

SOUTH AFRICA / JUDGMENT

S v Mbuyisa (2018/6) [2018] ZAGPJHC 421; 2018 (2) SACR 691 (GJ) (21 May 2018) [2018] ZAGPJHC 421

COURT

South Gauteng High Court, Johannesburg

BEFORE

Sutherland, Carelse

CASE / FILE NUMBER

2018/6

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REPUBLIC
OF SOUTH AFRICA
THE
HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Review
Case No: 2018/6
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED.
21/5/2018
In

the matter between:

THE
STATE
and
CAIPHUS
MBUYISA

JUDGMENT**Headnote**

Special review – a struck off attorney represented an accused at trial – proceedings in entirety to be set aside – decision in *S v Chukwu* 2010 (2) SACR 29 (GNP) which addressed a candidate attorney whose authority to appear had lapsed and condoned that irregularity disapproved and not followed – weight of caselaw supported the setting aside of the proceedings – South African Legal system the sum of parts and a profession of properly licensed officers of the court integral to the integrity of the system – no middle ground for pragmatism

Sutherland J:

[1] This matter came before the court by way of a special review. The reference to the Court was at the instance of the presiding Regional Magistrate.

[2] The Accused had been convicted 3 December 2013 of (1) malicious injury to property in that he exploded an ATM, (2) of unlicensed

possession of a firearm, ie a 356 magnum Ruger revolver and (3) of unlicensed possession of ammunition. The crimes were committed

in 2007. He was sentenced to terms of five years, twenty years and five years respectively.

[3] In the intervening five years between sentence and this review, several happenings occurred. After an application to the Magistrate

for leave to appeal was refused, the Accused petitioned this Court. Leave was granted. An appeal was heard. The result was, *inter alia*, that the case be referred back to the Regional Court for sentencing. At the time of writing, the case is pending before that court.

[4] After the matter had been returned to the Regional Court it was discovered that the person, described only as Ms Mpitso, who had represented the Accused during part of trial had been, at the time she represented the Accused, already struck off the Roll of Advocates.

[5] As a result, the matter has been sent to this court for a special Review.

[6] The trial was protracted. Apparently, the Accused quarrelled with the lawyers appointed by Legal Aid South Africa to represent him. Including Ms Mpitso, nine practitioners appeared for him over time, she being the last of them.

[7] According to the record, the trial commenced on 29 August 2012. It was postponed several times. Constable Molepo testified in chief. Then on 29 July 2013, Ms Mpitso entered the fray. On that day, Molepo, resumed his testimony. He was cross examined by Ms Mpitso. The matter was again postponed and on 19 November 2013, Constable Maruping Motena testified and was cross examined by Ms Mpitso. The case was then postponed to 3 December 2013. On that occasion an affidavit about the ballistics was introduced into evidence in terms

of section 212 of the Criminal Procedure Act 51 of 1977. Ms Mpitso raised no objection. Then a section 174 application was argued as a result of which the Accused was discharged on a charge of possession of explosives. Ms Mpitso then called the Accused to testify. He was cross examined by the prosecutor. Ms Mpitso then closed the Defence case. The matter was argued. Judgment and sentence were handed down. Save for the evidence in chief of Constable Molepo, the whole of the trial was conducted with Ms Mpitso as the Accused's representative.

