THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 432/2024

In the matter between:

SEAN DAVID TODD **APPELLANT**

and

MAGISTRATE: CLANWILLIAM **FIRST RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE **SECOND RESPONDENT**

KENDAL VICTOR (NÉE WAMPACH) **THIRD RESPONDENT**

Neutral citation: *Todd v Magistrate: Clanwilliam and Others* (432/2024) [2025] ZASCA 185 (04 December 2025)

Coram: MOKGOHLOA, SMITH and UNTERHALTER JJA, HENNEY and KUBUSHI AJJA

Heard: 11 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 04 December 2025.

Summary: Inquest Proceedings – Inquests Act 58 of 1959 – whether the magistrate misdirected himself by not holding a public inquest and hearing oral evidence – whether the principle of legality is the source of the high court's powers of review in respect of inquest proceedings in the constitutional era – whether the inquest

proceedings were vitiated by material irregularities – whether the matter should be remitted for a fresh inquest.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Lekhuleni and Allie JJ, sitting as court of review of an inquest finding):

1 The appeal is upheld with no order as to costs.

2 The order of the Western Cape Division of the High Court, Cape Town, is set aside and replaced with the following order:

'1 The proceedings of the inquest magistrate are set aside.

2 The finding of the magistrate in terms of s 16(2)*(d)* of the Inquest Act 58 of 1959 is set aside.'

3 The matter is remitted back to the Magistrates' Court, Clanwilliam, for the appointment of another judicial officer within 30 days of this order to hold a public inquest and to hear oral evidence regarding the circumstances surrounding the death of the deceased expeditiously and without any undue delay.

JUDGMENT

Henney AJA (Mokgohloa, Smith and Unterhalter JJA and Kubushi AJA concurring)

Introduction

[1] The appeal before us concerns the finding of the first respondent, the magistrate sitting in the Magistrates' Court for the Magisterial District of Clanwilliam in the Western Cape (the magistrate), in terms of s 16(2)*(d)* of the Inquests Act 58 of 1959 (the Act). The magistrate found that the death of Ms Theresa Wampach-Todd (the deceased) was brought about by an act or omission *prima facie* involving or amounting to an offence on the part of the appellant, her husband, Mr Sean David Todd (Mr Todd). The magistrate made this finding without hearing any oral evidence.

[2] On 31 October 2019, Mr Todd took the decision of the magistrate on review to the Western Cape Division of the High Court, Cape Town (the high court). He sought an order reviewing and setting aside the magistrate's finding, and have it substituted with a finding that it had not been established that the death of the deceased was brought about by any act or omission *prima facie* involving or amounting to an offence by any person. The high court dismissed the application on 23 February 2022 and refused leave to appeal on 19 August 2022. The appeal comes before us with the leave of this Court. The proceedings before the high court and before this Court were not opposed by any party. The magistrate as well as the second respondent, the Western Cape Director of Public Prosecutions (the DPP), elected to abide the decision of the high court.

[3] The first issue for consideration in this appeal is whether the magistrate acted in accordance with the law by not holding the inquest in public and without the hearing of oral evidence. If not, whether this amounted to a misdirection that vitiates the inquest proceedings. An allied issue is the source of the high court's power to review inquest proceedings, since the adoption of the Constitution.

Background

[4] The finding of the magistrate arises from the circumstances under which the deceased met her death on 14 January 2016, in the Cederberg Mountains in the district of Clanwilliam, Western Cape. On that day, the deceased fell to her death from a cliff. When this tragedy occurred, the deceased and Mr Todd were together. Mr Todd is thus the only person with first-hand knowledge as to what occurred. Pursuant to the incident and after a police investigation, the DPP, on 22 June 2017, requested the magistrate, in terms of s 8(1) of the Act to hold a public inquest by hearing oral evidence.

