
SOUTH AFRICA / JUDGMENT

S v Mavimbela and Others (R113/19) **[2020] ZAMPMBHC 35; 2021 (1)** **SACR 145 (MM) (22 April 2020)** **[2020] ZAMPMBHC 35**

COURT

Mbombela High Court, Mpumalanga

BEFORE

B M Ngoepe, C Pretorius, M T Mankge

CASE / FILE NUMBER

R113/19

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION MBOMBELA (MAIN SEAT)

CASE NO: R113/19

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

DATE HEARD: 24/02/2020

DATE DELIVERED: 22/4/2020

In the matter between

STATE

versus

ERNEST MAVIMBELA & VARIOUS OTHER SKUKUZA MATTERS

SPECIAL REVIEW JUDGMENT

Background

and context

[1] This is a special review by a Full Bench at the instance of Judge President Legodi of the Mpumalanga Division of the High Court in terms of Section 21(1)(b) and (c), read with Section 22(1) of the Superior Courts Act 10 of 2013. Subsection 22(2) would preserve the provisions of "any other law relating to the review of proceedings in Magistrates' Courts"; these would include common law. The issues involved led our pen to a rather long judgment. We set out briefly the circumstances that gave rise to this review. The Judge President (JP) issued a Directive to the Regional Court President (RCP) of Mpumalanga Province, Ms N Engelbrecht, for the Regional Court to also sit at the Skukuza court building used by a periodical Magistrate District Court. The court building is located within the Kruger National Park. The Regional Court had been sitting there all along, also on the basis of a Directive that had been issued by Judge President Mlambo of the North and South Gauteng High Courts prior to the establishment of the Mpumalanga Division as a separate Division. At one point after the establishment of this Division, the RCP decided to no longer allow the Regional Court to sit at Skukuza. Her reason is that the court at Skukuza has not been proclaimed as a place for the holding of a court. Notwithstanding the Directives by the Judge President Legodi and repeated requests by him, the RCP made it clear that she would not oblige. Apparently on her instructions, matters that had been enrolled for hearing at the Skukuza periodical court were transferred to the court in Mhala. Things came to a head when the JP directed that those matters be transferred back to Skukuza. Two Regional Court Magistrates who were otherwise due to deal with these matters were instructed by the RCP not to heed the JP's Directives; finding themselves between a rock and a hard place, they duly asked to be excused. The RCP, who was on leave at the time, decided to come to court herself; clearly to make sure that her view prevailed over the JP's Directives. When the State made an application before the RCP for the matters to be transferred to Skukuza in line with the JP's Directives, there was no surprise with the results: the RCP turned down the applications. This was as per her ruling on 9 December 2018. Although the reasons given by some practitioners who opposed the transfer of the matters to Skukuza were about some logistics, those were not the RCP's reasons. Her real reasons were based on points of law; hence this special review. The first point is whether or not the RCP's interpretation of the various relevant Government Notices discussed below - on the basis of which interpretation she based her decision - is correct. Her contention is that both Judges President misunderstood the Notices. The second point of law is this: whereas the Judges President say they were empowered in terms of the provisions of the Superior Courts Act to issue the Directives, the RCP held, in her judgment, that the Act, properly interpreted, did not authorise them to issue the Directives

in question. The RCP has made it clear that she is not going to change her mind. The implications of her judgment therefore go beyond the specific matters that were before her. This is one of many reasons why the RCP's judgment is reviewable, for if she is wrong, a legally unsound situation would persist.

At the invitation of the JP, prompted by public interest in the matter, written submissions were received for: the Minister of Justice and Correctional Services, the Minister of Environment, Forestry and Fisheries, South African National Parks (SANParks) and the office of the Director of Public Prosecutions for the State. They were also legally represented at the hearing and all argued against the RCP's view. The first three counsel made submissions as *amici curiae*. There was also counsel for the accused persons, who argued the RCP's case as well.

The subject of the special review

[2] What exactly is the subject of the special review? Two decisions were taken by the RCP on that day in respect of two applications. The first application before her was for the matters to be postponed to a future date. All stakeholders agreed that the matters be postponed, including the RCP who had, after all, specifically come to postpone them. The postponement of matters to a future date is therefore not in issue. The second application by the state was for the matters to be postponed to Skukuza for a Regional Court to hear them there. As said already, this application was turned down by the RCP in her judgment of 9 December

2019. It is this decision that is the subject of the review, given the reasons behind it.

Why the matter is reviewable

[3] The following are only some of the reasons why the matter is reviewable:

3.1 The RCP has made it abundantly clear that she regards the Directives by the Judges President as incompetent and thus null and void and would therefore not implement them. She said she had chosen to ignore them. Her judgment therefore has important implications regarding her existing or future obligations in respect of Directives by the Judge President of the Province issued in terms of section 8(4)(c) of the Superior Courts Act. The provisions of section 21(1)(c) are apposite: the Court has the power, "in its discretion, and at the instance of any interested person (in casu the JP) to enquire into and determine any existing, future or contingent right or obligation .. ." The inquiry is therefore in respect of the RCP's obligation vis-a-vis the Directives by the Judges President. Her stance has serious implications on the power relations between the Judge President and herself, with a possible ripple effect to other provinces.

3.2 The JP has raised the issue of conflict of interest in the form of interest in the matter or bias on the part of the RCP in favour of her own view. At first, this did not appear to be an important issue. But after going into the details of the interaction between the JP and the RCP, at the end of which the latter indicated that she would not implement the JPs' Directives but her own view, it turned out to be an important and real issue. She openly held that view even as she was ascending the Bench that day to make sure her own view was implemented. The whole exercise in listening to submissions by counsel for the State to implement the JPs' Directives was therefore a charade; the RCP had long made up her mind, and openly so. Section 22(1)(b) of the Superior Courts Act therefore applies; it gives as one of the grounds for review "interest in the case, bias, malice ... on the part of the presiding Judicial officer".

3.3 The Judge President's view is that the decision of the RCP is based on a misconception of the law, and it is therefore reviewable.

