

SOUTH AFRICA / JUDGMENT

S v Mkhize (Special Review) (RC552/2024; 15/2024) [2024] ZAKZPHC 123 (23 December 2024) [2024] ZAKZPHC 123

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop, E Bezuidenhout

CASE / FILE NUMBER

RC552/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

no: RC552/2024

Special

review no: 15/2024

In

the matter between:

THE
STATE
and
KWAZI
MICHAEL
MKHIZE

Coram:

Mossop J and E Bezuidenhout J

Received:

18 December 2024

Delivered:

23 December 2024
ORDER
The

following order is granted:

1.
The convictions of Mr Kwazi Michael Mkhize and the sentences imposed upon him on 27 June 2023 are set aside.
2.
Pending a decision by the Director of Public Prosecutions on whether to prosecute Mr Kwazi Michael Mkhize de novo, he is to be released from prison and the registrar of this court is directed to urgently notify the Department of Correctional Supervision of the terms of this order.
3.
A copy of this judgment is to be sent by the registrar of the high court to the Legal Practice Council, KwaZulu-Natal to consider whether further disciplinary steps are necessary in respect of the conduct of Mr Attorney Lizwi Joshua Kwela (the attorney)
4.
A copy of this judgment is to be sent by the registrar of the high court to the South African Police Services to consider the desirability of investigating whether Mr Attorney Lizwi Joshua Kwela is guilty of a criminal offence.

JUDGMENT

MOSSOP J (E BEZUIDENHOUT J CONCURRING):

[1] This matter comes before me on special review at the request of the magistrate of Pietermaritzburg. On 27 June 2023, Mr Kwazi Michael Mkhize (Mr Mkhize) was convicted in the regional court of that city on a count of unlawfully possessing a firearm and a further count of unlawfully possessing ammunition for that firearm. On the count of unlawfully possessing a firearm, he was sentenced to

10 years imprisonment and on the other count he was sentenced to 3 years' imprisonment, which latter sentence was ordered to run concurrently with the first sentence. He has, thus, already served almost 18 months of his effective sentence of 10 years of imprisonment.

[2] During the entire course of his criminal prosecution, which commenced on 25 November 2022 and which terminated on 27 June 2023 with his conviction and sentence, Mr Mkhize was legally represented by a Mr Lizwi Joshua Kwela (Mr Kwela), apparently at all times an admitted attorney with a right of appearance in the Regional Court.

[3] On 18 December 2024, the record of Mr Mkhize's proceedings in the regional court was received by the registrar of the high court on special review and was placed before me for consideration. The basis of the special review is to be found in the following remarks which appear in the covering letter that accompanied the request for the special review:

'The accused was defended by an attorney, Mr. Lizwi Joshua Kwela who was suspended as per annexure "A" of the Legal Practice

Council letter dated 12/ 11/ 2024.'

[4] Attached to the covering letter was a letter, dated 12 November 2024, in which the Legal Practice Council (the LPC) wrote to the magistrate of Pietermaritzburg and stated the following:

'Kindly be advised that Mr Lizwi Joshua Kwela of the above-mentioned firm[1] is suspended from practicing as a legal practitioner on 22 July 2020 till to date as per our database and the Director of the Legal

Practice Council (KwaZulu Natal Provincial office) is the appointed Curator in this matter.'

[5] No further particularity was mentioned in the LPC's letter. Given the time of year, being the festive season recess period at the end of the formal court year, I accordingly directed my registrar to urgently seek further information from the LPC of the grounds upon which Mr Kwela was suspended from practice and why he remained suspended four years after his initial suspension. However, it was not possible to contact the LPC, which appears to have closed for the festive period. I accordingly have no other information than that contained in the LPC's letter of 12 November 2024.

[6] It is trite that the LPC is the *custos morum* of the legal profession and it is its duty to, *inter alia*, identify, maintain and preserve the prescribed standards of conduct required by members of the legal profession generally. It has the power to suspend members who do not achieve those standards, and it may, in deserving cases, prevent a wayward legal practitioner from continuing to act as a legal representative. In performing its duties in either suspending or striking off a member, the LPC does not impose a penalty upon the legal practitioner but rather acts in protection of members of the public.[2] In coming to a decision on what steps to take against a legal practitioner, the LPC weighs up the conduct of which complaint has

been made against the standard of conduct expected of a legal practitioner. In doing so, it undoubtedly exercises a value judgment.[3] For the purposes of this judgment, and being unable to contact the LPC, I shall cautiously accept that the suspension of Mr Kwela was justified.