[5] On 1 November 2018, the magistrate decided not to hold a public inquest and hear oral evidence, but to hold the inquest based on the statements contained in the police docket provided to him. This was despite the request made by the DPP in terms of s 8(1), and a decision of a previous magistrate, that the inquest be conducted by the hearing of oral evidence. After having perused all statements in the docket, the magistrate set the inquest down for 24 January 2019 and informed all interested

parties of the date. On 24 January 2019, the only interested parties present were Mr Todd, with his legal representatives, and the third respondent, Mrs Kendal Victor (Mrs Victor), the daughter of the deceased from a previous marriage. The DPP was also represented by a prosecutor.

[6] During the proceedings, Mrs Victor was permitted to make oral submissions, without taking the oath. In her address, she made several damaging allegations against Mr Todd. She claimed that there were many unanswered questions surrounding the death of the deceased that needed to be resolved. Specifically, she questioned Mr Todd's version that the deceased had died after falling from the edge of the cliff and stated that he had a lot of explaining to do. She implored the magistrate to hear the oral testimony of various witnesses, contending that their evidence and statements, taken together, would paint a more accurate picture of what had happened on that day. She requested that a public inquest be held to hold Mr Todd accountable by requiring him to testify under oath.

[7] Counsel for Mr Todd submitted in his argument to the magistrate that while there may be suspicions as to what happened, there was no evidence implicating Mr Todd. He submitted that there was simply not enough evidence to conclude that there was a *prima facie* case for Mr Todd to be held criminally responsible for the death of the deceased. He submitted that, despite a request from Mrs Victor for oral evidence to be heard, the only witness who had knowledge of what transpired was Mr Todd. He submitted further that Mr Todd's version was not going to differ from what the magistrate had in his statement, which, he submitted is a reasonable explanation of the circumstances surrounding the death of the deceased. As such, his version must simply be accepted by the family. He further implored the magistrate to make a finding that no person could be held criminally responsible for the death of the deceased.

[8] On 27 May 2019, the magistrate, without hearing any oral evidence and purely based on statements presented to him during the inquest proceedings, made his findings in terms s 16(2)[1] of the Act. The magistrate found that the deceased's death

[1] This section provides as follows:
'16(2) The judicial officer holding an inquest shall record a finding upon the inquest-
(a) as to the identity of the deceased person;

was brought about by an act or omission of Mr Todd, *prima facie* involving or amounting to an offence. The magistrate based his decision on the 'available circumstantial evidence' surrounding the incident, which is the following:

(a) Mr Todds's actions after the incident, which the magistrate stated, 'does not speak of a person who basically witnessed his wife, with whom his marriage was sublime (sic), fall[ing]to her death'.

(b) Mr Todd's conduct, immediately after the incident, was not reconcilable with that of a person who was keen to seek emergency help for the deceased.

(c) Mr Todd was exceptionally calm, not emotional and did not show any signs of shock and panic.

(d) The evidence of the investigating officer, who alleged that Mr Todd tried to tamper with the scene by walking on the path while she was busy taking photographs of it.

(e) The evidence of the paramedic and a mountain rescue expert who expressed an opinion that based on the injuries sustained by the deceased, it was not indicative of a person that had merely slipped and fell down the edge of a cliff.

(f) The injuries sustained by the deceased were not reconcilable with the version that she had slipped.

[9] In light of the above, the magistrate concluded that the fall was probably due to the use of some force which caused the deceased not to have multiple injuries and that she must have been pushed for her to miss the step-like terrain on her way down to where she landed. The magistrate further stated that if it is accepted that the deceased was still alive after the fall, Mr Todd needed to explain the lack of any effort on his part to save her life.

The high court's powers of review

[10] Before dealing with the issue of whether the magistrate was correct to deal with the inquest without hearing of oral evidence, and its legal consequences, it is necessary first to deal with the issue of the legal foundation and the source of the high

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(b) as to the cause or likely cause of death;
(c) as to the date of the death;
(d) as to whether the death was brough about by any act or omission involving or amounting to an offence on the part of any person.'

court's powers of review in respect of inquest proceedings. It has been accepted that the high court has the power to review inquest proceedings. The Act is a remnant of pre-constitutional era legislation, in terms of which applications to review inquest proceedings were regularly dealt with by our courts. In this regard it was accepted that the high court enjoyed inherent powers to review inquest proceedings. This power of review has its origins in what Innes CJ, more than a century ago, stated in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*:[2]

'. . . Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court, . . .'

