THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Reference Number: **488/2020**
Case Number: **1323/2018 & A425/2014**

In the matter between:

THE STATE

and

DANIEL LOUIE

JUDGMENT: 14 DECEMBER 2020

BOZALEK J

[1] This matter was sent as a special review by the Magistrate of Bellville and arises out of extradition proceedings which were initiated by the Director of Public Prosecutions against the respondent.

[2] The extradition enquiry, held in terms of sec 9 of the Extradition Act, 67 of 1962 commenced on 22 February 2018 before a Bellville magistrate, Mr Godwana. By April 2018 the respondent was represented by senior counsel and challenged the admissibility of the extradition bundle which formed the evidentiary basis of the request for extradition. Finally, after argument by the parties and several hearings, the magistrate made a ruling that the extradition bundle be *'admitted in evidence supporting the application for the extradition'*. The magistrate then postponed the matter until 15 March 2019 in order to obtain a transcript of the record relating to the

admissibility challenge. Thereafter the matter was repeatedly postponed not least due to the fact that the magistrate secured a position at the nearby Cape Town Magistrate's Court and was thereafter absent from the Bellville Magistrate Court on the dates to which the matter was postponed. State counsel tried repeatedly to engage with Mr Godwana with a view to ensuring that the matter proceed and went so far as to write an email requesting an undertaking that he would attend at court. Finally, on 1 July 2019 Mr Godwana attended a hearing at the Bellville Magistrate's Court but then proceeded to rule that the extradition enquiry had not yet commenced and purported to recuse himself from the matter.

[3] The senior magistrate of Bellville then appointed another local magistrate to deal with the matter. On 17 October 2019 that magistrate ruled that she could not proceed with the extradition enquiry and decided to send the matter on special review to the High Court. She took the view that she was not entitled to proceed with the extradition enquiry as it had already commenced before Mr Godwana who had already made the admissibility finding referred to.

[4] In the magistrate's initial referral, she stated that she was of the opinion that the matter was part heard and sought *'guidance'* from the High Court as to whether the matter was part heard or not, whether Mr Godwana was entitled to have recused himself, whether previous proceedings should be set aside and start *de novo* or whether Mr Godwana was obliged to finalise the matter. She also sought a declarator as to the previous magistrate's ruling regarding the admissibility of the extradition bundle in the event that this Court should decide that the matter should start *de novo*.

[5] The magistrate who sent the matter on *'special review'* did not indicate whether her referral was based on sec 304 (4) or 304 A of the Criminal Procedure Act, 51 of 1977. The former section deals with sentences imposed which are not subject to review in the ordinary course whilst the latter section deals with the unusual circumstance of a review of proceedings before sentence. The circumstances of the present matter clearly do not fit neatly into either of these provisions and hence a query was directed to both the magistrate and to the Director of Public Prosecutions seeking clarification as to the basis of the referral and enquiring why the Director of Public Prosecutions did not seek to review the decision by way of an application in terms of sec 22 of the Superior Courts Act, 10 of 2013. Needless to say neither section 304(4) or 304 A are designed to offer a means whereby magistrates can seek general legal advice or *'guidance*' from the High Court on sundry legal issues which have little if anything to do with the review powers of the High Court.

[6] In response the magistrate indicated that in fact she had in mind that the Court deal with the matter in terms of sec 22 of the Superior Court Act, 10 of 2013 which provides for the review of proceedings of the Magistrate's Court *inter alia* on the basis of a *'gross irregularity'* in the proceedings. In the ordinary course, review proceedings under sec 22 will be civil proceedings, which are initiated by a party having a direct interest in the matter, citing all parties with an interest in the matter, and utilising the applicable rules of court relating to form, procedure and time limits.

[7] Inasmuch as it appears that the Director of Public Prosecutions, in particular, was unhappy with Mr Godwana's decision to *'recuse himself'*, I see no reason why the Director of Public Prosecutions could not at that stage have immediately launched

review proceedings under sec 22 of the Act 10 of 2013 to set aside the disputed decision citing the respondent and Mr Godwana.

[8] In response, while contending that it is generally accepted that the Extradition Act relies on the Criminal Procedure Act for its processes and that a referral in terms of sec 304(4) might be construed as a misstep, the Director of Public Prosecutions likewise submitted that it would be within the High Court's power to review this matter making use of its inherent review powers. It was submitted that the review could proceed by way of applying sec 173 of the Constitution of South Africa Act, 1996 read with the provisions of sec 22 of the Superior Courts Act. It was further submitted that with a view to dealing with the matter expeditiously this would be the most appropriate course but that, failing the Court doing so, the Director of Public Prosecutions' representative would be instructed to bring such an application for review in the normal course.

Procedural issues

[9] As was confirmed in *Geuking v President of the Republic of South Africa*[1] extradition dealings are *sui generis* and the Extradition Act in essence regulates the exercise of a sovereign state's power. In *Minister of Justice v Bagattini*[2], however, in considering whether costs should be awarded in civil review proceedings involving an extradition enquiry, the Court held that such proceedings were, in substance *'of the nature of the criminal proceedings'* and declined to make any such order.

