CASE NO. AR 397/2007

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS KWAZULU NATAL	**APPLICANT**
and	
THE REGIONAL MAGISTRATE, J DE BRUYN	**FIRST RESPONDENT**
JAN GEORGE VAN DER WATT	**SECOND RESPONDENT**
JAKOBUS JOHANNES UYS	**THIRD RESPONDENT**
AARON SHIYINDUKU ZULU	**FOURTH RESPONDENT**
MUZIMBIZI PETROS NDLOZI	**FIFTH RESPONDENT**
ERASMUS THOKOZANI FAKUDE	**SIXTH RESPONDENT**
MBHEKISENI PETROS BUTHELEZI	**SEVENTH RESPONDENT**
SIKHUMBUZO MBATHA	**EIGHTH RESPONDENT**

Delivered :
March 2009

J U D G M E N T

LEVINSOHN DJP

[1] The applicant has launched these proceedings seeking to review and set aside the verdict brought in by the first respondent, the Regional Magistrate of Vryheid (hereinafter referred to as “the Magistrate”), acquitting the second to eighth respondents respectively (these respondents where necessary will be referred to as accused Nos. 1 to 7 respectively).

[2] In order to properly get to grips with the issues that arise in these proceedings, I shall briefly set out the salient background facts and the essential chronology of events in this case.

[3] The accused were charged with the crime of kidnapping (count 1) and two counts of assault with intent to do grievous bodily harm (counts 2 and 3). They were arraigned before the Magistrate and pleaded not guilty to the charges. Each were legally represented.

[4] In a broad outline the State case appears to be that the accused were party to kidnapping the complainant, one Sithole, and taking him to a particular farm where he was assaulted and tortured with a view to compelling him to reveal the whereabouts of certain stolen cattle. A third charge of assault with intent to do grievous bodily harm related to one Bongani Ndlovu who apparently was deceased at the date when the trial commenced.

[5] The trial came before the Court on 4 September 2006. On that day it was adjourned to 11 December 2006 and then further adjourned for trial to commence on 3 to 13 April 2007. On 3 April 2007 all the accused pleaded to the charges and put up their statements in terms of section 115.

[6] The first witness called by the State was Dr H Hlela. Her testimony related to an examination on the complainant Thulani Sithole. One of the aspects mentioned by the doctor in her evidence was that on examination the complainant appeared to be “distraught”.

[7] The complainant commenced his evidence on 3 April 2007. He spoke in IsiZulu through an interpreter who interpreted the evidence into Afrikaans. During the course of this evidence the record reveals the following exchange between the Court and the interpreter:

> “HOF Ek sien hy huil, mnr die Tolk?
> TOLK Ja, hy huil, Edelagbare.
> HOF O, ek sien! Goed, nou, Meneer, ek neem aan dit was ‘n baie emosionele ervaring gewees wat u deurgegaan het. Wil u kans kry om uself te herstel om te hou huil of wat is die posisie? Kan ons maar voortgaan? --- Ons kan voortgaan.
> Kan ons voortgaan, is u seker, want u staan nou en snik? Is u goed genoeg om voort te gaan? --- Ja.”

The evidence in chief went on throughout 3 April 2007. The examination was resumed on 4 April 2007 and cross-examination by Mrs van der Walt for accused No. 1 commenced on that day. (See page 187 of the record.) To say the least this cross-examination was lengthy and searching.

[8] After what appears to have been the midday adjournment the record at page 227 reveals the following exchange between the Court and the prosecutor:

> AANKLAER Edelagbare, mag ek net voordat die kruisondervraging voortgaan, net die Hof, 'n aansoek bring dat die Hof net met die getuie opneem of hy emosioneel in staat is om aan te gaan vandag, want dit is onder my aandag gebring, nie deur die getuie nie, maar deur 'n ander groep persone, dat die Staat versuim om die getuie te beskerm deur die getuie is nie in staat om aan te gaan nie en ek vra die Hof om dit net met die getuie op te neem, of hy fisies, ensovoorts … (tussenkoms)
> HOF Emosioneel.
> AANKLAER In staat is om aan te gaan met die getuienis vandag, Edelagbare."