[11] This Court in the constitutional era affirmed this position. In *Hirt & Carter and Another v Arntsen NO and Others*[3] *(Hirt & Carter),* this Court dealt with an appeal against the unsuccessful review of inquest findings of the high court. It stated that 'the review was brought in terms of Uniform Rule 53 under common law and/or read with the Promotion of Administrative Justice Act.' It indicated that 'the application for review may be treated as one in terms of the common law'. The Court did not consider the impact of the Constitution on a high court's common law review powers. A matter I shall discuss later in this judgment. The powers of review referred to by Innes CJ, were those that a high court enjoyed at common law.

[12] Hoexter and Penfold[4] are of the view that this description of the power of review after 1994 is 'hopelessly inadequate, as in this era entirely new sources of review jurisdiction [were] created by the Constitution' and by the enactment of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[5] According to the authors the two gateways of review described by Innes CJ, are only available in limited instances. In the pre-constitutional era, the findings of an inquest could only be reviewed in terms of the common law. Inquest proceedings presided over by a judicial officer under the

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[2] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115 (*Johannesburg Consolidated*).
[3] *Hirt & Carter (Pty) Ltd v Arntsen NO and Others* [2021] ZASCA 85 para 3 (*Hirt & Carter*).
[4] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) (*Hoexter and Penfold*).
[5] Ibid at 146 to 147.

Act were regarded as the exercise of a public power susceptible to common law judicial review.

[13] The powers that a judicial officer exercises in terms of the Act are not administrative in nature, and also not purely judicial powers. They are both investigative and adjudicative in nature. Inquest proceedings are not court proceedings and the magistrate presiding over an inquest does not sit as a magistrate exercising powers in terms of the Magistrates' Court Act 32 of 1944 (the MCA).[6] A magistrates' court is defined in s 1 of the MCA as 'a court for any district or for any regional division' which is established in terms of s 2 of the MCA. A magistrates' court is established by the Minister of Justice in terms of s 2*(f)*(i) and (ii) for the purposes of 'trial of persons accused of committing an offence' and for the purposes of 'adjudicating civil disputes'. Magistrates' courts for a regional division are established for a similar purpose.[7] Although in terms of s 8(2) of the Act, 'the laws governing proceedings in criminal trials shall *mutatis mutandis* apply to securing the attendance of witnesses at an inquest, their examination, and the recording of evidence given by them', an inquest is not a criminal proceeding. And even though the findings made by a judicial officer in terms of s 16(2)*(d)* of the Act may lead to a criminal prosecution the inquest and its outcome are not a criminal proceeding.

[14] Inquest proceedings before a judicial officer are therefore not proceedings of a court of law. It is also for this reason that the findings in inquest proceedings cannot be reviewed in terms of s 22 of the Superior Courts Act 10 of 2013, which gives high courts the power to review the proceedings of a magistrates' court based on the review grounds mentioned in that section. In *Hirt & Carter*, this Court was of the view that for present purposes it was not necessary to deal with the question whether inquest proceedings can be reviewed in terms of s 22 of the Superior Courts Act. It referred to *Padi and Another v Botha NO*[8] where it was held that the predecessor of s 22 was not

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[6] Magistrates' Court Act 32 of 1944 (the MCA).
[7] Section 2(1)*(g)*(i) and (ii) of the MCA provides that the Minister may:
'establish a court for any regional division for the purposes of-
(i) the trial of persons accused of committing any offence, which shall have increased jurisdiction contemplated in sections 89 and 92; and
(ii) adjudicating civil disputes contemplated in section 29 (1) and 29 (1B)'.
[8] *Padi en 'n Ander v Botha NO en Andere* 1996 (3*)* SA 732 (W).

applicable in relation to inquests and that a review of inquests was in terms of common law.

