



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

**REPORTABLE**

**CASE NO: 871/2022**

**ZANDILE CHRISTMAS MAFE**

Applicant

and

**THE ACTING DIRECTOR OF PUBLIC PROSECUTIONS  
WESTERN CAPE**

First Respondent

**THE ACTING MAGISTRATE MR ZAMIKHAYA MBALO  
CAPE TOWN MAGISTRATE COURT**

Second Respondent

**CORAM:**

**JUDGE PRESIDENT HLOPHE et**

**ACTING JUSTICE WATHEN-**

**FALKEN**

---

**JUDGMENT**  
**Delivered on 29 April 2022**

---

A. Introduction

[1] On the 14<sup>th</sup> January 2022, the Applicant, Mr Mafe brought an urgent application to be released on bail pending the criminal proceedings, as a result of an order made by the second Respondent, Magistrate Mbalo on 11 January 2022 referring him for a 30 day psychiatric observation period in terms of Section 78 of the CPA.<sup>1</sup>

Hlophe JP directed that the application should be heard before two judges given the nature of the order of the court a quo. The court properly constituted heard the application on Tuesday 18 January 2022. The issue requiring this Court's immediate attention, the proverbial elephant in the room, was the review of the proceedings at which the order was made by the Magistrate in terms of Section 78 of the CPA.

[2] The Notice of Motion was accordingly amended by agreement between the parties. In terms of the amended Notice of Motion, the Applicant specifically asked for an order reviewing and setting aside Mr Mbalo's order referring him for psychiatric observation for a period of 30 days.

The First Respondent opposed the Review only insofar as it related to the Applicant's potential release on bail pending the criminal proceedings. The Second Respondent, Mr Mbalo filed a Notice to Abide.

---

<sup>1</sup> Criminal Procedure Act 51 of 1977

[3] After the issues were properly ventilated in open court, the following order was made.

3.1 That forms and service provided in the Uniform Rules of Court condoning non-compliance with the Uniform Rules of Court relating to service and time periods in terms of Rule 6(12) are dispensed with.

3.2 That the order of the *court a quo* to refer the Applicant in terms of Sections 77(1) and 78(2) of the Criminal Procedure Act of 51 of 1977 to Valkenberg Psychiatric Hospital is declared irregular and unlawful.

3.3 That the Applicant be removed from the Valkenberg psychiatric facility with immediate effect and shall be kept at Pollsmoor Correctional Facility pending further hearing of the matter.

3.4 That the matter is set down for bail application proceedings to be heard on Saturday 22 January 2022 before the Cape Town Regional Court or as may be agreed between the parties.<sup>2</sup>

3.5 The application succeeds with costs.

3.6 No cost order was made against the Second Respondent.

---

<sup>2</sup> The bail application was heard before Acting Regional Court President, Ms Adams and bail was refused in the matter. Subsequent thereto, Mr Mafe appealed to the High Court and the bail appeal was heard on 25 April 2022 by Lekhuleni and Thulare JJ, who reserved judgment.

B. Common Cause Facts

[4] The facts relating to the application are relatively common cause and not in dispute. A fire raged through the Parliamentary buildings in the early morning of 2 January 2022. The incident naturally generated much public interest given that The National House of Assembly represents a pillar of our constitutional democracy.

[5] The Applicant presented as a homeless person and was arrested within the Parliamentary precinct within a short time of the blaze. He had slept on the premises the night before since he was in search of employment in the city and travelling in and out of the city was too costly.

[6] A report was compiled by the District Surgeon, Dr Zelda van Tonder on 3 January 2022 who concluded that the Applicant suffered from paranoid schizophrenia.

On the 4 January 2022 the Applicant appeared at the Cape Town Magistrates Court before Mr Mbalo for the first time. The District surgeon's report was not made available to the Court nor to the Applicant's legal team. The Applicant indicated that he wished to apply for his release on bail. The matter was remanded to 11 January 2022 without any reference or enquiry into Mr Mafe's ability to follow the proceedings or his ability to have appreciated wrongful conduct prior to his arrest. Without any explanation, the Magistrate did not entertain the application for bail.

