



Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 87/2017**
DATE HEARD: **23 APRIL 2018**
DATE DELIVERED: **18 May 2018**

In the special review:

VAN EEDEN, DIEDERICK JOHANNES

and

THE STATE

Coram: Tlaletsi JP *et* Olivier J

JUDGMENT ON SPECIAL REVIEW

Olivier J:

- [1.] The accused, Mr DJ Van Eeden, is being tried in the Regional Court on charges of sexual assault and rape. On 17 November 2016, when the charges were put to him, he was represented by Mr P J Zietsman, a practising attorney.
- [2.] The accused pleaded not guilty to both charges. Apart from putting on record that he had only chased the complainant away from his home, no plea explanation was offered. The evidence of the complaint and her mother was presented. The matter was then remanded to 27 January 2017 for further trial.

On that date Mr Zietsman was not available and the case was remanded to 10 February 2017.

[3.] On 10 February 2017 the representation of the accused was taken over by Ms Markram, after Mr Zietsman had in the meantime unfortunately passed away. The matter was remanded to 9 March 2017 for the record to be transcribed, and on that date it was remanded to 31 May 2017, for further trial.

[4.] On 31 May 2017 Ms Markram appeared on behalf of the accused and placed on record that Mr Zietsman had been interdicted from practising as an attorney at the time of his representation of the accused. It is common cause that, on application by the Law Society of the Cape of Good Hope (under case no 1098/16), an interdict had been granted by this Court on 15 August 2016 ordering, *inter alia*:

- “1. *Pending the obtaining by the respondent of a Fidelity Fund Certificate for the period 1 January 2016 to 31 December 2016 prescribed in terms of section 41(1) of the Attorneys Act 53 of 1979, as amended, the respondent is interdicted and prohibited from practising as an attorney of this Court.*
2. *That the Respondent surrender and deliver to the Registrar of this Honourable Court his Certificates of Enrolment as Attorney who shall be and is authorised and directed to return to the Respondent such certificates upon production to him by the Respondent of the certificate referred to in paragraph 1 above.”*

[5.] It appears from the file in that matter that Mr Zietsman’s failure to furnish an audit report for the period 1 March 2014 to 28 February 2015 and his failure to apply for and obtain a fidelity fund certificate as envisaged in section 42(1) of the **Attorney’s Act**¹ for the year 2016 had led to that application and the Court order.

¹ 53 of 1979

- [6.] The presiding Regional Magistrate has submitted the criminal proceedings for special review, and has suggested that the proceedings be set aside and that the matter be remitted for trial *de novo*. The Regional Magistrate also pointed out that the parties had expressed the wish that, in such event, the trial be conducted before the same Regional Magistrate.
- [7.] I then directed that the matter be set down for hearing and that the following four questions be addressed:
- 7.1 Are the proceedings reviewable at this stage, while the criminal trial has not been finalised yet?
 - 7.2 Did the participation of Mr Zietsman in the criminal trial constitute a fatal irregularity, *per se* necessitating the setting aside of those proceedings?
 - 7.3 If not, did it in the circumstances of this particular matter prejudice the accused and constitute an infringement of his constitutional rights to a fair trial in terms of section 35(3)(f) of the **Constitution**?
 - 7.4 If the proceedings are to be set aside, should an order be made that the accused be tried *de novo* (or should it be left to the Director of Public Prosecutions to decide whether or not reinstitute the prosecution of the accused) and would it be proper for the same Regional Magistrate to preside in such a new trial?
- [8.] At the subsequent hearing of the matter the Director of Public Prosecutions was represented by Adv. M Makhaga, the accused by Adv. D C Jankowitz and the Law Society by Mr S M Addinall.
- [9.] It is trite that, although a Court will not readily interfere in proceedings that have not yet been completed, it will be done “*where injustice might otherwise result or*

where justice might not by other means be attained”². In **Mortimer v Municipality of Stellenbosch**³ Gauntlett AJ, in pointing out that not every unfairness would justify interference in incomplete proceedings, remarked⁴:

“That unfairness has occurred is not the issue. The issue is that an irregularity has occurred (unfairness is just one manifestation) which, it is already apparent, is of a kind and a degree calculated to give rise to injustice. And in that regard, the Court must consider whether the injustice is such that the affected party might not otherwise by other means attain justice. It may be noted that this is not the only area of law which seeks to differentiate between the potentially fatal or irremediable and that which is irregular, but is not to be treated as vitiating.”

