**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE LOCAL DIVISION - MTHATHA)**

**Case No: 884/2014**

***"Reportable"***

In the matter between:

**MINISTER OF POLICE** **Applicant**

and

**LINDA BLESSING VOWANA** **First Respondent**

**ZOLEKA SUSAN PONOANE** **Second Respondent**

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**JUDGMENT**

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**MALUSI *et* JOLWANA JJ:**

[1] The matter came by way of a review to set aside a judgment written by the second respondent in a trial presided over by the first respondent. The

misconduct which culminated in this review, to the best of our knowledge, is unprecedented in the annals of the judiciary in this country. We hope it will never be repeated by any judicial officer.

[2] The first respondent was a magistrate based in the Magistrates' Court for the district of Herschel. We were informed at the hearing that the first respondent *(the magistrate)* passed away before the date of hearing. The second respondent is an attorney in private practice.

[3] It is necessary to provide a background which led to the trial in the court *a quo.* An elderly woman was raped and murdered in her shack at Silindeni Administrative Area, Sterkspruit. A group of residents in the area attacked and burnt down the home of a person suspected to have committed the crimes. The police arrested six people who had allegedly been involved in the arson and mob justice. Each of the six persons later initiated a claim for damages for unlawful arrest and detention against the applicant *(the Minister).* Before the trial in the court *a quo* all six cases were consolidated into one case *(Case No 12/2009)* as per agreement amongst the parties. The six plaintiffs were all represented by the second respondent as their attorney of record.

[4] At the trial during November 2012 the Minister led the evidence of one witness and four of the plaintiffs tendered evidence. The magistrate reserved his judgment.

[5] On 26 November 2012 the magistrate prepared a draft judgment which was four pages in length. It will become clear later in this judgment the reason we referred to this document as a draft judgment. He sent the unsigned draft judgment to the second respondent per facsimile on 27 November 2012. Shortly after the second respondent received the draft judgment she discussed it telephonically with the magistrate. The respondents contend that it was during this telephone conversation that an agreement was reached between them that the second respondent would re-write the draft judgment. It was neither sent to the Minister's attorney nor was he informed of the involvement of the second respondent in re-writing the draft. The reasons for this conduct have not been stated by either of the respondents.

[6] On 30 November 2012 the second respondent sent per facsimile the judgment to the magistrate. The judgment was ten pages in length with significant amendments and additions effected to the draft. In a statement made later to the police the magistrate stated that he considered the ten page judgment the *'final, official judgment'.* Further comment on the differences between the draft and the judgment will be provided later.

[7] On 4 December 2012 the magistrate appended his signature to the judgment and sent it per facsimile to the second respondent. The Minister's

attorney collected a copy of the judgment in the court file from the Clerk of the Court. He transmitted it to the State Attorney for them to comply with the order.

[8] It appears that during April 2013 the second respondent enforced payment of the damages and costs awarded to the plaintiff as these had not been defrayed until then. It is at this stage that it came to the attention of the Minister's employees that there had been a gross irregularity or misconduct in the writing of the judgment. A criminal case on a charge of corruption was opened against the magistrate by the police in Sterkspruit. The magistrate deposed to a warning statement and answered questions from the police. The Minister launched the present review only on 1 April 2014.

[9] At the hearing Mr Matyumza, who appeared on behalf of both respondents, raised a *point in limine* that there has been an unreasonable delay in the launch of the application by the Minister. His argument relied on the contention in the answering affidavit that the judgment at issue was delivered *'during November 2012'* whereas this review application was launched only on 1 April 2014. Mr Matyumza argued that there has been a delay of more than sixteen months which has not been explained. The court was prevailed upon to dismiss the application on this point without a consideration of the merits.

[10] Mr Sishuba, who appeared on behalf of the Minister, submitted that there has only been an eleven months delay. He argued that the Minister could not

have known of the misconduct until it came to the attention of the police during April 2013. He correctly conceded that there has been no explanation of the eleven months delay. He strongly argued that the misconduct has been so egregious and unlawful that the court ought to condone the delay so as to deal with the misconduct.

