IN THE HIGH COURT OF SOUTH AFRICA

[TRANSVAAL PROVINCIAL DIVISION]

CASE NO: 16611/2004

In the matter between

GRAHAM NOEL TRAVERS Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

SANETTE JACOBS N.O. Second Respondent

MKOTEDI JOHANNES MPSHE N.O. Third Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Fourth Respondent

WILLEM GERHARDUS PRUIS N.O. Fifth Respondent

MALOSE JOHANNES MALEBANA N.O. Sixth Respondent

JUDGMENT

ISMAIL A J

THE PARTIES

[1] The applicant is a magistrate at the Regional Magistrates Court, Pretoria.

[2] The first respondent is the Director of Public Prosecution, appointed in terms of Section 179 (1) (a) of the Constitution of the Republic of South.

The second respondent is Sanette Jacobs, a Senior State Prosecutor at the Pretoria Magistrates Court.

The third respondent is Mkotedi Johannes Mpshe, The Director of Public Prosecutions for the Transvaal Provincial Division.

The fourth respondent is the Minister of Justice and Constitutional Development who is cited do the State Attorney.

The fifth respondent is Willem Gerhardus Pruis, a regional magistrate and until 1 April 2004 was the President of the Regional Division of Northern Transvaal.

The sixth respondent is Malose Johannes Malebane, the Acting Chief Magistrate of Pretoria.

THE DISPUTE

[3] The core dispute in this matter are three decisions by the first, second and third respondents to prevent any new matters to be heard by the applicant They justify their decisions based on the productivity and performance of the applicant as a magistrate They annexe various documents, wherein statistics are kept of various courts, pertaining to sexual offence cases where victims were minors. The applicant presided in court 12 which was one of three courts which dealt exclusively with such cases.

[4] The applicant in his papers stated that he suffers from a condition known as muscular dystrophy which affects his fine motor core co-ordination and in turn affects his ability to write speedily. He disclosed his condition to the Department of Justice in 1986 and again in 1959 when he re-joined the department after an absence of six months.

[5] The Chief Prosecutor directed a letter to the Regional Court President, the fifth respondent, on 20 October 2003, wherein he complained about

"the performance in court 12 particularly when regard is had to the finalisation rate and the court hours". The second paragraph of the letter stated:

"Whilst acknowledge that the Magistracy is not solely to be blamed for the poor performance in court 12, the following factors are commonly experienced.

The magistrate for court 12 has many part heard cases from the

ordinary Regional Courts and, as a result hereof, he is not always available for court 12. For instance during September he was only

available for 7 days."

[6] Subsequently on 22 September[1] 2003 the applicant was told by a prosecutor that at a weekly meeting of prosecutors they were informed that-

(a) the applicant was to be re-assigned away from court 12;

(b) no new trials were to be placed before the applicant.

1 Should read 22 OCTOBER 2003 – Ed.

[7] Consequently, the applicant's attorneys addressed a letter to the first and fifth respondents requesting clarification of the situation and requesting the first respondent to rescind the decision taken.

[S] On 24 October 2003 the fifth respondent landed to the applicant a copy of a letter received from the second respondent dated 22 October 2003 in which the second respondent complained about the applicant's performance. Paragraph 6 and 7 of the letter stated the following:-

> *"6. We have now reached a stage where this can no longer be tolerated. Crimes against children have been identified as high priority by Parliament Our efforts to reduce cycle times and improve service delivery are hampered by the poor performance of this magistrate. Performance of the whole unit is adversely affected by him.*
>
> *7. As a measure to reach our goals, we will start no new trial with this magistrate as from 22 October 2003."*

[9] The applicant met the second respondent, Mr Luphondo and the fifth respondent on 27 October 2003. He disputed the decision not to commence new trials before him. He indicated that he would initiate proceedings against them in order to rescind the decision they had taken. This meeting ended without the matter being resolved.

