

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

In the appeal of:-

DELETE

WHICH EVER IS NOT APPLICABLE

CASE No. A 327/2010

(1) REPORTED: YES/NO

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

(3) REVISED: ✓

29/7/11

DATE

Signature

SIGNATURE

LEFA BERNARD MARUWA

Appellant

and

29/7/2011

THE STATE

Respondent

JUDGMENT

Van der Byl AJ:-

Introduction

[1] This is an appeal, lodged with leave of this Court, against conviction and sentence which served before a Full Bench, but was referred to the Full Court because the two Judges concerned were apparently unable to agree.

[2] The Appellant (to whom I shall refer as "the Accused") who was at all relevant times an additional magistrate in the magistrate's office of Benoni, was charged with 11

counts of Fraud, alternatively, Defeating the Ends of Justice, further alternatively, Forgery and Uttering forged documents well knowing them to be forged.

[3] On 29 September 2009 the Accused was convicted on the 11 counts of Fraud and on 9 November 2009 he was sentenced to a fine of R5 000 or 12 months imprisonment, the counts taken together for purposes of sentence.

Relevant facts of the matter not in dispute

[4] In terms of section 56 of the Criminal Procedure Act, 1977 (*"the Act"*), 11 notices were issued to a certain Mr. Jonathan Given Mashego (*"the accused person"*) in respect of the following traffic offences, namely -

- (a) a contravention of section 58(1) of the National Road Traffic Act, 1996 (Act 93 of 1996), in that he upon or about **27 February 2004** did fail to stop at a stop sign (he was required to appear in court on **1 June 2004** unless he paid an admission of guilt of **R400** on or before 30 April 2004);
- (b) a contravention of regulation 212(j) of the regulations made under the National Road Traffic Act, 1996, in that he upon or about **11 March 2004** did drive a vehicle which was fitted with a pneumatic tyre which did not display throughout, across its breadth and around its entire circumference, a pattern which was clearly visible, and had a tread of at least one millimetre in depth (he was required to appear in court on **15 June 2004** unless he paid an admission of

guilt of **R200** on or before 4 May 2004);

- (c) a contravention of section 12(a) of the said National Road Traffic Act, 1996, in that he upon or about **5 April 2004** did drive a vehicle without the necessary driving licence (he was required to appear in court on **28 June 2004** unless he paid an admission of guilt of **R500** on or before 17 May 2004);
- (d) a contravention of regulation 319(1) of the said regulations in that he upon or about **17 May 2004** did hinder or obstruct traffic on a public road (he was required to appear in court on **24 August 2004** unless he paid an admission of guilt of **R300** on or before 23 July 2004);
- (e) a contravention of regulation 304(1) of the said regulations in that he upon or about **11 August 2004** did stop his vehicle on the roadway of a public road (he was required to appear in court on **27 September 2004** unless he paid an admission of guilt of **R500** on or before 9 September 2004);
- (f) a contravention of regulation 319(1) of the said regulations in that he upon or about **12 September 2004** did hinder or obstruct traffic on a public road (he was required to appear in court on **26 October 2004** unless he paid an admission of guilt of **R500** on or before 8 October 2004);
- (g) a contravention of regulation 213(4) of the said regulations in that he upon or was about **7 October 2004** did not wear a seat belt (he was required to appear

.../...

in court on **23 November 2004** unless he paid an admission of guilt of **R100** on or before 5 November 2004);

- (h) a contravention of regulation 212(j) of the said regulations in that he upon or was about **4 November 2004** did drive a vehicle which was fitted with a pneumatic tyre which did not display throughout, across its breadth and around its entire circumference, a pattern which was clearly visible, and had a tread of at least one millimetre in depth (he was required to appear in court on **10 January 2005** unless he paid an admission of guilt of **R100** on or before 23 December 2004);
- (i) a contravention of regulation 213(4) of the said regulations in that he upon or was about **18 November 2004** did convey a passenger not wearing a seat belt (he was required to appear in court on **10 January 2005** unless he paid an admission of guilt of **R100** on or before 23 December 2004);
- (j) a contravention of regulation 213(4) of the said regulations in that he upon or was about **21 December 2004** did not wear a seat belt (he was required to appear in court on **14 February 2005** unless he paid an admission of guilt of **R100** on or before 27 January 2005);
- (k) a contravention of regulation 155(1)(c) of the said regulations in that he upon or about **1 February 2005** did operate a vehicle with an inadequate parking brake (he was required to appear in court on **14 March 2005** unless he paid an admission of guilt of **R300** on or before 24 February 2005).

.../...

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[5] The accused person did not pay the amounts fixed as admission of guilt or appear in court on the respective dates set in the various notices and in each case a warrant was authorized for his arrest.

[6] On 29 March 2005 he appeared in the absence of the prosecutor in the Accused's office on these 11 traffic offences and, at the same time an enquiry was conducted, purportedly under section 170(2) of the Act for his failure to appear in court on the respective dates.

