

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
24/07/2025	[Redacted Signature]
DATE	SIGNATURE

IN THE REVIEW APPLICATIONS OF:

ELIZABETH MOKGOSI	R36/2025	Case no: 1/4/29-18//2025
IVY STUURMAN	R37/2025	Case no: 1/4/27-39//2025
PHUMLA STUURMAN	R39/2025	Case no: 1/4/29-62//2025
LUXOLO TSHUWUZANU	R40/2025	Case no: 1/4/29-63//2025
PUSELETSO THUBE	R41/2025	Case no: 1/4/27-40//2025
SIBIYA MBONGISENI	R42/2025	Case no: 1/4/29-61//2025
SIPHESIHLE ZOKHELA	R43/2025	Case no: 1/4/29-64//2025
BEN GUMBE	R44/2025	Case no: 1/4/29-58//2025

SPECIAL REVIEW JUDGMENT

STRYDOM, J

Facts

- [1] These matters come before the Court on special review in terms of section 22 of the Superior Courts Act.¹ All the matters emanate from the Magistrate's Court and concern applications for protection orders brought under either the Domestic Violence Act ("the DVA")² or the Protection from Harassment Act ("the PHA").³ The Additional Magistrate for Westonaria, Mr. C van Heerden referred these matters to the High Court as special reviews.
- [2] The common denominator across the eight cases is that they were all presided over by Ms. Mogaki, who was appointed as an Acting Magistrate for the period 27 January 2025 to 28 March 2025. However, she presided over all the cases in question on 31 March 2025, a date after which her appointment terminated.
- [3] Magistrate van Heerden has acknowledged the error and submitted the matters for review on the basis that Ms. Mogaki's actions on 31 March 2025 were taken without legal authority and therefore irregular. He indicated that he allowed Ms. Mogaki to fulfil her functions in court as he had rendered under the mistaken impression that her appointment extended to the 31st of March 2025.
- [4] Section 16 of the DVA⁴ and section 17 of the PHA, respectively, provides this Court with the power to review proceedings conducted in terms of these Acts.
- [5] The facts of each matter are as follows:
- a. **R36/2025 (Case No 1/4/29-18//2025):** On 10 January 2025 Ms. Mokgosi's applied for a protection order. Her application under section 4(1) of the DVA was returnable on 11 February 2025, without an interim order being made. On 11 February 2025, applicant appeared but respondent was absent. The matter was postponed to 31 March 2025 to serve the application on respondent. On this date, owing to no proof of service being presented and due to the absence of both parties, the matter was postponed again by Ms Mogaki, to 5 May 2025.

¹ 10 of 2013.

² 116 of 1998.

³ 17 of 2011.

⁴ "The provisions in respect of appeal and review contemplated in the Magistrates' Court Act, 1944, and the Superior Courts Act, 2013, (Act no. 10 of 2013), apply to any proceedings in terms of this Act."

- b. **R37/2025 (Case No 1/4/27-39//2025):** Mr. Mokgothu's application in terms of section 2(1) of the PHA was on 13 February 2025 postponed to effect service of the application on respondent. The respondent was called upon to show cause on 5 March 2025 why the court should not issue a final protection order against the respondent. On 5 March 2025 the complainant and respondent were absent. The matter was postponed to 31 March 2025 for applicant to appear. On 31 March 2025, the applicant yet again failed to appear, and Ms Mogaki dismissed the application
- c. **R39/2025 (Case No 1/4/29-62//2025):** On 13 February 2025, Mr. Mokgothu made another application, this time in terms of section 4(1) of the DVA. An interim order was not issued and the application was postponed with the return date of 5 March 2025, calling on respondent to give reasons why a final protection order should not be made. Service on respondent was ordered. On the return date applicant was absent and the matter was postponed to 31 March 2025 for the applicant to appear. On 31 March 2025, Ms Mogaki dismissed the application due to the absence of the applicant.
- d. **R40/2025 (Case No 1/4/29-63//2025):** On 14 February 2025 Ms Getrude applied for a protection order in terms of section 4(1) of the DVA. An interim protection order was granted by a magistrate calling upon respondent to appear on 5 March 2025 providing reasons why a final protection order should not be made. Service on respondent was ordered. On 5 March 2025 Ms. Getrude's application was postponed to 31 March 2025 for service on the respondent who was absent. On 31 March 2025, Ms Mogaki postponed the matter again to 5 May 2025 due to the lack of a return of service and both parties being absent.
- e. **R41/2025 (Case No 1/4/27-40//2025):** Mr. Masentle's applied for a protection order on 13 February 2025, in terms of section 2(1) of the PHA. No interim order was granted and the matter was postponed to 5 March 2025 for the respondent to show cause why a final order should not be made. On 5 March 2025 the parties were present, but applicant requested an opportunity to apply for Legal Aid. The matter was postponed to