[10] The prosecuting authorities on 5 November 2003 addressed a further letter to the fifth respondent and at paragraph 5 thereof stated -

"Regrettably, circumstances thus demand that no new matters and especially no new matters involving victims of child abuse be placed for trial by [sic] Mr Traverse." The prosecutorial management has been so instructed.

Your urgent intervention would, of course, be preferred and is, again, herewith requested."

[11] The applicant attempted to resolve the matter by approaching the International Commission of Justice [ICJ], the Association of Regional Magistrates of South Africa [ARMSA]. Mr Bekker the President of ARMSA raised the applicant's problem with the Chief Justice, Arthur Chaskalson. The Chief Justice recommended that the matter be referred to the Magistrates Commission.

[12] The applicant's attorney addressed a letter to the first respondent dated 13 May 2004 wherein he requested the first respondent to clarify the ambiguity in his letter to the Chief Justice regarding the issue not to enrol new matters before the applicant. He also called upon the first respondent to rescind the decision he had taken. In response to the applicant's attorney's letter, the first respondent on 9 July 2004 stated that there was no ambiguity in his letter to the Chief Justice and that he maintained the position he had taken and therefore, he would not rescind the decision.

THIS APPLICATION

[13] In this application the applicant seeks to review the decisions taken, on 22 October 2003; 5 November 2003 and 9 June 2004, that no new cases were to be placed before him.

[14] The applicant contends that this pattern on the part of the prosecutorial authorities emanates even before the decisions they have taken not to place new matters before him. He submits that as early as 2C01 or 2002 one of the senior prosecutors, Miss van der Merwe openly stated that if a Regional Magistrate chose not to give a decision she and the defence agreed upon during plea bargain negotiations that she would take the matter before another magistrate in order to obtain the desired result.

[15] The applicant also mentioned another prosecutor, one Mr Maharaj threatening "to close the applicant's court permanently" because he was dissatisfied with the applicant retaining charge sheets and the court book rather than returning them to the Clerk of the Court. In the letter to the fifth respondent wherein the complaint was noted the threat in the ultimate paragraph reads-

"We request you to take urgent steps regarding this problem. Failure to do so will leave this office with no other recourse that [sic] to close court 12 permanently"

[16] It was submitted that prosecuting authorities adopted a consistent attitude in complaining to the fifth respondent that they would take steps whether or not he approved of them being taken. This attitude impacts on judicial independence. The attitude of the prosecuting authority is further evidenced by a letter which the third respondent wrote to the fifth respondent on 6 April 2004. The third and fourth paragraphs thereof reads -

"The fact that Mr Travers is allowed to continue sitting in court 12 that is furnished with special equipment for purposes of testimony to be taken via an intermediary is not understood...

Since the latter unfortunate situation appears to be persisting despite request having being made for your intervention, the prosecution is again left with no option <u>but to consider taking some drastic measure</u> However, settling the matter in an amicable fashion will be much preferred. You thus kindly but urgently requested to please intervene and arrange for Mr Traverse not to sit in court 12 but in the available court 14 permanently." [my underlining].

The tone of this letter is not merely one of complaint, however it goes further in that it directs the fifth respondent to place the applicant in another court namely court 14. Failing the transference of the applicant to court 14 they would take drastic action.

[17] On 6 October 2004 the ethics committee of the Magistrate's Commission ["the Commission"] forwarded its report to the commission. On 25 November 2005 the Commission considered the report of the ethics committee and resolved that all role players should be informed that

(a) A clerk */* stenographer be assigned to Mr Travers' court who then make the necessary entries in charge sheets, record and registers and for Mr Travers to sign/endorse those entries as to his and where required to take written notes, and that the said clerk be given requisite training, induction and orientation;

(b) The Department of Justice and Constitutional Development be requested to ensure that Mr Travers' court is well ventilated and air-conditioned because its current condition exacerbates Mr Travers health condition;

(c) The Regional Court President should ensure that matters are allocated to Mr Travers in the same way that they are allocated to other regional magistrates;

(d) The Regional Court President to assist in case flow managements in Mr Travers' court to ensure maximum productivity and utilisation and court time by for instance helping implement a continuous court roll, provisions of regular prosecutor, public defendant, etc. to Mr Travers' court so as to obviate problems of postponements, double bookings, making continuous role possible.