[7] In each case the Accused completed a roneoed form which states or reflects (see: **Exhibits B1 to B11, record pp. 223 to 275**) that -

- (a) the prosecutor was Mr. Kabanyane and the interpreter Mr. Nomahagala;
- (b) the prosecutor has put the charges to the accused person and that he pleaded guilty on all the charges;
- (c) the court at the request of the prosecutor proceeded in terms of section 112(1)(a) of the Act;
- (d) the prosecutor and the accused person had "*no address*" on the merits;
- (e) the accused person was convicted on each charge as charged;

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- (f) the prosecutor proved no previous convictions;
- (g) the accused person in mitigation of sentence stated that he was married with four children who are at school, that his wife was unemployed, that he was the only breadwinner and that he sells vegetables earning on average R1 000 per month;
- (h) the prosecutor had "no address" on sentence;
- (i) the accused person was cautioned and discharged on each charge;
- (j) in relation to the section 170(2) investigation, the accused person explained -
 - (i) in some of the cases that his ex-employer took the respective tickets and said that he would pay the respective fines, that he constantly asked his employer whether he had paid the fines and that he assured him that he had paid the fines, but refused to show him any receipt and that he should not worry;
 - (ii) in the case of the offence that occurred on 7 October 2004 (para [4](g) above), that on the date he was supposed to appear in court (ie., 23 November 2004) he had to go and see a doctor, that he was given a sick certificate, but that he left it at home;

- (iii) in the case of the offence that occurred on 4 November 2004 (para [4] (h) above), that on the date he was supposed to appear in court (10 January 2005) his youngest child was on his way to school was involved in an accident and that he had to take the child to hospital;
- (iv) in the case of the offence that occurred on 1 February 2005 (para [4](k)), that on the date he was supposed to appear in court (14 March 2005) he was suffering from flu and went to see a doctor who gave him a medical certificated which he had unfortunately misplaced;
- (k) the explanations were, obviously, accepted at face value and the various warrants of arrest were cancelled.

[8] It is mainly on these facts that the Accused was charged on the allegation that upon or about 29 March 2005 and at or near the Benoni Magistrate's Court he did wrongfully, falsely and with the intent to defraud gave out and pretend to the Ekurhuleni Metro Police, M M Jacobs, the clerk of the court, P Myburgh, the Judiciary, Mr. Calitz, the prosecution or the community -

- (a) that the court was properly constituted in that a certain Mr. Kabanyane was present in his capacity as prosecutor, that he had put the 11 charges concerned to the accused person and that the accused person pleaded guilty to all the charges;

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- (b) that the prosecutor had no address on the merits;
- (c) that the prosecutor proved no previous convictions;
- (d) that the prosecutor had no address on sentence;
- (e) that the prosecutor had the opportunity to take part in the subsequent proceedings in terms of section 170(2) of the Criminal Procedure Act, 1977,

and did then and there by means of these false pretences induce the aforesaid instances to believe the foregoing contentions whilst in truth and fact he knew when he so pretended that the court was not properly constituted and that the prosecutor was not present at the proceedings.

[9] The Accused who was initially represented by an attorney, Mr. C Coetsee, pleaded not guilty on all the charges as well as the alternative charges.

(On 10 December 2008 Mr. Coetzee withdrew as defence attorney during the cross-examination of the witness Mr. Peens whereafter Ms. Killian appeared as defence counsel)

[10] The Accused formally admitted -

- (a) that the 11 cases in question were all tried in one trial in the Accused's

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chambers;

(b) that the prosecutor was not present during this trial, but that the interpreter, Mr. Nomahagala was present;

(c) that on the 11 roneoed forms used for this purpose he indicated that both the prosecutor and the accused person had "no address" on the merits.

(11) In his plea explanation the Accused alleged that --

(a) late in the afternoon of the day in question the accused person was brought to his chambers by a traffic official, a certain Mr. Peens, who had all the documentation in his possession;

(b) he attempted to arrange for Mr. Kabanyane the prosecutor to be present, but he was not available;

(c) if he had failed to deal with the matter, it would have resulted in the accused person being held in custody at least overnight on "*relative minor traffic related offences*" and where "*he might have valid explanations for failing to have appeared in Court*";

(d) he elected to deal with the cases in his chambers "*in what he considered the proper execution of his duties*" and that he "*at no stage had any ulterior motive*

(such as a bribe or being corrupt) in mind";

- (e) this is a matter which should rather have been sent on review in terms of section 304 of the Criminal Procedure Act, 1977, or investigated by the Magistrate's Commission.

[12] The Accused alleged in his plea explanation and in his evidence that it has become a practice, not only in the Benoni magistrate's court, but in all magistrate's courts throughout South Africa for magistrates to hear traffic related matters in chambers and not in open court, particularly, during the course of the afternoon as "a more relaxed way of ensuring the voluminous traffic cases, thrust upon magistrates daily" are dealt with.

[13] Against that background, the evidence can be considered.