3.4 If the RCP's decision is indeed wrong, it would self-perpetuate because the RCP will not allow for a Regional Court to sit at the Skukuza periodical court; every such application by the State would fall to be turned down and, if the Minister issues no further proclamation as contended for by the RCP, the impasse would continue. Indeed, it would be pointless for a state to make any such application.

3.5 As a result of the RCP's understanding of the law and the Directives, the Mpumalanga Regional Court will, not now or in the future, sit at the Skukuza court building because, after dismissing the application, she expresses herself as follows: " And we will await the Minister's proclamation of Skukuza as either the place for the holding of a court or as the seat of the regional court in regional division Mpumalanga". If the state's interpretation of the law is correct, including that of the Judges President that there is no need for any further legislation or proclamation to enable the sitting of a regional court at the Skukuza court, we will all have to wait forever for the proclamation the RCP is talking about. Why would the legislature make legislation to provide for what exists already? The current impasse would persist.

3.6 Judging by the submissions by various stakeholders, the matter is of huge public interest. On the basis of this sub-paragraph as well as 3.3, 3.4 and 3.5, the matter may also fall to be reviewed under common law.

In light of all the foregoing, we are satisfied that the matter falls to be reviewed and, as the Judge President correctly felt, by a Full Court given the importance of the legal issues involved. In the course of this judgment, we point out other issues that also make the review necessary. In any event, neither counsel for the accused persons (who also argued for the RCP) or any person who appeared before us, suggested that the matter was not properly placed for review.

Questions raised by the Judge President to the Full Court

[4] In referring the matter for review, the Judge President formulated the pertinent issues as follows:

"The full court is requested to deal with the following questions but not limited thereto:

1. Whether the Regional Court President was obliged to comply with the directives issued by Judges President Mlambo and Legodi not to close Skukuza periodical regional court?
2. If not, what is the extent of any Judge President's responsibility regarding coordination of judicial functions of the lower courts as contemplated in section 8(4)(c) of the Superior Courts Act and in what circumstances can such responsibility be carried out?
3. Put differently, what is meant by 'coordination of judicial functions ' as contemplated in section 8(4)(c) and the extent thereof?

4. Was the Regional Court President conflicted when she presided over applications for re-transfer of Skukuza matters back to Skukuza to be heard at Skukuza periodical regional court seen in the context of her prior defiance to the directives issued by the two Judges President read with the provisions of section 22(1)(b) of the Superior Courts Act?
6. Was the court correct in dismissing the applications by the prosecutor to transfer the cases herein and other Skukuza cases back to Skukuza periodical regional court also seen in the light of the fact that the applications were not opposed and the reasons for the applications as placed on record by the prosecutor?
7. Would this court sitting as a court of review be entitled to review and set aside the dismissal of the applications and substitute same with an order transferring all Skukuza cases back to Skukuza to be tried at periodical regional court there?" We can immediately dispose of this question by answering in the negative. We cannot unscramble the omelette; the legal consequences would be far reaching, and an uncertain legal situation would ensue in relation to the cases concerned, some of which might have been disposed of by now.

It will be noted that the JP's questions speak of the "Skukuza periodical regional court." The reference is to the Regional Court criminal proceedings that used to be held in the court building at Skukuza until the RCP decided otherwise. Thus, when for example the JP's first question asks whether the RCP is obliged "not to close the Skukuza periodical court" the actual question is whether the RCP is entitled to refuse to send a Regional Court to sit at the Skukuza court building, as per the Directives by the Judges President. In his affidavit on behalf of SANParks, Dr Xolani Nicholas Funda, General Manager of Area Integrity Management at SANParks headquarters in Pretoria, says the court building and the land on which it stands belong to the Department of Public Works; it does not belong to SANParks.

Questions by the Judge President to the Regional Court President and her responses

- [5] The JP directed certain questions to the RCP as the person whose decision was the subject of review. We furnish each of the RCP's response immediate to its respective question answered. We state the responses briefly, with no need to go into the now known arguments by the RCP. This is because the responses have a common basis, namely, her interpretation of the applicable laws and her view on the validity of the Directives by the two Judges President. When putting the questions, the JP informed the RCP that the proceedings were "to be laid before a full court of three judges. For this purpose you are hereby requested to respond and comment on the following questions:

"1 Is it conceded that Skukuza periodical court is proclaimed to be used also by regional court seen in the context of paragraph

- (d) of Government Gazette N.o 24091 of 27 February 2004 read with Government Gazette N.o 39961 of 29 April 2016 in terms of which Skukuza is appointed as a place for the holding of a periodical court?"

Answer: "/ do not concede that Skukuza court is proclaimed to be used also by the Regional Court' (Own underlining). It is clear from this emphasis that the RCP is of the view that the Skukuza court building, used for the holding of a periodical court cannot also be used by the regional court?

"2. Is it conceded that it was not necessary for the Minister to specify in the 29 April 2016 Government Gazette No. 39961 that Skukuza periodical court can also be used by the Regional Court seen in the light of the wording of paragraph

(d) of 27 February 2004 and paragraph (c) of 29 April 2016 Government Gazettes?"

Answer : Not surprisingly, given the RCP interpretation of the law, the answer is in the negative.

"3. Is it in dispute that the Minister in the 29 April 2016 Government Gazette intended both the regional and district courts to use Skukuza as a place for the holding of a periodical (court) and try cases for offences committed for the purpose of trying matters arising from within the park? And if so, what is the legal basis for the dispute?"

Answer: Consistent with her views, the RCP's answer was in the affirmative. We now know the legal basis of her answer.

"4. Is it still the contention of the Regional Court President that she together with the two regional court magistrates before whom Skukuza matters are laid, are not obliged to comply with the directives issued on 20 February 2017, 18 September 2019, 9 October 2019 and 29 November 2019 marked B, C, D and E referred to above? And if so,

5. What is the legislative contention for such a conclusion regard being had to the 'coordination of Judicial functions ' by any Judge President as contemplated in section 8(4)(c) of Superior Courts Act?"

This aspect is dealt with later when we consider the validity of the Directives. The RCP's answer is that the Directives had no legal effect as they were against the law.

