



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

20/5/16

CASE NO.: A423/2015

- | | |
|-----|--|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED: YES / NO |

20/5/2016

DATE


SIGNATURE

In the matter between:

FIDEL BYAMO

Appellant

and

THE STATE

Respondent

J U D G E M E N T

DE VOS J:

[1] This is an appeal against the conviction and sentence imposed on the appellant, Fidel Byamo, by Preller J on the 4th June 2012 in the Circuit Local Division of the Eastern Circuit District sitting at Secunda. The appellant (cited as accused 5) originally appeared with five other accused before Preller J under Criminal Case No. 162/2012. Before accused 6 was requested to plead, the charges against him were withdrawn. On the very same day they appeared before court, accused 1

(Johan Madoda Makhubu) and accused 2 (Allen Nkabinde) indicated to the court through their respective counsels that they intended to plead guilty to counts 1 and 2. Both accused 1 and 2 subsequently pleaded guilty and both submitted plea explanations. In both these statements the roles played by the remaining accused were outlined.

[2] Subsequent thereto, counsels for accused 3, 4 and 5 were invited to make oral submission as to why the Judge *a quo* should not proceed *de novo* with a new trial against accused 3, 4 and 5 (the appellant) after separation of the trial and after disposal of the case against accused 1 and 2.

[3] Before these arguments were heard the Judge *a quo* indicated that in his opinion there is nothing that prohibits him from disposing of the trial of accused 1 and 2 where guilty pleas were tendered and thereafter to preside in a new trial against accused 3, 4 and 5. On p27 of the appeal record he remarks:

“Yes, well we can, if that is possible, we shall do it, but let me assure counsel and everybody involved in the case, also the accused and members of the public, the family of the deceased that I shall do whatever I can to proceed with this case as speedily as possible and have it disposed of”.

This remark was made immediately after Adv Fourie, the State prosecutor, informed the Judge *a quo* that in the event of a guilty plea by accused 1 and 2 there will be an application by the remaining accused that the matter against them does not proceed before the same Judge.

[4] Both accused 1 and 2 then pleaded guilty on counts 1 and 2 and not guilty to counts 3 to 8. The pleas tendered by accused 1 and 2 were accepted by the prosecutor. Accused 3, 4 and 5 (the appellant) then pleaded not guilty. Adv Fourie informed the Court *a quo* that accused 1 and 2 prepared written plea explanations in terms of s112 of the Criminal Procedure Act and that if the court is satisfied that their plea explanations indeed amounted to pleas of guilty, the State will accept their pleas and ask for a separation of trials. The plea explanations of both accused 1 and 2

were accepted and read into the record. In accused 1's plea explanation, Exhibit A, he identified both accused 3 and accused 5 (the appellant) and described the roles they played in the commission of the crime. Similarly, accused 2 identified accused 3 in his plea explanation and described which actions were taken by accused. 3.

[5] The prosecutor requested that accused 1 and 2 be convicted and applied for a separation of trials. Before proceeding with the matter the Judge *a quo* recorded that he had a lengthy discussion with counsel in his chambers and that it is important, in his view, to dispose of the case against all five accused as soon as possible, particularly in view thereof that the accused had been in custody since February 2010. The Judge *a quo* also mentioned that it is important to dispose of the case at that time and not to postpone the trial until November 2012. He then gave a lengthy explanation as to why he thinks he can proceed with the trial against accused 3, 4 and 5 and need not recuse himself. The presiding judge then gave the prosecutor as well as the defence counsels an opportunity to indicate whether they have any objection as to why this course of action should not be followed. Adv Fourie supported this suggestion made by the Judge *a quo* whereas all three the defence counsels, appearing for accused 3, 4, and 5 respectively, raised their objections and requested the Judge *a quo* to recuse himself from the envisaged new trial against accused 3, 4 and 5.

[6] Immediately after Adv More, who appeared on behalf of accused 3, raised her objection the Judge *a quo* further placed on record that he also informed counsel in his chambers that while he was having coffee in a shop nearby, he was approached by Mrs Venter (snr), who is 82 years old, and was told by her that this case has been dragging on and she wishes it to be finalised now. The Judge *a quo* concluded that this "... *is one of the factors that I take into account when I formed the view that it is desirable that this case be finished*".