The State's case

[14] The State called four witnesses.

[15] First, Mr. Gerhardus Calitz who at the time was an additional magistrate at the Benoni magistrate's court and a colleague of the Accused.

He testified that in the ordinary course of the running of the courts the prosecutor, the State being *dominus litis*, would enrol matters and would then call the magistrate to

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court. There is, so he testified, no practice where matters are dealt with in the absence of a prosecutor.

[16] **Second**, Mr. Zukila Ronald Khabanyane who at the time was the prosecutor in the Accused's court, Court 7.

He testified that on 29 March 2005 the court adjourned at 15h35 (this appears from the court book). On that day no traffic cases were dealt with in that court as all traffic cases were dealt with in Court 5, the traffic court.

The Accused never called him after court hours to attend to traffic matters in his chambers.

The procedure he ordinarily followed constituting the court was that as soon as he was ready for the court to begin he would phone the Accused on his cell phone to inform him that the court was ready whereupon he would then come to court on his own.

Under cross-examination he explained that the Accused had his cell phone number and could at any time have phoned him on his cell phone.

[17] **Third**, Mr. Magiel Johannes Peens, who at the time, was employed by the Metro Police in Benoni and who acted as court orderly in the magistrate's court of Benoni charged with, *inter alia*, the duty of preparing the court rolls in respect of all traffic court cases.

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He testified that the Accused came to him on the day in question and handed some "printouts" of 11 cases to him in respect of the accused person who had outstanding warrants of arrest and requested him to get the cases ready and to bring them to his office. The "printouts" are ordinarily obtained from the computer system which contains details of traffic tickets issued to them and, if any, also outstanding warrants authorized against such persons. These printouts are obtained by accused persons themselves at the Traffic Department. In this case, he guessed, the accused person could have taken the printouts to the Accused. He then, as requested by the Accused, obtained the various control sheets and the respective warrants of arrest, entered the cases in the court book and in his register and took the matters to the Accused in his chambers. According to him this all occurred before 9h00 being the time the courts ordinarily commenced with their daily rolls. He did not see the accused person. According to him the Accused was alone in his office when he handed him the relevant documents. Having done that he left and went back to his office.

The next day he collected the cases from the Accused's office and handed it to Ms. Jacobs who was also employed in his office and who was charged with the function of capturing the information relating to the results in the computer system.

He, furthermore, testified that the normal practice was that accused persons would approach him whereupon he would prepare the cases and take the documents to the prosecutor who would then in turn take the cases to the traffic court.

At the time, according to him, traffic matters were dealt with in Court 5 where a certain



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Mr. de Beer was the presiding magistrate and a certain Mr Myburgh was the prosecutor.

It also appears from the evidence that the cases were previously entered into the court book of Court 5, but because the accused person was not present it was recorded in the court book by the presiding magistrate that the cases were entered in error and the cases were returned to him.

Under cross-examination his evidence was challenged in various respects.

In this regard I can refer to the following:-

First, it was put to him that he took the accused person to the Accused's office. He denied that he saw the accused person and persisted with his evidence in chief that he was requested by the Accused to bring the cases to his office and that the Accused was alone in his office when he handed the cases to him.

Second, it was put to him that it was not before 9h00 when he took the cases to the Accused's office, but that it occurred after 15h30. At first he denied the allegation, but later conceded that it was possible that it could have occurred after 15h30.

However, on resumption on 5 August 2009 on the occasion of which Ms. Killian, following the withdrawal of Mr. Coetzee, took over as defence counsel, he again persisted that it occurred before 9h00, ie., before the courts started.

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Should an accused person approach him in the afternoon after court hours he, so he testified, ordinarily requests the person to report the next morning so that the case can then be enrolled. In such cases he would prepare the cases and take them to the prosecutor of the court sitting as a traffic court. He never in the past approached any other magistrate to deal with traffic cases and to cancel warrants of arrest. He is not aware of cases that are disposed off in the offices of magistrates.

Third, he was asked whether he and the prosecutor, Mr. Myburgh, were setting a trap for the Accused to establish whether he was conducting trials in his office. He denied that a trap was set for the Accused.

Fourth, it was put to him that when he took the cases to the Accused, the interpreter, Mr. Namahagala, was present in the Accused's office. He denied that the interpreter was there when he handed the cases to the Accused.

[18] Fourth, Ms. Anna Magdalena Maria Jacobs, who was employed by the Ekurhuleni Metro Police in the warrants section.

She testified that she was approached on 21 February 2005 by a person who handed her "*printouts*" of warrants of arrest in respect of one Mashego and asked her to draw the cases and enter them into the court register. On a question whether he was an accused, he said that he was the court orderly of Court B. She then told him that the accused must come to her himself. He then left and returned the next day and told her that the magistrate, being the Accused, was looking for the cases and that she must

enter the cases in the register. She said to him that she would do that, but that the magistrate must come and sign for the cases. No one however came to her office to sign for the cases. The next day she was informed that the accused person was at court whereupon she phoned the prosecutor, Mr. Myburgh, and told him that the accused will appear in court. He then said that he would collect the cases from her. The cases were later returned to her on which it was indicated that the accused did not appear. She later returned the cases for filing.

