

SOUTH AFRICA / JUDGMENT

# Moyo v Minister of Police (749/2014)

## [2017] ZALMPTHC 2 (6 February 2017)

**[2017] ZALMPTHC 2****COURT**

Limpopo High Court, Thohoyandou

**BEFORE**

Phatudi

**CASE / FILE NUMBER**

749/2014

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**Source record****IN****THE HIGH COURT OF SOUTH AFRICA****LIMPOPO****LOCAL DIVISION, THOHOYANDOU****CASE****NO: 749/2014****DATE:**

749/2014

MOYO

ML

APPLICANT

And

MINISTER

OF POLICE

RESPONDENT

**JUDGMENT****PHATUDI J (AML)**

- [1] DBN[1] an attorney at law practising as such as a professional assistance at TM[2], a Law Firm, appeared in this court without a Right of Appearance Certificate as required in terms of section 4 (2) of the Right of Appearance in Courts Act 62 of 1995. This court directed her to show cause why her conduct should not be referred to either the relevant professional regulatory body and or the Director of Public Prosecution for disciplinary action as stipulated in the Act[3].

[2] On the 24 November 2016, DBN appeared in this court purporting to be counsel for the plaintiff. I neither “saw” nor heard her because of her failure to observe this Court’s decorum[4]. During short adjournment, DBN approached me in my chambers with intent to apologise for her deeds. She was accompanied by another

attorney at law who practices as such. It transpired during our discussion that DBN appeared not to have had any knowledge of the

Right of Appearance in Courts Act 62 of 1995 (RACA). Her lack of knowledge and or clue of what was expected of her in compliance with the Act prompted me to cause issue of the directive directed to her to show cause as mentioned in paragraph [1] above.

[3] DBN complied with the directive. She filed an affidavit where she, among other things, stated:

‘...it was for the first time for me to learn that I need to have a certificate in terms of section 4 (2) of the Act 62 of 1995 in order

to appear in the High Court. By virtue of being unaware and oblivious of the inappropriateness of my conduct, I even told Justice

[Phatudi][5] that I was not appearing before him for the first time, and that all along, I was under the impression that I am entitled to appear in the High Court by virtue of my admission [as an attorney].

I admit that the court’s censure of my failure to observe the dress code and to appear without the said certificate is warranted. I admit that I ought to have familiarised myself with the relevant dress code and above mentioned law beforehand and I should not have strayed from the straight and narrow. I am aware of the maxim that ignorance of the law excuses no man’

[4] The admission of any person as an attorney who, in the discretion of the court, is a fit and proper person to be so admitted and enrolled is governed by Attorneys Act, Act 53 of 1979 as amended[6]. An attorney admitted and enrolled as such has an automatic right of appearance in any court[7], any board, tribunal or similar institution other than any Superior Courts[8].

[5] The right of advocates and attorney to appear in courts in the Republic of South Africa is regulated in terms of the Right of

Appearance in Courts Act, Act 62 of 1995 (RACA). Section 3 of RACA provides:

‘3

(1) any attorney shall have the right to appear on behalf of any person in any court in the Republic, except the Supreme Court and the Constitutional Court.

