Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case Nr: 1897/10
Date heard: 05/11/2010
Date delivered: 12/11/2010

In the matter between:

JOHN FIKILE BLOCK **APPLICANT**

and

THE STATE **RESPONDENT**

CORAM: Majiedt J *et* Olivier J

REASONS FOR ORDER

MAJIEDT J

1] These are the reasons for our *ex tempore* dismissal of the applicant's urgent review application on Friday 5 November 2010. The applicant is presently in custody, having been arrested on Thursday 4 November 2010. A draft charge sheet annexed to the applicant's founding affidavit intimates that the State intends preferring charges of fraud, corruption and money laundering against the applicant and 16 others (some of which are corporate accused). A warrant for the applicant's arrest, issued on 2 November 2010, also foreshadows a charge of racketeering against him although that charge does not appear in the draft charge sheet.

2] At the applicant's first appearance in the local magistrate's court during the afternoon of Thursday, 4 November 2010, the State sought and obtained a postponement of the bail application in terms of sec 50(6)(d) of the Criminal Procedure Act ("*the Act*"). The matter was postponed to Tuesday 9 November 2010 and the applicant was remanded in custody. The same fate had befallen the first accused[1], while the rest of the accused were granted bail in varying amounts. The applicant approached this court on an urgent basis for an order reviewing and setting aside the magistrate's abovementioned order postponing the bail application.

3] The review came before me, as the duty Judge, as a matter of urgency on Thursday night. It was opposed by the State. The proceedings were eventually adjourned *sine die* when it became evident to all concerned (including the applicant's legal representatives) that a transcript of the proceedings before the magistrate was essential for a proper determination of the review. I granted the applicant leave to set the matter down on notice once the transcript became available. As it were, the matter was set down for hearing on Friday 5 November 2010 at 14h00, but argument only commenced at 16h00. A full transcript of the proceedings *a quo* was handed in. I sat with Olivier J, since it is practice in this Division to have reviews heard by two Judges.

4] The applicant sought a review and setting aside of the magistrate's decision to postpone the bail application and an order that the applicant be released on bail in an amount determined by this court. A short founding affidavit with annexures was filed in

1 The applicant is the seventh accused

support of the application. A short answering affidavit by Lieutenant Colonel Bruwer of the Kimberley Organised Crime Unit, was filed by the State.

5] Applicant's counsel conceded during the course of argument when this was put to him, that the relief sought in the second part of the application is not competent, since this Court has no jurisdiction to consider a bail application in respect of an accused charged in the Magistrate's Court[2]. Counsel consequently argued the review only.

6] The main thrust of the applicant's argument was that the magistrate grossly misdirected himself on the facts and on the law in granting the State's application for a postponement. I will discuss the merit of this contention as ground for a review as opposed to an appeal presently. A brief synopsis of the background facts is necessary first so that the proper context can be set for the consideration of this and other submissions.

7] The applicant chairs the African National Congress ("*ANC"*) in this province and he is the MEC for Finance, Economic Development and Tourism for the Northern Cape. The offences with which he will be charged are alleged to have been committed from March 2005 onwards. It is common cause that his house and office were raided by the police during either 2008 or 2009 and that the police investigation has been going on for about three years. It is also common cause that the offences with which the applicant will be charged fall under Schedule 5 of the Act.

---

2 By virtue of sec 50(6)(a)(i)(bb) read with sec 60 of the Act. See: Kruger, Hiemstra's Criminal Procedure at 9-14(1) to 9-15.

8] The State sought the postponement to enable it to follow up new information which may lead to further charges being preferred against the applicant. It requested that the applicant remain in custody to preclude the possibility of him interfering with and hampering such investigations and with the influencing and intimidating of witnesses. In this regard lead counsel for the State, Mr. Simelane, repeatedly emphasized in the court below, that the interests of justice required that there be further investigation so that a proper, informed assessment can be made as to the issue of bail in respect of the applicant.

9] Mr. Chavangu for the applicant, here and below, argued with considerable force that the State has been investigating this case for more than three years, has previously raided the applicant's home and office and should have completed their investigations before arresting the applicant. This argument did not find favour with the magistrate who postponed the matter for five days.

10] Sec 50(6)(d) reads as follows:

> "(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 inconsistent 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;
>
> (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A);
>
> (iii) .....
>
> (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to-

> (aa) procure material evidence that may be lost if bail is granted; or
>
> (bb) perform the functions referred to in section 37; or
>
> (v) it <u>appears</u> to the court that it is necessary in the interests of justice to do so". (underlining supplied)

11] The matter could conceivably have been dealt with *a quo* in terms of either sec 50(6)(d)(iv)(aa) or sec 50(6)(d)(v) or both. The magistrate did not specify in his ruling in terms of which of these two sections he is postponing the matter. Before us Ms Gcilitshana for the State argued that it is sec 50(6)(d)(v) *supra*. I think she is right. The magistrate appears to have been persuaded that the State requires time to follow up its new information and that the interests of justice warranted a postponement. I turn to a consideration of the law.

