



**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.: R84/2017

In the matter between:

THE STATE

Applicant

and

V SIBEKO AND THREE OTHERS

CORAM:

VAN ZYL, J & HEFER, AJ

JUDGMENT BY:

HEFER, AJ

DELIVERED ON:

29 JUNE 2017

- [1] The accused are charged with theft of stock in terms of Act 57 of 1959. The trial commenced during March 2014 in the Regional Court held at Bethlehem, Free State Province. During the trial, thirteen witnesses testified. Numerous documents were also handed in as part of their testimony.

[2] Advocate Mofokeng represented the accused during the trial. During the last appearance on 30 January 2015, Mr Mofokeng was however absent. The prosecutor then informed the Court that he has received information to the effect that Mr Mofokeng was involved in an application of the Pretoria Bar Society to have Mr Mofokeng struck from the roll of advocates. According to this information, Mr Mofokeng did not have the necessary legal qualifications to appear and practise as a legal representative, and more in particular, an advocate. At that stage an interim interdict was apparently granted, preventing Mr Mofokeng to appear as a legal representative in Court. Mr Mofokeng was therefore barred from appearing in Court.

[3] The presiding officer's query is as follows:

"In view of the fact that, advocate Mofokeng was removed from the roll of practising advocates and it appears, he was not from the onset allowed to have practised law as he is not qualified to do so. I humbly request the honourable reviewing judges for guidance."

[4] Upon investigation it was ascertained that in case number 17840/2015 in the Gauteng Division of the High Court, Pretoria, the Pretoria Society of Advocates sought an order for the removal of Mr Mofokeng as an advocate from the roll of advocates. It appears that the basis for the application was indeed to the effect that Mr Mofokeng did not have the necessary academic qualifications to be admitted as an advocate in the High Court of South Africa.

- [5] In the Pretoria Society of Advocates' replying affidavit amongst others, the following were stated:

"During the consultation I was advised that the document which purports to be a certified copy of a Baccalaureus Legum Degree, issued to the respondent appears to be suspect in the following respects:

- 5.1 The font used to indicate the degree and the name of the respondent is not a font that was ever used by the University of Johannesburg.*
- 5.2 The signature ostensibly of the Pro Vice Chancellor and Vice Principal appears not to be authentic.*
- 6. During the aforesaid consultation, I was also provided with a complete record of respondent's academic curriculum at the University of Johannesburg. A copy of such document is attached marked annexure "BH1". It appears from annexure "BH1" that there are a number of subjects which were not completed by the respondent which serves as proof that the Baccalaureus Legum Degree could never have been conferred upon respondent.*
- 7. The conclusion Mr Van Zyl arrived at is that the document, filed by the respondent, paginated page 142 to the opposing affidavit is not an authentic document issued by the University of Johannesburg, formally Rand Afrikaans University. Mr Van Zyl further was of the view that the document contradicts the academic record maintained by the University for the respondent."*

- [6] On 26 July 2016 the Pretoria High Court ordered that Mr Mofokeng be removed from the roll of advocates. The presiding judge did not deliver a full judgment, but merely granted the order referred to. Of importance is that it appears that the basis for such removal from the roll of advocates was that Mr Mofokeng was indeed not duly qualified to be admitted as an advocate in the High Court of South Africa.
- [7] The letter by the Presiding Officer refers to section 304(4) of Act 51 of 1977. Section 304(4) is however only applicable where a Magistrate has already imposed a sentence. In terms of this section, if it is brought to the notice of a Court or a Judge that such sentence was not in accordance with justice, such Court or Judge may consider such sentence on review.
- [8] Section 304A of the Criminal Procedure Act is applicable if a Magistrate or a Regional Magistrate refers a matter to the High Court for review after the accused had been convicted, but before sentence. Section 304(4) as well as 304A are therefore not applicable in the present matter. The trial has not yet been concluded and the accused have not yet been convicted nor sentenced.
- [9] With reference to section 304(4) of the Criminal Procedure Act, the following was held in **S v Ralo** (2012) ZAECHC 7 (CA & R 39/2012):

“On a plain reading of the section it only provides for a review of the proceedings at the instance of a magistrate after conviction and

sentence of an accused person. This does not, however, detract from the Court's inherent jurisdiction to interfere in exceptional circumstances at any stage of uncompleted proceedings where a grave injustice may otherwise arise."

