

SOUTH AFRICA / JUDGMENT

S v Serache and Others (Review) (HC12/2025) [2025] ZANWHC 75; 2025 (2) SACR 61 (NWM) (6 May 2025) [2025] ZANWHC 75

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Morgan, Titus

CASE / FILE NUMBER

HC12/2025

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FLYNOTES: CRIMINAL – Legal representation – Fidelity fund certificate lacking – Legislative intent – To impose penalties on non-compliant practitioners – Not to invalidate judicial proceedings – Lack of FFC did not constitute a gross irregularity – Did not impair trial’s fairness or integrity – Accused’s right to a fair trial remained uncompromised – No evidence that representation was incompetent or prejudicial – Accused retains accountability for selection – Review removed from roll.

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case No: HC12/2025

Magistrate’s serial No: 01/2025

Reportable: YES

Circulate to Judges: YES

Circulate to Magistrates: YES

Circulate to Regional Magistrates: YES

In the matter between:

THE STATE

and

GOITSEONE SERACHE ACCUSED 1

NKAKANE TSHILO

ACCUSED 2

JEFFREY RABI

ACCUSED 3

YVONNE MONNAMME ACCUSED 4

KGOMOTSO JWERE

ACCUSED 5

Coram: Reddy ADJP, Morgan AJ, Titus AJ

Received: 17 March 2025

Delivered: 06 May 2025

ORDER

It is ordered that:

1. The review proceedings are removed from the roll.
2. A copy of this judgment must be brought to the attention of The Legal Practice Council ('LPC'), (North West Provincial Office, Professional Affairs), by the Registrar of this Court.

REVIEW JUDGMENT

TITUS AJ

Introduction

- [1] This review application came before me on 17 March 2025 at the request of the Regional Magistrate, Mr S du Toit, for this Court to review the proceedings in the matter and determine whether the proceedings are a nullity due to the legal representative appearing at the trial for all the accused persons being without possession of a Fidelity Fund certificate.
- [2] The review is referred to this Court in terms of section 304(4)[1] of the Criminal Procedure Act 51 of 1977 ('the CPA'). As it appears from the record, the State preferred a count of robbery, read with the provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997 and a count of malicious injury to property against the accused. They were all represented by Mr Sekgopamang Moses Koloane ('Koloane'), an attorney of this Court[2] who, as it appears later in this review judgment, did so without being in possession of a valid Fidelity Fund Certificate ('FFC').

- [3] The covering letter to the record of proceedings received from Mr du Toit is not reproduced here but that letter records that the accused were all convicted on both counts and all sentenced to imprisonment. The accused were also found to be unfit to possess firearms in terms of section 103(1) of the Firearms Control Act, 60 of 2000. All were convicted on 16 August 2024 and sentenced on 31 January 2025.
- [4] At issue here is the subsequent discovery that Koloane, according to the Legal Practice Council (North West Provincial Office), was last issued with a FFC on 3 April 2014. It is self-evident that he appeared at the trial without a valid FFC. Mr du Toit requests this Court to review and determine whether the criminal proceedings are therefore a nullity. He has favoured the Court with references to various judgments, some which have found that such proceedings are a nullity while others have found that they are not. The Court is indebted to Mr du Toit for those authorities.
- [5] Section 84(1) of the Legal Practice Act, 28 of 2014 ('LPA') directs that "(e)very attorney...must be in possession of a Fidelity Fund certificate." (emphasis supplied). One consequence of not holding a valid FFC is that the legal practitioner may not receive or hold funds belonging to any person[3]. A more serious consequence is that section 93(8)(c) of the LPA criminalises any contravention of section 84(1) of the Act and that, on conviction, the offending attorney is liable to be struck off the Roll[4], amongst other things. The act of practising without a valid FFC is therefore no small issue. It is so that there is authority that the requirement that a legal practitioner must hold a valid FFC does not detract from that practitioner's qualification or competency to represent his or her client if he or she does not have such a certificate. Those authorities hold that the failure to possess a valid FFC, while an irregularity, does not vitiate the impugned proceedings. If the point is illustrated, and it can perhaps be accepted, it holds that a legal practitioner does not automatically become technically incompetent from one day to the next simply because his or her FFC expired the previous day. That the attorney may well have represented the accused ably and competently at the trial, albeit without a valid FFC, is however not the issue.
- [6] At issue is whether; by appearing for them in contravention of the law, the attorney thereby violated the accused fair trial rights. If he did, it must then follow that the proceedings were not in accordance with justice, and it should be set aside. This much is clear because the Constitution entrenches everyone's right to a fair trial[5]. The Constitution lists a non-exhaustive[6] list of fair trial rights. One such fair trial right is the right of an accused person to legal representation[7]. In terms of section 73(2) of the CPA "(a)n 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." (emphasis supplied). As indicated before, the LPA prohibits legal representatives from appearing at court proceedings without valid FFC's. The accused's right to a legal adviser is violated if the legal adviser is not legally entitled to appear.

