

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE****Review no: 16/2021**

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

THE STATE**And****MARTIN MUGERA****FIRST ACCUSED****MMASEGATLA MAVIS MOREMI****SECOND ACCUSED**

REVIEW JUDGMENT

KGANYAGO J

- [1] The two accused are facing one count of fraud, in the alternative theft read with the provisions of section 51(2) of the **Criminal Law Amendment Act**¹, and money laundering. Both accused are legally represented. Accused one is being represented by Ms Maloko a private legal practitioner, whilst accused two is being represented by Mr Mathebula from Legal Aid South Africa. Both accused have pleaded not guilty on both counts.
- [2] After the closure of the State case, accused one applied for discharge in terms of section 174 of the **Criminal Procedure Act**², which application was refused. Accused two did not apply for a discharge. Thereafter, accused one took the witness stand and testified under oath in his defence. During cross examination of accused one by counsel for accused two, the presiding magistrate noticed that the behaviour of counsel for accused one was somehow peculiar. The presiding magistrate suspected that counsel for accused one was under the influence of a substance, and she enquired whether counsel for accused one was well. Counsel for accused one responded by stating that she was well. Thereafter there was an engagement amongst the presiding magistrate, counsel for both accused and the prosecutor relating to the manner in which counsel for accused two was cross examining accused one.

¹ 105 of 1997

² 51 of 1977

- [3] During the engagement, the prosecutor raised some concern about the state of mind of counsel for accused one and enquired whether accused one was still been legally represented, and whether it was advisable for the trial to proceed. The court enquired from counsel for accused one whether she was feeling fit to proceed with the trial that day, and counsel for accused one stated that she was fit. The presiding magistrate *mero motu* decided to stand the matter down raising some concern that it appears that counsel for accused one was not in her sound and sober senses to proceed with the trial. Counsel for accused one requested that the matter be stood down until the following day, and that she will come to court being intelligent, proper and fit. At that stage counsel for accused one asked for forgiveness from court and stated that she was conveyancer, she does not know court things, she was very drunk and she thought that the court would not have picked it up.
- [4] The presiding magistrate has brought this matter as a special review stating that from the outset of the proceedings, counsel for accused one was absent at court without any reasonable explanation, and the investigating officer had to assist the court in securing the attendance of counsel for accused one. That after the attendance of counsel for accused one was secured, she did not ask any questions or put the version of accused one to the State witnesses. The presiding magistrate is requesting the reviewing court to determine whether accused's one right to a fair trial, encompassing the right to legal representation has not been infringed by the behaviour of his counsel who was not in her sound and sober sense during the proceedings of the 1st December 2020.

[5] I have requested the comment from the Deputy Director of Public Prosecutions (DDPP). The DDPP has provided me with a valuable opinion and I am indebted to them. According to the DDPP, accused one was not properly represented and that there was failure of justice. It is the DDPP's submission that the proceedings were not in accordance with justice, and should be set aside, and that the proceedings start *de novo* before another magistrate.

[6] An accused person has a fundamental right to be legally represented during trial. In terms of section 35(3) of the Constitution, every accused person has a right to a fair trial. The right to fair trial will entail the accused's trial being conducted in accordance with the basic notions of fairness and justice.

[7] In **NDPP v King**³ Harms DP said:

"The right to a fair trial is, by virtue of the introductory words to s 35(3) of the Bill of Rights, broader than those rights specifically conferred by the fair trial guarantee therein and embraces a concept of substantive fairness that is not to be equated with what might have passed muster in the past. This does not mean that all existing principles of law have to be jettisoned, nor does it mean that one can attach to the concept of a 'fair trial' any meaning, whatever one wishes it to mean. The question remains whether the right asserted is a right that is reasonably required for a fair trial. A generous approach is called for. This is a question for the trial judge and there is in general not an *a priori* answer to the question whether the trial will be fair or not. Potential prejudice may be rectified during the course of the trial and the court may make preliminary rulings depending on how the case unfolds and may revoke or amend them. Irregularities do not lead necessarily to a failure of justice."

[8] From the commencement of the trial the first accused has been legally represented by a legal practitioner. The legal practitioner who was

³ 2010 (2) SACR 146 (SCA) at 151d-g

representing the first accused has conceded that she was very drunk in relation to the proceedings of 1st December 2020. In her own words she said she was “very drunk”. She had represented the first accused whilst she was not in her sound and sober senses. The question is whether the legal practitioner for the first accused had conducted the defence of the first accused properly whilst she was very drunk, and also a conveyancer who knew nothing about court processes.

