IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: SS02/2013

In the matter between:

THE STATE

and

MZIWABANTU MADIBA MNCWENGI	Accused 1
MZIMASI MADIBA MNCWENGI	Accused 2
BUYELWA NOKWANDISA MNCWENGI	Accused 3
LUMKO BAMBALAZA	Accused 4
XOLANI MAKAPELA	Accused 5
MAWANDE SIBOMA	Accused 6

Judgment:	Boqwana, J
Coram:	Boqwana, J Assessor: Mr H Swart
For the State:	Adv. T Ntela NPA

For Accused 1:	Adv. J Losch
	Legal Aid
For Accused 2:	Adv. A Caiger
	Legal Aid
For Accused 3:	Adv. J van Rensburg
	Legal Aid
For Accused 4:	Adv A O` Neill
	Legal Aid
For Accused 5:	Adv PL Colenzo
	Legal Aid
For Accused 6:	Adv C Givati
	Legal Aid

First day of Hearing:	13 August 2013
Last day of Hearing:	03 November 2014
Date of Judgment:	19 November 2014

JUDGMENT

BOQWANA, J:

The accused were arraigned for trial before this Court on an indictment consisting of altogether 8 counts namely; four counts of kidnapping count 1, 2, 3 and 4; one count of assault with the intent to do grievous bodily harm count 5 and three counts of murder counts 6, 7 and 8 read with section 51 of the Criminal Law Amendment Act 105 of 1977. It is alleged that the killing of the deceased was committed by a group of persons in the execution of a common purpose.

The State alleges in respect of count 1, 2 and 3 that the accused during the evening of Wednesday 14 March 2012 and at or near Harare Khayelitsha wrongfully and intentionally deprived Sivuyile Rola, Luxolo Mpontshane and Mabhuti Matinise of their freedom of mov ement by ty ing their hands with wire and keeping them against their will. In respect of count 4 it is alleged that the accused on the same date and evening wrongfully and intentionally dep rived Mphuthumi Nobanda herein after referred to as Mphuthumi, of his freedom by keeping him against his will and in respect of count 5 that the accused on the same date and evening wrongfully and intentionally assaulted Mphuthumi Nobanda with blunt objects with the intention to do grievous bodily harm.

In respect of count 6, 7 and 8 the State alleges that the accused on the same date and evening and at or near Macassar Sand Mines at Macassar in the district of Khayelitsha wrongfully and intentionally killed Sivuyile Rola (hereinafter referred to as Mshwele and also known as Vido'), Luxolo Mpontshane ('hereinafter referred to as Luxolo'), Mabhuti Matinise ('hereinafter referred to as Mabhuti'), all male persons by hitting them with blunt objects. All the acc used were legally represented. They all pleaded not guilty to all the charges. Only accused gave a plea explanation.

The trial commenced on 14 August 2013 with the Court constituted of the Judge and two assessors Mr H Swart and Ms S Solomons. After the trial had run for over seven months and in the middle of a trial-within-a-trial received a medical certificate from a certain Dr P C Ndomile on 17 March 2014 stating that Ms Solomons was booked off sick due to acute anxiety disorder from 17 to 19 March 2014. On the same day of 17 March 2014 Ms Solomons contacted the Court's registrar and advised her that she had collapsed the previous week end and could not attend court for the period she was booked off sick.

The matter was accordingly postponed to Monday 24 March 2014 also taking

into account the f act that counsel for accused 5 had been involved in another matter that same week.

The office of the registrar attempted to contact Ms Solomons for the duration of that week to ascertain the nature of her sickness and the period of her envisaged absence to no avail. On Monday 24 March 2014 Ms Solomons did not attend the trial proceedings, the registrar attempted to contact her on the telephone numbers that she had provided to no avail. An attempt was made to contact the magistrate's court in Upington where she was suspected to be. Ms Solomons had indicated in the past week that she was offered a position to act as a magistrate in Upington and requested the presiding Judge to release her from the trial which request was declined. Indeed she was found to be at the Upington Magistrate's Court where she was appointed as an acting magistrate. Had it not been for the attempts made by this Court to locate Ms Solomons this Court would not have known of her whereabouts as she f ailed to answer her calls.