On 30 March 2005 she was approached by officers of the Metro Police to check for outstanding warrants. In the process the name of the accused person came up. A few days later she found the cases on her desk and noticed that the cases had been disposed of.

Under cross-examination when confronted with her police statement she confirmed that there were eight cases against the accused person at the time she was requested to draw the cases against him during February 2005, but when she was approached by the Metro Police on 30 March 2005 she established that the cases have in the meantime increased to 11 cases.

The Accused's case

[19] The Accused gave evidence in his defence and called two witnesses.

[20] The Accused testified that he had been a magistrate since 1989 and admitted

that he conducted the proceedings in the 11 matters in question.

He contradicted the evidence of, particularly, Mr. Peens and Ms. Jacobs in various respects.

[21] With regard to the evidence of Mr. Peens he testified that -

- (a) at about 15h35 or 15h40 on the day in question Mr. Peens came to his office with the accused person and asked him whether he could deal with the matters as the prosecutor of the traffic court had already left, whereupon, reluctantly he agreed to deal with the matters;
- (b) at the time the interpreter was with him in his office;
- (c) after he dealt with the matters Mr. Peens returned to his office as the accused person was leaving his office and collected the court register and the court documents.

[22] With regard to the evidence of Ms. Jacobs he denied that at any stage before 29 March 2005 he dealt with any of these matters.

[23] According to his evidence, immediately having received the documents, he started to enter the appearances on the roneoed sheet - he, as the presiding officer, Mr. Kabanyane, as the prosecutor and Mr. Nemahagala, as the interpreter.

[24] Having done that he attempted to telephone his prosecutor, Mr. Kabanyane, on his land line extension, but there was no reply. When asked by his counsel why he did not attempt to get hold of another prosecutor or the control prosecutor or the senior prosecutor, he stated that he did not do that because the "cases were many" and that he wanted to finish them before "work knocked off". When asked why, after having been unable to get hold of Mr. Kabanyane, he did not phone him on his cell phone, he said that he did not think of that.

[25] He said that after he tried to get hold of Mr. Kabanyane, he started to ask the accused person whether he was guilty or not guilty. At that stage he thought that Mr. Kabanyane would come to his office because he had by then not yet come to collect the daily statistics. On being referred to the words on the roneoed form indicating that the prosecutor had put the charges to the accused person and that the accused understood and pleaded guilty, he stated that he genuinely thought that the prosecutor would come "at a later stage". With regard to the words "no address" inserted by him after the question whether or not the prosecutor had any address on the merits, he said that he entered those words "because at that stage the prosecutor was not there and that (he) thought that at a later stage if he would not come (he) would delete his name ... and then 'no address' would mean that the prosecutor was not there". He said that later, because it was already late, he forgot to delete the prosecutor's name.

[26] In relation to the words "public prosecutor proves no previous convictions and hands in no SAP 69" and the words "public prosecutor on sentence: no address" he said that that was the correct position as the prosecutor was not there.

[27] In concluding his evidence in chief he denied that it was ever his intention to defraud anyone or to make any misrepresentations at that time his only intention was to help the accused person who had been brought to him by Mr. Peens. However, he admitted that at the time of his trial, but not at the time he conducted the proceedings, he realized that leaving Mr Kabanyane's name on the papers was false and that having indicated in the record that the prosecutor had "*no address*" was also false.

[28] In relation to the contempt of court proceedings he testified that he normally never asks the prosecutor anything in response to an explanation offered by an accused.

[29] Under cross-examination -

- (a) he admitted that the proceedings were not conducted in accordance with law because of the absence of the prosecutor;
- (b) he said that he thought that in the event of him not proceeding with the proceedings the accused person would be locked up because of the warrants of arrest;
- (c) when asked why he did not merely roll the matters over to the next day, he said he did not think about that and referred to a case at Kimberley sometime ago where a magistrate refused to deal with a criminal matter because it was late, but eventually agreed that it was a mistake not postponing the matter;

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- (d) he stated that after having recorded all the appearances it could have already been 16h00 and that if the prosecutor came to his office thereafter he would merely have deleted the prosecutor's name because by that time he had already done everything.

[30] The first witness called on behalf of the Accused was the accused person, Mr. Jonathan Mashego.

[31] He testified that -

- (a) after having obtained certain printouts from the Traffic Department, he went to the magistrate's court where he met a certain white man (who he later pointed out as Mr Peens) to whom he handed the printouts;
- (b) after having collected some documentation, Mr. Peens took him to the Accused's office where he left him;
- (c) apart from the Accused, there was another person in the office who performed the function as interpreter;
- (d) he was asked whether or not he was guilty of the traffic offences concerned, being offences he committed whilst he was a taxi driver;
- (e) he asked them to afford him the opportunity to pay the fines off monthly;

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- (f) amongst the 11 cases there were two in respect of which he failed to appear in court because he was in hospital;
- (g) he was then told that he should go;
- (h) as he left the office Mr Peens entered the office, but that he did not know for what reason.