[7] On 11 January 2022, further charges were added which placed the offences within the ambit of Schedule 6 of the CPA, consequently placing a more onerous

burden on the Applicant in his bid to be released on bail. We must conclude that the seven day remand from 4 January 2022 to 11 January 2022 was granted in terms of Section 50(6) of the CPA to afford the state sufficient time to obtain information in preparation for a bail application. The State, however submitted the single page medical report procured on 3 January 2022 to the *court a quo* and requested that the Applicant be referred for psychiatric observation at the Valkenberg Psychiatric Facility for the maximum period of 30 days based on the diagnosis of the District surgeon.<sup>3</sup> This was the first time that the Applicant and his counsel were made aware of the report relating to the state of his mental health.

[8] The Applicant, through his Counsel, objected to the referral and persisted with his application for bail. No ruling was recorded by the Magistrate in response to the Applicant's plea for bail.

The *court a quo* summarily accepted the medical assessment without granting the Applicant the opportunity to present evidence in rebuttal.

On 11 January 2022, the Magistrate made a ruling:

“state has produced prima facie evidence in terms of section 78”

Thereafter, the court a quo accordingly referred the Applicant for observation in terms of section 78 of the CPA.

C. The issues to be decided on:

- i. Whether it is proper for a Magistrate before whom bail proceedings are pending, to summarily refer an accused person in terms of section 77 and/or

---

<sup>3</sup> Section 79(2)(a) of the Criminal Procedure Act 51 of 1977

section 78 purely on the strength of a medical report which was never disclosed to the accused person or his legal representative? And

- ii. Whether it is proper for a Magistrate, in those circumstances to disallow an accused person the opportunity to rebut a prejudicial medical finding?

D. The Applicable Law

[9] Section 77 to 79 Chapter 13 of the CPA

The framework within which judicial officers ought to approach matters where an accused persons' capacity to understand or appreciate proceedings: mental illness and criminal responsibility is at issue.

Section 77: capacity of accused to understand proceedings

*Section 77 (1): if it appears to the court at any stage of criminal proceedings that the accused by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court **shall** direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.*

*Section 78: Mental illness or mental defect and criminal responsibility Section 78 (2) : "If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such reasons not be so responsible, the court **shall** (own emphasis) in the case of an **allegation** (own emphasis) or appearance of mental illness or mental defect, and may, in any other case, direct that the*

*matter be enquired into and be reported on in accordance with the provisions of section 79.”*

*Section 79: Panel for purposes of enquiry and report under sections 77 and*

*78:* *“2 (a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any at other place designated by the court, for such periods, **not exceeding thirty days at a time** (own emphasis), as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.*

*(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.*

*[Para (b) added by s 4 of Act 4 of 1992 (wef 11 March 1992).]*

*(c) The court may make the following orders after the enquiry referred to in subsection (1) has been conducted-*

- (i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine;*
- (ii) refer the accused at the request of the prosecutor to the court referred to in section 77(6) which has jurisdiction to try the case;*
- (iii) make any other order it deems fit regarding the custody of the accused; or*
- (iv) any other order.”*

## E . Evaluation

[10] The Magistrate was presented with the following on 11 January 2022:

- 10.1 The additional charges by the State which altered the Applicant's position insofar as it related to his application for bail;
- 10.2 The presentation of the Schedule 6 certificate submitted by the First Respondent;
- 10.3 The Applicant's opposed bid for his release on bail; and
- 10.4 The single page medical report by the district surgeon dated 3 January 2022 which was placed in dispute.

[11] Let us consider the rationale behind section 78 of the CPA. It relates to requirement of culpability which is an essential enquiry as to whether the Accused may ultimately be held criminally liable for his or her actions, whether it be due to lack of insight or lack of self-control. The rationale being that a person suffering from mental illness cannot be expected to act in accordance with the law and/or appreciate the nature or wrongfulness of his or her conduct. Section 78 of the CPA therefore requires a Court to make an assessment based on *all the available facts* which would be in the interest of justice and which is aligned with the essence of Section 35 of the Constitution.<sup>4</sup>

[12] This is an evidential and factual determination which is in some instances based on the adjudicator's own observations or in other instances based on medical

---

<sup>4</sup> Section 35 of the Constitution Act 108 of 1996.

evidence presented by either or both parties before Court. (*S v Makoka* 1979 (2) SA 933 (A)). It follows that all evidence and facts ought to be placed before the Court for evaluation. The Magistrate had an obligation in terms of Section 77 of the CPA to note and record his observations of the Applicant which would best inform him whether Mr Mafe was in a position to appreciate the nature of the Court proceedings. This would best have been done through some degree of interaction with the Applicant. The Magistrate, forewent the opportunity to apprise himself of all the evidence before making the blanket referral.