As an explanation for her absence Ms Solomons furnished this Court with a letter requesting to be excused from further attendance of the proceedings permanently for the following reasons:

1. When she was requested to act as assessor it was communicated to her that the estimated duration of the trial would be six to eight weeks. She was not aware that the matter would run for such a lengthy period, it having run and having been more than six months on the court roll. It is not clear from her letter who communicated this to her as it certainly was not an instruction from this court.

2. She is a practicing attorney. In the interim she has lost income, clients and financially is not doing well. She was offered several positions which she had declined however, when she was offered a position to act as a magistrate in the Upington District Court she stressed, panicked and

thought about her four children and her financial difficulties as well as her future in the legal profession and she decided to accept the job offer.

She stated that she did not take this decision in isolation but with due regard to the rights of the other parties involved in the matter that is the accused, the defence, advocates, the State prosecutor . She further advised that her decision was based on the fact that she was aware that there were other trials in which only one assessor was sitting and her wish was for the matter to proceed in her absence. In her view, the right s of the accused would not be affected as there was still one assessor remaining. She apologised for the manner in which she dealt with the situation and pleaded to all interested and relevant parties to accept her reasons and absence from the case.

When it was apparent that Ms Solomons would no longer avail herself to continue with the trial the presiding Judge requested the State and defence counsel to present argument on the effect of her absence in the proceedings in light of sect ion 147 of the Criminal Procedure Act 51 of 1977 and the prevailing case law. The matter was argued extensively. The State submitted that section 147 was not applicable in this instance as it dealt with incapacity or death of the assessor. It however submitted that taking into account that no prejudice would be suffered by any of the parties the Court may release the assessor from her duties and with reference to the accused rights to a fair trial the trial shouId not start *de novo* as it had aIready run for a lengthy period, some of the accused are in custody and witnesses might have to be recalled.

There was consensus from defence counsel acting on behalf of accused 1, 2, 3 and 4 that it wouId not be in the interest of justice for the trial to start *de novo* taking into account the rights of the accused to a f air trial and balancing those with the interests of the society and the administration of justice. The most common view held by the respective counsel on behalf of the accused was that the accused would be far more prejudiced if the trial were to start *de novo.* At the

request of counsel for accused 5 and 6, the Court requested further particulars from Ms Solomons regarding her absence and requested release fr om the proceedings. She responded on 14 April 2014 by confirming that she would not be able to further attend in the matter due to her decision that was taken on 17 March 2014 that she had signed a contract on 17 March 2014 and she was currently working as an acting magistrate and was bound by the contract. She stated that she could not breach that contract as it may have an adverse impact on her future in the magistrate's profession.

The matter was argued further on receipt of Ms Solomons' further representations. Counsel for accused 5 and 6 were doubtful as to whether the Court was empowered to release Ms Solomons as an assessor based on the reasons that she had put forward. Counsel for accused 5 suggested that arrangements could be made for Ms Solomons in her position as a n acting magistrate to be seconded in terms of the Public Service Act 1994 to complete the case as assessor. Having considered Ms Solomons' letter and argument on this issue, I directed that the trial proceed in the presence of the remaining members of the court and reserved reasons for later, here follows my reasons.

The Court in this matter was faced with untenable and a unique situation. Although Ms Solomons letter was couched as a request to be excused from further attendance in the trial she had already made herself absent and gave a clear indication that she would not be able to return. Effectively the decision I was faced with was not whether or not to release her but to determine and give direction on the status of the trial and whether it was to proceed in her absence or be set aside and proceed *de novo* before a newly constituted court. Perhaps before I continue I should mention that the proposal made by counsel for accused 5 was not applicable in this case as the provisions of the Public Service Ac t 1994, that he referred to applied to permanent government officers and are not applicable in this instance. Furthermore, Ms Solomons had indicated that she was unable to continue as assessor in the trial. I must also state that she was

given an opportunity and was requested to address the situation with the relevant authorities in charge of her acting appointment before she sent her final letter of 14 April 2014 confirming her inability to continue sitting as an assessor in this matter.

