

SOUTH AFRICA / JUDGMENT

Mpongoshe v S (CA&R211/2018) [2019] ZAECHGC 104 (9 September 2019)

[2019] ZAECHGC 104

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Hartle, Beard

CASE / FILE NUMBER

CA&R 211/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA&R 211/2018

OF INTEREST

In the matter between

MICHAEL MLUNGISI MPONGOSHE Appellant

and

THE STATE

Respondent

APPEAL

JUDGMENT

HARTLE J

- [1] The appellant appeals with leave granted on petition against his conviction in the regional court, Port Elizabeth, on twelve counts of fraud, two counts of carrying on business as an estate agent without a valid Fidelity Fund certificate and one count of failing to comply with a bail condition.
- [2] He was sentenced to an effective term of fifteen years imprisonment.

- [3] In granting leave this court directed the parties to pertinently address the issue of whether the appellant was not compromised in his fair trial rights by his attorney withdrawing before the trial commenced and the issue on appeal before us is whether any such irregularity exists in the proceedings warranting this court's intervention.
- [4] On the first set down of the trial on 8 January 2015, the applicant was represented by Attorney Griebenouw of Port Elizabeth. It appears from the transcript that seven counts of fraud and one of carrying on business as an estate agent without a valid Fidelity Fund certificate were initially put to him. He pleaded not guilty and reserved the basis for his defence. Certain admissions were however made on his behalf pursuant to the provisions of section 220 of the Criminal Procedure Act, No. 51 of 1977 ("CPA")

including the fact that he had not been issued with a valid Fidelity Fund certificate as an estate agent for the period 2013/2014 when the transactions which were the subject of counts 1 to 7 were entered into; that separate amounts received into his banking account had been paid to him by each of the complainants mentioned in those counts in lieu of the purchase prices (and in some instances transfer fees) for properties sold to each of them through his agency, and that the transfers were never effected neither were the trust monies so paid to him refunded to the relevant complainants.

- [5] The appellant confirmed on 8 January 2015 that these admissions were made in accordance with his instructions and that he was making them freely and voluntarily. A postponement of the trial was granted at his request, however, as a result of a knee injury which he had sustained and because of which he claimed to be in pain.
- [6] After the matter was postponed at his request and before any evidence was led, the appellant was arrested on additional charges of fraud alleged to have been committed using the same modus operandi of taking deposits from other potential purchasers who never took transfer of the properties they believed they were buying and which payments were never refunded to them, and of carrying on business as an estate agent without a valid Fidelity Fund certificate for the period February – May 2015. A single count of failing to comply with additional bail conditions that had been imposed on him on the day he pleaded to counts 1 - 7 and made the admissions aforesaid was also brought into contention. By the time he pleaded to the supplementary charges, all of which he also denied, he was unrepresented.
- [7] The state led the evidence of several witnesses during the trial and after the state's case was closed the appellant testified in his own defence. He also called several witnesses. The trial magistrate after evaluating all the evidence found the appellant's version not reasonably possibly true and convicted him on all 15 counts as charged.
- [8] More detail relevant to the complaint that the appellant's fair trial rights were infringed because he conducted his trial undefended is apposite. It appears that the matter had initially been enrolled for trial on 7 – 9 January 2015. On 7 January 2015 Mr. Griebenouw appeared in the appellant's absence and requested a postponement based on the knee injury

aforesaid. The request was opposed by Mr. De Villiers who both prosecuted the matter in the trial court and appeared for the state in the appeal. He was not inclined to accept the medical certificate tendered on the appellant's behalf as a result of which the matter was postponed for the customary fourteen days and the state witnesses evidently excused. A warrant for the appellant's arrest was authorized and his bail monies were declared provisionally forfeit to the state.

- [9] The J15 (before the transcript commences) reflects that on 8 January 2015 the appellant appeared "uit eie beweging," assisted by Mr. Griebenouw. The warrant for his arrest was cancelled, and the state launched right into the plea proceedings which were mechanically recorded. Before pleading Mr. Griebenouw confirmed that the appellant was fully aware of the charges and added that these had been canvassed with the appellant when the charge sheet had been received by him in 2014 already.