[10] The essential elements of sec 304(4) are that any review should involve a

[1] 2003 (3) SA 34 (CC) 34 at page 54.
[2] 1795 (4) SA 252 (T).

criminal case in which a sentence has been imposed, which sentence is not normally reviewable and, finally, that the proceedings are not in accordance with justice. Accepting for present purposes the present matter can be equated with a criminal case it would seem that it lacks the requirements of a sentence having been imposed and the allegation that proceedings are *'not in accordance with justice'*. However, as has been noted by the authors of Du Toit in Commentary on the Criminal Procedure Act, the statutory review scheme shows a legislative intention that all criminal procedures in the Magistrates Court should be capable of being reviewed and corrected if justice so requires. This construction is supported by sections 35(3) and 39(2) of the Constitution. The authors add however that such irregularities should be considered *'not as a review under sec 304(4), but under the High Court's inherent jurisdiction'*.

[11] In *S v GD*[3], similar circumstances as those which prevail in the present matter arose. The regional magistrate before whom the case had begun resigned before completing the matter. The application for special review was dismissed, the Court finding that the magistrate's resignation and unavailability to finalise his part heard matters was not a justifiable reason for invoking sec 304 A of Act 51 of 1977. It held, however, that the magistrate had a duty to finalise the case and could not shirk his duty merely because he has resigned. To that end it remitted the matter back to the magistrate's court for the magistrate in question to finalise the trial. The Court placed reliance on sections 9(7)(a) and 9(7)(b) of the Magistrate's Court Act, 32 of 1944 which provide inter alia that where a magistrate presiding in criminal proceedings in which a plea was recorded continued to hold office in respect of the disposal of those

[3] 2018 (1) SACR 630 (WCC).

proceedings notwithstanding his subsequent vacation of the office of magistrate prior to the finalisation of such matter. It relied too on the judgment of the Supreme Court of Appeal in *Magistrate Stutterheim v Mashiya*[4] where that Court held it is beyond doubt that the higher courts have supervisory powers over the conduct of proceedings in the Magistrates Court in both civil and criminal matters which includes the power to intervene in unconcluded proceedings.

[12] The enquiry then before this Court appears to boil down to the question of whether an irregularity has taken place which has rendered the proceedings *'not in accordance with justice'* and whether the Court should exercise its inherent powers of review to correct same as opposed to leaving it the parties to remedy the irregularity through civil review proceedings brought by way of application before this Court in the ordinary manner.

[13] Turning to the first question there can be little doubt in my view that the magistrate's *'recusal'* was a gross irregularity. He referred to the issue which he decided as a *'point in limine'* and stated, without furnishing any reasons, that in his view the extradition enquiry had yet to commence. He advised the parties that he would have to withdraw from the matter because he was no longer based in Bellville. Counsel for the Director of Public Prosecutions then submitted that in his view the enquiry had already started and enquired of the magistrate whether he would hear submissions in this regard. The magistrate's response was to state that he was not open to that and to repeat that he regarded the enquiry as yet to commence.

[14] The dangers of a magistrate recusing him or herself too readily from a matter

[4] 2003 (2) SACR 106 (SCA).

were recently referred to in the matter of *MJ Vermuelen Inc v Magistrate S Engelbrecht NO and one other*[5]. It appears that the proceedings were acrimonious and the Magistrate perceived that both parties, self-represented attorneys, were also treating him with disrespect. The Court quoted with approval from the Namibian High Court's decision in *S v Boois*[6] and *The President of the Republic of South Africa v South African Rugby Union and Others*[7]. In *SARFU* the Constitutional Court stated presiding officers *'must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves'*.

[15] In *S v Boois* at paragraph 28 the Court stated as follows:

> *'[28] Viewed in its entirety, there is, in my view no sound reason in law why the learned Magistrate found himself unfit to continue sitting in the matter, assuming that his decision to enter a plea of not guilty had been correct in the first place. While the decision to recuse oneself, especially* mero motu *is one of judicial conscience and must ordinarily be respected. It should, however have a reasonable basis in law and judicial officers should not be allowed to shirk their duty to sit in matters by unilaterally recusing themselves when there is, objectively speaking no sound basis in law for doing so. And importantly, the decision to recuse oneself* mero motu, *must not only be viewed from the subjective position of the judicial officer concerned. There is an important objective assessment that must be carried out and the test in this regard appears to some extent to be a tapestry of both objective and subjective elements'*.

[5] [2020] ZAWCHC 148 (6 November 2020).
[6] 2016 JDR 0118 (NM).
[7] 1999 (4) SA 147 (CC) para 40.

