IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

High Court Case no. 8098/2004

In the matter between

THE ACTING PREMIER, WESTERN CAPE	Applicant
v	
THE REGIONAL MAGISTRATE FOR THE DISTRICT OF BELLVILLE, DIVISION OF THE WESTERN CAPE, A. LE GRANGE NO	First Respondent
DAVID MICKEY MALATSI	Second Respondent
PETRUS JACOBUS MARAIS	Third Respondent
THE LEGAL AID BOARD	Fourth Respondent

JUDGMENT HANDED DOWN THIS TUESDAY, 15 NOVEMBER 2005

CLEAVER J:

[1] The second and third respondents are currently facing criminal charges in terms of the Corruption Act and charges of fraud in the regional court. Their trial commenced in George on 18 November 2003 and after running for two weeks was postponed to 21 June 2004. Both the second and third respondents had enjoyed legal representation up to that stage, but on 21 June the legal representatives of the second respondent withdrew due to a lack of funds on the part of the second respondent.

[2] At that stage it was known that prior to the trial commencing, the second and third respondents had applied to the state attorney for her to represent them at the trial

on the basis that when the alleged offences were committed, the second respondent had been the Member of the Executive Council responsible for Environmental Affairs and Development Planning in the Western Cape and the third respondent had been the Premier of the Western Cape. Their application had been refused. When the second respondent's legal team withdrew, application was made on his behalf and on behalf of the third respondent to the Minister of Justice and Constitutional Development for her department to provide legal representation for them at the trial. The second respondent averred that he had no funds to finance further representation for him and the third respondent had indicated that the funds which he had available for legal representation were expected to be exhausted shortly. The trial was then postponed to 16 August 2004 and the second respondent warned that he was to secure legal representation irrespective of the outcome of the application to the Minister of Justice.

[3] Although no response had been received from the minister, the trial proceeded on 16 August. However, it was stopped on 19 August because the first respondent concluded that the second respondent, who was of course unrepresented at the time, was not able properly to deal with the evidence being led without legal assistance. On 24 August a reply was received from the Minister of Justice in which it was indicated that the Department of Justice could not fund legal representation for the second and third respondents, but it was suggested that the Provincial Government of the Western Cape be approached for assistance for them. On 25 August 2004 the Head of the Branch: Legal Services in the

Provincial Administration of the Western Cape Province (Mr Pretorius) met the first respondent in the latter's chambers, together with a representative of the state attorney, counsel for the state, counsel for the third respondent and also the second respondent. Mr Pretorius was informed by the first respondent that the latter intended conducting an enquiry in terms of section 342A of the Criminal Procedure Act, Act 51 of 1977 ("the Act") with the view to ordering the first respondent to fund the further legal representation of the accused in the trial. After obtaining senior counsel's opinion, Mr Pretorius appeared before the first respondent on 27 August. After hearing him, counsel for the third respondent, the second respondent in person and counsel for the state, the first respondent ordered the applicant to pay the costs of legal representation for the second and third respondents in the trial with effect from 27 August 2004. He also ordered that in the event of the two respondents being found guilty the applicant would be entitled to recover the costs paid by it from them. The trial continued for a period and the stage has now been reached where the state has closed its case. On 12 December 2005, the first respondent will hear argument in support of an application on behalf of the two respondents for their discharge. The application before me is one to review the order made by the first respondent against the applicant. Although brought as a matter of urgency, it was not dealt with on that basis and came before me more than a year after it had been launched.

[4] The Legal Aid Board is cited as the fourth respondent although no relief is sought against it. Notwithstanding this, the fourth respondent saw fit to file an answering affidavit in which it sets out that the object of the Legal Aid Act is to provide legal representation for indigent persons and in which it supports the ruling made by the first respondent. At the hearing of the matter counsel appeared for the fourth respondent, but

since he indicated that the fourth respondent will abide the decision of the court, he was excused from further attendance.

[5] Section 342A of the Act was introduced into the Act with effect from 1 September 1997. The provisions of the section relevant to this application are:

> "***342A 'Unreasonable delays in trials***
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> *(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, the State or a witness.*
>
> *(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:*
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> *(a) The duration of the delay;*
>
> *(b) the reasons advanced for the delay;*
>
> *(c) whether any person can be blamed for the delay;*
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> *(d) the effect of the delay on the personal circumstances of the accused and witnesses;*
>
> *(e) the seriousness, extent or complexity of the charge or charges;*
>
> *(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;*
>
> *(g) the effect of the delay on the administration of justice;*
>
> *(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;*
>
> *(i) any other factor which in the opinion of the court ought to be taken into account.*
>
> *(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order—*
>
> *(a) refusing further postponement of the proceedings;*
>
> *(b) granting a postponement subject to any such conditions as the court may determine;*
>
> …"

[6] The first respondent concluded that on the evidence before him the second and third respondents had acted in the scope and course of their duties as MEC for Local Government and Premier for the Western Cape respectively. He also concluded that since the two respondents were not indigent persons they would not qualify for legal aid. He also found that the criminal proceedings before him

were being unreasonably delayed due to the lack of legal representation for the second respondent *"which also affects accused 2"* (third respondent) and that in terms of the section, he was obliged to make a ruling as to who should assist the second and third respondents with their legal costs. The following order was made:

> "*1. The Provincial Government of the Western Cape grants legal assistance to both accused to eliminate the unreasonable delay in the case.*
> *2. In the event of both accused being found guilty, the Provincial Government of the Western Cape can recover the costs from the accused.*
> *3. Due to the intricate and complex nature of the matter, that legal assistance be granted in the manner of Counsel assisted by an Attorney.*
> *4. The order only relates to the proceedings in the Magistrate's Court.*

[7] On behalf of the second and third respondents it was submitted that in line with the decision in *Wahlhaus and Others v Additional Magistrate, Johannesburg*[1] *and Another*, this court ought not to embark on a review in the unterminated proceedings in the regional court. The view expressed in *Wahlhaus* was reaffirmed in *Ismail & Others v Additional Magistrate, Wynberg and Another*[2] and *S v Attorney General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* [3]. The authorities quoted make it clear that such an intervention should be reserved for exceptional cases. The cases to which I have referred concern issues between the state and the accused in pending criminal trials. The case before me differs from those cases because the order made by the first respondent was against a third party which was in no way connected to the criminal trial. Counsel for the second and third respondents submitted that the principle laid down in the cases was broad enough to cover the present case, but in my view the circumstances are so different that the present case can be distinguished. Both before the first respondent at the enquiry in terms of s 342A and in the papers before me, it was recorded that the first respondent had a long standing protocol in terms whereof it

1. 1959 (3) SA 113 (A)
2. 1963 (1) SA 1 (A)
3 . 1999 (2) SACR 13 (C)

did not and does not provide funds for the legal assistance to employees of it who are charged with crimes of dishonesty. Instead it supports the prosecution in such cases. It was also submitted on behalf of the applicant that it had no legal obligation to provide legal representation for such persons. Counsel for the second and third respondents did not contend that the first respondent had a legal obligation to fund the defence of the respondents concerned, but contended himself with the submission that since s 342A allowed the Regional Magistrate to make *"any such order as it [he] deems fit"*, that constituted sufficient authority for the order which was made. What is important is that the applicant had already refused a request by the relevant respondents to have their legal representation funded by the applicant. If the second and third respondents were of the view that the applicant was obliged in law to fund their defence, the proper course would have been to take the first respondent's decision in terms whereof assistance was refused on review. Until that is done, the decision to refuse the request stands. By making the decision which he did the first respondent in effect overturned the applicant's earlier decision and in effect reviewed that decision. To that extent at least I consider that he acted *ultra vires* the authority granted to him in terms of s 342A. In the course of the further reasons supplied by the first respondent, the following remark appears:

> "*The decision by the State attorney is not under review by this court."*

Presumably the first respondent here refers to the initial request on behalf of the respondents for the funding of legal representation addressed to the state attorney. The first respondent continues

> "*To do that is to usurp more power than merely be a Creature of Statute, as so eloquently put by Senior Counsel for the Provincial Administration."*

Since the first respondent seemed to appreciate that being a creature of statute he did not have the power to review the earlier decision by the state attorney, it is a little difficult to follow why he did not foresee a similar difficulty when dealing with a decision which had previously been made by the first respondent.

[8] Quite apart from the fact that the first respondent's decision had the effect of overturning the applicant's earlier decision, I am of the view that in any event the

first respondent exceeded his authority in making the order. It has repeatedly been held that a magistrate's court is a creature of statute[4]. As such it has no inherent jurisdiction such as possessed by the Superior Courts. The Act gives the magistrate no such power and on that basis his decision is *ultra vires*. Support for this view is to be found in *Scholtz and Others v S*[5]. Finally, the wording of section 73(2)(C) of the Act clearly envisages that an order under section 342A can include an order that the Legal Aid Board should fund the defence of an accused in appropriate circumstances. The section reads

> "*If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may, in addition to any order which it may make in terms of section 342A, order that the trial proceed without legal representation unless the court is of the opinion that that would result in substantial injustice, in which event the court may, subject to the Legal Aid Act, 1969 (Act 22 of 1969), order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she so prefers to conduct his or her own defence.*"

This should be read with section 3B of the Legal Aid Act 22 of 1969 in which provision is made for a court to direct that a person be provided with legal representation at state expense. In my view these sections make it clear that the provision of legal representation for persons charged with criminal offences is to be provided by the Legal Aid Board.

