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

**CASE NO: AR 111/2012**

**STEWART GRAHAM HEWITT** **APPLICANT**

**and**

**THE REGIONAL MAGISTRATE** **FIRST RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS** **SECOND RESPONDENT**

**NW** **INTERESTED PARTY**

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**REVIEW JUDGMENT**

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**SISHI J**

**Introduction**

[1] This is a review application wherein the applicant seeks an order that the criminal proceedings held in K Regional Court, Durban under Case No. 41/806/10 be reviewed and set aside.

[2] The applicant herein is an accused person in the criminal proceedings in K Regional Court, Durban under Case No. 41/806/10 (the criminal proceedings).

[3] The proceedings in the Regional Court were presided over by the Regional Magistrate, Miss D J Turner, the first respondent herein.

[4] The charges preferred against the applicant were those of indecent assault, and the criminal proceedings commenced on the 26th of October 2010. The applicant was on the 1st of December 2010 convicted on the said charges.

[5] On the 25th of November 2011, the applicant was sentenced to fifteen years imprisonment by the first respondent.

[6] The decision sought to be reviewed and set aside is that of the first respondent.

[7] The review application is on Notice of Motion in terms of Rule 53 of the rules of this Court supported by an affidavit deposed to by the applicant and other supporting affidavits. The first respondent, whose decision is sought to be reviewed and set aside, has not filed any answering affidavit to respond to the allegations set out in the foundation affidavit.

[8] This review application has been set down together with an appeal under Case No. AR 176/12 involving the same parties.

[9] We were of the view that it would be appropriate and convenient to first deal with the review application and, if necessary, the appeal to be dealt with at a later stage.

**Background to Review Application**

[10] The background leading to this review application is central to the decision of the review application.

[11] The allegations made by the applicant in this review application are against the first respondent only. The second respondent filed only the notice of intention to oppose the matter but no affidavits were filed by both respondents. NW (N[…] W[…]), the complainant in the criminal case who was admitted as an interested party in both proceedings, also did not file any opposing affidavits, save for submissions referred to in the Court Order referred to below. The irregularities complained of in this review are alleged to have occurred before and after conviction of applicant.

[12] The applicant was charged with indecently assaulting the complainant on diverse occasions during the period 2000 to 2003/4. In particular, he was charged with inserting his finger into her vagina, touching her vagina, touching her breast, forcing or telling her to touch his penis and inserting his penis into her mouth. These incidents are alleged to have occurred from the time when the complainant was eight years old until she reached the age of eleven years.

[13] When the trial commenced on the 26th of July 2010, the State made an application for the appointment of an intermediary to assist the complainant in her testimony.

[14] The complainant was eighteen years old at that time, and was a learner attending high school.

[15] Counsel for the applicant did not object to the prosecution's application for the complainant to testify by means of an intermediary.

[16] The Magistrate granted the application and the applicant testified by means of an intermediary.

The SCA in this regard has said:

> "The failure by the accused or his legal representative to object to what was patently an irregular procedure, can never turn such an irregular act into a lawful or regular one"[1]

[17] The complainant's evidence at the trial was the only direct evidence against the applicant. The applicant was convicted on the 1st of December 2010. The conviction of the applicant was essentially based on the evidence of the complainant who testified through an intermediary appointed by the first respondent in terms of Section 170(A) of Act 51 1977 ("the Act").

[18] After conviction and before the sentencing process, the applicant terminated the services of his erstwhile legal team and appointed a new legal team.

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[1] S v Mashinini 2012(1) SACR 604 (SCA) para 10.

[19] On the 11th of April 2011, the applicant's new legal team informed the first respondent that the transcript of the proceedings reflect that gross irregularity had resulted from the fact that the complainant testified through an intermediary despite the fact that she was older than eighteen years at that time when the intermediary was appointed.

[20] It was further argued that this gross irregularity in all probability vitiated the entire criminal proceedings against the applicant.

[21] The first respondent acknowledged that Section 170(A) of the Act did not give her the discretion to allow a witness over the age of eighteen years to testify through an intermediary and she consequently referred the matter to the KwaZulu-Natal High Court Durban for a special review in terms of Section 304(1) of the Act. On the 2nd of June 2011, Mr Justice Swain issued an order directing that the Legal Resources Centre be granted leave to file submissions on behalf of the complainant and that the parties should pay special regard to whether the evidence of the complainant was regarded inadmissible by the irregularity.