The Magistrate then made enquiries and the witness assured him that the matter can proceed, whereupon Mrs van der Walt resumed her cross-examination which in parts was in my view unfair and badgered the witness. See for example at page 250 lines 2 – 19.

[9] The case was remanded until 5 April 2007. Upon resumption the prosecutor made the following statement to the Court:

> "AANKLAER Edelagbare, ek wil net op rekord plaas dat die klaer, Thulani Sithole, wat nog onder kruisondervraging staan, 'n boodskap gestuur deur die ondersoekbeampte dat hy baie siek is en kan nie hof bywoon nie, hy is op die oomblik by die dokter. Die ondersoekbeampte is gestuur om die mediese sertifikaat te bekom sodat ek dit kan inhandig, een of ander tyd. Edelagbare, ek gaan nie 'n aansoek bring dat ek my volgende getuie gaan roep op hierdie stadium nie, ek dink dit sal teëgestaan word en dit sal ook onregverdig wees, gesiene waar ons nou in die saak staan."

The case was then remanded to 3 July 2007 and a suspended warrant of arrest was authorised against the witness.

[10] When the case resumed on 3 July 2007 there was a new prosecutor Mr N. Zuma. Mr Zuma announced:

> "Your Worship, at this stage the State is applying for the postponement of this matter which is partly heard. The reason for the postponement as it appears on the previous occasion, that the witness had a problem proceeding with the matter."

Mr Zuma addressed the Court in English whereupon Mrs van der Walt with the support of Mr Prinsloo, objected to the proceedings in English since according to them it had been agreed that Afrikaans be the language of record. A debate about this ensued whereafter the Magistrate made a ruling that the case should proceed in Afrikaans and that an Afrikaans prosecutor should be made available. This ruling effectively excluded Mr Zuma who was only fluent in the English and Zulu languages. He then indicated to the Magistrate that he would have to consult the Director of Prosecutions, whereupon the Magistrate allowed the matter to stand down.

[11] On resumption the previous prosecutor Mrs VK Brown appeared. She indicated that she was not prepared to proceed with the matter. She said that there had been threats made against her life. The difficulty however was that there were no substitute Afrikaans speaking prosecutor available to proceed with the case. She accordingly made an application for the postponement saying :

> "Edelagbare my opdragte is om aansoek te doen om 'n uitstel, op grond van die Hof se beslissing oor die taal problem, om 'n Afrikaanse aanklaer te kry om hierdie saak verder te voer."

Mrs Brown went on to say (page 274):

> "AANKLAER Edelagbare, ek het ter goedertrou aangeneem dat 'n Engelssprekende aanklaer toegelaat sou word om Engels te praat in die Hof en dit is hoekom ek dit nie gerade geag het om 'n Afrikaanssprekende aanklaer te kry in hierdie saak nie, aangesien ek wel hierdie selfde problem al voorheen in sake het ek ondervind, en ek het ter goedertrou opgetree."

The matter of the witness' previous absence was then raised by Mrs Brown. She produced a doctor's letter and also a psychologist report Exhibit N. The psychologist recorded that the witness Mr Sithole was suffering symptoms

which are consistent with a diagnosis of post traumatic stress disorder (see page 278). The prosecutor also indicated to the Magistrate that the witness Sithole was present but in view of his condition he ought not to give evidence. At page 279 the Magistrate observed:

> "HOF Hoe lank gaan hierdie toestand van hierdie getuie voortduur en wanneer gaan hy eendag gereed wees as hy nie in die laaste drie maande kon herstel het nie met terapiesessies nie? Hoe lank gaan hy dan nou nog ongesteld wees, as ek dit nou so kan stel?"

The Magistrate also expressed his displeasure about the absence of the psychologist. The prosecutor could not furnish an explanation as to why the psychologist had not been subpoenaed.