"6. As contemplated in section 22(1)(b) of the Superior Courts Act can it be said the (conduct of the) Regional Court President in presiding over the applications for transfer of the cases back to Skukuza was proper and that the Regional Court President did not show 'interest in the cause, bias or malice' regard being had to the fact that the cases were transferred from Skukuza to Mhala in defiance by the Regional Court President of the directives issued by the two Judges President pursuant to the provisions of section 8(4)(c) of the Superior Courts Act?" The answer was that the RCP acted properly, as her Magistrates were "scared to go to court."

"7. Has the court in these proceedings not committed irregularity as contemplated in section 22(1)(c) of the Superior Courts Act by finding that Skukuza is not appointed as a place for the holding of periodical regional court and try cases for offences committed within the park?"

Answer: The answer is, as can be expected, in the negative

"8. The Skukuza regional court has been operating since 2017 on the basis of Judge President Mlambo's directive acting in terms of section 8(4)(c) supported by the PEEC- Mpumalanga which he chaired. In August, October and November 2019 you decided to close down the Skukuza Regional Court. Is it the Regional Court President's view that she was entitled to unilaterally ignore the directive aforesaid and to take the decision as she did? If so, what is the legal basis to do so without in consultation with the Judge President"

Answer : On the basis of the RCP's view that the Directives by Judges President are in conflict with the law, the answer is in the affirmative.

It will be noticed that the questions raised above are also in line with the issues raised by the JP in his referral of the matter for review; likewise, the RCP's answers rhyme with her reasons in the judgment dismissing the State's application for the transfer of the matters to Skukuza. In responding, the RCP went beyond the questions asked by the JP and dealt with issues of logistics, inaccessibility

of the court, transparency, small size of the courtroom etc, all of which are contested by other stakeholders. But it is important to note that in any case those were not the reasons for the dismissal of the application for the transfer of the matters to Skukuza or for not paying heed to the JP's Directives. Her judgment makes it clear that the reasons were how she understood the law, both with regard to the Magistrates' Courts Act, relevant Government Notices and the powers of the Judges President in terms of the Superior Courts Act. This point is important to note because we are not dealing here with a case where the RCP decision was the product of an exercise of discretion. On the contrary, her attitude was that she was bound by law to turn down the application and also to disregard the Directives, which she regarded as being null and void. There is one inaccurate statement made by the RCP in her responses; she says: " The complainant (SanParks) owns the premises". As already mentioned, the court building, although situate within the park, belongs to the Department of Public Works like all other courts in the country.

Governments Notices Published in Government Gazettes relied upon by the Regional Court President

[6] In turning down the application for the transfer of matters to the Skukuza court the RCP relied on her interpretation of Government Notices published in two Government Gazettes, and issued in terms of the Magistrates' Courts Act. Firstly, Government Notice NO. 219 published in Government Gazette No 26091 of 27 February 2004. The second one was Government Notice NO. 492 published in Government Gazette No 39961 of 29 April 2016. Before dealing with the above Notices in detail reference should be made to other gazetted Notices but which did not impact on the legal position created by the above two. Government Notice 3 published in the 18 January 2016 Government Gazette No 39603: it varied Government Notice N.o. 219 published in the 27 February 2004 Gazette referred to above, as well as Government Notice N.o 670 published in the 29 July 2010 Government Gazette. The variations had no bearing on the status of the Skukuza as a periodical district

court and are therefore not relevant to this case.

Government Notice No 219: Government Gazette No 24091 of 27 February 2004 :

[7] The heading speaks for itself: "Abolition of Regional Divisions: Creation of New Regional Divisions and Establishment of Regional Courts". This was to be with effect from 1 April 2004. As it can be seen, this Notice dealt with Regional Courts. The relevant part of the

Notice is that White River was mentioned as one of the Magisterial District Courts within the Mpumalanga Province, and then Skukuza,

being a periodical court under White River at the time. For the purpose of this review, it is of no consequence. By this Government

Notice, the Minister abolished all the then existing Regional Divisions, created and established and named new Regional Courts, and established a court for each sub-regional division as per items (a)(b) and (c) respectively of the Notice. Of importance to the matter before us, is that in item (d) of the Notice, the Minister

appointed "as places for the holding of a court for each regional division all the seats of magistracy for those districts mentioned on the Schedule under each item as well as all the centres for those districts mentioned which have, in terms of section 2(1) of the Magistrates Court Act ... been appointed as places for the holding of a court " (Own underlining). It is no exaggeration to say that the resolution of this matter turns on a proper understanding of the

underlined portions This is because the fundamental argument by the RCP is that the Skukuza court has never been designated as a place where a regional court can sit; in fact it is her view that the law does not allow for the regional court to sit there. Properly Understood her argument is that the Skukuza court has not been "appointed as a place for the holding of a court." The RCP misconceives the law:

7.1 The RCP is correct to say that the above Gazette (actually, Notice) was about the establishment of new regional divisions. She is however wrong to say that it had nothing to do with the District Courts. District courts are implicated by the parts underlined above which expressly provide that a Regional Court may sit at anyone of the places, and at all centres, declared as a place for the holding of a court; that is, any court building; this would include the court at Skukuza. The idea was obvious and made sense: a Regional Court would use the same facilities used by a District Court, such as the building etc., thereby obviating the need to build parallel buildings or facilities specifically for a regional court to sit, particularly where it does so only periodically.

7.2 The RCP seems to accept that a Regional Court can hear cases at for example the Bushbuckridge District Court and Mhala, but not Skukuza. In so thinking, she misses the point that the Notice appoints places "as well as all the centres for those districts mentioned which have ... been appointed as places for the holding of a court". (Own underlining) One may not, for example, hold a Regional Court hearing at a clinic building or a school, because they have not been appointed as places "for the holding of a court." The question is therefore whether the place

or building where the Skukuza periodical court sits is one of the "centres which have...been appointed as places for the holding of a court'. The answer is yes, since 1963, at that time falling under the White River district.