[22] Thereafter, Madam Justice D Pillay became ceased with the matter and issued a directive on the 1st of August 2011, seeking submissions on the constitutionality of Section 170 A (1) of the Act, and whether the restriction on the provision of the intermediary to a person under the age of eighteen, in this section, amounted to a rational limitation on the rights of a child complainant

who testified when she has become an adult. Submissions were accordingly made on behalf of the parties.

[23] On the 5th September 2011, Madam Justice D Pillay issued a certificate stating that she was satisfied that the proceedings were in accordance with justice.

[24] On 16 September 2011, the applicant filed an Application for Leave to Appeal against the decision of Madam Justice D Pillay.

[25] On the 26th September 2011, the first respondent sent an e-mail to the review court, urging that court to finalise the applicant's Application for Leave to Appeal speedily and urgently as the complainant deserved closure. This was, according to the applicant, done without the knowledge of the applicant at that time. It was later argued on behalf of the applicant that the first respondent's letter created the reasonable perception that the first respondent was anxious to proceed with the sentence procedure at all costs by simply ignoring the applicant's right to Appeal to the Supreme Court of Appeal.

[26] The applicant's Application for Leave to Appeal to the SCA was held on the 27th of October 2011 before the Review Court.

[27] At this hearing the complainant, who was represented by the Legal Resources Centre, was granted leave to be joined as a party in the application for Leave to Appeal.

[28] The Tshawaranang Legal Advocacy Centre to End Violence Against Women, was also granted leave to intervene in the proceedings as *amicus curae.* At this hearing, Madam Justice D Pillay, granted the applicant leave to appeal her decision to the Supreme Court of Appeal, but ordered that the Application for Leave to Appeal be suspended pending the finalisation of the sentencing proceedings in the Magistrate's Court, including any appeal from the decisions of that court.

[29] The applicant felt severely prejudiced by the Review Court's order and launched an application for Leave to Appeal to the Supreme Court of Appeal on the 21st of November 2011.

[30] In view of the review court's order, the applicant was constrained to appear before the first respondent on the 25th of November 2011, for the sentence procedure. By that time, the applicant had serious doubt as to whether the first respondent would afford him a fair trial.

[31] On the 25th of November 2011, the first respondent refused an application made on behalf of the applicant for a postponement of the sentence proceedings pending the outcome of his Application for Leave to Appeal to the Supreme Court of Appeal.

[32] The applicant alleges that the proceedings before the first respondent on 25th November 2011 were tainted by several gross irregularities which

vitiated the proceedings. She denied the applicant legal representation during the sentencing process. He was thereafter sentenced to fifteen years imprisonment by the first respondent. He was, however granted leave to appeal against both conviction and sentence.

**The Review Application**

[33] On the 27th of February 2012, the applicant filed the present review application to review and set aside the criminal proceedings under Case No. 41/806/10.

[34] In his founding affidavit supporting the review application, the applicant has alleged that this application is aimed at dealing specifically with the conduct of the first respondent during the entire criminal proceedings.

[35] The applicant is of the view that a reasonable perception exists that, generally, the first respondent became subjectively involved in the criminal proceedings and that she was in fact biased in favour of the complainant. This resulted in several gross irregularities vitiating the entire criminal proceedings and also nullifying the applicant's right to a fair trial.

[36] On the 28th February 2012, the SCA granted special leave to appeal to the Applicant.

[37] On 20 March 2012, a letter was directed to the SCA on behalf of the first respondent, advising the SCA that the first respondent regarded the order made on 28 February 2012 as annullity and with no effect.

[38] On the 23rd of August 2012, the KwaZulu-Natal High Court Pietermaritzburg struck off applicant's appeal from the roll after it was agreed by all parties including the first respondent that the matter should be heard by the SCA. The applicant's application for the review of the proceedings was, however, stayed pending the outcome of the applicant's appeal to the SCA.

[39] Applicant's appeal was set down for hearing on 29 August 2013 before the SCA. However, on the 7th of June 2013, the SCA queried the fact that the Applicant brought his appeal directly to that Court without first exhausting his right to appeal before the High Court. By agreement between the parties, the applicant's appeal was again enrolled in this Court.

[40] By order of Madam Acting Justice Marks, dated 20 March 2014, the complainant (NW) was admitted as an interested party to these proceedings and granted leave to make submissions in respect of Section 170A of the Act. It will be convenient to set out the terms of the court order:

"IT IS ORDERED THAT:

[40.1] The prayers 1 and 2 of the Notice of Motion be and are hereby refused;

[40.2] NW (the complainant) is admitted as an interested party in the review and the appeal proceedings pending under Case Numbers AR176/12 and DR111/12;

[40.3] The applicant is granted the right as an interested party to be represented in the proceedings under respective Case Numbers AR176/12 and DR 111/12 and that the complainant is granted leave to make submissions in respect of Section 170A of Act 51 of 1977, proceedings only and not on the merits.