The primary question is whether the Magistrate's decisions and conduct in the proceedings resulted in procedural unfairness and/or substantive injustice, and accordingly to an infringement of Mr Mafe's constitutional rights.

[13] It would appear that the Magistrate applied Section 78 in strict compliance with the plain reading of the section. The CPA does not give the presiding officer a discretion and it would appear that Mr Mbalo considered himself hamstrung by the provisions of Section 78. The section must be applied to the unique circumstances as presented in court and it must be interpreted through the lens of the Constitution. It is evident that the Magistrate did not consider the prescripts of Section 77 and must therefore have been of the view that the Applicant was able to appreciate the court proceedings when one considers his order. The interpretation and implementation of the section must affirm the democratic values of human dignity, equality and freedom. When interpreting legislation every Court must promote the spirit, purport and objects of the Bill of Rights.<sup>5</sup>

---

<sup>5</sup> Section 39(2) of the Constitution.

[14] Effect must be given to the principle of audi alteram partem. The CPA is silent on the procedure to be adopted by courts when Sections 77 and 78 applications are challenged prior to the referral order. The view that these sections must be applied without entertaining evidence in rebuttal when the situation arises simply cannot be sustained. The Applicant's right to be heard and to challenge the evidence presented by the State cannot be denied. Sections 77 and 78 in the circumstances must be interpreted in harmony with the Constitution and the audi alteram partem principle.

[15] A classic formulation of the principle was referred to with approval by the Appellate Division (as it then was) in its judgment in *Administrator Transvaal v Traub and others* [1989] ZA SCA, page 84 where it held that:

*'The classic formulations of the principle states that when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken'*

[16] On the face of it, the Magistrate selectively elected to apply Section 78 without recording his own observations in accordance with the prescripts of Section 77 of the CPA. As earlier stated, Mr Mbalo filed a notice to abide and attached a summary of his reasons including the fact that he described Mr Mafe's behaviour as "odd" during his appearance before him.

This is peculiar since that observation ought to have formed part of the Court record and ought to have been considered by the Magistrate in terms of Section 77 of the

CPA. Section 77 of the CPA would have required more from the presiding officer, for example, by asking the Applicant a few questions to assist him in his assessment of the matter.

Furthermore, he selectively entertained the State's application for referral despite the Applicant's contestation. (*Newell v Cronje and another* 1985 (4) SA 692(E)). In granting the Applicant the opportunity to present evidence at that stage would have led to no prejudice. At the very least the Magistrate ought to have engaged with the Applicant or his counsel to fully apprise himself of the reasons for the opposition. The Magistrate did not even acknowledge or greet the Applicant.

I agree with Mr Mpofu's (who represented the Applicant in Court) contention that the denial of the Applicant's right to rebut or challenge the district surgeon's report which led to denying the Applicant the right to apply for his release on bail, impacted on his constitutional right to be heard fairly.

[17] The more pertinent issue relates to the Magistrate's election to displace the bail application. The record reflects that the Magistrate did not at any stage dignify the Applicant's plea to be heard on bail with any response whatsoever thereby impacting the Applicant's rights entrenched in the Constitution.<sup>6</sup> Mr Mafe was entitled to apply for bail. The magistrate made no enquiry into Mr Mafe's ability to understand the proceedings. In fact there was nothing preventing the Magistrate from proceeding with the bail application. Dr van Tonder's report of the circumstances would have been one of the factors to consider in his bid for bail. This is further amplified by Section 79 (2)(a) grants the Court a discretion with regard to the period for which an accused may be referred for observation and it may not exceed 30 days at a time.

---

<sup>6</sup> Section 12(1) of the Constitution Act 108 of 1996.