Government Notice No 492: Government Gazette No 39961 of 29 April 2016

[8] Heading: "Creation of Magisterial Districts and Establishment of District Courts in respect of the Mpumalanga Province." As the heading indicates, this Notice provided for inter alia, the creation of magisterial districts and declared that they be known by the names mentioned in each case; for the detachment of portions of some magisterial districts and for the adjustment of the jurisdiction of detached courts into sub-districts and the naming of the sub-districts. New magisterial districts were thereby established to align them with municipal districts. Significantly, items (h) and (i), respectively, provide for the Minister to "appoint, within the districts and sub- districts places for the holding of a court or a periodical court" and for the Minister to "declare that the periodical courts...shall have jurisdiction over the same area of jurisdiction of the district courts...." Zooming onto the matter before us, the following was thus the legal situation created:

8.1 Magisterial District created: Bushbuckridge.

8.2 Name of Magisterial Court established: Bushbuckridge.

8.3 Bushbuckridge made Seat of the District Court.

8.4 Mhala created as a Sub-district/Detached Court.

8.5 Skukuza made a periodical court within Mhala. The exact relevant part of the Notice being its Column G, reads: "PLACES FOR THE HOLDING OF A COURT AND PERIODICAL COURTS: Acomhoek (place for the holding of a court) Skukuza (place for the holding of a periodical court n (Own underlining)

Two points are clear. Firstly, Skukuza is now made to fall under Bushbuckridge magisterial district, and no longer White River; it retains its status as a periodical court. Secondly, as long ago as 1963 it was given the status of being one of "a l/ the courts for those districts mentioned which have, in terms of ... The Magistrates Courts Act.. been appointed as places for the holding of a court." It was never stripped of its status as a place "for the holding of a court' ; indeed, the above Notice affirms its place in the administration of justice.

[9] In her judgment, the RCP says the following: " Column G also dealt with further places for the holding of court and Acomhoek and Mkhuhlu were proclaimed as places for the holding of court. Skukuza was proclaimed a periodical court." So far so good; Skukuza was indeed proclaimed a periodical court. But then she immediately proceeds as follows: "Skukuzais not proclaimed a place for the holding of a court. As far as the periodical court is concerned it is by its very nature not a full service court and is used by the district court to channel matters to the place for the holding of a court." (Own underlining}. With respect to the RCP, the emphasis discloses two misconceptions on her part.

9.1 Firstly, she misses the point that within the context of the Notices, reference to the Skukuza "court" or to any other place for the holding of a "court", is of course to the building itself. The building, property of the Department of Public Works, having been appointed a place for the holding of a Magistrate Court (read judicial proceedings), can on one occasion house such periodical proceedings when presided over by a District Magistrate and on another occasion, house regional court judicial proceedings presided over by a Regional Court Magistrate as had been the case all along until the RCP changed her mind. In section 1 of the Superior Courts Act 10 of 2013, Magistrates' Court "means any court established in terms of section 2 of the Magistrates' Courts Act, 1944." For its part the Magistrates' Court Act defines in section 1, a "court" to mean "a magistrate's court for any district or for any regional division". When the Minister appoints a place for the holding of a court in terms of section 2 of the Magistrates' Courts Act, the place would therefore be competent to host a regional court as well; this is because the cumulative effect of the above definitions of a court is to include

both the District court and the Regional court. As the Skukuza courtroom has been appointed "a place for the holding of a court", it can therefore host either.

9.2 The problem with the RCP is that she labours under a wrong impression that a "periodical court" is not a court. She gives her own definition of what a periodical court is, namely, that it is merely a vehicle for the channelling of cases, and, on the basis of that definition, emasculates a periodical court of its trial jurisdiction and its status as a court, and then says it is not a court. There is no basis for such a drastic definition of a periodical court. Many a legal practitioner would attest to participating in full criminal trials before a periodical court. It is not only judicial proceedings presided over by a Judge, a Regional Court Magistrate or a District Court Magistrate that are a court; the proceedings in a periodical court are also a court. To show that these proceedings are indeed judicial proceedings and therefore a "court", one may be convicted of contempt of court for disrespecting or disturbing them. Indeed, like any other court, a periodical court can issue a warrant of arrest. The RCP is therefore wrong to view a periodical court as being anything but a court. The RCP also speaks of the need for Skukuza being proclaimed a "seat of the Regional Court"; indeed she earlier said: "Skukuza is not a proclaimed seat for the regional court". Well, neither is Acornhoek, Mkhuhlu, Mhala or even Bushbuckridge itself for that matter; this is because Mbombela has already been proclaimed as the "seat" of the Regional Court for Mpumalanga. The concept "seat" means where the Regional Court is headquartered, as opposed to merely "sitting"; that is, "sit" to hear cases. There is a conceptual difference. The wait for Skukuza to be "proclaimed seat for the regional court" is therefore doomed.

[10] In dismissing the application for the postponement and transfer of the matters back to Skukuza, the Regional Court President's decision was based on a wrong understanding of the law and was therefore the result of a material misdirection on a point of law. This finding does not, however, close the matter; we must still deal with the issue of the validity of the Directives by the Judges President, given the RCP's firm view that they are null and void and would therefore not implement them.

Directives by Judges President

[11] These Directives instructed that the Regional Court sat at the Skukuza court building to hear criminal cases there. For some time, while Mpumalanga still fell under the jurisdiction of Judge President Mlambo, the RCP, albeit under protest, as she says, obliged. After the establishment of the Mpumalanga High Court, Judge President Legodi continued with the same Directives. This time the RCP decided not to oblige, despite several requests by the JP. She later confirmed, in so many words, that she would not comply with the Directives as they were null and void. Here too her argument was based on her interpretation of the law. If the Directives are binding, and the Skukuza court building has

been duly appointed a place for the holding of a court, the Regional Court President was obliged to transfer the matters to Skukuza, and also to deploy Regional Court Magistrates there to try cases.

Judge President Mlambo's Directive

[12] On 20 February 2017 Judge President Mlambo issued the following directive to a regional magistrate who was at the time serving under the RCP, and the RCP herself. It is important to quote the directive:

"The PEEC in Mpumalanga, which I chair has resolved that Skukuza Regional Court matters must be heard in the Skukuza Magistrates Court. I supported that decision in my position as the Judge President responsible for Mpumalanga in terms of my prerogative as found in Section 8(4)(c) of the Superior Courts Act, Act 10 of 2013. This being the case the Prosecution will not transfer any matters to Mhala as appears to be the decision taken by the RCP. This status quo will remain until the PEEC adopts a different resolution supported by myself as the responsible Judge President. The RCP's decision was also taken by her without discussion with myself. In any event the Prosecution is dominus litis in Criminal trials and for that reason matters must be heard where the Prosecution enrolls them."

