

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**



CASE NO. AR769/14

In the matter between:

KEVIN AARON NAIDOO

APPLICANT

and

**THE REGIONAL MAGISTRATE FOR DURBAN
MAGISTRATES' COURT, MR M MAHARAJ**

FIRST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS: KZN

SECOND RESPONDENT

J U D G M E N T

STEYN J

[1] The applicant was charged in the regional court Durban, KwaZulu-Natal with 171 counts of fraud alternatively 171 counts of theft. Before the trial commenced, he applied

for a permanent stay of the prosecution against him. That application was refused by the first respondent who presided in the criminal trial.¹ The applicant hereafter launched the present application in which he seeks the following relief:

- ‘1.1 That the decision by the First Respondent dated 30th May 2014 under Commercial Crimes Court case number 41/1447/09 to refuse the application by the Applicant for a permanent stay of criminal proceedings against him, be and is hereby reviewed and set aside;
- 1.2 That the criminal proceedings in the Durban Commercial Crimes Court under case number 41/1447/09 be and is hereby permanently stayed;
- 1.3 Costs of the application in the event of opposition thereto;
- 1.4 That the Applicant be granted such further and/or alternative relief as the above Honourable Court may deem fit.’

[2] The complainant in the fraud charges against the applicant and his co-accused is a company, PG Bison (‘the complainant’), that manufactures boards and related products at a factory in Pietermaritzburg. The applicant, who is accused 2 before the court *a quo*, is the proprietor of a business, Tool and Engineering Supplies, who formerly supplied goods to the complainant. With the help of accused 1, who was the stock controller and employed by the applicant, he made certain misrepresentations unlawfully and with the intent to defraud the complainant of R3 130 619,37. The conduct of the accused caused financial prejudice to the complainant.

[3] This application before us has a protracted history. It was set down for hearing on 13 October 2015 but was removed from the roll by the parties after the presiding judges requested the parties to file supplementary heads to address the following issues:

- (i) Whether the matter was set down as a review or an appeal; and
- (ii) Whether the learned regional magistrate had the necessary jurisdiction to entertain the application to stay the proceedings.

¹ See case 41/1447/09 of the Durban Commercial Crime Court.

Various adjournments followed thereafter and the review was finally set down and heard by a full court on 12 January 2017.

[4] The abovementioned queries were raised in the light of the grounds listed in terms of s 22 of the Superior Courts Act 10 of 2013 which provides:

- ‘(1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are -
- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.’

[5] The applicant, in his supplementary heads, responded to the queries raised and submitted that the application is indeed a review. Reliance was placed on this court’s inherent jurisdiction to review proceedings of the magistrates’ court. In the same vein counsel on behalf of the applicant submitted that the magistrates’ court was cloaked with the necessary jurisdiction to hear the application and order a stay of the prosecution. The second respondent submitted that the ruling by the first respondent, the regional magistrate, is not reviewable since no grave irregularities or illegalities occurred during the course of the proceedings. The second respondent relied on *S v Scholtz & others*² and *Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate Durban & another*³ in support of its submissions.

[6] At the outset it is necessary to deal with the procedure adopted by the applicant in challenging the outcome of the application before the first respondent. The applicant

² 1996 (2) SACR 623 (C).

³ 2001 (2) SACR 463 (N).

launched the application before the regional court. *Ex facie* the record the applicant is not challenging any irregularity committed by the learned regional magistrate, he is however dissatisfied with the outcome of his application. In my view the applicant is not seeking a review in the narrow sense since the conduct complained of is not an irregularity that occurred during the trial nor the proceedings or caused an undue delay in terms of s 342A⁴ of the Criminal Procedure Act 51 of 1977 ('the Act'). The applicant in his founding affidavit reveals the basis for his application as being the complaint-driven investigation of the crimes, and challenges certain conduct that he labels as

⁴ Section 342A provides insofar as relevant:

- '(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.
- (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
 - (a) The duration of the delay;
 - (b) the reasons advanced for the delay;
 - (c) whether any person can be blamed for the delay;
 - (d) the effect of the delay on the personal circumstances of the accused and witnesses;
 - (e) the seriousness, extent or complexity of the charge or charges;
 - (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
 - (g) the effect of the delay on the administration of justice;
 - (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
 - (i) any other factor which in the opinion of the court ought to be taken into account.
- (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
 - (a) refusing further postponement of the proceedings;
 - (b) granting a postponement subject to any such conditions as the court may determine;
 - (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general;
 - (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
 - (e) that-
 - (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
 - (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
 - (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.'

irregularities that occurred during the investigation of the matter, not at the trial. The applicant alleges that the first respondent erred in not granting the permanent stay of the proceedings and that this court should review the ruling.

[7] In essence the applicant's grounds for the relief sought are that PG Bison paid a private investigator, John Trickey, to conduct all the investigations into the alleged crimes. The applicant took issue with the fact that Inspector Jason Reddy of the Directorate of Priority Crimes Investigations ('the Hawks') was the investigating officer of the case. The applicant avers that he would suffer trial related prejudice should the evidence procured by Trickey be tendered at the pending trial. It is further submitted by the applicant that Trickey has improperly and unconstitutionally interfered in the prosecution of the case. In addition the applicant avers that the complainants ought not to have been the investigators of their own cases. In relation to the ruling that was made by the first respondent, he submitted that the first respondent was misdirected in finding that any possible prejudice can be evaluated by the trial court after weighing all the relevant evidence adduced. The applicant's submission was that the first respondent came to an incorrect conclusion that the grounds for a permanent stay of the prosecution were not met.

[8] The first respondent, in his reasons for refusing a stay of the proceedings, stated:

'In my view, prejudice can only be measured by the trial court hearing all relevant evidence. There is in my view in this particular case no irreparable trial prejudice to the appellants or insurmountable trial prejudice as was put to the Court during argument.

Having regard to the following, the strength of the State case, which I indicated before, based on documentary evidence and the Section 204 witness can be described as a strong *prima facie* case. The fact that the matter was set for trial on two occasions between 3 October 2011 and 27 to 31 May 2013, the delay in the prosecution is with the applicants in launching this application seems to me to be an abuse of court process. In my view it is ill conceived to say the least. What also needs to be mentioned at this stage is the State, for no reason or reasons beyond me agreed to this application when clearly the matter was ready for trial at the stage in 2013. In my view the State ought to have been more forceful in having the matter to proceed. Rather than capitulating and agreeing to this application.

A permanent stay is a radical and far reaching remedy to bar prosecution before the trial commences. A bar is only to be given in a narrow range of circumstances, more so where it is established that the accused person has suffered irreparable trial prejudice as a result of the delay.

The State, in particular Mr Trickey, was willing to and in fact did assist the applicants with the documentation required for trial purposes. The fact that the documents were kept with him is a matter for the trial court to decide whether anything turns on this facts.

The application for permanent stay for prosecution in respect of both applicants is dismissed.¹⁵

[9] Generally an accused person's remedy in the case of a wrong conclusion would be to appeal after the case has been concluded. In principal, High Courts are reluctant to interfere with uninterminated proceedings since it leads to piecemeal finalisation of cases. In *Lawrance v Assistant Resident Magistrate of Johannesburg*⁶ Innes J said:

'This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter.'⁷

[10] The relief sought by the applicant was opposed by the second respondent, who had filed a detailed affidavit and disputed the averments made by the applicant as being without merit. Mr Nel, appearing on behalf of the second respondent, firstly, submitted that the court *a quo* had the necessary jurisdiction to decide on the application before it and placed reliance on *Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate, Durban*.⁸ I shall return to this decision later in this judgment. Secondly, he submitted that the first respondent correctly dealt with the applicant's application on the merits, since the applicant had failed to show that it would be in the 'interests of justice' to grant the stay of the proceedings.

⁵ See pages 295 to 296 of the transcript.

