

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case Number: 04243/2023

|              |                                                                                   |
|--------------|-----------------------------------------------------------------------------------|
| (1)          | REPORTABLE: NO                                                                    |
| (2)          | OF INTEREST TO OTHER JUDGES: NO                                                   |
| (3)          | REVISED: YES                                                                      |
| 4 March 2024 |  |
| DATE         | SIGNATURE                                                                         |

In the matter between:

**HERMAN MDLULI**

Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

First Respondent

**THE LEARNED MAGISTRATE RADASE,  
JOHANNESBURG MAGISTRATES COURT**

Second Respondent

**THE CHIEF CLERK, JOHANNESBURG  
MAGISTRATES COURT**

Third Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS**

Fourth Respondent

*This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines, and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 4 March 2024*

Summary Criminal law — Trial — Irregularity in — What constitutes — Accused represented by person not admitted as attorney — Effect on proceedings — Proceedings against the accused irregular- Set aside and remitted to start de novo.

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## JUDGMENT

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MUDAU, J

- [1] This matter came before us as a special review at the instance of the accused, Mr Mdluli. The applicant is currently serving an 18-year prison sentence. This follows his conviction for charges that include robbery with aggravating circumstances, by the Regional Court, Johannesburg on 20 August 2019 under case number 41/1453/16. On the applicant's version he subsequently became aware of the fact that Mr. Sibusiso Mashinini, who had represented him in the trial, did not as a fact have right of appearance. The matter is not opposed.
- [2] On 21 November 2023, Adv Guarneri from the Johannesburg Legal Aid Local Office received a Directive from the Judge President of this Division requesting Legal Aid SA to consider legal representation for the applicant. This was after the applicant had brought a motion under case number 2023/04243 in which he sought relief *inter alia*, in respect of the outstanding record of proceedings. On 29 November 2023, Adv Guarneri sent a letter to the Judge President which was also served as a notice in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [3] The matter served before Strydom J on 30 November 2023. A draft order was made an Order of Court by Strydom J. In terms of this Order, both the LPC and the Regional Magistrate, Mr Radasi, were to provide affidavits commenting on the correctness of the allegation that the purported attorney, Mr Mashinini, did not in fact have right of appearance during the trial. Subsequently and on 2 February 2024 Adv Guarneri sent another letter to the Deputy Judge President, which also served as a notice in terms of section 304(4) of the CPA. The Deputy Judge President constituted a full court to determine this application.



[4] By 23 January 2024 Ms. Shivani Naicker, on behalf of the LPC, pursuant to the Strydom J order uploaded an affidavit stating that Mr. Sibusiso Mashinini did not have right of appearance during 21 October 2016 to 20 August 2019, the time when the trial took place as his articles of clerkship ceased on 31 October 2003. The Regional Magistrate's affidavit, however, is still outstanding. It is apparent from the papers that the record of proceedings before the Regional Magistrate is far from complete. Attempts to reconstruct the record have not yielded the desired results. The final date of the proceedings which is transcribed is 4 February 2021. On this date the applicant was represented by a new practitioner, Mr Ngxumza. The exchange between the practitioner and the Magistrate confirms that the issue of Mr Mashinini not having a right of appearance was raised. The matter was postponed to 12 February 2021 pending special review, which never happened as the record was incomplete. As indicated, it remains incomplete to date.

[5] Section 304(4) of the CPA provides:

"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".

[6] Decades ago in *S v Mkhise*; *S v Mosia*; *S v Jones*; *S v Le Roux*<sup>1</sup> the appellate division dealt with various matters on appeal with similar facts closely related to the appeal before us. The significant common feature of their trials was that each appellant was represented by pro Deo counsel in the person of a Mr Sebastiaan Hendrik de Jager. At the time that he appeared on their behalf he had not been admitted to practise as an advocate in terms of either section 3(1) or section 5(1) of the Admission of Advocates Act 74 of 1964 ("the Act") and, it follows, was not enrolled as an advocate.

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<sup>1</sup> 1988 (2) SA 868 (A).

