

SOUTH AFRICA / JUDGMENT

S v Borias (41/01927/2010) [2013] ZAGPJHC 13 (4 February 2013)

[2013] ZAGPJHC 13

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, L Windell

CASE / FILE NUMBER

41/01927/2010

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

High Court Ref no 27/13

Magistrates' Serial no 38/12

Case no 41/01927/2010

In the matter between

THE STATE and LUCIEN BORIAS ACCUSED

R E V I E W J U D G M E N T

VAN OOSTEN J:

- [1] The accused appeared before the Regional Court in Johannesburg on a charge of housebreaking with intent steal and theft. He was represented by Mr McKay who held himself out as a duly admitted attorney.
- [2] The accused pleaded not guilty. One witness, the complainant and owner of the house that was broken into, testified. The matter was remanded and on resumption the accused, who had been on bail, failed to appear. It had by then been discovered that Mr McKay had over a number of years misled the courts into believing that he was a duly admitted attorney whereas in fact he was not. His "associate" Mr Kedijang appeared on behalf of the accused and a warrant for the arrest of the accused was authorised and issued. The accused was subsequently re-arrested and brought before court. The Regional Magistrate postponed the case for a special review to be submitted to this Court which is the matter now before us.

- [3] In a long line of cases it has been decided that the appearance on behalf of an accused person by a person without the right of appearance is per se an irregularity. The issue was fully dealt with by the then Appellate Division in *S v Mkhize; S v Mosia; S v Jones; S v Le Roux* 1988
- (2) SA 868 (A) where such irregularity was held to be so fundamental as to nullify the whole trial proceedings (see also *S v Khan* 1993 (2) SACR 118 (N); *Oliver en 'n ander v Prokureur-Generaal KPA* 1995
- (1) SA 455 (K); *S v Gwantshu and Another* 1995 (2) SACR 384 (E); *S v La Kay* 1998 (1) SACR 91 (C); *S v Nkosi and others* 2000 (1) SACR 592 (T)). In all these cases the proceedings were set aside due to a similar irregularity.
- [4] The request of the Regional Magistrate is that the proceedings be set aside by this Court and for the trial to start de novo. In my view the request is well-founded. The order I propose to make will further enable the accused to obtain proper legal representation.
- [5] In the result the following order is made:

The proceedings in the Magistrates' Court for the Regional Division of Gauteng held at Johannesburg in case no 41/01927/2010 are set aside and the matter is remitted to the Regional Court for hearing de novo.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

L WINDELL

ACTING JUDGE OF THE HIGH COURT

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