- [7] The Constitutional Court also recognised that:

“The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that proceedings before them are always fair.”[8]

- [8] The right to a fair trial is a right that however not only has consequences for an accused person but also extends to others who have an interest in the criminal justice system[9]. In Thebus[10], the Constitutional Court held:

“Although a principal and important consideration in relation to a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice.”[11] (emphasis supplied)

- [9] The same court held in *S v Jaipal*[12] that the “...right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.” (emphasis supplied)
- [10] That permitting the appearance of legal practitioners, in contravention of the law, disrespects the proper functioning of the criminal justice system, and brings it into disrepute, is unquestionable.
- [11] The court in *S v Mazaleni*[13] expressed the view that the “...act of practising without a fidelity fund certificate has been described by our courts as an irregularity that 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...”. I agree.
- [12] For all these reasons, the criminal proceedings in the Regional Court stand to be reviewed and set aside in toto. From the records of the LPC, it would appear that Koloane has practised without a valid FFC since 2014. This is an unhappy state of affairs to put this as mildly as possible. Accordingly, I shall direct that a copy of this judgment be delivered to the offices of the Professional Affairs department of the Legal Practice Council, North West Provincial Office, for it to investigate the attorney’s conduct and to take appropriate action against him.

Order

- [13] In the premises, I propose an order in the following terms:

1. That the criminal proceedings in the Regional Division of North West, held at Atamalang, under case number RC27/2023, are hereby reviewed and set aside.

2. Should the Director of Public Prosecutions elect to recharge the accused persons, the criminal proceedings shall then be heard de novo before another Magistrate.
3. A copy of this judgment must be brought to the urgent attention of:
 - (a) The Regional Court President, North West Province, and
 - (b) The Legal Practice Council ('LPC') (North West Provincial Office, Professional Affairs) as well as the National Director of the LPC, by the Registrar of this Court.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION

MAHIKENG

REDDY ADJP

- [14] I have considered the judgment of my brother Titus AJ which was presented to me for consideration. Regrettably, I am unable to agree with his reasoning and conclusion. Given the conflicting judgments, the judgments were presented to the Judge President for his direction. The Judge President consequently referred the matter to Morgan AJ for his consideration.
- [15] In essence, this Court is invited to review the proceedings before the court a quo within the import of section 304(1) of the Criminal Procedure Act 51 of 1977 (the CPA). Central to this request is whether the proceedings before the court a quo are vitiated by the appearance of Mr Sekgopamang Moses Koloane ('Koloane'), who represented all five accused (the accused), in the absence of a Fidelity Fund Certificate (FFC) having been issued to him within the purview of section 84(1) of the Legal Practice Act 28 of 2014 (the LPA).

Background

facts

- [16] My brother Titus has briefly touched on the background facts. I propose to set it out in finer detail. On 16 August 2024, after a full-blown trial, the accused were convicted on both counts. On 31 January 2025, the accused were each sentenced to 10 years imprisonment on count 1; and 5 years imprisonment on count 2. Two consequential orders followed:
- (i) in terms of section 280(2) of the CPA it was ordered that the sentence imposed on count 2 would run concurrently with count 1, (ii) in terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused were declared ex lege unfit to possess a firearm.