[11] The Constitutional Court has held that when an applicant seeks condonation for delay, a full explanation that covers the entire period must be provided.[1] That court has also stated that the delay cannot be *'evaluated in a vacuum'.* It is necessary that all the relevant factors be considered and a determination be made whether or not there are sound reasons for overlooking the delay.[2] *Tasima* cautioned that *'A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review…'.*[3]

[12] It is perhaps appropriate that the common law principles on undue delay which were recently summarized by the full court of this division be highlighted. They are the following:

*"(a) where no time limit has been specified for the institution of review proceedings, such proceedings must be instituted within a reasonable time;*

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[1] *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC), 2008 (4) BCLR 442 (CC) at para 22.
[2] *Department of Transport v Tasima (Pty) Ltd* 2017 (1) BCLR 1 (CC) 2017 (2) SA 622 (CC) at para 159.
[3] *Tasima ibid* at para 160.

*(b) common law remedies may be withheld by a court if a party has delayed unreasonably in bringing the proceedings. The rationale for this rule is that the respondent may be prejudiced by the delay because witnesses may no longer be available, or it may no longer have recollection of the events;*

*(c) the party seeking condonation must furnish a full and reasonable explanation for the delay which covers the entire duration thereof;*

*(d) the issue as to whether or not the delay is unreasonable is a factual enquiry and is not related to the court's discretion;*

*(e) relevant factors to be taken into account in determining whether an undue delay should be condoned include the nature of the relief sought, the extent and cause of the delay, its effects on the administration of justice and other litigants, the importance of the issues to be raised in the proceedings, and the prospects of success, and;*

*(f) the potential of prejudice to the respondent occasioned by the delay is a crucial factor in determining whether a remedy should be granted or withheld.[4]"*

[13] The issues raised in the review have a wider effect surpassing the narrow interests of the parties involved. They affect the public interest fundamentally. The misconduct at issue is an affront to the foundational values of the Constitution and the basic tenets of the judiciary. The misconduct is a stain on

[4] *Member of the Executive Council for the Department of Health Eastern Cape Province v Gono* (2053/13) [2017] ZAECMHC 48 (24 November 2017) para 15.

the judiciary which requires that the court determines the merits. It is of singular importance for the integrity of the judiciary that the merits of the review are considered. It would be *'irresponsible and not in the interests of justice'* for this court not to consider the important issues to be raised on the merits. There has been no averment that the respondents would be prejudiced if the delay is condoned and we also could not find any. The applicant has good prospects of success. We are in agreement with the approach propounded by Pickering J (Lowe J concurring) when he dealt with a defective condonation application stating that:

*"Unsatisfactory as the circumstances may be, due to the nature of the issues it is preferable to deal with the merits."*[5]

The respondents' point *in limine* stands to be dismissed and condonation granted.

[14] In terms of section 165 of the Constitution[6] the judicial authority of the Republic is vested in the courts. A magistrate's court is recognized by the Constitution as a court. Section 165 of the Constitution provides:

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

[5] *Minister of Safety & Security v Jongwa & Another* 2013 (3) SA 455 (ECG); 2013 (2) SACR 197 (ECG) at para 33.
[6] Constitution of the Republic of South Africa, 1996.

*(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 functioning of the courts.*

*(4) Organs of state, through legislative and 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."*

[15] When dealing with these foundational principles the Constitutional Court has said:[7]

*"[18] The Constitution thus not only recognizes that courts are independent and impartial, but also provides important institutional protection for courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the Judiciary and the government and are enforceable by the Superior Courts, including this Court. It is in this context that the issues raised in the present matter must be decided.*

*. . .*

*[19] In De Lange v Smuts NO and Others, Ackerman J referred to the views of the Canadian Supreme Court in The Queen in Right of Canada v Beauregard, Valente v The Queen and R v Genereux on the question of what constitutes an independent and impartial court, describing them as being 'instructive'. In this*

[7] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) at page 268C-269C.

