



**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

Review No. : R82/2017

THE STATE

versus

JABULANI PETER SIBEKO

CORAM: DAFFUE, J *et* SNELLENBURG, AJ

JUDGMENT BY: SNELLENBURG, AJ

DELIVERED ON: 30 JUNE 2017

- [1] Mr Jabulani Peter Sibeko, a 35 year old male, is arraigned in the Regional Court, Reitz on the counts of rape and aggravated robbery. When the trial commenced during July 2014 the accused was represented by Adv Mosebetsi Richard Mofokeng. The accused pleaded not guilty to both counts. The state presented the evidence of the complainant and one other witness before the matter was postponed to enable the state to procure the

attendance of further witnesses it intends to call. The matter was subsequently adjourned on various occasions due to different reasons. The matter is part heard.

- [2] Before the matter could proceed the Magistrates' Court was informed that Mr Mofokeng was struck off the roll of advocates by virtue of an order by the Gauteng Division of the High Court of South Africa, Pretoria on 26 July 2016. It has also become general knowledge that Mr Mofokeng was never properly qualified to represent anyone, let alone accused persons in criminal matters. All matters where Mr Mofokeng appeared on behalf of accused persons were subsequently struck off the roll pending the outcome on review of the matter between **F Mtshali and Another v The State, case number: 4031/2015** which has in the meantime been finalised in this Division. In that matter the accused had been convicted and sentenced and the court of review per Jordaan, ADJP (as he then was) *et* Daffue, J set aside the conviction and sentence as result of a failure of justice.
- [3] The presiding Magistrate consequently requests a special review of this matter in terms of the provisions of s 304(4). It also appears from the request for special review that the Magistrate has been unable to reconstruct the record of the part heard case. The complainant's evidence in chief is amiss and the Magistrate has not been able to reconstruct the record in that regard. The accused's representative may no longer assist in the task.
- [4] Several matters which are part heard where Mr Mofokeng appeared on behalf of accused persons have subsequently been

referred for special review. At date of this judgment I am aware of at least two other special reviews on similar facts which pended before different judges in this division. The only difference is that in this matter the Magistrate is also aware that the record of proceedings cannot be properly reconstructed.

[5] In the special review of **The State v V Sibeko and Others, case R84/2017 [Sibeko]** Hefer, AJ on behalf of the court dealt fully with the court's power to review a matter where the proceedings have not reached the stage of conviction and/or sentence. After reviewing the applicable provisions and legal precedent, Hefer, AJ concluded that although the matter could not be reviewed in terms of either section 304(4) or 304A, due to the fact the jurisdictional requirements of the said sections are not satisfied¹, the High Court retains the inherent power by virtue of s 173 of the Constitution to review proceedings of this nature where the matter is part-heard.² That court also relied on the provisions of s 22 of the Superior Courts Act, 10 of 2013 which includes as ground for review of the proceedings of the Magistrates' Court, gross irregularity in the proceedings.³ I agree.

[6] This court's inherent power to prevent a material failure of justice in uncompleted proceedings cannot be open to debate. In similar vein a magistrate is both obligated to prevent the anticipated manifestation of a failure of justice,

¹ **Section 304(4)** is only applicable where the Magistrate has imposed a sentence and **section 304A** applies where the accused has been convicted but not yet sentenced.

² See **S v Taylor 2006 (1) SACR 51 (CPD)**.

³ Ibid.

“...any presiding officer who allowed such a situation [where a substantial injustice was anticipated by the presiding Magistrate] to persist, was irresponsible in the extreme and acted in conflict with the oath of office he or she took on appointment.” (see **S v Du Toit and Others** (2) 2005 (2) SACR 411 (T)),

and should also be at liberty to immediately call in aid the High Court’s powers of review to rectify a failure of justice in proceedings the moment he/she becomes aware of it.

“Dit is 'n saak van eminente 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. In sulke gevalle sal hierdie Hof steeds doen wat immer moontlik is om die goeie gang van die regspleging te bevorder.” See **Die Staat v Sekakala** 1962 (2) SA 105 (GW) at 107G-H.

- [7] Equally applicable to matters of this ilk is the observation of Ackermann, J in **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) para [19]:

“If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

- [8] The requirements for admission as an advocate in terms of the Admission of Advocates Act, 74 of 1964, include that subject to the provisions of any other law, any division shall admit to practice and

authorize to be enrolled as an advocate any person who upon application made by him/her satisfies the court:

- 8.1 that he/she is over the age of twenty-one years and is a fit and proper person to be so admitted and authorized;
- 8.2 that he/she is duly qualified;
- 8.3 that he/she is a South African citizen or that he/she has been lawfully admitted to the Republic for permanent residence therein and is ordinarily resident in the Republic;
- 8.4 in the case of any person who has at any time been admitted to practise as an attorney in any court in the Republic or elsewhere, that his/her name has been removed from the roll of attorneys on his/her own application.

[9] The basis for the application to have Mr Mofokeng struck of the roll of advocates was the fact that Mr Mofokeng did not have the required academic qualifications to be admitted as an advocate in the High Court of South Africa in the first place. The background of those proceedings are dealt with by Hefer, AJ in **Sibeko**. Suffice it to say that Mr Mofokeng's admission as advocate is shrouded in mystery. He could never have been admitted as advocate as he did not satisfy the requirements to be admitted as such. That those proceedings also evidenced doubt regarding the authenticity of the court order admitting Mr Mofokeng, is apparent from para 1 of the court order, namely "The order of Van der Byl (AJ) and Ebersohn (AJ) purportedly made on 3 August 2010 in case number 34133A/2010 admitting

the respondent as an advocate of the High Court (a copy of which is attached hereto as annexure “X”) is hereby rescinded and set aside.”

- [10] It was the Pretoria Society of Advocates’ case that the Baccalaureus Legum Degree which was purportedly conferred on Mr Mofokeng was not authentic. It appears that the official records of the relevant University show that Mr Mofokeng in fact never completed a number of subjects which were a prerequisite before he could satisfy the requirements for the said degree to be conferred on him and the signatures of the Pro Vice Chancellor and Vice Principal on the degree appeared not to be authentic.
- [11] Mr Mofokeng misrepresented to the accused, the court and the public at large that he was a duly admitted advocate who had satisfied all the requirements to be so admitted. Inherent in the misrepresentation to the accused was that he, Mr Mofokeng, was duly qualified to represent the accused during his trial as legal representative with the requisite legal training and qualifications. The misrepresentation strikes at the very heart of the accused’s right to a fair trial of which legal representation is a corner stone. This right also entails the right to effective legal representation.
- [12] I have no doubt that the accused’s constitutionally enshrined rights to a fair trial and legal representation have been infringed and that Mr Mofokeng’s conduct has already caused a grave failure of justice. This should be remedied without further delay. It would be manifestly unfair to allow the trial to continue, regardless of what has been described as a ‘gross irregularity’ in **Sibeko** *supra*,

where the outcome is already foredoomed. To allow the proceedings to continue will undermine the interests of justice.

[13] In addition to this the record of proceedings is already incomplete whilst the prosecution is still presenting its case.

[14] The proceedings therefore stand to be set aside. The matter needs to be remitted so that it can commence *de novo* before another presiding officer. The accused will obviously have the right to legal representation when the matter commences *de novo*.

[15] I accordingly make the following order:

1. The proceedings in the Regional Court, Reitz in case SH03/14 are set aside.
2. The matter is remitted to the Regional Court, Reitz to commence *de novo* before another presiding officer.

N. SNELLENBURG, AJ

I concur.

J.P. DAFFUE, J