[40.4] The applicant's representative is directed to file heads of argument on or before 7 April 2014"

[41] The first two orders which were refused by the Acting Judge, Madam Justice Marks, in the Notice of Motion were:

[41.1] Firstly, to join the complainant as the third respondent in the review and appeal proceedings, and ;

[41.2] Secondly, to admit the complainant as an *amicus curae* in review and appeal proceedings under the two cases pending.

[42] In terms of the above mentioned court order, the interested party's rights to make submissions would only be limited to Section 170 A (1) of the Act and not on the merits of the matters.

[43] On the 3rd of April 2014, a notice in terms of Rule 16A of the Rules of this Court was filed on behalf of the interested party. This notice reads as follows:

> "Kindly take notice that the following Constitutional issues are raised in the interested party's submissions in this application:

1. Whether Section 170A(1) of the Criminal Procedure Act 51 of 1977 (CPA), properly interpreted in the light of Section 39(2) of the Constitution, confers a discretion on a Presiding Officer in a criminal trial order the appointment of the intermediary in cases where the witness concerned is over the age of eighteen years.
2. In the alternative, whether Section 170A(1) of the CPA is unconstitutional and unlawful on the basis that it infringes:

   2.1 The right to equality under Section 9 of the Constitution;

   2.2 The right to human dignity under section 10 of the Constitution;

   2.3 The right to bodily and psychological integrity under Section 12(2) of the Constitution; and

   2.4 The right of access to court under Section 34 of the Constitution;

3. If Section 170A (1) of the CPA is inconsistent with the Constitution, what the appropriate remedy is."

[44] Written submissions on behalf of the interested party (the complainant) were filed on the 7th of April 2014. These mainly deal with the Constitutional validity of Section 170A (1) of the Act. These were not set out as grounds of review in the applicant's founding affidavit in support of the review application.

[45] At the commencement of the proceedings, the Court enquired from Counsel for the interested party if Rule 10A of the Rules of this Court, dealing with the joinder of the relevant Minister had been complied with. Counsel for

the interested party submitted that in terms of this Rule, it is sufficient if the Minister concerned is served with the application papers and she referred to the case of *Khosa and others vs Minister of Social Development and Others*; *Mhlaule and Others vs Minister of Social Development and Others*[2]. However, in the *Khosa* matter, the case had to be postponed for the non-joinder of the relevant Minister.

[46] The notice in terms of Rule 16A and the interested party's submissions appears to have been served on the State Attorney's office, addressed to the Minister of Justice and Constitutional Development. But the Minister was not joined as an interested party, hence the case was postponed.

[47] Before the issue of the non-joinder of the Minister concerned was dealt with, Counsel for the applicant in the review application raised a point *in limine,* on whether it was appropriate for this court to deal with a Constitutional issue that had no bearing on the resolution of the cases before it.

[48] Mr Scheltema, for the applicant in the review application, referred to the Director of Public Prosecutions, *Transvaal vs Minister of Justice and Constitutional Development and Others*[3].

[49] He submitted that the Constitutional Court in that case found that it was not appropriate for the High Court to raise and deal with the constitutionality of Sections of Acts that had no bearing on resolution of the cases before it.

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[2] 2004(6) SA 505 (CC) at para 25.
[3] 2009(2) SACR 130 CC.

[50] In upholding the point *in limine*, I indicated that as in the present case, the accused in that case had no interest in defending the constitutionality of certain provisions of the Act. In this case, the applicant had not filed any submissions dealing with the constitutionality or invalidity of the relevant section of the Act.

[51] It was correctly submitted on behalf of the applicant in the review application that the submissions made on behalf of the interested party cannot cure the problem that arose as the parties themselves are disinterested in the resolution of that matter.

[52] I pointed out that the submissions made by the interested party, although important, are irrelevant to the case before this Court.

[53] The Court declined to deal with the Constitutional validity of Section 170A of the Act. This finding coupled with the limited rights granted by Marks AJ led to the exit of Counsel for the interested party from these proceedings.

**Considerations of the question of law – Bias**

[54] Bias, in the sense of judicial bias, has been said to mean a departure from the standard of even-handed justice which the law requires from those who occupy judicial offices[4].

[4] Franklin & Others v Minister of Town and Country Planning (1947) 2 All ER 289 at 296 B-C
S v Rall 1982(1) SA 828 at 831 A – 832 A.

[55] What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be 'manifest' to all those who are concerned in the trial and its outcome, especially the accused.