*context, he mentioned the following summary of the essence of judicial independence given by Dickson CJC in Beauregard's case:*
*'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. This core continues to be central to the principle of judicial independence.'*

*[20] This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at institutional level it requires structures to protect courts and judicial officers against external interference."*

[16] The requirement of judicial officers to not only be independent but also be seen to be independent is one of the foundational prescripts of our law and one of the very important aspects of the rule of law – a fundamental jurisprudential principle. On this constitutional principle the Constitutional Court has said:[8]

*"[31] Judicial officers must act independently and impartially in the discharge of their duties. In addition, as O'Regan J points out in De Lange v Smuts, the courts in which they hold office must exhibit institutional independence. That involves an independence in the relationship between the courts and other arms of government. It is that relationship, as laid down in the Magistrates' Act and the Magistrates' Court Act that the High Court held to be inconsistent with the Constitution.*

[8] *Van Rooyen and Others supra* at 271H-272F.

*[32] In dealing with this, the High Court adopted the test used in R v Genereux, which is whether the court or tribunal 'from the objective stand point of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence'. That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in Valentine v The Queen where Le Dain J held that:*

> *'Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operations. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.'*

*The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.*

*[33] When considering the issues of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack impartiality*

*'the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal … that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude".'*

[17] The above test which was formulated in the Canadian jurisprudence and quoted sixteen years ago by our Constitutional Court in the *Van Rooyen* case does aptly define the central issue in this matter. The test is *'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.'*

[18] Among other things, section 165 of the Constitution deals with the accountability of judicial officers. They account to all persons to whom the Constitution applies. The people are entitled to assume with confidence that the law is applied without fear, favour or prejudice and the constitutional principle of legality is painstakingly observed.

[19] The independence of the courts and judicial officers is not only enshrined in our Constitution but it is a universal principle respected by all civilized judicial systems. The Bangalore Principles of Judicial Conduct[9] identify independence, impartiality, integrity and propriety amongst the six core-values of the judiciary. These principles are intended to establish standards of ethical conduct for judges. They provide guidance to judges in the performance of their judicial duties and afford the judiciary a framework for regulating judicial conduct.

[20] The Bangalore Principles of Judicial Conduct provide that:

"*a Judge shall exercise the judicial function independently on the basis of the Judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference direct or indirect from any quarter or for any reason…. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A Judge shall ensure his or her conduct is above reproach in the view of a reasonable observer. …The behavior and conduct of a Judge must reaffirm the peoples' faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done…A Judge shall in his or her personal relations with individual members of the legal profession who practice regularly in the Judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favoritism or partiality."*

[21] The importance of the independence of the decision maker and the reasons he/she has given for the order has been stated in a number of cases,

[9] www.undoc.org>judicial group;accessed on 24/1/2019

mostly those dealing with bias. The Constitutional Court in *Stuttafords Stores*[10] dealt with a matter where the Judge had reproduced the heads of argument of counsel for the respondents save for adding thirty-two lines of his own writing. It appeared that the judgment was substantially a reproduction of the heads of argument instead of being the original reasoning of the Judge. The Constitutional Court stated as follows:

*"[10] This Court has stated that furnishing reasons in a judgment—*
*'explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.'*

*[11] While some reliance on and invocation of counsel's heads of argument may not be improper, it would have been better if the judgment had been in the judge's own words-*
*'The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn . . . are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.*
*. . .*
*The very act of having to summarize in one's own words what a witness has said, or what is stated in an affidavit or what a document says or*

[10] *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) at paras 10 and 11.

*provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case.'" (*Footnotes omitted).

[22] Meer J in *Calligeris NO*[11] was faced with facts strikingly similar to those in *Stuttafords Stores*. An award by an arbitrator was a word for word regurgitation of the claimant's heads of argument. It did not contain any independent consideration or assessment of the defendant's argument and defence which were presented to the arbitrator both orally and in writing. The learned Judge expressed herself in the following terms:

*". . . the manner in which the arbitrator abrogated his duty to write his own award, and his failure to address the trustees' arguments and defences, prevented a fair trial of the issues. In replicating the heads of argument as his award, the arbitrator did not exercise his own judgment in deciding the issues. The arbitrator's actions clearly prevented the trustees from having its case fully and fairly determined and thus falls under the purview of gross irregularity. . . His actions also permitted his decision making function to be usurped by the claimant's heads of argument in a manner subversive of his independence, and prevented the exercise of his own judgment in deciding the issues. . ."*

[23] The Supreme Court of Appeal had occasion in *Total Support Management*[12] to consider the conduct of an arbitrator who had an assistant throughout the hearing. After the hearing the assistant had conducted research and based on a discussion with the arbitrator had drawn the first draft of the award. The arbitrator later spent fifteen hours writing the award himself though

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[11] *Calligeris N.O. & Another v Parker N.O. & Another* (7937/2017) [2018] ZAWCHC 35 (22 March 2018) at para 27.

