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 number: R75/2017

In the matter between:

THE STATE Applicant

and

MOLIFI SOKOI Respondent

CORAM: LEKALE, J et MBHELE, J

JUDGMENT BY: LEKALE, J

DELIVERED ON: 10 AUGUST 2017

REVIEW JUDGMENT

SUMMARY: Criminal Procedure and Bill of Rights-Abuse of right to legal representation-Whether or not right abused depends on reason advanced for termination of representative's mandate. Right substantial in nature and contemplates representation by representative with full and proper instructions to ensure that accused person gets fair trial. Accused to be afforded opportunity to furnish reasons for termination of mandate or for withholding instructions before representative is excused from proceedings.

BACKGROUND AND INTRODUCTION

[1] On 4 August 2016 the accused Mr Sokoi, who was not legally represented following the withdrawal of his attorney, appeared before the Magistrates' Court at Bloemfontein as accused number two together with another accused person on a charge of housebreaking with intent to steal and theft and was found guilty as charged. He was, thereafter, sentenced to ten (10) months imprisonment.

[2] The matter, thereafter, served before Ramdeyal, AJ in this division on review in the ordinary course as provided by Section 302 of the Criminal Procedure Act 51 of 1977(the CPA) and she directed a query in, *inter alia*, the following terms to the trial magistrate:

> **"4. Section 35 (3) of the Constitution of the Republic of South Africa 1996 specifically makes reference to an accused person's rights to a fair trial including his right legal representation.**
>
> **5. Were the accused person's rights not infringed by him being "forced" by the Magistrate to conduct his own defence bearing in mind that he constantly required legal representation?"**

[3] The learned Magistrate has gratefully since responded as follows, among others:

> **"3. The Court takes cognisance of the provisions of the section so cited. The court dealt extensively with this aspect in its judgment from page 219 at paragraph [20] until page 223 at paragraph [20]. The court is well aware that her honourable judge is familiar with**

this passage from S v Shaik 2008 (2) SA 208 at para [43] but for easy reference same will be quoted. ...

My further submission on this specific point can be supported by my attitude towards the accused throughout the entire proceedings. The accused was treated with the necessary courtesy and respect deserved by all parties before a court of law.

5. **The Court although accepts that in retrospect it may appear that the accused person's right to legal representation may have been infringed, but in truth an(sic) in fact that was not the case. the accused simply abused his right to be legally represented as he would have legal aid and along the way just simply wanted to conduct his own and then again wants legal aid. this is something that is well documented from the entire record of the proceedings. even on the trial date a different legal aid practitioner was in court and confirmed that she was ready to proceed but the attitude of the accused was simply not to get the case started. it can be pertinently seen in page 2 paragraph [10] of the record. the court even at some stage long before the trial started invoked the provisions of section 342 A of the criminal procedure act since in order to investigate and eliminate those unreasonable delays caused by the accused persons.**

I therefore requested the Honourable Judge on review to make the following order:

(a) Confirm both the conviction and the sentence imposed, or

(b) Make an appropriate order under the circumstances."

[4] The matter is now before us for finalization of the automatic review. As correctly conceded by the trial Magistrate the sentence has already been fully served and the record was only received by the Registrar of this Court on 7 June 2017. The delay in dispatching the record has, however, been adequately and

satisfactorily explained by the Magistrate who attributes the same to the transcribers as well as the fact that the record was returned to them on at least three occasions due to incomplete transcriptions.

SALIENT FACTUAL POSITION

[5] A perusal of the record reveals, as correctly noted by the trial court in his judgment, that the accused and his co-accused first appeared in the Reception Court on the 1st of September 2014 and their rights to legal representation were explained, whereupon, the accused elected to apply for assistance from Legal Aid SA. The matter was first received by the trial court for plea and trial on 13 January 2015, whereupon, the accused's right to legal representation was once again explained and he opted for assistance by Legal Aid SA. The matter was, thereafter, postponed on numerous occasions for reasons unrelated to the accused's legal representation until 16 April 2015 when the accused terminated the mandate of his Legal Aid SA provided representative electing to conduct his own defence.

