



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **A81/2023**

In the Appeal of:

MUSLIN DZINGIRAI
VALENTINE MALUNGA
LAZARUS GREGORY MAHLANGU

1st Appellant
2nd Appellant
3rd Appellant

and

THE STATE

Respondent

CORAM: M OPPERMAN J *et* PJJ ZIETSMAN AJ

HEARD ON: 23 OCTOBER 2023

DELIVERED ON: 2 NOVEMBER 2023

JUDGMENT BY: PJJ ZIETSMAN AJ

Introduction

- [1] On 30 August 2018, and at the R57 road between Sasolburg and Heilbron, the appellants robbed a Mercedes Benz truck, the property of one Suleman and driven at the time by Mr Molefi. In so robbing Suleman's vehicle, Molefi was assaulted, kidnapped and driven to Thokoza.

- [2] The third appellant, armed with a handgun, was the aggressor and threatened to kill Molefi. Was it not for the intervention of the driver of the getaway vehicle, Mr Jabulani Justice Khumalo, who succeeded in convincing the third appellant not to kill Molefi, that day might have had a very different outcome.
- [3] The appellants were found guilty of robbery with aggravating circumstances while acting in and in furtherance of a common purpose. The first and second appellants were also found guilty of contravening the provisions of section 49(1)(a) of the Immigration Act, 13 of 2002.

Grounds of Appeal

- [4] The appeal only lies against the conviction.
- [5] Although various grounds of appeal were raised, ultimately the appeal was against the Regional Court Magistrate's factual finding in favour of the State's witnesses, and more particular the court *a quo's* finding that the appellants were correctly identified as the perpetrators of the robbery.

Discussion

- [6] The appellants' heads of argument was prepared by Mr Mokoena of Legal Aid South Africa, Bloemfontein Offices, but the appeal was argued before us by Miss Abrahams from the same office.
- [7] The appellants' heads of argument was riddled with what appears to be the appellants' instructions to their legal representative. During argument before us the same approach was adopted, namely the court was informed of the appellants' instructions.
- [8] When the legal representative of the appellants was asked to advance her submissions, the court was informed that, as an officer of the court she cannot advance any meaningful argument on behalf of the appellants.

- [9] It is maybe apposite, before I deal with the merits, or demerits, of the appeal to attempt to define the delicate balance between a legal practitioner's duty as an officer of the court versus the duty to his client.
- [10] The principles which follows hereunder are applicable to the independent referral advocate but I deem it equally applicable to all legal practitioners who practice in the Courts of this country.
- [11] A good starting point is the Cab Rank Rule. All referral advocates have a professional duty or professional tradition to take all work offered to them provided they are available and competent to do it, and will receive a proper remuneration for it.
- [12] The principles which flows from the Cab Rank Rule is equally applicable to legal practitioners from Legal Aid because those practitioners, like the referral advocate, do not have the luxury to refuse an instruction,¹ however reprehensible the actions of the client might appear to be.
- [13] Thus, the Cab Rank Rule promotes access to justice by ensuring that legal representation is available to all who need it, including odious clients and unpopular causes² and it ensures that no advocate can be criticise for presenting a client whom the public considers to be particularly reprehensible.
- [14] In *Hall v Simons*³ Lord Hobhouse stated that '*the duty to act for any client*' is '*a fundamental and essential part of a liberal legal system*' since even the most unpopular are entitled to legal representation. He described the Cab Rank Rule as:
- 'vital to the independence of the advocate since it negates the identification of advocate with the cause of his client and therefore assists to provide him with protection against governmental or popular victimization.'

¹ There are exceptions to the rule which are not discussed in this judgment.

² The difference between the independent referral advocate and Legal Aid is that the client who has the means to instruct an independent advocate has the right to choose an advocate to represent his/her case whereas a Legal Aid client does not have that luxury, but that difference does not detract from the general application of the Cab Rank Rule.

³ [2002] 1 AC 615 at 739 G – H.

