

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case No: CA&R 9/2012

Heard: 11/06/2012

Delivered: 18/06/2012

In the matter between:

MUKHALI IVY THENGA

Appellant

v

THE STATE

Respondent

Coram: Kgomo JP *etPakati*J

JUDGMENT ON APPEAL

KGOMO JP

- 1] The appellant is the Director of Public Prosecutions (DPP) of the Northern Cape Province. She was convicted of Contempt of Court by the Regional Court Magistrate, Mr M Viewe, on 13 April 2007 and was cautioned and discharged. She applied for leave to appeal but it was refused by him. Leave was granted (Phatshoane J and Henriques AJ) on petition to the Judge President of this Division.

- 2] The somewhat protracted backdrop towards the appellant's conviction for Contempt of Court must be understood in the context that follows. The accused in the main case, Mr Thomas Nginase

(Nginase), appeared before the Magistrate in Upington on 12 March 2007 on charges of rape, assault with intent to do Grievous Bodily Harm (AGBH) and murder. The dates 13 to 16 March 2007 were reserved for the completion of the case. Later another charge of rape and AGBH were added.

3] On 12 March 2007 the prosecutor, Mr Damarah, informed Magistrate Viewe that the trial is unable to proceed because there are several prosecutor vacancies. One of the vacancies was occasioned by Ms L B French having been appointed a district magistrate. He conveyed to the court in essence that he is the control prosecutor and as such not available to prosecute in that his duties are administrative. He also stated that he will in due course relocate to Queenstown, Eastern Cape, where he has been appointed Chief Prosecutor (hoofaanklaer). Ms Engelbrecht, a relief prosecutor, was indisposed and was receiving treatment out of town. Her husband, who is a senior prosecutor, was therefore on compassionate or family responsibility leave. Damarah said that Mr Bouman, the district control prosecutor, was assigned to prosecute this case but there was a crisis in the district court. Another prosecutor, Mr Nyirenda, tragically died in an accident. So, the list went on. Mr Damarah applied and was granted a remand to the following day (13/03/2011) to consult with his witnesses and undertake the prosecution.

4] I relate the foregoing history because the defence, Adv Victor, objected to the postponement as the case had a long history. The postponement diary shows that the case was first postponed in the District Court on 11 May 2004. I have counted 10 postponements up to 22 September 2004. The dates were fruitfully utilized mainly for a bail application. The case first served in the Regional Court on 05 October 2004. Between this date and 12 March 2007 there

were a total of 29 further postponements on account of both sides for various reasons I need not traverse here. The Regional Magistrate directed that Mr Swarts, now the control prosecutor, explain the delay in prosecuting the case.

- 5] The court accordingly ordered an immediate enquiry in terms of s342A of the **Criminal Procedure Act, 51 of 1977** (the CPA). Mr Swarts testified at the enquiry. The appellant, the DPP, was not present. Interestingly, Adv Victor seemed to suggest to the Court that the case be heard in the Circuit Court (Upington) in that "there is a shortage of cases in the High Court." The bait was not taken. S342A(1) provides that:

"342A Unreasonable delays in trials

(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."

- 6] When the hearing resumed on 13 March 2007 (the very next day) Mr Damarah informed the court that the "state was still not ready to proceed" because "there was still uncertainty as regards who will prosecute the case". He said the witnesses were not yet consulted with (as vague as all that) and that a further obstacle was that the accused (Nginase) faces two charges and a third was in the process of being added. After a short recess it emerged that a fourth and fifth charges were being prepared. The court directed that Mr Swarts prosecute the case and afforded him an opportunity to consult with the witnesses. When the trial was due to commence at 14h15 Mr Swarts informed the court that the rape charge (count 4) was still in the district court and asked for a further

postponement, which was granted until 14 March 2007.

7] On 14 March 2007 Mr Swarts informed the court that the rape charge, the fifth count, has now been incorporated in the charge sheet. He stated that he had a discussion with Adv Chris Louw, deputy DPP. The latter's directive was that the case be forwarded to the DPP for the necessary decision. The accused was out on bail on some of the charges and not on others. On a conspectus of the situation he was refunded his bail deposits and remanded in custody to 29 March 2007.

8] Strangely the case was advanced to 20 March 2007; or was it? The presiding Regional Magistrate was Mr C T G Jacobs. He notes: "The presence of the accused cannot be secured at short notice by means of a requisition. Mr Viewe, the presiding officer [seized with the case] phoned from Pofadder [an outlying town] and requested that the subpoena (dagvaarding) for Mr Pikoli, the National DPP, be stopped because of his unavailability. He is unaware of this matter. Ms Marian Sparg (CEO) of NPA at VGM Building, Silverton, Pretoria, was the relevant official to be subpoenaed in Mr Pikoli's stead, for 29 March 2007. Mr Tyers[prosecutor] will ensure that Capt Mona serve the subpoena."