[12] The defence representatives opposed any application for an adjournment and the Magistrate at page 298 gave his ruling. He severely criticised the State for failing to procure the presence of both the doctor and the psychologist. He took the view that the factual basis upon which the State sought the postponement was wholly insufficient. He accordingly refused the postponement and ordered that the witness, who was present in court, proceed with his evidence. As the witness Sithole entered the witness box he said the following:

> "Edelagbare, ek wil graag onder die aandag van die Hof bring, ek kan nie meer praat nie, vandag kan ek nie praat nie, want ek moet terug dokter toe gaan."

The Magistrate responded as follows:

> "HOF Meneer, as u weier om verdere getuienis af te lê – ons het reeds die aangeleentheid voor u debatteer, ons is al van vanoggend hoe laat, besig met hierdie aangeleentheid. Ek het al van vanmôre tienuur tot nou probeer vasstel wat die aangeleentheid is. Daar is geen mediese getuienis voor my dat u so ongesteld is dat u nie kan voortgaan met u getuienis nie. Mag ek net vir u daarop wys dat as u weier om voort te gaan om getuienis af te lê dan is die Hof by magte om u toe te sluit vir vyf jaar, as daar goeie gronde is. Verstaan u dit, Meneer?"

The witness then said:

> "Ek verstaan Edelagbare, maar ek is nog nie gesond nie, my kop is nog nie reg nie."

The retort of the Magistrate was the following:

> "Mevrou, gaan voort asseblief. As u nie die vrae wil beantwoord nie, dan moet u vir my so sê, dan sal ek die nodige doen en sal ons die saak uitstel vir 'n tydperk van vyf jaar en kan ons u toesluit en dan kan u my laat weet wanneer u gereed is om voort te gaan met u getuienis. Die keuse is u s'n."

At which point the prosecutor asked for an adjournment to consult with the witness. The Magistrate refused and directed Mrs van der Walt to proceed with her cross-examination which she did from pages 301 through to 306 at which point the Court took the luncheon adjournment.

[13] On resumption the witness was not present and the following exchange took place:

> "HOF Waar is die getuie?
> AANKLAER Edelagbare, die getuie het ineengestort.
> HOF Ja.
> AANKLAER Edelagbare, die sekuriteit het my kom roep na ons verdaag het vir ete en ek het toe die getuie gevind buite by die voorhek van die landdroskantoor se perseel waar hy so half agteroor gelê het. Ek kan nie sê wat sy toestand was nie, dit het gelyk asof hy flou geval het. 'n Ambulans is toe geroep deur die polisiebeamptes en hy is toe nou weg hier met 'n ambulans. Ek het 'n afskrif van die ambulans se rekordboek gevra, aangevra indien die Hof dit wil hê om te bewys dat hy hier weg is met 'n ambulans. …"

After discussion the case was adjourned to 4 July 2007. A warrant of arrest was issued against the witness that the warrant was to stand over until 4 July.

[14] On resumption on 4 July 2007 the Court was presented with a medical certificate from a doctor which read as follows:

> "Mr Thulani Sithole presented to our hospital on 3 July 2007 as it was reported that he had collapsed. On examination his vital signs were within the normal range as well as his blood sugar. The patient was checked from head to toe and was admitted to the ward for overnight observation. On 4 July he was seen and he is feeling better and there was no problem overnight. Patient is fit for discharge."

The prosecutor informed the Court that the doctor had indicated that he was not going to come personally to court. Also that he was not in a position to give evidence about the witness' mental condition ("gemoedstoestand").

