

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

CASE NO: AR 1049/09

In the matter between:

THE STATE

Appellant

and

XOLANI ZONDI

Respondent

REVIEW JUDGMENT

Date: 30 September 2011

PLOOS van AMSTEL J

[1] This matter was submitted for review to the High Court by the Chief Magistrate at Newcastle. The order sought to be reviewed was made by a different magistrate and is in the following terms: ‘Accused to be detained in Midlands

Hospital as a state patient in terms of section 77(6) of the Act (51 of 1977) pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act of 2002’.

[2] The Chief Magistrate also seeks guidance in the light of the statement in *S v Ramokoka*¹ that, as a matter of good practice, magistrates should refer the orders which they make in terms of s 77(6) of the Criminal Procedure Act (the CPA) to the High Court for review.

[3] I should say at the outset that the provision in section 77(6)(a)(i) that an accused be detained pending a decision of a judge in chambers in terms of section 47 of the Mental Health Care Act is not a reference to a review of the magistrate’s order. S 47 deals with applications to a judge in chambers for the discharge of a state patient.² Such an application is not concerned with whether or not the order was properly made. It involves an assessment of the evidence relating to the mental health status of the patient at the time of the application and whether he should remain a state patient, be reclassified or discharged.³

[4] The order made by the magistrate in terms of s 77(6) is reviewable by the High Court as it is an order made by an inferior court as defined in s 1 of the Supreme Court Act.⁴ S 19(1)(a)(ii) provides that the High Court has the power to review the proceedings of all inferior courts within its area of jurisdiction. The grounds upon which the proceedings of an inferior court may be reviewed are, in terms of s 24:

1 *S v Ramokoka* 2006 (2) SACR 57 W

2 ‘State patient’ is defined in section 1 of the Mental Health Care Act of 2002 as a ‘person so classified by a court directive in terms of section 77 (6)(a)(i) or 78 (6)(i)(aa) of the Criminal Procedure Act’.

3 *S v Wills* 1996 (2) SACR 105 T; *S v Van Wyk* (1) 2000 (1) SACR 79 T

4 Act 59 of 1959. In terms of the relevant part of section 1 an inferior court means ‘any court (other than the court of a division) which is required to keep a record of its proceedings...’.

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or s 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, 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 powers of review of the High Court are not limited to the grounds set out in s 24(1). S 19(3) provides as follows: ‘The provisions of this section shall not be construed as in any way limiting the powers of a provincial or local division as existing at the commencement of this Act, or as depriving any such division of any jurisdiction which could lawfully be exercised by it at such commencement’. S 24 (2) provides as follows: ‘Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts’.

[6] In *S v Hlongwa*⁵ Caney J, with whom Milne JP concurred, pointed out that prior to the enactment of the Supreme Court Act in 1959, s 8 of the Natal Supreme Court Act, 39 of 1896, gave the court wide powers, in the following terms: ‘The said Supreme Court shall have full power, authority, and jurisdiction to review the proceedings of all inferior courts of justice or tribunals, and to exercise full supervision and control over all magistrates and other judicial officers, and, if necessary, to set aside, amend or correct their proceedings’. He held that in spite

⁵ 1963 (1) SA 14 NPD

of the repeal of Act 39 of 1896 the jurisdiction which this court enjoyed prior to the passing of the Supreme Court Act of 1959 was preserved by s 19(3).

[7] There is ample authority⁶ that s 8 of the Natal Supreme Court Act gave the court full power to review the proceedings of all inferior courts and that ‘review’ in this context meant review in its widest sense, in other words falling within the third category of reviews discussed by Innes CJ in *Johannesburg Consolidated and Investment Company vs Johannesburg Town Council*.⁷

[8] The fact that the decision made by an inferior court was wrong is, on the authority of these cases, an adequate basis to review and set it aside.⁸ That does not mean, however, that the distinction between an appeal and a review will be ignored. In an appropriate case the court will refuse to deal with a case by way of a review and insist that it be dealt with on appeal.