31 March 2025. On 31 March 2025, Ms. Mogaki, postponed the application to 5 May 2025 due to the applicant's absence.

- f. **R42/2025 (Case No 1/4/29-61//2025):** On 12 February 2025, Mr. Nhlapho applied for a protection order in terms of section 4(1) of the DVA. An interim order was granted returnable on 5 March 2025. Service on respondent was ordered. On 5 March 2025 both parties were absent, and the matter was postponed to 31 March 2025 for the parties' attendance. The interim order was extended. On 31 March 2025, the matter was postponed Ms Mogadi to 5 May 2025 due to the absence of both parties. The interim order was further extended to this date.
- g. **R43/2025 (Case No 1/4/29-64//2025):** On 14 February 2025, Mr Mandla applied for a protection order in terms of section 4(1) of the DVA. No interim order was issued and the matter was postponed to 5 March 2025. Service on respondent was ordered. On 5 March 2025 both parties were absent in court. The court ordered a postponement and service. The return date was 31 March 2025. On 31 March 2025, the matter was dismissed by Ms Mogadi, due to there being no return of service in the court file and the absence of both parties.
- h. **R44/2025 (Case No 1/4/29-58//2025):** On 11 February 2025 Ms. Sumbe applied for a protection order in terms of section 4(1) of the DVA. No interim order was made but the matter was postponed to 5 March 2025 for services on respondent. On 5 March 2025 both parties were absent, and the court postponed the application to 31 March 2025 for reissue and service. On 31 March 2025, the matter was again postponed for reissue and service by Ms Mogadi, with a return date of 5 May 2025.

Issue

- [6] Whether Ms. Mogaki, having completed her acting term as a Magistrate, was still lawfully authorised to continue presiding over matters which originally came before her during her acting term?
- [7] If Ms Mogaki was no longer authorised to deal with the matters, what will the consequences be pertaining to her rulings made after her appointed lapsed?

Applicable Legislation

[8] Section 9 of the Magistrates' Courts Act⁵ states as follows:

"(3) Subject to subsections (4) and (5), the Minister, after consultation with the head of the court concerned, may appoint any appropriately qualified and fit and proper person to act—

(a) in the place of any magistrate, additional magistrate or assistant magistrate who is not available; or

(b) in any vacant office of magistrate; or

(c) as a magistrate in addition to any magistrate of a regional division or a district.

(4) (a) A magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may—

(i) whenever a magistrate additional magistrate or assistant magistrate is for any reason unavailable to carry out the functions of his or her office; and

(ii) in consultation with the Minister or an officer in the Department of Justice and Constitutional Development designated by the Minister,

temporarily appoint any competent person in the place of the magistrate concerned.

...

(6) Any person appointed in terms of subsection (3) or (4) is also deemed to have been so appointed in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceedings—

(a) in which he or she has participated as such a magistrate, including an application for leave to appeal in respect of such proceedings; and

(b) which have not yet been disposed of at the expiry of the period for which he or she was appointed." [Emphasis added.]

Interpreting Section 9(6)

⁵ 32 of 1944.

- [9] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁶ the SCA laid down the principles of statutory interpretation:

"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".
[Emphasis added.]⁷

- [10] In applying these principles to section 9(6) it is clear that the purpose of a statutory provision is not inferred in the abstract but arises from a reading of the

⁶ [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

⁷ *Id* at para 18.

text having regard to the context, the background to the drafting of the provision, and the practical results of applying the provision.