That was the business for the day in accused-Nginase's matter.

9] On 29 March 2007 Mr Swarts (control pp) informed Magistrate Viewe that the docket has now been forwarded to the DPP and that no decision has been taken as the said Adv Louw was out of his office. He informed the court that Adv M I Thenga, the appellant and DDP, was attending a National Stakeholders Conference in Johannesburg (Midrand) and has tendered a written apology and

undertook to avail herself at the next hearing.

10]Adv Victor, Nginase's counsel, in response reminded the court that the s342A enquiry is the court's enquiry. She submitted that the appellant was not entitled to inverse the procedure by absenting herself prior to being excused. The court authorised a warrant for the appellant's arrest and suspended its execution until 13 April 2007 to co-incide with the date to which the s342A enquiry was postponed. Mr Swarts handed in the letter of apology by the appellant.

11]The letter is dated 27 March 2007 and addressed to the Senior Public Prosecutor, Upington, and copied to the Clerk of the Court, Upington. It reads:

"Attention: A C Damarah

THE STATE VERSUS THOBILE NGINASE: RC 136/04

1. *The above matter refers.*
2. *I wish to confirm receipt of the subpoena dated 12 March 2007, which my office received on 19 March 2007, requiring me to appear on 29 March 2007 in Court K.*
3. *My **request** is that I should be allowed to appear on the same date as the CEO for the NPA would be appearing. The reasons for the **request** is that I had other commitments already scheduled from 28 to 30 March 2007 in Johannesburg. The arrangements for the above were planned sometime last year, 2006. I intend to avail myself on the date still to be determined when the CEO will be appearing in Court K in Upington.*"(Emphasis added).

12]The subpoena that summoned the appellant to testify is the standard pro-forma J32 form: "*Subpoena in Criminal Proceedings*"and is dated 12 March 2007. The only detail that the

recipient can go by is that the name of the accused is:
"Thabile Nginase: Enquiry in terms of section 342A of the Criminal Procedure Act, 51 of 1977."

13] One step backwards: On 13 March 2007 Mr Swarts conveyed to the court that another count has to be added. Why this had to be repeated is incomprehensible. The court was on earlier dates evidently misinformed by a prosecutor or prosecutors that Nginase's case had been forwarded to the DPP for a decision whereas that was not so. The Magistrate, rightly, felt betrayed and postponed the case to 14 March 2007 for a proper explanation. What happened on the latter date is inconsequential for the determination of this appeal.

14] What is of consequence and concern to me, though, which I have to revert to, is the Magistrate's remarks aimed at the appellant-DPP when he postponed the case in the presence of the accused-Nginase on 13 March 2007. The recitation is copious but it demonstrates that the Magistrate had made up his mind already at that early stage that the appellant was in wilful default. In the premises the s188 of the CPA enquiry of 13 April 2007 was a mere subterfuge. My translation follows (the paragraphs are mine):

"(a) *The Court is settled with this predicament. **I am of the view that the DPP of the Northern Cape does not take seriously the magnitude of the shortage [of prosecutors] in her Province, if she decides to attend a workshop without informing the Magistrate who conducts the [s342A of the CPA] enquiry.** She surely knows what the enquiry is all about regard being had to the letter that she forwarded to the senior prosecutor. As DPP she knows that it is not the sector of the prosecution that has subpoenaed her, it is the Court.*

- (b) *I would have expected that a senior functionary in the position of AdvThenga would have communicated with the presiding officer to say this or that is my predicament. Because this is what her superior (boss) has done. AdvVusiPikoli's, the National DPP's, office phoned and explained his predicament. I accordingly directed that AdvVusiPikoli be excused from attending court today and that Marion Sparg, the CEO in the National Prosecuting Authority (NPA), substitute him. I am pleased that the NDPP has at least shown the necessary respect to the Court. I cannot, for certain, say the same of AdvThenga if she does not deem it necessary to phone the presiding officer.*
- (c) *Mr Nginase[the accused], I would naturally very strongly have considered excusing her (the DPP) from attending the enquiry (today) if she only took the trouble to contact the Court. **The Court is of the view that the excuse that she has currently proffered, which she has not given, but which she directed to the prosecution sector, does not hold water with the Court ("nieopgaan by die Hof nie")**. Adv Victor [for the accused] is 100% correct by submitting that one cannot default on a court date without being excused by the court when subpoenaed.*
- (d) ***The Court is of the view that it is disrespectful of her to have acted in that manner.** She knows that the CEO was also required to attend (the enquiry). She wanted to attend Court with the CEO. I don't know where she gleaned this knowledge, but the awareness is there. **She nevertheless come to the Court in a prescriptive manner. She wants to dictate to the Court who the court ought to summon and when she would appear – when the other person also appears.** I mean, this is disrespectful of her. We expect hundreds of witnesses to attend court, all of whom*