[15] The witness was present and the Magistrate ordered him to be sworn in. The following exchange between the Court and the witness took place:

> "HOF Volle naam asseblief. Praat harder asseblief.
> GETUIE Ek het hoofpyn, Meneer.
> HOF U volle naam asseblief, Meneer.
> THULANI SITHOLE
> HOF Sweer hom in, asseblief.
> GETUIE U Edele, ek voel ek kan nie vandag praat nie. Asseblief kan ek huis toe gan om rus te kry.
> HOF Meneer, gaan u weier om die eed te neem of moet ek die nodige stappe doen om u toe te sluit? Ja Meneer, asseblief. Gaan u die eed neem of gaan u nie die eed neem nie?
> GETUIE Ek vra asseblief U Edele, dat u die saak uitstel want ek het regtig hoofpyn.
> HOF Meneer, gaan u die eed neem of gaan u nie die eed neem nie? Sweer him in asseblief, mnr die Tolk.
> GETUIE Asseblief Edelagbare, ek kan nie vandag praat nie.
> HOF Mnr Sithole asseblief. Hierdie saak gaan nou klaar gemaak word. Ek wild it vir u baie duidelik stel. Ek wit hê u moet die eed neem. As u nie die eed neem nie, gaan ek vir u toesluit vir 'n tydperk van vyf jaar, want u het geen rede om nie die eed te neem nie. Ons het dit reeds bepaal. Die mediese sertifikaat sê u is *fit*.
> GETUIE Dit is nie die feit dat ek weier om die eed te neem nie. Ek is regtig siek, Edelagbare. As die Hof voel ek moet toegesluit word, dan kan die Hof aangaan."

Thereafter the Magistrate agreed to stand the case down for a quarter of an hour in order that the prosecutor consult with the witness in the presence of the defence, to ascertain whether he is willing to proceed. During this exchange the prosecutor once again indicated to the Magistrate that:

> "Dit lyk net asof die getuie emosioneel nie reg is nie."

On resumption after the consultation the prosecutor informed the Court that the witness had told her that he wishes to proceed with the case but was not able to do so that day as a result of a severe headache. The prosecutor indicated to the Court that in her view the witness was about to have an emotional breakdown and she therefore tried to call a psychiatrist who treated him. The defence strenuously objected to any postponement for that purpose. The Court once again refused a postponement and ordered the witness to give evidence. The record reveals an exchange between the

witness and the Court. The Court threatened the witness with imprisonment for refusing to testify and the witness asked for a postponement and begged the Court to let him go home. The upshot of all this appears at page 322 of the record with the following exchange between the Court and the witness:

> "HOF Ja mnr Sithole, het u nou besluit wat u wil hê dat ek moet doen?
> GETUIE Ek het alreeds vir uitstel gevra.
> HOF Dit is vir my duidelik dat die getuie te siek is om voort te gaan en hy word verskoon van verdure verrigtinge in hierdie saak. Dankie.
> HOF Ja, Mevrou, Dit is onwaarskynlik wanneer hy die nodige kapasiteit sal hê om te kom getuig.
> AANKLAER Edelagbare, kan die Hof net, is die getuie, gaan die getuie nou nie voortgaan nie?
> HOF Hy gaan nie voort nie, hy is te siek om voort te gaan vandag or enige ander tyd.
> AANKLAER Ek vra die Hof dan vir 'n verdaging Edelagbare."

[[16] On resumption the prosecutor asked for a long adjournment in order to transcribe the record for the consideration of the Director of Public Prosecutions. She submitted that the way in which the Court treated the witness was not in the interests of a healthy administration of justice. She indicated that consideration would be given to instituting review proceedings. This application by the prosecutor was vigorously opposed by the defence and a lengthy debate ensued.

[17] In reply the prosecutor informed the Court that the State would not proceed with this case without the evidence of the witness who had been stood down and excused. She said that the possible evidence of other witnesses was only supplementary and of a circumstantial nature.

[18] In his judgment the Magistrate emphasised that the accused were entitled to a speedy trial. He observed that according to the charge sheet the case started on 12 August 2005 in the District Court. It was eventually transferred to the Regional Court on 4 September 2005 whereupon it was adjourned eventually until April 2007. At that stage it was adjourned because of the absence of the main witness Sithole. The Magistrate recognised that a case of this nature is not only traumatic for the witness but also for the accused in the case. The Magistrate observed that he did not gain the

impression that Sithole was so traumatised that he could not give evidence. He recorded that he had made an order that the evidence of Sithole was to be expunged from the record because he gained the impression that Sithole was unwilling to proceed with his evidence and that he deliberately was trying to delay the case.