[16] The Court went on to hold there must be an objectively reasonable basis where judicial officers decides *suo motu* to recuse themselves, stating as follows at paragraph 30:

> *'If it were otherwise, judicial officers would recuse themselves from hearing matters in respect of which they have some personal aversion, fear or foreboding, under the ruse of subjective reasons which may not be subjected to objective standards of scrutiny and this may* (sic) *the administration of justice and the esteem and dignity of the courts a shattering blow in the minds of the public. In that way, judicial officers may circumvent their duty to sit even in appropriate cases by employing the simple stratagem of recusing themselves* suo motu *for personal reasons when no objective or reasonable basis for doing so exists in law, logic or even common sense. Willy nilly recusal on* mero motu *bases is therefore a practice that we should, as judicial officers, steer clear from like a plague, understanding as we should, that in light of our judicial oaths of office we have a duty to sit unless a proper case for recusal is evident or justly apprehended'.*

[17] I associate myself fully with these remarks adding only that by, definition, they apply with equal if not greater force to situations where presiding officers such as the magistrate in question appeared to have had no other reason to recuse himself other than considerations of personal convenience. In this regard I have also asked myself why this matter was not dealt with administratively at a much earlier stage. It appears that the magistrate only recused himself after many months of evading hearing the case. It is most regrettable that the magistrate's superiors at some early stage did not

make it clear that it was his legal and official duty to complete the extradition enquiry he commenced so long before.

[18] The question then is whether this Court should intervene and exercise its inherent powers of review. A similar situation confronted the Court in *S v Kirch*[8] where a magistrate recused herself from a matter in the midst of the state's case where it emerged that the State would have to call a witness who was friendly with the presiding magistrate. Although neither sec 304(4) nor 304A of the Criminal Procedure Act were applicable the Court, taking a broad view of its review powers and its inherent power under sec 173 of the Constitution, set aside the proceedings and remitted the case back to the Court *a quo* to be heard by another magistrate. In so doing the Court relied *inter alia* on *S v S*[9] and *Magistrate Stutterheim v Mashiya*[10] where the Supreme Court of Appeal held that:

> *(a) at common law which subsists under the Constitution, higher courts have superisory powers over the conduct of proceedings in lowers courts;*
>
> *(b) this includes the power to intervene in unconcluded proceedings; and*
>
> *(c) the power must, however, be exercised only in cases of 'great rarity – where grave injustice threatens and where intervention is necessary to attain justice'.*

[19] The Court in *Kirch* also relied on the finding in *S v Taylor*[11] where the Court, referring to sec 173 of the Constitution, namely that the higher courts have the inherent power to protect and regulate their own process, and to develop the common

[8] 2014 (2) SACR 419.
[9] 1999 (1) SACR 608 (W).
[10] 2003 (2) SACR 106 (SCA).
[11] 2006 (1) SACR 51 (C).

law taking into account the interests of justice, held that such section allowed the exercise of the Court's inherent power taking into account the interest of justice, without being subjected to any form of statutory constraint.

[20] I have already expressed my reservation that this matter was not dealt with at an earlier stage at an administrative level and, furthermore that, when the magistrate recused himself the Director of Public Prosecutions or any other interested party did not immediately launch civil review proceedings in this Court in terms of sec 22 of the Superior Courts Act and the Uniform Rules of Court which make provisions for review proceedings.

[21] That was not done, however, and to dismiss this special review and require of the parties to bring civil review proceedings will no doubt cause yet a further delay in this matter which has been inordinately delayed. The record in this matter reveals that the respondent was arrested in this country on 5 March 2014 pursuant to a request for his extradition from the United States of America. The respondent appeared in court on the following day and less than a month later was released on bail or R100 000. It is unclear, beyond references to awaiting the outcome of the High Court proceedings, what took place over the next four years in relation to the matter until February 2018 when the extradition enquiry commenced. Since that date there were numerous hearings and postponements before magistrate Godwana until he recused himself on 1 July 2019. In all that time no evidence was heard and the only point determined by the magistrate was the admissibility of the extradition bundle. To sum up: in a period of more than six and a half years the sum of the progress in this extradition enquiry, inherently a matter of some urgency, is a ruling that the extradition bundle is

admissible. The Director of Public Prosecutions noted in her submission that, unsurprisingly, there has been *'sustained interest from the US authorities as to the progress in the matter'*. Needless to say the reputation of the South African legal system and its criminal justice system is done a grave disservice when a matter of this nature is allowed to drag itself through the courts for so long with so little progress.

[22] In the circumstances I regard this as a matter where it would be appropriate for the Court to exercise its inherent power of review. This decision should not be taken as suggesting that the special review or inherent review powers of the High Court are to be exercised automatically in such circumstances when the parties have available to them the ordinary remedies of review proceedings in the High Court. I consider that it is, furthermore, appropriate to send a copy of this judgment to the Magistrate's Commission with a view to its investigating and considering the conduct of magistrate Godwana recusing himself from an extradition enquiry in which he had been long involved, simply to suit his personal convenience.

[23] In the result the following order is made:

1. The decision of magistrate Godwana, *suo motu*, to recuse himself from presiding in the extradition enquiry in the Bellville Magistrate's Court, case number A1323/2018 is reviewed and set aside.

2. Magistrate Godwana is hereby directed to continue with the hearing of the enquiry on a date to be arranged by the parties, failing which to be determined by the Clerk of the Criminal Court at Bellville Magistrate's Court.

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BOZALEK, J

Judge of the High Court

I agree.

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BINNS-WARD, J

Judge of the High Court