(e) The Commission, Department of Justice and Constitutional Development, the Regional Court President and other stakeholders do acknowledge I be made to acknowledge that Mr Travers has a disability challenge, and that part as the equality plan for the courts in general, each of the parties mentioned in this report does the necessary to ensure that Mr Travers' disability is accommodated and respondent to in terms of the demands of his work.

[18] The applicant also submitted that the prosecuting authority by controlling the trial allocation effectively manipulated the allocation of trials to magistrates. He cites as an example, Miss van der Merwe's remarks that if a magistrate does not agree to impose a sentence which she and the defence agree to during the plea bargaining process she would take it to another magistrate who would endorse the sentence. The failure to allocate new cases to him is a further example

hereof.

It was argued that the allocation of cases to magistrates is not a function of the prosecuting authority as they were a party to the dispute in each instance. The allocation of cases it was submitted should be the function of the President of the Regional Court. The applicant seeks an order that the allocation of cases should be placed in the hands of an independent person and not the prosecuting authorities and that the order should be suspended for a period of 6 to 12 months with a view to rectify the system.

[19] What is apparent that the current mode of allocating trials by the prosecuting authority and this practice impacts upon the independence of the judiciary.

THE INDEPENDENCE OF THE JUDICIARY

[20] The apt starting point is section 165 of the Constitution of the Republic of South Africa. The section states as follows: -

(1) The judicial authority of the Republic is vested in the courts.

(2) *The courts are independent and subject only to the constitution and the law which they must apply impartially and without fear; favour or prejudice.*

(3) No person or organ of State may interfere with the functions of the courts.

(4) Organs of State, through legislative or other measures, must assist and

protect the courts to ensure the independence, impartiality dignity accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[21] In Van Rooyen and Others v The State and Others 2002 (5) SA 246 (CC) at para [23] Chaskalson CJ stated -*"In: deciding whether a particular court lacks the institutional protection that it requires to function independently and impartially, it is relevant to have regard to the core protection given to all courts by our Constitution to the particular functions that such court performs and to its place in the court hierarchy. Lower courts are, for instance, entitled to protection by the higher Courts should any threat be made to their independence. The greater the protection given the higher Courts, the greater is the protection that all courts have."*

The Chief Justice, at para [28] of the judgment said -

[11]The jurisdiction of the magistrates' courts is less extensive than that of the higher Courts. Unlike higher Courts they have no inherent power their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction... The said, magistrates are entitled to the protections necessary for judicial independence, even if not in the same form as higher Courts.

and at para [131] the Chief Justice concluded that:-

"I have come to the conclusion that it is not unconstitutional to vest the powers in the Commission. The making of the code is subject to the controls that have been mentioned, and the higher Judiciary can ensure that nothing appears in the code that would in any way be inconsistent with judicial independence. Viewed objectively, there is

no risk that the code could ever impair judicial independence, and that being so, there is no basis for holding that 5 16 (1) (e) is inconsistent with the Constitution. The consequential finding made by the High

Court that reg 54 A and Schedule E (the code of conduct) are

inconsistent with the Constitution cannot be sustained and the appeal is therefore upheld."

[22] The objections raised by the prosecuting authority against the applicant is based on statistics regarding the number of cases completed by the court dealing with child abuse cases in Pretoria and nationally. Based on the statistics kept it appears that the applicant's completion of cases falls significantly below those of other courts. In addition, the prosecuting authorities submit that the applicant has many partly heard matters. For these reasons they deemed it necessary to take a decision not to place any new cases before the applicant. As noble as the prosecuting authorities' intention may have been, be it to see that justice is seen to be done expeditiously, the decision to prevent new matters to be placed before the applicant was not theirs to make. They had every reason to complain if they felt aggrieved about the performance or any other grievance they may have had against the applicant. They should have taken it up with the fifth applicant and thereafter with the Commission.