Under cross-examination he explained that when he received the traffic tickets he gave them to the persons for whom he was working from time to time and thought that they would pay the fines as they said that they will sort the tickets out or would pay them.

[32] The Accused's second witness was Mr. Calvin Nemahagala who was the interpreter in the proceedings conducted in the Accused's office.

[33] He testified that -

- (a) Court 7 in which he was the interpreter and the Accused was the presiding officer adjourned on this day at about 15h35;
- (b) whilst he was sitting in court the Accused asked him to come to collect the court book in his office;
- (c) whilst he was still in the Accused's office Mr. Peens arrived, with control sheets,

at the Accused's office with a person who later appeared to have been the accused person and who, according to his perception, had been arrested;

- (d) Mr. Peens asked the Accused to entertain the matters because the prosecutor of the traffic court had already left;
 - (e) the Accused attempted to get hold of his prosecutor, without success, and the Accused then "*reluctantly*" said that he will assist;
 - (f) the accused person was then asked whether he was guilty or not guilty of the various charges whereupon he pleaded guilty to all the offences;
 - (g) they were busy with this process until after 16h30;
 - (h) all the documents were handed over to Mr. Peens who was present throughout in the office whereafter he left together with the accused person.
- [34] Under cross-examination he testified that -
- (a) he made his statement on 8 June 2005 at the request of the Accused;
 - (b) it was the first time that he was involved in traffic matters in a magistrate's office in the absence of a prosecutor;

- (c) he in any event did not find it strange as the court orderly was present;
- (d) he recalled, albeit in uncertain terms, that on one occasion he acted as interpreter in chambers of another magistrate without a prosecutor.

Findings of court a quo

[35] The magistrate found that -

- (a) he was favourably impressed by the evidence of Mr. Calitz and Mr Kabanyane;
- (b) Mr. Peens did not impress him favourably and that it would be unsafe to rely on anything he said;
- (c) the evidence of Ms Jacobs did not take the matter any further;
- (d) there is no reason why he should not accept the evidence of Mr. Mashego;
- (e) the evidence of Mr. Nemahagala was "*pathetic*";
- (f) there is no reasonable possibility of the Accused's version as to why he submitted the false documents being substantially true and rejected, particularly, his explanation why he proceeded with the 11 cases without a prosecutor and why he did not correct the record.

[36] The magistrate concluded that the following facts were proven beyond reasonable doubt, namely -

- (a) the Accused, as an additional magistrate, indeed conducted the proceedings on the day in question in the absence of a prosecutor;
- (b) the Accused in the process allowed the respective records of the proceedings to show that the court was properly constituted, that the prosecutor was present and that he was afforded the opportunity to take part in the proceedings;
- (c) no prosecutor was present at any time and the proceedings were irregular and invalid;
- (d) the accused person was given the lightest possible sentence, being a caution and a discharge, despite the fact that the admission of guilt fixed in respect of the various matters varied between R100 and R500.

[37] The magistrate held that -

- (a) the Accused intentionally gave out and pretended (in respect of the instances alleged in the chargesheet) that the court was properly constituted and that the prosecutor was present when he knew that this was not true;
- (b) a possibility of prejudice constitutes potential prejudice;

- (c) if a prosecutor had been present and had been allowed to take part in the proceedings, it is quite likely that the accused person would have been imposed a more severe sentence;
- (d) court proceedings without a prosecutor in itself creates extreme prejudice for the State.

The grounds of appeal on conviction

[38] In the Accused's heads of argument, the Accused's convictions are challenged on the following grounds -

- (a) during cross-examination of the Accused, the presiding magistrate improperly descended into the arena with the consequences set out in, *inter alia*, **S v Rall 1982(1) SA 838 (A)**;
- (b) as held in the judgment in **S v Visagie 2009(2) SACR 70 (W)**, the Accused should have been acquitted as the maxim *de minimis non curat lex* is applicable on the facts of this case;
- (c) the Accused's actions did not constitute the crime of fraud because of the lack of potential prejudice and the intention to defraud,

[39] I deal *seriatim* with these grounds.

The contention that the magistrate descended into the arena

[40] The manner in which a judicial officer should conduct a case before him or her was dealt with in the case of **S v Maseko 1990(1) SACR 107 (A)** (albeit in the context of an application for recusal) at **116e** as follows:

“Die juiste benadering tot die hele aangeleentheid van rekusering is al telkemale in ons regspraak oorweeg en toegelig. Die grondliggende beginsel is dat die regspleging te alle tye sonder enige sweem van suspisie moet geskied. Nie alleen moet die voorsittende regspreker die saak voor hom onpartydig, onbevooroordeeld en met 'n oop gemoed benader nie, maar daar moet ook niks in sy optrede of verbintenisse met ander wees wat 'n redelike persoon aanleiding kan gee om te dink dat reg en geregtigheid nie in sy Hof geskied het nie.”.