[19] The Magistrate observed at page 342:

"Ek vind dit baie vreemd. Gister na lang debate, het ons voortgegaan met die saak en die getuie het omtrent 'n halfuur getuienis gegee onder kruisondervraging en ewe skielik het hy ineengestort. Hy is hospital toe geneem. Hy is vanmôre ontslaan met 'n sertifikaat wat aandui dat hy fit is, "fit for discharge". Daar is niks in hierdie verslag aangedui dat die getuie nie in staat is om vandag te gaan getuig nie. Die dokter wat die getuie by die hospital klaarblyklik behandel het, weier om hof toe te kom, maar die Staat het nie alternatiewe reëlings gemaak om die getuie na die distriksgeneesheer te neem en die distriksgeneesheer dan te sê. Jy moet hof toe kom om te kom getuig oor hierdie man se toestand nie. Dit gebeur daagliks oral in die howe in hierdie land, dat 'n dokter op kort kennisgewing hof toe kom."

The Magistrate then went on to refuse the application. The prosecutor then indicated that she was not going to close the State case whereupon the Magistrate said he would close the State case for her. The accused promptly closed their case and they were acquitted.

[20] Following upon this verdict the Director of Public Prosecutions has launched review proceedings aimed at setting aside the acquittal and seeking an order that she may reinstate the prosecution. A number of submissions have been made in support of the application. I need mention in particular the issue of language. From the outset it was agreed by all concerned in the case that the language of record would be Afrikaans. Accused No. 1 and 2 were Afrikaans speaking, their legal representatives likewise spoke Afrikaans. The remaining five accused spoke IsiZulu. My impression was that the interpreter who interpreted from Zulu into Afrikaans appeared to be competent and no complaint was lodged at any stage as to his competence to interpret in the Afrikaans language. Problems however arose after Mrs Brown the prosecutor was threatened and felt compelled to withdraw from the case. A Mr Zuma was then designated to carry on with the prosecution. He is not Afrikaans

speaking nor apparently does he understand that language. The defence objected to the change in the language of record on the basis that the Magistrate had made an order that the case proceed in Afrikaans. I am not sure that this is a correct interpretation of what occurred. It seems to me that all the parties agreed at the outset that the case be conducted in Afrikaans. Be that as it may, I am of the view that no one had the right to as it were debar Mr Zuma from appearing in the case. He is an officer of the Court duly designated by the Director of Public Prosecutions to appear on her behalf and he spoke one of the constitutionally recognised languages. While I acknowledge that the change in language may cause some inconvenience and another interpreter would have been required, there is no way in my view that any court in the land can stop an officer of the court from speaking an official language during the course of any proceeding before it.

[21] The circumstance surrounding Mr Zuma's appearance and his subsequent withdrawal from the case cannot be said to have resulted in any irregularity in the proceedings. Accordingly I say no more about the language issue at this stage.

[22] The first question that arises is whether this Court is competent to review proceedings of a lower court where an accused has been acquitted. It is evident that the provisions of section 304 of the Criminal Procedure Act, No 511 of 1977, would not be applicable *in casu*. It seems to me that the only basis upon which review proceedings can be instituted is in terms of section 24(1) of the Supreme Court Act, No 59 of 1959, which states:

> "The grounds upon which the proceedings of an inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are –
> (a) …
> (b) …
> (c) gross irregularity in the proceedings; and
> (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."

Clearly the section confers an inherent jurisdiction on the High Court to review proceedings of any nature in inferior courts including criminal cases subject

however to the proviso in subsection (2) of section 24 that this will not affect or derogate from other laws which deal with reviews.

[23] The power to review proceedings where there has been an acquittal was recognised in *S v Lubisi* 1980 (1) SA 187 (T) at 188H Le Roux J said:

> "I have come to the conclusion that there exists an inherent power in a Supreme Court to correct the proceedings of an inferior court at any stage if it appears to be in the interests of justice (see eg *R v Marais* 1959 (1) SA 98 (T); *Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another* 1959 (3) SA 113 (A); *Singh v Dickinson NO* 1960 (1) SA 87 (N).)"