The instructions that the Regional Court should hear cases at the Skukuza court, as opposed to transferring them to Mhala, could not have been clearer. Following this, the Regional Court sat at the Skukuza court until the RCP's recent change of mind.

Directives by Judge President Legodi AND his interaction with the Regional Court President

[13] On 18 September 2019 Judge President Legodi issued an email to the RCP and the Director of Public Prosecutions. This email was important in at least four respects.

13.1 It shows, in its first paragraph, that the JP had been trying to get hold of the RCP to resolve the matter, and that he was still amenable to doing so.

13.2 The second paragraph directs specifically that in the meantime, the regional court would continue to sit at the Skukuza court

13.3 The source of the Judge President's authority to issue the directive namely, Section 8(4)(c) of the Superior Courts Act, is indicated in the third paragraph: "The directive above is given in that capacity as envisaged in section 8(4)(c)..."

13.4 For guidance to the RCP, the email also refers to the relevant legal framework within which the issue was to be considered (the various government notices for example).

The email was therefore a very substantive and clear guidance to the RCP.

[14] On 9 October 2019 Judge President Legodi issued yet another email to the RCP and others, including the Director of Public Prosecutions. It appears that the RCP was still on leave at the time; there was an Acting Regional Court President, Ms Joubert. The email confirms a meeting the JP had had with Ms Joubert, the Acting Deputy Director of Public Prosecutions and others. We state some of the important points from the email.

14.1 The JP states: "The Acting Regional Court President (Mrs Joubert) has conveyed that as in this morning before the meeting; you gave her firm instructions to close the Skukuza Regional Court and that all matters that are still on the Skukuza Court roll must be transferred to Thulamahashe on Monday 14 October 2019" (Own underlining)

14.2 The JP again makes the point that the issue of the Regional Court sitting at Skukuza would still be discussed with other stakeholders; timeframes were given for submissions, including from the RCP herself.

14.3 The email states once more that in the meantime, the regional court should continue to sit at Skukuza. This time, for emphasis, the point is made in capital letters right in the middle of the email: "IN THE MEANTIME THE STATUS QUO SHALL REMAIN." This would not have missed anybody's attention. The Judge President went further and pleaded his cause with the RCP: "The Regional Court President is therefore humbly requested to ensure that there is a judicial officer to deal with matters in the Skukuza Regional Court pending the discussion alluded to in the preceding paragraphs". The humble request was turned down. The email went further: "During the meeting, we were informed that Ms Lesufi (regional magistrate) will be at Skukuza Regional Court on Monday 14th to transfer all more than twenty matters to Thulamahashe as per your instructions" (own underlining). The JP called for that not to happen. We now know that his humble plea was turned down by the RCP.

[15] It appears that the Judge President had a meeting with the RCP on 29 November 2019 where the matter was discussed; because on that day the JP sent the following email to the RCP: "I refer to the meeting which just ended this afternoon and wish to confirm that despite my previous directives not to close the Skukuza Regional Court you continued to defy my instructions or directives as conveyed to you in my email sent to you on 9 October 2019. This I did despite your insistence that you will not comply" (own underlining) - we will return to the significance of the underlined part when we discuss the RCP's conduct. It also appears from this email that although the earlier email of 9 October 2019 was issued to the RCP while she was away, the instructions contained therein were "repeated" to the RCP. The 29

November 2019 email also cautioned that the RCP would be reported to the Magistrates Commission-she was, however, still not moved.

- [16] In the 29 November 2019 email, referred to in the preceding paragraph, the JP informed the RCP that he had given instructions to two Regional Magistrates serving under her, namely Ms Theron and Ms Lesufi to comply with his directive of 9 October 2019 (not to remove matters from the Skukuza court). In conclusion, the JP states: "You are therefore requested not to give them contrary instructions or threaten them with victimization" as that would be added to complaints to the Magistrates Commission; and finally: "My door is still open for one to one discussions." This offer was spurned.
- [17] On 9 December 2019 the Judge President wrote a letter to the RCP about a meeting he had had that day with the Director of Public Prosecutions and his other colleague at which they "discussed the issue of proclamation for Skukuza court in particular whether the regional court is authorised to sit at Skukuza periodical court." The JP referred to the various Government Gazettes. It is clear that the people the JP had a meeting with did not agree with the RCP that the Skukuza court needed any further proclamation to be able to host a Regional Court sitting. He said he hoped the RCP would therefore shift from her position, and concluded: "I also once more, hereby request for a meeting to be held at my office on Friday this week, that is 13 December 2019 at 10h00. We can resolve this issue and there may not be a need to continue with the impasse". The meeting did in fact take place, as confirmed by the RCP's letter of 23 December 2019 to the JP. The letter indicated that some documents had been given by the JP to the RCP. Her letter concludes: "The content of the attachment handed to me by your good self does not change my mind The option of holding sessions at another seat will be explored in the near future. You will be notified in due course". (Own underlining) . In other words, Skukuza was out and the JP should just wait until further notice from her. Of course, we now know that the day on which the JP wrote the letter requesting a meeting with her (9 December
- 2018) is the very day on which the RCP turned down the application to transfer the matters to Skukuza. The RCP's response in her 23 December 2019 letter was also significant in two other respects: firstly, it showed that the JP's efforts, including humble requests as well as reference to various Government Gazettes, had come to naught. Secondly, it showed that in future the Regional Court would not sit at Skukuza, notwithstanding the Judge President's directives, until the RCP notified the Judge President otherwise "in due course." In one of her responses to the questions raised by the JP, the RCP says: "It is my contention, as the Regional Court President, that the regional court magistrates are not obliged to comply with the directives, in that the directives are in contravention of the 2004 gazette and the Superior Courts Act." The RCP threw down the gauntlet! We have already shown that she could not rely on any of the Notices, or on any other legal instrument for that matter. The implications of her stance are that, even if she were to accept, as she must, that the court at Skukuza has been duly appointed for a Regional Court sitting as we have found, she might still refuse to implement the JP's Directives. It therefore behoves us to adjudicate the issue

of their validity.

The validity and authority of the Directives by Judges President Mlambo and Legodi

- [18] It is common cause that the Directives were issued in terms of Section 8 of the Superior Courts Act 10 of 2013, Chapter 3 thereof. In dealing with the powers of the Heads of Courts, it is important to understand the objective or at least part of the objective of Chapter 3 of the Act in particular section 8. As will be shown later there are certain powers reserved for the head of a court be it a Judge President or a Magistrate. These powers are in respect of the management of the judicial functions of a court. But the authority to co-ordinate "judicial functions of all Magistrates Courts" in a province lies with the Judge President of the Division. The heading to the Chapter is "Governance and administration..." and the sub-head reads: "Judicial management of judicial functions. In order for those objectives to be achieved in an orderly manner, the section creates levels of hierarchy within the Judiciary. At the top is the Chief Justice and - leaving out for now the Supreme Court of Appeal and other Superior Courts - followed by the provincial heads (Judge President) of the various Provincial Divisions of the High Court, and then the heads of Magistrates Courts (Regional Court Presidents and Chief Magistrates). When the Department of Justice and Correctional Services exited the management of the courts, this judicial authority replaced it to ensure that there is a common systematic well co-ordinated judicial management. At the provincial level, it is the responsibility of the Judge President to achieve this. This brings us to section 8(4)(c), in terms of which Judge President Mlambo and Legodi issued the Directives.
- [19] In addition to other duties, Section 8(4)(c) states that "the Judge President of a Division is also responsible for the co-ordination of the judicial functions of all Magistrates Courts falling within the jurisdiction of that Division (Own underlining). At the time Judge President Mlambo issued his Directives, he had jurisdiction over the Mpumalanga Province and of course its Regional Court. Judge President Legodi is now the Judge President of the recently established Mpumalanga Division of the High court and, as he explained to the RCP, issued his Directives in that capacity. All a Judge President does is to co-ordinate the judicial functions of the courts. In a province such as Gauteng there may be more than one Regional Court and thus more than one RCP, let alone the plethora of Districts Magistrates Courts with a number of Chief Magistrates or Senior Magistrates as heads of those courts Gauteng alone has five
- (5) Chief Magistrates. It is the responsibility of the Judge President of a province to make sure that the various courts do not pull in different directions with regard to their judicial functioning; he/she must co-ordinate them. It is not possible for us to give an exhaustive list of specific things the JP may or may not do; each Directive will be looked at carefully to see if the JP remains within the perimeters of their competence. Where for example a Chief Magistrate refuses to avail empty courtrooms to a Regional Court the Regional Court President may approach the Judge President for intervention. As long as a particular building has been declared a place for the holding of a Magistrate's Court, it would then be within the competence of a Judge President to issue a directive that a Regional Court should

be allowed to sit there. This would be for a variety of reasons, such as the optimal utilization of resources, enhancement of the credibility of the Judiciary, making justice accessible etc. Of course the JP would ordinarily consult with other stakeholders such as the Director of Public Prosecutions, the Chief Magistrate and/or the Regional Court President - as JP Legodi did almost endlessly with RCP Engelbrecht. We underlined above the word "co-ordination" to make the point that it is a wide concept in terms of what may be done. Secondly, the word presupposes the existence of different entities whose activities need to be, broadly stated, brought together. A co-ordinator needs some authority to do that. Of course, the Judge President may not, in co-ordinating the judicial functions of magistrates courts, impinge on the powers reserved in terms of section 8(4)(b) for Magistrates who are heads of courts, such as Regional Court Presidents.

Powers of a Head of Court (eg Judge President, Regional Court President. Chief Magistrate)

[20] In resisting the Judges' President Directives, the RCP relies on section 8(4)(b) read

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with sub-section (6). Sub-section(4)(b) reads : The management of the judicial functions of each court is the responsibility of the head of that court:.". (Own underlining) Earlier on we underlined the phrase "co-ordination of the judicial functions" in relation to a Judge President, to make the point that the word "co- ordinate" contemplates engagement with many entities, or with different activities of an entity. The Oxford Dictionary meaning of the word "co-ordinate" is to "bring the different elements of (a complex activity or organization) into a harmonious or efficient relationship" for the wider benefit. On the other hand, the dictionary meaning of the word "manage" is "being in charge of, or run". Therefore, in contrast to co-ordinating, managing, particularly in the context used, contemplates the mere running of one entity, being for example a particular court such as a provincial Regional Court. We find support in the wording of the subsections: Regarding the JP, he/she is responsible for co-ordinating the judicial functions of "all Magistrates' Courts" in his/her Division, which must mean for the greater good or benefit. (Own underlining). On the other hand, the management of the judicial functions of "each court" (own underlining; i.e. one entity) is for the head of "that" particular court only (own underlining). Again, it is not possible to give an exhaustive list of the head's competencies; but examples would be the allocation of cases, rotating judicial officers, deciding which judicial officer goes out on a periodical or circuit court, etc. Broadly put, in terms of section 8(4)(b) the head of court such as Judge President, Regional Court President or Chief Magistrate deals directly with the individual judicial officers of that particular court while, under section 8(4)(c), a Judge President cannot do so with the Magistrates of any court; that would be the preserve of the Regional Court President or the Chief Magistrate . The Judge President would be limited to doing so with the judges of his/ her own court. We also get a cue from sub-section 8(6) which sets out some of the judicial functions reserved for a head of court such as a Regional Court President or Chief Magistrate:

20. 1 (a) determination of sittings of the specific courts". For example the RCP is entitled to determine a calendar for the sessions during which the court sits

20.2 "(b) assignment of judicial officers to sittings". This gives the RCP the power to decide which judicial officer goes to which court.

20.3 "(c) assignment of cases and other judicial duties to judicial officers", this provision speaks for itself.

20.4 "determination of the sitting schedules and places of sittings for judicial officers". An RCP is empowered to draw up a schedule of sittings at various places also showing which judicial officer would go where.

The rest of the sub-section deals with management procedures within a particular court. As it can be seen, no provision is made for the RCP to decide that a Regional Court may not be held at a particular place. That aspect is governed by the relevant legislation, such as the Magistrates' Court Act, read with the various Notices discussed

above.

[21] The ultimate question is therefore whether the Directives issued by Judges President Mlambo and Legodi served to co-ordinate the judicial functions of the courts. They aimed to have the courtroom at Skukuza used not only by the periodical District Magistrate Court, but also by the Regional Court periodically. The circumstances under which the Directives were issued and their objectives are important in determining whether the JPs remained within the parameters of their authority.

21.1 Circumstances: In his 20 February 2017 (the first Directive), JP Mlamboin dedicated that the Directive was a resolution of the "PEEC" which he chaired, and said that he supported it in his capacity as the Judge President in terms of section 8(4)(c). In her affidavit dated 26 January 2020 filed of record, the RCP tells us what that body is: "The Provincial Efficiency Enhancement Committee ('the PEEC) is a provincial offshoot from the National Efficiency Enhancement Committee (the NEEC'). It is a Forum established at the initiative of the Chief (J)ustice.....It has the objective of improving service delivery". (Own underlining)

21.2 Apart from the obvious objective to maximize the utilization of the courtroom between the two courts, JP Legodi, in his letter of 9 December 2019, stated that the objective was to try offences committed within the park and that that should also "be seen as bringing courts closer to the people particularly victims of crimes within the areas where offences are committed with about 98% of witnesses in each case coming from within the park". (Own underlining); counsel for the State made the same point to the RCP during the hearing. The RCP was therefore at all times aware of the circumstances under which the Directives were issued, and their objectives.

21.3 The underlined part speaks directly to the issue of the enhancement of service delivery, which, as the RCP says in her own affidavit, is the very objective of the PEE.

[22] For the reasons stated above, we find that the Directives amount to the co-ordination of judicial functions within the meaning of section 8(4)(c) of the Superior Courts Act 10 of 2013, are valid and binding on Regional Court President Engelbrecht, and she is obliged to

implement them. In the event of a concurrency of competencies, the Directives by a Judge President would prevail by virtue of the hierarchy within the Judiciary as an institution in terms of Chapter 3 of the Act in particular section a. We also hold that, for the reasons advanced earlier, the RCP should not have heard the State's application herself for the transfer of the matters to the Skukuza court. Imagine JP Legodi in turn also sitting as a member of this reviewing panel!

Regional Court President Engelbrecht's Conduct

[23] In looking at the conduct of RCP Engelbrecht we are not doing so with reference to her judgment, because it is accepted that any judicial officer may be wrong, especially On a point of law. Rather, we are looking at her conduct throughout the time JP Legodi was interacting with her administratively, in an attempt to resolve the matter It is our view that she acted improperly. Our view is based on not only the emails and other letters from the JP, but also on her own correspondence. All these form part of the record before us, in black and white; there can therefore be no dispute as to who said what, and when. We should also contextualize our concerns in advance. For any institution to function properly there must be different levels of

authority; the Judiciary is no exception. It seems it is necessary to make this point clear to RCP Engelbrecht: within the Judiciary and with regard to judicial functions, the Judge President of a province is senior to all magistrates including the Regional Court President and the Chief Magistrate in the province; apart from any other considerations, that much is clear from the provisions of Chapter 3, section 8 of the Superior Courts Act. Judge President Legodi is her senior; what is said below must therefore be viewed in that context. Furthermore, as we point out below, her conduct had actual and potential harmful consequences to the administration of justice.

23.1 The RCP failed to act reasonably under the circumstances. Despite the contrary strong views held by the two Judges President and the Director of Public Prosecutions, the RCP failed to pay any regard to the possibility that her understanding of the law might indeed be wrong. She should have, under the circumstances, factored that possibility in and made allowance for that, especially as the Regional Court had all along been sitting at Skukuza anyway.

23 2 She flatly refused to implement a suggestion by the JP that the court continued to sit while the matter was being resolved, without explaining as to what irreversible harm would be done, bearing in mind that the court had been sitting there for years anyway. In doing so, she failed to display the openness of mind a person in her position should have.

23.3 One is entitled to disagree with one's seniors; but this should be done professionally and with appropriate respect for one's seniors. Seniors are respected not so much for their own sake as it is in the interests of an institution and the cause it serves. Secondly, it is one thing not to hold respect but quite another to actually show the disrespect openly and publicly as the RCP did. Her conduct showed disrespect for the Judge President in his capacity as the head of the Judiciary of the Province. She persisted in defying the JP despite his numerous pleas and humble requests.

She also persisted in defying the JP despite an email from the JP informing her that the Director of Public Publications also disagreed with her. We have set out above numerous emails, some pleading and others instructing, all of which were in vain. She dismissed the JP, and told him that he would hear from her. Numerous meetings at the instance of the JP, including the one held on the very day on which she brushed aside the Directives with her judgment, failed to move her, not even to temporarily oblige pending the resolution of the matter. It is indeed hard to see any good faith on her part. This was unbecoming of her as Regional Court President.

23.4 Throughout, the RCP used language that was inappropriate, disrespectful and unnecessarily belligerent towards the JP and therefore unbecoming, the emails speak for themselves. At one time she dismissed the JPs' plea to let the court sit at Skukuza, and said "You will hear from me" (meaning that she would be the one to decide as to whether the court would sit at Skukuz, a and not the JP); and went so far as to

say to the JP that she "chose to ignore the directives..." (Own underlining) ; there is not even a modicum of respect.

23. 5 We point out again that the RCP was entitled to disagree with the J P. The problem is that instead of acting as she did, she could and should have resorted to other avenues; such as referring the matter to the Magistrates Commission for guidance as the Chief Magistrate in her province had the good sense to do (see paragraph 25 below), or used structures within the Judiciary. This point is important to make because the JP was trying to have the matter resolved administratively. There is also no indication that she sought legal advice from the State Law Adviser or anywhere else.