- [17] On 7 February 2025, Mr Zisiwe (Zisiwe) who appeared for the accused intending to prosecute an application for leave to appeal. Zisiwe contended that in his preparation he had to change his legal approach to the matter. This was founded on recent information that came to his knowledge. Pertinent to this was the discovery that Koloane although an admitted as an attorney in 2003, had not been issued with a FFC at the time he represented the accused.
- [18] On 5 February 2025, Zisiwe received a communiqué from the Legal Practice Council of the North West Provincial Office (LPCNW) confirming that Koloane with member number 20487 is a legal practitioner registered with the LPCNW. However, according to the records of the LPCNW, Koloane was last issued with a FFC on 3 April 2014.
- [19] On 6 February 2025, the LPCNW caused a similar communiqué to be emailed to the Acting Regional Court President which mirrored that of 5 February 2025. Additionally, it asserted Kolaone should not have taken on account of fees or disbursements in respect of legal services rendered.
- [20] Notwithstanding the contentions in the memorandum forwarded on review, that the proceedings in the court a quo be considered within the prism of the review process as envisaged in section 304(4) of the CPA, the said provisions find no application. The review is to be considered in terms of section 22 of the Superior Courts Act 10 of 2013 (the SCA), which provides a numerus clausus for the review of proceedings of the Magistrates' Court. Section 22 of the SCA, reads:

“22 Grounds for review of proceedings of Magistrates’ Court

- (1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are –
- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.

(emphasis added)

- [21] What can be extrapolated from the memorandum and the engagement between the court a quo and Zisiwe, is that the common intent was that the proceedings in the court a quo were to be considered under the umbrella of a “gross irregularity in the proceedings.” This consensus brings section 22(1)(c) of the SCA into sharp focus.

- [22] In respect of criminal matters, the right to legal representation of detained and accused persons is entrenched in sections 35(2)(b) and 35(3)(f) of the Constitution of the Republic of South Africa, 1996. Section 35(3)(f) provides that an accused has a constitutional right to choose and be represented by a “legal practitioner”. The right to legal representation and the definition attributed to the phrase “legal practitioner” is dealt with in other law of general application, which includes the CPA and the Legal Practice Act 28 of 2014 (the LPA). See: *S v Sekeni and Others* (HC 05/2023) [2023] ZANWHC 193 (25 October 2023). The right to legal representation is unassailable and is of no moment to this review proceedings.
- [23] The definition of a ‘legal practitioner’ in the LPA makes it plain who qualifies as such. A legal practitioner is now defined as “an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act>.” To this end, section 24(1) of the LPA provides that:
- “24(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.”*
- [24] There is no lis, that Koloane met the threshold of the proscribed definition of a legal practitioner. There is no underscoring the legal synergy that co-exists between s24 (1) and s84 of the LPA. Section 84(1) provides that “(e)very attorney...must be in possession of a Fidelity Fund certificate.” Section 93(8)(c) of the LPA speaks to the criminal liability for the contravention of section 84(1) of the LPA. It is common cause that: (i) Kolaone had last been issued with a FFC on 3 April 2014 and; (ii) he represented the accused for the duration of the trial.
- [25] The purpose of a FFC is to afford the public protection against pecuniary loss due to possible misappropriation of trust funds. It bears re-iterating that Koloane was last issued with a FFC on 3 April
2014. The criminal trial that is subject to scrutiny within the purview of section 22(1)(c) of the SCA commenced on 31 January 2025.
- [26] To set the proceedings aside would not be a slippery path to follow. The wording of section 84(1) of the LPA is uncontroversial. Moreover, Chapter 7 of the LPA which includes S 84(1) is titled: Handling of Trust Monies. The purpose and object of this Chapter are unambiguous. What ignites legal debate is the consequences that follow from non-compliance.
- [27] In *Schierhout v Minister of Justice* 1926 AD 99 at 109, one of the earliest cases to consider the consequence for the validity of an act in conflict with a statutory prohibition. Innes CJ said:
- ‘It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.’ But that will not always be so. Whether that is so, as later cases have made clear, will depend upon a proper construction of the legislation in question.’

