

SOUTH AFRICA / JUDGMENT

S v Mtjikane, S v Prechand and Another, S v George, S v Makhunoane (36/2012, 37/2012, 38/2012, 39/2012) [2012] ZAFSHC 48 (22 March 2012)

[2012] ZAFSHC 48

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Claassen

CASE / FILE NUMBER

36/2012, 37/2012, 38/2012, 39/2012

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Review No. : 36/2012

1. The First Review

In the review between:-

THE STATE

versus

SEIPATI LYDIA MTJIKANE

Review No.: 37/2012

2. The Second Review:

NARESH PRECHAND Accused 1

T. MOKUBUNG Accused 2

Review No.: 38/2012

3. The Third Review

ARTHUR FILILE GEORGE

Review No.: 39/2012

4. The Fourth Review

VINCENT PHOTO MAKHUNOANE

CORAM: RAMPAL, AJP et CLAASEN, AJ

JUDGMENT

BY: RAMPAL, AJP

DELIVERED ON: 22 MARCH 2012

- [1] The aforesaid matters were considered together because the same issue arose in all of them. The first matter came to this court by way of a special review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977, as amended. The accused first appeared in the district court on 12 November 2010. She was released on warning.
- [2] The accused was charged with the crime of theft. The presiding officer alleged that she stole a CPU computer and accessories, at Sasolburg on 26 October 2010. The stolen goods belonged to Metsimaholo Municipality.
- [3] The hearing started on 21 February 2011. Ms Sookraj was the presiding officer, Mr Masisi prosecutor, Mr. T.M. Marabo the legal representative and Mr. Makoanyane, the court interpreter.
- [4] Since then the trial was postponed on a few occasions. The record showed that Mr Marabo first appeared on 13 December 2010, and last on 21 October 2011. Ever since then there has been no meaningful progress made towards the finalisation of this matter. Questions were raised about Mr. Marabo credentials as a lawyer.
- [5] The second matter also came to this court by way of a special review in terms of section 304(4), 51 of 1977, as amended. The two accused, Mr. Naresh Prechand and Mr. Thabo Mokubung were charged together as accused 1 and accused 2 respectively. They first appeared in the Sasolburg District Court on 21 October 2010. They were released on warning.
- [6] The accused faced a number of criminal charges. The prosecution alleged that, the two police officers committed crimes of extortion, attempted extortion, corruption, robbery and defeating the ends of justice at Sasolburg between 1 November 2009 and 16 January 2010 in contravention section 4(1) Prevention and Combating of Corrupt Activities, Act 12 of 2004 section 3(a) and related provisions of the same statute as well as section 369A CPA, 51 of 1977.

- [7] The hearing started on 7 October 2010. On that day each of them pleaded not guilty to all the charges. I pause to remark that accused 2 was charged with fewer charges than accused 1. The presiding officer was Ms C. Neyt, the public prosecutor, Mr. W.J. Harrington, the defence legal representative for both of the accused, Mr. T.M. Marabo and the court interpreter Mr. C.J. Makoanyane.
- [8] The trial was postponed on a few occasions since then. The record showed that Mr. Marabo's first appearance was on 21 January 2010 and last appearance was on 29 March 2011. Since then no constructive progress was made towards the finalisation of the matter. On 24 October 2011 questions were again seemingly raised in court concerning Mr. Marabo's legal credentials. It was noted by the trial magistrate that the matter would have to be taken on special review. The matter was then postponed to 10 November 2011. The purpose of the postponement was to investigate Mr. Marabo's locus standi.
- [9] The third matter likewise came to this court by way of a special review in terms of section 304(4) CPA, 51 of 1977, as amended. The accused first appeared in the Sasolburg District Court on 12 August 2010. He was released on warning.
- [10] He was charged with multiple counts of fraud and theft. The prosecution alleged that he defrauded Excel Motors or Estelle Nelson or Hercule Kruger of the sum of R135 499,43 at Sasolburg from 1 August 2009 to 13 July 2010.
- [11] The hearing started on 17 November 2011. He pleaded not guilty to all the charges. Ms Sookraj presided, Mr. Masisi prosecuted, Mr. T.M. Marabo defended and Mr. Masenya interpreted.
- [12] The trial was postponed on a few occasions, since then. Mr. Marabo first appeared on 22 August 2010 and last appeared on 26 June 2011. Since then no constructive progress was made towards the finalisation of the matter. On 31 October 2011 questions were, once more, seemingly raised in court concerning Mr. Marabo credentials.
- [13] The fourth matter similarly came to this court by way of a special review in terms of section 304(4) Criminal Procedure Act, 51 of 1977. The accused first appeared in the Sasolburg District Court on 24 December 2009. He was released on warning.
- [14] The accused was charged with the crime of fraud. The prosecution alleged that he defrauded the First Bank or Ms Susan Masike of an amount of R13 950,00 at Sasolburg between 3 October 2009 and 22 October 2009.
- [15] The hearing started on 24 August 2010. Ms Sooraj was the presiding officer, Mr. Masisi the public prosecutor, Mr. T.M. Marabo the legal representative and Mr. Lesako the court interpreter. The accused pleaded not guilty. The evidence in support of the charge was then presented.