The learned Judge also relied on the dicta of Ogilvie Thomson JA in the *Wahlhaus case (supra)* at 119-120 as follows:

> "It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict or *mandamus* – against the decision of a magistrate's court given before conviction … This, however, is a power which is to be sparingly exercised."

Courts have however been reluctant to follow *Lubisi's case (supra)*. In *S v Makopu* 1989 (2) SA 577 the Court was confronted with a situation where an accused had pleaded not guilty to a charge of housebreaking with intent to commit an offence unknown. Evidence was led before a magistrate. This magistrate was transferred before the case was completed and it was postponed on a number of occasions for further evidence. Eventually it came before a second magistrate who refused an application for a further postponement and ordered that the case should proceed before him in terms of section 118 of the Criminal Procedure Act. The second mentioned magistrate had not realised that evidence had already been led in the case. The State was not ready to proceed and the magistrate deemed the State to have closed its case and he acquitted the accused. Jones J said the following at 577I:

> "There can be no doubt that all this was irregular. Section 118 does not apply. The case should have been completed before Mr Luwes. There is, however, no provision in the Criminal Procedure Act 51 of 1977 which empowers me to remedy the situation. I have been referred to the decision of *S v Lubisi* 1980 (1) SA 187 (T) where it was held that in these very circumstances the Supreme Court may in the

> exercise of its inherent jurisdiction and in the interests of justice set aside an acquittal and order that trial be resumed before the original magistrate. While it is correct that the interests of justice include justice to the prosecution as well as the accused, there are a number of policy considerations which underlie our criminal law which may be raised to support an argument that, even if the Court has the inherent power to make this sort of order, it should not do so. I refer, for example, to the policy considerations which require certainty and finality in criminal cases, or which limit the State's right to appeal, or which preclude a second prosecution where fresh evidence is found. Be that as it may, I am quite satisfied that I should not exercise an inherent jurisdiction to set aside an acquittal without first hearing the accused …"

Jerold Taitz in his work "The Inherent Jursidiction of the Supreme Court" 1985 Edition commented on *Lubisi's case* at page 83 and more particularly on the finding by the learned Judge that there exists an inherent power in a Supreme Court to correct proceedings of an inferior court at any stage if it appears to be in the interests of justice:

> "Certainly *S v Lubisi* is an unusual case and one which some may consider a dangerous precedent."

In *S v Makriel and Others* 1986 (3) SA 932 *Lubisi's case* was not approved. Marais J (as he then was) held that the decision was flawed because the accused was not afforded an opportunity of making representations to the Court. The learned Judge expressly did not decide the issue under what circumstances an acquittal could be reviewed.

[24] The advent of our new constitutional dispensation has cast a whole new dimension on this enquiry. Section 35(3)(m) of the Constitution of the Republic of South Africa 1996 states:

> "Every accused person has a right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."

The Director of Public Prosecutions review is aimed at setting aside the acquittal verdict and reinstating the prosecution. The question that arises is whether the so-called "double-jeopardy" protection of section 35(3)(m) comes into play. Put simply are the accused's fair trial rights infringed if this Court were to set aside the acquittal?

[25] Now the dicta of Jones J in *Makopu's case (supra)* are entirely apposite to the question posed. The Constitution envisages that an accused person charged with a criminal offence is entitled to finality one way or the other – either being found guilty or not guilty. If an accused is found not guilty, for example, as a result of a deficiency in the evidence led by the State, he or she should not be harassed by a second prosecution. The interests of justice proclaim that there should be finality in criminal proceedings. Louise Jordaan in a very learned and helpful article published in the Comparative and International Law Journal of Southern Africa, Volume 32 of 1999, has dealt in detail with the issue of double jeopardy. At page 2 of this article she quotes what she characterises as "the most comprehensive summing up of the rationale of double jeopardy protection" from the US Supreme Court case of *Green v US* 355 US 184 (1957) at 187-188:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby [1] subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as [2] enhancing the possibility that even though innocent he may be found guilty."