[9] Even if I am wrong in distinguishing this matter from the general principle applied in *Wahlhaus* and the other cases cited, I consider that the present matter is one of the rare and exceptional cases in which a review of an interlocutory decision is

4. *Hatfield Town Management Board v Mynfred Poultry Farm (Pty) Ltd* 1963 (1) SA 737 (SR at 739E)
5. 1996 [3] All SA 210 CPD

justified. The order against the applicant brought about significant implications for the applicant. In the replying affidavit filed on behalf applicant, the deponent records that following on the order made by the first respondent, the applicant has been faced with numerous enquiries *"in respect of the impact and consequences of the court order"*. Difficulties which have arisen include the fact that an order of the nature granted by the first respondent can not be budgeted for. The first respondent has acquiesced in the order pending determination of the review and since the expenditure incurred in terms of the order had to be allocated to a department within the Province, it was initially decided to allocate the expenditure to the Department of Environmental Affairs. That Department could not meet payment of all the costs of the third respondent within its budget, nor could the costs be accommodated in the Premier's budget. In the result the third respondent's costs are being paid from the Legal Services' budget which is already in the red. The deponent for the first respondent submits that having to give effect to the order threatens the underlying principles of sound financial management. In passing I would remark that although the cases referred to relate to interlocutory applications in a *lis* between the state and an accused, the present application is not interlocutory in so far as the applicant is concerned, but is of the nature of a final order in respect of which no limits have been set and in respect of which the applicant has no means of monitoring the expenditure. This is clearly also a significant distinguishing feature.

[10] In my view there are further reasons why the review ought to succeed. In the first place it was not established that proceedings were being delayed in so far as the third respondent was concerned, let alone that there had been an unreasonable delay in the

case of the third respondent. Counsel for the third respondent continued to be on brief although he had intimated to the first respondent that the funds available to the third respondent for the purpose of his defence were being eaten up. Any delay in the criminal proceedings had in fact been caused by the second respondent who had failed to obtain legal assistance which he had been warned to do when the matter was postponed. Accordingly, in so far as the third respondent is concerned, the jurisdictional fact which had to be present for an order under s 342A was not present. As far as the second respondent was concerned the provisions of s 73(2)(c) could have been applied as he had delayed the proceedings by failing to obtain legal representation as he had been ordered to do.

[11] In my view there are also grounds for concluding that the ruling or order made by the first respondent can be set aside on review because the order was either irrational or unreasonable. I have already referred to the consequences on the first applicant's budgeting system. It is also not sanctioned by the framework of the Province's exercise of executive authority as set out in s 125 of the Constitution. Finally, there is the apparent basis upon which the first respondent concluded that the applicant ought to fund the defences of the second and third respondents. He relied on the fact that the two respondents were innocent until proven guilty and on evidence on record to the effect that both of them acted within the scope and course of their duties as elected officials of the Provincial Government of the Western Cape. That the two respondents are innocent until proven guilty is so, but in my view that presumption does not justify the ruling that the first respondent was to provide legal assistance for them. As to the official capacities which the two respondents occupied, it would seem that the first respondent was of the view that the applicant ought to fund the defences of the two respondents because the applicant would in some way be vicariously responsible for the actions of the two respondents. Vicarious liability generally applies when an employer is sought to be held liable for the delict committed by an

employee acting in the course and scope of his employment. The two respondents are not being charged with offences under the Corruption Act and fraud committed **on behalf of** the applicant, they are being charged in their personal capacities and vicarious liability is not an issue.

[12] For the reasons set out above I conclude that the ruling made by the first respondent is to be reviewed and set aside.

[13] During the course of his representations to the first respondent, the legal representative of the applicant submitted that representation for the two respondents could be funded by the Legal Aid Board. Since the main object of the enquiry was to establish why an order in terms of s 342A ought not to be made against the applicant, it is perhaps understandable that this issue was not addressed as fully as it might have been. The first respondent concluded very briefly that since the object of the Legal Aid Board was to provide legal representation for indigent persons and the two respondents were not indigent, funding for the defence of the two respondents by the Legal Aid Board was not a viable proposition. I heard a considerable amount of argument on this issue, but since I have already concluded that the ruling made by the first respondent is to be reviewed, it is not necessary for me to make a finding as to whether or not the two respondents ought to be granted legal aid. Counsel for the two respondents submitted that in the light of the contents of the affidavit filed on behalf of the fourth respondent (the Legal Aid Board), the two respondents will be left with no recourse to legal assistance if the review succeeds. The matter is not so simple. As pointed out by counsel for the appellant, the state fulfils its function and

obligation to provide legal assistance to persons charged with criminal offences through the medium of the Legal Aid Board. A decision as to whether legal aid can be provided will require a careful consideration of the provisions of s 73(2B) and 73(2C) of the Act read with sections 3, (3A) and (3B) of the Legal Aid Act 22 of 1969. On my reading of these sections it is by no means clear that a case cannot be made out for legal aid to be provided, but that is not for me to decide.

[14] In the order which I will make, there will be no provision for the payment of costs as I am under the impression that counsel for the applicant indicated that such an order would not be sought. However, I may be wrong and it may be that it was only in respect of the fourth respondent that no order for costs was sought. If I have misunderstood the position, counsel will be afforded a period of ten court days from the date of this judgment within which to approach me in order to obtain directions as to how the issue of costs is to be dealt with.

[15] The application succeeds and the decision of the first respondent made on 27 August 2004 in case no GSH 235/03 in terms whereof the applicant was ordered to grant legal assistance to the second and third respondents is reviewed and set aside.

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R B CLEAVER