[7] Our legal system cherishes the right to legal representation in legal proceedings, especially criminal proceedings. Section 35(3) of the Constitution permits an accused person the right to choose, and be represented by, a legal practitioner, and to be informed of this right promptly following upon arrest. Section 73(1) of the Criminal Procedure Act 51 of 1977 reinforces that right when it proclaims that:

‘An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.’[4]

And s 33(1) of the Legal Practice Act 28 of 2014 provides that:

‘Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward:

(a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear;’

[8] Mr Mkhize was represented at his criminal trial by a person that had no entitlement or right to do so, given his suspension. In appearing as he did, it is entirely probable that Mr Kwela misled both Mr Mkhize and the regional magistrate. Neither of them knew that he was not entitled to act as an attorney or to represent any person while under suspension. By failing to disclose this to either Mr Mkhize or to the regional magistrate, Mr Kwela intended to deceive both. That goal he achieved for it was only after the criminal proceedings had ended that it emerged that Mr Kwela had been suspended.

[9] In *Ex parte Swain*,^[5] this court observed that:

‘It is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court.’

The extract refers to assurances sought from an advocate, but the same reasoning applies where attorneys appear before the court.

[10] It is so that there are varying degrees of irregularity. A gross irregularity in a trial may vitiate the entire trial.^[6] Where the irregularity is gross, the conviction is set aside without a consideration of the merits of the matter. Where the irregularity

is less serious, the merits may be considered separately from the irregularity and a just decision taken on whether there was a failure of justice.

[11] Those qualified legal practitioners that are given the right of audience before our courts must be persons of unquestionable honesty and integrity. These qualities, on the known facts, appear to be lacking in Mr Kwela. It barely needs saying that he ought to have disclosed the fact that he had been suspended before embarking on the defence of Mr Mkhize. If suspended legal practitioners are permitted to appear without consequence before the courts of this country the

proper administration of justice, in my view, will fall into disrepute.

[12] Irrespective of the merits of the defence raised by Mr Mkhize at his trial or the performance of Mr Kwela in presenting that defence, it seems to me that the irregularity that occurred is so profound that

it invites the intervention of this court. Indeed, the irregularity is:

‘... “of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred” ...’[7]

[13] In my view, it is in the public interest that defences in criminal trials be conducted by persons in good standing with the regulatory body that governs the legal profession. Where there is an absence of such good standing in the sense that the legal practitioner has been prevented by the LPC from continuing to ply his trade, yet continues to do so, such conduct is so fundamentally irregular as to nullify the entire trial proceedings. This is an unfortunate consequence of such conduct, but it is inevitable when considerations of public interest are paramount, as in this case. In my view, the convictions of and sentences imposed upon by the regional magistrate must be set aside. This is also the view of the magistrate who sent the proceedings through on special review.

[14] Given the passage of time since Mr Mkhize’s conviction, it is not entirely certain whether the Director of Public Prosecutions will be able to retry Mr Mkhize. It is possible that witnesses may not be available. Pending the decision on whether to retry Mr Mkhize, he should in my view be released from his prison sentence.

[15] Finally, the registrar of this court is directed to send a copy of this brief judgment to the LPC and to the South African Police Services for further investigation into the conduct of Mr Kwela.

[16] I would accordingly propose the following order:

4. A copy of this judgment is to be sent by the registrar of the high court to the South African Police Services to consider the desirability of investigating whether Mr Attorney Lizwi Joshua Kwela is guilty of a criminal offence.

MOSSOP J

I agree:

E BEZUIDENHOUT J

- [1] The firm referred to was 'Kwela and Company.'
- [2] Malan and Another v Law Society of the Northern Provinces
- [2008] ZASCA 90; 2009 (1) SA 216 (SCA) para 7.
- [3] Jasat v Natal Law Society 2000 (3) SA 44 (SCA) para 10.
- [4] Of course, in this given instance, there was an impediment to Mr Kwela representing Mr Mkhize at his criminal proceedings and that was the fact that Mr Kwela had been suspended from continuing to practice.
- [5] Ex parte Swain 1973
- (2) SA 427 (N) at 434H.
- [6] S v Naidoo 1962
- (4) SA 348 (A) at 354D-F.
- [7] S v Mkhise; S v Mosia; S v Jones; S v Le Roux 1 988
- (2) SA 868 (A) at 872G and 875C.

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