[56] After carefully considering the previous decisions dealing with bias – including *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers Union and Another*[5] and other related cases, the SCA in *S v Roberts*[6] concluded that the requirements of the test thus finalised are as follows:

(a) There must be a suspicion that the administrator might – not would – be biased;

(b) The suspicion must be that of a reasonable person in the position of the person affected;

(c) The suspicion must be based on reasonable grounds;

(d) The suspicion must be one which the reasonable person would – not might – have.

**Grounds of the Review Application**

[57] On the 1st of March 2012, the second respondent filed a notice of intention to oppose the review application and in the said notice the second respondent indicated that the answering affidavit will be filed within thirty days of receipt of the Notice of Motion.

[5] 1992(3) SA 673(A)
[6] 1999(4) SA 915 (SCA) at paras 32-34

[58] However, no answering affidavit has been filed to date.

[59] The background and the grounds upon which the review application is founded are clearly set out in the founding affidavit in support of the review application.

[60] In these grounds of review, the appointment of an intermediary in terms of Section 170 (A) of the CPA has not been advanced as an independent ground of review, as the complainant was 18 years old at the time she testified.

[61] However, the applicant has alleged as a ground of review that a reasonable perception exist that, first respondent when considering the appointment of the intermediary, already accepted that the applicant had forced the complainant into some sexual activity before even hearing the complainant's evidence.

[62] This and other grounds mentioned in para 43.2 to 43.7 of the founding affidavit have not been properly substantiated by the applicant.

[63] It was submitted on behalf of the applicant that a reasonable perception exists that the first respondent became subjective in the criminal proceedings, and that she was in fact biased in favour of the complainant or the prosecution. This resulted in several gross irregularities vitiating the entire criminal proceedings and also nullifying the applicant's right to a fair trial.

[64] It was submitted that on the 22nd of September 2011, the first respondent, without the knowledge of the applicant at the time, submitted by way of the letter to the review court, that the certificate be endorsed in terms of Section 304(1) of the Criminal Procedure Act 51 of 1977 to the effect that the proceedings were in accordance with justice. This refers to an email from the first respondent sent to Judge Pillay on the 2nd of September 2011, which reads as follows:

> "Dear Judge Pillay
>
> **Re - S Hewitt**
>
> As per our telephonic conservation, the court setting was as follows: Complainant testified through an intermediary in an adjoining room to the court. Questions that were asked to her, were repeated by the intermediary almost verbatim, and in a more gentle tone of voice (as opposed to the harsh tone used by the defence advocate). She could be seen on CCTV by all parties including the accused, seated in the accused dock. I respectfully submit that although there was this irregularity, it was by no means gross or fatal, and that proceedings were still in accordance with justice, and respectfully submit, that the certificate should be endorsed to this effect in terms of section 304(1) of the Criminal Procedure Act 51 of 1977.
>
> Do not hesitate to contact me should you have any further questions …
>
> Kind regards

Dina Turner"

[65] It has been submitted that it was not the function of the first respondent to endorse the certificate as aforesaid. The first respondent was not invited to make any recommendations with regard the issuing of the said certificate.

[66] It was also submitted that the applicant had no knowledge of the telephone conversation between the first respondent and the review court referred to in the letter.

[67] In the memorandum dated 5th September 2011, under review Case No. DR 349/11, annexure SG5 to the applicant's founding affidavit, Judge Pillay states that on the 12th of August 2011, when she became aware that Swain J had permitted the parties to deliver submissions fourteen days after they had received a record, she wrote to the DPP, Karl Van der Merwe, TLAC and the LRC extending the date for the submission to 29 August 2011. She goes on to say that on the 1st of August 2011, she wrote to the learned Magistrate inviting her once again to elaborate why she had found that the alleged irregularity was not gross. Not having heard from her, she telephoned her on the 2nd of September 2011 and elicited her written response describing the physical condition under which the complainant testified. These are the circumstances under which the letter referred to above was written by the first respondent.

[68] In the same memorandum, Judge Pillay, concluded :

"Having considered the record of the proceedings in the Magistrate's Court, the submissions by the DPP on behalf of the State, by Mr Van

> der Merwe for the accused and the learned Magistrate's description of the physical arrangement for the eliciting of evidence of the complainant through an intermediary, I am satisfied that the proceedings were in accordance with justice. I accordingly have endorsed my certificate to this effect".

[69] In the light of the memorandum referred to above, in my view, this ground of review by the applicant has no substance.