⁶ 1908 TS 525.

⁷ *Ibid* at 526.

⁸ 2001 (2) SACR 463 (N).

[11] The general principle that should be followed before criminal trials are finalised has been succinctly defined in *Walhaus & others v Additional Magistrate, Johannesburg & another*⁹ by Ogilvie Thompson JA:

'If, as appellants contend, the magistrate erred in dismissing their exception and objection to the charge, his error was that, in the performance of his statutory functions, he gave a wrong decision. The normal remedy against a wrong decision of that kind is to appeal after conviction. The practical effect of entertaining appellants' petition would be to bring the magistrate's decision under appeal at the present, unconcluded, stage of the criminal proceedings against them in the magistrate's court. No statutory provision exists directly sanctioning such a course. ... Nor, even if the preliminary point decided against the accused by a magistrate be fundamental to the accused's guilt, will a Superior Court ordinarily interfere – whether by way of appeal or by way of review – before a conviction has taken place in the inferior court ... This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances.'¹⁰

(My emphasis.)

The court also qualified the general rule applicable in criminal proceedings by stating that the 'interests of justice' should be recognised.

[12] In my view the issue that needs to be decided *in casu* is whether the first respondent had the necessary jurisdiction¹¹ to entertain the application of a stay of the proceedings in circumstances where the court was not specifically authorised by a statute to do so. Counsel appearing on behalf of the applicant had to concede, albeit reluctantly, when the matter was argued, that the application before the regional court was controversial especially since it was not based on an undue delay in terms of s 342A of the Act. The trial had not commenced so the magistrate could not have acted in terms of the categories listed under s 22(1)(b) to (d) of the Superior Courts Act. It is therefore unnecessary for us to deal with the review in terms of the aforesaid provisions.

⁹ 1959 (3) SA 113 (A).

¹⁰ At 119D-F and 120A.

¹¹ See s 22(1)(a) of the Superior Courts Act 10 of 2013.

[13] It has always been trite in our law that magistrates' courts are creatures of statute and, unlike the High Courts, do not have any inherent jurisdiction.¹² Magistrates are officers appointed within the public service.¹³ In my view, magistrates' courts are regulated by the Magistrates' Courts Act¹⁴ and the Magistrates' Act.¹⁵ The jurisdiction of the magistrates' courts is dependent on any Act, granting such jurisdiction.¹⁶ Since the advent of our Constitution, the proposition should be understood in a constitutional

¹² Cf *S v Scholtz & others* 1996 (2) SACR 623 (C) at 626b-e, where the court held:

'It follows that the question as to whether a magistrate's court has jurisdiction to order a stay of prosecution must be answered by reference to Acts 32 of 1944 and 51 of 1977. Mr Hodes, who appeared for the appellants, was unable to refer to any provision in either of those Acts expressly conferring the power to grant a stay of prosecution on a magistrate's court. He conceded that magistrates' courts, being creatures of statute, only have such powers as are granted to them by statute but he contended that a power to stay a prosecution must be regarded as having been granted to magistrates' courts by implication.

Although it is clear that magistrates' courts may have implied as well as expressed authority (cf *National Party v Jamie NO and Another* 1994 (3) SA 483 (El At: WC) at 492G-493C), I cannot agree that the authority contended for can be regarded as having been conferred by implication in the present case. In this regard I agree with the view expressed by the research staff of the SA Law Commission in para 4.33 of its *Working Paper on the Simplification of Criminal Procedure* (Working Paper 49: Project 73) (to which Mr Slabbert drew our attention) that:

"The lower courts in South Africa ... have no inherent power to prevent abuses of their process."

¹³ For a discussion of Magistrates see LAWSA Vol 11 (2 ed) para 499.

¹⁴ Act 32 of 1944.

¹⁵ Act 90 of 1993.