[28] The approach advocated in Schierhout cannot be considered to be a one size fits all formula. Developing precedence and jurisprudence have made it clear, that it will depend upon a proper construction of the legislation in question. See: Swart v Smuts 1971

(1) SA 819 (A) at 829C-G.

[29] To this end, in Standard Bank v Estate Van Rhyn 1925 AD 266 at 274, it was held:

'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the [act] null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the [act] invalid, we should not be justified in holding that it was.' See also: Sutter v Scheepers 1932 AD 165 at 173-174; Swart v Smuts 1971

(1) SA 819 (A) 829C-830C; Oosthuizen & another v Standard Credit Corporation Ltd [1993] ZASCA 59; [1993] ZASCA 59; 1993

(3) SA 891 (A) 902H-903F and the authorities there cited.

[30] My brother Titus AJ relies heavily on paragraph 4 in the judgment of S v Mazaleni which was delivered on 22 July 2024 in the Eastern Cape Division, Bhisho where Stetch J (Lowe J concurring) relied on, amongst others, NW Civil Contractors CC v Anton Ramaano Inc. (a judgment handed down in the Limpopo Local Division by A.M.L. Phatudi J under case number 993/2016, on 14 May 2018). The decision in NW Civil Contractors CC was, however, overturned by the Supreme Court of Appeal on 14 October 2019, reported as NW Civil Contractors CC v Anton Ramaano Inc & another (1076/2018 and 1024/2018) [2019] ZASCA 143 (14 October 2019). Ponnan JA (Swain, Zondi and Mocumie JJA and Dolamo AJA concurring) at paragraph 14 postulated the following with reference to the

possession of a FFC:

'An attorney is obliged to apply to the secretary of the relevant law society for a fidelity fund certificate. If the secretary is

satisfied that the attorney has discharged his or her liabilities to the society in respect of the contribution to be made, and has complied with any other lawful requirement of the society, a fidelity fund certificate must be issued to the attorney concerned. The primary purpose of the fidelity fund is to reimburse clients of legal practitioners who may suffer pecuniary loss due to the theft of money or property that they had entrusted to an attorney. That protection encourages the public to use the services provided by legal practitioners with confidence. Section 41(1) thus exists in the public interest. By prohibiting legal practitioners from acting unless in possession of a valid fidelity fund certificate, the legislature seeks to ensure that an attorney is not let loose on an unsuspecting member of the public."

[31] An interpretation of s 84(1) of the LPA is called for. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.’

[32] In *CSARS v Daikin Air Conditioning* (185/2017) [2018] ZASCA 66 (25 May 2018) Majiedt JA and Davis AJA dissenting accentuated the principles of legislative interpretation as follows:

[32] What is required when seeking to ascertain the meaning of legislation is to subject the words used to an engagement, not with speaker meaning, but with the principles and standards that are appropriate to relevant law making exercise and the subsequent exercise of legal interpretation. In the case of fiscal legislation, an appropriate standard is the contra fiscum rule which is based upon the idea that no tax can be imposed upon a subject of the State without words in legislation clearly evincing an intention to lay a burden on him or her. (*Coltness Iron Co v Black* (1888) 6 App CAS 315 (HL) at 330; LR Dison ‘The Contra Fiscum Rule in Theory and Practice’ 1976 (93) SA LJ 159). In the case of tariff headings, the Brussels Notes and the General Rules for the Interpretation of the Harmonized System provide a further basis to determine the meaning beyond a rigid recourse to sentence meaning.