The learned author rightly observes at page 2:

> "It is apparent that the guarantee serves the basic values on which all constitutional rights of detained and accused persons are based: (1) the minimisation of the possibility that an innocent person be convicted; and (2) treatment of the individual with dignity and respect. It has been suggested that the consideration that the innocent should be protected from wrongful conviction 'lies at the core of the [double jeopardy] problem."

[26] The right not to be tried for an offence for which he/she has been acquitted must in my view be interpreted in accordance and be consistent with the principles of our criminal law pertaining to *autrefois acquit*. These can be stated in summary form to be the following : -

[27] An accused can only invoke such plea if the acquittal was on the merits. If his/her conviction was quashed on appeal because of an irregularity

of such a nature that it can be said he/she was never in jeopardy of being convicted, this will not be regarded as an acquittal on the merits.

[28] In ***State v Moodie*** 1962 (1) SA 587 (A) at 596 Hoexter ACJ said : -

> "However that may be, I am of opinion that in our common law the *exceptio rei judicatae* cannot succeed unless it is based on a final judgment on the merits."
>
> See also ***S v Naidoo*** 1962 (4) SA 348 AD.

[29] The question that presents itself in the present case is whether indeed the accused have been acquitted on the merits as understood by the authorities. I answer this question in the negative for the following reasons.

[30] Plainly the verdict of not guilty was triggered off by three important incidents in the case. Firstly, the magistrate's decision to release Sithole from undergoing any further cross-examination. Secondly, to expunge this uncompleted testimony and thirdly to constructively close the State case. In my view the first of these decisions was flawed which gave rise to an irregularity in the proceedings. The witness at no stage indicated that he was reluctant to give evidence. The tenor of his representations and indeed that of the prosecutor on his behalf was that he was not in a fit mental state to proceed with his testimony. There were sufficient indications that he was suffering from some mental or psychological stress. By the same token a judicial officer in the position of the magistrate was not able to evaluate his condition and form a view that he was malingering. That judgment ought to have been made by experts. It is true to say that the State should have made arrangements to put this type of evidence before the Court and in that regard it was at fault.

[31] I do not think however that this failure or omission on its part should have been visited with the ultimate sanction, as it were, of discharging the witness and refusing any further postponements. The magistrate ought in my view to have directed that a proper enquiry be instituted by the appropriate

experts as to determine the condition of the witness and more particularly whether he was in a mentally fit state to proceed with his evidence.

[32] There is obviously a constitutional duty to ensure that accused persons receive a fair trial and such trial should be concluded as expeditiously as possible. However this must be weighed and balanced against the community's interest in ensuring that wrongdoers be prosecuted. The National Prosecuting Authority represented by its duly appointed prosecutors is entrusted with that important constitutional function (section 179(2) of the Constitution).

[33] It follows from this that the prosecution must at all times be permitted to present its case. In this instance it was effectively prevented from doing so, in circumstances which in my view constitute a gross irregularity in the proceedings. This Court is entitled to exercise its inherent powers to review in terms of section 24(1) of the Supreme Court Act (*supra*) and set aside the verdict.

[34] I propose therefore the following order : -

1. The verdict of not guilty brought in by the Regional Magistrate of Vryheid on 4th July 2007 is hereby reviewed and set aside.
2. In the event that the applicant decides to continue with the prosecution against the second to eighth respondents, such prosecution is to commence *de novo* before another judicial officer.

GYANDA J :

LOPES AJ :

LEVINSOHN DJP : It is so ordered

DATE OF HEARING	**:**	**30 JANUARY 2009**
DATE OF JUDGMENT		**24 MARCH 2009**
COUNSEL FOR APPLICANT		**MR C. S. MLOTSHWA**
INSTRUCTED BY		**DIRECTOR OF PUBLIC PROSECUTIONS, PIETERMARITZBURG**
COUNSEL FOR RESPONDENTS		