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IN THE HIGH COURT OF SOUTH AFRICA  
TRANSVAAL PROVINCIAL DIVISION)

DATE: *17/10/2002*

CASE NUMBER: *A642/99*

IN THE MATTER BETWEEN;

THOMAS FREDERIK VAN ROOYEN                      APPELLANT

AND

MICHIEL DE KOCK NO                                      FIRST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTOR                      SECOND RESPONDENT

MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT                      THIRD RESPONDENT

JUDGMENT

BOSIELO, J

1.        This matter concerns one Mr Thomas Frederick Hermanus Van Rooyen, who was charged and convicted in the Regional Court Pretoria of the offence of housebreaking with intent to steal and theft. The appellant was convicted on 12 September 1997 and

sentenced to imprisonment for six (6) years on 21 October 1997.

2. The appellant has now launched both review and appeal] proceedings against both his conviction and sentence. As the appeal is patently out of time, the notice of appeal having been filed only on 1 February 1999, appellant filed an application for condonation. The same holds true for the review proceedings which were only launched on 26 October 1999. Although review proceedings under Rule 53 of the Uniform Rules are not subject to specific time limits, the established practice is that such proceedings must be brought within a reasonable time. Without expressing my views on the reasonableness or otherwise of the explanations tendered for the delays accompanying the appeal and review, I have decided to grant appellant the necessary condonation and to hear the matter. Suffice it to say that it is my considered view that appellant has

raised substantive constitutional questions which merit urgent attention.

3. For reasons of convenience and pragmatism I have decided to deal first with the review proceedings, as these, depending on the decision to which I may come on the facts, have the potential of bringing an end to these proceedings. A brief summary of the facts of this case is necessary for an understanding of my judgment. The appellant was arrested by a police officer inside complainant's house in the early hours [sic] of the morning of 14 April 1997. The owner of the house was not present. According to the owner of the house and one Ramaripe, the house was securely locked. Appellant had no permission to be inside that house. The appellant's co-accused was arrested a few metres away from the complainant's home, whilst in unlawful possession of complainant's property. According to an employee of the complainant (Ramaripe) he saw appellant and his co-accused inside complainant's premises

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the previous night. As against this version, the appellant's defence is that he entered the complainant's premises because he was drunk and he wanted a place where he could "pass out". As the house was open, he entered the house and "passed out". Appellant denied ever having broken into the house. Appellant also denied having removed any of the complainant's property.

4. Having evaluated the evidence in its entirety, the regional magistrate rejected the appellant's version as not being reasonably possibly true. In fact the regional magistrate found appellant to be a mendacious and untruthful witness. The regional magistrate accepted the state's version and found that appellant and his co-accused unlawfully broke into complainant's home and stole the property that was found in the possession of appellant's co-accused on 14 April 1997. The appellant was convicted of housebreaking with intent to steal and theft.

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5. The grounds of review advanced by the appellant in his Notice of Motion are as follows:

"1. Dat die eerste respondent horn wanvoorgelig het deur die uitbring van 'n skuldigbevinding van huisbraak en diefstal in die omstandighede van die saak.

2. Dat die eerste respondent nie behoorlik aangestel was as 'n regterlike amptenaar vir doeleindes van artikel 174(7) en (8) van die Grondwet vir

doeleindes van die verhoor nie."

The appellant seeks an order reviewing and *setting* aside the judgement of the regional magistrate.

6.1 It is apposite to disclose that there are three respondents in these proceedings. The first respondent is the Regional Magistrate (De Kock), the second respondent is the Director of Public Prosecutions (DPP) whilst the third respondent is

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Minister of Justice and Constitutional Development. Both first and third respondents have given notices of their intention to abide by the judgement of this court. It is therefore the second respondent alone who is vehemently opposing these proceedings.

6.2 First respondent retired as a regional magistrate on 28 February 1994. On 23 April 1997, first respondent was appointed indefinitely as an acting magistrate in terms of section 9 (4) of the Magistrate's Court Act 32 of 1944. On 27 July 1998, he signed a written contract of service, Annexure TVR 3 to the papers, with the Department. of Justice which contract was

antedated to 1 July 1997.

6.3 By a Notice filed with the Registrar of this court on 23 October 2000, the appellant gave notice of his intention to apply, at the hearing of this matter, for the following relief:

- a) That his conviction and sentence be set aside;
- b) An declaratory order that section 9(3)-(5) of the Magistrate's Court Act are unconstitutional.

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- c) Costs as against third respondent."

