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

**HIGH COURT REF NO:117/2024
REVIEW CASE NO.:1/2024
MAGISTRATE'S SERIAL NO.:C166/2024**

In the matters between:

THE STATE

v

P [...] H [...]

User

JUDGMENT DELIVERED: 22 APRIL 2024

LEKHULENI et NZIWENI JJ

Introduction

- [1] The matter came before us by way of automatic review in terms of section 302 of the Criminal Procedure Act, Act 51 of 1977 (“the CPA”), read with the provisions of section 41 of Prevention and Treatment of Drug Dependency Act, Act 70 of 2008 (“the Act”). On 27 February 2024, the learned Magistrate committed Mr P [. . .] H [. . .] (“the user”) for treatment, rehabilitation and skills development for a period not exceeding six (6) months, in terms of section 35(7) read with the provisions of section 39(9) of the Act. The committal order was made pursuant to a finding by the Magistrate that the User is a person contemplated by section 33(1) of the Act

[a person who is dependent on substances, who is a danger to himself and in any other manner does harm to his or her own welfare or the welfare of his or her family].

- [2] According to the Magistrate's order, the admission at the treatment centre was scheduled to take place on 01 April 2024.

Some background facts of the committal enquiry

- [3] The committal enquiry was initiated by the user's wife. At the said proceedings, the State called one witness; Ms Els, a social worker ("the social worker"). After the testimony of the social worker, the application by the user's wife for the committal of the user to a treatment center was read into the record and handed in as an exhibit.
- [4] The social worker briefly testified that she consulted with both the user and his wife. The social worker's evidence reveals that the user is an electrical engineer and someone who has an above average intelligence and whose work experience spans a period of about 20 years.
- [5] It was the social worker's evidence that the user informed her that he [the user] is currently unemployed due to the fact that he needs to look after his children. According to the social worker, the user informed her that he started smoking dagga during his university years. The user informed the social worker that he does not have a problem with his dagga use and it does not have a negative effect on him or his family. The user further informed the social worker that he is not an addict and does not need treatment.

- [6] On the other hand, the social worker also testified that the wife of the user informed her that the user is unemployed because he has various excuses as to why he is unemployed, and his daily use of dagga impairs his work performance.
- [7] The social worker also testified that the wife links the user's use of dagga to his [the user's] loss of touch with reality, psychotic episodes, struggles to complete household tasks, excessive day time sleep, short temper, depression episodes and lack of appetite.
- [8] It was the testimony of the social worker that the wife of the user also associates the user's chronic headaches and back pains with the use of dagga. The social worker was also informed that the user squandered a large amount of money over the years on dagga.
- [9] According to the social worker, the user's addiction is having a financial impact on his wife, causing her exhaustion, and creating tension in their marriage. Due to the user's inability to manage household chores and take care of their children, his wife is struggling to balance her work and family life effectively.
- [10] The user's wife also informed the social worker that the user has isolated himself from family and friends, rarely leaves the house, and does not attend their children's activities.

- [11] It is the testimony of the social worker that the user's addiction and use of dagga also affects the children as they witness their father using dagga and constantly seeing their father being under the influence of dagga.
- [12] The social worker testified that the user has a prior history of addiction treatment and rehabilitation. And his [user] treatment programs manifest relapses and early dropout from an in-patient drug abuse treatment program.
- [13] The social worker concluded that the user is dependent on drugs as described in the Act, and that he would benefit from treatment with an extended program.
- [14] The record reflects that after the testimony of the social worker, the Magistrate posed certain questions to the social worker.
- [15] After questioning the social worker, the court posed the following question to the parties:
- “Any questions from the Court's questions?”
- The prosecutor responded by saying she does not have any questions. The Magistrate then asked the user if he had any questions for the social worker, to which he answered in the affirmative.
- [16] After the user questioned the social worker and interacted with the Magistrate; the Magistrate requested the prosecutor to read the applicant's [user's wife'] application into the record. After the application of the user's wife was read into the record, the affidavit

was handed in as an exhibit. Thereafter, the Magistrate asked the user if he had anything to tell the court, to which he answered in the negative. The matter then stood down for the court's finding.

