

SOUTH AFRICA / JUDGMENT

S v Machobane and Another (A3004.13) [2014] ZAGPPHC 1062 (2 May 2014)

[2014] ZAGPPHC 1062

COURT

North Gauteng High Court, Pretoria

BEFORE

C Basson

CASE / FILE NUMBER

A3004/13

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

SUPREME COURT REFERENCE NO: 06/2013

MAGISTRATE CASE NO: A3004/13

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

2 MAY 2014 _____

DATE A

C BASSON

BASSON,J

[1] The two accused (Mr Moses Machobane and Mr Joseph Tladi) pleaded not guilty to three accounts of assault with intent to cause grievous bodily harm and one count of crimen iniuria.

[2] This special review was referred to this Court by the presiding officer Ms Pisanie who is of the view that the attorney representing

the two accused has a conflict of interest and as a result should not be allowed to continue representing the two accused. The two accused are represented by Mr van Heerden from an attorneys firm Mills and Groenewald.

- [3] Whilst the complainant (Mrs Danpu Carol Jaine) was still testifying in chief, the Court was adjourned in order for the presiding officer to attend to a telephone call. It was during this adjournment that it was brought to the attention of the presiding magistrate by the civil magistrate (Ms Dineso) that the complainant was involved in a civil matter where she (the complainant) was the applicant and the two accused the respondents. In the civil matter the complainant (then the applicant) was represented by Mr Grove from the same attorneys firm (Mills and Groenewald). The civil matter has since been settled.
- [4] Mr van Heerden confirmed on record that he was from the same attorneys firm as Mr Grove. The issue was discussed on record and the presiding officer conveyed to the parties that she was of the view that there is a conflict of interest where the complainant had been represented by the same attorneys firm in a previous civil matter.
- [5] Mr van Heerden denied that he had any knowledge of the civil matter and stated on record that he did not even know the complainant. He also stated that he did not discuss the matter with Mr Grove.
- [6] At the outset it must be pointed out that this is not a case where the same legal representative first represented the complainant in civil proceedings (against the two accused) and thereafter represents the accused in the criminal trial where his previous client is now the complainant. I am of the view that in the latter scenario the potential for a conflict of interest is more likely. This scenario is different: The only common denominator is the fact that the two attorneys are from the same firm. Nothing was placed before the presiding officer indicating a conflict of interest but for the fact that Mr van Heerden is from the same firm as Mr Grove. I am also mindful that this fact was disclosed to the prosecution and that it appears from the record that the prosecution had no objection. Unfortunately the presiding officer did not afford Mr Van Heerden an opportunity to fully explain his position before bringing an end to the proceedings nor did she enquire from the two accused whether they were aware of the situation and whether they had any objection.
- [7] Under these circumstances I am of the view that there is no reason to exclude Mr van Heerden from representing the two accused especially in light of the fact that nothing is on record indicating that the two accused were of the view that their right to a fair trial was being infringed upon.
- [8] In arriving at my conclusion I had regard to the following general principles as was summarised by the Zimbabwean High Court in Longhurst NO v Lee & others [2006] JOL 18501 (ZH) with reference to Legal Ethics by EAL Lewis (1982) at page 50:

"The rule is this: A practitioner must not act at the instance of a client or prospective client if he has or is likely to have a conflicting interest as above defined and if such an interest or its likelihood appears when he is already acting he must cease to act unless before undertaking the task or when the interest or its likelihood appears, he shall have made the fullest disclosure to the client or prospective client of that interest or its likelihood and the latter, with the clearest understanding of the disclosure and of the implications, shall have unreservedly consented to his acting. There is however the rider that even with such understanding and consent the attorney shall avoid acting or continuing to act if he is not absolutely certain of his ability to do so without leaning towards any preference contrary to the client's interest unless exceptional circumstances operate . . . The making of full disclosure in any instance may be inhibited by considerations of privilege or confidence which if not waived may render it impossible for the attorney to proceed on behalf of the instructor."

In the same matter the Court referred to *Stockton v Ford* 52 US (11How) 232; 247[1850] USSC 138; ; 13 L Ed 676 (1850) where the following was stated:

"There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or generally

speaking, one more honourably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious,

to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it."

[9] I am in agreement with the principles as set out in the above cases and I am in agreement with the view expressed in *Longhurst* (supra) that it is for the Courts to seriously and jealously guard the principles in respect of conflict of interest.

[10] I am, however, of the view that a conflict of interest will not necessarily arise in each and every case merely because another

attorney from the same firm has had some involvement in matters affecting the parties before court. (See in this regard *Dobrock Holdings (Pvt) Ltd v Turner & Sons (Pvt) Ltd & Others; Turner & Sons v Zambezi Paddle Steamer (Pvt) Ltd & Another*

[2007] JOL 19622 (ZH).) Whether a conflict or a perceived conflict of interest exists in these circumstances is always a matter of fact and of discretion.

[11] I accordingly make the following order:

11.1 Mr van Heerden is allowed to represent the two accused.

AC BASSON

JUDGE OF THE HIGH COURT

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