[23] Notwithstanding the Commission's recommendations the prosecuting authorities persisted with their policies and decisions which they took against the applicant. The stance taken by them effectively meant that they *'suspended'* the applicant from presiding over new trials.

[24] The Constitution Court in De Lange v Smuts NO & Others 1988 (3) SA 785 (CC) at para [63] stated -

> *"Judicial Officers enjoy complete independence from the prosecutorial arm of the State and are therefore well placed to curb possible abusive of prosecutorial power*

[25) The *bona fides* and good intention on the part of the prosecuting authorities in the circumstances in which they acted did not justify their actions, in view of the constitutional limitation provision in section 36 of the Constitution. Judicial independence is not subject to limitations (see Van Rooyen, supra, at para [35]).

[26] When dealing with the functions of a magistrate or judge the level at which cases are finalised might be important. However, it not the sole factor which plays a role in the equation. The speed at which cases are finalised cannot be regarded as the sole criteria in determining productivity in dispensing of justice. The function of a presiding officer is not similar to that of a production manager in a factory, whose object is to meet targets and dead lines. In a factory the units manufactured be they cars or garments are done by machines whereas in a court the object is to hear and to adjudicate over issues which will invariably differ from case to case. The duration of the trial will vary depending on the magnitude, novelty and complexity of the issues and the number of witnesses involved and the nature and substance of argument.

[27] The first, second and third respondent's complaint to the fifth respondent regarding the applicant did not centre around his ability or competence as a presiding officer. Instead the thrust of their objection focused around *'finalization*

of cases' and in one instance the applicant retaining the

charge sheet and court books thereby frustrating them to compile their statistics. The latter complaint was resolved through intervention of the fifth respondent. The finalization of cases do not depend upon fixed targets. Finalization of cases and judicial decision making depends on variable factors. Thus, the prosecuting authority is not competent to dictate to the presiding officer how quickly a case should be finalised.

[28] Section 165 of the Constitution has recognised that the principle of judicial independence applies to all court including the magistrates court. In Van Rooyen supra, at paragraph [22] the chief Justice stated

> *"The Constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required."*

and the Chief Justice was emphatic at para [28] -

> *"That said, magistrates are entitled to the protection necessary for judicial independence, even if not in the same form as higher Courts."*

[29] In Botha v White 2004 (3) SA 184 (T) at 194 I at para [36] Pate J raised the question *"What does judicial independence mean?"*

At para 37 of the judgment he refers to the late Chief Justice, Ismail Mahomed, at the first orientation course for new judges said

> *"What judicial independence means in principle is simply the right and duty of judges to perform the function of judicial adjudication, through an application of their own integrity and the law, without*

any actual or perceived, direct or indirect interference from or dependence on any other person or institution."

('The Role of the Judiciary in a Constitutional State' (1998) 115 SALJ 111 at 112)

[30] In the final analysis, I am of the view that undoubtedly that magistrates enjoy the same level of judicial independence as judges do. Thus, any decision on the part of the prosecuting authority regarding finalisation of cases by magistrates amounts to an interference with the judicial independence of the magistrate.

ALLOCATION OF CASES

[31] The applicant submits that the Prosecuting Authority being part of the 'Executive Branch of Government' and a party to the dispute in most criminal matters should not be permitted to allocate cases to the courts. The allocation of cases to different courts strikes at the very independence of the judicial process in that executive branch determines which cases should be allocated to presiding officers. In doing so, they can control the allocation of cases to individual magistrates and thereby compromise the independence of the judiciary. On behalf of the applicant it was argued that the allocation of cases to magistrates under prosecutorial control is inconsistent with the constitutional principle of judicial independence and international norms in countries such Canada and Australia and the United Nation's guidelines.

