REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

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DATE SIGNATURE

CASE NO: A91/2014

THE DIRECTOR OF PUBLIC PROSECUTIONS

NORTH GAUTENG, PRETORIA **APPELLANT**

and

JULIAS RESIMATE MAKHUBELA **RESPONDENT**

JUDGMENT

KHUMALO J

[1] With leave of this court, the Appellant seeks to set aside the decision of Magistrate P Johnson, in terms of which the Respondent was acquitted. He was found not guilty after the learned magistrate had deemed the state's case to have been closed when the Public Prosecutor, though unable to proceed with the trial, refused to close the state's case. The Appeal is not opposed.

[2] The facts in brief are that the 54 year old Respondent appeared in the Regional Court in Pretoria on 8 November 2012 on two charges of rape of a 12 year old girl ("the complainant"), following his arrest on 6 November 2012. The charges were explained to him and he confirmed that he understood. His legal representative indicated that he would not be applying for bail at that stage and the matter was postponed to 15 November 2012.

[3] According to the documents forming part of the record, on 15 November 2012 DNA was taken from the Respondent and the matter was postponed to 4 December 2012 for the Respondent to obtain legal representation. On 4 December 2012, the

court heard the Respondent's application for bail and it was refused. The matter was postponed to 13 December 2012.

[4] The Respondent reapplied for bail on 13 December 2012 and it was granted in the amount of R1000. The matter was postponed to 8 January 2013 for further investigation to wit, DNA and witnesses' statement. On that day it was again postponed for the same reason to 5 March 2013. It's indicated that on 5 March 2013 all investigations were complete and matter remanded to 12 March 2013 for disclosure and allocations. It was recorded on 12 March 2013 that all investigations complete and disclosures received. The matter was remanded to 27 August 2013 in court 1 for provisional Plea and Trial, a typographical error, as it is obvious that 27 March 2013 must have been intended.

[5] On 27 March 2013 the Respondent's attorney did not appear and he could not tell the court why his attorney was not at court. The matter was therefore postponed to 10 April 2013 for Respondent to obtain legal assistance. On 10 April 2013 it was postponed due to new attorney to 12 April 2013 for preparation for trial. The complainant was writing exams on 12 April 2013 and she together with her witness did not attend court on that day. At state's request the matter was postponed to 25 July 2013 for trial and the parties warned that this was a final postponement.

[6] The record further indicates that on 25 July 2013 the trial proceeded. The Respondent pleaded "Not guilty" to the charges when they were put to him and his attorney Mr Gerber tendered his plea explanation. The state, before calling the complainant who was its first witness, endeavoured to apply in terms of s 170A of the Criminal Procedure Act 51 of 1977("the Act") for her evidence to be heard through an intermediary, relying on an extensive report set out in an affidavit compiled in terms of s 212 (4) of the Act by Ms M P Mutileni ("Mutileni"), a social worker. The affidavit confirmed that it would not be conducive for the child to testify in open court.

[7] The defence did not raise any objection at the time but the magistrate was apparently not too pleased with the report. He quizzed the Public Prosecutor to tell him to which requirements of s 212 was he referring to, insisting that the affidavit can only be presented if it meets the requirements. The two legal representatives being confused by the learned magistrate's inquisition agreed to a short adjournment to investigate the inadequacies of the affidavit. All this time the learned magistrate did not indicate in what sense the report did not meet the requirements.

[8] After the adjournment the Public Prosecutor, still confused by the learned magistrate's objection to the affidavit sought a postponement to arrange for the deponent of the affidavit, Mutileni to attend court and testify in person. The court called upon the defence to respond to the state's Application and Mr Gerber would not oppose the postponement if it was marked to be a final postponement. The learned magistrate expressed his bewilderment to the defence's failure to object to the postponement. With all the state's witness present the matter was then postponed to 6 November 2013 and accused's bail was extended accordingly.

[9] On 6 November 2013, the state called Mutileni to lead her evidence to confirm that her supplementary affidavit in support of the s 212 Application was not yet ready. Mutileni testified that when the request came she was going away on study leave and only came back a few days before the date of trial. She has since realised

then that she compiled the report a year ago and as a result would like to interview the complainant and her mother again to compile an updated report which was going to be ready in two weeks' time or perhaps by the following week. She confirmed that she received the request around October 2012 to compile the first report that she submitted. Consequently the Public Prosecutor applied for a further postponement to obtain a supplementary affidavit with an updated report.

[10] The Respondent opposed the Application on the basis that the trial was being postponed for the third time at the instance of the State after it was pointed out on the previous occasion to be a final postponement. The learned magistrate in agreement with the Respondent's Counsel commented that the first postponement of the trial was for the Respondent to obtain legal assistance. The second one was at the instance of the complainant who was writing exams and her witness. The third was as a result of the court not accepting the report that the State relied upon to apply for the complainant to be assisted by an intermediary, and as Mutileni was not available, the prosecution requested a postponement. Then when Mutileni was available, the report was not ready, so the state sought a further postponement. He concluded that the Respondent has a Constitutional right to a speedy trial and justice must be seen to be done. Even though he accepted Mutileni's excuse of not having the report ready as valid, the learned magistrate nevertheless refused the postponement on the basis that Mutileni is not the only social worker in the Department that can compile the report, other social workers could have attended to the report instead of causing a delay.