[10.] The question is therefore really whether the present matter is one where the Court should in the exercise of its discretion interfere in the as yet incomplete trial of the accused. To consider this it will have to be determined whether the fact that Mr Zietsman represented the accused:

10.1 while he had no fidelity fund certificate; and

10.2 while there was a court order prohibiting him from practising

constituted an irregularity in the criminal proceedings and, if so, whether the irregularity was of such nature as to have vitiated the proceedings, regardless of the merits. The proper approach in this regard was set out as follows in **S v Mkhise; S v Mosia; S v Jones; S v Le Roux**⁵:

“It is a well-established principle that an irregularity in the conduct of a criminal trial may be of such an order as to amount per se to a failure of justice, which vitiates the trial. (I shall, for convenience, refer to an irregularity having such

² **Wahlhaus v Additional Magistrate, Johannesburg** 1959 (3) SA 113 (A) at 120B; See also **Motsepe & another v Phaala** [2006] JOL 16719 (T) at pp 16 to 17

³ (18243/2003) [2008] ZAWCHC 306 (27 November 2008)

⁴ At p25

⁵ 1988 (2) SA 868 (A) at 871G – 872A

effect as a ‘fatal irregularity’). On the other hand, less serious and less fundamental irregularities do not necessarily have that effect. As Holmes JA said in *S v Naidoo* 1962 (4) SA 348 (A) at 354D – F, in reference to such irregularities:

‘Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as per se to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits, and the accused can be re-tried... On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses.’

In the former case the fact of the irregularity is all that matters. No further enquiry into the merits is called for⁶. In the latter case, as indicated in the quoted passage, the evidence is to be examined and assessed by the Court of Appeal and it must ‘decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt’.”

[11.] Ms Makhaga argued that Mr Zietsman’s participation in the criminal trial indeed amounted to a fatal irregularity that, in itself, necessitates the rescission of those proceedings. Both Mr Jankowitz and Mr Addinall agreed that Mr Zietsman’s appearance on behalf of the accused constituted an irregularity in the criminal proceedings, but argued that it was not an irregularity *per se* calling for the rescission of those proceedings, and that there is no indication that the accused was prejudiced by being represented by Mr Zietsman.

[12.] The right to legal representation in the context of criminal proceedings was set out as follows in **Ndlovu v S; Sibisi v S**⁷:

⁶ My emphasis.

⁷ [2005] JOL 13805 (W) at pp 3 - 4

“Section 35(3) of the Constitution ... provides:-

‘Every accused person has a right to a fair trial, which includes the right –

...

(f) to choose, and be represented by, a legal practitioner, ...’

The relevant parts of Section 73 of the Criminal Procedure Act ... provide:- ”

‘(1) ...

(2) An 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.

(2A) ...’”⁸

[13.] The expressions “*legal practitioner*” and “*legal adviser*” are not defined in respectively the **Constitution** and the **Criminal Procedure Act**⁹.

[14.] In the **Labour Relations Act**¹⁰ the term “*legal practitioner*” is defined as “*any person admitted to practise as an advocate or an attorney in the Republic*”.

[15.] In **De Allende v Baraldi t/a Embassy Drive Medical Centre**¹¹ the word “*practitioner*” was held to include an attorney or an advocate in the context of legal representation in proceedings in the Magistrates’ Court. In fact, that the word “*practitioner*” would, for purposes of such proceedings¹², include an attorney is clear when regard is had to section 20 of the **Magistrates’ Court Act**¹³,

⁸ My emphasis.