have commitments but they come to court. Now AdvThenga wants to tell me: "I am a senior functionary. I have a commitment. I am not coming to court. **If we allow all the people to prescribe to us in this way, where is the administration of justice headed.** Our legal system is overwhelmed by crime, which AdvThenga ought to be acutely aware of. The manpower or the capacity to overcome this scourge is lacking.

- (e) **The Chief prosecutor [Mr Swarts], sir, [addressing MrNginase] has testified under oath that this has reached crisis proportions which the prosecution is faced with due to a lack of manpower. He went as far as stating that no court can function properly with a shortage of 40% of prosecutors.** AdvThengacertainly does not **apparently** (sic) see the seriousness of the situation, otherwise she would have phoned me. That is my problem. On the contrary she communicates with her junior [Mr Damarah], she requests her junior to excuse her instead of the court. **Adv M I Thenga, unlike AdvPikoli, is not excused.**
- (f) The Court will authorise a warrant of arrest today. At the next appearance an enquiry will be held to determine whether her absence was negligent or intentional. If an ordinary person can be arrested when he/she did not even get proper notice of the date of hearing, why can't the same be done with our upstanding people in the land? We have to lead by example. I will suspend the execution of the warrant of arrest because AdvThengahas at least written a letter of excuse, even though not directed to me.
- (g) **Mr Swarts, the court requests you to please inform your superior, AdvThenga, that should she fail to attend court on the next date I will definitely have her**

arrested. I will not overlook (tolerate) the disrespect that she has displayed.”(Emphasis Added).

I will revert to these unfortunate remarks in due course and the effect or impact they have had on the Contempt of Court enquiry. I note in anticipation that Adv Botha, for the state, has sensibly conceded that the remarks by the Magistrate were inappropriate and precipitant.

15]The appellant duly attended court on 13 April 2007 and testified in the s342A enquiry. From the reading of the enquiry record it is unclear just what the Magistrate tried to establish or achieve. **Du Toit et al, Commentary on the Criminal Procedure Act,** encapsulates the essence of a s342A enquiry as follows:

"An unreasonable delay (or unreasonable duration of a case) can affect the fairness of the trial. In S v Maredi 2000(1) SACR 611 (T) the accused was in custody for 22 months before the case was concluded. Mynhardt J referred the matter to the authorities to investigate the conduct of the prosecutor and magistrate concerned as the accused's fundamental right to a speedy trial had been violated. In S v Jackson & others 2008(2) SACR 274 (C) Moosa J (Griesel and Motale JJ concurring) pointed out that some elements of the right to a fair trial related to pre-trial procedures, some to trial procedures and some to post-trial procedures. The court also confirmed the three basic forms of prejudice which can be caused by unreasonable delays: loss of personal liberty; impairment of personal security; and trial-related prejudice, such as witnesses becoming unavailable.

Several South African cases on the matter of unreasonable delays and the right to a speedy trial, have followed the United States case of Barker v Wingo 407 US 514 (1972) which dealt with the issue of a permanent stay of prosecution on the ground that the

constitutional right to a fair trial within a reasonable time had been violated. This case indicated that the following four factors should be considered: (1) the length of the delay before the institution of the prosecution; (2) the reasons for the delay; (3) the assertion by the accused of his rights; and (4) the prejudice to the accused. In Sanderson v Attorney-General, Eastern Cape 1998(1) SACR 227 (CC), 1997 (12) BCLR 1075 (CC) the Constitutional Court held that the three most important factors to consider are: (1) the nature of the prejudice suffered by the accused; (2) the nature of the case; and (3) the systemic delay.”

16]In casu the enquiry was not confined to the Nginase-accused case or perhaps more broadly the cases relating to the Magistrate's court. It lost focus and ranged throughout the Northern Cape Province. The provisions of various sections of the National Prosecuting Authority Act, 32 of 1998, and the Constitution of the Republic of South Africa, 108 of 1996, were traversed. The Magistrate belaboured aspects already thrashed, which were in any event irrelevant. He pontificated and lectured the appellant, a DPP. This melodrama carried on over some 18 pages of the record (transcribed pp163 – 180 and paginated pp 238-255 of Volume 3).