- (2) Any attorney who wishes to acquire the right to appear on behalf of any person in the Supreme Court may apply to the registrar of a provincial division of the Supreme Court in the manner provided for in section 4(1).
- (3) Any attorney who has acquired the right of appearance in the Supreme Court may also appear in the Constitutional Court[9].
- [6] Any attorney who wishes to acquire the right of appearance in the superior courts must apply as stipulated in terms of section 4
- (1) of RACA. The requirements are set out as follows:
- 4.
- (1) An application by an attorney to appear in the Supreme Court, shall be in writing, shall be signed by him or her and shall be accompanied by- '
- (a) documentary proof that he or she has satisfied all the requirements for
- (i) The degree baccalaureus legum of any university in the Republic; or
- (ii) a degree of any university in a designated country in respect of which a university in the Republic with a faculty of law has
- certified that the syllabus and standard of instruction are at least equal to those required for the degree baccalaureus legum of a university in the Republic; or . . .
- (iii) a degree which is the equivalent of the baccalaureus legum degree and in respect of which an exemption contemplated in section 2 of the Recognition of Foreign Legal Qualifications and Practice Act, 1993 (Act No. 114 of 1993), has been granted; or
- (b) a certificate issued by the secretary of the law society of which the applicant is a member, to the effect that the applicant has been practising as an attorney or has been performing community service as an attorney at any law clinic, for a continuous period of not less than three years; and
- (c) a certificate signed by the secretary of the said law society to the effect that no proceedings to strike the applicant's name off the roll of attorneys, or to suspend him or her from practice as an attorney, have been instituted by that law society. . . .
- [7] DBN's former principal when she was a candidate attorney appeared on her behalf. He submits that this court should put the blame on his door step for his failure to educate and or inform DBN that she needed to acquaint herself with the requirements set out in RACA. He pleaded for mercy. He further submitted that even the though ignorance of the law excuses no man, referral of this matter to the relevant professional body may be tantamount to 'crashing a nut with a sledge hammer'. I disagreed.

- [8] DBN was admitted as an attorney on 29 July 2016. She did not apply for the right of appearance in the Superior Courts as envisaged in terms of RACA. Perhaps a perception has been created that the right of appearance in superior courts was automatic once admitted as an attorney. The right of appearance in the Superior Courts is automatic only if one is admitted as an Advocate. Section 2 of RACA grants advocates an absolute right to appear in any court in the Republic of South Africa.
- [9] The legal profession has always been divided into two branches. The advocates and attorneys. The requirements for the admission into any of the two professional streams are stipulated in Admission of Advocates Act 74 of 1964 and Attorneys Act 53 of 1979 respectively. The Legal Practice Act, Act 28 of 2014 consolidated the two professions with distinction between the two branches that perpetuates under strict ethical codes.
- [10] The law as it stands (in terms of RACA) provides that advocates can on admission as such, automatically appear in any court whereas all attorneys admitted as such, can automatically appear in any other courts other than Superior Courts and any High Courts of Appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa[10]. An attorney who wishes to acquire the right of appearance in Superior Courts, must apply to the Registrar of the High Court of the division he/she wishes to acquire the right of appearance (see section 4 (1) of the Right of Appearance in Courts Act, Act 62 of 1995)
- [11] The Legal Practice Act, Act 28 of 2014 changed to a greater extent the requirements an attorney must comply with when applying for the right of appearance in the Superior Courts. The requirements are set out in section 25. They are:
25. (1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.
- (2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections
- (3) and (4) or any other law.
- (3) An attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court must apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney—

- (a) (i) has been practising as an attorney for a continuous period of not less than three years: Provided that this period may be reduced in accordance with rules made by the Council if the attorney has undergone a trial advocacy training programme approved by the Council as set out in the Rules;
- (ii) is in possession of an LLB degree; and
- (iii) has not had his or her name struck off the Roll or has not been suspended from practice or that there are no proceedings pending to strike the applicant's name from the Roll or to suspend him or her; or
- (b) has gained appropriate relevant experience, as may be prescribed by the Minister in consultation with the Council, if the attorney complies with paragraph (a) (iii).
- (4) (a) An attorney wishing to apply for a certificate contemplated in subsection (3) must serve a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.
- (b) A registrar of a Division of the High Court who issues a certificate referred to in subsection (3) must immediately submit a certified copy thereof to the Council.
- [12] It is trite law that the courts are independent and subject only to the constitution and the law, which must be applied and enforced impartially and without fear, favour or prejudice[11].
- [13] Section 4 (1) (b) of RACA and section 25(3) of the Legal Practice Act, requires an attorney who wishes to have the right of appearance in the Superior Courts to have had practiced for a continuous period of not less than three years. Non-compliant with the requirement set out in section 4(1) of RACA is an offence and an unprofessional conduct on the part of an attorney as stipulated in terms of section 6 (1) and (2) of RACA. The section, for ease of reference, provides:

6.