[70] The other ground of review is that on the 26th of September 2011, the first respondent sent an email to the review court urging the court to finalise the applicant's application for leave to appeal speedily and urgently as the complainant deserved closure. The applicant contends that this was also done without his knowledge at the time.

[71] This email was sent to different parties involved in this matter on the 26th of September 2011 by the first respondent, it has not only been emailed to the reviewing Judge. Even the heading is addressed to all parties concerned.

[72] It would be convenient to set out this letter verbatim:

> "My submission was faxed through to the Honourable Reviewing Judge Pillay on 5 August 2011. For unknown reasons, it was never received, and was resent once I was contacted by Ms Chiara, when I was informed that the submission had not been received, so I re-sent it, together with proof of the 5 August fax.

The matter is currently still part-heard. Although the accused has been convicted, it remains for him to be sentenced. The matter is set down again in the Regional Court on 25 November 2011. I respectfully request that the defence application for leave to appeal the review decision (whole case is still part-heard) be made speedily and urgently, well before 25 November 2011, so there are no further delays in this matter reaching finalisation.

Cases of this nature usually take about three months, from plea to finalisation. The accused in this matter, pleaded on 26 October 2010 (a year ago today), and was convicted on 1 December 2010, so by the time 25 November 2011 rolls around, if will be almost a year since the date of conviction and this trial would have been proceeding for over a year.

Because of the on-going delays, in this case, I respectfully request, that the defence application for leave to appeal be dealt with as speedily and as urgently as possible, as not only does the accused have a right to a speedy trial, but the victim deserves closure. It is now in the best interests of justice, and of all the parties that this case be finalised, without any more delays.

This court has requested the probation officer's report and the correctional supervision report, and can see no reason, why the accused should not be sentenced on 25 November 2011. Both the state and defence are requested to be ready, if they have further submissions to make in mitigation or aggravation and to have their witnesses present (if any, are to be called). Thanking all parties in advance, for their anticipated co-operation.

Regards
Delia Turner
Regional Magistrate
K Court, Durban."

[73] It is also clear that this same letter was also sent to the applicant's attorney Carl Van der Merwe in this email address carivdm@law.co.za. It is therefore misleading to allege that this was done without the applicant's knowledge as alleged.

[74] It was, however, submitted on behalf of the applicant that as the letter suggested the applicant should be sentenced on the 25th of November 2011, this actually influenced the reviewing Judge to suspend the operation of the application for leave to appeal.

[75] In my view, this ground of review has no substance in that the applicant himself has alleged that the parties argued before the Reviewing Judge, prior to the suspension of the operation of the Application for Leave to Appeal.

[76] In view of the review court's order, the applicant was constrained to appear before the first respondent on the 25th of November 2011 for the sentence procedure. The applicant had some serious doubts as to whether the first respondent would afford him fair hearing. On the same day, the first respondent refused an application made on behalf of the applicant for a postponement of the sentence proceedings pending the outcome of his Application for Leave to Appeal to the Supreme Court of Appeal.

[77] The review court certified that the proceedings in the Regional Court were in accordance with Justice and granted Leave to Appeal to the SCA which was also suspended. The Court gave the applicant leave to appeal

against its decision which it suspended. It is against that decision that the applicant approached the Supreme Court of Appeal for Leave to Appeal against that particular decision of the review court.

[78] The applicant was entitled to approach the Supreme Court of Appeal to seek leave to appeal against the decision of the review court.

[79] In my view, the Magistrate committed a gross irregularity in refusing applicant the right to approach the Supreme Court of Appeal.

[80] In refusing an application for postponement pending the results of the SCA Court, the Magistrate stated the following:

> "The court is aware of all the appeal processes that are going on and the court does not know how long it will take in the SCA or what is going to happen in the future. There is even talk of this matter going to the Constitutional Court, and this will take a very long time.
>
> The court, however, feels that what this court dealt with was strictly this irregularity, was that of the age which has been found by the High Court not to be an irregularity at all and at the risk of repetition, the High Court stated:
>
> > *"Not an irregularity … for these reasons I have certified the proceedings in the Magistrates' Court as being in accordance with justice".*
>
> So the proceeding that happened in this court, the Regional Court, have been found to be in accordance with justice.
>
> The application for a further remand is refused."
> *(Record pages 274 – 275)*

**Further application for adjournment of the sentence proceedings pending review in terms of Rule 53 of the Rules of Court.**

[81] Mr Scheltema for the applicant applied to court for a further postponement to enable the applicant to take the Regional Court decision ordering that the sentence proceedings commence, on review in terms of Rule 53 of the Rules of Court..