[6] On 25 April 2015 the matter could not proceed to trial as one of the accused had a new private attorney while the accused still appeared in person. On 26 June 2015 the trial court determined, in terms of section 342 A of the CPA, that the unreasonable delays involved in the finalization of the matter were attributable to all the accused. On 23 July 2015 the accused's newly provided legal representative withdrew from the matter on the basis that the accused refused to give her instructions although

she, on her part, was ready to proceed with the trial. The trial court excused the relevant legal representative from the proceedings and directed that the trial was to proceed without the accused being legally represented notwithstanding his protestations and explanation of the differences between him and the legal representative in question.

[7] The trial, thereafter, proceeded with the accused refusing to plead and the trial court entering a plea of not guilty on his behalf in terms of section 109 of the CPA. The accused refused to participate in the proceedings by declining to cross examine the first two witnesses called by the State. On 22 October 2015, when the State was about to call a third witness, the accused placed on record that he was not feeling well and, further, enquired after the whereabouts of an attorney who, according to him, was supposed to consult and represent him in the proceedings on Legal Aid South Africa's brief. The trial court entertained his concerns about his ill health but refused point blank to allow him an opportunity to acquire or consult a legal representative pointing out that the accused would not be allowed to abuse the right to legal representation by changing attorneys provided by Legal Aid SA "**left, right and centre.**"

[8] On 26 November 2015, when the trial resumed after an adjournment following the accused's indisposition, the accused once again informed the trial court that he had secured another legal representative from Legal Aid SA but the court rejected the idea effectively reiterating that the *status quo ante* would prevail until the trial was finalised. The matter, thereafter, proceeded to

finality with the accused participating to the extent of even testifying in his defence and in mitigation of sentence.

APPLICABLE LEGAL POSITION

[9] It is true that the right to a fair trial, which is conferred on every accused person by the Constitution of the Republic of South Africa, 1996 (The constitution), includes the right to legal representation as well as the right to have their trial begin and conclude without unreasonable delay. (See **Section 35 (3)(d); (f) and (g) of the Constitution**).

[10] It is equally correct that in the words of the Constitutional Court

> **"the right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires –**
> **fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime. (See S v Shaik and others *supra* at paragraph [43])"**

[11] Failure to advice an accused person of the right to request a postponement and, thus, allowing her an opportunity to acquire the services of another legal representative after her attorney withdrew constitutes gross irregularity insofar as she is, as such, given no choice and opportunity as to the exercise of her constitutional right to legal representation. It in fact, amounts to failure of justice in the context of section 322 (1) of the CPA.

(See **Mafongosi v Regional Magistrate Nel & Another** [2007] JOL 20706 (Ck) and **S v Shaik & others** *supra* par [44]

[12] In the context of the doctrine of abuse of rights "**[o]ne of several meanings of the term "abuse of rights" provides that there is an abuse of right when the exploitation of an individual right injuriously affects the interests of the community.**" (See **Abuse of Rights: An Old Principle, A New Age** by Michael Byers (2002) 47 McGill L. J. 389)

APPLICATION OF LEGAL POSITION AND FINDINGS

[13] It is not inconceivable that an accused person may abuse the right to legal representation by changing legal representatives "**left, right and centre**" as found by the trial court without just cause for the purpose of delaying commencement or finalisation of the trial in the hope that witnesses would simply lose interest or die in the process and, thereby, compromise and frustrate the interests of justice.

[14] It is, however, equally conceivable that an accused person may have sound reasons for moving from one legal representative to the other all with the view to ensure that his rights are well protected and he, as such, gets a fair trial.

[15] It is, further, possible that an accused person, who initially elected to conduct his own defence, may, in the course of the trial and when the going gets tough, decide to enlist the services of a legal practitioner either because he wants to delay the process maliciously or because he simply needs expert assistance in the

process in order to ensure that he gets a fair trial. The question as to whether or not the accused person in the context of the instant matter abused the relevant right depends, in my view, on the answer to the question whether or not he terminated the services of the relevant legal practitioners and, if so, whether or not he had good cause for doing so.

