



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

High Court Ref No: 14299

Bellville Case No: D166/2013

In the matter between:

STATE

And

ZAMUXOLO XAMENI

ACCUSED

Coram: ROGERS & BOQWANA JJ

Delivered: 17 MARCH 2014

JUDGMENT

ROGERS J:

[1] This matter has been referred to this court by the presiding magistrate, prior to conviction or sentence, because he considers that a gross irregularity has occurred in the proceedings.

[2] The accused has been charged with one count of theft allegedly committed on 16 January 2013. He was arrested on 14 February 2013 but released on bail shortly thereafter. At a further appearance on 20 March 2013, where the case was remanded, the accused was represented by a legal aid attorney. However, on 30 May 2013 a person describing himself as 'Advocate Silinga' came on record for the accused. The trial itself began on 6 November 2013, with Silinga still representing the accused. The accused pleaded not guilty and offered no explanation for the plea. The prosecutor called the complainant, and her evidence was completed on that date, including cross-examination by Silinga. The case was then adjourned to 9 December 2013 for further evidence on behalf of the state.

[3] On 9 December 2013 Silinga failed to appear. It appears from the magistrate's report that the magistrate was told by the accused that Silinga had sent him to court with copies of the statements from the docket. It came to light that Silinga, although he was previously an admitted advocate, was struck off the roll by this court on 30 October 2013. This court's judgment in the striking-off (Case 9988/12) has the neutral citation [2013] ZAWCHC 171. The criminal case in the court *a quo* was postponed on the basis that the accused would seek legal aid.

[4] The magistrate expresses the concern that the accused was not properly represented during the trial thus far. Silinga, he considers, misled both the magistrate and the accused. The magistrate's opinion is that the accused would not have appointed Silinga if he knew the latter was no longer an admitted advocate; and that an injustice has occurred with potential prejudice to the accused. The magistrate thus asks that the proceedings of 6 December 2013 be set aside and that the matter be referred back to the magistrate's court for trial *de novo*.

[5] Although the magistrate has purported to refer this matter to the high court in terms of s 304(4) of the Criminal Procedure Act 51 of 1977, that section applies only where a sentence has already been imposed. Section 304A is also not applicable

because it applies only after conviction. In the present case there has been neither conviction nor sentence.

[6] This does not mean, however, that this court may not deal with the matter. The high court, quite apart from the review jurisdiction conferred by s 22(1) of the Superior Courts Act 10 of 2013, has an inherent jurisdiction to review the proceedings of lower courts, and this is a power which in appropriate though exceptional circumstances will be exercised in the course of uncompleted proceedings (see *S v Khalema & Others Cases 2008 (1) SACR 165 (C)* paras 7-15; Du Toit & Others *Commentary on the Criminal Procedure Act* at pp 30-5 – 30-6).

[7] It appears from this court's judgment in the striking-off application that the application was launched by the Cape Bar Council during May 2012. Silinga filed a notice of opposition but did not initially file answering papers. On 18 October 2013, the date on which the application was to be heard, Silinga filed a late answering affidavit and was represented by counsel. The court refused Silinga's application for a postponement but received the late answering affidavit. The application was then argued with reference to the founding and answering papers. The court concluded that the allegations of misconduct and unprofessional behaviour had been established. The misconduct included the fact that in proceedings before three separate magistrates Silinga falsely claimed to be acting on the instructions of an attorney whose name he furnished, in circumstances where he had not been briefed by an attorney at all. Another of the complaints found to be established was that Silinga had procured his appointment as the executor in a deceased estate under false pretences and had then misappropriated a sum of money from the estate bank account. This court, in a reserved judgment delivered on 30 October 2013, found that the only appropriate sanction was a striking-off.

[8] About a week later Silinga appeared in the present proceedings and represented the accused in entering a plea of not guilty and cross-examining the state's first witness. The magistrate is undoubtedly correct in his assumption that the accused instructed Silinga on the assumption that he was an admitted advocate lawfully entitled to practise as such. It is safe to assume that Silinga failed to disclose to the accused that the position changed on 30 October 2013. Silinga by

conduct also misrepresented to the magistrate on 6 November 2013 that he was still an advocate. Furthermore, in purporting to represent the accused as an advocate, Silinga was *prima facie* committing a criminal offence in terms of s 9(1) of the Admission of Advocates Act 74 1964. That section provides *inter alia* that no person whose name has been removed from the roll of advocates shall 'in any manner, directly or indirectly, practise as an advocate or hold himself out as, or pretend to be, or make use of any name, title, addition or description implying or tending to induce the belief that he is, an advocate or is recognized by law as such'.

[9] It is a fundamental right that an accused is entitled to legal representation. This means representation by a person entitled by law to act as an attorney or advocate. The accused in the present case has been denied that right by Silinga's reprehensible conduct. I do not propose to consider whether the manner of Silinga's conduct of the cross-examination of the state's first witness was or was not competent. It is impossible to say what prejudice the accused might not have suffered by virtue of being advised and represented by a person who has been found by this court to be untrustworthy and unfit to practise as an advocate. In *S v Mkhise & Other Cases* 1988 (2) SA 868 (A), where the accused had been represented by a person passing himself off as an advocate, the court, after a full review of relevant authorities, concluded that it was in the public interest that the defence in a criminal trial be undertaken by a person duly authorised to practise as an advocate and that the lack of such authorisation must be regarded as 'so fundamental an irregularity as to nullify the entire trial proceeding' (at 875G). Although that was a case where there had been convictions and sentences, there are a number of instances where this principle has been acted upon prior to conviction by way of review proceedings (see, for example, *S v La Kay* 1998 (1) SACR 91 (C) and *S v Borias* [2013] ZAGPJHC 13).

[10] A gross irregularity thus occurred in the proceedings of 6 November 2013. It would self-evidently serve no purpose to allow the irregular proceedings to run their course before dealing with the matter. Justice demands that this court intervene in the matter. Such interference is justified by s 22(1)(c) of the Superior Courts Act (interference on grounds of 'gross irregularity in the proceedings') and in any event by this court's inherent jurisdiction.

[11] Through no fault of his own, the magistrate who presided in the court *a quo* has, during the course of the irregular proceedings, heard evidence on the merits of the case. It is thus appropriate to direct that the remitted case be heard by another magistrate.

[12] I thus make the following order:

[a] The proceedings conducted in this matter in the court *a quo* on 6 November 2013 are set aside and the matter is referred back to the court *a quo* for trial *de novo* before another magistrate.

[b] The registrar is directed to refer this judgment to the Western Cape office of the Director of Public Prosecutions for such action as that office may consider appropriate in regard to Mr Silinga's *prima facie* violation of s 9(1) of the Admission of Advocates Act 74 of 1964.

[c] The registrar is also directed to refer this judgment to the chairperson of the Cape Bar Council.

BOQWANA J:

[13] I concur.

ROGERS J

BOQWANA J