[24] As said earlier, the difficulty with RCP Engelbrecht's conduct described above is that it resulted in actual, and potential, harm to the administration of justice in the province.

24.1 The interests of justice always demand that a high premium be placed on the co-operation between a Judge President and a Regional Court President in a province. The RCP's conduct had the potential to poison and render unworkable the relationship between the JP and herself; that would make the JP's task of carrying out his responsibilities in terms of section 8(4)(c) of the Superior Courts Act difficult. As they say, when two elephants fight, it is the poor grass that suffers; that grass is the interests of justice in the province. The RCP acted in disregard of this. If the relationship were still functional at all, as we pray it is, it would only be thanks to the extraordinary humility and patience of the JP and certainly not due to any effort on the part of the RCP.

24.2 The conflict between the JP and the RCP, and, importantly the manner in which the RCP was handling it, became known to other stakeholders in the province such as the Director of Public Prosecutions and community structures with whom the JP had to consult, such as members of the PEEC. The dignity and status of the Office of the Judge President of the Mpumalanga Division of the High Court, and by extension the Court itself, was undermined in the eyes of those stakeholders by the manner in which the RCP interacted with the JP; at least it had the potential to do so. It is, for example, before the JP, the incumbent of that office, that the Premier and

members of the Provincial Legislature take their oath of office, with appropriate deference; and it is before the occupant of that office that new judges take an oath of office. It is an office that should not be disrespected; least of all by a senior judicial officer such as the RCP who ought to know better. After all, in one of his emails, JP Legodi specifically pointed out to the RCP that he was acting in terms of section 8(4)(c) and thus in his official capacity as the head of the provincial Judiciary. A minimum amount of respect should have been shown by the RCP.

24.3 The RCP's conduct negatively impacted directly on the administration of justice. Two Regional Magistrates (Ms Theron and Ms Lesufi), found themselves between a rock and a hard place: they did not know whether to go to court and refuse to transfer the matters to the Skukuza court as instructed by the RCP, or to comply with the JP's instructions to transfer the matters there. She placed them in an awkward situation in relation to the judicial head of the province. They had to opt out, which was when the RCP decided to preside herself. Her decision to hear the application herself raised the question whether it was appropriate for her to do so instead of getting a judicial officer from another jurisdiction.

Alleged logistical and other challenges at the Skukuza Court

[25] In passing, we mention that some complaints were raised by the attorneys who opposed the state's application for the transfer of the matters to the Skukuza court for trial, such as the small size of the court, inconvenience to the public, and the lack of effective air-conditioning system. The JP is not quite correct to say that the attorneys did not oppose the State's application. It was only one who, for his own convenience, opposed the transfer; two did not oppose. The third one only opposed the transfer of a particular case as he would not be available; otherwise he had no objection. A number of issues raised by them were for their own convenience. We say we refer to these alleged challenges in passing because, as said earlier, they were not the reason for the RCP's decision to turn down the application. Anyway the claims were largely disputed by Ms Anna

Susan Venter, one of the regional court prosecutors, in her affidavit; for example, she says the air conditioning is working and

that the courtroom is actually larger than the one at Mhala where the court currently sits. She also points out some positive points about holding the court at Skukuza, and says any challenges that are there are being addressed. In his affidavit, Dr Xolani Nicholus Funda also goes into details as to how the problems are being addressed, including the fact that some additions to the courtroom commenced in January this year and are due for completion in May.

[26] In her responses to questions directed at her by the JP for the review, the RCP attached a letter from the Chief Magistrate, Mbombela, dated 21 November

2017. In it, the Chief Magistrate, on the basis of her own misinterpretation of the Constitution, incorrectly questions the validity of the establishment of the Skukuza court. At the same time though, she too raises similar concerns regarding the Skukuza court building, such as its small space. Commendably the Chief Magistrate took the concerns to the Magistrates

Commission for advice, but ominously added: "failing which I propose to withdraw service by district court magistrate from Skukuza effectively from 31st May 2018." It is a startling statement. Magistrates are not employees of the Chief Magistrate; they do not serve the public at the latter's pleasure, but are appointed by the Minister upon the recommendation of the Magistrates

Commission to serve at the courts, including the Skukuza court. Apparently, both the RCP and the Chief magistrate view serving at that court as an inconvenience. It might be so; but let us remind ourselves, if a reminder is needed, that periodical courts are not necessarily there to suite the convenience of judicial officers or practitioners, but to reach people out there. There is a disturbing statement in Ms Venter's affidavit that the RCP stopped the regional court from sitting at Skukuza as a result of request by the attorneys. We also hope that, unlike the RCP, the Chief Magistrate has not made good her threat. The Minister has, as we have seen, duly appointed the court building at Skukuza as a place for the holding of a court; it is not the business of the two judicial officers to go about shutting down courts; doing so could amount to obstructing the course or administration of justice.

Conclusion

[27] We therefore hold the view that the Regional Court President's decision taken on 9 December 2019 refusing the state's application for the transfer of the several matters to the Skukuza court building was invalid; however, for practical reasons, the decision by the Regional Court President will not be set aside and our Declaratory Order will not operate retrospectively. We cannot unscramble the omelette. We also do not deem it necessary to respond to each question or issue raised by the Judge President in his referral but prefer instead to cut the proverbial Gordian knot.

[28] The following Declaratory Order is therefore made:

- (a) The court building at Skukuza has been duly appointed as a place for the holding of a court including the holding of Regional Court proceedings for the hearing of criminal trials, in terms of the Magistrates Court Act 32 of 1944, read with Government Notice NO. 219 published in the 27 January 2004 Government Gazette together with Government Notice No. 492 published in the 29 April 2016 Government Gazette.
- (b) The Directives issued by Judge President Mlambo and Judge President Legodi in terms of Section 8(4)(c) of the Superior Courts Act 10 of 2013 are valid and binding on Regional Court President Engelbrecht or her successor.
- (c) The Decision by Regional Court President Engelbrecht dismissing the State's application for the transfer of the matters to the Skukuza court and their trial thereat is hereby declared invalid; this Declaratory Order does not, however, operate retrospectively.
- (d) The Registrar is directed to send a copy of this judgment to the Magistrates' Commission.

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