[32] The allocation of cases to the individual magistrates should be the function of the magistracy and under the supervision of the Regional Court President and not in the hands of the prosecuting authority who are a party to the dispute. The applicant submits that the current system in

operation at the Regional Courts are unconstitutional and in contravention of the Basic Principles of the United Nations which was adopted by the General Assembly Resolution 40/32 and 40/146 in 1985.

Principle 14 of the Basic Principles state;

> *The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration."*

[33] The allocation of cases to individual judges has also received attention in foreign judgments such as *R V Valente* (1985) 24 DLR 161 (SCC) in Canada; *Rajski v Wood (1989)18* NSW LR 512 (New South Wales Court of Appeal) and *Vietnam Veterans Association Australia v Patrick Gallagher* (1994) 52 FLR 34. [35] in Australia.

[34] In *Mackeigan v Hickman* (1989) 61 DLR $_{(4th)}$ 688 (SCC), McLachlin J relied on the decision in Valente and Beauregard and stated

> *"It thus appears beyond doubt that the assignment of judges is a matter exclusively within the purview of the court. It would be unthinkable for the Minister of Justice of Attorney General to instruct the Chief Justice as to who should or should not sit on a particular case; that prerogative belongs to exclusively to the Chief Justice as the head of the court. To allow the executive a role in selecting what judges hear what cases would constitute an unacceptable interference with the independence of the judiciary.*

A

[35] In *Rajski v* Wood supra, at 519 A Kirby P stated

> *alt is one of the fundamental principles of judicial independence that the constitution of a court should be outside the control or influence of litigants in the court. This self-evident truth is reflected not only in local law and practice. It is clearly laid down in principles concerning the independence of the judiciary contained in international statements contained on the subject."*

Kirby P continued at 519 E

> *ttIf parties could pick and choose judges according to their perception of the way in which their choice could advantage them, or disadvantage their opponents and then render judges answerable for sitting arrangements, great damage would be done to the integrity of the judicial process and to community confidence in the neutrality and impartiality of the judiciary. This is a reason why, in courts of our tradition, at least since the Act of Settlement 1700 (UK] the assignment of judges to hear cases has been by express law, inherent jurisdiction and daily convention and practice reserved to the judiciary itself It is not something over which litigants may exercise influence..."*

In this judgment the court also referred to clause 14 of the United Nations Basic Principles of the independence of the judiciary.

[36] Ackerman J in *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC) para (70] referred to the Queen in Right of Canada V Beauregard supra

491 - Dickson CJC summarised the essence of independence as follows

"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases *that come before them: no outsider - be it government, pressure group, individual or even another Judge -should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision The core continues to be central to the principle of judicial independence..."*

[37] In *Valente,* supra at p182 to the importance of tradition as a safeguard of judicial independence the following statement by Lord Denning in *The Road to Justice (1955) pp 16/17:*

"The County Court Judges have some measure of protection but the stipendiary' magistrates and justices of peace have no security of tenure at all. They hold office during pleasure...

Nevertheless, although these lesser judges can theoretically be dismissed at pleasure, the great principle that judges should be independent has become so ingrained in us that it extends in practice to them also. They do in fact hold office during good behaviour and they are in fact only dismissed for misconduct. If any Minister or Government Department should attempt to influence the decision of any one of them, there would be such an outcry' that no Government could stand against it,'

*

[38] Section 179 of the Constitution created the office of the National Director of Public Prosecutions [“NDPP"]. The opening line of sec 179 (1) provides

> *"There is a single national prosecuting authority in the Republic consisting of ["NDPP”]".*

The purpose of creating a NDPP was to do away with many prosecuting authorities for diverse jurisdictions, whereas now there is only one. See Minister of Defence v Potswane 2002 (1) SA 1 at 11 A. The prevention of crime on behalf of the State is the primary objective of the NDPP. It is trite that the prosecution is *dominus litis* in criminal matters. This means that in its objective in prosecuting persons it bears the burden of proof and therefore it starts with the presentation of its case against accused persons. This does not mean that it is saddled with the obligation of setting down matters before a specific judge or a presiding officer. The determination of which matter should be heard by a specific judge or judicial officer should be a senior judge or a senior magistrate.