Interaction between the Magistrate and the user

[17] For the reasons that follow, we consider it apposite to recite verbatim and comprehensively the following interaction between the magistrate and the user, during the questioning of the social worker by the user:

"Court: Okay, right is there any questions, the statement has been answered, any other question?

User: Some.

Court: Mr . . ., can the Court ask you, do you want to go to the facility, do you want assistance?

User: If I can make a little bit of a statement now.

Court: Because you inform the Court, yes.

User: Because you see, this was not what I was expecting.

Court: What do you mean.

User: Yes, I, I, if I can describe by.

Court: What do you mean, not what you were expecting. What do you mean by that? What do you mean, because it is clear that you want to be assisted.

User: Yes.

Court: And you understand, if the Court does grant the order, that there will be a warrant, that the Court understood (sic).

User: You see.

Court: So what are you battling with?

User: Okay, my wife, I asked her, so how does she envision this, how long would it be? She envisions 3 weeks, that is what she said to me, just yesterday. A 3 week stay . . . if the experts that connect for some reason, say whatever, we will follow their advice, from

there, but we cannot say in advance now, what will happen at that time. The reason why I use cannabis, it is cheap.

Court: No, no, no, do not explain why, you are using cannabis, the Court is interested in whether or not the Court should make the order and the rate at which we are going now, the witness has testified, you need just to ask her questions to clarify things for the Court. if you have no further questions, then she is excused and your wife will come and testify, as well.

User: Your Honour, I am not, I did not know it would be such an intense legal questioning, could we delay to a point that I have a lawyer then, because I am out of my depth here, I am going to say something and I will regret it. . . I have got experts, doctors who could testify to my condition and to my needs, and right now, I feel as if I am in danger of having myself incarcerated for six months or a longer period. And I did not realise that I would be putting myself in that kind of a danger, when I came to court.

Court: Do you have any further questions to the witness?

User: Have I shown any, am I a danger to myself or to my family, that is what I do not understand, have been called here because I have been accused of being a danger to myself and my family, and I have been a responsible caring father and husband for an extended period, now getting better.

Court: Mr . . . , you are going, your character.

User: Okay.

Court: Is not in dispute. The essence of the enquiry is that there is an underlying problem, and your family wants to assist you. You are constantly going off the topic.

Use: I have been treating myself with cannabis, and I would like to withdraw from cannabis, in a controlled environment. So, yes, I would like to spend 3 weeks, in a controlled rehabilitation facility, so that I can detoxify and rehabilitate and heal. That is what I would like, after 3 weeks I would like the doctors to advise me further. I would not like to be incarcerated for 6 months.

Court: Okay, do you understand, that you have placed on record you want to speak for yourself.

User: Yes.

Court: And you understand that now you want an attorney. But do you also understand that now, just now, you have submitted that you want to go to a Rehabilitation Centre, but you want to dictate to the Court how long? It is not for you to dictate to this Court, how long you want to be at this facility. And it is not for the doctor to decide, if there is an order in place, hence when an order is made, the Court can tell you that then the doctors can, not change the order, but decide to release you earlier or later. So, you cannot dictate to the Court, how long you want to be there, when the Court signs the order, then the experts decide, if they want to release you earlier or later. Based on their expertise, so you are basically contradicting yourself and going in circles, you want assistance, but you also do not want to be there. So, it seems as if you are fearing to be assisted, so, do you want to be assisted as you told the Court?

User: I would like to be assisted but I would like the doctors.

Court: To tell the Court what to do?

User: No, Your Worship, if you could just bear with me, because I do not mean to offend the Court in any way. I would like the doctors who are treating me, to determine my stay.

Court: Yes.

User: I am just saying, my point is that from my perspective here, and our expertise here, who are not really in a position to say, how long my stay should be.

Court: And the Court agrees,

User: Fair enough.

Court: The Court agrees, maybe it is just relayed in a different way to you, but the Court hears what you are saying and the court (sic) agree (sic), the Court makes the order, and the expertise, as you have rightly pointed out, will decide how long you will stay.

User: Correct.

Court: But you must be aware also that they may say, another extra week Mr . . . , and you must be willing to co-operate.

User: That I can understand, and I can agree with you on. Thanks, I was afraid that you were trying to determine now, the duration of my stay.