[33] Recourse to the meaning of the speakers of words used in a statute is not determined in the same fashion as that of words used in a contract. In order to ascertain the intention of the lawmaker, one must have regard to the appropriate principles of law-making. In the instance of the contra fiscum rule, absent unambiguous language, the rule will be decisive in favour of the taxpayer in cases of doubt (*Estate Reynolds and others v Commissioner for Inland Revenue* 1937 AD 57 at 70; *Willis Faber Enthoven Ltd v Receiver of Revenue* [1991] ZASCA 163; 1992 (4) SA 202 (A) at 216 C). The words employed in the statute must be the primary enquiry to consider whether they admit any doubt or ambiguity. If not, effect must be given thereto, unless a glaring absurdity results which the lawmaker could not have contemplated. (*Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd and others* 1990 (1) SA 925 (A) at 942I – 943A). As is correctly pointed out in *Lawsa*, this approach, laid down in a number of judgments of our courts relating to the interpretation of a legislative enactment, is based upon the literalist-cumintentionalist view (*Lawsa* (2 ed) vol 25, Part 2 *ibid* at 331, footnote 38).

[34] In addition there is the compelling consideration that the Interpretation Act 33 of 1957 applies only to legislation. Section 1 reads:

‘1. Application of the Act. 14 The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at, or after the commencement of this Act in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.’ This distinction reinforces the view that the interpretation of a statute cannot simply be equated to that of a contract. Finally s 39(2) of the Constitution mandates a recourse to the spirit, purport and objects of the Bill of rights in interpreting any legislations.’

[33] Against the backdrop of these settled tools of interpretation, the LPA in my view proposes two consequences for practicing without a fidelity fund certificate, namely, disentitlement to a fee for the work done and a criminal conviction. It does not contemplate a visitation of nullity.

[34] In *Oilwell (Pty) Ltd v Protec International Ltd*, 2011 ZASCA 29; 2011

(4) SA 394 (SCA) at paragraph 19 Harms DP referred to Voet Commentarius ad Pandectas 1.3. (Gane’s translation), who said:

“Things done contrary to the laws are not ipso jure null if the law is content with enacting a penalty against transgressors.

...

Nay indeed there is no lack of laws which forbid, and yet do not invalidate things to the contrary, nor impose any penalty upon them. Hence came into vogue the famous maxim ‘Many things are forbidden in law to be done which yet when done hold good.’

...

‘This approach has been adopted in many judgments, more particularly in the leading case of *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274, where Solomon JA also referred to a further statement by Voet (not as translated by Gane), that an important consideration is whether “greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law”. Voet concluded this section with a reference to H De Groot (Grotius to some) *Inleidinge* 1.2.2, where the author, dealing with the same subject, said that things done contrary to law are only void if the law so expresses itself (“de wet sulcks uytdrukt”), or if someone’s ability to perform the act has been curtailed, or if the deed “heeft een gestadigde onbehoorlickheid” (translated by Gane via Voet, as “if the act performed suffers from some obvious and ingrained disgrace”, but more correctly from some “unremitting impropriety”).’

[35] The propositions supra are attractive and find application in this review. A proper interpretation of section 84(1) of the LPA leads to the ineluctable

conclusion that the legislature had no other intention in enacting section 84(1) other than that of punishing the attorney who did not comply therewith. It does not seem to me that, in addition, the legislature also intended that nullity should follow. This much has been enunciated by the Supreme Court of Appeal in *NW Civil Contractors CC*. It stands to reason that these proceedings cannot be entertained within the perimeters of the review process. Other remedies must be pursued. In sum, greater inconveniences and impropriety would result from the setting aside of these proceedings as mooted by the court a quo. This does not align with the intention of the legislature.

[36] What follows speaks to the second order I propose. It is inconceivable that Koloane was allowed to practice without a FFC from 3 April 2014 without the Law Society of the Northern Provinces (LSNP) and subsequently its successor in title the LPC taking any action.

[37] Loosely calculated, prior to the commencement of the trial in the court a quo, Kolaone had been practicing as an attorney in the absence of a FFC for a decade. I underscore that this is an indictment on the

LSNP and LPC. One can but only wonder how Kolaone was allowed to traipse through the various courts for such a lengthy period being

totally undetected. Moreover, it would appear on the face of it that the penal provisions as evinced in section 93(8)(c) of the LPC have been ineffective and that the potential sanctions impotent.