- [11] Section 9(6) exists within the broader framework of the Magistrates' Courts Act, which governs the lawful appointment, powers, and functions of magistrates and acting magistrates alike.
- [12] The deeming provision of section 9(6) clearly implies that the Legislature contemplated situations where an acting magistrate's formal term might lapse before a matter they presided over could be concluded. Hence it appears that the primary purpose of section 9(6) is to prevent disruption in cases in which an acting magistrate already participated in, but which matter has not been disposed with. Without such a deeming clause, every expiry of an acting appointment would risk producing null and void proceedings, frustrating justice and requiring matters to be heard *de novo*.
- [13] In *S v Dyidi*,⁸ whilst the matter did not involve the application of section 9(6), the court emphasised a Magistrate's duty to dispose of a case and bring it to finality:

"The applicant's Constitutional rights to a fair and speedy trial should have been of paramount importance. The magistrate's core business is to administer justice to all people, and not to leave part-heard matters unfinished, simply because the High Court is there to rubber-stamp the referral and set such matters aside.

....

*The magistrate's duties and responsibilities are fully set out in the Magistrates' Courts Act. He cannot shirk his responsibilities simply because he has resigned from office."*⁹

- [14] Thus, the clear purpose of section 9(6) is to prevent technical nullities: once the acting magistrate has participated in a case, he or she must be able to finish it rather than leave litigants without closure.

⁸ 2018 (1) SACR 630 (WCC).

⁹ *Id* at paras 10-11. See also *S v Willemse* [2024] ZAWCHC 131 at para 4.

[15] It is, however, required that the engagement must be necessary in connection with the disposal of the matter.

[16] Three issues require interpretation.

- a. What is the meaning of *participated in proceedings*.
- b. What is the meaning of *disposal of any proceedings*.
- c. When would an acting magistrate *necessarily* be engaged in connection with the disposal.

The meaning of participated in proceedings.

[17] To *participate in proceedings* is a broad term in the context of court proceedings. A magistrate participates in proceedings by presiding over a matter called in his or her court. It can be for any purpose, from a request to remove the matter from the roll, to consider a postponement of the matter, to rule on procedural issues or to deal with the merits of the matter. The situation could differ depending on whether a magistrate deals with a criminal, a civil matter or matters provided for in legislation. Accordingly, the mere participation in a matter would not provide an answer as to when an acting magistrate would be allowed to dispose of a matter after his or her appointment has come to an end.

The meaning of "Disposal of Any Proceedings"

[18] "Disposal" according to the 10th edition of the Concise Oxford means to "get rid of". In the context of court proceedings this would mean to finally deal with a matter to its conclusion in the court which dealt with the matter. This would mean that the engagement is aimed at the disposal of the matter. However, it is also evident that the extension of authority in section 9(6) is further limited and does not provide a general extension of power. Apart from the requirement that the magistrate must have had prior participation in the proceedings¹⁰ the matter should still be pending, meaning not yet finally been disposed of ¹¹ and the engagement should be necessary for its disposal.

¹⁰ Section 9(6)(a).

¹¹ Section 9(6)(b).

- [19] Precedent makes it clear that if an acting magistrate's appointment had already expired before the proceedings commenced or before the magistrate took any official part in the case, then he or she has no authority. In *S v Ndzeru*,¹² the acting magistrate's term had lapsed before the trial commenced. The court held that —

"Essentially, any court proceedings that an acting Magistrate preside over after the expiration of the acting period for which he or she was appointed are rendered null and void in terms of the Act, solely because of the Magistrates' lack of official authority to do so.

*Ostensibly, the irregularity results into an impermissible injustice to the litigants before that court. In the accused's instance, it is tantamount to violation of their constitutional right enshrined in Section 35 of the Constitution of the Republic and a further violation of their unscripted right to appear and be criminally tried by a competent and legally appointed judicial presiding officer."*¹³

- [20] Consequently, the phrase "disposal of any proceedings" in section 9(6) should be understood to mean *the final conclusion of proceedings*. In plain terms, it means the magistrate brings the matter to a close by issuing a final order or judgment—whether dismissing or granting relief—so that no further judicial steps remain.

When would an acting magistrate necessarily be engaged in connection with the disposal?