Court: Do you have any questions to the witness?

User: No.

Court: Do you want to delay the matter further and have an attorney? You must understand you are delaying your assistance.

User: But my assistance is in April, so the way you have described it to me now, I am satisfied, if I can go there, and 3 weeks, consign myself, if the Court sends me for a 3 week rehabilitation program, I and from there, I am in the hands of the doctors, that I . . . can agree to.

Court: Mr . . . look 3 weeks, is 21 days.

User: Correct.

Court: The facility takes for the first 42 days for proper evaluation, you understand? 42 days. Thereafter the experts decide to send you to the other facility, if the followed correctly, were you following the proceedings?

User: Your Honour.

Court: 42 days, is less than 3 weeks .

User: 42?

Court: More than.

User: You said it was 6 weeks.

Court: Slightly over a month.

User: Well I do not understand that because 3 weeks is the period of the stay at the facility. So where does the 6 weeks, where does 43 days come from.

Court: 42 days.

User: Where does it?

Court: That is.

Ms Els: The primary phase and the secondary phase, so primary is 21 days, and the secondary is 21 days.

User: Yes, yes.

Court: Correct do you understand?

User: But even so, the prayer secondary phase is not necessary.

. . .

User: That is still a treatment that is determined by the doctors and the experts at the time.

Court: The doctors. Yes.

User: It is not to say, they can advise it, or they cannot advise it, surely it is not for the Court to decide that

Court: But you do follow. You do follow.

Ms Els:

User: Yes. That I understand.

Court: Is there any other questions?

Prosecutor: No, your Worship.

Court: You can read, thank you Ms Els, you can stand down. You can read the applicant's application to the Court and you can hand it in.

Prosecutor: Your Worship, I am handing in the report of the social worker for now, to exhibit (sic).

Court: Thank you, you can be seated Mr . . .

Prosecutor: I may (sic) proceed with the statement of the complainant, Your Worship?

Court: Yes. [Prosecutor reads statement into the record]

Prosecutor: May I hand it up as an exhibit?

Court: Yes, thank you. Is that the state's application?

Prosecutor: That is the state's application, Your Worship.

Court: Mr . . ., is there anything else you want to tell the Court?

User: No, Your Honour.

Court: Nothing else. The matter will stand down for 30 minutes, for the Court to make a decision, you can wait outside. The matter will stand down Mr . . ., the matter will be recalled later, at about 30 minutes time. You can just wait outside thank you." [End of the mechanically recorded proceedings.] Underlining added.

This Court's query to the Magistrate

- [18] On our examination of the record, it raised constitutional questions more akin to issues of fair hearing. We then directed an urgent query to the magistrate to which she promptly responded. The query that we forwarded to the Magistrate stated the following:

‘1. According to the record Mr. H [. . .] on page four of the record indicated the following:

“ . . . I have been self-medicating myself for chronic pain, and this I can tell you, I can bring doctor, if I knew it would be this kind of a hearing . . . ”

2. Page 14 of the record reveals the following:

“Your Honour, I am not, I did not know it would be such an intense legal questioning, could we delay to a point that I have a lawyer then, because I am out of my depth here, I am going to say something and I will regret it. . . I have got experts, doctors who could testify to my condition and to my needs, and right now, I feel as if I am in danger of having myself incarcerated for six months or a longer period. And I did not realise that I would be putting myself in that kind of a danger . . . ”

3. Section 35 (3) of Prevention and Treatment of Drugs Dependency Act, Act 70 of 2008, stipulates that of the person in respect of whom the enquiry is being held—

(a) is entitled to legal representation;

(b) is entitled to cross-examine any witness and to call witnesses;

(c) may give evidence in person or through his or her legal representative; and

(d) may show cause why an order must not be made in terms of subsection (7)

4. During the involuntary commitment hearing, the State sought to curtail his liberty by involuntary committal to a treatment facility. Thus, Mr P [. . .] H [. . .] was facing involuntary committal, and he was subsequently committed by the learned magistrate.