17]Of particular relevance was the enquiry whether the appellant was aware of the shortage of prosecutors not merely in his court but in the Province and what she has done about it. Her explanation went as follows:

"Yes. I will confirm that he [Mr Swarts]--- explained the shortage, what we did was to have interviews, if I am not wrong, they were held in December on – between the 11th, 12th or 13th, somewhere there. And unfortunately until now we haven't had anything--- for the final decisions whether any person has been appointed or not. But what was expected of us in this region to have done, we have

done that. In other words, we have requested for the positions to be advertised, which we did. Requested for candidates to be shortlisted, which we have done. Held interviews, which we had done. Recommended some candidates which we did and then we are still waiting for the final results from the recruitment officers."

18]The upshot of what the appellant conveyed was that as DPP she does not approve or do the actual appointments. The appellant also explained that it is difficult to attract the best candidates to the Northern Cape and some of them find it difficult to adjust and leave. In my view this whole saga could have been more speedily resolved administratively by the Regional Magistrate (Mr Viewe) directing the problems to the President of the Regional Court (Mr Nqadala) to take up the matter concerning the shortage of prosecutors with the DPP or if need be with the NDPP.

19]The Magistrate's statement to the appellant that: "for two days [between 12-14 March 2007] there was no prosecutor ---" is not entirely accurate. Both messrs Damarah and Swarts were available. The former had not yet left for Queenstown. More tellingly in this regard is para 1.3 of the directive (below) by the Regional Magistrate, which is part of the record and self-explanatory.

19.1 *"In die Landdroshof vir die Distrik Gordonia gehou te Upington*

In die saaktussen: Die Staat En Thabile Nginase

NA AANHOOR VAN DIE GETUIES VOOR DIE HOF EN NA DEURLEES VAN DIE REKORD EN DIE ANDER BETROKKE STUKKE:

Gelas die Hof

1. Dat die Nasionale Vervolgingsgesag 'n skriftelike verslag sal voorberei maante dui:

1.1 welke stappe geneem is om die aanstelling van aanklaers in vakante poste, waartekort voorkom, regtestel; en

1.2 welketussentydsereëlingsgetref is totdat die vakante poste in 1.1 gevul is; en

1.3 tot welke mate die Senior Staatsaanklaer en Hoof

- Staatsaanklaer, aanwendbaar is binne die Hof as vervolgingsgesag, gegewehulleadministratiewewerksaamhede; en*
- 1.4 *Tot welke mate bevoegdebeskikbarepersone in tydperkeenhedeaanwendbaar is totdatvakante poste in 1.1 gevul is;*
2. *Die voormeldeverslagpersoonlikondertekendeur die NasionaleDirekteur van Vervolging;voorgelêsal word by wyse van viva voce getuienisdeurhomself en/of sygedelegeerde op 30 Mei 2007.*
DATUM VAN UITSPRAAK 26/04/2007
KLERK VAN DIE HOF: UPINGTON – signed
GETEKEN LANDDROS – M VIEWE.”

19.2 The NDPP, AdvPikoli, responded as follows (note para 2(iii)):

"In the Magistrates Court of Gordonia District held in Upington In the matter between: THE STATEANDTHABILE NGINASE The above matter refers.

1. *Following the Honourable Court's order handed down on 26 April 2007, I wish to report as follows:-*

- i) Four(4) new prosecutors assumed their duties in Upington Court on 2 May 2007.*
- ii) See the paragraph at (i).*
- iii) In terms of paragraph 3 (Job Functions) of the Performance Contract of Chief Prosecutors, sub 3.1 lays down that Chief Prosecutors have:*

"To Institute and Conduct Criminal Proceedings on behalf of the State."

The above is further clarified in one of the KRA's where Chief Prosecutors are expected to "Manage cases effectively and efficiently."

This KRA carries a weighting of 35% in the performance contract, so it goes without saying that Chief Prosecutors and their Senior Prosecutors are expected to go to court.

To clarify the issue further, the following needs to be mentioned that, during the NPS Conference in July 2006, a resolution was taken where Managers were expected to lead by example. The resolution was prompted by the issue where some managers were seen not to be interested in prosecuting cases in court.