See also: **S v Zuma 1995 (1) SACR 568 (CC) (1995 (2) SA 642 at 579d**
S v Mosinyane 1998(1) SACR 583 (T) at 594d
S v Jaipal 2005 (1) SACR 215 (CC) at 225b
S v Msithing 2006(1) SACR 266 (N) at 273c
S v Phiri 2008(2) SACR 21 (T) at 24c
S v Owies and Another 2009(2) SACR 107 (C) at 112i
S v Le Grange and Others 2009(1) SACR 125 (SCA at 140e

[41] The question very often is whether a judicial officer's questioning and conduct constituted on his or her part “an *unjustified descent into the arena*” to such an extent that he or she became “*blinded by the dust of battle*” (see: **S v Mafu and Others 2008 (2) SACR 653 (W) at 672f, para [38]**).

[42] On the question whether or not an irregularity of descending into the arena constituted a failure of justice, the learned Judge in **Maseko's case, supra**, referred to the test set out in **S v Felthun 1999 (1) SACR 481 (SCA) at 485h - 486b**, as follows:

"Generally speaking, an irregularity or illegality in the proceedings at the criminal trial occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated and conducted. The basic concept is that an accused must be fairly tried

As to the question whether there has been a failure of justice, this Court has in a number of decisions recognised that in an exceptional case the irregularity may be of such a kind that it per se results in a failure of justice vitiating the proceedings Where the irregularity is not of such a nature that it per se results in a failure of justice, the test to be applied to determine whether there has been a failure of justice is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no resultant failure of justice." (My underlining)

[43] The following remarks of Curlewis JA in ***R v Hepworth 1928 AD 265 at 277*** are apposite in the circumstances of this matter:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to the recognised rules of procedure but to see that justice is done."

See also: ***S v Gerbers 1997(2) SACR 601 (SCA) at 606a***

[44] These principles need to be considered in the light of what happened at the hearing.

[45] The Accused contends that -

- (a) when the Accused was cross-examined the magistrate asked 63 questions and the prosecutor asked only 58 questions;

- (b) the magistrate's questions were not asked for purposes of clarification, but were put in cross-examination style.

[46] In the Accused's Heads of Argument reference is made to various passages in the record where the magistrate posed questions to the Accused.

A reading of these passages shows that these questions relate to -

- (a) the Accused's allegation that he proceeded with the proceedings notwithstanding the absence of a prosecutor because he thought that if he did not finalize the proceedings the accused person might be incarcerated as there were various warrants of arrest authorized against him;
- (b) the Accused's concession that his actions in proceeding with proceedings in the absence of a prosecutor were irregular;
- (c) the Accused's allegation that if the prosecutor arrived late he would have deleted any reference to the prosecutor from the record; and
- (d) an altercation between the magistrate and defence counsel as to whether he would or should have done that in respect of all the 11 cases concerned if the prosecutor arrived before he had dealt with all the cases.

[47] Regarding the Accused's evidence that he wanted to prevent the accused

person being incarcerated, the magistrate asked the Accused, following a question by the prosecutor, whether he could not have rolled the matter over until the next day when the prosecutor would have been available in response to which the Accused conceded, correctly in my view, that he could have done that, but indicated that he did not at that stage think about doing that. It is in passing significant to note that there is no evidence to suggest that the Accused investigated whether or not the accused person would otherwise have been incarcerated

[48] Regarding the Accused's concession that the proceedings were irregular, the magistrate asked the Accused whether he realized that the proceedings were irregular and, when he conceded that the proceedings were irregular, why he then did that, in response to which, the Accused reiterated that he did that because he wanted to prevent the accused person being incarcerated.

[49] Regarding the Accused's evidence that he would have deleted the prosecutor's name if the prosecutor arrived late and the altercation between the magistrate and the defence counsel are concerned, the magistrate asked the Accused, following a question by the prosecutor, to clarify his allegation as he did not understand the Accused's contention. It is of some significance to note that the Accused's proposition that he expected the prosecutor to collect certain statistics was never put to the prosecutor, Mr. **Kabanyane**. The proposition smacks of an afterthought.

[50] Having considered these passages I am unpersuaded that the magistrate's involvement in this regard was of such a nature that there was a resultant failure of

justice.

[51] This is best illustrated if regard is had to the findings the magistrate made on the evidence after having dealt with the credibility of the respective witnesses and the factual findings he made.

[52] The manner in which the magistrate dealt with the various witnesses and their credibility, finding, for example, that it is unsafe to rely on the evidence of Mr. Peens, does not in the least create the impression that he was biased or failed to exercise an unfettered judgment (*S v Mohase 1998(1) SACR 185 (O) at 193b*).