- [15] It is the existence of this rule that allows advocates to act for and against the government or any other major consumer of advocacy services, in different cases, without fear of harassment or loss of future instructions. The application of the rule has often been seen as the strength of the independent referral Bar.
- [16] An advocate's duty to his client was eloquently described by Lord Reid in *Rondel v Worsley*⁴ thus:
- 'Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to court, to the standards of his profession and to the public.'
- [17] The concept of 'Justice', or more precisely, acting in the interest of justice, has the potential to encapsulate almost all values required of an advocate namely, independence, trust and personal integrity, confidentiality, competence or excellence and civility.
- [18] However, it is important to identify the principle of 'Justice' as a free standing principle. The observations of Lord Hobhouse of Woodborough in *Medcalf v Mardell*⁵ on the role of the advocate in securing a fair and just system is apposite:
- 'The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognise and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.'
- [19] The advocate's right to represent clients in court is a corollary of the advocate's duty to serve the administration of justice. One aspect of this duty is the Cab Rank Rule, discussed above, and another is the responsibility to ensure effective representation of those who cannot afford legal services. Another similarly important aspect of the modern advocate's justice-related

⁴ [1969] 1 AC 191.

⁵ [2003] 1 AC 120 at [51].

responsibilities is the duty to give the court ‘a fair representation of facts and adequate instruction in the law’.⁶

- [20] Advocates thus owe an overriding and paramount duty to the administration of justice. It is the existence of this duty that led Lord Hofmann to conclude that:⁷

‘Lawyers conducting litigation hold a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice.’

- [21] However, an advocate’s duty to fearlessly represent his client, whether in light of general public hostility or in light of hostility from the Bench, is just as important to the administration of justice as integrity. In *R v Farooqi*⁸ it was explained that:

‘Neither the judge nor the administration of justice is advantaged if the advocates are pusillanimous. Provisional integrity, if nothing else, sometimes requires submissions to be made to the judge that he is mistaken, or even, as sometimes occurs, that he is departing from contemporary standards of fairness. When difficult submissions of this kind have to be made, the advocate is simultaneously performing his responsibilities to his client and to the administration of justice.’

And as was stated by Judge Parry in *The Seven Lamps of Advocacy*⁹

‘Advocacy is a form of combat where courage in danger is half the battle. Courage is as good a weapon in the forum as in the camp. The advocate, like Caesar, must stand upon his mound facing the enemy, worthy to be feared, and fearing no man. Unless a man has the spirit to encounter difficulties with firmness and pluck, he had best leave advocacy alone.’

- [22] Nugent JA, (with whom Harms ADP, Streicher JA, Lewis JA and Musi AJA concurred) writing for the SCA in *Van der Berg v The General Council of the Bar of South Africa*,¹⁰ explained the interplay between an advocate’s duty to his/her client and the advocate’s duty as an officer of the court, as follows:

⁶ Lord Hofmann in *Hall v Simons* [2002] 1 AC 615 at 692 D.

⁷ *Hall v Simons* *supra* at 686 E – F.

⁸ [2014] 1 Cr App R 8, [2013] EWCA Crim 649 at [109].

⁹ [London], 1923 at p 23.

¹⁰ 2007 JDR 0169 (SCA) at par [14] – [18].

'[14] Advocacy fulfils a necessary role in the proper administration of justice. (What is said in this judgment applies equally to attorneys to the extent that they play an equivalent role but for convenience I have referred to advocates). It is through the availability of the knowledge and skills of an advocate that a litigant is able to realise the right of every person to have a dispute resolved by a court of law. Its function in the administration of justice at the same time defines the duties of those who practise it. The right of every person to have a dispute resolved by a court of law would be seriously compromised if an advocate were to be required to believe the evidence of his client before being permitted to present it. That would mean that the rights of the litigant would be determined by the advocate rather than by the court. As David Pannick QC observes (in his book entitled 'Advocates') an advocate is required

'to keep his personal opinions of the merits of the case (legal or otherwise) to himself and not make them the subject of his submissions. The advocate's duty to his client authorizes and obliges the advocate to say all that the client would say for himself (were he able to do so) ... He has no right to "set himself up as a judge of his client's case" and should not "forsake [his] client on any mere suspicion of [his] own or any view [he] might take as to the client's chances of ultimate success". As Baron Bramwell explained in 1871, a "man's rights are to be determined by the Court, not by his [solicitor] or counsel ... A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the Court.'"

The Master of the Rolls made the same point when describing the duty of an advocate towards his client in *Rondel v Worsley*:

'[A barrister] has a monopoly of audience in the higher courts. No one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end.'

