, and may issue the necessary directives on how the matter is to be dealt with.

[24] This matter was a classic demonstration of the abuse of authority by officers of the court which happens within the court building. The conduct of the prosecutors adversely affects those who are vulnerable and who depend on the very officers and those courts to protect, defend and advance their rights. The ‘surname’ of the Deputy

Ministry in Justice responsible for the Prosecutors, to wit, Constitutional Development, carried no meaning and reflection in what the prosecutors did in this matter in their offices and the corridors of the courthouse. The decision to authorize the issue of a requisition of an accused person cannot be left only to officials who are simply obstinate and go on to show disrespect to a directive of a Judge of a High Court.

[25] A magistrate has an obligation to uphold and protect the Constitution and the human rights entrenched in it [section 9 (2) (a) of the Magistrates' Courts Act, 1944 (Act No 32 of 1944). The magistrate of a district is the ultimate repository of the administration of justice and constitutional development in that district. Implicit in this constitutional creature, is the power to authorize the clerk to issue the requisition. The Constitution of the Republic does not envisage a toothless Judiciary in the wake of conduct by prosecutors that brings about shame and disgrace to magistrates and which interferes with the exercise of judicial functions of the lower courts. The Constitution requires of a magistrate to afford substantive protection of the right of a detained person not to be deprived of their freedom arbitrarily.

[26] The Act does not make provision for this type of application, which is an omission which this judgment show was at great personal cost to the applicant. This in my view, and the adage that a magistrate is a creature of statute, must be understood in the context of the supremacy of the Constitution as envisaged in its section 2. The Constitution is the supreme law of the Republic and the obligations imposed by it must be fulfilled. I can see no reason that militates against a magistrate, in appropriate circumstances, authorizing the clerk to issue a requisition.

[27] The peculiar circumstances of this case warrant a cost order against the Director of Public Prosecutions. The prosecutors' conduct was inexcusable and clearly unlawful. An order for costs *de bonis propris,* would be appropriate if it was prayed for.

[28] For these reasons I make the following order:

1. No order as to costs is made in respect of 1st and 2nd respondents.

2. The third respondent to pay the costs.

3. The Registrar is to cause a copy of this judgment to be served on the Director of Public Prosecutions, Western Cape, and the Minister for Justice and Correctional Services, for their attention.

D.M. THULARE
Acting Judge of the High Court