- [10] In **S v Nhlapo** 2016 (1) SACR 489 (GP) Jansen J, however, said the following in paragraph 15:

"In Ralo ... it was held, incorrectly, in the Court's opinion, that proceedings must reach the conviction stage before a matter may be reviewed by a Court."

- [11] In **DIE STAAT v SEKAKALA** 1962 (2) SA 105 (GWPA) the following was said on review at p107 F-G:

"Dit is 'n saak van imminente openbare belang dat 'n landdros, wat van mening is dat daar iets met 'n verhoor voor hom verkeerd geloop het die vrymoedigheid sal hê om sonder die nakoming van 'n formele en soms swaarwigtige prosedure, hom onmiddellik op die hersieningsbevoegdheid van die Hooggeregshof sal kan beroep sodat wat verkeerd gegaan het herstel kan word en die verhoor sy normale voortgang kan hê."

- [12] The Court then also referred to the High Courts' inherent power to review proceedings of the Magistrate's Court.

- [13] In **S v Taylor** 2006 (1) SACR 51 (CPD), the Court also referred to the inherent power of the High Courts as contained in the Supreme Court Act, 59 of 1959. More importantly, Yekiso J also referred to section 173 of the Constitution of South Africa which reads as follows:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.”

- [14] It was held that the approach suggested in section 173, is indeed comprehensive for it allows the exercise of the Court’s inherent power, taking into account the interest of justice, without being subjected to any form of statutory constraint.

- [15] I therefore find that the Magistrate was entitled to refer the matter for review at this stage and that this Court does have the power to review the proceedings before the conclusion thereof.

- [16] Currently, the grounds for review of proceedings of the Magistrates’ Courts by the High Court are contained in section 22 of the Superior Courts Act, 10 of 2013 and includes amongst others, gross irregularity during the proceedings.

- [17] Dealing with the High Court’s power to review the proceedings of the lower Courts, Herbstein & Van Winsen with reference to authorities, states in *“The Civil Practice of the High Courts of South Africa, 5th Edition at p. 1275”*, that once it is proved that a gross irregularity has occurred during the proceedings, it is not necessary to establish that it caused prejudice to the Applicant, being the accused. It is sufficient that the irregularity was such as was likely to prejudice the accused.

- [18] The provisions of section 35(3)(f) of the Constitution of South Africa , Act 108 of 1996 is of further importance. In terms thereof, an accused who is brought before Court is entitled to a fair trial, which includes such accused's right to legal representation by a legal representative of his own choice. This right indeed forms part of the Bill of Rights as contained in Chapter 2 of the Constitution.
- [19] A legal representative is a person who obtained the necessary qualifications to appear in a Court of Law and to practise as such. These qualifications will include in the first instance, the degree which was bestowed on such a person at one of the institutions recognised and referred to in the Attorneys Act, 53 of 1979 as well as Admission of Advocates Act, 74 of 1964. A person may not be admitted as an attorney or an advocate without obtaining such a degree. If indeed a person is admitted as an advocate in particular, without obtaining the relevant degree, such admission is to be set aside. It is on that basis also that Mr Mofokeng was indeed removed by the Pretoria High Court from the roll of advocates.
- [20] When an accused is represented by a person who, unbeknown to such accused, does not have the necessary qualifications to practise as legal practitioner, such an accused's right as contained in section 35(3) of the Constitution has indeed been infringed. Such an infringement on an accused's rights constitutes a gross irregularity as referred to by the author Van Winsen (*supra*). This irregularity was likely to prejudice the accused.

[21] I therefore find that by reason of the gross irregularity referred to, the proceedings up to date is to be set aside. The presiding officer should therefore also grant the accused the opportunity to obtain the services of another legal representative. The trial is then to start *de novo*.

[22] The matter can however not proceed before the presiding officer who dealt with the matter thus far. Such presiding officer may already have made some credibility findings, based on the evidence presented so far. If evidence is now presented for the second time, these findings may influence such presiding officer which will be improper.

In view of the aforesaid, the following order is made:

ORDER:

1. The proceedings in the Regional Court held at Harrismith in case number HSH30/2013 is set aside.
2. The matter is referred back to the Regional Court at Harrismith to commence *de novo* before another presiding officer.

J.J.F. HEFER, AJ

I concur.

C VAN ZYL, J