[7] Counsel for both accused 4 and 5 then addressed the Court *a quo* and submitted that after separation of the trial, the case against accused 3, 4 and 5 should be postponed as they are

of the opinion that the information contained in the plea explanations of accused 1 and 2 are sufficient to create the reasonable belief that there is perceived prejudice present if the same Judge should hear the case against them. Adv Malanguti (on behalf of accused 5) also informed the Judge *a quo* that it was his opinion that accused 3, 4 and 5 will be prepared to accept a further postponement until the case against them can proceed before another Judge. Notwithstanding Adv Malanguti's attempts to persuade the Judge *a quo* to recuse himself, the presiding judge eventually decided that he will proceed with the case against accused 3, 4 and 5 immediately after finalising the case against accused 1 and 2. The matter then proceeded and after separation was ordered, accused 1 and 2 were convicted and sentenced. During this process several exhibits were handed in, including Exhibit E, a photo album of the scene.

[8] The only point on appeal is whether the Judge *a quo* should have recused himself. I am not going to deal with the merits of the arguments raised by the Judge, the prosecutor and the defence counsel at this stage, save to state that these arguments should have been heard after separation has taken place and should have been dealt with when the new indictment was put to accused 3, 4 and 5 in a separate trial. Furthermore, and without binding another Court, the overwhelming impression I gained from reading the record is that the Judge *a quo* wanted to finalise the matter against all five accused within the shortest possible period of time. I say this especially against the backdrop as set out in the record. During defence counsels' argument, the Judge *a quo* repeatedly informed the parties that he will give them leave to appeal against his ruling not to recuse himself. This so-called "leave to be granted" became non-sensible as leave to appeal would only become relevant after separation of the trial and after hearing all the relevant evidence.

[9] Accused 3, 4 and 5 (renumbered accused 1, 2 and 3 for purposes of the new trial) then appeared before the same Judge as appears from p74 of the record. They were eventually

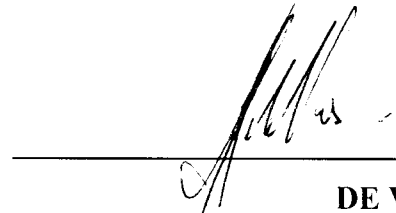
convicted and sentenced. The first part of the evidence was not transcribed. From what is contained in the record it is impossible to determine whether a new indictment was prepared and properly signed by the authorised official. It is also unknown if there was a further application for a recusal. The incomplete record further leaves this Court completely in the dark as to what the accused pleaded and what admissions were made. The transcription starts off with Ms More's cross-examination of Mr Makhubu, who was accused 1 in the first trial. It is impossible to determine the credibility of this witness without a proper record. Bearing in mind that this witness identified and explained the roles played by accused 1 (formerly accused 3) and accused 3 (formerly accused 5) in his plea explanation in the first trial, the relevance of a complete record becomes clear.

- [10] Leave to appeal against their conviction and sentence was granted to accused 1, 2 and 3. This was done before the *Judge a quo* made a final decision regarding the recusal application and even before any evidence was lead against the appellant and accused 1 and 2. At this stage of the proceedings only the appellant (accused 3) is before this Court. Adv Fourie, on behalf of the State, submits that the appeal must be postponed to a date to be arranged by the Registrar and that the Legal Aid Board be requested to obtain instructions from accused 1 and 2 to proceed with their appeal in order to dispose of the appeal against all three the accused simultaneously. This suggestion cannot be faulted.

I therefore propose that the following order be made:

1. The appeal is postponed sine die for a date to be arranged by the Registrar.
2. The matter may be re-enrolled if and when a complete record is obtained and filed.
3. The Legal Aid Board is requested to obtain instructions from Nzeyimana Djuma

(accused 1) and Morisho Minani (accused 2) to proceed with their appeal against their conviction and sentences imposed without delay and thereafter to proceed with their appeal in terms of the Court Rules.



DE VOS J

JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

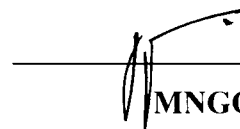
I agree.



BAM AJ

ACTING JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

I agree and it is so ordered.



MNGQIBISA-THUSI J

JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA