



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

CASE NUMBER: 15846/2023

In the matter between:

SUSAN VAN ASWEGEN

Applicant

And

THE DISTRICT MAGISTRATE, ATLANTIS

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

WESTERN CAPE

Date Heard: 06 May 2024

Date Judgment delivered electronically: 20 May 2024

JUDGMENT

NZIWENI, J:

Introduction and background

- [1] This is a review brought in terms of section 21 (1) (b) of the Superior Courts Act 10 of 2013 ("the Act"). The applicant who initiated this review application, is currently standing trial in the District Court, Atlantis ("court a quo"), facing

charges of defeating or obstructing the administration of justice. The trial is currently partly heard at the stage where the State has closed its case.

- [2] Following the completion of the State's case before the first respondent ("the magistrate"), the applicant applied for the discharge in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA"). The application for the discharge was premised on the grounds that the second respondent ("the State") had failed to prove the elements of the crime as set out in the charge sheet.
- [3] At the conclusion of the parties' oral submissions for and against the discharge, the magistrate reserved judgment on the application and postponed the proceedings for his ruling. Eventually in reaching his decision, the magistrate refused the application for the discharge on the grounds that he was satisfied that the State has made out a case against the applicant. At this point in the proceedings, the magistrate also indicated that his reasons for his decision would be delivered later in the main judgment.
- [4] Pursuant to the refusal by the magistrate to discharge the applicant in terms of section 174, she [the applicant] approached this Court seeking to review and to set aside the court a quo's decision. As part of this review, in terms of section 21 of the Act, the applicant also seeks that this Court should exercise its powers in terms of section 304 (2) (c) (iv) of the CPA and substitute the court a quo's ruling with an order for her discharge in terms of section 174.

- [5] The magistrate has delivered a notice to abide. On the other hand, the State vehemently opposes this application. Due to this review application, the trial proceedings before the magistrate were adjourned pending this Court's decision.
- [6] According to the applicant's heads of argument, this Court has jurisdiction to hear and determine this review by reason of sections 21 and 22 of the Act and section 173 of the Constitution Act 108 of 1996 ("the Constitution").

The proceedings before the magistrate

- [7] During the trial, the State in its endeavours to prove its case against the applicant, presented evidence of two witnesses. The witnesses who testified against the appellant were the witnesses who were present at the time of the incident.
- [8] I am going to give the barest outline of the evidence led during the trial as this is a review application of an impending trial.
- [9] The facts relevant to this Court's determination are as follows. On 17 August 2021, Captain Els and Captain Van Aardt from Polokwane Hawks division and other uniformed officers, travelled from Polokwane to the house of the applicant to arrest the applicant's husband.

- [10] Captain Els had the original warrant of arrest in his possession. Captain Els handed the original warrant of execution to the applicant and enquired about the whereabouts of the applicant's husband. The applicant, after being handed the search warrant told the officers that it was invalid and tore it up ("the incident").
- [11] Captain Els testified during evidence in chief that due to the actions of the applicant, he could not continue further with the arrest of the suspect due to the fact that the warrant was destroyed. Later that evening, he received a call from the applicant informing him that her husband was going to hand himself over at their offices in Polokwane. When he ultimately arrested the suspect in Polokwane, he did that without a warrant.
- [12] Shortly thereafter [the incident] the applicant was charged with the defeating or obstructing the administration of justice. The charge gave rise to the impugned trial proceedings, in which the applicant, who was duly legally represented, pleaded not guilty to defeating or obstructing the administration of justice.
- [13] As mentioned previously, after the magistrate's decision, and before the applicant made an election on whether to testify or not; the applicant brought an application before the court *a quo* to adjourn the impugned trial proceedings in order to launch this review application. The trial proceedings were then adjourned pending the finalisation of this review application.