[9] It is noteworthy that the same test applies in a review in terms of s 302 and 304 of the CPA. The test is not whether there was an irregularity or some other traditional ground of review. It is simply whether or not the court is of the view that the proceedings are in accordance with justice⁹.

[10] In *Davids and ors v Van Straaten and ors*¹⁰ Erasmus J said the High Court has jurisdiction beyond the confines of the grounds of review set out in s 24 of the Supreme Court Act to review a decision of an inferior court which is alleged to be

6 Mbekela v Nkomozake 1921 NPD 287; S v Sithole 1975 (1) SA 873 N; S v Zungu 1984 (1) SA 376 N

7 1903 TS 111at 116

8 Mbekela v Nkomozake (supra) at 295

9 Section 304(1) of the CPA

10 2005 (4) SA 468 C

an infringement of a fundamental right entrenched in the Constitution. It is a review of the third category identified by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*¹¹.

[11] This is a reference to s 38 of the Constitution¹², which provides that anyone listed in the section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons listed in the section include anyone acting in their own interest and anyone acting on behalf of another person who cannot act in their own name.

[12] In *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening*¹³ Southwood J said the following with reference to the provisions of s 38: ‘Die Grondwet het ‘n spesiale meganisme geskep en dit is duidelik nie beperk tot gemeenregtelike hersiening nie alhoewel dit gemeenregtelike hersiening kan insluit. Dit is duidelik dat die Hof die wydste moontlike magte en bevoegdhede het om binne die raamwerk van die Grondwet toe te sien dat daar nie op ‘n persoon se konstitusionele regte inbreuk gemaak word nie en indien dit reeds plaasgevind het, om die posisie reg te stel.’

[13] In the present matter the magistrate made the s 77(6) order on the flimsiest of evidence. The first report delivered by a specialist psychiatrist was prepared by Dr Z Ngama, who stated in the report that on the available information it seemed that the accused was mentally well and fit to stand trial. He expressed a reservation about the fact that little information was available and said it would be

¹¹ P 486 D

¹² Constitution of the Republic of South Africa, 1996

¹³ 1998(2) SA 559 T at 569G

helpful to speak to a relative or a neighbour. Dr Ngama was called to give evidence and agreed with the magistrate's suggestion that the accused should be sent to the Midlands Hospital for further mental observation so that a detailed report could be completed. The record shows that a further report was made available to the court, prepared by Dr J A Dunn, a senior psychiatrist at the Fort Napier Hospital. He stated in his report that there were no abnormal clinical findings and no background of past mental illness. He said the accused was fully lucid and able to offer a superficially detailed account of himself. No abnormal behaviour was seen in the ward. He said there was no psychiatric disturbance, and there was marginal intellectual disability. He said the accused was able to grasp what went on during the trial proceedings and spoke sensibly concerning the charge against him. He concluded that there was nothing to indicate that the alleged offence was a direct product of mental illness. Dr Dunn was not called to testify. It would appear that his report was simply handed in by the prosecutor. The magistrate stated during a discussion in court that he gathered from the two reports that the accused did have a mental illness. That was apparently based on his own reading of the reports. When the matter resumed the magistrate explained to the accused that according to Dr Dunn's report he was able to follow the proceedings and that there was nothing to indicate that the alleged offence was a direct product of mental illness. He then informed the accused that according to the report he suffered from a marginal intellectual disability, and then said the following: 'So it is quite clear from this report that you do have a mental defect. It has already been decided. I mean the Criminal Procedure Act clearly indicates that mental defect must be taken as a synonym of intellectual disability'.

[14] When the magistrate asked the accused whether he disputed the findings of the doctor he said that he did. The matter was then postponed so that the accused

could be provided with the services of a legal practitioner. When the matter resumed the accused said he did not want a legal aid attorney. The magistrate then proceeded to deliver a judgment. He said that the accused had been provided with the services of a legal practitioner but that it appeared that the accused was not prepared to cooperate. He then said the following: ‘From what happened on the last occasion before the accused was referred to the mental institution it is quite clear that the accused is not capable of understanding the proceedings so as to make a proper defence.’ This conclusion was clearly based on the magistrate’s own observations of the accused’s behaviour in court. He then proceeded to make the order in terms of s 77(6) to which I have referred.