¹⁶ *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) para 5, reads:

'It is well-established that the magistrate's court has no jurisdiction and powers beyond those granted by the Act (compare *Riversdale Divisional Council v Pienaar* (1885) 3 SC 252 at 256; *Stork v Stork* (1903) 20 SC 138 at 139; *Gqalana and Others v Knoesen and Another* 1980 (4) SA 119 (E) at 120; *Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) SA 406 (T) at 409E-F; *Venter v Standard Bank of South Africa* [1999] 3 All SA 278 (W) at 280i-j) and that in this context, jurisdiction means "the power vested in a court by law to adjudicate upon, determine and dispose of a matter" (see *Ewing McDonald & Co. Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256G-H; *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424; *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551C). It is also well-established that powers may be conferred expressly or by implication. Where the Act is silent on a matter the general rule is that by expressly conferring on the magistrates' courts' jurisdiction in respect of a particular matter, the Act confers by implication the ancillary powers necessary to give effect to that jurisdiction. In regard to matters specifically provided for in the Act, the Act will govern that situation (compare *Reuters v Clarke* 1922 EDL 303 at 305; *Van der Merwe v De Villiers and Another* 1953 (4) SA 670 (T) at 672F-673C; *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1963 (1) SA 737 (SR) at 739E-F). The primary question to be answered therefore is whether the Act expressly or by implication confers on a magistrate's court jurisdiction to grant provisional sentence.'

Also see LAWSA Vol 11 (2 ed) para 534 that reads:

'The magistrates' courts are creatures of statute, and have no jurisdiction beyond that granted by the Constitution or the statute creating them. They have no inherent jurisdiction to develop the common law since they have not been empowered by the Constitution to develop the common law, taking into account the interests of justice, but must in their decisions apply the provisions of the Bill of Rights, by which they are bound, as organs of state.'

(Footnotes omitted.)

context¹⁷ since the Constitution is the supreme law of our country.¹⁸ Section 170 of the Constitution should be interpreted and understood that magistrates' courts only have jurisdiction if an Act of Parliament grants them such authority.¹⁹ The aforesaid does not detract from the judiciary's independence. The independence of all courts has been affirmed by the Constitutional Court in *Van Rooyen & others v The State & others (General Council of the Bar of South Africa intervening)*:²⁰

'The Constitution thus not only recognises that courts are independent and impartial, but also provides important institutional protection for courts. The provisions of s 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the Judiciary and the government and are enforceable by the Superior Courts, including this Court.'²¹

(My emphasis.)

[14] In *S v The Attorney-General of the Western Cape; S v Regional Magistrate, Wynberg & another*²² the court affirmed a magistrates' court's jurisdiction to order a permanent stay of the prosecution in light of the jurisdiction granted to the court in terms of s 342A of the Act. Before the commencement of the interim Constitution, our courts recognised that criminal proceedings should be heard expeditiously since it was an essential element of a fair trial. Section 168 of the Act²³ therefore empowered the courts to refuse any adjournment if the court deemed it not to be in the 'interests of

¹⁷ See s 166(d) of the Constitution of the Republic of South Africa, 1996 that provides for the judicial system to be:

'The courts are –

(d) the Magistrates' Courts;'

See also s 110 of the Magistrates' Courts Act 32 of 1944.

¹⁸ See s 2 of the Constitution:

'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

¹⁹ For a discussion of the magistrates' courts procedures, see LAWSA Vol 5 2 ed para 251.

²⁰ 2002 (5) SA 246 (CC)..

²¹ Para 18.

²² 1999 (2) SACR 13 (C).

²³ Section 168 reads:

A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.'

justice'. In *S v Magoda*²⁴ the court addressed the issue of undue delay caused by the State by refusing a further adjournment, and in order to ensure a speedy trial went as far as to deem the State's case closed in circumstances where the State refused to close its case.