- iv) See paragraph 2(i) above.*

Regards

Signed: ADV VUSI PIKOLI
 NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
 PRETORIA DATE: 23.05.2007"

20] During the s342A enquiry the cross-examination by Adv Victor, for Nginase, ushered in a new dimension to the case. That on 27 August 2006 (not 11 September 2006 as Adv Victor suggested) the prosecutor (Ms Freeman) informed the court that the dockets relating to the Nginase's case had been forwarded to the DPP for decision whereas this was misleading. The appellant-DPP responded that she only received the dockets recently (after 12 March 2007). She prepared and signed the indictment on 11 April 2007 and instructed that the accused be tried in the Gariep (Upington) Circuit Court of the High Court. She was bemused that a case that was an out-and-out High Court matter was reserved for the Regional Court. Worth noting though is that the Regional Magistrate knew that as of 13 April 2007 the accused's case would be tried in the High Court as a copy of the indictment was handed in as proof. The s342A-enquiry seemed to have been academic thereafter. The Regional Court nevertheless still had jurisdiction to complete the enquiry. See **S v Khalema and Five Similar cases** 2008(1) SACR 165(C) at 173b-*ipar*as 26-30.

21] As soon as the appellant had completed her s342A-enquiry evidence the Magistrate said: "*There is another thing Ms Thenga. S188 – Contempt of Court*". The appellant was informed that she may, if she wished, testify under oath and call witnesses and that she had a right to legal representation. She elected to testify under oath and to prosecute her own defence. S188 of the CPA provides:

"188 Failure by witness to attend or to remain in attendance

1) *Any person who is subpoenaed to attend criminal proceedings and who fails to attend or to remain in attendance at such*

proceedings, and any person who is warned by the court to remain in attendance at criminal proceedings and who fails to remain in attendance at such proceedings, and any person so subpoenaed or so warned who fails to appear at the place and on the date and at the time to which the proceedings in question may be adjourned, shall be guilty of an offence and liable to the punishment contemplated in subsection (2).

2) *The provisions of section 170(2) shall mutatis mutandis apply with reference to any person referred to in subsection(1)."*

22]A comedy of errors then ensued. First, and of immediate relevance, is that s35(3)(a) and (b) of the Constitution of the Republic of South Africa Act 108 of 1996prescribes that every accused person has a right to a fair trial, which includes:

"a) *to be informed of the charge with sufficient detail to answer it;*

b) *to have adequate time and facilities to prepare a defence."*

The appellant was afforded a mere 8 or so court days calculated from 19 March 2007 (when appellant received notification) to 29 March 2007 to attend court. The computation has to exclude March 21 because it was a public holiday. A DPP is an official of multifarious responsibilities for which there has to be some understanding. Conversely, as the appellant was an accused person in the Contempt of Court proceedings section 54(3) of the Criminal Procedure Act was applicable. It reads:

"A summons under this section shall be served on an accused so that he is in possession thereof at least fourteen days (Sundays and public holidays excluded) before the date appointed for the trial."

Adv Botha, for the state, fairly conceded this aberration on the part of the Magistrate.

23]Secondly, Mr Swarts who serves directly as the appellant's subordinate was retained and participated as a prosecutor. This was not only improper from a human relations point of view but must also have been embarrassing to the appellant, although this remained in the appellant's inarticulated premise. This is so even though she agreed that she had no objection that Swarts be so retained. It was more like: Let us get over and done with it.

24]Thirdly, it was grossly irregular that Mr Swarts who testified in the s342A-enquiry and had mentioned a number of things (adverse and favourable) concerning the appellant and then later prosecuted her. Some of the matters that emanated from the enquiry (see paras 14(a)–(f) above) were once more traversed in the Contempt of Court enquiry. Both the Magistrate and Mr Swarts, consciously or unconsciously, invoked the information or were influenced by what they gleaned from the initial enquiry.

25]In the fourth place, both the Magistrate and Mr Swarts should have recused themselves from the Contempt of Court proceedings. The Magistrate principally because he had already pre-determined the outcome and Mr Swarts for the reasons already stated. More fundamentally because it offends against the principle that a prosecutor cannot act as a witness and a prosecutor in the same case. Granted, the s342A enquiry is distinct from the s188 enquiry but in essence the same set of facts emerged. In **Rex v Nakedie and Another** 1942 OPD 162 the court held that it was difficult to figure out how someone who has acted as a witness can prosecute an accused person with that detachment and moderation which is in accord with the high traditions of prosecution at the public instance. See also **Rex v Kristen** 1950(3) SA 659(C) at 663H-665H .