⁹ 51 of 1977

¹⁰ 66 of 1995

¹¹ 2000 (1) SA 390 (TPD) at 395 A

¹² See Magistrates’ Court Rule 52(1)(a)

¹³ 32 of 1944

which provides that “*an advocate or attorney of any division of the Supreme Court¹⁴ may appear in any proceedings in any court*”.

- [16.] For present purposes it can, in my view, safely be assumed that an attorney would indeed in the normal course of events qualify as a “*legal adviser*” and as a “*legal practitioner*” for purposes of, respectively, the **Criminal Procedure Act** and the **Constitution**. The definition of the word “*practitioner*” in section 1 of the **Attorneys Act** is indeed that it means “*any attorney, notary or conveyancer...*”¹⁵. In fact, even a candidate attorney would by virtue of the provisions of section 8 of the **Attorneys Act** and section 21 of the **Magistrates’ Court Act** be able to act as “*legal adviser*” in terms of the **Criminal Procedure Act**¹⁶ (and therefore in my view by extension a “*legal practitioner*” for purposes of the **Constitution**), provided that he or she “*is not in terms of any law prohibited from appearing at the proceedings*”¹⁷.
- [17.] In terms of section 1 of the **Attorneys Act** an “*attorney*” is “*any person admitted to practise as an attorney ...*”. It is common cause that Mr Zietsman had been properly admitted and enrolled to practise as an attorney.
- [18.] Due to the fact that Mr Zietsman was not in possession of a fidelity fund certificate at the time of representing the accused he was, however, in terms of section 41(1)¹⁸ of the **Attorneys Act** prohibited from practising or acting “*as a practitioner on his or her own account or in partnership*”¹⁹.

¹⁴ Which should now be read as defined in the Superior Courts Act, 10 of 2013.

¹⁵ My emphasis

¹⁶ Subject to the provision in subsection (1) pertaining to appearance by candidate attorneys in the Regional Court.

¹⁷ As envisaged in section 73(2) of the **Criminal Procedure Act**.

¹⁸ Section 41(1) of the **Attorneys Act** provides as follows:

“*A practitioner shall not practise or act as a practitioner of his or her own account or in partnership unless he or she is in possession of a fidelity fund certificate.*” (My emphasis)

¹⁹ See also **Law Society of the Northern Provinces and another v Viljoen and others** [2011] 3 All SA 133 (SCA) Also reported as 2011 (2) SA 327 (SCA) para [10]

- [19.] It is indeed common cause that Mr Zietsman had in the normal course of events practised as an attorney for his own account, and there is no indication that he had been representing the accused on any other basis. It in fact appears from the record that Mr Zietsman represented the accused “*as per private instructions*”, which in my view could only mean that he was representing the accused on the basis that he would be paid for his services as part of his private practise. This would have constituted practising and acting as an attorney and practitioner “*for his ... own account*”²⁰, which he was under the circumstances by the provisions of section 41(1) of the **Attorneys Act** prohibited from doing.
- [20.] Did the prohibition from practising (or acting as a practitioner) on own account²¹ in section 41(1) of the **Attorneys Act** include a prohibition from appearing in the criminal proceedings? In my view there can be no doubt that the act of representing a client for reward would constitute practising and acting as a practitioner, as envisaged in section 41(1) of the **Attorneys Act**²².
- [21.] The provisions of section 41(1) therefore by necessary implication also prohibited Mr Zietsman from appearing in, *inter alia*, the Regional Court “*on his ... own account*”.
- [22.] At the time of representing the accused Mr Zietsman was therefore “*in terms of* (section 41(1) of the Attorneys Act) *prohibited from appearing at the proceedings*”, as envisaged in section 73(2) of the **Criminal Procedure Act**. In my view he did therefore not, in terms of the provisions of that Act, have the right to represent the accused in the criminal proceedings.
- [23.] To interpret the provisions of section 73(2) of the **Criminal Procedure Act** as permitting the appearance of an attorney who does so for reward and who is at the time prohibited by section 41(1) of the **Attorneys Act** from practising on his or her own account, and therefore also from appearing for a client on that basis,

²⁰ Compare **R v Zeiss** 1961 (1) SA 610 (T) at 613D

²¹ Or in partnership.