[38] Given the inordinate timeline that Koloane practiced in contravention of section 84 of the LPA, there are no factors that can redound in his favour. A legal conundrum clearly stares the LPC in the face to track matters that Koloane has appeared in nationally over the last decade and proceed to assert the legal remedy that may find application. This is no mean feat.

[39] The conduct of the LSNP and LPC must be frowned upon. It bears mentioning that the inexorable inference to be drawn is that the LPC exercised poor oversight which may impact on the interests of justice.

[40] In the premise, I make the following order:

A REDDY

ACTING DEPUTY JUDGE PRESIDENT

OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Morgan AJ (concurring in the judgment of Reddy ADJP)

- [41] Having considered the submissions and the record before this Court, it is necessary to address the divergent views expressed by my brothers Titus AJ and Reddy ADJP, regarding the impact of Koloane's failure to possess a valid Fidelity Fund Certificate (FFC) during his representation of the accused in the proceedings under review. A summary of their respective judgments is apposite to clarify the reasoning underpinning my concurrence with Reddy ADJP.
- [42] Titus AJ, in his judgment, posits that Koloane's appearance without a valid FFC constitutes a fundamental irregularity that vitiates the entire proceedings in case RC27/2023. He anchors this conclusion in the constitutional right to a fair trial under section 35(3) of the Constitution of the Republic of South Africa, 1996, and section 73(2) of the Criminal Procedure Act 51 of 1977, which entitles an accused to representation by a legal adviser not prohibited by law from appearing. Titus AJ relies on *S v Mazaleni*,^[14] asserting that practicing without an FFC undermines the proper administration of justice and public confidence in the criminal justice system. Consequently, he proposes an order that the proceedings to be set aside in toto and directs that the Legal Practice Council (LPC) investigate Koloane's conduct, noting his decade-long practice without a valid FFC since 3 April 2014.
- [43] Reddy ADJP, in contrast, adopts a more restrained approach, emphasizing that the absence of a FFC does not inherently render the proceedings a nullity. He interprets section 84 of the Legal Practice Act 28 of 2014 as primarily aimed at protecting the public against financial misconduct, such as the misappropriation of trust funds, rather than regulating a practitioner's competence to represent clients in court. Drawing on principles of statutory interpretation from authorities such as *Schierhout v Minister of Justice*^[15] and *Standard Bank v Estate Van Rhyn*,^[16] Reddy ADJP concludes that the legislature intended non-compliance with section 84 to attract disciplinary or criminal sanctions against the practitioner, not to invalidate judicial proceedings. He finds no evidence that Koloane's lack of a FFC prejudiced the accused's fair trial rights under section 35 of the Constitution. Accordingly, Reddy ADJP removes the review from the roll and criticizes the LPC for its failure to detect Koloane's non-compliance over an extended period, urging further action by the LPC.
- [44] I align myself with the reasoning and conclusions of Reddy ADJP. The purpose of the FFC, as elucidated in *NW Civil Contractors CC v Anton Ramaano Inc & another*^[17], is to safeguard clients against pecuniary loss arising from financial misconduct, not to serve as a prerequisite for competent legal representation in court. Reddy ADJP's application of statutory interpretation principles correctly discerns that the legislature did not intend for a practitioner's failure to hold a FFC to nullify proceedings, as such an outcome would lead to greater inconvenience and impropriety than the regulatory breach itself. This is consistent with the maxim that acts contrary to law are not ipso jure null unless the law expressly so provides. Furthermore, there is no indication in the record that Koloane's representation

compromised the fairness of the trial, a critical consideration under section 22(1)(c) of the Superior Courts Act 10 of 2013. Reddy ADJP's judgment also appropriately highlights the LPC's oversight failures, which allowed Koloane to practice undetected for over a decade, thereby addressing the broader systemic implications without disrupting the judicial process. For these reasons, I concur with Reddy ADJP's order to remove the review proceedings from the roll and to refer the matter to the LPC for further investigation.