This discretion must be exercised in accordance with the facts before Court. Section 79 further allows for a variety of orders including orders relating to the liberty of an accused.<sup>7</sup> A 30 day observation period at a mental health facility in the ordinary course hugely impacts on an accused's freedom and liberty. A referral in these terms ought to be implemented with caution and with sufficient judicial insight and oversight. Section 79 specifically allows for shorter observation periods to be assessed as the facts of each unique case presents. In this regard, we can find guidance in the Mental Health Care Act where a 72 hour assessment is legislated for involuntary mental health care.<sup>8</sup>

[18] The evidence on record demonstrates to this Court that the Magistrate did not at any point thoroughly consider the gravity of his decision to refer Mr Mafe for psychiatric evaluation and how same would impact on his personal freedom and human dignity. There was never an allegation that the Applicant was not able to understand the Court proceedings. Mr Mafe was entitled to know why his bail application would not be heard and moreover, why he was not allowed to present evidence in opposition to the Section 78 application. The Magistrate simply failed to inform him or address his Counsel on these issues. The actions of the Magistrate constitute an irregularity.

[19] The Applicant's right to a fair trial entails substantive justice which includes his right to participate in the proceedings and to challenge evidence. This principle further affirms that in circumstances such as these, an accused person may testify and a

---

<sup>7</sup> Section 79 (2)(b)(iii) of the CPA.

<sup>8</sup> Section 34 of Act 17 of 2002.

Court cannot refuse or deny such right. Although the Applicant is not an expert, the Court cannot stop him from testifying about his mental capacity.

[20] In *S v Malcolm* 1998 (1) SACR 577(EC) the *court a quo* had refused to hear a bail application pending an appeal against the order granted for the accused to be detained at a psychiatric facility. The Court on appeal held that the Magistrate had deprived himself of the opportunity to observe the accused's behavior in the witness box and concluded that his refusal to hear the accused was a gross irregularity. The curtailment of the Applicant's evidence in this matter is therefore irregular.

Similarly, the *court a quo* in the matter before us gave no consideration to the *audi alteram partem* legal principle.

*Hiemstra's Criminal Procedure Act*. At page 13-9 it is stated:

*"the question of ability of the accused to understand the proceedings and criminal responsibility must be decided by the court after it has heard evidence. The accused is entitled to testify on this aspect."*

[21] Mr Menigo's (who represented the First Respondent in Court) argument that the referral to a psychiatric facility was the better prospect for Mr Mafe given the current prison conditions is simply untenable. In both instances his right to liberty and freedom would be severely curtailed. Mr Menigo was not able to explain why the medical report was not made available to the Court or the Applicant at his first appearance on the 4<sup>th</sup> January 2022. In fact, during argument before this Court the concession was made that the medical assessment ought to have been presented to the Court at the earliest opportunity given the fact that the State was aware of the district surgeon's diagnosis.

F. Conclusion

[22] No justification exists for the Magistrate to have preferred to make the referral for psychiatric evaluation and not consider the application for bail.<sup>9</sup> Notwithstanding any issue to the contrary Counsel for the Applicant ought to have been granted the opportunity to present their evidence to rebut the district surgeon's assessment which could have been presented at the bail hearing. This course would have best informed the Magistrate in his decisions as to bail and any potential orders in terms of Sections 77 and 78 read with Section 79 of the CPA.

[23] Therefore, I am of the view that the referral order made in terms of Section 78 of the CPA made was not done in accordance with justice. It was substantively and procedurally flawed which resulted in a gross irregularity and is accordingly set aside.

---

**R WATHEN-FALKEN**

Acting Judge of the High Court

I agree and it is so ordered:

---

<sup>9</sup> Newell v Cronje and Another 1985 (4) SA 692

**J M HLOPHE**

Judge President of the High

Court

COUNSEL FOR APPLICANT:

Adv. D Mpofu (SC)

Adv. N Nyathi

INSTRUCTED BY:

Godla & Partners Attorneys

ATTORNEY BRIEFED:

Mr L Godla

COUNSEL FOR RESPONDENT(S):

Adv. Menigo

Adv. H Booysen

FOR RESPONDENT(S):

Director of Public Prosecutions,

Cape Town, Western Cape