[53] The factual findings the magistrate made in relation to the Accused's intention are based common cause facts, namely, that the Accused gave out and represented in respect of each case referred to in the chargesheet that the court was properly constituted and that the prosecutor was present whilst he knew that it was not true.

[54] The submission in this regard is accordingly in my view unfounded.

De minimis non curat lex

[55] The contention appears to be (with reference to the *Visagie case, supra*) that this is a matter where the court "should (not) become concerned with ... childish and trivial behaviour".

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[56] In support on this contention the Accused submits that -

- (a) the Accused intended to assist the accused person;
- (b) the magistrate's finding that the presence of a prosecutor would have influenced the outcome of the various cases is mere speculation;
- (c) the magistrate indicated "*that the case is one of minute potential prejudice as well as a very petty offence*";
- (d) the fact that the matters were not taken on review is support for the lack of seriousness.

[57] These submissions are not correct in all respects.

[58] The Accused's explanation for his actions (ie., that he intended to assist the accused person) were rejected by the magistrate as being so improbable that there is not the slightest of it being reasonably possibly true. The magistrate's finding in this regard is not challenged either in the Notice of Appeal or in the heads of argument filed on his behalf. In fact the Accused conceded that he made a mistake by not having rolled the matters over to the next day.

I have no reason to fault the magistrate's finding.

Although it is impossible to determine what exactly motivated the Accused to act as he did, I am satisfied that the Accused was not truthful when he indicated that he had done that to assist the accused person. The Accused was at the time already an experienced magistrate. He admittedly knew what he had done was irregular and to say that he did not think of merely rolling the matter over to the next day is simply unbelievable and unrealistic. It would appear that because of the fact that he finalized the matter at or after 16h30 he should have known that the cancellation of the warrants of arrest could not at that late stage been taken up into the system and that the accused person could in any event have remained at risk of being arrested. The safest option would have been to have rolled the matter over to the next day if it was his intention to assist the accused person.

[59] Whether or not the outcomes of the various matters would have been more severe if the prosecutor attended the proceedings may be speculation, but it is a possibility that cannot be excluded. The accused person's address in mitigation and his explanation why he failed to appear in court on the days determined in the various notices was in any event untested. It is not unlikely that the prosecutor, if present, could have insisted on adducing evidence in aggravation of sentence or to persuade the Accused on the credibility of the accused person's contentions. Bearing in mind the fact that the accused person appeared to be a serial traffic offender, the sentences imposed are to say the least unrealistically lenient. The accused person, according to his evidence, indicated that he informed the Accused that he was there to ask for an opportunity to pay the fines off. It defies belief that simply because the accused person said that although he earned on average about R1 000 per month, he did not have

money to pay a fine, the sentence would be a mere caution and discharge. This means that any offender would be cautioned and discharged in respect of any offence punishable with a fine, simply because he or she alleges that he or she is unable to pay a fine. This is patently absurd.

[60] The contention that the magistrate indicated "*that the case is one of minute potential prejudice as well as a very petty offence*" is not correct and in any event referred to out of context. During the evidence of the second State witness the magistrate said that looking at the chargesheet the impression is created that the Accused created the impression that everything went according to procedure. In so far as everything did not go according to procedure the magistrate indicated that "*it is obvious that there had been prejudice, even minute prejudice*". The magistrate did not indicate that it all related to petty offences. The offences are in my view by no means of a petty nature.

As already indicated, it is, as is apparent from Exhibits B1 to B3 the Accused obstructed the traffic. According to Exhibit B4 he drove a vehicle without a driver's licence. Exhibits B5 and B9 indicate that he drove a vehicle with worn tyres. According to Exhibit B6 he disregarded a traffic sign and in Exhibits B8, B10 and B11 he is accused of having driven a vehicle without wearing a seat belt. As a taxi driver these offences should be considered as serious offences.

[61] It does not appear from the record that the 11 matters had indeed not been taken on review. It is in any event of no consequence. The fact remains that the

proceedings were indeed irregular.

[62] The charges against the Accused and the circumstances under which the were committed are in my view by no means a trivial matters.

[63] A fraud committed by a magistrate in the performance of his judicial functions could simply not fall under the maxim *de minimis non curat lex*.

[64] In my view there is no merit in this submission.

The question whether the evidence constituted the offence of fraud

[65] Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another (see: **Snyman, Criminal Law, fourth edition, p. 520**) which has as its elements (a) misrepresentation; (b) prejudice or potential prejudice; (c) unlawfulness; and (d) intention.

[66] It cannot be disputed that the Accused's actions constituted in each of the 11 cases a misrepresentation. The Accused in any event in fact admitted, albeit *ex post facto*, that the contents of the records kept in the cases were indeed false. It indeed created the impression to at least the Metro Police who were in effect the complainants in these matters that the court was properly constituted, that the prosecutor was present and that the proceedings were otherwise conducted in accordance with law.