A plea of not guilty on all 8 counts was offered and the court was advised of the appellant's election not to disclose a basis for his defence. The admissions referred to above were then placed on record.

- [10] Mr. Griebenouw repeated his request for a postponement on the basis that the appellant was in pain, whereas the state, eager to commence leading evidence and ready to proceed, opposed the application. The magistrate acceded to his request however acknowledging that it would be "unfair for (the court) to expect (the appellant) to proceed" and recognizing that this court might later criticize that court for not granting the postponement.
- [11] In the light of the appellant's admission that he did not hold a Fidelity Fund certificate for the period under scrutiny relating to counts 1 - 7, Mr. De Villiers also made application for his bail conditions to be altered. This application was entertained even though the court had ruled that it would be unfair to expect the appellant to meaningfully participate in the proceedings because he was in pain.
- [12] It is necessary to relate the exchange in court in respect of this application, given the appellant's defence to the charge of failing to comply with the amended bail conditions which emerged under cross examination.

"PROSECUTOR: Your Worship, the witnesses have also brought under my attention that the accused who has now admitted that he is not a [intervenes]

COURT: Estate agent.

PROSECUTOR: Yes, that one. Still advertises as an estate agent and that he has his advertisement billboards all over the show. I want to make that part of the bail application - ag not - bail condition, Your Worship, that he refrain from acting as an estate agent and that he removes all those billboards with immediate effect.

COURT: Your admission, Mr. Griebenouw was that he is still not an estate agent or is that at the time of the commission of the offence was not an estate agent?

MR GRIEBENOW: Your Worship, at the time of – well, that he is still not registered as an estate agent. His registration is pending the outcome of this case. It will be processed. As far as the billboards are concerned, Your Worship, it is my instructions from the accused that there are still billboards up out there. That those billboards were erected prior to this case but he has no problem with this bail condition as soon as he is fit and ready to do – to move around but he has got no problem with that being added as a bail condition.

COURT: Bail condition is then altered. The accused is ordered to cease all advertisements (as) estate agent. Accused is also ordered to remove all remaining billboards on or before 15 January that indicate that he is an estate agent.

MR GRIEBENOW: As the court pleases.

PROSECUTOR: As the court pleases, your Worship.

COURT: If you fail to comply with this, sir, the State may bring an application that I revoke your bail and keep you in custody.

PROSECUTOR: Your Worship, this includes all advertisements in the property post, property guide, so I just want to make it clear.

COURT: Okay, he must cease advertisements from today on. I mean I cannot do anything regarding the advertisements he (has) already

placed in the past.

PROSECUTOR: I get that. I just wanted to make it clear that I am not only referring to billboards, Your Worship.

MR GRIEBENOW: As the court pleases, Your Worship.

COURT: Thank you. Thank you, Mr. Griebenouw, you and your client (are) excused.”

[13] The matter was thereafter postponed for trial to 27 July 2015. Evidently on 23 July 2015 the appellant was arrested on the additional charges (Counts 9 – 15) and appeared under a second case in tandem with the present one. His bail was also revoked based on the allegation that he had breached his bail conditions (Count 15) and the court had to deal with an application by the Asset Forfeiture Unit that his bail monies be declared forfeit to the state. At this appearance he was still represented by Mr. Griebenouw. The matter was postponed at his request to 7 August 2015 with the appellant now in custody and again to 19 – 21 August 2015 for trial.

[14] On 19 August 2015 the appellant terminated Mr. Griebenouw’s mandate and indicated that he wished to appoint one Mr. Maqunqu in his place. The latter appeared in the absence of the Appellant (who was in custody) on the 21st and the matter was postponed again to 24 August 2015. There is no indication what happened on this date, but the next entry is on 20 October 2015 when the court noted that Mr. Maqunqu had withdrawn due to a lack of funds. The matter was postponed again, to 28 October 2015, ostensibly finally for legal