[12] *Total Support Management (Pty) Ltd & Another v Diversified Health Systems (SA) (Pty) Ltd & Another* 2002 (4) SA 661 (SCA) at para 41.

he had utilized the draft drawn by the assistant. The court expressed itself in the following apt words regarding the conduct of the arbitrator:

*"[41] When selecting an arbitrator the parties to an arbitration agree to someone in whom, by dint of (his or her) experience and ability, they can repose the necessary confidence and trust to determine their dispute. What they seek is a judgment from the person chosen. An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted,.... Because of the essentially personal nature of his appointment he should be circumspect about using the services of an assistant.... In no circumstances may the assistant be allowed to usurp the decision making function of the arbitrator or act in a manner subversive of his independence. . . ."*

[24] It is manifest that this matter impacts on section 34 of the Constitution which provides:

*"Everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

The learned Pickering J has stated that section 34 has the effect of entrenching, as a constitutional value, the right to a fair trial.[13]

[25] In *S v Le Grange*[14] where the Supreme Court of Appeal was dealing with the alleged bias of a presiding officer, the following was stated:

*"[14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly,*

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[13] *Jongwa ibid* at para 36 and the authorities cited therein.
[14] *S v Le Grange* 2009 (2) SA 434 (SCA) at 449B-D.

*but that such conduct must be 'manifest to all those who are concerned in the trial and its outcome . . . .' The right to a fair trial is now entrenched in our Constitution. . . . The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognized as lying at the heart of the right to a fair trial."*

And later in the judgment the learned Ponnan JA eruditely stated:[15]

*"[21] It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described - perhaps somewhat inexactly - as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. . . . Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."*

[26] The magistrate forwarded his draft judgment to the second respondent. He thereafter discussed the contents of his judgment with the second respondent. He agreed with her that she would write the final judgment. He engaged in the dishonorable conduct of abdicating his responsibility of writing a judgment in the matter to the second respondent. Her involvement in writing the judgment was the antithesis of impartiality. She had a vested interest in the

[15] *Le Grange ibid* at 459C-F.

outcome of the case as she represented the four plaintiffs in the matter. It would have been most surprising if the judgment she wrote had dismissed their claims!

[27] An explanation of the misconduct by the magistrate, who did not depose to an affidavit in these proceedings, can be gleaned from an annexure to the replying affidavit. This is a warning statement made by the magistrate to the police in connection with a charge of corruption relating to the impugned judgment. This is the closest one gets to hearing an undiluted version of events from the magistrate.

[28] The magistrate stated the following:

*"2. I made the judgment in the matter in question myself on 26 November 2012 and I gave it to Miss Vuthu to type. After the judgment was typed it was brought to me and I read it through. When I was satisfied by the content I then signed it (judgment) and I later faxed it to Mrs Ponoane, the attorney of the plaintiffs on 27 November 2012. I wish to add that my judgment was in favour of Mrs Ponoane or the plaintiffs.*

*3. Later on, I am not sure about the date, Mrs Ponoane phoned me to confirm receipt of the judgment. On the day Mrs Ponoane phoned me she also raised the format in which my judgment was written. She further informed me that there was a better format that she had seen from a certain advocate with whom she handled another civil matter. Mrs Ponoane and myself agreed that she was to rewrite my judgment, meaning the same judgment I already gave her, in the same manner she had seen without altering the content of my judgment.*

*4. On 30 November 2012 I received a copy of the judgment that Mrs Ponoane had re-written for me. That judgment was sent by fax to Lady*

*Grey Magistrates Court when I do magisterial work every Thursday of the week. Upon receiving the judgment from Mrs Ponoane I read it through and I was interested by the format in which it was written. When I was satisfied I signed the judgment from Mrs Ponoane.*