[15] In *Marais NO v Tilley* (*Marais*),[9] this Court characterised an inquest as 'An official investigation into a death which occurred otherwise than from natural causes, which has not been the subject to a criminal prosecution'.[10] It is therefore not a formal court hearing, which follows an adversarial process. It is a formal investigative process undertaken by a judicial officer, fulfilling a public duty in terms of the Act. It is akin to a judicial commission of enquiry, the function of which is to investigate matters of public concern.[11] The findings made by a judicial officer in inquest proceedings are not binding. The DPP is not obliged to institute criminal proceedings based on a finding made in terms of s 16(2)*(d)* of the Act.

[16] The Constitution sets out a different framework for judicial review. These are administrative reviews in terms of PAJA, statutory reviews, and reviews based on the principle of legality in terms of s 2 of the Constitution. As mentioned, a judicial officer does not exercise administrative powers in inquest proceedings. Consequently, such proceedings do not fall under administrative action in terms of s 33 of the Constitution, and PAJA does not find application. The statutory review pathway is also not of application because the Act does not provide for the review of inquest proceedings. The Act only provides for 'automatic reviews' in terms s 18(1) of the Act, in certain limited circumstances provided for in s 16(1) of the Act. In terms of s 16(1) of the Act, where the body of a person concerned is alleged to have been destroyed, or where no body has been found or recovered, and the evidence prove a finding beyond reasonable doubt that a death has occurred, the judicial officer holding such inquest shall record a finding accordingly. Upon a recording of such finding, the judicial officer concerned shall submit the record of such inquest to any provincial or local division of the high court having jurisdiction in the area wherein the inquest was held for a review by a court or a judge thereof. Normally such 'automatic review' is placed before a judge in chambers. The findings thereof, if confirmed on such review, have the same effect

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[9] *Marais NO v Tilley* 1990 (2) SA 899 (A) (*Marias*).
[10] Ibid at 901D-F.
[11] *Memela v Chairperson of the State Capture Commission and Others* [2025] ZAGPPHC 816 (14 August 2025) para 23.

as if it were an order granted by such court or judge that the death of the deceased person concerned is presumed in accordance with such finding. Besides this, there are no other provisions in the Act that provide for the review of inquest proceedings.

[17] In *Pharmaceuticals Manufacturers Association of SA: In Ex Parte President of the Republic of South Africa*,[12] the Constitutional Court held that:

'. . .The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the Courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. . .'[13] The question which then arises is whether common law reviews, as formulated in *Johannesburg Consolidated*, remains a source of the high court's power to review the decision of a judicial officer in inquest proceedings, in a post constitutional era. It seems that since the high court's common law review powers been subsumed by the Constitution, the power of a court to review inquest proceedings, that cannot be characterised for the reasons stated as administrative action are similar to that of judicial commissions of inquiry, is to be found in the constitutional principle of legality, enshrined in terms of s 1*(c)* of the Constitution It is therefore my view that the source and legal foundation upon which an inquest may be reviewed by a high court is founded on the principle of legality.

[18] In *Corruption Watch and Another v The Arms Procurement Commission and Others*,[14] in the context of a review of the findings of judicial commission of inquiry, the court with reference to the Canadian decision of *Canada (Attorney General) v Canada*

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[12] *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*).
[13] Ibid at para 33.
[14] *Corruption Watch and Another v The Arms Procurement Commission and Others* [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (*Corruption Watch*) paras 9-11.

Commission of Inquiry on the Blood System in Canada[15] and *Keeting v Morris and Others; Leck v Morris and others*,[16] held that the principles set out in these judgments are applicable to the South African legal system as it is sourced in the values of our Constitution. In this regard, the court referred to *Pharmaceuticals Manufacturers*[17] to locate the source of a review court's powers of commissions of inquiry headed by a judicial officer, with regard to the overall exercise of public power. The Constitutional Court said the following:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary . . .. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries, must at least comply with this requirement. . ..'[18]

[19] The findings of a judicial officer in inquest proceedings are not the findings of a court of law, it is nonetheless an exercise of a public power. Such power must be exercised within the confines of the Constitution and the law, and, in particular, the provisions of the Act that regulate the proceedings held by a judicial officer when conducting an inquest. In *S v Mabena*,[19] in the context where the high court had not given the prosecutor in a criminal case a 'proper opportunity to be heard, subjected the prosecutor to a relentless barrage of hectoring questions, which created a distinct impression of hostility and impartiality to the prosecution'. This Court said the following about the exercise of a court's powers in terms of the Constitution and the rule of law: '. . .As in the case of other State authority, the exercise of judicial authority otherwise that in accordance with the law is simply invalid.'