- [8] The question arises as to whether the proceedings must be set aside owing to the ineligibility of Ms Mpitso to perform the role of defence counsel, and as such her performing that role constituted an irregularity that vitiates the proceedings.
- [9] The opinion of the Director of Public Prosecutions, Johannesburg (DPPJ) was solicited. A memorandum was submitted. The thrust of that view is that the proceedings should not be vitiated because, as that argument runs, the Accused was competently represented by Ms Mpitso, notwithstanding having been struck off. Accordingly, there should be no effect on the proceedings and the matter should proceed before the Regional Court for sentencing, as contemplated by the order of the court of appeal. The substantial prejudice to the State to begin again was stressed.
- [10] In support of this approach, reference was made to the decision in *S v Chukwu* 2010 (2) SACR 29 (GNP). This was a special review that came before Webster and Poswa JJ. The issue in that matter was that a candidate attorney appeared for the defence. When he commenced his role as representative his rights of audience were valid. However, before the conclusion of the trial, his rights of audience lapsed. Later when the candidate attorney had been admitted to the Bar, his old firm briefed him to continue with the trial. Poswa J addressed the question of the legality of the proceedings. The court had solicited an opinion from the DPP, Pretoria (DPPP). The State Advocate who prepared the submission concluded, after traversing the case law, that the proceedings should be vitiated. The DPPP, however, added his view that notwithstanding the legal soundness of that opinion, factors of a pragmatic nature should be taken into account and the irregularity excused. The outcome of the case was that the Court excused the irregularity on the grounds that it was not of a nature to vitiate the proceedings, that the proceedings had been in accordance with justice and that the trial should resume from where it had left off. Notwithstanding this result, the Court castigated the person who had appeared for the defence without rights of audience.
- [11] There have been six other decisions dealing with candidate attorneys without rights of audience appearing in matters. In every case the court had set aside the whole of the proceedings. These decisions are *S v Kahn* 1993 (2) SACR 118 (N); *S v Gwantshu* 1995(2) SACR 384 (E); *S v La Kay* 1998(1) SA SACR 91 (C); *S v Nkosi* 2000(1) SA 592 (T); *S v Stevens* 2003 (2) SACR 95 (T); *S v Nghondziweni* 2013 (1) SA 272 (FB). Plainly, the weight of authority in several divisions make no allowance for pragmatic considerations. *S v Stevens* decided in the

same Division as *S v Chukwu*, and which reached the opposite conclusion, was not dealt with in *S v Chukwu*.

[12] In my view, the reasoning and result in *S v Chukwu* ought not be followed. It is out of step with the jurisprudence in its own

Division and with that of several other Divisions of the High Court. Moreover, as a matter of principle there cannot, in my view, be any middle ground and therefore there can be no space to intrude pragmatic considerations. The adversarial system of litigation, to which we adhere, is premised on a profession of licenced legal practitioners whose role is to assist the courts in performing their adjudicative function. The licensing of these independent professional intermediaries is not a mere formality. Rather, the

insistence on the materiality of representatives being licensed is an integral part of the very system itself. The reliance of the courts upon persons who have been accorded a right of audience is heavy, not only for their skills in court craft, but because they are bound by an ethical code that addresses the considerable zone of the unseen which is an important dimension of the role as representative of persons who come before the courts.

[13] Moreover, independently of the considerations mentioned, the examples of what to do when candidate attorneys fall foul of the laws relating to rights of audience is distinguishable from the circumstances where the representative had been struck off the Roll and yet persists in performing a representative role in a trial.

[14] A decision not mentioned in the DPPJ's submissions in the present case is *S v Dlamini* 2008 (2) SACR 202 (T). This matter came before Prinsloo J and Jooste AJ in the Transvaal Provincial Division. It addresses exactly the issue in the present case: in that case an attorney had been suspended from practice by the Law Society and by reason thereof was without any rights of audience, yet, continued to represent an Accused in a trial. At [13] of that judgment Prinsloo J held that the proceedings had been so tainted by the irregularity that it had to be set aside in its entirety. It was held that it amounted to a failure of justice.

[15] In my view that must be the result in this case too. It is fortified by the decision in *S v Mkize* 1988 (2) SA 868 (A), the only decision in Supreme Court of appeal to address this species of problem. In that case, the question was about one, Sebastian de Jager, who had not been admitted as an advocate, purporting to represent persons before the courts masquerading as an advocate. He had appeared in many trials. The proceedings in each was set aside.

[16] Accordingly in my view, the appropriate order in this matter is to set aside the proceedings in their entirety. The order makes

provision for that outcome and also includes safeguards that the future of the matter is dealt with swiftly and effectively.

The Order

1. The proceedings are set aside in their entirety.
2. The DPP, Johannesburg shall decide whether to institute fresh proceedings within 30 days of the date of this judgment.
3. If the proceedings are to be reinstituted, the trial must take place before another Magistrate.
4. The Accused shall not be imprisoned or detained for longer than 30 days from date of this judgment, unless he is recharged, whereupon he may, if so advised, seek bail, a the Court hearing such application shall make such decision as in appropriate in law.
5. The DPP, Johannesburg, shall within 60 days of the date of this judgment, file a brief report to this Court to inform it as to the decision taken and the steps taken to reinstitute proceedings, if so be the case, and if not so decided, what the circumstances are as regards the incarceration of the Accused

Sutherland J

I agree.

Carelse J

21 May 2018.

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