[16] The trial was postponed on a number of occasions. The record showed that Mr. Marabo made his first appearance on 4 February 2010 and his last on 5 May 2011. Since then the proceedings have practically come to a complete standstill. On 18 November 2011 questions were once again raised about Mr. Marabo. The case was then remanded to 5 December

2011. From the record, I could not ascertain what transpired on 10 November 2011.

[17] It would seem that on 26 October 2011, the trial magistrate involved in the second matter, Ms C. Neyt, herself emailed an enquiry to the regulatory structure with disciplinary jurisdiction over attorneys to enquire about Mr. T.M. Marabo's professional standing.

[18] The Law Society: The Northern Provinces replied on 2 November 2011. The letter reads:

"Geagte Dame,

INSAKE: TM MARABO [M30849]

Ons verwys na u e-pos van 26 Oktober 2011 gerig aan ons Me Estelle Jordaan en bevestig dat ons op die inhoud daarvan gelet het.

Volgens ons rekords het Mnr Marabo se leerkontrak in Junie 2010 verstryk en sal ons dit hoog op prys stel indien u aan ons kan vermeld in welke sake hy in u hof of ander howe verskyn het aangesien ons sodanige optrede in 'n baie ernstige lig beskou. Ons bevestig dat ons reeds 'n nota teenoor sy naam aangebring het om te verhoed dat hy as prokureur toegelaat word totdat hierdie aangeleentheid volledig ondersoek is."

[19] On 5 December 2011 the same magistrate, in a letter addressed to this court wrote:

"Dear Sir/Madam

Special review: D79/10 and 3 others

Attached hereto four special reviews to be handed over to the Vice Judge President so that he can allocate it to a Judge doing reviews.

An attorney Mr TM Marabo appeared in all these cases and we received an email from the Law Society of the Northern Provinces which confirmed that he did not have any right of appearance as from 26 June 2010. I did take up the matter with Mr Marabo and he said the law must take its course.

These matters are all part-heard and no judgment has yet been rendered by the Magistrates. Please request the Judge to set aside these proceedings so that the matters can start de novo."

[20] The aforesaid letter apparently reached the clerk of the court at Sasolburg on 2 February 2012 and the registrar of this division only on 22 February 2012.

[21] The magistrate, Ms Neyt, described Mr. Marabo as an attorney. The description was not correct. The gentleman was not an attorney. According to the responsible law society, he was a candidate attorney at all times material to the four matters taken on special review. He was serving articles of candidacy or clerkship, to use a more familiar but old-fashioned term.

[22] The magistrate commented as follows in support of the relief she seeks:

“... he did not have any right of appearance as from 26.06.2010.”