I must hasten to add, such a review remedy would only be available in certain exceptional cases, where no provision is made in the law for the impugned decision.

The decision of the magistrate not to hold a public inquest

[20] Mr Todd submitted that the magistrate misdirected himself by failing to hold a public inquest and hear oral evidence. He submitted that, if regard is had to the proper

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[15] *Canada (Attorney General) v Canada Commission of Inquiry on the Blood System in Canada* (1997) 3 SCR 440 para 57.
[16] *Keeting v Morris and Others; Leck v Morris and Others* [2005] QSC 243 paras 36 and 158.
[17] Ibid para 85.
[18] *Corruption Watch* fn 20 above para 10.
[19] *S v Mabena and Another* [2007] 2 All SA 137 (SCA); 2007 (1) SACR 482 (SCA) para 2.

interpretation of s 8(1), the fact that his legal representative abided the decision of the magistrate to dispense with the hearing of oral evidence, should not have any effect on the question whether the magistrate was legally competent to make such a decision. He further submitted that the DPP's 'recommendation' to hear oral evidence is nothing more than a 'request' as required in terms of the Act, which the magistrate was obliged to comply with. Therefore, the high court having found that the magistrate should not have proceeded with the inquest without hearing oral evidence, should have reviewed and set aside the inquest proceedings.

[21] Mr Todd submitted that he was prejudiced by the magistrate's findings. If the magistrate rejected any part of his affidavit or it was unclear or lacked particularity, he was obliged to call him for oral evidence. Mr Todd asserted further that he should at least have been afforded the opportunity to present his version orally and answer questions. He submitted that it was fair and reasonable for him to assume that his version, presented under oath, was not at risk of being rejected in order for an adverse finding to be made against him. Whilst the high court made a finding that he had an obligation to explain the circumstances surrounding his wife's death, it should have found that the magistrate erred in not calling for the hearing of oral evidence. In this regard, he submitted that the high court erred in finding that he did not suffer any prejudice, when such prejudice was apparent from the magistrate's reasons for his adverse findings.

[22] It would be appropriate at this stage to restate the principles underlying the holding of inquests in terms of the Act. In *Marais*,[20] this Court held that the default position regarding the holding of an inquest to determine the circumstances surrounding the death of a person and whether any person was responsible for such death, 'requires a full and fair investigation'. This 'presupposes the adherence to basic principles of procedure' which 'in the normal course would require the hearing *of viva voce* evidence'. The hearing of evidence in inquest proceedings, which is open and in public, is in accordance with the basic tenet of our law that justice must be seen to be done. This is no less a truism in the holding of inquests than it is in the hearing of trials. This default position was firmly laid down in terms of s 10(1) of the Act that states:

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[20] *Marias* in fn 12 above at 902A-C.

'. . .Unless the giving of oral evidence is dispensed with under this act or the judicial officer concerned directs otherwise under subsection (2), an inquest shall be held in public.'

In *Marais* this Court held that the main or dominant effect of s 10 is the injunction that an inquest shall be held in public. Furthermore, the requirement that an inquest shall be held in public clearly implies that oral testimony must be heard. This Court was of the view that it would be purposeless to hold an inquest in public if only affidavits are to be admitted and no *viva voce* evidence is heard.