²² Compare **Marx v Stalcor and others; Glaubitz v Preston Anderson CC** [2001] 12 BLLR 1338 (LC) para [58]

would defeat the very purpose of section 41 of the **Attorneys Act** viz “*the reimbursement of persons who may suffer pecuniary loss as a result of theft committed by an attorney*”²³.

[24.] In view of this conclusion it is unnecessary to consider whether the court order could also be regarded as a “*law*” for purposes of the qualification in section 73(2) of the **Criminal Procedure Act**²⁴.

[25.] It is also not necessary to consider whether Mr Zietsman could at the time still have been regarded as being “*admitted to practise*”, as envisaged in the definition of the word “*attorney*” in section 1 of the **Attorneys Act**²⁵. Even if he was at the time of representing the accused still an attorney for purposes of the **Attorneys Act**, and therefore also a “*legal adviser*” for purposes of section 73(2) of the **Criminal Procedure Act**, the fact would remain that in terms of the provisions of section 73(2) of that Act he nevertheless did not have the right of appearance in these criminal proceedings. To put it another way, even if it could be said that the provision in section 41(1) of the **Attorneys Act** had left Mr Zietsman’s status as an admitted and enrolled attorney, and his right of appearance in general as part thereof²⁶, intact and in existence, he would nevertheless by virtue of the provisions of section 73(2) of the **Criminal Procedure Act** not have been entitled to appear in criminal proceedings.

[26.] It follows that I am of the view that Mr Zietsman’s appearance on behalf of the accused did indeed constitute an irregularity in those proceedings.

[27.] There is a long line of cases in which it was held that the lack of authorisation to appear on behalf of accused persons in criminal proceedings constitutes a fatal irregularity, regardless of the fact that the representatives concerned had the

²³ **S v Heji and Others** 2007 (2) SACR 527 (C) para [14]

²⁴ Compare **Registrar General of Elections v Combined Harare Residents Association & another** [2002] JOL 9489 (ZH) p 5

²⁵ Compare **Marx v Stalcor and others**, *supra*, footnote 22

²⁶ In **ABSA Bank v Snyman** 2015 (4) SA 329 (SCA) remarked that only “*an admitted advocate or attorney with a right of appearance*” (my emphasis) would be entitled to represent a party in the Supreme Court of Appeal, which would suggest that the mere fact of being an admitted advocate or attorney would not be decisive. A right of appearance would also be required.

required academic qualifications, and that such an irregularity necessitated the rescission of those proceedings without regard to the merits²⁷.

[28.] In **S v Chukwu and Another**²⁸, however, the appearance of a candidate attorney without the right of appearance in terms of section 8 of the **Attorneys Act**, was apparently found not to have constituted a fatal irregularity, because **Poswa J** went on to consider the merits and concluded that the accused in that matter had not been prejudiced. The provisions of section 73(2) of the **Criminal Procedure Act** do not appear to have been considered. The **Chukwu** case is in any event distinguishable from the present matter on the facts, because in the **Chukwu** case the criminal proceedings had taken place in a Magistrates' Court, and not in a Regional Court²⁹. The provisions of section 8(1) of the **Attorneys Act** as regards the rights of a candidate attorney to appear in Magistrates' Court are permissive ("*shall be entitled to appear*"), as opposed to the prohibitive wording in the proviso to that section as regards the right to appear in Regional Courts ("*shall not be entitled to appear*"). The candidate attorney in the **Chukwu** matter had therefore not been prohibited from appearing. He had simply not been authorised to appear. It is not necessary to express an opinion on whether **Poswa J** was correct in not approaching that matter on the basis that the unauthorised appearance of a candidate attorney in a Magistrates' Court also constituted an irregularity which *per se* vitiated those proceedings. It is also in the circumstances unnecessary to express an opinion on whether the approach adopted by **Poswa J**, viz to consider the merits and the question whether the accused had been prejudiced, was in accordance with the approach enunciated in **S v Mkhise; S v Mosia; S v Jones; S v Le Roux**³⁰.