[15] The order made by the magistrate cannot stand. He based his conclusion on his own observations and on an incorrect reading of Dr Dunn’s report. Dr Dunn was not even called to testify, in spite of the indication by the accused that he disputed the contents of the report. The magistrate also ignored the indications in the report that the accused was in fact able to follow the proceedings. There was no evidence to support the order and the manner in which the magistrate dealt with the matter constituted a gross irregularity.

[16] It remains to consider whether magistrates should as a matter of course submit s 76(6) orders to the High Court for review. I think it is appropriate for us to deal with this as there are conflicting decisions in other divisions and the Chief Magistrate seeks guidance in this regard.

[17] There is ample authority for the proposition that an order in terms of s 77(6)

is not subject to automatic review in terms of the CPA.¹⁴ S 302, read with s 303 and 304(1) and (2), provides that certain sentences ‘shall be subject in the ordinary course to review by a judge ...’. An order in terms s 77(6) is not a sentence, with the result that s 302 does not apply to it. Nor does s 304(4). The special review provided for in that section also only applies where a sentence has been imposed.

[18] The basis on which the court in *Ramokoka*¹⁵ suggested that such orders should be submitted for review is ‘the potential for serious prejudice to an accused person where an order is made in terms of s 77(6)’¹⁶ and that it would be a good practice to do so¹⁷.

[19] An accused against whom an order is made in terms of s 77(6) has the right to appeal against that finding.¹⁸ Where the appeal is allowed the court of appeal sets the direction aside and remits the case to the court which made the finding, whereupon the relevant proceedings continue in the ordinary way.¹⁹ Further, in terms of s 47 of the Mental Health Care Act a number of persons may apply to a judge in chambers for the discharge of a state patient. They are the state patient, an official curator ad litem, an administrator (if appointed), the head of the health establishment at which the state patient is admitted, the medical practitioner responsible for administering care, treatment and rehabilitation services to a state patient, a spouse, an associate or a next of kin of the state patient, or any other person authorised to act on behalf of the state patient.

[20] Magistrates have the power to impose sentences which involve serious

14 S v Blaauw 1980 (1) SA 536 CPD; S v Van Wyk (1) SACR 2000 (1) 79 T; S v Ramokoka (supra)

15 supra

16 Para 12

17 Para 16

18 S 77(8)

19 S 77(10)

prejudice. Not all their sentences are subject to review. Some sentences are subject to review only if they were imposed by a magistrate below a specified level of seniority. The potential for serious prejudice does not seem to me to justify the creation of a new category of automatic review. In *S v Blaauw*²⁰ Grosskopf J (as he then was) said: 'Die landdros wys daarop dat 'n persoon ten opsigte van wie so 'n bevel gemaak is, moontlik nie sy reg tot appel sal begryp nie. Die reg van appel is egter juis bedoel om 'n persoon te beskerm wat wel in staat is om die verrigtinge behoorlik te begryp en derhalwe veronreg is deur 'n bevel ingevolge art 77 (6). Maar, hoe dit ook al sy, selfs al sou 'n reg tot appel nie genoegsame beskerming bied nie, sou dit na my mening nie die Hof veroorloof om 'n stelsel van outomatiese hersiening te skep waarvoor die Wetgewer geen voorsiening gemaak het nie.' I respectfully agree with this approach.

[21] In my view there is no obligation on magistrates to submit orders in terms of s 77(6) of the CPA for review as a matter of course. If a magistrate has reason to believe that there may be a problem in a particular case he is of course free to submit the matter for review. In such a case the High Court will exercise its powers of review if the circumstances require it.

[22] In the circumstances the following order is made:

- (a) The order made by the magistrate in terms of s 77(6) of the Criminal Procedure Act is set aside;
- (b) The matter is remitted to the trial magistrate for the criminal proceedings to be continued in the ordinary way.

²⁰ *Supra*, at 537 H

Ploos van Amstel J

I agree:

Patel AJP