5. *On 04 December 2012 I caused Mr Sipamla, a senior interpreter at Sterkspruit Magistrate's Court to fax the same judgment back to Mrs Ponoane. I kept the fax that I received from Mrs Ponoane in my office for future reference.*
6. *There was no favour or benefit of any kind to anybody in the process."*

[29] The signed draft judgment never found its way to the court file. The first respondent also says he destroyed his manuscript thereof after it was typed. He did not even inform the applicant's attorney that he had asked the plaintiffs' attorney, the second respondent, that his judgment was to be re-written by the latter for whatever reason. After the judgment was re-written from initially having only four pages it more than doubled to ten pages. This is not explained. Most importantly the only signed judgment that was found in the court file is the ten page judgment which had admittedly been re-written by the second respondent.

[30] With these scandalous anomalies not having been explained we are unable to accept the innocence with which this behaviour is sought to be deceptively imbued. On the respondents' own showing it is clear that there was improper conduct on the part of the magistrate who got the second respondent involved in his work, all without the knowledge of the applicant. The behaviour of the second respondent was equally deplorable, probably driven by improper motives. According to her version it was her unsolicited suggestion that the

judgment of the first respondent be re-written so that it then '*is in keeping with modern trends of judgment writing*'.

[31] The behaviour of both respondents has not been explained on any cogent basis. It was dishonest and crafty for the magistrate to have no compunction at all at having had secret liaisons with the plaintiffs' attorney about a matter in which he presided. Similarly the second respondent who, after all, is an officer of this court, perhaps blinded by dishonesty and unprofessionalism, sees nothing wrong with what they both did. Her own craftiness and deceit is palpable and in our view has brought the attorneys' profession into disrepute. The audacity with which she sought to unashamedly explain the inexplicable even when her subterfuge had been uncovered is shocking.

[32] This brings us to the magistrate's election not to depose to an affidavit in these proceedings and instead, merely deposing to a confirmatory affidavit. In a case of this nature in respect of which a judicial officer is a litigant it is simply not enough for such a respondent to be content with merely deposing to a confirmatory affidavit.

[33] It is odd and perturbing, to put it mildly, that the magistrate saw no need to depose to an affidavit and in his own words account on how he exercised the authority that the Constitution vests in him. It needs no emphasis that a judicial officer in respect of a matter in which he presided is not an ordinary litigant when the exercise of his judicial authority is being questioned. In such an affidavit the

magistrate ought to have given a full, personal version of events in his own words. This is crucial in light of the fact that in essence, the misconduct is that he had abdicated his judicial office and thus put the judiciary as an institution into disrepute.

[34] The conduct of the magistrate is utterly unacceptable as he is not an ordinary litigant. This court was confronted with the unedifying spectacle of a magistrate deposing to a confirmatory affidavit when it
is his judgment that was at issue in the review. Instead the attorney for the plaintiffs *(second respondent)* deposed to the answering affidavit. This was deplorable conduct by the magistrate in failing to explain his scandalous abrogation of the responsibility of writing a judgment to the attorney. Our view that the magistrate had compromised his independence and impartiality was bolstered by the fact both respondents were represented by the same firm of private attorneys – the second respondent's firm - and the same Counsel.

[35] A comparison of the draft and the judgment indicates that the judgment was predominantly in the second respondent's words. She assessed the evidence of the witnesses and decided to reject the evidence of the Minister's sole witness. She further accepted the evidence of her own clients and gave reasons for doing so. The difference between the two documents is pronounced. This misconduct violated the core values of the judiciary including the truism from antiquity that *'one cannot be a judge in his own case'.*

[36] The second respondent astonishingly explained the differences between the draft and the judgment in the following terms:

*"I wish to point out that even where one compares these two annexures [the draft and the judgment], he will find that their tone and style is not the same up to their respective court order though the content of the results it's the same being in favour of the plaintiff."*

Read in the context of the affidavit as a whole, she makes the point that the re-writing was not improper as the magistrate had already indicated the order to be granted in the draft. The magistrate in his statement to the police labours under the same fallacious reasoning that only the order is important.