²⁷ See **S v Khan** 1993 (2) SACR 118 (N); **S v Gwantshu and Another** 1995 (2) SACR 384 (E); **S v La Kay** 1998 (1) SACR 91 (C); **S v Nkosi en Andere** 2000 (1) SACR 592 (T); **S v Stevens en 'n Ander** 2003 (2) SACR 95 (T); **S v Tume and Others** (188/2004) [2006] ZANCHC 12 (24 February 2006); **S v Beleng** (An unreported judgment on review in this Division under case number 14/11); **S v Nghondzweni** 2013 (1) SACR 272 (FB) and **S v Swapi and Others** (14/14, RCZ 300/13, 6/2014) [2015] ZAECBHC 23 (1 September 2015)

²⁸ 2010 (2) SACR 29 (GNP)

²⁹ In all the cases referred to in footnote 26 above the criminal proceedings had taken place in Regional Courts.

³⁰ See para [10] and footnote 5 above.

- [29.] In my view there is no distinction between the position of a candidate attorney who does not in terms of section 8(1) of the Attorneys Act have the right to appear in the Regional Court, on the one hand, and any legal adviser who in terms of section 73(2) of the Criminal Procedure Act does not have the right of appearance in criminal proceedings, on the other.
- [30.] Mr Addinall relied on the judgment in **S v Heji and Others**³¹ in submitting that Mr Zietsman's appearance in the criminal proceedings without a fidelity fund certificate did not result in an unfair trial and did not constitute a "*gross*" irregularity which would call for the setting aside of those proceedings without having regard to the merits. He also pointed out that Mr Zietsman's new attorney could have witnesses recalled for further cross-examination.
- [31.] The **Heji** case also concerned an attorney who had appeared in criminal proceedings while he had no valid fidelity fund certificate. The prohibition in section 41(1) of the **Attorneys Act** was considered in the context of the penal sanction provided in section 83(10) of that Act for a contravention of that prohibition. It was found that the existence of the sanction did not necessarily imply the invalidity of the proceedings concerned and that "*the possession of a fidelity fund certificate ha(d) no relevant connection with the qualifications or competence of the attorney concerned*" to appear in those criminal proceedings, and the Regional Magistrate was ordered to proceed with the trial.
- [32.] There is no indication that the Court in the **Heji** case considered the prohibition on section 41(1) in the **Attorneys Act** in the context of the provisions of section 73(2) of the **Criminal Procedure Act**.
- [33.] The **Heji** judgment was followed in **Venter and Another v S**³², where the facts were for all purposes similar to those in the **Heji** case. Again no reference was made to the provisions of section 73(2) of the **Criminal Procedure Act**.

³¹ 2007 (2) SACR 527 (C)

³² An unreported judgment on appeal in the Western Cape Division of the High Court on 2 May 2014, under case number A121/13