[9] In **S v Halgryn**⁴ Harms JA said:

“The constitutional right to counsel must be real and not illusory and an accused has, in principle the right to a proper, effective or competent defence. Compare *S v Majola* 1982 (1) SA 125 (AD) at 133D-E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Compare *S v Louw* 1990 (3) SA 116 (A) at 125D-E. The Court must place itself in the shoes of the defence counsel, bearing in mind that the prime responsibility in conducting the case is that of the counsel who has to make decisions, often with little time to reflect (cf *R v Matonsi* 1958 (2) SA 450 (A) at 456C as explained by *S v Louw* (supra). The failure to take certain basic steps, such as failing to consult, stand on a different footing from failure to cross-examine effectively or the decision to call or not call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of the case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in *Strickland v Washington* 466 US 668 (1984) at 689:

‘Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and

⁴ 2002 (2) SACR 211 (SCA) at para 14

it is all too easy for court, examining counsel's defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'

Not everyone is a Clarence Darrow or FE Smith and not every trial has to degenerate into O J Simpson trial."

[10] Counsel for the first accused has stated that she was a conveyancer and knows nothing about court processes, yet she took the instructions to represent the first accused. Since she knew nothing about court processes, I doubt whether she had properly prepared for the case. If she did not prepare for the case, she would not have been in a position to conduct the first accused defence properly. Her state of sobriety would also have affected her ability to represent the first accused properly on 1st December 2020.

[11] According to the presiding magistrate the first accused counsel did not ask State witnesses any questions or put the version of the first accused. It would seem as if the first accused was unrepresented during trial. If it was made clear from the beginning of the trial by the first accused that he will appear in person, he would have been in a better position as it would have been the duty of the presiding magistrate to assist an unrepresented accused person.

[12] The trial started on 3rd August 2020, and accused one has pleaded not guilty to all the counts and elected not to disclose the basis of his defence. The State called Johannes Manamela, Godliep Lesiba Ratlou, Ephraim Doctor Ratlou, Matome Samson Madia, Johanna Khumalo and Michael Benny Moffat as its witnesses. Counsel for accused one has cross examined Madia, Khumalo and Moffat. The witnesses that were implicating the first accused were Khumalo and Moffat. The version that counsel for accused one has put to Khumalo and Moffat was just a bare denial. It was only when one accused

one took the witness stand that he gave full details of his defence, which was a version which was not entirely put to the State witnesses. It is therefore not correct that counsel for accused one did not cross examine the State witnesses. The State witnesses that she did not cross examine did not implicate the first accused, and there was no need for her to cross examine them. With regard to putting the version of accused one to the State witnesses, counsel for accused one did not put that version in detail, and that will result in prejudicing accused one when he testified in his defence.

[13] Failure by counsel for the first accused to put the version of the accused in an articulate manner had serious consequences for the first accused. When he took the witness stand and gave the version that was never put to the State witnesses, it was like he was adjusting his evidence as the trial progresses. Failing to put an accused version to the State witnesses in an articulate manner will not be rectified by an accused person when he/she took the witness stand as that will be regarded as an afterthought. That in itself has prejudiced the first accused in presenting his defence.

[14] An accused person has the right to effective legal representation. An effective legal representation denotes that the legal representative must act in the best interest of his/her client, whilst still ensuring that his/her inherent duty towards justice is maintained. (See **S v Mofokeng**⁵). Failure by counsel for first accused to put in detail the version of accused one to State witnesses might be as a result of her not knowing court processes. By taking instructions from the first accused whilst not knowing court processes was a disservice to the first accused.

⁵ 2004 (1) SACR 349 (W) at para 18

[15] The other area of concern in this matter occurred on 1st December 2020 when counsel for accused one came to court and represented accused one whilst very drunk. The objection that she had raised against the line of questioning of Mr Mathebula on the first accused did not make sense at all, and that is what alerted the presiding magistrate that something was wrong with counsel for first accused. It was clear that counsel for the first accused was not following the proceedings as a result of her intoxication. I agree with the State prosecutor that on 1st December 2020 accused one was not represented, as his counsel was not in his sound and sober senses. In my view, taking into consideration that the first accused's counsel was very drunk, and was a conveyancer who knew nothing about court processes, the first accused did not have the benefit of effective legal representation during trial. That has tainted the whole proceedings. The proceedings were therefore not in accordance with justice, and stand to be reviewed and set aside. The conduct and behaviour of the first accused's counsel is an issue of great concern as that is the conduct and behaviour not expected from an officer of the Court. Copy of this judgment need to be brought to the attention of the Legal Practice Council for their investigation of the conduct and behaviour of counsel of the first accused in this matter.

[16] In the result I make the following order:

16.1. The proceedings of this matter in its entirety are reviewed and set aside.

16.2. The matter is remitted to the trial court for a trial *de novo* before another Magistrate.

16.3. Copy of this judgment to be sent to the Legal Practice Council.

MF. KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE**

I AGREE

MV SEMENYA J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION, POLOKWANE**

DATE DELIVERED: 6TH MAY 2021