[37] A court order is a consequence of the assessment of the evidence and the application of the law to the facts. It is manifest from the authorities cited above that it is not only the order that is important. Equally important are the reasons which result in the order. The process of coming to a decision for a judicial officer starts with the consideration of the matter and a formulation of the reasons. It is those initial steps that inform the order to be granted. It is an act of inherent intellectual dishonesty at best and at worst down-right fraudulent to have one person decide what order to give and thereafter have another person make up the reasons for that order post *facto*.

[38] In the answering affidavit the respondents sought refuge in the version that the draft had been the magistrate's judgment. The second respondent

asserted that she only improved on the draft to show the magistrate a better way to write a judgment in the future. This version only has to be stated for it to be rejected as a fabrication. The purported signed version of the draft sent to the second respondent has never been produced nor was it placed in the court file. For all we know, it does not exist. The magistrate directly contradicted this version in his warning statement to the police. The magistrate said the judgment is the *'final, official'* one.

[39] Another aspect requires our comment. The judgment was ostensibly delivered by the magistrate in faxing it to the second respondent. The magistrate in his statement to the police further disclosed that it is an accepted procedure in the magistrates' court for a judgment to simply be placed in the court file and the parties' attorneys are expected to uplift the judgment from the court file.

[40] Section 5(1) of the Magistrates' Court Act 32 of 1944 provides that:

*"(1) Except where otherwise provided by law, the proceedings in every court in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and recorded by the presiding officer or other officer appointed to record such proceedings."* (Own emphasis).

Rule 55 of the Magistrate's court rules provides that:

*"(10) All opposed applications shall be heard in open court."* (Own emphasis).

[41] Applying the principles of interpretation enunciated in *Endumeni Municipality,*[16] both the Magistrates' Court Act and the rules require that hearing of trials and applications be conducted in open court. The word hearing in this context must be read to include the delivery of judgments and orders. It is absurd to read the Act and the rules to provide that only the tender of evidence and arguments constitute a hearing to the exclusion of delivery of judgments. Such an absurdity would also be contrary to transparency which is a thread that runs through the Constitution.

[42] It is trite that our Republic is a constitutional State. The institutions of State and the officials may act only in accordance with the powers conferred on them by law. This is the principle of legality, an incident of the rule of law[17] which is a foundational value of the Constitution. It is salutary practice that delivery of a reserved judgment must be done in open court. The High Court and the Appellate Courts routinely follow this practice. We find no reason for the magistrate's court not to apply this practice. If this practice had been applied in this case there would have been no allegation by the respondents that the draft was the actual judgment.

[43] In our strong view the only reasonable conclusion is that the conduct of the respondents was indeed an unconstitutional, disgraceful, dishonest and

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[16] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA).

[17] *Gerber v MEC of the Gauteng Provincial Government, Development Planning & Local Government* [2002] 4 ALL SA 518 (SCA), 2003 (2) SA 244 (SCA) at para 35.

unlawful abuse of the judicial authority which the Constitution vests in the courts. In our view the misconduct under review is beyond the pale. The costs are to be awarded on a punitive scale as a mark of our disapproval of the respondents' misconduct.

[44] Accordingly, the applicant must succeed in his application. In the result the following order will issue:

**44.1 The proceedings and judgment in consolidated Case No 12/2009 in the magistrates' court for the district of Herschel are reviewed and set aside.**

**44.2 The trial in the abovementioned case must be heard *de novo* before another magistrate from outside the magisterial district of Herschel.**

**44.3 This judgment is referred to the Legal Practice Council to investigate the conduct of attorney Zoleka Susan Ponoane.**

**44.4 The first and second respondents are ordered to pay the costs of this application on an attorney and client scale.**

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**T MALUSI**
**JUDGE OF THE HIGH COURT**

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**M S JOLWANA**

**JUDGE OF THE HIGH COURT**

*Appearances:*

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|---|---|
| Counsel for the Applicant: | Advocate Sishuba *instructed by* |
| | State Attorney |
| | **EAST LONDON** |
| | c/o State Attorney |
| | **MTHATHA** |
| Counsel for the Respondents: | Advocate Matyumza *instructed by* |
| | ZS Ponoane & Co. |
| | c/o Mafungo Tshaka Inc |
| Date heard: | 18 October 2018 |
| Delivered on: | 14 February 2019 |