

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

A 44/16
28/01/2016

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

26/01/16

DATE

SIGNATURE

Magistrate:

PRETORIA

Review Case no: 14/1211/2012

High Court Ref no: 507/15

THE STATE V THANDO K MPUNGA & 2 OTHERS

REVIEW JUDGMENT

RAULINGA J,

- [1] These matter was placed before me on special review in terms of section 304 of the Criminal Procedure Act ("CPA"). The matter is partly heard before the regional magistrate court in Pretoria.
- [2] The three accused are facing charges under the Prevention of Organised Crime Act ("POCA"). Accused NO 3 is also facing a charge of contravening sections 18 (i) (e)(g) and (i) of Act 68 of 1977.

- [3] Accused No 1 engaged services of a private attorney. Since February 2013 accused No 2 and 3 have been represented by Mr Lekota up until February 2015 when he failed to pitch up in Court. Several witnesses for the state have testified.
- [4] The regional magistrate submitted the case on special review after ascertaining that Mr Lekota who represented accused No 2 and 3 is not an admitted attorney. This was also confirmed by the Law Society of the Northern Provinces. The regional magistrate is of the view that this amounts to an irregularity warranting interference by this court.
- [5] Review is a procedure designed to ensure that those who appear before lower courts are not subjected to judicial decisions which bring injustice to bear upon them, or which are preceded by a procedure, or procedures that are flawed or are a result of irregularities.
- [6] The first trial right is expressly set out as a residual right which includes, but not limited to, the enumerated fair trial rights in section 35(3) of the Constitution Act 108 of 1996. ("the Constitution") In our law, the understanding of what constitutes a fair trial is flexible, its constitutive components being informed by the values that underlie our constitution. It is trite that the right to a fair trial embraces substantive fairness and one need not emphasise that trials are required to be conducted in accordance with general open-ended notions of justice. All courts are therefore enjoined to ensure that accused's right to a fair trial is protected.¹
- [7] Section 35(3)(f) provides that every accused person has a right to a fair trial, which includes the right to choose and be represented by a legal practitioner, and to be informed of this right promptly.² Whereas section

¹ Bogaards v S 2012(12) BCLR 126 (CC).

² The Constitution.

1 of the Attorneys Act³ defines a practitioner as any attorney, notary or conveyancer: And for the letter given by the Law Society of the Northern Provinces Mr Lekota does not fall within the ambit of the above Act, and as such he cannot be a qualified person to represent accused person in proceedings.

[8] Our jurisprudence is such that an irregularity is "an irregular or wrongful deviation from the formalities and rules of procedure aimed at ensuring a fair trial ". There is no exhaustive list of what constitutes an irregularity. This is because of the open-ended notions of fairness and justice that underlie our conception of the right to a fair trial⁴.

[9] In *S v Mkhize: Sv Mosia: S v Jonas: S v Le Roux*⁵, the court dealt with a similar situation (first time such a matter had come before court in the legal history of this court) and concluded (at 875F-H) that, having regard to all the relevant considerations it is in the public interest that the defence in a criminal trial be undertaken by a person who has been admitted to practice as an advocate in terms of the Admission of Advocates Act and lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire trial proceedings.

[10] Southwood J in *S v Mhlonga and others*⁶ states as follows:

"It is not easy to, if not possible in most cases to disentangle the facts and determine what effect the appearance of an unqualified person had on the trial of the other accused. Since the object of the rule is to safeguard the integrity of the proceedings, it seems to me to be essential that the entire proceedings be set aside. Similarly, that was the approach of the Court in S v Gwantshwe and Another⁷ which is the

³ 53 of 1979.

⁴ Bogaards v S supra 1 at para [53].

⁵ 1998(2) SA 868 (A).

⁶ (A314/10) [2010] ZAGPPHC 33 (29 April 2010) at para [9].

⁷ 1995 (2) SACR 384 at 386 D

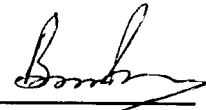
only case referred to which deals with a situation where one accused was properly represented and the other accused not....."

[11] Considering the fact that accused No 1 was legally represented and hence one cannot be able to ascertain the effect of Mr Lekota on the proceedings as a qualified person. It follows that the trial proceedings in this matter must be set aside.

[12] Accordingly I make the following order:

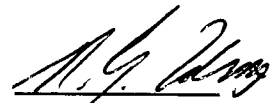
(a) The trial proceedings are set aside.

(b) The matter is remitted to the regional magistrate for it to start *de novo*.



T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



R G TOLMAY
JUDGE OF THE NORTH GAUTENG HIGH COURT