5. Clearly, the relevant statute provides for the right to legal representation, the right to testify, the right to call witnesses, and the right to cross examine adverse witnesses. Essentially, the statute in question recognises that the person who is addicted to substances and is facing a chance of being involuntarily committed; has a right to be heard as well as the right to procedural due process prior to being involuntarily committed. All the more so, when the issue raised in the hearing relates to the deprivation of personal liberty of a person. The aforesaid raises the following questions.

5.1 Why was Mr H [. . .] not afforded the indulgence he sought to obtain legal representation and to call witnesses?

5.2 Can it be said that Mr H [. . .] was afforded proper opportunity for effective cross examination of Ms Els and his wife [the applicant]?

5.3 Why were the rights related to cross examination not explained?

5.4 In light of what is revealed in the record, can it be said that procedural due process was followed?

6. Given the impending committal of Mr. H [. . .] it is essential that this matter be treated with the utmost urgency. Hence, I am sending it by email to the learned Magistrate.

7. Mindful of the demanding workload of the learned Magistrate, I humbly request the learned Magistrate to respond to this query by email and the response should reach me by Thursday [28 March 2024].

8. Due to urgency of the matter, the record is retained, hopefully the learned Magistrate can get a copy of the transcribed record.'

[19] The magistrate in her brief and timely response indicated that, at the beginning of the hearing the user specified that he would conduct his own hearing in person. She also intimated that due to the fact that she could not secure a copy of the record she could not give a comprehensive reply to my query. Gleaning from the response of the Magistrate, it is plain that the learned Magistrate insists that the user waived his right to legal representation.

[20] Pursuant to the response by the Magistrate we made the following urgent order:

- "1. The committal order made by the Magistrate in terms of section 35 (7) of Act 70 of 2008, dated 27 February 2024, is hereby reviewed and set aside.
2. Consequently, the impending committal of Mr. P [. . .] H [. . .] should be immediately cancelled.
3. Reasons to follow in due course.

4. The office Manager of the Somerset West Court and or the Clerk of the Court for Criminal Reviews should make sure that copies of this order are made available to:
 - 4.1 Senior Public Prosecutor Somerset West Court;
 - 4.2 1[...] V[...] Road H[...] B[...];
 - 4.3 Mr P [. . .] H [. . .] [address]; and
 - 4.4 Harmony Clinic.”

Discussion

Due process of law

- [21] At the outset, it should be pointed out that, inasmuch as there is no criminal charge pending against the user, he is still entitled to all the due processes of the law. While it is true that in most instances the involuntary committal of a user does not always involve a user in conflict with the law, it still forms part of the criminal justice system.
- [22] It is equally true that involuntary committal orders have grave implications for the users. Amongst others, it intrudes on his liberty particularly, his constitutional right to freedom of movement. Thus, the effect of depriving the user the right to legal representation, during the enquiry proceedings vitiates the entire proceedings due to a fundamental irregularity. Hence, it is crucial that the court seized with such a hearing takes care in ensuring that the hearing is conducted in accordance with the prescripts of the Act and the Constitution. Axiomatically, it is thus crucial that an adequate procedure should be followed. Hence, we even venture to say that the user is entitled to receive the same benefits of the due process that afford protection to an accused person facing criminal trial. Of course, as noted above, it is entirely untenable that a user may be deprived of his or her personal liberty without due process of law. This is so because, the user faces

a coercive serious deprivation of liberty by the State. To put the point in another way, the committal for treatment does not require the user's consent, as the user is virtually forced by the court to undergo treatment.

[23] Hence, the court has a significant role of making sure that a fair procedural protection is always and completely observed. And to ensure adequate protection of the interests of the user.

[24] It is necessary to emphasise that in so far as procedural protection is concerned; a court seized with a committal hearing should guard against treating such hearing as a distant cousin to a typical criminal hearing. But it should not follow from this that the committal hearing is a synonym or an equivalent to a criminal hearing as the two hearings operate on completely opposite sides of the spectrum. Committal proceedings before the enquiry magistrate are inquisitorial in nature. The magistrate holding the enquiry is imbued with the power to call witnesses and may, amongst others, direct that the person in respect of whom the enquiry is being held, to be examined by a medical practitioner, psychiatrist or clinical psychologist designated by the magistrate and may call upon the medical officer, psychiatrist or clinical psychologist to furnish him or her with a report reflecting the results of the examination. The analogy is merely used to point out a criminal law procedural protection.

[25] It must also be true that for the committal hearing to measure up to due process; it should accord with the rudimentary demands of justice and procedure. Therefore, it has to afford the user:

- an option to appoint legal representation of his or her choice, if he can afford one;
- if the user cannot afford to appoint an attorney of his or her own choice, he or she should be afforded an option to obtain legal representation at the State's expense [Legal Aid assistance];
- the right to have insight into the evidence in possession of the State before the commencement of the commitment hearing;
- the right to have the State to prove his addiction beyond reasonable doubt;
- the right to adduce and challenge the evidence presented by the applicant or the State;
- the right to appeal and review process should be explained

[26] Equally applicable to any user in a committal hearing is the right to be permitted to testify in his own behalf, to call witnesses, to cross examine witnesses, to address the court. And if there are two mutually destructive versions before the court, the user is also entitled to a reasoned judgment.

[27] Evidently, as mentioned earlier, the aforesaid rights are meant to guarantee that the user is afforded due process designed and deemed necessary to ensure amongst others; the right to liberty and that the user is not committed except if it appears to a magistrate on consideration of the evidence and of any report submitted or furnished to him that the user is indeed an addict within the meaning of the Act. Another way of looking at it is this: the mere fact that one of the aims of the Act is to benefit the user as it is a protective piece of legislation, does not mean that due process should be flouted.

[28] Even though the user in the present case has been characterised as someone who is educated and has an above average intelligence, that does not mean that he possesses a legal skill to conduct his own case, or he is familiar with the rules of evidence, or has the knowledge to adequately prepare his case.

[29] At the risk of repetition and in the interest of clarity it is also worthy of note that section 35 (3) of Act, specifically dictates that a person in respect of whom the enquiry is being held—

(a) is entitled to legal representation;

(b) is entitled to cross-examine any witness and to call witnesses;

(c) may give evidence in person or through his or her legal representative; and

(d) may show cause why an order must not be made in terms of subsection (7).

[30] Additionally, in terms of section 9 of the Constitution, Act 106 of 1998, everyone has the right to equal protection and benefit of the law.

Waiver of legal representation

[31] Needless to say, the Act clearly states that a user is entitled to legal representation. We are mindful to the fact that implicit in the right to legal representation is the right to self-representation. Generally, nothing can prevent a user from revoking his waiver to legal representation.

- [32] However, the waiver of legal representation must be well informed, unequivocal and unconditional. Similarly, we are acutely alive to the fact that in order to determine whether there has been an unequivocal, unconditional and intelligent waiver of the right to legal representation depends upon the facts of each case, including the training, skill, and conduct of the of the user.
- [33] It is so that at the commencement of the hearing, the user expressly waived his right to legal representation. Notwithstanding that, the record of the hearing also reveals that after the expressed waiver to be legally represented, the user changed his mind in the middle of the hearing and requested legal representation. The record also demonstrates that, at that stage of the hearing, the user changed his request because he appreciated the pitfalls and the consequences of relinquishing legal representation. Similarly, he also realised the benefits of having a legal representation.
- [34] In our mind, the change of stance by the user, as far as the right legal representation is concerned, rendered the initial waiver to legal representation immediately ineffective. We emphasise that even during the enquiry, the necessary opportunity to secure legal representation should be afforded.
- [35] The record of this matter viewed holistically does not bear that the user had a desire to dispense with the use of legal representation. In the present case, however, the record illustrates that the user changed his desire to represent himself. Additionally, the record of the hearing contains an unequivocal request of legal representation. Therefore, it

cannot be said that from start to finish the user was willing to forgo his right to legal representation.

[36] When the user expressed that he felt out of depth and the risk of representing himself; to us that signified that even the waiver to legal representation that was made at the beginning of the hearing was not made knowingly and intelligently. As mentioned earlier, in essence, the request for legal representation effectively cancelled the first election of self-representation.

[37] Hence, it cannot be said that the record of this matter reveals that the user acquiesced to proceed without legal representation, after he had renewed his stance to waive legal representation. Pursuant to the user indicating his desire to have legal representation, he never confirmed that he wants to represent himself. Even after the Magistrate had enquired from him if he still wants an attorney.