Paramount to this Court when a decision was made was the fairness of the trial to all the accused persons, the interest of justice, the administration of justice and the circumstances placed by Ms Solomons before this Court regarding her absence and her inability to continue to act as an assessor going forward. The relevant provision that deals with the assessor's inability to act in the Criminal Procedure Act is section 147. Section 147(1) provides as follows:

> "If an assessor dies or in the opinion of the presiding judge becomes unable to act as an assessor at any time during the trial the presiding judge may direct :
>
> (a) That the trial proceed before the remaining member or members of the court or;
>
> (b) That the trial starts *de novo* and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor."

The issue to be determined was whether the assessor became unable to act within the purview of section 147. The meaning of the words 'unable to act' has been deliberated in many cases. In S v Malindi and Others 1990(1) SA 962 (A) Corbett CJ held that:

> "The word "unable", in the context of section 147(1) conveys to my mind an actual inability to perform the function of acting as an assessor. Such an inability could derive from an inherent physical or mental condition or possibly also a situation which physically prevented the assessor from attending the trial, such as for example indefinite detention here *or* in a

foreign country."

I do not read S v Malindi to limit inability to act to physical or mental impairment. The list of ex amp les provided in that case includes a situation where an assessor is detained for an indefinite period here or abroad. The detainment situation has nothing to do with illness, it has to do with a n unforeseen situation that restricts an assessor from being physic ally able to act, such as his or her detention here or abroad which may be indefinite or permanent. I venture to s ay that situations of the assessor's inability to act are not limited to physical sickness or mental impairment. Clearly, any other situation that prevents the assessor from being physically or mentally present to act as an assessor for an indefinite or permanent period could constitute inability to act in my view. Each case would need to be treated on its own facts.

It is also important that in this Constitutional dispensation section 147 is not mechanically interpreted, fairness of a trial to the accused, policy considerations, interest and administration of jus tice become important. The judge, in my view, should in the circumstances balance all these factors in coming to an appropriate decision. To support this view, I refer to a decision of S v Jeke 2012 JDR 1551(GSJ) at para 15 in that case Mbha J said the following:

"Moreover the peculiarities of the reason for the absence of the assessors ought to be a crucial factor because any concept of unable must be fact specific an aspect addressed more fully hereafter. Furthermore, sight must not be lost of the important fact that the Ac t does give a court discretion to formulate an op inion as to whether or not under the circumstances prevailing at the time it can be said that an assessor is unable to act as an assessor. The proper formulation of a n op inion about an inability of an assessor to continue participating implies more than a mechanical fact-finding process. The magistrate unavoidably must make a value choice informed by policy considerations about the administration of justice and chiefly about the avoidance of a failure of justice. In Malindi the policy choice

excluded factors pertinent to grounds for recusal. Furthermore, the approach I adopt in fact is informed by the minority in the judgment of MT Steyn JA in S v Ggeba and Others 1989(3) SA 712 (A) at 718-719 where an assessor sought, during a trial, to be discharged on the ground that he wanted to be with his only child, a daughter, who was in hospital having been diagnosed with terminal cancer. The learned judge referred to the Oxford English Dictionary Volume XI definition of the word unable meaning *"not able, not having ability or power to do or perform (undergo or experience) something specified (chiefly of persons),"* and after considering the emotional attachment that existed between the assessor and his daughter he held that:

a) The ability to pay proper attention to judicial proceedings is essential for the due performance of a n assessor's task; and
b) Should an assessor become incapable of paying such attention he would whilst such ability lasts be *unable* to act as an assessor. (emphasis added)"

The court in the Jeke matter was of the view that the approach adopted by the minority decision in S v Ggeba, *supra,* fell within what Corbett CJ had envisaged in S v Malindi, *supra,* when he spoke of an ability deriving from a mental condition or any situation which physically prevented the assessor from attending the trial. The majority in Ggeba found that the assessor was released on compassion ate grounds and not on inability. In the Jeke matter the magistrate had formed an opinion that the assessors had become unable to act based on a number of factors. Firstly, the withdrawal from the court of the services of the assessors after the collapse of the pilot project in terms of which the lay assessors had been appointed as a result of a depleted budget. The magistrate found that the collapse of the budget also collapsed their ability to serve, that is, as fulltime assessors.