[23] In terms of s 13(1) of the Act, a judicial officer may forego the hearing of oral evidence and determine the inquest on the affidavits filed of record. This is a discretion conferred upon the magistrate, which must be exercised not only judicially, but in conformity with the purpose of the Act as encompassed in s 10. This can only be done by paying due regard to the general rule that there must be a public inquest with oral evidence. This rule may only be departed from where exceptional circumstances exist which entitle the judicial officer to accept all the affidavits submitted as proof of the facts stated therein. There are no hard and fast rules, and the circumstances of each case would depend on whether such cause of action should be followed. In *Marais*,[21] it was further stated that:

'Broadly speaking a departure from the general rule would only be justified where the affidavits before the inquest magistrate do not raise relevant dispute of fact and, furthermore, are conclusive in respect of all relevant matters; or they strongly point to the debt under consideration not having been caused by an act or omission constituting an offence on the part of some person, eg where it is a clear case of suicide or accidental death.'

[24] It is not clear on what basis the magistrate dispensed with the hearing of oral evidence. First, there are no reasons on record for this decision, despite having been requested by the DPP in terms of the proviso contained in s 8(1), to hold a public inquest and hear oral evidence. Second, no reasons have been provided, why he decided to depart from the decision of the previous magistrate, who was initially seized with the inquest, that the inquest should be in public and that oral evidence should be heard. Lastly, the hearing of oral evidence was also requested by a person with a

[21] Ibid 903D-F.

substantial and peculiar interest in the proceedings, namely the daughter of the deceased, Mrs Victor.

[25] Section 8(1) of the Act states:

'. . .The judicial officer who is to hold or holding an inquest may, of his own accord or at the request of any person who has a substantial interest and peculiar interest in the issue of the inquest, cause to be subpoenaed any person to give evidence . . . at the inquest: Provided that the said judicial officer shall, if so requested by the attorney- general within whose area of jurisdiction the inquest is to be held or is being held, cause persons or any particular person to be subpoenaed to give oral evidence in general or in respect of any particular matter at the inquest.' It seems that the word 'shall' in the text indicates that this is a peremptory provision, if read with s 10, as interpreted in *Marais*, with which the judicial officer must comply. The DPP's use of the words that it 'recommended' that the magistrate conducting the inquest hear the evidence *viva voce'*, is nothing but a polite way of requesting the magistrate to do so.

[26] The high court found that the decision of the magistrate to hold an informal inquest despite the recommendations of the DPP and the request by the daughter of the deceased was wrong and misguided. It found that the magistrate was under an obligation in terms of s 8 (1) to call for oral evidence. The high court, however, found that, even though the magistrate failed to comply with the provisions of the Act, that it is not enough reason for the proceedings to be reviewed and set aside. This cannot be correct, as this reasoning goes against the principles stated in *Marais.*

[27] In coming to this conclusion, the high court relied on the decision of *Claassens v Landdros Bloemfontein* (*Claasens*),[22] which in my view is to be distinguished from the facts and circumstances in this case. In *Claassens* the court found that a magistrate's decision not to call for oral evidence constitutes a judicial discretion. The only time when a court on review will interfere with such a decision, even if it was unreasonable, is when it can be shown that the judicial officer did not consider the matter or acted *mala fide*. It is also not enough to show that the decision was wrong,

[22] *Claasens v Landdros Bloemfontein* 1964 (4) SA 4 (OFS) at 9B-D.

but it also has to be shown that the unreasonableness of the decision is of such a nature that it can be concluded that it was arbitrary or *mala fide.*[23]

[28] In *Claassens* the magistrate stated that the facts placed before him, justified the need to dispense with the hearing of oral evidence. A number of witnesses did give *viva voce* evidence but some of the witnesses' statements were admitted in terms of s 13(1). It was found that based on what those witnesses said in their statements in the light of the *viva voce* evidence, it was unlikely that they could have assisted the magistrate in coming to a conclusion. That conclusion was that the deceased in all likelihood died at his own hands.

[29] In the present case, there was more than one request that oral evidence be presented. First, there was the request by the DPP, with which the magistrate was compelled to comply, unless there were compelling circumstances not to do so. Second, a request was made by Mrs Victor, the daughter of the deceased, who had a substantial and peculiar interest in the issue and outcome of the inquest. Lastly, there was a decision of the previous magistrate to hold a public inquest and call for oral evidence.