- [45] The Fidelity Fund for legal representatives in South Africa, the Legal Practitioners Fidelity Fund (LPFF), plays a crucial role in safeguarding the public from financial losses caused by the misconduct of legal practitioners.
- [46] Established under the Legal Practice Act 28 of 2014 (the Legal Practice Act), this fund acts as a financial safety net, reimbursing clients who suffer pecuniary loss due to the theft of money or property entrusted to a legal practitioner.
- [47] This protection applies in specific scenarios: when the theft occurs in the course of the practitioner's legal practice; when the practitioner acts as an executor or administrator in a deceased estate; or when serving as a trustee in an insolvent estate. By compensating clients for losses resulting from dishonest actions—such as the misappropriation of trust funds—the LPFF fosters public confidence in the legal profession.[18] It ensures that individuals can engage legal services, whether from attorneys or advocates holding a FFC, with the assurance that they are protected against financial wrongdoing.
- [48] However, it's essential to understand that the Fidelity Fund's role is limited to financial protection and does not extend to assessing or ensuring the professional competence of legal representatives.
- [49] The fund's primary mandate is to address the consequences of theft or misappropriation, not to evaluate a practitioner's legal skills, expertise, or overall ability to practice law. Some might mistakenly assume that the LPFF offers protection or exoneration to practitioners in cases of trust fund defalcations, but this is not the case—the fund exists solely to protect the public, not the practitioners themselves. There is no mechanism within the LPFF's framework for monitoring or improving the competence of legal representatives. Instead, its efforts are focused entirely on compensating victims of financial misconduct, thereby maintaining trust in the legal system as a whole.
- [50] In essence, the Fidelity Fund serves as a critical mechanism for protecting clients from financial losses due to theft or misappropriation by legal practitioners. It reimburses affected clients in specific circumstances, reinforcing the integrity of the legal profession and ensuring that the public can rely on legal services without fear of financial ruin from practitioner dishonesty. At the same time, it remains distinct from any role in assessing or regulating professional competence, as its purpose is purely financial recourse rather than professional oversight or evaluation. Through this focused approach, the LPFF upholds its core mission of safeguarding the public and sustaining confidence in the legal system.

- [51] In casu, it is my view that the fact that the accused legal representative (Mr Koloane) did not have a valid FFC for the period in which he represented the accused persons cannot be considered as gross irregularity impacting the fairness of the procedure carried out by the Magistrate when adjudicating the matter.
- [52] Therefore, Mr Koloane's failure to obtain or be issued with an FFC does not constitute gross irregularity and does not vitiate or render the proceedings not in accordance with justice. In assessing whether the proceeding was conducted in a fair manner in line with justice, the test does not include the representative's suitability to represent the accused. The accused elected the legal representative for themselves, inferring that they would have done the required checks with the regulatory body, the Legal Practice Council, regarding the practitioner's suitability. Their failure or election not to cannot be faulted on to the court, as there is no legal duty on the court to ensure that prior to a matter being heard the court must be satisfied that the practitioner is in good standing. As the principle goes, clients stand or fall by the

submissions

of representatives they have elected, hereto the accused must regrettably suffer the consequences of their own election.

- [53] Lastly, the fairness of proceedings within the trial is determined by the way the Magistrate conducted the proceedings as laid down in the Criminal Procedure Act, and case law. Considering the trite principles pertaining to judicial reviews. If there was a belief that the Magistrate may have misapplied the facts or misinterpreted the law or committed any other error of finding in law or fact in relation to the conviction or sentence, then appeal proceedings would have been an appropriate avenue, which at the present moment are not before me.
- [54] The Fidelity Fund Certificate (FFC) serves a protective function within the legal profession, primarily safeguarding clients against financial misconduct by practitioners who manage trust accounts. Under the Legal Practice Act, it is a mandatory credential only for those handling client funds and not a universal requirement for all legal representation. Thus, Mr. Koloane's lack of a FFC, while potentially limiting his ability to manage client money, has no direct bearing on his capacity to argue a case or provide legal advice in court. This distinction ensures that the absence of a FFC does not inherently undermine the accused's right to a fair trial, as the trial's integrity hinges on procedural fairness rather than the financial regulatory status of the representative.
- [55] The responsibility for ensuring compliance with the FFC requirement lies squarely with the legal practitioner and the Legal Practice Council, which oversees the profession's regulatory framework. Courts, by contrast, are designed to adjudicate disputes and administer justice, not to act as enforcers of administrative credentials. If Mr. Koloane practiced without a FFC in a capacity requiring one, this would be a matter for the Legal Practice Council to address