- [21] Importantly, interim actions such as adjournments or procedural rulings do not appear to qualify as "disposal"; only a pronouncement on the merits or a final, case-ending order counts as "disposal." This interpretation is consistent with the court's reasoning in *HAT v DBT*.¹⁴ Whilst the matter did not concern the authority of acting magistrates or section 9(6), it nevertheless considered the equivalent High Court statutory provision to section 9(6) – being section 48 of the Superior Courts Act. Like section 9(6), that provision deems the period of an acting Judge's appointment to extend for so long as that Judge is

¹² 2025 (1) SACR 409 (LT).

¹³ *Id* at paras 9-10.

¹⁴ [2021] ZAGPJHC 817.

“necessarily engaged in the disposal of any proceedings in which he or she has participated”. In interpreting this phrase, the court held as follows:

“There is accordingly no general rule that acting Judges must release whatever matters remain on their rolls when their appointments come to an end. The question is really whether section 48 of the Act applies. In this case, I do not think that it does.

It is true that, were I to retain the matter, notwithstanding the fact that my period of appointment has now ended, I would be engaged in the disposal of proceedings in which I participated. However, I do not think I would be “necessarily” so engaged.

The Act provides that an acting Judge’s appointment is only extended where necessary – in other words, where there is some real need for the acting Judge to continue to carry out their judicial functions in relation to the case in question. Apart from the determination of applications for leave to appeal against judgments given on matters heard during their terms (which section 48 addresses explicitly), section 48 has also been held to apply to applications under section 18 (3) of the Act, for the execution of orders pending the determination of appeals against them (see, in this regard Okuli Security Services CC v City of Cape Town [2016] ZAWHC 117). In both of these circumstances, there is a real need for an acting Judge to retain the matter, because the accepted practice (at least in this division) is that applications for leave to appeal and applications for interim execution are heard, where possible, by the Judge who gave the judgment against which an appeal is contemplated.

There is plainly no closed list of circumstances under which section 48 might deem an acting Judge’s appointment to have been extended. The appointment of acting Judges is intended, in part, to relieve the permanent judiciary of some of its caseload. Section 48 ought to be read to facilitate rather than frustrate that purpose – especially in a division as busy as this one, where the press of judicial business is nothing short of relentless.

In this case, though, there is no real need for me to continue to adjudicate the matter. Unlike the practice applicable to applications for leave to appeal and interim execution, there is no general rule in this division that would entail my keeping a matter that I postponed from my Rule 43 roll.”¹⁵

¹⁵ Id at paras 11-15.

- [22] Thus, it is clear that routine interim steps do not count as an "disposal". A mere adjournment or interlocutory ruling leaves the case pending, so an acting magistrate cannot rely on section 9(6) to extend jurisdiction for nothing more than postponing the matter, albeit, with the instruction that further or better service of the application should take place. On the date to which the matter was postponed any other duly appointed magistrate could deal with the matter. The acting magistrate who postponed the matter need not necessarily have to further deal with the matter as the record of proceedings indicating the reasons for the postponement would be available. This is not to say that the record indicating the reason for the postponement is necessarily required. What should be clear, however, is that the previous magistrate did not proceed with the hearing of evidence or otherwise dealt with the merits of the matter. When a matter is postponed for lack of proper service, or because of the absence of a party, a magistrate is not seized with the matter. Any other magistrate can deal with that matter to its final disposal. The necessary engagement of a specific magistrate is not required.
- [23] The same principle would apply when a matter is dismissed, and therefore finally disposed of, following the non-appearance of a complainant. The engagement of the magistrate, which previously postponed the matter because of the non-appearance of the applicant and/or the respondent, is not necessarily required. Any magistrate could, on the date to which the matter was postponed, dismiss the application. The basis for the dismissal would not be on the merits of the application but because of the non-appearance of the complainants (applicants). The magistrate who previously postponed the matter was not seized with the matter.
- [24] Undoubtedly, it was irregular for the acting magistrate to have adjudicated upon matters when she was no longer appointed in that position. This would ordinarily lead to a review and setting aside of orders made by such an acting magistrate, unless the authority to dispose of the matter was sanctioned by the terms of section 9(6) of the Magistrates' Court Act. In my view, Ms. Mogadi, was not legally authorized to make the orders in the matters under review as her engagement was not necessarily required in connection with the disposal

of the proceedings. Any other duly appointed magistrate could have made the orders in terms of which some matters were dismissed and others postponed.

- [25] This would mean that Ms. Mogaki was not legally authorized to deal with any of the matters on 31 March 2025.