[67] As I have already indicated, the accused person, according to the record of the proceedings kept by the Accused explained by way of unsworn statements -

- (a) in mitigation of sentence that he was married with four children who are at school, that his wife was unemployed, that he was the only breadwinner and that he sold vegetables earning on average R1 000 per month;
- (b) in relation to his failure to appear court on the various dates specified in the respective notices -
 - (i) in the case of the offence that occurred on 7 October 2004 (see: **paragraph [4](g) above**), that on the date he was supposed to appear in court (23 November 2004) he had to go and see a doctor, that he was given a sick certificate, but that he left it at home;
 - (ii) in the case of the offence that occurred on 4 November 2004 see: **paragraph [4](h) above**), that on the date he was supposed to appear in court (10 January 2005) his youngest child when going to school was involved in an accident and that he had to take the child to hospital;
 - (iii) in the case of the offence that occurred on 1 February 2005 see: **paragraph [4](k) above**), that on the date he was supposed to appear in court (14 March 2005) he was suffering from flu and went to see a doctor who gave him a medical certificated which he had unfortunately

misplaced;

- (iv) in all the other cases that his ex-employer took the respective tickets and said that he would pay the respective fines, that he constantly asked his employer whether he had paid the fines and that he assured him that he had paid the fines, but refused to show him any receipt and that he should not worry.

It is obvious that the Accused simply accepted these explanations at face value notwithstanding the fact that, in some cases, the explanations were extremely vague and in some of the other cases, the explanations appear to be highly doubtful or suspicious, for instance -

- (a) in relation to his allegation that he was unemployed, no particulars were given or obtained as to when he became unemployed as he was obviously until 1 February 2005, being the date of the last offence, still employed as a taxi driver;
- (b) in relation to his explanations on his failure to appear in court on the respective dates, it appears -
 - (i) from the particulars contained in the various notices that the offences were committed by him as taxi driver in at least five different vehicles;
 - (ii) that, notwithstanding his explanation that he was under the impression

that his employer had taken care of the tickets, he was apparently aware that he was bound to appear in court on 23 November 2004, 10 January 2005 and 14 March 2005, but failed to have done so because he was indisposed on those days;

- (iii) that he failed to give any explanation why he did not report at court on any of the days thereafter.

The inescapable inference is that the Accused had given very little, if any, consideration to the matters or that he at least considered the matters with the utmost disinterest or a preoccupied intention to let the accused person go unpunished.

[68] It would appear that the misrepresentations were clearly made to conceal the inexplicable and bizarre conduct of the Accused.

[69] In having recorded that the court was properly constituted and that the prosecutor duly participated in the proceedings the Accused obviously created the impression, and by clear implication intended, to represent to the authorities that the proceedings were conducted in accordance with law.

The Accused, however, explained that he intended at some stage, either after having dealt with the matters or if the prosecutor arrived late, to delete the reference to the prosecutor in the respective records, but eventually forgot to do that. The magistrate, correctly in my view, rejected this explanation as unconvincing. The Accused's version

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is certainly so improbable that it cannot reasonable possibly be true (see: ***S v Shackell 2001(2) SACR 185 (SCA) at 194f, para [30]***).

I am satisfied that the Accused intended to proceed with the matter in the absence of the prosecutor and, having done so represented to the authorities and intended to do so that the matters were disposed of in accordance with law.

[70] This brings me to the question of prejudice or potential prejudice.

[71] In view of the fact that the misrepresentations could have had the effect that the authorities would have accepted the proceedings to have been regularly conducted and not to take the proceedings on review to ensure that the proceedings were properly disposed of, counsel acting on behalf of the Accused conceded in argument that potential prejudice has been established.

[72] In my opinion the concession was correctly made.

[73] Having held that the Accused intended to represent to the authorities that the proceedings were conducted in accordance with law, I am accordingly satisfied that the State proved the charges of fraud against the Accused beyond all reasonable doubt.

Sentence

[74]. It would appear that this Court granted the Accused leave to appeal against

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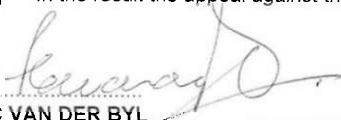
conviction and sentence, although the Accused in his application only sought leave to appeal against his conviction.

[75] In the heads of argument filed on behalf of the Accused it is merely submitted that the magistrate misdirected himself in having indicated that the actions of the Accused was "*a serious form of prejudice towards the judiciary*", alternatively, that should this Court have imposed a sentence, such sentence would be so disparate from the sentence imposed by the magistrate.

[76] I do not agree.

[77] In my opinion it rather appears that the sentence is on the lenient side, particularly, where actions such as those committed by the Accused are not in the public interest and inclined to discredit the judiciary in the eyes of the general public.

[78] In the result the appeal against the conviction and sentence is dismissed.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

I agree


B R SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

.../...

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I agree

G. Webster

G WEBSTER
JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPELLANT

ADV E KILIAN

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DATE OF HEARING

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JUDGMENT DELIVERED ON

29 July 2011