7.1 Mr Pieters appeared for the appellant in these proceedings whilst Miss Waite appeared for second respondent only. The principal submission made by -Mr Pieters is that the proceedings during which appellant was convicted and sentenced by first respondent (De Kock) are a nullity, alternatively that such proceedings should be declared null and void as first respondent \was not properly appointed either in terms of the Magistrate's *Court Act 32 of 1944*

or the Magistrate's Act 90 of 1993 but was appointed in terms of a special contract, Annexure TVR-S (which was attached to the papers.) Mr Pieters, argued with zeal, on appellant's behalf that according to annexure TVR-3 first respondent (De Kock) was appointed as a consultant subject to the provisions of "die Staatsdienswet, 1994, soos gewysig, en die Staatsdiensregulasies daaronder uitgevaardig, waar van toepassing" and therefore was not a judicial officer but a mere

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civil servant. This fundamental fact, so it was argued by Mr Pieters strongly militated against the salutary principles of judicial independence as contemplated by section 165(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), to an extent that it can be said that appellant "did not have a fair trial before an ordinary court"

7.2 As an alternative and based squarely on the recent judgement of the Constitutional Court in the matter of *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) (incidentally it is the same Van Rooyen) Mr Pieters, argued with vigour that, even if first

respondent was appointed in terms of section 9(4) of the Magistrate's Court Act 52 of 1944, his appointment was still improper as this section was declared unconstitutional by the Constitutional Court. With regard to section 9(4) of the Magistrate's Court Act, the learned Chaskalson CJ held as follows in *Van Rooyen and Others v The*

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*State and Others (supra)* at p329 para [248] "Section 9(4) also make provision for the appointment of a "competent person" to act "generally" or "in a particular matter" in a Regional or District Court. There may be occasions on which it will be necessary to appoint an acting magistrate to deal with a particular case. For instance where the magistrates of the division concerned are not qualified to hear the case because of perceived personal interest in the outcome. This happens on occasions where, for that reason, judges from one High Court are appointed to hear a particular case in another High Court. Section 9(4) does not, however, require that the person to be appointed to deal with a particular case be another magistrate. It requires only that the person appointed be a "competent person". Whilst there can be no objection to appointing a "competent person"<sup>1</sup> as a temporary magistrate to act generally in a particular court, to appoint a person who is not a magistrate and who does not have security of

tenure to hear a particular case would, in my view, be inconsistent with judicial

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independence. The constitutional flaws in 5 9(4) cannot readily be resolved through reading in, severance or notional severance, and the section needs to be redrafted. The appeal against the High Court's order must therefore be dismissed and the order of invalidity made concerning this section is confirmed."

8. Ms Waite, on behalf of second respondent (DPP) argued that although first respondent's appointment was in terms of a contract) annexure TVR-3, that the contract was pursuant to and therefore covered by section 9(4) of the Magistrate's Court 'Act 32 of 1944. She argued further that the fact that first respondent's appointment is subject to the Public Service Act, 1957 does not necessarily mean that his appointment was improper and/or unconstitutional as all the Magistrates appointed in terms of section 9(3) and 9(4) are subject to the Public Service Act.

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9. In order to understand this legal conundrum properly, it is imperative to have regard to

the relevant sections of the Constitution. Sections 165(1) and (2) and section 174(7) of the Constitution are relevant to the present proceedings. Section 165(1) provides that "the judicial authority of the Republic is vested in the courts! whilst section 165(2) provides that <sup>t1</sup>the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

Of even great [sic] significance is section 174(7) of the Constitution which provides that "other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice."

10. It is against this constitutional background that I have to decide whether the appointment of first respondent (De Kock) as an

acting regional magistrate, was proper or whether it conflicted with the salutary and

hallowed principle of judicial independence which is entrenched in the Constitution. The main argument presented on appellant's behalf is that the contract under which appellant was appointed, annexure TVR 3 makes appellant a public servant as opposed to a judicial officer. It was argued further that this is seriously incompatible with the clear constitutional requirements of separation of powers between the judiciary and the executive.

It is not disputed that annexure T<sup>7</sup>R 3 clearly states that first respondent is subject to 'the Public Service Act of 1957 and the regulations made thereunder. It is also not disputed that the contract TVR-S could be terminated at any time~ Based hereon, it was argued that this made first respondent subservient to the Executive, in which event, he was unable to act independently.

11 In adjudicating over the first legal argument against first respondent being appointed subject to the Public Service Act of 1957 and the regulations made thereunder, it is important to bear in mind that historically magistrates were appointed in terms of the Public Service Act. The

Hoexter Commission of Enquiry found this to be incompatible with the judicial independence of magistrates. As a result, the Hoexter Commission made strong recommendations that magistrates be taken out of the ambit of the Public Service Act and the public service.