26]In the fifth place, a gross irregularity was committed through the participation of Adv Victor, Mr Nginase's counsel, in the contempt enquiry. That enquiry had nothing to do with Nginase as it was the Magistrate who was said to have been held in contempt. It should be borne in mind that the Magistrate, at para 14(c) (above), had already stated that Adv Victor was "100% correct" that the appellant stayed away wantonly from the Court on 29 March 2007. Advocate Victor in fact also cross-examined the appellant. Having painted himself into a corner with the "100% correct" finding the Magistrate could not now be heard to go back on his word. The s188 enquiry should have been insulated against the Nginase case, in the sense adverted to.

27]A sixth misdirection: At the early stages of the Contempt of Court enquiry the Magistrate adjourned the hearing as he wanted to sort out who could or could not participate in the proceedings. Portions of the proceedings when the court ordered the adjournment are marked "inaudible". It is therefore unclear who were summoned to the Magistrate's chambers. It must be assumed that when he announced: "so let me rather go speak in chambers" at least the prosecutor and Adv Victor were present, both of whom should have dropped out of the trial in the first place. It is therefore immaterial whether the unrepresented appellant accompanied them or not. It should not have happened irrespective of what was discussed. Nothing was placed on record for the appellant to make representations on this aspect, if she wished.

28]There is no indication on record that the appellant knew or was made aware of what transpired in the s342A-enquiry when she was in Midrand. If she knew she would or ought to have asked for the recusal of the Magistrate, the prosecutor and Adv Victor.

29]It will be noted that the appellant in this matter was literally

ambushed. **Kriegler J** in **S v Mamabolo** (ETV And Others Intervening) 2001(3) SA 409 (CC) at 436A-J (paras 54-57) states:

"[54] Manifestly the summary procedure is unsatisfactory in a number of material respects. There is no adversary process with a formal charge-sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert their evidence. Here the presiding Judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the Judge and the accused. There is no formal plea procedure, no right to remain silent and no opportunity to challenge evidence. Moreover, the very purpose of the procedure is for the accused to be questioned as to the alleged contempt of court.

[55] The composite effect of these departures from the normal procedure where an accused person is called upon to face a charge of criminal conduct is fundamental. Indeed, there is no adversarial process where an impartial judicial officer presides over and keeps the scales even in a contest between prosecution and defence. The process is inquisitorial and inherently punitive and unfair. Moreover, this procedure which rolls into one the complainant, prosecutor, witness and Judge - or appears to do so - is irreconcilable with the standards of fairness called for by s 35(3).

[56] There can be no doubt that a procedure by which an individual can be hauled before a Judge for the sole purpose of enquiring into the possible commission of a crime, there to be questioned and, depending on the Judge's view of the responses to the questioning, possibly to be punished by a fine or imprisonment, constitutes a major inroad into his fair trial rights. Nor can it be denied that such an individual enjoys little protection or benefit of the law and its processes.

[57] ---. If one keeps in mind that the enquiry is limited to the use of the summary procedure in cases of alleged scandalising of the court, there can be only one answer. In such cases there is no pressing need for firm or swift measures to preserve the integrity of the judicial process. If punitive steps are indeed warranted by criticism so egregious as to demand them, there

is no reason why the ordinary mechanisms of the criminal justice system cannot be employed."

See also generally **S v Singo** 2002(2) SACR 160 (CC) at 168e-170e (paras 11-17).

30]The following is the verbatim explanation by the appellant for her default (speaking English):

"On the 28th until 30th of last month, I was in the programme of stakeholders meeting where I was chairing one of the sessions. The unfortunate side on my part was the chairing was happening exactly on the same date when I was required to appear in this Court. After I realised that I immediately phoned the Regional Court President, Mr Nqadala, to explain my situation. Perhaps I should stop and explain the reason why I did not make a call directly to this Court. I had felt at that stage that it would be unethical for me to communicate with the Court which is calling [me as a witness].

Come again, please? === Yes, I was mentioning that the reason why I decided to call the Regional court President, was that in my view, I had thought that it would be irregular and improper and unethical for me to communicate directly with this Court that has --- called me. And I explained the engagement, which was in Midrand – that is Gallagher Estate and I indicated to him that to me both situations – that is coming to Upington and also chairing and attending the stakeholders meeting, [were] both equally important for me. And as a result I had requested him to ask some indulgence from this Court so that I can be given some more time to attend. The reason was that I had thought or it was clear for me that at that stage the planning of the conference took [place] some time last year and due to this culmination I was supposed not to attend. And I must mention at this stage that as one of the

