NOT REPORTABLE

IN SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 2254/2012

DATE: 28/02/2012

In the matter between

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

and

REGIONAL MAGISTRATE, MR MASHIMBYE 1st RESPONDENT

MARK NICHOLAS MAITLAND 2nd RESPONDENT

J U D G M E N T

C. J. CLAASSEN J:

[1] This matter has a chequered history convoluted by a number of rather strange action by the stakeholders. The matter originated as a criminal trial in the Regional Court of Germiston. At the beginning of the trial the magistrate presiding ruled that a trial-within-a-trial should be held to determine the admissibility into evidence of two search warrants that were issued by a magistrate in Germiston. These warrants had been executed and certain items were attached by the police found in possession of the accused. At the end of the trial-within-a-trial, the

magistrate ruled that these search warrants were issued improperly and that the evidence derived therefrom was ruled inadmissible.

[2] The trial was postponed on a number of occasions thereafter. Eventually the State filed a review application in this court in terms of Rule 53 of the Uniform Rules of Court to set aside the interlocutory ruling by the magistrate declaring the evidence inadmissible. Such review application is set down for 8 May 2012.

[3] The criminal matter had again been postponed to 11 January 2012. On that day the State applied for a further postponement, basically to enable the review application in this court to be dealt with before the criminal trial was to be proceeded with. After hearing argument on the postponement application, the magistrate refused the postponement and determined that the matter was to proceed on 1, 2 and 30 March 2012.

[4] The State then launched yet a further review application to this court on an urgent basis to review the magistrate's refusal to grant the postponement applied for by the State. This matter was incorrectly brought by way of an urgent application. The urgent court forms part of the motion court procedures. It came before my colleague, Carelse J, who then opined that matters of this nature should actually be placed before two judges in terms of the practice rule number 8.5. An officer from the Director of Public Prosecutions

attempted to obtain two judges to hear the matter, without success. He then approached the Depute Judge President who then ruled that this matter was to be determined before me, sitting as a single judge to hear the review of the magistrate's refusal to grant the postponement in the court *a quo.*

[5] There are a number of unfortunate aspects to this case. First of all, the various delays in completing the criminal trial is to be deprecated. Secondly, I venture to say that it does seem as if the State was remiss in not diligently setting down and completing the application for reviewing the interlocutory decision of the magistrate at an earlier date. In fact, there was a promise that it would be heard during the fourth quarter of last year. If it had been heard then, the matter of the correctness, or otherwise, of the decision in regard to the admissibility of the search warrants, would have been completed by the time the matter was to continue on 11 January 2012. This did not happen and the review application was only set down to be heard for 8 May 2012. In my view the State could have acted more diligently and speedily in this regard.

[6] The question that I have to decide is two-fold. Do I have jurisdiction to hear this review application regarding the refusal of the postponement in the court *a quo,* and secondly, if I do have such jurisdiction, whether I should grant the application or not?

[7] In my view I do not have such jurisdiction. It has been a longstanding practice to place matters emanating from Magistrate's Courts before two judges. It is only in the case of bail applications where the Criminal Procedure Act 51 of 1977 expressly permits such bail appeals to be placed before a single judge.

[8] In this case, the rule of practice, 8.5, states that appeals or reviews, at least from Magistrate's Courts, are usually placed before two judges. Rule 8.5 is founded upon the longstanding practice to place criminal reviews emanating from lower courts before two judges. I see no reason why I should cause an exception to that rule in this particular case.

[9] The ruling of the Deputy Judge President to place the matter before me as a single judge did not by implication constitute a definitive decision that I did have the necessary jurisdiction to deal with the matter. It is for me to decide that issue. For the reasons set out above, I find that I do not have jurisdiction, and for that reason alone the application should be dismissed.

[10] But even if I were wrong in coming to the aforesaid conclusion and even if I do have the jurisdiction to deal with this matter, I would still not grant the application reviewing the decision of the magistrate refusing the postponement.

[11] There has been a long line of cases which established a very clear principle of law that only in very exceptional circumstances should a High Court review a lower court's decision prior to the completion of the trial. A trial in the Magistrate's Court should be completed before either party can appeal on issues where they are of the view that the magistrate had misdirected him or herself or made an incorrect finding on the facts of the case.

[12] To interrupt trials in the Magistrate's Court by applications to this court to rule on the correctness of interlocutory orders, cannot be countenanced by this court. If this court were to set a precedent of allowing the State to come to this court to attack the correctness of a refusal to grant a postponement, this court will be inundated with a flow of reviews which can never have been intended by either the long line of cases referred to above, or the Constitution, which expressly states in section 35, that an accused is entitled to a speedy trial.

[13] Many applications for postponements in the courts *a quo* by either the accused or the State are refused by such courts. If all of them were to be the subject of review applications to this court, not only will the administration of justice come into disrepute but the entire wheels of justice will come to a grinding halt. This court would not be able to handle the inordinate flow of review applications from lower courts.

[14] I am therefore of the view that, even if I do have jurisdiction to hear this case, such a precedent should not be set in this particular case. I say that in circumstances where I am, obiter, of the view that the magistrate may very well have been wrong in disallowing the evidence regarding the two search warrants. However, I speak from a point of view purely looking at the papers without the advantage that the ultimate court of review will have when both sides, including the magistrate have stated their views. I am *prima facie* of the view that the decision of the magistrate to disallow the search warrants into evidence was wrong.

[15] But that still does not entitle a party to come to this court purely because a postponement to hear that review application, before proceeding with the trial, was dismissed. The trial can proceed and further witnesses may be called. The interlocutory order may be subject to a further review by the magistrate at the end of the case. He is entitled to recall that ruling once all the evidence has been placed before him. There are a variety of imponderables which ultimately may prove the postponement to have been unnecessary. Furthermore, the accused may probably be convicted, but he could also be acquitted. If he is acquitted then there would be no reason for all these interruptions in any event. If he is convicted, the State may appeal the magistrate's refusal to allow the search warrants, as a point of law.

[16] For all of the above reasons, I am of the view that this application cannot succeed and it is struck from the roll for lack of jurisdiction of a single judge to hear this matter.

[17] After hearing argument on costs, I make the following order:

The application is struck from the roll with costs.

DATED THE 28th DAY OF February 2012 AT JOHANNESBURG

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT: ADV E. WESSELS
COUNSEL FOR THE RESPONDENTS: ADV M. HELLENS SC

ARGUMENT WAS HEARD ON 27 FEBRUARY 2012