[15] The Constitutional Court in *Sanderson v Attorney-General, Eastern Cape*²⁵ held:

'It is appropriate at this juncture to make some brief observations about the remedy sought by the appellant. Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this is determined by s 7(4)(a) of the interim Constitution. In interpreting that provision in *Fose v Minister of Safety and Security* we adopted a flexible approach that is certainly inconsistent with the availability of a single remedy in North American jurisdictions. In our interpretation of s 7(4)(a) we understood 'appropriateness' to require 'suitability' which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3.'²⁶

(My emphasis.)

[16] The Constitutional Court recognised the societal interest in bringing criminal matters to finality in a court of law. Sachs J held in *Bothma v Els & others*²⁷ at para 41:

'[41] The judgment in *Sanderson* points out that in determining reasonableness it is not only the interests of the accused that must be borne in mind. In making a value judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. When a permanent stay of prosecution is sought this societal interest will loom very large.'

(My emphasis.) (Footnote omitted.)

²⁴ 1984 (4) SA 462 (C).

²⁵ 1998 (1) SACR 227 (CC).

²⁶ Para 38.

²⁷ 2010 (2) SA 622 (CC).

Jurisdiction

[17] Both the applicant and the respondents have submitted to us that the magistrate's court had the necessary jurisdiction to consider the application. Reliance was placed on the *Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate Durban*.²⁸ In the supplementary heads filed by the second respondent's counsel he also relied on s 170 of the Constitution,²⁹ in support of his argument on jurisdiction.

[18] In *DPP KwaZulu-Natal v Regional Magistrate, Durban*³⁰ Hugo J and Combrink J found that the magistrates' courts have the necessary jurisdiction to decide on applications that lie beyond the scope of s 342A of the CPA. It is accordingly necessary to re-visit the court's reasoning and determine whether it is still correct, given various constitutional and procedural developments over the past years. The court's findings were for example not endorsed by the Western Cape High Court in *S v Naidoo*.³¹

[19] Binns-ward J and Cloete AJ summarised the limitation of the lower courts' review powers in *Naidoo supra*, at para 16:

'Magistrates' courts do not ordinarily enjoy jurisdiction to judicially review administrative or constitutional action, or to make declaratory orders. That well-established limitation on their jurisdiction probably explains why the wording of s 342A of the CPA, which does afford a basis for a magistrate to make an appropriate delay-related order, is limited to delay after the commencement of proceedings, that is, delay which occurs while the matter is under the supervision of the court. The appellant was in essence applying for a declaration that he could not be prosecuted. He was seeking a remedy which would avert his trial, rather than one which asserted his right to a fair trial. The difference between the two concepts in the context of the issue currently under consideration is illustrated by the fact that it does not lie within a magistrate's power to give a declaratory

²⁸ *Supra*.

²⁹ Section 170 reads as follows:

'Other courts. – All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'

³⁰ See *supra* para 10.

³¹ 2012 (2) SACR 126 (WCC).

relief, while it does fall within a magistrate's duty to ensure that criminal proceedings conducted before that court are so conducted as to assure an accused of a fair trial. In our view the inclusion of the right to have a trial begin without unreasonable delay as one of the elements of a fair trial within the ambit of s 35(3) of the Constitution does not detract from the relevance of the aforementioned dichotomy for jurisdictional purposes. For the moment we are concerned not with the content of the implicated right, but with identifying the forum in which the particular remedy sought in this case could competently be granted.'

(My emphasis.) (Footnote omitted.)

[20] In my view s 170 of the Constitution does not confer jurisdiction on magistrates' courts to hear applications not authorised by an Act of Parliament.³² Section 171 of the Constitution states that all courts function in terms of national legislation and their rules and procedures must be provided for in terms of national legislation. The court in *The DPP KwaZulu-Natal v Regional Magistrate, Durban* expanded the jurisdiction of magistrates' courts and relied on s 170 of the Constitution as the authority to do so. At 466 the court held:

'The applicant seems to have thought that s 170 of the Constitution is not applicable to the present case because of the provision therein that the magistrate's court may not enquire into or rule on the constitutionality of legislation. That is the very thing that the court was not doing. It was applying legislation and assuming it to be constitutional as indeed it had to because it was contained in the very Constitution itself.