*Directors in the NPA, I am one of the owners of the projects in the Strategy 20/20, hence the need from my side and the NPA's side to chair one of the breakaway sessions. Now, Mr Nqadala apparently phoned this Court and then the response that he gave me was that unfortunately that cannot happen. That I should go to Upington. I immediately phoned the National Deputy Director as the person that I report to, explaining the situation. **And from his side he said the invitation and the programmes are already out and there is no one that can really take my place as the national owner of those two projects.** And he suggested that maybe it will be better if I were to write a letter, explaining my situation, which I wrote but I didn't give detail as to the commitments. I have, as a result brought along the printout of the communication or the indication that I phoned Mr Nqadala on his cellphone and it was on the 26th[of March 2007] in the morning – very early on arrival in the office. Your Worship, can I hand this over? The first call that was made, it couldn't go through. And the second one, which is highlighted, is where we spoke for one minute and some few seconds. And I have also brought a document also from part of our strategic planning indicating my ownership of the national project. I have also brought along a programme, which indicates my commitment thereof on that day --- That is the programme for the day that coincided with the subpoena for me to appear. ---I think that is all that I need to explain.”(Emphasis added).*

31]As I pointed out earlier the appellant was cross-examined by both prosecutor-Swarts and Adv Victor for accused,Nginase. Some of the Magistrate's questions are impertinent and impersonal. The appellant is referred to as "she"several times and not in the first person. Some questions/remarks were also sarcastic like: you achieved this, that or the other thing and became the DPP but decided not come to court. The Magistrate further suggested: "You

as a senior person [know that] nobody is above this Court. Do you deny that? === Answer: No, I don't deny that."

32]No worthwhile purpose will be served by delving into how the questions and responses proceeded except to say it went on *ad nauseum* and along the lines already given in para 14 above. It makes for tedious reading.

33]If the Magistrate excused Mr Pikoli, the then NDPP, I am at a loss why the appellant was not excused as well as their situations appear to be almost identical. For example AdvPikoli did not phone the Magistrate himself. According to the Magistrate his (Pikoli's) office phoned. It means an official in his office. On the other hand the appellant phoned the Magistrate's superior (the President of the Regional Court) to intercede. She dispatched an excuse through the control prosecutor (Mr Damarah) and through the clerk of the court.

34]The Magistrate misdirected himself in his view that a witness has to communicate directly with a presiding officer to purge his/her default. It is not only highly irregular for a witness to do so but also undesirable because a serious conflict could arise on what was said or not said or agreed to or not agreed upon. This could seriously compromise the position of a judicial officer. It was certainly not wrong for the appellant to have asked or notified any of the persons mentioned (including the clerk of the court who occupies a neutral position) to intercede on her behalf or simply notify them, as the case may be. A notable omission on the part of the appellant was not to have favoured the appellant's lawyers with a copy of the letter, to balance the scales. However, this does not detract from the validity or otherwise of the manner in which the excuse was proffered. The Magistrate said, see para 14(c) above, that "*I would naturally very strongly have considered excusing the DPP from*

attending the enquiry today if she only took the trouble to contact the Court."The implication is inescapable that the excuse advanced was valid. Therefore to have denied appellant absolution is irrational.

35]The Magistrate's regimental approach is also problematic for many reasons. Medical practitioners are summoned daily to testify in court. Emergencies arise in their line of duty and they notify the investigating officer or the prosecutor about the situation. We never insist on a warrant of arrest for them. On the next available date they avail themselves and testify. The same can be said for teachers who invigilate students writing examinations. This works very well. On the very isolated occasions when such a responsible person does not co-operate or shows recalcitrance a warrant of arrest would be authorised and the s188 of the CPA enquiry route followed. Pragmatism and open-mindedness are the watch words and not over-fastidiousness. See **S v Mushonga** 1994(2) SACR 782 (ZS) at 787h-788c where **Gubbay CJ** held:

"The exception to the general proposition is where blind compliance with an obviously invalid order would itself tend to weaken respect for the administration of justice. Suppose, for instance, that a judicial officer had ordered a person to do something quite absurd and blatantly in violation of his legal rights; his disobedience could not be regarded as contemptuous. See Makapan v Khope 1923 AD 551 at 556 in fine-557; R v Vass (supra at 37); Melius de Villiers The Roman and Roman-Dutch Law of Injuries at 172-3; Snyman Criminal Law 2nd ed at 343.

Accepting the limitation, which is essentially a matter of commonsense, it is the second view that I find the more persuasive. Its adherence ensures that the authority, dignity and respect of the court - the maintenance of which is so fundamental to the proper administration of justice - is not demeaned or prejudiced.