Applicant's Submission

- [14] From the submissions made on behalf of the applicant, it was argued that the evidence presented by the State was not sufficient to sustain a conviction on the charge preferred against the applicant. It is further suggested on applicant's behalf that the court *a quo* abused its discretion by refusing to grant the application for the discharge.
- [15] During the hearing of this application, it was strenuously contended on applicant's behalf that the trial record bears it out that Captain Els [one of the state witnesses] conceded that he did not make any attempts to arrest the husband of the applicant after the warrant was torn. It was also contended on applicant's behalf that this Court, sitting as a review court, has a jurisdiction to hear the matter because the court *a quo* totally ignored evidence that should have led to a discharge of the applicant.
- [16] It has been strongly asserted on applicant's behalf that, if regard is had to the evidence that was placed before the court *a quo*, it is evident that a gross irregularity was committed by the magistrate, because the evidence contained in the record warrants the granting of the application for discharge. It was contended that the evidence did not rise to the level to show that the State had made out *prima facie* evidence against the applicant.
- [17] According to the applicant, the record does not indicate any iota of evidence indicating the commission of the offence for which the applicant is charged. Additionally, it was argued that the evidence led by the State was insufficient to prove the intent to defeat the administration of justice. It was further contended

on applicant's behalf that the warrant under which the state witnesses wanted to execute the arrest was invalid.

[18] It was then argued that the magistrate committed a legal error by refusing to discharge the applicant. Thus, it was submitted on behalf of the applicant that there is no evidence on which a reasonable court could convict in relation to the charge or a lesser charge.

[19] Lastly it is argued by the applicant that the submissions made in support of this application are bolstered by the outcome of the Legal Practice Council's investigations into the facts of this case. So, the argument continues; it is difficult to imagine circumstances wherein a reasonable court would find that there is sufficient evidence for an accused person to answer to a State's case when a legal professional body found the same allegations to not even warrant a disciplinary hearing.

[20] In respect of the Magistrates conduct during the trial, amongst others, it is contended that the magistrate's conduct was concerning on 15 September 2023; when he refused to grant a postponement, despite the fact that the State was amenable to the postponement which was sought by the applicant. In the head of argument on behalf of the applicant, this conduct by the magistrate in refusing a postponement is described as bizarre and clearly prejudicial to the applicant. It is further submitted on applicant's behalf that the magistrate's conduct does not accord with the conduct of 'a dispassionate presiding officer who presides over properly conducted criminal proceedings'.

- [21] By contrast, it was submitted on behalf of the State that, amongst others, if the applicant asserts that the magistrate's ruling was not justified given that, in their view, the evidence led by the State did not support the charge the applicant is facing; then the correct route for the applicant to follow is an appeal route not a review route.

Section 174

- [22] A section 174 procedure involves a scenario that many accused persons in a trial will encounter. The procedure laid out by section 174 is a common feature in criminal trials. It is recognised, without citation of authority, that a section 174 procedure is an interlocutory procedure. It is unnecessary for me to set out in detail the law which governs applications in terms of section 174 and the test applicable at the close of the State's case. The test at the close of the State case has been repeated by our courts on numerous occasions. Thus, the law on this subject is settled.
- [23] It is important to bear in mind that a court seized with an application in terms of section 174, in deciding whether to grant it or not, the test is not whether a reasonable court would find the accused guilty beyond reasonable doubt. At this stage of the proceedings the court does not reach a definitive determination that the finding leads it to conclude that the accused is guilty. Hence, the application is interlocutory. The court has to still decide later on in the proceedings as to whether the State has discharged the burden necessary to secure the guilt of an accused person.

- [24] At the same time, however, it is important to remember that before the conclusion of the trial the decision whether there is any evidence on each material element of the offence, should be left to the trier of facts. Of course, this is to avoid piecemeal adjudication and protracted costly delays of a trial.
- [25] Against that background, before considering anything, this Court will consider first the question as to whether the decisions of the magistrate to refuse to discharge the applicant is susceptible to a review.
- [26] This is so because the issue of whether this is a case in which review proceedings lie, may be dispositive of this review application. In order to decide that, I have to consider the grounds of this application, and specifically the legal principles related to this question.

Is a refusal to grant a discharge reviewable?

- [27] The different grounds relied upon by applicant for the relief sought are the following:
- a. no reasonable presiding officer, acting carefully within the specific circumstances of the matter, would have dismissed the discharge application; and
 - b. Magistrate's conduct during the proceedings.
- [28] Consequently, at this juncture, this Court's power to decide this review hinges on the question of whether the applicant in the circumstances of this case can review a refusal to discharge her at the close of the State's case. Applicant's

counsel submitted that the magistrate's discharge constituted gross irregularity and his finding constitutes a deviation from constitutional criminal law norm that one would have expected in properly conducted trial.

[29] I wish to repeat here what I have indicated before; it is the role of the magistrate as a trier of facts to decide whether the evidence presented establishes the elements of the charge. When a court, during an application in terms of section 174, makes a finding that is contrary to the expectations of an accused person, that does not make the decision of the presiding officer reviewable. Even assuming for the purpose of argument, but not for deciding, that the decision of the presiding officer is wrong, I am afraid, the decision stands.

[30] It is, therefore, not open to this Court to determine that the discretion should have been exercised differently. Simply stated, when a magistrate refused to discharge an accused in terms of section 174, it is not for the review court to review the exercise of the discretion of the magistrate if the grounds mentioned under section 22 of the Act are absent.

As previously mentioned, this is the case even if the exercise of the discretion is erroneous. Simply put, even if this Court disagrees with the decision of the magistrate, it has to defer to him if the grounds for review mentioned in section 22 are not satisfied.

[31] It is important to note that a discharge of an accused at the close of the State's case, notwithstanding the fact that there is evidence before the court upon which a reasonable court can convict; is in complete contrast to a situation

where the trial court refuses to discharge an accused person in terms of section 174 of the Act.

[32] This is so, *inter alia*, because at the close of the State's case the accused may elect to present evidence or may choose to close his or her case without tendering evidence.

[33] Applicant's reliance on the case of *Director of Public Prosecutions, Gauteng Local Division, Johannesburg v Regional Magistrate, Krugersdorp* AA 2018 (1) SACR 93 (GJ), in arguing that a review application lies in this case is misplaced. The Regional Magistrate, Krugersdorp case postulates a scenario where the prosecution took a discharge of an accused on review. This is obviously distinguishable from the instant case. The mischief in that case was directed at the gross irregularity committed by the trial court, in its application of the law. Clearly, if a presiding officer short-circuits proceedings at the close of the State's case and there is evidence upon which a reasonable court can convict, that is a gross irregularity, and it is contrary to the provisions of section 174. Importantly, it is a gross irregularity not to apply the law evenhandedly and as it is supposed to be applied.

[34] Furthermore, by contrast to this matter, in the matter of *Regional Magistrate, Krugersdorp*, the conduct of the magistrate brought the proceedings to a definite termination. As a consequence, the magistrate's decision [in the matter of *Regional Magistrate, Krugersdorp*] finally disposed of the issues between the accused and the State.

- [35] In this matter, I agree with the submissions made on behalf of the State that the applicant is calling upon this Court to examine the trial court's exercise of its discretion. For instance, amongst others, it was argued on behalf of the applicant that the State did not present evidence as to the intention of the applicant when she tore the warrant of arrest.
- [36] It is a well-known fact that the intention of an accused person is rarely proven through direct evidence. In this regard, it is true, of course, that generally the State relies on the surrounding circumstances from which the intent of an accused person may be inferred. Thus, the conduct of an accused person may give an insight into his or her intentions. In other words, the court can infer intention from the conduct of an accused person. One thing this Court cannot do, is to usurp the functions of the trial court in weighing evidence and drawing inferences.
- [37] By its nature, the application to review a decision to refuse to discharge an accused person in terms of section 174 refusal would be rare. This is borne out by the fact that it is very difficult to find jurisprudence directly to the point to support the stance that the applicant desires this Court to take. Little wonder the applicant's counsel could not bring to this Court's attention jurisprudence directly bearing on the issue.
- [38] In the context of this case, I find it necessary to enumerate the several grounds upon which a review can be brought. In terms Section 22 of the Act,

proceedings stemming from the magistrate court may be brought under review before a court of a division only on the following grounds:

- " . . . (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."

[39] A careful reading of section 22 (1) (c) of the Act, suggests that the gravity of an irregularity contemplated in section 22 is relevant as evinced by the use of the word 'gross'. As a consequence, a twofold question becomes. First, whether the magistrate acted irregularly during the trial and if so, whether such irregularities are sufficient enough to vitiate the proceedings.

[40] In *LAWSA Vol 5* paragraph 61, the authors state the following:

"An incorrect judgment is not an irregularity; an irregularity refers to the method of conducting the trial and, to be gross, it must be of such a serious nature that the case was not fully and fairly determined."

[41] First and foremost, even if this Court is of the view that the evidence before the magistrate does not satisfy the elements of the crime, this court cannot interfere with the discretion of the trier of facts.

[42] This assertion by the State finds support in the case of *Ebrahim v Minister of Justice* 2000 (2) SACR 173 at 175F-H, the following is stated:

“ . . . [A]s I already said, if the magistrate’s ruling was not justified by the evidence before him, this is a matter for appeal, not review. Of course, such an appeal can only be brought at the end of the case as a whole and not now before the applicant has closed his case. As the applicant has not produced any proof of any irregularity in the conduct of the trial, there is no basis whatsoever for the present application . . . ”

[43] *Du Toit et al* in the *Commentary on the Criminal Procedure Act*, Service 70, 2023, ch 22 p123 state the following on reviewability of a refusal to grant a discharge of an accused person:

“Where an application for discharge at the end of the State’s case is refused there are no grounds for review where there is no proof of an irregularity in the conduct of a trial . . . It was held in *Director of Public Prosecutions, Gauteng Local Division, Johannesburg v Regional Magistrate, Krugersdorp & another* 2018 (1) SACR 93 (GJ) that the State is entitled to bring a review of an unwarranted discharge by a magistrate where it constitutes a gross irregularity in the proceedings as understood within the provisions of s 22 (1) (c) of the Superior Courts Act . . . In that case the facts were such that ‘no reasonable presiding officer could have granted a discharge’, and the ‘deviation from the norm [was] such that that one would not have expected it in a properly conducted criminal trial’. . . In Namibia it has been held that a higher tribunal may interfere with a decision to discharge an accused *only* if the judicial officer, in deciding that the requisite facts or state of affairs existed, acted mala fide from ulterior motive or failed to apply his or her mind to the matter.” Emphasis added.

[44] As these above-mentioned cases well show, as far as reviewability of a decision of a magistrate to refuse a discharge of an accused person is concerned; it is clear that a different approach applies. Plainly, the courts have slammed the door on such review if it falls outside the grounds stated in section 22 of the Act.

[45] Ms Du Toit on applicant's behalf strenuously submitted that the magistrate's dismissal of the applicant's application for discharge on the basis that "the State made out a case against you" constitutes a gross irregularity in terms of section 22 (1) (c) of the Act.

[46] In *Doyle v Shenker and Co Ltd* 1915 AD 233, the court stated the following regarding what constitutes gross irregularity:

"There is no need to attempt a definition of that expression: it must be allowed to speak for itself. The question is whether it can be applied to the matter before us. Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise, a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity."

[47] Clearly, for an error in law to be a ground of review it must also be material enough or fundamentally erroneous as to render the magistrate's decision nugatory. The applicant's assertion of an error in law simply states that the magistrate committed a clear error in law.

[48] Obviously, there is a difference between an error in law and a material error in law. There is nothing from the part of the applicant to indicate how this error in law relates to the matter in issue at the time of the evidence. In the present matter, there is no iota of evidence to attest to the fact that the comment of the

magistrate is central to the case against the applicant. As I mentioned earlier, at that juncture the magistrate, when he posed the question, was engaging the applicant's counsel. In my mind, the exchange between the magistrate and the applicant's counsel did not lead to the magistrate to lose his objectivity. Nothing turns on the questions that were posed to the applicant's counsel by the magistrate, that warrants it to be treated as an irregularity or an error in law. I am fortified in this view by the following case.

[49] In *Seedat v Arai and Another* 1984 (2) 198C-D, the following was stated:

"In my view a mistake, to qualify as such for the purposes . . . must relate to and be based on something relevant to the question to be decided by the Court at the time, or to something in the procedure adopted. It can never be founded on material which is irrelevant at the time of the grant of the judgment sought to be set aside."

After considering the submissions, this Court can also not find that there is evidence that the magistrate acted in bad faith or as prejudicial against the applicant in refusing the application. For that matter, the said irregularities are not of such serious nature that they could result to an unfair trial.

[50] Much was also made about the magistrate's conduct that supported the contention that his finding constitutes a deviation from a constitutional criminal law norm. According to applicant's counsel, when the magistrate posed a certain question when she was putting the version of the applicant to the State witnesses, constituted an error in law and a lack of understanding of the requisite elements of the offence of defeating or obstructing the administration

of justice. It boggles one's mind as to how a question by the court can constitute an error in law and a lack of understanding of the law. Particularly, if the questions do not imply a finding of guilt. Much of the fault found with the magistrate does not amount to an irregularity. The remarks made by the magistrate were mostly when the applicant's counsel was cross examining a state witness. For instance, when applicant's counsel was cross examining Captain Els [state witness] the counsel asked him about the validity of the warrant he wanted to execute. It was also put to him that it was rational for the applicant to tell them that the arrest was unlawful as the applicant was aware of the facts. When this assertion was made, the magistrate commented as follows:

"[t]herefore she can take the law into her own hands". The applicant counsel responded as follows: "we will get to that part, Your worship."

[51] Another instance was when the magistrate posed the following question:

"So, until it is cancelled it remains a legal valid document . . ."

After the applicant's counsel responded to the question, the magistrate responded as follows:

". . . [m]ine was just to clarify the legal position that I have allowed you to go on in your cross- examination on the basis that this J50 is invalid and that is why I asked you whether that is a fact or not."

[52] In my mind, most of the questions asked by the magistrate during the cross examination of Captain Els were questions aimed at engaging the applicant's counsel or seeking clarity. It is also my view that the questions raised by the

magistrate to the applicant's counsel had factual relevance in her cross examination of the state witness.

[53] One final point bears mentioning. The material that was relevant at the time of considering the application for discharge was the evidence that was presented by the State at the close of the State's case, not the comments made by the magistrate.

[54] Even if the magistrate committed an error in law, that on its own does not make the decision reviewable . But it may be appealable. The upshot of this is that an applicant who relies on an error in law to review a decision taken in terms of section 174, would have to show that this error materially affected the outcome of the decision reached by the magistrate. It bears noting, however, that in the present case, for instance, gleaning from the record, there is absolutely nothing to show that the decision of the magistrate borders on being absurd.

[55] I am well alive to the fact that irregularities in a trial may come in different shapes and forms. Hence, irregularity in a case depends on its facts and has to be decided on a case-by-case basis. However, in the instant case, I am not convinced that the magistrate committed any act as envisaged by the provisions of section 22 of the Act.

[56] For that matter, I am of the view that the magistrate did not commit any irregularity in the instant case. The occurrences mentioned by the applicant, merely relate to the peripheral aspects of the case and not central to the case

against the applicant. Even when the magistrate was engaging the applicant's counsel. All the incidents mentioned, do not even come close to create an apprehension of unfairness in the case, as suggested.

[57] This is especially true, when regard is had to the record, particularly the evidence of the State witnesses; there is nothing to suggest that the alleged irregularities pointed out by the applicant separately or cumulatively had any influence or effect on the ruling by the magistrate.

[58] Additionally, pursuant to the perusal of the record, I am clearly of the view that it does not disclose any irregularity that would render the decision to refuse the discharge irregular as contemplated by the provisions of section 22. Accordingly, the applicant's reliance on the case of *S v Lubaxa* 2002 (2) All SA 107 (A) (25 September 2001), is also misplaced.

[59] For these reasons I make the following order:

1. The application is dismissed;
2. The matter is remitted back to the magistrate to continue with the trial; and
3. There is no order as to costs.


C. N. NZIWENI
Judge of the High Court

I agree


R PARKER
Acting Judge of the High Court

Appearances

On behalf of Applicant:

Adv A Du Toit

Instructed by:

VA Attorneys and Conveyancers

On behalf of the respondent:

Adv S. M. Galloway

Instructed by:

Director of Public Prosecutions