Secondly , claims by assessors f or court services would not be paid due to their unavailability of budget. Thirdly, there were no prospects of the pilot project being

resuscitated in the near future. Fourthly, the magistrate could not cause the assessors to continue to act at his own expense. Fifthly, the court could not order the assessors' participation at their own expense. It followed that if a n assessor cannot be compelled to attend then from the perspective of the administration of justice such assessor is unable to participate. Finally, the trial was at a stage where the State had called their last witness. The appeal court agreed with the view taken by the magistrate. Although that case dealt with section 93 ter (11) (iii) of the Magistrate's Court Act 32 of 1944 the principles adopted therein are similar to those required by section 147 of the Criminal Procedure Act.

The most important principle stated by the court in the Jeke case, which I find to be equally important to the present matter, is that where it is impossible to obtain or secure the assessor's presence the court may in the interest of justice direct the proceedings to continue before the remaining member or members of the court or direct that the proceedings start afresh. The Court found it would have been impossible to procure the presence of the assessor and furthermore, because the matter was almost at the end of the State's case, it would not have been in the interest of justice , which is the chief and overriding factor, to order that the trial start *de novo.* See paragraphs 15, 16, 18 and 19 of the Jeke decision.

Another important decision with circumstances similar to those in the present matter is that of S v Matakati and Others 2007 ZAWCHC 328 (1 January 2008) which is a decision from this division by Ndita J. In that case an assessor had indicated to the court that in view of the trial having continued for longer than two years, which was more than he had predicted, his legal practice as an attorney was heavily impacted to the point that he had been reported to the Law Society by clients, magistrates were complaining about his matters being constantly postponed, he had lost clients and was unable to pay staff salaries and other expenses, due to income being severely affected. Ndita J held in those circumstances at paragraph 8 that:

> "The consistent approach of the courts to the release of an assessor is understandable as the issue of an accused having his case considered by a properly constituted forum is crucial and conflated with the right to a fair trial. Indeed it would be most undesirable to have assessors willy-nilly deciding to be excused from trial when it suited their purpose to serve. Neither should an accused be unnecessarily deprived of the benefits and safeguards arising out of a trial with a judge and two assessors. However, this issue is not only a matter f or form, but also of substance as well because two assessors can overrule a judge on the merits. Each matter should of course be decided on its merits. In the present matter, it is not a question of Mr Godla willy-nilly deciding to excuse himself, the substantive reasons he has submitted clearly demonstrate that a lot of injustice will result to his person, legal firm and clients whose cases he cannot attend to. For all it is worth, Mr Godla has, to his detriment served far more than the estimated duration of the trial. That to his credit shows commitment. It is not only a question of his compelling personal reasons but also about justice being denied or delayed to numerous clients whose cases he cannot attend."

What makes the present matter slightly different from the Matakati matter is that unlike Mr Godla who requested to be released by the court due to his compelling personal reasons Ms Solomons in essence deserted from her duties as an assessor without being formally released by the judge albeit for reasons similar of Mr Godla in the Matakati decision. While it is desirable that the trial should be completed in the presence of all members who constituted the court at the beginning of the trial, unforeseen circumstances do arise. Section 147 was introduced to deal with eventualities specified in that provision that is death and inability to act as assessor. See S v Baleka and 4 Others 1988(4) SA 688 (T).

There is also no mechanism available for a judge to force a member who has

made her intentions clear that she would not be returning to continue sitting as an assessor to do so. Letting that assessor go is not to condone irresponsible behaviour but to focus the Court on its primary function which is to ensure that the rights of the accused are protected and the administration of justice is attained and not compromised by the assessor's absence . A situation like the one prevailing in this case enjoins the judge not only to look at the circumstances of the assessor but also to balance the rights of the accused to a fair trial with the interests and administration of justice. I am in agreement with Ndita J's remark s in the Matakati matter where she found that circumstances like these call to question whether a person under such emotional and mental distress would be able to apply his or her mind fully to the facts and the evidence.