[15] ... Merely to suspect, or even to firmly believe, that evidence is false does not preclude an advocate from permitting his client to place the evidence before a court. On the contrary, it would be improper for an advocate to refuse to do so on those grounds alone. ...

An advocate is not called upon to believe, to any degree, the evidence that he is instructed to place before a court. Even if he believes positively that his client's evidence is false, he is entitled, and indeed obliged, to place it before a court if those are his client's instructions, and there can be no qualification in

that regard. (No doubt it would be prudent for an advocate to advise his client that a court is likely to share his belief but that is something else.)

[16] But it is a different matter altogether if an advocate knows (as a fact and not merely as a matter of belief) that evidence is false or misleading. For the role of advocacy in furthering the proper administration of justice also gives rise to duties that are owed to the court, primarily a duty upon an advocate not to deceive or mislead a court himself. After observing in *Rondel v Worsley* that the advocate must do 'all he honourably can on behalf of his client' the Master of the Rolls went on as follows:

'I say "all he *honourably* can" because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court.'

In *Incorporated Law Society v Bevan* the Chief Justice expressed it as follows: 'Now practitioners, in the conduct of court cases, play a very important part in the administration of justice. Without importing any knowledge or opinion of their own - which it is entirely wrong that they should ever do - they present the case of their client by urging everything, both in fact and in law, which can honourably and properly be said on his behalf. And this method of examining and discussing disputed causes seems to me a very effective way of arriving at the truth - as effective a way, probably, as any fallible human tribunal is ever likely to devise. But it implies this, that the practitioner shall say or do nothing, shall conceal nothing or state nothing, with the object of deceiving the Court; shall quote no statute which he knows has been repealed, and shall put forward no fact which he knows to be untrue, shall refer to no case which he knows has been overruled. If he were allowed to do any of these things the whole system would be discredited. Therefore any practitioner who deliberately places before the Court, or relies upon, a contention or a statement which he knows to be false, is in my opinion not fit to remain a member of the profession.'

[17] An advocate breaches his duty to the court not only by permitting evidence to be given knowing it to be false but also by failing to speak when he knows that the court is being misled. An example is *Meek v Fleming*, in which counsel

knew that the jury was under the impression that a police witness was a Chief Inspector and failed to disclose that the officer had been demoted to the rank of sergeant on account of misconduct.

[18] Advocates who confine themselves to acting upon instructions will usually avoid ethical conflicts of that kind. But advocates who depart from that salutary practice, and set about discovering the truth for themselves (which they have no duty to do) invite such conflicts. For by doing so they run the risk of becoming material witnesses themselves and thereby compromising their ability to perform their proper function. That is what occurred in the present case.'

(footnotes omitted)

- [23] There is thus no duty on an advocate (or legal representative) in discharging his duty to the court, to concede the merits of his client's case and/or to concede that no meaningful argument can be advanced on behalf of his client.
- [24] It might well be that an advocate cannot advance any meaningful argument on behalf of his client, simply because the facts and/or the law are heavily stacked against him, but not even in such a case is there a duty on the advocate, as an incidence of his duty to the court, to make any concessions provided that the court is not deceived or misled with regards to the facts and/or the law.
- [25] I now turn to deal with the merits of the appeal. It is trite that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong.¹¹
- [26] The court *a quo*, in a lucid judgment, gave due consideration to the evidence of the State's witnesses and the contradictions in their evidence, and on a conspectus of all the evidence came to the following conclusion:¹²
- 'I find the witnesses to have been honest and consistent in their identity of the accused. There is nothing in my view, which called for the rejection of their versions. There is in my view further enough corroboration among the state

¹¹ *S v Frances* 1991 (1) SACR 198 (A) at 198 J – 199 A; *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645 E – F.

¹² Judgment *a quo* para [32].

witnesses regarding the identity of each accused and their respective roles and that serves as a safe guard against false identification. I therefore accept the testimony concerning the identities of the accused persons and their respective roles in the robbery as reliable.'

[27] I have considered the evidence of record and find that there is no basis to upset the factual findings of the court *a quo*. Neither did the appellants' legal representative advance any submissions to support a finding to the contrary.

[28] It follows that the appeal should fail.

Order

[29] The following order is issued:

1. The appeal is dismissed.

I concur

PJJ ZIETSMAN AJ

M OPPERMAN J

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