[11] The parents of the complainant were not willing to agree to their child to testify in open court, so without the intermediary the child could not testify. The Public Prosecutor indicated that for the mere fact that the report is outstanding and the court is refusing a postponement the state could not close its case.

[12] The learned magistrate then deemed the state's case closed and found that as the accused had pleaded not guilty, with no evidence having been led upon which a reasonable court could convict, the Respondent was not guilty and discharged him of all the counts in accordance with provisions of s 174 of the Act.

[13] S 212 (4) that has caused all this contestation reads:

> 'Whenever any fact established by any examination or process requiring any skill-
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> (i) in biology, chemistry, physics, geography or geology;
> (ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
> (iii) in computer science or in any discipline of engineering;
> **(iv) in anatomy or in human behavioural sciences;**
> **(v) ….**
> (vi) ….
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> is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any University in the Republic or any other body designated by the Minister for the purpose of this subsection by notice in Gazette, and that he she has

established such fact by means of an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact;
Provided that the person who may make such an affidavit may, in any case in which skill is required in chemistry and anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.

[14] The learned magistrate did not at any stage of his objection to Mutileni's affidavit mention what was wrong or which requirements did the affidavit not meet, leaving the Public Prosecutor to speculate. A quick analysis of the affidavit indicates compliance with the requirements. It is of fundamental importance to note that the interests of justice serve that the court is likewise obligated to invoke the provisions of s 170A *mero motu* if it appears to it at any stage of the trial that a child under the age of 18 years is or might be exposed to undue mental stress or suffering. For the court to be able to determine if that is the case before a child testifies, the child would need to undergo an assessment and a report prepared for the court to exercise its discretion judiciously. The interest of a child being of paramount importance, the section is said to represent the legislature's attempt to alleviate the problems of child victims, especially victims of child abuse. See Hiemstra's *Criminal Procedure* Service Issue 6. More so the court was supposed to play a more emphatic role in ascertaining that such a report is available and deal with the officials of the Department decisively however not by way of compromising the interest of justice. Compliance with s 170A should not be seen as part of the State's case but assistance to the court.

[15] The importance of the child's right that was at stake is elucidated by the fact that it was found to displace the right of the accused to a fair trial that is the right to see and hear witnesses. Such displacement was confirmed to pass Constitutional muster in *K v Regional Court Magistrate N O and Others* 1996 (1) SACR 434 (EC). The court was therefore obliged to consider or hear an application for the child to testify through an intermediary even though delayed by a further a postponement. The learned magistrate's objection to the Application and refusal of a postponement compromised the fair administration of justice.

[16] As mentioned in this instance due to the rights that were at stake and affecting the proper administration of justice the court should have dealt with the matter differently and issued an appropriate alternative order as provided in s 342A other than one that would result in an unfair result. The court should have established if any prejudice would have been suffered by any of the parties and if the interest of justice would have been served by refusing or granting the postponement.

[17] S 342A that was applied by the learned magistrate actually provides for such a consideration and reads:

(1) "A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, state or a witness".

The court was more concerned in this instance about the accused's right that stems from s 35 (3) (d) of the Constitution, Act 108 of 1996 that entitles the Respondent to a speedy trial, the only consideration mentioned by the learned magistrate when he refused the postponement, without due regard to the sexual offence child victim who was present at court and the prosecution. The court also disregarded the fact that it was also not of any of the latter's doing that the report was not ready. S 342 (2) (h) specifically mentions the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued as a factor to be taken into consideration in deciding if any delay can be regarded as unreasonable.

[18] In addition, the Respondent was on bail, a further postponement for two weeks would not have caused any prejudice to him. So there was no justifiable reason for refusing a postponement. Nevertheless as correctly pointed out in Appellant's heads of argument, s 324A 4 (a) prescribes that:

> "An order contemplated in subsection 3 (a) where an accused has pleaded to the charge and an order contemplated in subsection 3 (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case maybe has given notice beforehand that it intends to apply for such an order."

[19] It is clear, *in casu*, that the court could not have taken this decision without holding an enquiry whereupon facts from which it could determine if the exceptional circumstances for it to issue the order in terms s 342A (3) (d) exist. I am of the view that the court misdirected itself when it failed to consider the appropriate aspects provided in s 342 A (2) to determine the suitability of an order refusing postponement and to follow or comply with the prescripts of s342 A (4) (a) that are prescriptive in nature. Its misapplication of the law resulted in a gross irregularity.

[19] Under the circumstances I make the following order:

[19.1] The Appeal is upheld. The decision of the learned magistrate in the court a quo is hereby set aside. The matter is remitted back for the trial to start *de novo* before a different magistrate.

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N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

I agree

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T V RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

On behalf of Appellant: **F C Roberts**
Instructed by: **National Director of Public Prosecutions**
Pretoria