- [34.] I find myself in respectful disagreement with the **Heji** and **Venter** judgments. In my view it is a jurisdictional requirement for the right to appear in criminal proceedings that the legal adviser concerned must not by any other law be prohibited from appearing in those proceedings³³.
- [35.] There is no indication that the source of the prohibition envisaged in section 73(2) of the **Criminal Procedure Act**, or even the reason therefor, would in any way be relevant.
- [36.] To permit an attorney who is prohibited from appearing on behalf of a client “*for ... own account*” to do precisely that, would in my view indeed frustrate the very purpose of the requirement of a fidelity fund certificate. It would expose that client to the risks that the requirement of a fidelity fund certificate, and the concomitant prohibition in section 41(1) of the **Attorneys Act**, intend to avoid. There is, in this sense, indeed a rational connection between the requirement that the legal adviser in criminal proceedings not be prohibited from appearing, on the one hand, and the prohibition in section 41(1) of the **Attorneys Act** from appearing, *inter alia* in such proceedings, on behalf of a client while not in possession of a fidelity fund certificate.
- [37.] Mr Zietsman was, because of the provisions of section 73(2) of the **Criminal Procedure Act**, read with those of section 41(1) of the **Attorneys Act**, in my view not “*qualified*” to appear in the criminal proceedings; not in the sense that he did not have the necessary academic qualifications, or even experience, but because he had no right to appear in criminal proceedings as long as he was prohibited from doing so³⁴.
- [38.] Although made in the context of different facts the remark of Kumleben AJA (as he then was) at 874G of the judgment in **S v Mkhise; S v Mosia; S v Jones; S v Le Roux** that “*authority to practise ... is essential to the proper administration of*

³³ Compare **S v Qmotsho** [2007] JOL 19092 (T) para’s [7] and [8]

³⁴ Compare **S v Gwantshu and Another**, *supra*, at 385f – g and 386b; **S v Nghondzweni**, *supra*, at 274b and **S v Stevens en ‘n Ander**, *supra*, at 97i - j

justice in a criminal case” should in my view find equal application in the present matter. Mr Zietsman must be assumed to have deliberately acted in contravention of the provisions of section 41(1) of the **Attorneys Act**, which could be argued to cast a shadow of doubt over his “*honesty and integrity*”³⁵. His conduct constituted “*professional misconduct*”³⁶.

- [39.] The lack of authority in terms of the **Criminal Procedure Act** to appear in criminal proceedings would in my view constitute a fatal irregularity, regardless of what the cause of the absence of such authorisation was.
- [40.] In **S v Dlamini en ‘n Ander**³⁷ the fact of the attorney’s temporary suspension and his resulting lack of authority to appear were held to have constituted an irregularity which in itself necessitated the rescission of the proceedings.
- [41.] In **S v Van Der Sandt**³⁸ the temporary suspension of an attorney was held to have constituted a prohibition against him appearing in the criminal proceedings and it was held that his appearance had amounted to the type of irregularity which had *per se* necessitated the rescission of the criminal proceedings.
- [42.] Section 83(4) of the **Attorneys Act**, read with section 22 and section 83(7) of that Act, makes it clear that an attorney who has been suspended from practising “*shall not*” continue to practise, which means that the attorney in the **Van Der Sandt** matter was in fact in effect, like Mr Zietsman, prohibited from appearing in those proceedings. The Court in the **Van Der Sandt** matter therefore held, in my respectful view correctly, that the attorney had lost his right of appearance as envisaged in, *inter alia*, section 73(2) of the **Criminal Procedure Act**.
- [43.] In my view our justice system will fall into disrepute, and public trust in it will be undermined, if the attitude is to be adopted that, even though an attorney has

³⁵ Compare **S v Mkhise; S v Mosia; S v Jones; S v Le Roux**, *supra*, at 874E

³⁶ **Law Society of the Northern Provinces and another v Viljoen and others**, footnote 19 above

³⁷ 2008 (2) SACR 202 (T)

³⁸ 2016 JDR 0323 (GJ) ([2016] JOL 36192 (GJ))

seen fit to blatantly disregard a statutory prohibition, it could be argued that no prejudiced has been suffered.

[44.] Mr Zietsman had in all probability misled both his client and the Regional Magistrate into believing that he was entitled to act as an attorney³⁹. In doing so he had been dishonest.

[45.] As regards the right to representation by a “*legal practitioner*” as envisaged in section 35(3)(f) of the **Constitution**, I think that it would presuppose that such practitioner must actually be entitled to represent the accused in a court of law and that he or she should not in terms of any law be prohibited from doing so.

[46.] In my view this irregularity 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*”⁴⁰ and “*when considerations of public interest are paramount, hardship in a particular case, should it arise, is to be regretted but cannot be avoided*”⁴¹.