It does not follow inevitably, however, that disobedience of an order of court constitutes the crime of contempt. It must be committed intentionally and in relation to the administration of justice in the courts. See S v Van Niekerk 1970 (3) SA 655 (T) at 657F-G; S v Gibson NO and Others 1979 (4) SA 115 (D) at 120A-121B; S v

Benatar 1984 (1) ZLR 296 (SC) at 304D-E, 1984 (3) SA 588 (ZS) at 593I; S v Harber and Another 1988 (3) SA 396 (A) at 413G-414E. Doluseventualis is sufficient. Indeed, it is this form of intent that is usually present when contempt is committed. See R v Silber 1952 (2) SA 475 (A) at 484D-E; S v Van Niekerk (supra at 657G-H). Intention is absent if the seemingly insulting behaviour is the result of forgetfulness, ignorance, absentmindedness, inadvertence or excitement. See Snyman (op cit at 344). And where an order of court has been disobeyed because of a genuine belief that it was invalidly made, mensrea may be found to be lacking."

The Learned Chief Justice continued at 790h-791a:

"I am also disturbed by the learned Judge's recourse to the issue of a warrant for the arrest of the appellant. The behaviour objected to occurred ex facie curiae. See R v Magerman and Others 1960 (1) SA 184 (O) at 189D-E; R v Butelezi 1960 (1) SA 284 (N) at 285H; S v Nene 1963 (3) SA 58 (N) at 60A-B. Obviously, as the learned Judge was disposed to deal with the absent appellant himself, some degree of formality was required to bring him before the Court. But, at most, a citation in writing from the learned Judge calling upon the appellant to attend at a designated time and place to show cause why he should not be punished for contempt was all that was necessary."

36] By consent counsel provided us with two pages of the Policy Directives issued by the National Direction of Public Prosecutors. In Part 8 under "Prosecution of Certain Categories of Persons" clause 1(f) directs that:

"1. In addition to instances where statutory provisions require prior authorisation from the DPP for the institution of a prosecution, there are certain categories of persons in respect of whom prosecutors may not institute and proceed with prosecutions without the written authorization or instruction of the DPP (either in general terms or in any particular case or category of cases). This general rule is subject to the exception set out in paragraph 2 below. The categories of persons are –

(f) Prosecutors, magistrates and judges."

The appellant certainly resorts under the category of prosecutors.

Clause 5(c) stipulates that:

"5. *Where any criminal charge involving violence or dishonesty is pending or a decision regarding prosecution is taken (including a decision not to prosecute), the prosecutor must forward a written notification thereof to –*
 (c) *the NDPP in respect of any official or employee of the Prosecuting Authority.*"

Whilst the Constitution decrees that all people are equal before the law there are instances, such as the present, where even without the benefit or the knowledge of the foregoing Policy Directives commonsense would dictate that a degree of circumspection could have been exercised. It is a serious matter for a DPP, an officer of the court, to commit a Contempt of Court offence.

37]For the reasons discussed hereinbefore, cumulatively and even separately, the Magistrate should have found that the appellant has purged her default and exonerated her, particularly if her conduct is tested against the definition of Contempt of Court recited in **Milton, Criminal Law and Procedure Vol2** p164 that:

"Contempt of court consists in unlawfully and intentionally violating the dignity reputé or authority of a judicial body, or interfering in the administration of justice in a matter pending before it."(Footnote omitted).

38]On another issue. The judges of this bench have in numerous cases over the years pointed out to the DPP that the more serious cases are regularly tried in the Regional Court and some run-of-the-mill ones referred to the High Court. The Nginase case is such an instance. There was no reason for the district court to have transferred the case *meromotu* to the Regional Court. The Regional Court should also not have clung to the case when Adv Victor

suggested, as she was entitled to in the interest of her client, that justice would be speedier served in the High Court. It is therefore no wonder that the Regional Court rolls are clogged because the very control prosecutors who have a phobia for appearing in court fight for turf with the High Court by diverting extremely serious cases to the Regional Court.

39]What remains is to thank counsel for the appellant, AdvRathidili, and Adv J Botha, attached to the Free State DPP's office, for their most helpful Heads of Argument and oral submissions.

40]In the result the appellant was, by a long stretch, not shown to have made herself guilty of Contempt of Court. The appeal should therefore succeed.

41]I make the following order:

The appeal is upheld. The conviction and sentence are set aside.

F DIALE KGOMO

JUDGE-PRESIDENT

Northern Cape High Court, Kimberley

I concur

B M PAKATI

JUDGE

Northern Cape High Court, Kimberley

-On behalf of the Appellant:
Instructed by:

AdvN R RATHIDILI
Office of the State Attorney

On behalf of the First Respondents:
Instructed by:

AdvJ BOTHA
National Prosecuting
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