[82] The Regional Magistrate responded as follows:

> "You can do all the applications you like after the sentencing proceeding is complete. In mitigation?"
> *(Record page 275)*

[83] It is clear from the Magistrate's utterance in response to this application that she had made up her mind even before hearing the grounds upon which the application was going to be founded.

[84] In this regard, it would be appropriate to quote verbatim from the record regarding these applications:

"Mr Scheltema: Your Worship, I have notified The Court of the intended procedure that we would like to take this on review. Now, Your Worship, … [intervention]'

Court: … [indistinct – simultaneously]

Mr Scheltema: May I then ask that this matter stand down at this point so we can approach the High Court this morning and before 2 o'clock so that we can still get to a judge in chambers?

Court: … [indisctinct]

Mr Scheltema: May I take an instruction then, Your Worship, because … [intervention]

Court: No, … [indistinct]

Mr Scheltema: May I just take an instruction as to what we are supposed to so because If we are prevented from approaching the High Court I … [intervention]

Court: You can … [indistinct – simultaneously]

Mr Scheltema: … [indistinct – simultaneously] going to respect Your Worship's order. Can you just allow me the opportunity? We respect Your Worship's ruling but I will have to take instructions. I do not think that his legal team at this point will be able to do any justice to his case because [intervention]

Court: You cannot take instructions in mitigation?

Mr Scheltema: No no, Your Worship, we have indicated we want to take Your Worship's ruling on review, which is his good right by the way in terms of Rule 53. That is being refused. Your Worship ordered that the sentence commences. We have indicated … [intervention]

Court: … [indistinct – simultaneously] the High Court.

Mr Scheltema: We then request to approach the High Court urgently. It is a Friday afternoon. We are only asking that the matter stand down until 2 o'clock so that we bring an application in the High Court on this issue. Now, this has also been refused. We also respect that. But that places us in a predicament.

Court: You can just proceed to sentence and you can make all the applications you like afterwards.

Mr Scheltema: Your Worship, …[intervention]

Court: You just … [indistinct] delaying tactic … [indistinct]

Mr Scheltema: Your Worship, approaching the High Court is aimed at the very order that Your Worship made.

Court: Are you going to instruct – are you going to … [indistinct – simultaneously]

Mr Scheltema: May I be allowed two minutes to take instructions?

Court: Right, two minutes. Take instructions.

Mr Scheltema: Thank you.

Court: Mr van der Merwe is the advocate. Can you address the Court in mitigation?

Mr Van der Merwe: No, Your Worship. My instructions are already I can place on record that we will approach the Judge in the High Court for an order preventing this Court … [intervention]

Court: On sentencing?

Mr Van der Merwe: On sentencing, yes.

Court: [indistinct]

Mr Van der Merwe: Yes. It is our good right, Your Worship. If I may address you. I am not properly robed and I am not properly before you but may I address you as I am clothed at the moment?

Court: Can I take it that the defendant is going to refuse to address the Court in mitigation?

Mr Van Der Merwe: Those are instructions because my instructions are from the accused that his right is that he wants to go on review of Your Worship's ruling, which is his good right. It has been done in this building before, so it is not a novel situation. The rules are very clear that it is a legal right that he has.

It is also very clear in the Constitution that he has that right and if we are prevented from going on review my instructions are that I will have to withdraw because I will have to leave this Court and go and approach a High Court judge in chambers which is available up until 4 o'clock and we will be back at this court with an order from the judge. It has been done in this building before, I have placed on record. It's not a not a novel approach, it is a proper legal approach to the whole situation.

The accused feels he is very aggrieved and he has a right of review and appeal. That's a constitutional right and he feels that that right is being taken away from him at this stage. So, I won't be in a position to proceed because I am instructing counsel and my instructions …[intervention].

What I want to know basically are you withdrawing as his attorney of record?

Mr Van der Merwe: I will take instructions now.

Court : … or are you going to address the Court in mitigation/

Mr Van der Merwe: Your Worship, I will take instructions now to confirm what I have placed before Court. If it is correct what I have placed before Court then we will be withdrawing and proceeding directly to the High Court and I will tell the Court and give the Court the Court notice that we are proceeding to the High Court immediately from here. Your Worship, might I turn my back on you … ?"

*(Record pages 275-279)*

[85] These applications were refused by the Magistrate and the applicant's rights to legal representation, as a result thereof Mr Scheltema and Mr Van der Merwe withdrew as legal representatives of the applicant, their mandate having been terminated by the applicant. The aspect of the refusal of legal representation is dealt with fully 'below'.