12] The underlined words in sec 50(6)(d) above plainly signifies that the magistrate is vested with a discretion. This is of considerable importance in considering what our powers are on review. To my knowledge, the case is *res nova*, inasmuch as I was unable to find any reported judgment where a postponement in terms of sec 50(6)(d) has been considered on review[3]. Mr. Chavangu accepted our views, expressed during argument, that sec 24 of the Supreme Court Act[4] and the provisions in sec 35(1)(f) of the Constitution[5] are the applicable legislative tools in reviews of this nature[6]. The provisions in sec 35(1)(f) of the Constitution reads as

3 Magano and Another v District Magistrate, Johannesburg and Others 1994(2) BCLR 125 (W); 1994(2) SACR 304; 307 (W) concerned the review of a postponement of a bail hearing, but was decided prior to the amendment of sec 50 by the insertion of subsection 6 by sec 1(b) of Act 75 of 1995 and its substitution by sec 1(b) of Act 85 of 1997.
4 No 59 of 1959
5 Act 108 of 1996
6 Reviews under other statutes such as sec 25 of the Prevention and Treatment of Drug Dependency Act, 20 of 1992 and sec 36 of the Mental Health Care Act, 17 of 2002, are left out of the reckoning for obvious reasons. Reviews under the Act in terms of sec 302 read with sec 304 are also not applicable

follows:

> "35(1) Everyone who is arrested for allegedly committing an offence has the right –
>
> (a) .....
> (b) .....
> (c) .....
> (d) .....
> (e) .....
> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

13] Sec 24 of the Supreme Court Act reads as follows:

> "24 Grounds of review of proceedings of inferior courts
>
> (1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are-
>
> (a) absence of jurisdiction on the part of the court;
>
> (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;
>
> (c) gross irregularity in the proceedings; and
>
> (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
>
> (2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts."

14] A review under sec 24 is generally regarded as being of a narrower ambit than a review under the common law, particularly if regard is had to the grounds set out in subsection (1)[7]. It is a

---

here.

7 Paper, Printing Wood and Allied Workers' Union v Pienaar N.O. 1993(4) SA 621 (A) at 693 E-F.

review of the kind listed as a first species by Innes CJ in **Johannesburg Consolidated Investments Co v Johannesburg Town Council**[8]. Thus in the present matter the applicant is, for purposes of a sec 24 review, limited to the grounds set out in subsection (1) above. Generally speaking, where the result of proceedings in an inferior court is attacked, appeal is the appropriate recourse while, in instances where the method of such proceedings is assailed, review would be the proper remedy[9].

15] Mr. Chavangu relied on sec 24(1)(c) *supra*, but was unable to point to a gross irregularity in the proceedings below. He was driven to resort to a submission that the magistrate grossly misdirected himself on the facts and on the law to the extent that this constitutes a gross irregularity. This submission can be dismissed without more. Arbitrary or unreasonable orders may constitute a gross irregularity[10]. No such arbitrariness or unreasonableness have been established by the applicant. Refusal by a magistrate to grant a postponement may constitute a ground for an appeal, but same may only be reviewable where a gross irregularity is committed in arriving at that decision[11]. A gross misdirection on the facts and/or the law may constitute a ground of appeal, but not of review. In the present matter none of the grounds listed in sec 24(1) have been established by the applicant. I do not think that sec 24 assists the applicant. I turn to consider whether sec 35(1)(f) of the Constitution may be of assistance to his case.

8 1903 TS 111 at 114. See also: Hira v Booysen 1992(4) SA 69 (A) at 85 I-J.
9 Cf Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration 2007(1) SA 576 (SCA) at 589 H – 590 A.
10 See the discussion in Erasmus, Superior Court Practice at A1-73 *et seq*.
11 Levinsohn's Meat Products (Edms) Bpk v Addisionele Landdros, Keimoes 1981(2) SA 562 (NC) at 568 D – 569 B.

16] The review powers of a high court has been considerably extended by the Constitution. Thus greater flexibility is possible in the application of sec 24 of the Supreme Court Act[12]. Ultimately what must be determined is the fairness of the proceedings. It is striking that both sec 35(1)(f) of the Constitution and sec 50(6)(d)(v) of the Act contain the "*interests of justice*" criterion. What must be determined is whether, in exercising his discretion to conclude that the interests of justice warrant a postponement, the magistrate's decision is reviewable. The "*interests of justice"* is a very wide concept. In the context of bail as set out in sec 35(1)(f) of the Constitution, it is of some importance that this wording has replaced the wording of sec 25 of the Interim Constitution[13] of "*unless the interests of justice require otherwise"*. It has the effect of weakening the position of an arrested person and of fettering the right to be released on bail[14].