[39) It was submitted on behalf of the respondent that their allocating of cases to magistrates should not be construed as interference but rather the proper administration of trial rosters which causes the wheels of justice to run efficiently. The respondent contend that by allocating cases to magistrates they are not motivated by or subscribe to any forum shopping. Should the practice of allocating cases to judicial officers be altered, this court would be putting an end to a system which has been functioning for years throughout the country in the lower courts. This argument may have some merit, however, it does not mean that it should continue simply because it has been in existence for years. Mr Chaskalson submitted that the prosecutorial control over the allocation to magistrates is

objectively inconsistent with sec 35 (5) of the Constitution and the accused's right to a fair trial. The test for judicial independence is *"whether the court or tribunal from the objective standpoint of a reasonable and in formed person, will be perceived as enjoying the essential condition of independence"* - Van Rooyen & Others v The State & Others.

[40] Mr Dorfling, acting for the respondents submitted that the reason for not referring new matters to the applicant had nothing to do with forum shopping or the interference with the independence of the judiciary. The decisions taken were taken in order to ensure that the accused received a speedy trial. I disagree with Mr Dorfling's submission that the Prosecuting Authority, being part of the executive branch of government could exercise this right. Their dissatisfaction with the applicant's work rate or productivity in the finalisation of matters ought to have been taken up with the relevant body, namely the Magistrates Commission.

[41] Objectively seen the allocation of cases to magistrates by the prosecution would be perceived by accused persons and any reasonable person as interference in the judiciary as the prosecution could manipulate the outcome of a trial by choosing certain presiding officers instead of others. In the apartheid era political matters were given to certain magistrates who were hand chosen to hear these cases. South Africa is no longer regarded as pariah state and is well regarded in the international community of nations. For this reason despite Mr Dorfling's argument that the system in place has been in operation for many years and for that reason it should not be altered is not a persuasive one. The allocation of cases to presiding officers should follow international trends such as in Canada and Australia.

[42] I am of the view that the applicant has made out a case that there has been interference in the independence of the judiciary. In the circumstances I make the following order;

(I) Setting aside the decision of the second respondent communicated in a letter dated *22* October 2003 and addressed to the fifth respondent directing that no new trials start before the applicant.

(ii) Setting aside the decision of the third respondent communicated in a letter dated 5 November 2003 addressed to the fifth respondent confirming the decision referred to in (i) above.

(iii) Setting aside the decision of the first respondent communicated in a letter dated 9 June 2004 addressed to the attorneys of the applicant not to rescind the decision contemplated in (i) and (ii) above.

(iv) Directing the first respondent to instruct all prosecutors working in the Regional Court, Pretoria that they may not take steps to prevent the enrolment of new trials before the applicant.

(v) Interdicting the second and third respondents from attempting to. control or to influence which matters are enrolled before the applicant.

(vi) Interdicting the second and third respondents from interfering with the independence of the Regional Court in relation to any matters concerning the judicial office of the applicant.

(vii) Directing that the allocation of cases at the Regional Court be altered and that cases be allocated under the supervision of the fifth respondent and/or the sixth respondent. This specific order is suspended for 12 months whereafter a new system of allocation of cases be brought into existence.

(viii) The first, second and third respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.

Judgment delivered 18 August 2005

For Applicant: Adv M Chaskalson instructed by Rudman attorneys[2]

For Respondent (1st to 4th) Adv Dorfling instructed by State Attorneys, Pretoria

2 PRETORIA