[7] The court on appeal concluded, *inter alia*, that—

“it would be wholly impracticable to attempt to determine *ex post facto* (that is, at some later stage when the irregularity comes to light) whether counsel concerned was 'a fit and proper person' in the sense that this term is applied and understood in the Act, ie whether he is generally a person of integrity and reliability”.<sup>2</sup>

The court finally concluded that:

“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 Act and the lack of such authorisation must be regarded as so fundamental an irregularity as to nullify the entire trial proceeding”.<sup>3</sup>

[8] In this division and quite recently, in *S v Mbuyisa*<sup>4</sup> this court per Sutherland J (as he was then) considered several authorities dealing with a similar situation where an accused had been represented by a candidate attorney who did not have right of appearance in the relevant court. The court considered *S v Chukwu and Another*<sup>5</sup> which was as a special review. The issue in *Chukwu* was that the candidate attorney who appeared for the accused commenced his role as representative when his rights of audience were valid. However, before the conclusion of the trial, his rights of audience had lapsed. Later, when the candidate attorney had been admitted to the bar, his old firm briefed him to continue with the trial.

[9] Poswa J, with Webster J concurring, addressed the question of the legality of the proceedings. The court had solicited an opinion from the DPP, Pretoria. The state advocate who prepared the submission concluded, after traversing the case law, that the proceedings should be vitiated. The DPP, however, added his view that notwithstanding the legal soundness of that opinion, factors of a pragmatic nature should be considered, and the irregularity excused. Poswa J excused the irregularity on the grounds that it was not of a nature to

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<sup>2</sup> Id at 875C-D.

<sup>3</sup> Id at 875F-G.

<sup>4</sup> 2018 (2) SACR 691 (GJ).

<sup>5</sup> 2010 (2) SACR 29 (GNP).



vitiating the proceedings, that the proceedings had been in accordance with justice and that the trial should resume from where it had left off. Sutherland J was of the view that "the reasoning and result in 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".<sup>6</sup> We agree.

[10] As Sutherland J alluded, the licensing of these independent legal practitioners is not a mere formality. Instead, the insistence on the materiality of legal representatives being licensed to practise is an integral part of the very system itself. Our courts have been consistent following a strict approach about the question of an unqualified person representing an accused and have set the proceedings aside.<sup>7</sup>

[11] The fact that Mr Mashinini at no stage had a right of appearance constitutes a fatal irregularity to the proceedings under consideration. There is no doubt that prejudice to the applicant is manifest, given the facts of this case, amounting to an injustice. It follows that the conviction and sentence against the applicant stand to be set aside.

#### *Order*

- [a] The proceedings in relation to the accused are set aside.
- [b] The Director of Public Prosecutions (the DPP), Johannesburg, shall decide whether to institute fresh proceedings within 30 days of the date of this judgment.
- [c] If the proceedings are to be reinstituted, the trial must take place before another magistrate.

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<sup>6</sup> *Mbuyisa* above n 4 at 694E-F.

<sup>7</sup> See for e.g. *S v Nkosi en Andere* 2000 (1) SACR 592 (T); *S v Stevens en 'n Ander* 2003 (2) SACR 95 (T); *S v Gwantshu and Another* 1995 (2) SACR 384 (E); *S v Dlamini en 'n Ander* 2008 (2) SACR 202 (T).

- [d] The accused shall not be imprisoned or detained for longer than 30 days from the date of this judgment, unless he is recharged, whereupon he may, if so advised, seek bail, and the court hearing such application shall make such decision as is appropriate in law.

  
TP MUDAU  
JUDGE OF THE HIGH COURT  
JOHANNESBURG

 I agree  
M.H.E ISMAIL  
JUDGE OF THE HIGH COURT  
JOHANNESBURG

 I agree  
D DOSIO  
JUDGE OF THE HIGH COURT  
JOHANNESBURG

#### **APPEARANCES**

Counsel for the Applicant: Adv. E A Guarneri  
Instructed by: Legal Aid South Africa, Johannesburg

Counsel for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents: Adv. Advocate T.I. Tshifhango  
Instructed by: The State Attorney, Johannesburg

Counsel for the 4<sup>th</sup> Respondent: Adv M Mokwatedi (NPA)

Date of Hearing: 21 February 2024

Date of Judgment: 4 March 2024