The Constitution of course, is in itself an Act of Parliament and s 170 in terms permits the magistrate's court to decide such a matter.

It is surely within the province of any magistrate's court even aside from the provisions of the Constitution to ensure that trials heard before it are fair.'³³

(My emphasis.)

[21] The court thereafter proceeded on an analysis of s 342A of the Act and found, correctly in my view, that the provisions of s 342A do not apply to events preceding the institution of criminal proceedings. The court then considered the prejudice suffered by

³² '**170. Magistrates' Courts and other courts** – Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'

³³ At 466b-d.

an accused if there is a delay in the proceedings and found that the question of prejudice to an accused must take precedence in the a consideration of any delay.

Whilst I am in agreement with Hugo J that *S v Scholtz*³⁴ was of no assistance to the court since the said case was decided in terms of the provisions of the interim Constitution³⁵ which differed vastly from the final Constitution in regard to an expeditious trial,³⁶ the interim Constitution provided for the time period to start when an accused is charged with an offence, whilst s 35(3)(d) of the Constitution now provides:

‘Every accused person has a right to a fair trial, which includes the right – (d) to have their trial begin and conclude without reasonable delay;

(My emphasis.)

In *DPP KwaZulu-Natal v The Regional Magistrate, Durban supra* the court noted the difference between the interim Constitution and present Constitution but concluded that the two Constitutions also differed on the issue of the jurisdiction of courts. The court reached this conclusion without substantiating its finding.

[22] In my view an application for a permanent stay of the prosecution, not provided for in s 342A of the Act, must be brought before the High Court that has the necessary jurisdiction to hear it.

[23] Reverting to the facts of this application it is necessary to state, without deciding, that the applicant’s chances are very slim to succeed with a review on the merits, should it be brought before another court. Any document or any evidence obtained in an unconstitutional manner should be challenged before the court hearing the matter.

³⁴ 1996 (2) SACR 623 (C).

³⁵ Interim Constitution of the Republic of South Africa Act 200 of 1993.

³⁶ See s 25(3)(a) and (j) of the interim Constitution.

The presiding officer is best placed to rule on the evidence in accordance with recognised procedures and applicable principles of law.³⁷ It is necessary to draw the applicant's attention to the merits in light of the conclusion reached on the issue of jurisdiction. The magistrate rightly, in my view, concluded that the trial court would be best suited to decide on the issues raised by the applicant. One can only hope that the trial would not be further delayed by instituting the same review before the right court.

[24] It is trite that costs should follow the result. The success of this review cannot be attributed to any grounds advanced by the applicant in his papers. The result is solely based on the issues raised by this court. Under the circumstances it would be improper to mulct the second respondent with the costs of this application. It would be far more just not to make any costs order.

[25] Accordingly I have reached the conclusion that the learned regional magistrate lacked the necessary jurisdiction to hear the application since s 170 of the Constitution did not vest the lower court with jurisdiction beyond that bestowed on it by s 342A of the Act.

[26] The following order is made:

- (i) The review succeeds and the order issued by the first respondent is set aside.

³⁷ See *Key v Attorney-General, Cape Provincial Division, & another* 1996 (4) SA 187 (CC) para 14: 'If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded. It follows that the applicant is not entitled to an order from this Court in these proceedings that the evidence secured as a result of the searches and seizures will be inadmissible in criminal proceedings against him. Insofar as the decision in *Park-Ross* is inconsistent with this conclusion, it must be taken to be incorrect.'

- (ii) It is directed that the proceedings commence before another regional magistrate, without any further delay.
- (iii) There is no order made in respect of the costs of the review.

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STEYN J

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CHETTY J

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MNGUNI J

Application heard on : 12 January 2017
Counsel for the applicant : Mr M Chetty
Instructed by : Yugendrie Maharaj & Associates
Counsel for the respondents : Mr C Nel
Instructed by : The Director of Public Prosecutions
Judgment handed down on : 23 May 2017