[30] The judge presiding in *Claassens*, did not have the benefit of the guidance provided by this Court in *Marais*, which was decided many years later. In the present case, a dispute of fact existed, based on the circumstantial evidence that the death of the deceased was brought about by an act or omission *prima facie* involving or amounting to an offence on the part of Mr Todd.

[31] The magistrate, having formed a *prima facie* view, based on the affidavits placed before him, of a possibility of an adverse finding against Mr Todd, had to draw his attention to that possibility. At the very least Mr Todd should have been afforded the opportunity (although he was opposed to the holding of a public inquest and the hearing of oral testimony) to challenge the circumstantial evidence from which inferences were drawn that resulted in the magistrate's findings. On the other hand, it would have been proper for Mr Todd, being the only person present during the incident

[23] Ibid page 8 H-9A -D.

that led to the death of the deceased, to assist the magistrate in determining the circumstances surrounding her death.

[32] Even though the high court concluded that the decision of the magistrate not to call for oral evidence was wrong, it held that the decision should not be reviewed. In my view, the high court erred in not reviewing the decision of the inquest magistrate, despite the material irregularities. The decision of the magistrate was not in accordance with the settled law, based on what was decided in *Marais* and he failed to comply with the provision of s 8(1) and s 10 of the Act. In this case without exceptional circumstances being present, the magistrate deviated from the standard procedure as laid down in *Marais* to hold a public inquest and call for the hearing of oral evidence. There were no exceptional circumstances to deviate from the standard procedure. The DPP requested the presiding officer who would be seized with inquest in terms of s 8(1) to hold an inquest by the hearing of oral evidence. This was clearly under the circumstances a breach of a statutory duty he failed to comply with. Furthermore, there was clearly a dispute of fact as to the precise manner in which the deceased died. Mr Todd's version of the events of the facts was inconsistent with the facts that appeared in the inquest docket on which the magistrate made his findings. Besides all of this, the magistrate also acted procedurally unfair when he prior to making his finding, formed a definitive view that he would be making an adverse finding against Mr Todd that might lead to a criminal prosecution, without affording Mr Todd an opportunity to persuade him otherwise.

[33] The high court should have followed the principles laid down in *Marais* as restated above rather than the standard laid down by in *Claassens.* Even on the basis of the standard laid down in *Claassens,* and for the reasons mentioned, I am of the view that given the totality of the circumstances and in the absence of reasons, the decision not to hold a public inquest and to call for oral evidence was arbitrary. For all of these reasons I am of the view that the inquest proceedings should be reviewed and set aside.

[34] Counsel for Mr Todd requested this Court to set aside the finding of the magistrate and substitute it with an order that there is insufficient evidence to show that the death of the deceased was brought about by an act or omission *prima facie*

involving or amounting to an offence by Mr Todd. I cannot grant this order. My primary difficulty is that it will also be based on the same affidavits on which the magistrate made an adverse finding against Mr Todd without hearing oral evidence. It will also not be in accordance with the law, and it will perpetuate the illegality Mr Todd complained of. An order of substitution is indeed an extraordinary remedy which would not be suitable in this case. There is no reason for this matter not to be remitted to the Magistrates' Court, Clanwilliam for the holding of a public inquest by hearing oral evidence before a different judicial officer.

[35] In the result I make the following order:

1 The appeal is upheld with no order as to costs.

2 The order of the Western Cape Division of the High Court, Cape Town, is set aside and replaced with the following order:

'1 The proceedings of the inquest magistrate are set aside.

2 The finding of the magistrate in terms of s 16(2)*(d)* of the Inquest Act 58 of 1959 is set aside.'

3 The matter is remitted back to the Magistrates' Court, Clanwilliam, for the appointment of another judicial officer within 30 days of this order to hold a public inquest and to hear oral evidence regarding the circumstances surrounding the death of the deceased expeditiously and without any undue delay.

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R C A HENNEY

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	J C Tredoux
Instructed by:	EN Bester & Associates, Cape Town
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