Ndita J held as follows at paragraph 11:

> "Section 35 (3) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides that every accused person has a right to a fair trial. In my view, the substantive right to a fair trial demands from a trier of facts a complete presence of the mind and being alive to the facts presented at trial. Whilst the *dicta* referred to above reflect a commitment by the courts to the strict enforcement of procedural safeguards aimed at ensuring a fair trial, it is in my mind doubtful that in the circumstances of this case, the accused's right to a fair trial will be better served by the continued presence of an assessor whose commitment to the trial is questionable."

She went on to state that at paragraph 13:

> "When regard is had to the notion of basic fairness and justice, I am not of the view that an assessor who lacks commitment to a trial is capable of delivering justice to a n accused. This renders him incapable of functioning as such. Whilst acknowledging that there has been consistency in judicial decisions that the word "unable" relates to the assessor's physical and

> mental inability, I am of the firm view that the dictum in Zuma , *supra,* justifies that the scope of section 147 include eventualities such as inability of the part of an assessor to deliver just ice. In my opinion, Mr Godla is unable to act as an assessor due to his inability to deliver justice to the accused in these proceedings. Thus , I made the direction that the assessor in this matter was unable to continue with the trial."

In the same manner the continued presence of Ms Solomons in this trial would not have served the interest of justice and those of the accused as her commitment was questionable. Moreover, she departed not having been released by the Judge. It would not have served the interest of justice and the accused for Ms Solomons to be forced to sit in a trial in which she was not committed. I must stress that Ms Solomons was not released by this Court due to her unwillingness to act as assessor or due to lack of interest rather, she advised having absconded that she could not come back citing financial distress arising from loss of clients, wrong estimation of the trial duration which had caused her stress and emotional distress and her appointment to act as a magistrate in Upington.

Like Ndita J, my view is that the meaning of the word unable to act in section 147 of the Criminal Procedure Act should be interpreted to include inability to deliver justice to the accused. It must also be borne in mind that four of the accused persons had been in custody for just over two years awaiting finalisation of the trial. The trial had been running for about seven months and the State was nearing the close of its case in the main trial and the trial-within-a -trial had commenced when the assessor became absent. Witnesses had given extensive evidence some of whom individually testified for a number of days. The procedural safeguards in the form of the provisions for the appointment of assessor in section 145 of the Criminal Procedure Act are without a doubt designed to ensure a fair trial although such a right is not listed in section 35(3) of the Constitution. As Tshabalala JP observed in S v Khumalo 2006(9) BCLR 1117

(N) if section 145 is a procedural safeguard then section 147 is a limitation to the protection afforded by that safeguard. Section 147 of the Criminal Procedure Act permits a trial to be continued in the absence of an assessor in certain specified circumstances.

Tshabalala JP in S v Khumalo, *supra,* emphasised the point that the fact that there was only one assessor remaining should not be a threat to the fairness of the trial because in terms of section 146(d) of the Criminal Procedure Act a judge is obliged to give reasons for the decision or findings of the assessor that is remaining where there is a difference of opinion. The court in Khumalo found that on the balance a significant threat to the administration of justice would have resulted if the trial started *de novo .* A similar situation would have prevailed in this matter.

Concluding on this matter it might perhaps serve the legislature well to revisit the heading of section 147 of the Criminal Procedure Act which reads *"Death or incapacity of assessor"* as such wording might be the reason the provision tends to be interpreted in narrow terms. The language of the body of the section itself however makes no reference to incapacity but rather refers to a judge forming an opinion that the assessor is unable to act as an assessor which in my view is clearly broader than the heading. For the reasons above I directed that the trial proceed in the presence of the remaining members of the court being myself and Mr H Swart.

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BOQWANA, J