Reviewability

- [26] Section 22(1) of the Superior Courts Act provides that:

"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."

- [27] If a person who presides over court proceedings is not duly appointed in that position a gross irregularity is committed. This court is empowered to review and set aside the orders made by Ms. Mogaki. The question remains what order this court should make within the factual context of each one of these individual cases. In five of the cases the matters were merely postponed to 5 May 2025 for a different magistrate to deal with these matters. What has transpired in the Magistrates' Court on 5 May 2025 this court is not aware of. As far as the three other matters are concerned, where Ms. Mogadi dismissed the applications, the evidence is that the complainants/applicants who instituted proceedings for protection orders must have lost interest in their matters as they failed on more than one occasion to appear in court.

- [28] It may be argued that no prejudice was suffered by the parties who appeared before Ms. Mogadi, on 31 March 2025 as she merely postponed some matters and dismissed others because of non-appearances. This argument holds no water. It is not only a matter of whether prejudice was suffered by the parties in

these matters or not. The irregularity relates to legality. The presiding officer had no longer the standing to act as a magistrate.

[29] As such, even where litigants may contribute to delays through non-attendances, the involvement of an unauthorised judicial officer in any step of proceedings inflicts serious prejudice by undermining both trust and fundamental rights. Three key dimensions of this prejudice are:

- a. **Rule of Law and Public Confidence:** Courts must not only act within their lawful authority but be seen to do so. Proceedings conducted by an unauthorised presiding officer, even for interim measures, erode the public's confidence in the justice system. They send the message that judicial power may be exercised arbitrarily, undermining the rule of law and diminishing respect for court orders. It is trite that public confidence in the judiciary demands that courts act within the bounds of their lawful authority—failure to do so undermines the rule of law and imperils the legitimacy of judicial decisions. In *S v Mamabolo*,¹⁶ the Constitutional Court held:

*"This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die."*¹⁷

- b. **Impermissible Injustice and Constitutional Rights:** As was held in *S v Ndzeru*¹⁸, irregular conduct by a magistrate result in an impermissible injustice to litigants. For criminal matters it violates the right entrenched in section 35 of the Constitution to be tried before a competent and legally appointed presiding officer. More broadly, all applicants suffer a denial of their constitutional right of access to courts (section 34) and fair adjudication by a properly constituted tribunal.

¹⁶ [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC).

¹⁷ *Id* at para 19.

¹⁸ 2025 (1) SACR 409 (LT)

- c. **Otherwise, unconstitutional:** Magistrates are appointed in terms of the Magistrates' Court Act which act is referred to in section 166(d) of the Constitution. Section 165(1) of the Constitution provides that judicial authority of the Republic is vested in the courts. Thus, the conduct of Ms Mogadi who made court orders and rulings was contrary to the Magistrates' Court Act and the Constitution.

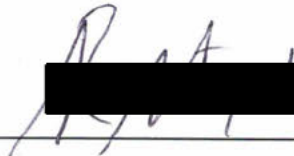
[30] The orders made by Ms Mogadi was grossly irregular and stands to be set aside.

[31] The orders made by Ms. Mogadi on 31 March in relation to **R36/2025, R37/2025, R39/2025, R40/2025, R41/2025, R42/2025, R43/2025** and **R44/2025** stand to be reviewed and set aside.

Order

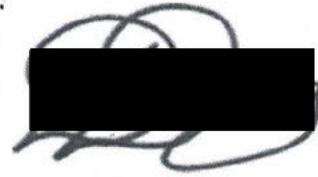
[32] In respect of matters **R36/2025, R37/2025, R39/2025, R40/2025, R41/2025, R42/2025, R43/2025** and **R44/2025**:

- a. The special reviews should be upheld;
- b. The 31 March 2025 orders of postponement in reviews **R36/2025, R40/2025, R41/2025, R42/2025** and **R44/2025** and dismissals in **R37/2025, R39/2025** and **R43/2025** should be set aside; and
- c. The matters should be remitted to the Magistrate's Court to be heard by a duly appointed magistrate and to make appropriate orders.



R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I concur,



D. DOSIO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date referred to Judge: 12 June 2025

Date of delivery: 24 July 2025

Appearances: No appearances (Special reviews considered in chambers)