[47.] It follows that I am of view that the present criminal proceedings should be set aside.

[48.] The next question is whether this Court should then remit the matter to the Regional Court and order that the accused be tried *de novo*. This is the order initially suggested by Ms Makhaga.

[49.] Although such an order is quite common in cases where proceedings are set aside, it has often been held to be undesirable. In **S v La Kay**⁴² it was held that the provisions of section 324 of the **Criminal Procedure Act**⁴³ provided the

³⁹ Compare **S v Xameni** (D 166/2013) [2014] ZAWCHC 36 (17 March 2014), para [8]

⁴⁰ **S v Mkhise; S v Mosia; S v Jones; S v Le Roux**, *supra*, at 872G

⁴¹ *Ibid*, at 875C

⁴² See footnote 18 above

⁴³ The relevant provisions of section 324 of the **Criminal Procedure Act**, which are in terms of section 313 of that Act applicable to review proceedings, read as follows:

“*Whenever a conviction and sentence are set aside by the Court of Appeal on the ground-*
(a) ...; or

prosecuting authority with a discretion to decide whether to charge an accused again and that an order that an accused be tried *de novo* would interfere with that discretion⁴⁴.

[50.] In my view this approach should find equal application in cases like the present, where the criminal proceedings have not been finalised and there has therefore not been a conviction and a sentence. There may well be cases where the Director of Public Prosecutions may decide not to reinstitute the charge, for instance where a complainant no longer wishes it.

[51.] If it is decided to prosecute the accused again the trial should, in view of the fact that the present Regional Magistrate has heard evidence on the merits, be conducted before a different Regional Magistrate⁴⁵. This would be consistent with the proviso to section 324 of the **Criminal Procedure Act** in cases where a conviction and sentence are set aside. Ms Makhaga also made the valid point that the accused would, in the event that he is again faced with the same charges, be entitled to reconsider his plea and his instructions to his legal representative, and that a trial before the same Regional Magistrate would compromise that right. The prosecution may also be prejudiced, because the Regional Magistrate may already have formed an unfavourable opinion regarding the demeanour of a prosecution witness. The accused in this matter has apparently for some reason expressed the wish that the proceedings in a trial *de novo* be conducted before the same Regional Magistrate. Acceding to this

(b) ...; or

(c) *that there has been any other technical irregularity or defect in the procedure,*

*proceedings in respect of the same offence to which the conviction and sentence referred **may** again be instituted either on the original charge, should it be amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: **Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.***" (My emphasis)

⁴⁴ See also **S v Dlamini en 'n Ander**, *supra*, para [13], and the orders in cases like **S v Masithela** 1986 (3) SA402 (O) at 404i; **S v Mkhise**; **S v Mosia**; **S v Jones**; **S v Le Roux**, *supra*, at 875H; **S v Nkosi en Andere**, *supra*, at 595h – i; **S v Stevens en 'n Ander**, *supra*, at 97h – i and 98c; **S v Swapi and Others**, *supra*, para [11]

⁴⁵ See **S v Khan**, *supra*, at 120d – e

request would however, quite apart from considerations like those already referred to, for obvious reasons create a very dangerous precedent.

[52.] In the premises the following orders are made:

- 1 THE PROCEEDINGS AGAINST THE ACCUSED, DIEDERICK JOHANNES VAN EEDEN, IN CASE NUMBER 07/2016 IN THE REGIONAL COURT HELD AT KATHU ARE SET ASIDE.
- 2 SHOULD THE CRIMINAL PROCEEDINGS AGAINST THE ACCUSED BE REINSTITUTED THE TRIAL IS TO BE CONDUCTED BEFORE A DIFFERENT PRESIDING OFFICER.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

L P TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the accused:	ADV DC JANKOWITZ (Instructed by DGF Attorneys Inc.)
For the Director of Public Prosecutions:	ADV M MAKHAGA
For the Law Society of the Cape of Good Hope:	MR S M ADDINALL