Undoubtedly the underlying reason was to ensure and preserve the institutional independence of the magistracy.

12.1 It is common cause that first respondent was appointed in terms of and subject to the Public Service Act and the regulations made thereunder. It is furthermore common cause that his appointment, the tenure of his contract, conditions of his employment including his salary and incidental benefits tell to be determined within the scope of the Public Service Act

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and the regulations made thereunder. In my view, there can be no doubt that the appointment of first respondent directly conflicted with the core principle and notion of judicial independence enshrined in the Constitution, in particular section 174(7). In *De Lange v Smuts NO and Others* 1998 (3) SA 385 (CC) of page 514F<sub>7</sub> the learned Ackerman J, quoted with

approval from Valente's case as follows:

I think that the test for independence for purposes of section 11(d) of the Charter should be, as for impartiality, whether the tribunal might be reasonably perceived to be independent. 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 the acceptance that are essential to its effective

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operation. 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 perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective condition or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it

enjoys such conditions or guarantees.”

(My own emphasis.)

12.2 In fairness to first respondent, it was conceded that he conducted the trial wherein appellant was convicted impartially and without obvious bias. However, I pause to state that that is not the test. The real test is and remains whether the appointment of first respondent was such that it created a perception of lack of judicial independence or not. To my mind, what is really at the heart of the problem is the confidence

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which courts, operating in an open, democratic and constitutional state, must engender and inspire in the public. Public confidence in the judiciary is crucial for the credibility and legitimacy of the entire judiciary. In my view it is imperative that in every modern democratic society, particularly ours which is still relatively young and nascent, that the judiciary- as a whole must, not only claim or purport to be, but must manifestly be seen to be truly independent. I venture to say that the attributes of judicial independence and impartiality lie at the very heart of the due process of the law. They represent the true essence of

a proper judicial process. It follows logically that all attempts must therefore be made to avoid any perception or indication of dependence by the judiciary on the Executive. See *De Lange v Smuts NO and Others (supra)* (in paragraph [59] at 810 where Ackerman J pointedly stated that "judicial independence is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This

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independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by sections (2), (3) and (4) of s165 of the Constitution

12.3 In my respectful view, the appointment of first respondent falls foul of section 165(2), (3) and (4) of the Constitution. Manifestly it does not engender any individual or public confidence in the administration of justice. I have no doubt that the objective right-thinking and reasonable members of society would perceive first respondent to be a public servant who may be influenced advertently or inadvertently, perceptibly or imperceptibly by some extraneous factors to pass judgment intended to please his master for the sole purpose of safeguarding his position. To my mind this suspicion is not unreasonable when one considers

the fact that according to TVR-3 first respondent enjoyed no security of tenure. This contract was terminable by either party at any time. In fact, the

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contract TVR-3 was terminated unilaterally by the Department of Justice by a letter dated 14 December 1997. In view of the above stated facts, I feel constrained to conclude that first respondent's appointment which was clearly at the discretion of the state is patently inimical to the core constitutional values of judicial independence and impartiality.

13. Regarding the validity of first respondent's appointment under section 9(4), of the Magistrate's Court Act, 32 of 1944, I have already alluded to the essential fact that this section was declared unconstitutional by the Constitutional Court in *Van Rooyen and Others v The State and Others (supra)*, the court holding at page 329C that "an appointment to hold office at the discretion of "the State" is clearly inconsistent with the security of tenure that is an essential element of judicial independence". It follows logically that the purported appointment of first respondent under this section is adversely affected by the declaration unconstitutionality.

However it is important to

bear in mind that the order declaring section 9(4) of the Magistrate<sup>1</sup>s Court Act 32 of 1944 unconstitutional was suspended for a period of twelve (12) months from the date of the order.

14. In view of the conclusion to which I have arrived, I do not think that it is still necessary to deal with the appellant's appeal.

In the result the applicant's application for review <sup>must</sup> succeed and consequently the following orders are made:

1. An order is hereby made declaring the appointment of first respondent improper and inconsistent with the clear provisions of section 165(2) and 174(7) of the Constitution of the Republic of South Africa Act 108 of 1996.
2. That the criminal proceedings during which appellant was charged, convicted and sentenced which were presided over

by first respondent are hereby declared null and void and of no legal force or effect.

3. That the conviction and sentence imposed on the appellant, including all incidental orders made, are set aside.

4. That the second respondent is ordered to pay the costs of this application.

**L O BOSIELO**

**JUDGE OF THE HIGH COURT**

I agree,

**R D CLAASSEN**

**ACTING JUDGE OF THE HIGH COURT**