[86] Having regard to the above, I fully agree with Counsel for the applicant's submissions that:

[86.1] First respondent's refusal to have the criminal proceedings postponed on the 25th of November 2011 was grossly unfair;

[86.2] The first respondent's refusal on 25th November 2011 to allow the applicant take her decision on review to the High Court in terms of Rule 53 was grossly unfair and irregular.

[87] First respondent's refusal on the 25th of November 2011 to allow the applicant to approach the High Court for an urgent relief was grossly unfair and irregular.

[88] The first respondent's conduct in proceeding with the sentence procedure well knowing that the High Court was being approached on an urgent basis, on the 25th of November 2011 was grossly unfair and irregular.

**Denial of Legal Representation**

[89] A further ground of review is that a reasonable perception exists that the first respondent was in fact unaware that the applicant had the right to legal representation during the sentencing procedure. The applicant submits that the first respondent's remark that the applicant was not required to defend himself during the sentence procedure was wrong in law and this approach overlooked the fact that his right to a fair trial also extended to the sentence procedure.

[90] In this regard, it would also be convenient to quote verbatim from the record, on what transpired between the applicant and the first respondent in this regard.

"Court: Are you going to conduct your own defence during the sentencing process?

Accused: No, ma'am, I am not qualified enough to do that.

Court: I will help you through that. You may be excused. As per your instructions you have now terminated the mandate of your attorney and advocate and the Court is now duty bound to sentence you. You have got certain rights that the court will now explain to you. You can address the Court from there …[intervention]

Mr Van der Merwe: May I be excused?

Court: You may. You can address the Court from where you are standing and the court will assist you because you are no longer represented or you can come to the witness box and you can testify in mitigation or sentence and/or you can also call any witnesses that you wish to testify in mitigation. Do you understand that?

Accused: I understand but I am not qualified enough and I will request to get legal representation.

Court: I will help you through it because I am qualified so I can help you through it. See, that's going to put this … [indistinct]

Accused: No, ma'am, I would like to get legal representation.

Court: The Court is not going to grant that now. You just fired your legal representation. And do you want to address me in mitigation of sentence or do you want me to sentence you without any address in mitigation?

Accused: Ma'am, I am waiting for my - it's my constitutional right to have legal representation and I need legal representation. I am not qualified enough to handle it". *(Record pages 280-281)*

[93] It is clear from the extract referred to above, from the record that when the Magistrate asked the applicant as to whether he was going to conduct his

own defence during the sentencing stage, he answered in the negative, and clearly stated that he is not qualified enough to do that.

[94] The Magistrate proceeded to say that as per the applicant's instructions he has now terminated the mandate of his attorney and advocate and the court is now duty bound to sentence him. He goes on to explain his rights.

[95] Despite the applicant's insistence that he required legal representation and that he was not qualified to deal with the sentencing process, that it was his Constitutional right to have legal representation, the Magistrate proceeded with the sentencing process until the case was finalised.

[96] In my view, this constituted a serious irregularity.

[97] It is trite that in terms of subsections (1), (2) and (3) of Section 35 of the Constitution, a right to legal representation is not limited to a trial stage. The right to legal representation exists during the whole of the legal process until the last court has spoken the last word.

*See: S v Mofokeng 2004(1) SACR 349 (W) at para 17.*

[98] It is trite that the accused's right to legal representation is of course worthless if he or she is not given a reasonable opportunity to use it. When a reasonable request for time to obtain legal advice is refused, any conviction which follows will almost be invalid and set aside on appeal or review.

[99] Everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator. This common law right is now constitutionally entrenched.

[100] It has been held that a supreme approach towards litigation by Judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case, or of clients to terminate the mandate, to force the court to grant the postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is at bay, in suitable cases, by refusing the postponement. Mere withdrawal by a practitioner or, mere termination of the mandate does not, contrary to popular belief, entitle a party to a postponement as of right.

*See: Take and Save Trading CC vs Standard Bank of S.A. Ltd 2004(1) 4 SA 1 SCA at pages 4G – page 5B.*

[101] It is trite that upon the withdrawal of the accused legal representative from the case, the court should ask the accused whether he wishes to have an opportunity of instructing another legal representative; and if he does not seek an opportunity, he should be asked whether he is ready to undertake his own defence.

See: S v Kwali 1990(1) SACR 276 and
S v Manali 200(2) SACR 666 (NC) at 671 g-h.

[102] An all important consideration in assessing an application for postponement because of the withdrawal of a legal representative is whether the situation will be any better on the date postponed to. Prejudice is an important consideration.

[103] The Regional Court Magistrate in this regard, did not consider the principles applicable in applications for postponement, more especially the prejudice to be suffered by the applicant when she proceeded to sentence applicant without legal representation.