through disciplinary measures. However, this regulatory lapse does not translate into a procedural defect in the trial itself, as the Magistrate's role is to evaluate evidence and uphold legal standards, not to audit the credentials of counsel appearing before them.

- [56] A potential concern might arise that Mr. Koloane's failure to hold a FFC could signal broader ethical or professional shortcomings, possibly affecting the quality of his representation. Yet, this assumption requires a leap that the law does not support—regulatory compliance with financial rules is separate from courtroom competence. The accused would need to demonstrate specific instances of deficient performance tied to the trial's outcome to challenge its fairness, rather than relying on the tangential issue of the FFC. Absent such evidence, the trial's legitimacy remains intact, as fairness is assessed by the judicial process, not speculative inferences about counsel's overall professionalism.
- [57] Imposing a duty on courts to proactively verify the FFC status of every legal representative would disrupt the judicial system's efficiency. Trials could face unnecessary delays as Magistrates pause proceedings to investigate matters outside their purview, shifting focus from the case at hand to administrative oversight. The legal framework instead presumes that practitioners are compliant unless proven otherwise, a practical necessity that balances justice with expediency. In Mr. Koloane's case, no evidence suggests the court knew of his FFC status, nor was it required to inquire, reinforcing that the trial's fairness was not compromised by this external regulatory detail.
- [58] Lastly, the accused's decision to engage Mr. Koloane reflects their autonomy in selecting legal counsel, a cornerstone of fair legal proceedings. The court respects this choice unless it demonstrably prejudices the trial, such as through clear incompetence or conflict of interest. Without proof that the lack of a FFC directly impaired Mr. Koloane's performance or altered the trial's outcome, the accused retains accountability for their selection. This principle upholds the integrity of the judicial process, ensuring that fairness is judged by what transpires in court, not by unrelated administrative credentials.

M MORGAN

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA, NORTH WEST DIVISION

- [1] "if in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the

ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section." (emphasis supplied)

[2] As it would appear from the Legal Practice Council (North West Provincial Office) correspondence to the Acting Regional Court

President, North West, dated 6 February 2025. From this same correspondence, it would appear that the attorney, with member number 20487, is a practising attorney and the only Koloane on its records.

[3] Section 84(2), LPA

[4] Section 93(8)(b), LPA

[5] Section 35(3), The Constitution of the Republic of South Africa, 1996

[6] *S v Jaipal*

[2005] ZACC1; 2005(4) SA 581 (CC) at para [26]

[7] *Supra* note 5, section 35(3)(f) and (g)

[8] *De Beer NO v North-Central Local Council and South-Central Local Council* [2001] ZACC 9, 2002(1) SA 429 (CC) para 11

[9] *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para

[127] per minority judgment of Kollapen J (Mlambo AJ concurring)

[10] *ibid*

[11] *Supra* para 107.

[12] *Supra* note 6 at para [28]

[13]

[2024] ZAECBHC 18

[14] *S v Mazaleni* [2024] ZAECBHC 18.

[15] *Schierhout v Minister of Justice* 1926 AD 99.

[16] *Standard Bank v Estate Van Rhyn* 1925 AD 266.

[17] *NW Civil Contractors CC v Anton Ramaano Inc & another* [2019] ZASCA 143.

[18] Section 57, read with section 55, of the Legal Practice Act deals with the various purposes the LPFF can be utilised.

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