

SOUTH AFRICA / JUDGMENT

S v Mhlanga and Others (A314/10) [2010] ZAGPPHC 33 (29 April 2010) [2010] ZAGPPHC 33

COURT

North Gauteng High Court, Pretoria

BEFORE

Southwood, Pretorius

CASE / FILE NUMBER

A314/10

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 29/04/2010

Magistrate

PRETORIA

THE STATE v SIPHO MHLANGA, NXULULEKO NDEBELE AND MTHANDENI NDLOVU

REVIEW JUDGMENT

SOUTHWOOD J

[1] This is a special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977. The Pretoria regional magistrate has submitted the case for special review because he has ascertained that the person who represented

accused no 3, a Mr. Moagi, is not an advocate as he represented to the court. Concerned about the effect on the trial of this fact in the light of SvMkhise: S v Mosia: S v Jones: S v Le Roux 1988 (2) SA 868 (A) the regional magistrate raises the following questions -

whether the entire proceedings must be set aside because they are not in accordance with justice; and

whether only the proceedings relating to accused no 3 must be set aside because they are not in accordance with justice.

He has pointed out that this is not pertinently addressed in Mkhise's case.

- [2] The three accused are standing trial on two counts of robbery with aggravating circumstances, one count of assault with intent to do grievous bodily harm and two counts of unlawful possession of a firearm. The accused were arrested on 28 July 2004 (the night of the incident), refused bail and their trial commenced on 19 September 2005. The trial has not been completed.
- [3] At the commencement of the trial accused no 1 and 2 were represented by an advocate, Mr. Rakgobela, and accused no 3 by Mr. Moagi who represented to the court that he was an advocate. Mr. Rakgobela and Mr. Moagi continued to represent the three accused from that date but Mr. Moagi's appearances became progressively more erratic until during the first half of 2008 he disappeared and did not appear again. Mr. Moagi's failure to attend the proceedings resulted in the trial being postponed and considerably delayed the finalisation of the matter.
- [4] When Mr. Moagi disappeared the prosecution had closed its case and the accused were about to present their defence. Accused no 3 then successfully applied for legal aid and a Mr. Nel was appointed to act on his behalf.
- [5] To enable Mr. Nel to represent accused no 3 it was necessary to prepare a record of the proceedings. Numerous difficulties were experienced in doing so: in November 2008 the charge sheet and written record were stolen together with a number of documentary and photographic exhibits. The process of reconstructing the record was completed only in August 2009.
- [6] When addressing the court in August 2009 Mr. Nel alleged that Mr. Moagi had never been an advocate of the High Court. This caused the regional magistrate to make enquiries and he discovered that Mr. Moagi had never been admitted as an advocate of the High Court in terms of the Admission of Advocates Act 74 of 1964.
- [7] In *S v Mkhise*; *S v Mosia*; *S v Jones*; *S v Le Roux* supra the court dealt with a similar situation (the first time such a case had come before court in the legal history of this country) and concluded (at 875F-H) that, having regard to all the relevant considerations, it is in the public interest that the defence in a criminal trial be undertaken by a person who has been admitted to practise as an advocate in terms of the Admission of Advocates Act and the lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire trial proceedings.

This conclusion clearly relates to the facts in that case where only one accused and his legal representative were involved in each case.

- [8] Since *Mkhise's* case our courts have followed a strict approach with regard to the question of an unqualified person representing an accused and have set the proceedings aside - see e.g. *S v Nkosi en Andere* 2000
- (1) SACR 592 (T); *S v Stevens en 'n Ander* 200Z (2) SACR 95 (T); *Sv Gwantshu and Another* 1995

- (2) SACR 384(E); S v Dlamini en 'n Ander 2008
- (2) SACR 202 (T). That was also the case before Mkhise
- see e.g. S v Masithela 1986
- (3) SA 402 (O).
- [9] The Director of Public Prosecutions is of the view that the conclusion in Mkhise referred to applies to the present situation because the whole proceedings are tainted. I agree. In most cases it would be extremely difficult if not possible to disentangle the facts and determine what effect the appearance of an unqualified person had on the trial of the other accused. Since the object of the rule is to safeguard the integrity of the proceedings it seems to me to be essential that the entire proceedings be set aside. That was also the approach of the court in S v Gwantshu and Another 1995
- (2) SACR 384 (E) at 386b-d which is the only case referred to which deals with a situation where one accused was properly represented and the other
- accused not. Accordingly, the entire proceedings will be set aside.
- [10] The Director of Public Prosecutions must decide whether or not to proceed against the accused de novo. Order
- [11] I The proceedings against the accused in the Pretoria regional court under case number 14/00184/2005 are set aside;
- II The matter is referred back to the regional court for the matter to proceed de novo if the Director of Public Prosecutions so directs.
- b.r. southwood
- judge of the high court
- I agree
- c. pretorius

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