- (1) An attorney who has not acquired the right to appear on behalf of any person in the Supreme Court or an attorney whose right so to appear has been withdrawn or suspended, may not appear in the Supreme Court or hold himself or herself 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 or she is an attorney who has the right so to appear in the Supreme Court.
- (2) An attorney who contravenes subsection (1) shall be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment,

and any contravention of that subsection by an attorney shall, in addition, constitute unprofessional conduct.(emphasis added)

[14] Enforcement of the laws that govern the profession is to protect the dignity and the integrity of our Courts of Law. The legal

practitioners' tendency of not observing and or heeding the decorum of the Superior Courts, this Local Division in particular,

has been a concern raised by judicial officers from other Divisions who presided herein. Judicial officers' concern is the drop of good standard displayed by some legal practitioners in this Division.

[15] I find myself unable to comprehend as to how DBN, an attorney practicing as such, would not have known of RACA. When enquired from DBN of her right of appearance in High Court, she with confidence, indicated to have had full knowledge of RACA. She repeated in her affidavit that "[she] did not admit that [she did] not have such a certificate". She insisted that she had the certificate though not in her possession at the time[12]. She, in my view, deliberately misled me in chambers in her representation with regard to her right of appearance in the High Court. She confirmed under oath that she indeed did mislead me in her representation to have had a right of appearance certificate as required in terms of RACA.

[16] I could not have agreed more with her counsel that referral of the matter to the Director of the Public Prosecution, notwithstanding the provisions of section 6 of RACA is tantamount to "crashing a nut with a sledge hammer" but for the prescription of her conduct as being unlawful. The rules of the legal profession and ethics required of DBN to be a person of unquestionable honesty and integrity.

[17] This court with its inherent power to protect its integrity, dignity and to regulate its own process, necessitated the issuing of the directive to DBN to show cause why her conduct should not be brought to the attention of either the professional body or the Director of the Public Prosecution. DBN is not the only attorney with the perception she demonstrated with regard to "automatic"

right of appearance in the High Court.

[18] I am unfortunately not persuaded by submissions advanced by counsel not to refer the matter to any professional body for any disciplinary action. Counsel submitted that the fault lies with him. He failed to educate DBN more on ethical conduct. Even if I am to accept counsel's failure as he puts it, there is no evidence that he influenced her to conduct herself in the manner she did. There is no evidence that counsel, as her former principal or any other person, coerced, or unduly influenced DBN on the day in question to come to court and appear in the High Court with full knowledge that she did not have the right to do so. DBN's conduct is defined as a criminal offence and an unprofessional conduct that warrants a sanction as stipulated in section 6(1) and

(2) of RACA.

- [19] I am still of the view that it was DBN's duty to acquaint herself with the requirements set out in RACA for acquisition of the certificate for the right of appearance in the High Court. It is further required of any legal practitioner who wishes to appear in the Superior Courts to first acquaint him/herself with the Rules and the practice directives of the division. The challenge I have is that DBN's appearance in the High Court without the required right of appearance certificate may vitiate the entire trial proceedings. (See *S v Mkhise*; *S v Mosia*; *S v Jones*; *S v Le Roux* 1988(2) SA868 at 875 G-H)
- [20] What worried me most was DBN's flawed duty to act honestly, consciously and open to court when making misrepresentations to me in chambers and which she repeated under oath that 'I did not admit that I do not have such a certificate. Instead, I said I did not bring it with me'. As a matter of principle, a legal practitioner who lies, more damning under oath, in defending himself or herself in any matter will be bound by such representation if his or her perjury is held against him or her by a professional body or court of law. DBN misled this court on her right of appearance in the High Court. There is no assurance that she will not repeat her misrepresentations should she find herself in a position where she would be expected to prevent anyone from misleading the Court. (See *Kekana v Society of Advocates of South Africa* 1998(4) SA 649(SCA). Hefer JA penned in the majority judgment that 'the preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners,

it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and,...that a practitioner who lacks these qualities cannot be expected to play his/her part.'