[104] In my view, the denial to legal representation at this crucial stage of the proceedings is the violation of a right to a fair trial which, in my view, constituted gross irregularity by denying the applicant legal representation.

[105] The applicant's request to a legal representation did not amount to an abuse of the legal process as the Regional Magistrate found.

[106] The whole sentencing process on the 25th of November 2011 in the absence of the applicant's legal representative resulted into a travesty of justice.

[107] When the first respondent rushed the sentencing procedure to finalise the case, even during the lunch break, she was aware that the process for an urgent relief in the High Court, was on the pipeline. Arrangements had been made and Senior Counsel had been appointed to deal with High Court

application on the 25th of November 2011 at 2pm. As the applicant has correctly pointed out, the sentence was, however, handed down during lunch break and before the High Court could entertain the urgent application brought on behalf of the applicant.

[108] The applicant was further denied an opportunity to address the court after the evidence of the witnesses E P Moodley, the Correctional Officer, and A B Nkabinde, the Correctional Supervision Officer. In this regard, the Court was referred to *S V Phillips*[7], wherein the accused's counsel was not given an opportunity of addressing the court on a Probation Officer and Correctional Officer's reports. The Court, in that *Phillips* case held that such constituted a gross irregularity that led to the setting aside of the sentence.

[109] It is clear from the record that the Magistrate failed to give the applicant an opportunity to address the court on the contents of the Probation and Correctional Officer's reports before imposing sentence. This constituted an irregularity.

[110] The right to address court at the conclusion of evidence is of such a fundamental nature as not to be departed from unless expressly waived by the parties *(See: S v Muller and others*[8]*.)*

[111] In *De Beer NO vs North – Central Local Council and South Central Local Council and Others (Umhlatuzana Civil Association intervening)*[9], the

[7] 2010(1) SACR 466
[8] *2005(2) SACR 451 at 458 a-c*

Constitutional Court said the following about a fair hearing: Component of a section 34 of the Constitution:

> *"A fair hearing before a Court is a prerequisite to an order being made against any one is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution. Courts must interpret legislation and rules of court, where it is reasonably possible to do so, in the way that would render the proceedings fair. This was cited with approval in S v Phillips, supra."*

[112] I have already indicated that, no answering affidavits were filed on behalf of the first and the second respondents in this matter. At the end of the day, the allegations made by the applicant and the grounds upon which the review is founded as set out in the founding affidavit save where they are inconsistent with the content of the record, have not been refuted by any other evidence.

[113] The irregularities alleged in the founding affidavit have been levelled against the first respondent who actually made decisions sought to be reviewed and set aside. There are no allegations of impropriety against the second respondent. Counsel for the second respondent clearly indicated that she was not acting on behalf of the first respondent but represented the second respondent in the proceedings. She had no authority whatsoever, to represent the first respondent.

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[9] 2002(1) SA 429 (CC) 2001(11) BCLR 1109 at 439 g-h

[114] In the absence of any impropriety or irregularities against the second respondent, the less is said about the second respondent's submissions, the better.

[115] Returning to the application of the reasonable suspicion test to the facts and circumstances of the instant case, there can be no doubt that the first respondent's conduct from the beginning to the end of these proceedings would have provided the reasonable person in the applicants position with reasonable grounds to think that the Court might be biased.

[116] In my judgment, and considering all the circumstances of the instant case, the applicant has succeeded in discharging the necessary onus of proving bias by the first respondent.

[117] It follows that in the instant case that there are circumstances which compel the conclusion that these irregularities taint the entire trial and that the convictions and sentences cannot be allowed to stand.

[118] Remitting this matter to the Magistrate's court for retrial would cause undue delay contrary to the interest of justice.

[119] An accused person is entitled to have his trial completed within a reasonable time. The applicant was convicted on 1 December 2010 and sentenced on 25 November 2011.

[120] I am satisfied that the irregularities referred to above are of such a nature that the applicant's constitutional rights to a fair trial were violated.

[121] The court was not addressed on the issue of costs in this application.

[123] In the result, the following order is proposed:

(a) The review application succeeds.

(b) The convictions and sentences imposed by the court *a quo* are set aside.

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**SISHI J**

_____ **I agree**

**RADEBE J**

**APPEARANCES**

| | | |
|---|---|---|
| Date of hearing | : | 15 April 2014 |
| Date of judgment | : | 19 February 2015 |
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| Counsel for 1st Respondent | : | No appearance |
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| Instructed by | : | Office of the Director of Public Prosecutions<br>**PIETERMARITZBURG** |
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