[38] Gleaning from the reply of the learned Magistrate to our query; the Magistrate plainly conceived the user as having elected to represent himself. As mentioned previously, whether a person had waived his or her right to legal representation, depends on all the circumstances of the case, and not the perception by the presiding officer.

[39] It must be remembered that the determination of a presiding officer that a person has waived his right to legal representation should be borne out by the record.

Of course, it is certainly wrong to presume acquiescence when a person faces a deprivation of a fundamental right. Clearly, an abandonment of a fundamental right may not be inferred from silence. Palpably, silence does not amount to an effective waiver of a right. Particularly, given the fact that self-representation is usually a bad call.

[40] In the circumstances, the learned Magistrate should have erred on the side of caution and gave the user the indulgence he sought to appoint legal representation, particularly when the user said he felt that he was out of his depth. At that stage of the hearing the user felt that legal representation could be of great help to him in handling the hearing. Hence, he pertinently expressed to the court that he faced a grave risk in representing himself.

[41] Additionally, equally clear, there is nothing in this record that can serve to show that after the user requested legal representation, he later abandoned that request. At a risk of repetition, where a person waives his right to legal representation, that should clearly be discernible from the record. For that matter, in this case, after the user had expressly indicated that he wants to be legally represented; the user did not make any further statement to imply that he had an intent to self-represent. The presiding magistrate was obliged to adjourn the proceedings to enable the user to secure the services of a legal practitioner. It must be stressed that the right to legal representation is ensconced in the Constitution and should not be lightly dispensed with by courts.

- [42] Even the engagement between the Magistrate and the user does not come close to meaning that he had withdrawn the request for legal representation. Instead, the record reveals that the Magistrate ignored the request that was made by the user.
- [43] In the circumstances, the learned Magistrate, instead of trying to convince the user that things would go a lot faster and swift without legal representation, she ought to have adjourned the proceedings for legal representation. More so, in light of the fact that the user's request was not meant to delay. Thus, the learned Magistrate should not have tried to highlight the benefits of speedy finalisation of the matter, but instead she should have determined whether the user competently and intelligently wanted to self-represent.
- [44] The record in this matter plainly evinces the lengths the learned Magistrate went to in her endeavours to assist the user to understand the duration of his imminent admission at the treatment centre.
- [45] In the context of this matter, it is apparent that the Magistrate unwittingly wanted to discharge the roles of both presiding officer and that of a legal representative. Yet this was not practical and effective. As a result, in her efforts to assist the user, the Magistrate neglected a significant aspect that the user disputed that he was an addict and that he [the user] wanted to call witnesses to prove same.

[46] Additionally, as far as the cross examination of the social worker by the user is concerned, there was no cross-examination worthy of the name.

[47] The magistrate also did not fully apprise the user of significant procedural rights of which laymen could not be expected to know but to which a legal representative would have brought to the user's attention for instance;

- the right to fully cross examine the social worker;
- the right to have his wife testify under oath and be cross examined by him
- the user was not advised of his right to testify on his behalf and the consequences of him not testifying;
- the right to address the court after all the evidence was led; and
- the benefit of calling witnesses

[48] Clearly, in this matter, the user was denied the right to legal representation. In the context of this case, the Magistrate erred in not allowing the user to get legal representation.

[49] The picture of this matter is further complicated by the fact that the user was not given an opportunity to call witnesses, albeit he expressly indicated that he would like to call his doctors as witnesses. The corollary of this is that the user who was without legal representation and whose personal liberty was at stake; was also not afforded the opportunity as evinced by section 35 (3) (c) of the Act, to present his side of the case by presenting evidence or through his legal representative.

Conclusion

[50] It is unfortunate that the lack of due process culminated in the order of the Magistrate reviewed and set aside. To this end, the hearing was set aside on a technical basis. It is apparent from the record that there were valid grounds for initiating the application. Should the applicant still desire to bring the application, the State should ensure that the application should start de novo before a different Magistrate.

[51] Accordingly, for all these reasons, we decided to review and set aside the committal order with immediate effect.

**LEKHULENI JD
JUDGE OF THE HIGH COURT**

**NZIWENI CN
JUDGE OF THE HIGH COURT**