- [21] In my consideration of the evidence and submissions made, I find myself in no position than to refer the matter to the relevant

professional body to take any reasonable step or remedial sanction (if any), if from their enquiry, they deem appropriate on the basis that DBN, in her state of mind, knew at the time of making representation in my chamber that she was not telling the truth. She however, propounded factual assertions which were contrary to the truth. In my view that is enough to establish the intention to mislead the judge and the Court. In principle, a practitioner must not knowingly make a misleading statement to a court in any matter. Her conduct warrants an investigation by a professional body to which she subscribed.

- [22] I digress to mention in obiter, the disparity on rights of appearance in Superior Courts created by RACA and Legal Practice Act 28 of 2014. Any person who complies with the Admission of Advocates Act and who gets admitted as an Advocate, does have an automatic right of appearance in the Superior Courts without any attendance of any trial advocacy training programme whereas a practitioner, who wishes to practice as an attorney, will only have the right to appear in the Superior Courts only after

he/she would have practiced as an attorney for a continuous period of not less than three years. This translates that a practitioner who chooses to be an attorney will only have the right to appear in the Superior Courts after 4 to 5 years<sup>[13]</sup> of completion of his/her legal studies. Lack of attendance of any form of trial advocacy training programme by all persons who intend to be admitted as an Advocates, tends to, in my view, compromise the standard and integrity of the Superior Courts especially the High Courts. Appearance of Advocates who have been admitted without having undergone a trial advocacy training programme or practical vocational training, has shown that they lack appropriate relevant experience or decorum required and expected of a High Court practicing practitioner. In most instances, such advocates come from what is commonly known as “Independent Bar”.

<sup>[23]</sup> In my view, any person who intends to be admitted as an advocate must also satisfy the registrar that they attended any kind of trial advocacy training programme approved by the professional body or South African Legal Practice Council. Professional bodies must do something about the said disparity.

<sup>[24]</sup> I, in the result, make the following order.

#### Order

24.1 The registrar is directed to send a copy of this judgment and the affidavit deposed to by DBN to the Law Society of the Northern Provinces

24.2 The Law Society of the Northern Provinces is ordered to investigate the conduct of DBN as set out in paragraphs

<sup>[18]</sup> and <sup>[21]</sup> vis-à-vis the provisions of section 6 of the Right of Appearance in Courts Act 62 of 1995

24.3 The registrar is further directed to send a copy of this judgment to the General Council of the Bar; the South African Legal Practice Council to consider the obiter dictum espoused in paragraphs <sup>[22]</sup> and

<sup>[23]</sup> of this judgment.

AML Phatudi

Judge of the High Court

#### APPEARANCES

For DBN Attorney : Mr M Mangena Instructed by : Tambani Matumba Attorneys

Louis Trichardt, Limpopo

<sup>[1]</sup> The name of the practitioner has been omitted for her reputation and integrity.

<sup>[2]</sup> The name of the Law firm has been omitted to secure its reputation and integrity.

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- [3] See section 6 of the Right of Appearance in Courts Act 62 of 1995
- [4] She was not properly dressed and her court address was demeaning.
- [5] The name is wrongly spelt as phathudi.
- [6] Section 15, 16, 20 and 21 stipulates the procedure and requirements to be met by the applicant for admission and enrolment as an attorney.
- [7] Section 20 of Magistrate Court Act 32 of 1994 as amended provides- an attorney of any division of the [High] court may appear in any proceedings any court.
- [8] Superior Courts Act, Act 10 of 2013 defines Superior Courts as the Constitutional Court, Supreme Court of Appeal, the High Court and any courts of a status similar to the High Court.
- [9] The word Superior Courts is now used for the High Court, Supreme Court of Appeal and the Constitutional Court in the Superior Courts Act 10 of 2013.
- [10] Section 166 (c) of Constitution of Republic of South Africa Act 1996.
- [11] Section 165 (2) of Constition of Republic of South Africa Act, 1996.
- [12] During my attendance at the Judge's Chambers, Justice Phathudi(sic) requested me to show him my Certificate of a right of appearance in terms of Section 4 (2) of Act 62 of 1995. Initially, I did not admit that I do not have such a certificate. Instead, I said I did not bring it with.
- [13] 1-2 years as candidate attorney coupled with 3 years after his/her admission as an attorney.
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Prepared on 10 October 2026 · Esheria