I am uncertain as to where the magistrate obtained the precise date from. It will be re-called that the letter from the law society was inexact. It reads:

“Volgens ons rekords het Mr Marabo se leerkontrak in Junie 2010 verstryk.”

- [23] Perhaps the magistrate telephonically received further information concerning the date from the law society. It may well be that she received it from Mr. Marabo himself. She apparently took the matter up with him before these matters were referred to this court to be specially reviewed. On account of the perceptible uncertainty of the source of such information, I am somewhat reluctant to accept in the absence of any reliable documentary evidence that the gentleman's contract expired on 25 June 2010 and that, as from the 26 June 2010, he had no valid right to appear in any court of law to legally represent any accused person on behalf of his principal.
- [24] Notwithstanding the aforesaid lacuna of imprecision, I assume, in favour of the candidate attorney, that his contract to serve his principal as an apprentice terminated, at the very latest, on Wednesday 30 June 2010, if not earlier. This then is the cut-off line I am proceeding to use in examining and assessing the four matters.
- [25] What emerges from the facts may briefly be summarised review by review. As regards the first matter, the gentleman's first appearance was on 13 October 2010 and the last on 29 March 2011. Therefore he did wrongly appear subsequent to the expiry of his contract on 30 June 2010 and before his admission as an attorney. Therefore, the accused lady was not properly represented.
- [26] As regards the second matter, the gentleman's first and last appearance were on 21 January 2010 and 29 March 2011. His appearance(s) before 1 July 2010 was lawful, but his subsequent appearances were unlawful. Accordingly he was not supposed to have appeared on behalf of the two accused subsequent to the expiry of his articles.
- [27] As regards the third matter, the gentleman's first and last appearances in court were on 22 August 2010 and 26 June 2011. When he first appeared his contract had already lapsed. Therefore, he was not entitled to legally represent the accused at all right from beginning.
- [28] As regards the fourth matter the gentleman first and last appearances were on 4 February 2010 and 5 May 2011 respectively. Therefore, the former was rightful but the latter rightless.

- [29] By appearing as he did, he falsely represented to the accused and the trial courts in particular, as well as the members of the public in general that he was a lawyer qualified to appear in court and to represent people whereas in truth and reality he knew that he had no such a right. In the premises he prima facie defrauded the accused.
- [30] The dominant impression I get upon my integrated reading of all these reviews, is that the accused know, as a candidate attorney, that he did not have an indefinite or absolute right of appearance in a court of law; that knowledge, notwithstanding, he projected himself as a qualified attorney with unrestricted right of appearance in the district courts on several occasions; that the accused in these matters regarded him as an attorney qualified to legally represent them; that each of the accused probably paid him or his principal to be legally represented; that they were not lawfully and fairly represented and that the false representation constituted an irregularity of such gravity that it virtually vitiates the proceeding in respect of each of these matters. I take a very dim view of this sort of unethical conduct by a prospective attorney.
- [31] I recommend that The Law Society of the Northern Provinces should speedily investigate the gentleman as well as his principal in order to take a swift and appropriate disciplinary action against those concerned. I also strongly recommend that, should anyone be found guilty of these apparent misconducts, the sanction must include full compensation to the victims, namely the five accused.
- [32] I have come to the conclusion that there was miscarriage of justice, occasioned by the irregular, unethical and prima facie fraudulent conduct of the gentleman, Mr. T.M. Marabo, in each of the aforesaid matters. I am satisfied that a proper case has been made out for the relief sought by the magistrates.
- [33] Accordingly I make the following order:
- 33.1 The entire proceedings in respect of each of the four matters are set aside.
- 33.2 The nullification in respect of each matter applies ab initio each trial.
- 33.3 The matters are remitted to the Sasolburg District Magistrate Court for the de novo retrials of all the accused concerned.
- 33.4 The Law Society of the Northern Provinces should be furnished with a copy of this

judgment.

M.H. RAMPAI, AJP

I concur.

J.Y. CLAASEN, AJ

/sp

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Prepared on 11 October 2026 · Esheria