17] In **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat**[15] Kriegler J conducted a thorough analysis of sec 35(1)(f) including the "*interests of justice"* criterion. The learned Judge remarked generally that:

> "(section) 35(1)(f) postulates a judicial evaluation of different factors that make up the criterion of the interests of justice."[16]

Later he remarks that:

> "(t)he focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution

12 Erasmus, Superior Court Practice at 30-6.
13 Act 200 of 1993
14 Cheadle *et al*, South African Constitutional Law: The Bill of Rights at 29-6.
15 1997(7) BCLR 771 (CC); 1999(2) SACR 51 (CC); 1999(4) SA 623 (CC)
16 At para 6.

of the case against hindrance"[17]. (emphasis added).

Directing his attention to the "*interest of justice"* criterion Kriegler J in typically erudite fashion describes it thus:[18]

> "It is a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned. But while its strength lies in its sweep, that is also its potential weakness. Its content depends on the context and applied interpretation. It is also, because of its breadth and adaptability, prone to imprecise understanding and inapposite use."

18] In applying the "interests of justice" criterion, both trial-related and extraneous factors are taken into account[19]. This criterion requires a weighing up of the interests of the accused in liberty against those factors which suggest that bail be refused in the interests of society – this differs from for example the balancing required by sec 60(11)(a) of the Act where the "exceptional circumstances" criterion is applied. In the latter instance the balancing of the accused's liberty interests against society's interests in denying bail will favour the denial of bail unless "exceptional circumstances" are shown by the accused to exist, thus a more stringent test than the "interests of justice" criterion[20].

19] I turn to the facts before us. During his argument as I have said, we alerted Mr. Chavangu to the fact that, even if the applicant were to succeed before us, we would not be able to consider a bail application, since that is the magistrate's court's exclusive preserve[21]. Such an application could only have been heard in the magistrate's court on Monday 8 November (i.e. a day before the

17 At para 11.
18 At para 45
19 Dlamini, Dladla, Joubert, Schietekat *supra* at para 53.
20 Dlamini, Dladla, Joubert, Schietekat, *supra* at para 64.
21 See para 5 above. Compare the obiter remarks of Cameron JA in Magistrate, Stutterheim v Masiya 2003(2) SACR 106 (SCA) at paras 24 and 25.

postponed bail proceedings were to resume there) since bail applications are not heard after ordinary court hours[22]. Mr. Chavangu pressed on nevertheless in pursuit of an order which may virtually amount to a *brutum fulmen*. Be that as it may, we were satisfied that the applicant did not make out a case for the reviewing and setting aside of the magistrate's decision on the grounds enumerated in sec 24 of the Supreme Court Act. What bears consideration further is the application of the "*interests of justice"* criterion in the present matter.

20] There was nothing before the magistrate to gainsay the prosecutor's information from the Bar that new information had come to hand which required further investigation before the State could make a final assessment on bail for the applicant. And Mr. Simelane emphasized more than once that the interests of justice require that this be investigated before an assessment is made. His reasons for effectively seeking that the applicant remain in custody during the continuance were that the applicant may interfere in the investigation and influence and intimidate witnesses. Again there was nothing to gainsay the possibility (not the fact) of this happening. The likelihood of further charges being added as a result of the further investigations was also mooted by Mr. Simelane.

21] While a prosecutor's *ipse dixit* is not to be regarded as the alpha and omega on whether or not the interests of justice warrant a postponement[23], it will be an important consideration[24]. Mr Chavangu countered by questioning why the arrest was not held

22 Sec 50(6)(b) of the Act.
23 Compare S v Joone 1973(1) SA 841 (C) at 847 A-B.
24 S v Bennett 1976(3) SA 652 (C) at 654 H.

over until conclusion of the investigation, since the applicant, on the common cause facts, was not a flight risk. There is some merit in this submission. But the prosecutor as *dominus litis* has the prerogative to utilise the provisions of sec 59(6)(d)(v) of the Act. One can postulate that the State may in appropriate instances seek to have the accused remain in custody while it pursues unhindered the investigation of new facts. And in effect, one can infer that it is what the State sought to do in this case, reading between the lines of Mr. Simelane's address to the court below. In my view the magistrate's decision that the interests of justice warrant a postponement cannot be assailed on the facts which he had before him.

22] To conclude – we were satisfied that the magistrate's decision cannot be set aside on these facts and legal principles, hence the *ex tempore* order dismissing the application. We decided not to make an order for costs against the unsuccessful applicant. In exercising our discretion in this regard it seems to me that it would be inequitable to mulct in costs a person who seeks his liberty.

_____

SA MAJIEDT
JUDGE

I concur.

_____

CJ OLIVIER

JUDGE

Adv Chavangu on behalf of the applicant instructed by Mjila and Partners, Kimberley.

Ms Gcilitshana on behalf of the respondent instructed by the State Attorney.