representation. On this occasion the appellant was informed of the provisions of section 342 of the CPA (sic) and that he would be expected to appear in person at the trial if he could not secure legal representation.[1] An entry made on 28 October 2015 in the tandem case (which was only withdrawn later and the charges in that matter added as counts 9-15 to the present matter), to which the court in the present matter referred on 28 October 2015 when the matter was postponed for trial for four days in December 2015 (it reads “Sien CC1/43/15”), reflects the appellant’s election to conduct his own defence. A further entry in the tandem matter reads: “Application brought by (accused) refused.” What this application is comprises of several pages of “(a)n urgent application for (the appellant’s) matter to be set aside”. In it the appellant refers to a “corrupt relationship” between his erstwhile attorney and the state and suggests a conspiracy between them to force the trial upon him and to amend his bail condition while he was ill and incapacitated. He complains that whereas he was arrested on 10 July 2015 on the additional charges, they could just as well have been added to the present charges but that this was, in his view, a strategic move to have his bail cancelled and declared forfeit to the state by way of an urgent application also foisted on him at the same time. He claims that the bail monies of R50 000,00 were thereafter

paid to Mr. Griebenouw with the assistance of the prosecutor, rendering him without funds to appoint another attorney. The

basis for his claim to set the matter aside as stated in the penultimate paragraph is that he “stood for this trial while

(he) was in custody” and that it was a “trick” to frustrate his fair trial. Astoundingly this application appears to have been dismissed perfunctorily. No reasons were furnished for this decision. There is no record of the application having been argued, and no comment was made by the court even concerning those aspects pertinently bearing on his ostensibly forced election to forego the services of a private attorney because he did not have funds. A discussion regarding the alternative possibility of still pursuing an application for legal aid was evidently not even conducted.

[15] On 26 November 2015 it is noted that copies of the docket, charge sheet, etc. were given to the appellant and he confirmed that he would conduct his own defence at the trial which eventually commenced on 14 December 2015. He was asked again before he pleaded to the additional charges whether he wished to conduct his defence without an attorney and once again confirmed his election in

this respect to carry on unrepresented.

[16] Unfortunately, the numerous appearances before the trial got off were not electronically transcribed so one must contend with cryptic court notes to gather what exchanges were had between the court and the appellant.[2]

[17] The right to a fair trial is a Constitutional right and is entrenched in section 35 (3) of the Constitution of the Republic of South Africa, No. 108 of 1996. The subcomponents of the fair trial rights of accused persons applicable for present purposes provide that:

“(3) Every accused person has a right to a fair trial, which includes the right –

(a) – (e).....

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise

result, and to be informed of this right promptly;

(h) –(o).....”

[18] Mr. Solani, who appeared for the appellant submitted, regarding the contention that the appellant had not enjoyed a fair trial, that:

18.1 the trial court did not inform him promptly of his right to legal representation or of the consequences - especially having regard to the serious nature of the charges, of conducting his trial without such assistance;

18.2 the court did not promote the possibility of him applying for legal aid or pursuing that application, or to get a new attorney to represent him;

18.3 the court did not render assistance to him during the conduct of his trial, especially in challenging the evidence of the state witnesses.

18.4 the court did not allow the appellant to call his witnesses neither did it promote the opportunity for their evidence to be adduced; and

18.5 the court failed to consider that the appellant did not understand the niceties of the admissions made on his behalf which should have been apparent from the fact that during the trial he challenged their admissibility.

[19] Dealing with the first two of these complaints, the appellant was most likely not informed of his right to legal representation when attorney Griebenouw’s mandate was terminated because an alternative arrangement was already in place for Mr. Maqunqu to be substituted in his stead. But certainly once Mr. Maqunqu had indicated that there was a problem with the appellant’s ability to afford his services, and because he was by now in custody, it ought to have occurred to the court to be mindful of possible prejudice to him by this unfortunate turn of events. In this respect the right referred to in section 35 (3)

(9) of the Constitution had come into sharp focus and the appellant was entitled to be informed without further ado that if he could no longer afford the attorney of his choice he could apply to have one assigned to him at state expense. The manner in which he was to exercise that right should also have been clarified to him. The mere fact of the serious nature of the charges against him should have been a red flag that substantial injustice might otherwise result were he to conduct his own defence.

[20] Despite the fact that the magistrate's notes of 20 October 2015 suggest that the matter was postponed to enable the appellant to apply for legal aid ("Regshulp?"), and even assuming that he prefaced this entry with an explanation and a warning to the appellant that he should get his house in order so that he could be assisted in his defence upon trial lest he be

compromised (Mr. De Villiers submitted that this is the only plausible explanation for the entry), this does not per se confirm

that the appellant was indeed apprised of his rights in this respect, more especially that he was entitled to the assistance of a legal aid attorney or that he understood what he was to do to invoke such assistance. The court's reliance on the provisions of section 342 of the CPA (I assume section 342A), especially at this vital juncture when the appellant should have been given the space to make an application for legal aid and consult for a trial that was imminent, instead of allaying one's concerns that his fair trial rights were being prioritized, to the contrary suggests that they were negated or rendered secondary to the state's objective of a speedy trial at all cost.

[21] The appellant may well, because of the court's reliance on these extreme measures, have felt under compunction to simply represent

himself especially since he had but a mere eight days at his disposal to obtain legal representation. He also evidently had other concerns in the back of his mind which were distracting him, and which were self-evidently within the court's knowledge when a week later his purported election to conduct his own defence was noted in the record of the tandem case. Given the onerous provisions of section 342A of the CPA, the question begs itself what the appellant was told he was up against on 20 October 2015. Was he was told that his needing time to make the necessary financial arrangements to secure representation after Mr. Maqunqu had just withdrawn as his attorney was causing an "unreasonable delay" in the completion of the proceedings which could or had already occasioned substantial prejudice to the prosecution, the state or the witnesses (this is the clear jurisdictional basis for its invocation) warranting the censure of the court against him on one or other of the bases envisaged in section 342A

(3) of the CPA?[3] What else could have been the basis for the court's resort to the provisions of section 342A except perhaps to place him under pressure to resolve his situation within the very limited opportunity afforded to him?

- [22] One is further left in doubt, for the reasons referred to above, whether his precarious position of being without funds to engage private counsel and the alternative option still available to him to have a legal aid attorney appointed were properly canvassed with him or at all on 28 October 2015.
- [23] In *May v S*[4] the Supreme Court of Appeal had occasion to deal with the court's obligation to advise an unrepresented litigant of his right to legal representation, exhorting in no uncertain terms that:
- "[6] Of course, the magistrate should have informed the appellant of his right to legal representation, at State expense, expressly in court, and should have confirmed that he was aware of the right to have a different advocate or attorney appointed at State expense. It was apparently taken for granted that he was aware of his rights. Judicial officers should not assume that accused people are fully aware of their rights and of the implications of acting in their own defence. Even if the assumption is correct, it is incumbent on the person presiding over a criminal trial to ensure that the accused is fully informed, in open court, not only of the right to legal representation but also of the consequences of not having a lawyer to assist in the defence."*
- [24] In that instance the assumption that that appellant was fully aware of his rights flowed from the fact that prior to the commencement of his trial he did indeed have legal representation so must have chosen not to avail himself of it when the trial commenced. The court noted however that there had been a substantial period, when the appellant was in custody, between his appearance with an advocate and the time when he had confirmed that he would continue the trial without legal representation. The appellant had not complained nor presented any evidence, either to the trial court or to the first court of appeal, of any prejudice he had suffered by virtue of the lack of representation. The Supreme Court of Appeal made the assumption in the state's favour that as an awaiting-trial prisoner the appellant would probably have been made aware that he had a right to another representative once the first advocate had withdrawn, yet qualified this expectation with the remark that: "But we do not know that this is the case...". In the present matter of this appeal there are similarly just as many unknowns and concerns about the interchanges between the appellant and the court on 20 and 28 October 2015.
- [25] It is evident that in order to meaningfully give expression to an accused person's right to legal representation that he should promptly and expressly be advised by a court of such right at every juncture where the circumstances require it and of the implications of his choice not to avail himself of a legal aid attorney, more especially in relation to the consequences that will flow from conducting his own defence. The more serious the nature of the charges the more compelling such an explanation becomes. It would probably also be necessary on each occasion of his subsequent appearance for the court to gauge whether the accused person has been enabled to make the necessary application and that there have been no challenges to the assignment of a public defender in each scenario. The requirement that he must be informed in "open court," as the headnote of *May v S* suggests, affirms the necessity for transparency and formal record keeping giving effect to the time

tested adage that “Not only must Justice be done; it must also be seen to be done”. One should also, in my view, be able from the transcript itself to be satisfied that this crucial right has been accorded the necessary significance and not dispensed with perfunctorily to the detriment of an accused person’s right to a fair trial.

- [26] Having said so, it is not in every instance of an ostensible breach of such a right that the proceeds are necessarily vitiated thereby. The crucial question to be answered, as was affirmed in *May v S*,^[5] is what the legal effect such irregularity has had on the proceedings at the trial:

“[7] However, as this Court has previously said in Hlantlalala and Others v Dyantyi NO and Another, ‘the crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellant’s trial. What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not per se result in an unfair trial necessitating the setting aside of the conviction on appeal.’ In addition it must be shown that the conviction has been tainted by the irregularity - that the appellant has been prejudiced.

- [8] Whether or not prejudice has resulted from the lack of legal representation is really a question that can be determined only by having regard to the whole trial, and the way in which it was conducted by the judicial officer; and the ability, as shown during

the course of the trial, of the accused to represent himself adequately; and to whether the evidence adduced has led justifiably

to the conviction and sentence.” (Footnotes omitted.)

- [27] There is the obvious further expectation in such enquiry - whether an accused person has made a conscious election to be unrepresented or was simply in fact unrepresented for want of recognition of his fair trial right to legal representation (the reason may well have a bearing on the outcome), that it is the duty of the presiding officer to assist him in the conduct of his defence to ensure fairness and justice and to prevent any prejudice to him.

- [28] It is evident therefore that the appellant will have to show that he was prejudiced in the conduct of his defence at the trial because of the lack of legal representation. To prove prejudice, he will have to show a failure by the presiding officer to have properly assisted him during the trial and that he could not adequately represent himself and that the evidence adduced did not lead to a justifiable conviction.

- [29] Regarding the first of the three determinants, Mr. De Villiers advanced the contention that the appellant could not complain of any prejudice by being unrepresented vis a vis the way the trial magistrate interacted with him throughout the proceedings. He alluded to several examples reflecting the

several occasions where the magistrate (to his credit) assisted the appellant to conduct his defence, in my view all amply borne out in the transcript. This includes him asking the appellant before he pleaded if he wished to represent himself and whether he was ready to proceed; explaining to him the effect of the prior admissions made by him and their consequence (which the appellant acknowledged without demur); explaining his right to give a plea explanation; ensuring that he had every opportunity to see and take in what documentary exhibits were being entered into evidence; explaining his rights regarding cross examination and patiently rendering assistance therewith - pointing out irrelevancies and indicating where it was open for him to rather argue aspects later; pointing out to him in one instance very gently that he should not mislead the witness; explaining to him the difference between criminal prosecutions and civil actions arising from the same causes when he seemed to be confused as to why he was being prosecuted whereas according to him the recoveries of some of the deposits paid have apparently been the subject matter of civil litigation; allaying his fears on an occasion when he noticed that one of the witnesses had been sitting in court during the testimony of another by assuring him that they were testifying about completely different unrelated experiences; making sure that the appellant had copies of the voluminous bank statements entered into evidence and; most significantly, spelling out his rights upon closure of the state's case (which he acknowledged he understood), offering assistance in getting his witnesses to court and deferring the matter not once but twice until they could be available. Before the appellant commenced his own testimony the magistrate also afforded the appellant an opportunity to consult with his witnesses (which chance he acknowledged he had availed himself of

and was ready to proceed) and prompted him to present his own explanation and put his version before court. In this respect

he again explained the consequences of unchallenged testimony and how the court was expected to evaluate the evidence. He also carefully teased out the details of the appellant's defence count by count and made sure that nothing was left uncovered. He went through the same exercise in inviting him to make closing submissions, prompting him wherever necessary.

[30] This takes care of Mr. Solani's concern raised in paragraph 18.3 above which is in my view without any merit. The transcript reflects to the contrary the great extent to which the magistrate went to be of active assistance to the appellant.

[31] Concerning his submission in paragraph 18.4 the appellant, again with the assistance of the court, in fact called three witnesses. When it became apparent that the trend of their evidence was merely to confirm that they transacted successfully with the appellant, the magistrate elicited the concession of the state that there were indeed successful transactions concluded by the appellant as an estate agent which were beyond reproach. One of the witnesses, a bishop of the church where the appellant is a congregant, was correctly informed by the magistrate that his evidence was in the nature of character evidence that he was better placed to tender on the appellant's behalf if he was convicted. The doctor who would supposedly have confirmed the diagnosis in the medical certificate that undergirded the approach adopted by the court on 8 July 2015 when the trial was first postponed, was not

available to testify but the court again gave the appellant the assurance that his being unable to proceed with the trial on 8 July 2015 by virtue of the injury sustained by him was not in contention at all. The appellant did not suggest that any

other witnesses should be called. Mr. Solani submitted that the appellant was prejudiced since he had indicated that other witnesses were present when he transacted with one Jackson to invest the trust monies of the complainants, but the appellant himself indicated that this possible witness, known only as Andrew, had returned to Zimbabwe and was uncontactable.

[32] I turn now to the second determinant which concerns the appellant's ability shown during the course of the trial to represent himself adequately which also incorporates Mr. Solani's challenge raised in paragraph 18.5 above.

[33] To be fair to the state the appellant certainly gave the impression of being knowledgeable of legal concepts and evidentiary matters, but in my view ambivalently so. For example, he was conversant with the concept of master's letters of authority and its impact on the standing of one of the witnesses to assert his interest in a property as its "owner" only from the date of the issue of the master's authority but missed the point that the witness was not purporting to act as the owner but was there to explain why the appellant had no business purporting to sell a house in which he had lived for the last three decades. He appreciated the relevance of title deeds to immovable property as conferring legal standing yet missed the irony that his purported

dealings as an estate agent fell far short of understanding that it was primarily such a title holder from whom his authority to sell immovable property should emanate. He made capital of the negative implication for the state by one of the witnesses (Witbooi) only being in a position to render secondary evidence because he was not present when the deceased purchaser had transacted with him yet missed that it was unnecessary for him to have been present or seen the money change hands or that he was coming to the party late in a mere representative capacity. He was ostensibly aware of his legal right to remain silent and not disclose his defence at the stage the police took a warning statement from him yet it was lost on him why it would have been important to have conveyed to the witnesses in cross examination that he had innocently placed (and lost) their monies for investment with a third party both so as to give them an opportunity to respond and more significantly to give credence to his defence that he had offered repayment to them on terms and had therefore not acted fraudulently. One of his standard defences to the fraud charges against him is that his obligation to the purchasers to refund the monies owing back to them (which he acknowledged was owing) was purportedly "wiped out" by growing interest charged for loans to those persons. Like a lamb to the slaughter he admitted without a hint of recognition that his conduct was unlawful both in respect of carrying on business as a moneylender and charging interest at the usurious rate of 30% per month! His stance in this regard also demonstrates an absolute lack of understanding of his fiduciary responsibilities concerning the handling and accounting of trust monies collected under the auspices of his purported trading as an estate agent in respect of (by his own admission) failed transactions in instances where reimbursement to the offerees was obviously necessary.

[34] The appellant disassociated himself with the admission made that the complainant in count 6, Mr. Ngcwembe, had paid him amounts totaling R146 500,00. Leaving aside his glossed over defence that the admissions made by him were unenforceable or invalid or unfair (I deal with this below), it does not appear to have been of any significance to him whatsoever that this witness' deposits self-evidently reflected in his banking account. Since the witness had not given viva voce evidence, however, the appellant completely denied his existence or that he had had any dealings with him whatsoever. When he was reminded of the admission made in respect of the witness, he denied making it at all. He also denied receiving monies from him despite what his bank statements reveal, but when asked for a reason stated that it is because the witness "is supposed to come to Court and testify".

[35] His contention that he had been prejudiced by the fact that the state had unfairly applied to amend his bail conditions on a date when he was medically incapacitated and where the court had ruled that he was "not fit to stand trial" was only raised for the first time when he was under cross examination whereas this complaint had featured largely in his application to set aside the charges on the basis of an unfair trial on 28 October 2015 already. He purported to explain in this respect that he "regarded the amendments of (his) bail conditions...as a high violation of (his) rights (in consequence of which) those conditions were invalid." This is because, so he submitted, the medical report stood before the court which had ruled that he was "unfit to stand ... trial", the state had no call to dispute it, and consequently Mr De Villiers had had no right to ask the court at this juncture to amend his bail conditions. The same applied as far as he was concerned regarding the admissions made by him which he argued were of not force because he had produced a medical certificate. He ultimately conceded that he deliberately

ignored the amended bail conditions because he did not agree with them. He equivocated though between concepts of trial fairness and legal validity. Further he only sought to put emphasis behind his defence(s) in this respect when he was given the opportunity to make closing submissions. The important issue of him having in fact made an application to the Estate Agency Affairs Board for the issue of a Fidelity Fund certificate, which application was pending and in respect of which he claims to have been given "amnesty" to trade without the certificate was also only raised belatedly yet was fundamental to his case. I point out that in the excerpt of the transcript referred to in paragraph 12 above Mr. Griebenouw had intimated to the court that the appellant's registration was "pending," which of necessity suggests that an application procedure must have been followed in order to get to that point. In the absence of any evidence from the Board as to the status of that application, it would be improper to not give the appellant the benefit of the doubt that there might have been an entirely different outcome in the trial had this "defence," properly articulated and motivated, been given the time of day.

[36] Whilst acknowledging that most of the examples reflected above point equally to the appellant astutely and opportunistically conducting his defence, the double-edged sword is his apparent lack of understanding of the crucial provisions of section 32 (1) - (3) of the Estate Agency Affairs Act, no 112 of 1976 regarding his obligations to open and keep a

separate account in which to deposit monies held or received on account of any person under the Act, to in fact deposit such monies there and to professionally account for them, and, most importantly how to invest monies in a separate but official interest bearing account with a bank or other permissible institution under the peculiar provisions of subsection 2. His loose reliance on so called contracts with the persons who placed monies with him to invest these as he saw fit and to only have to reimburse them on 90 days' notice, his lack of any separate official accounts and the absence of any paper trail reflecting where monies left to from his personal banking account (he openly admitted to drawing out vast amounts of cash in order to purportedly invest same), not a single vestige of any kind of accounting, a reckless assumption that he could use the funds to lend money against, and a continuation of this practice, unchecked by any kind of audit over a lengthy period, demonstrate a disturbing lack of proficiency as an estate agent or any understanding of the objectives of the Act and the peculiar nature of trust monies and his fiduciary responsibilities. It is outrageously reproachful that an estate agent can act in the manner which he did, but in the absence of vital indicators in the evidence to the contrary (rather than inferences which can go either way) that he did so with the necessary criminal intent, the alternative proposition, namely that he is just plainly nescient of the expectations of him as an estate agent, is one that cannot simply be discounted. Once the later proposition is accepted it becomes more compelling to conclude that the appellant should have been assisted in his defence by competent legal counsel and that the outcome was necessarily prejudicial to him.

[37] Concerning the third determinant, which goes to the merits of the conviction itself, whilst I am satisfied that the trial court looked for and found justification in the evidence for its conclusions I am hesitant to conclude that the element of intention received the necessary introspection or that the unwitting admissions made by the appellant (over and above the formal ones made by Mr. Griebenouw) were properly informed or that their significance in the whole scheme of the state's case was appreciated by him.

[38] To my mind this is one of those clear instances where the irregularity occasioned by the court in not promoting the opportunity or necessity for an accused person to be assisted by legal counsel when he was entitled to such assistance was inevitably going to and indeed led to a manifest and substantial injustice. In my view the convictions fall to be set aside, and the matter remitted to the regional court for a trial de novo.

[39] In the result I issue the following order:

1. The appeal is upheld;
2. The convictions and sentences imposed pursuant thereto are set aside; and

3. The proceedings in respect of the same offences to which the conviction and sentences above refer may again (pursuant to the provisions of section 324 (c) of the Criminal Procedure Act, no 51 of 1977) be instituted either on the original charges, suitably amended where necessary, or upon any other charges as if the appellant had not previously been arraigned, tried and convicted as set out above.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE,

M BEARD

ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 5 June 2019

DATE OF JUDGMENT : 9 September 2019

Appearances:

For the Appellant: Mr. M T Solani, Legal Aid Board, Grahamstown.

For the Respondent: Mr. W J De Villiers, Director of Public Prosecutions, Grahamstown.

- [1] The correct section is section 342A of the CPA which deals with unreasonable delays in trials. It is not clear why the magistrate postponing the matter felt it necessary to invoke this provision.
- [2] The magistrate in penning his judgments on the merits and in respect of the failed application before him for leave to appeal purported to give an account of all the appearances either before himself or his colleague, Mr. Claasen, as it appears in the J15, so as to allay the suggestion that the appellant had not been kept in the loop regarding his entitlement to legal representation. (No reference was made at all though to the proceedings of 28 October 2015) Given the critical nature of this right however, one would have expected these exchanges to have been mechanically recorded. Whereas the judicial officers' notes record the formalities, as they must, where an accused person is to be fully informed of his right to legal representation in open court and of the consequences of not having an attorney assisting in his defence, those interactions should be mechanically recorded and transcribed so that the record can reflect for itself how the message was perceived, understood and reacted to by the accused person.
- [3] The provisions of section 342A of the CPA provide as follows: " Unreasonable delays in trials (1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears

to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal

adviser, the State or a witness. (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

- (a) The duration of the delay;
- (b) the reasons advanced for the delay;
- (c) whether any person can be blamed for the delay;
- (d) the effect of the delay on the personal circumstances of the accused and witnesses;
- (e) the seriousness, extent or complexity of the charge or charges;
- (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
- (g) the effect of the delay on the administration of justice;
- (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
- (i) any other factor which in the opinion of the court ought to be taken into account. (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
 - (a) refusing further postponement of the proceedings;
 - (b) granting a postponement subject to any such conditions as the court may determine;
 - (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;
 - (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
 - (e) that- (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State; (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or

- (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action

against any person responsible for the delay. (4)

- (a) An order contemplated in subsection (3) (a), where the accused has pleaded to the charge, and an order contemplated in subsection
- (3) (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.
- (b) The attorney-general and the accused may appeal against an order contemplated in subsection (3) (d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply mutatis mutandis. (5) Where the court has made an order contemplated in subsection

- (3) (e)-

- (a) the costs shall be taxed according to the scale the court deems fit; and
- (b) the order shall have the effect of a civil judgment of that court.

[3] The provisions of section 342A of the CPA provide as follows:

“Unreasonable delays in trials

- (1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears

to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal

adviser, the State or a witness.

- (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
 - (a) The duration of the delay;
 - (b) the reasons advanced for the delay;
 - (c) whether any person can be blamed for the delay;
 - (d) the effect of the delay on the personal circumstances of the accused and witnesses;
 - (e) the seriousness, extent or complexity of the charge or charges;

- (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
 - (g) the effect of the delay on the administration of justice;
 - (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
 - (i) any other factor which in the opinion of the court ought to be taken into account.
- (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
- (a) refusing further postponement of the proceedings;
 - (b) granting a postponement subject to any such conditions as the court may determine;
 - (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;
 - (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
 - (e) that-
 - (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
 - (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
 - (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action

against any person responsible for the delay.

(4)

- (a) An order contemplated in subsection (3) (a), where the accused has pleaded to the charge, and an order contemplated in subsection

- (3) (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.
- (b) The attorney-general and the accused may appeal against an order contemplated in subsection (3) (d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply mutatis mutandis.
- (5) Where the court has made an order contemplated in subsection
- (3) (e)-
- (a) the costs shall be taxed according to the scale the court deems fit; and
- (b) the order shall have the effect of a civil judgment of that court.
- [4] 2005
- (2) SACR 331 (SCA)
- [5] Supra

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