[16] The answers to the preceding questions are apparent *ex facie* the judgment of the trial court as well as the record. According to the trial court the accused terminated the services of his first legal representative because they could not understand each other due to language differences. He, thereafter, elected to conduct his own defence but before the trial could commence he secured another legal representative, once again through Legal Aid SA, with whom he could communicate without any hiccups. The practitioner in question, however, withdrew on the morning of the trial because she could not get instructions from the accused. A look at the record reflects that the practitioner in question was excused from the proceedings without the accused being afforded an opportunity to consent to and confirm the reasons advanced by the relevant practitioner for the withdrawal. Only after she was excused did the accused give his side of the story without being invited thereto. It is clear from the explanation furnished by the accused that, in his view, there existed no sufficient time for consultation between him and the relevant practitioner insofar as the contents of the docket were only provided to the relevant practitioner on the morning of the trial and in the presence of the accused. There was a need, according to the accused, to consult with his representative at the Correctional Centre. The trial court,

however, rejected his explanation holding that he decided for the practitioner that the latter was not ready for trial when, in fact, the practitioner had informed the court that she was ready. The practitioner could, obviously, not have been ready for trial when the accused was refusing to give her instructions.

[17] In my opinion the accused's version should have been presented before the practitioner could be excused in order for her to get an opportunity to respond thereto all in an endeavour to get to the bottom of the matter and resolve any possible misunderstandings between the two of them. In short the accused did not terminate the mandate of the practitioner in question but simply needed more time to consult with her before the trial could commence. He insisted on legal representation to the extent of refusing to plead and to take the first two witnesses for the prosecution under cross examination. He sought representation before the third witness was called but the court maintained that a ruling had already been made to proceed without any legal representation on his part. The witness in question was called in terms of section 204 of the CPA and was the former accused number 3 in the matter.

[18] The accused, in his request for legal representation, effectively pointed out to the trial court that he needed a lawyer because there were discrepancies between the relevant witness's first statement on which he consulted with his previous representative and the second statement which was then in his possession. The witness in question was an accomplice and the accused, probably, needed an expert, in the form of a lawyer, to assist him

in, *inter alia*, proving previous inconsistent statements against such a witness. It is, further, possible from his utterances, which were made without any clarity-seeking questions from the trial court, that such first statement was still in the custody of his previous attorney.

[19] It is clear to me that the accused only terminated the services of one attorney and had just cause for doing so insofar as there existed a language barrier between him and such representative. He elected to proceed on his own but the trial never proceeded during the relevant period. He secured the services of a second representative before the trial commenced but the latter withdrew on the day of the trial. I am, further, persuaded by the material before the trial court that the accused had good reason to doubt that the relevant practitioner was ready to proceed insofar as the contents of the docket were only secured that morning and she never consulted with him before that date. As the accused correctly and effectively pointed out to the trial court, his liberty was at stake and it was necessary that he developed trust and confidence in his representative.

[20] Such confidence and trust, in my opinion, needed to be cultivated and nurtured through proper consultations between attorney and client, in the comfort and privacy of the attorney's office or at a place regarded as familiar and private enough by the accused such as the Correctional Centre which was his place of abode at the relevant time. Meeting and consulting with one's lawyer for the very first time along court corridors or in the holding cells on the morning of the trial can hardly inspire one with confidence. It

has the reasonable potential to create the impression, right or wrong, in the mind of an accused person that the lawyer has little, if any, interest in the matter regard being had to failure on her part to make time to consult the accused, as her client, in time to prepare. Substantive approach to the right to a fair trial, within the contemplation of **S v Shaik and Others** (*supra*) reveals that the right to legal representation, as integral part of the right to a fair trial, is substantial and does not only allow representation by a practitioner simply because such a practitioner is academically qualified and has audience in criminal courts but, in essence, ensures that the accused gets a fair trial by securing, if he so desires, the services of a practitioner who is well armed to assist him to get a fair trial. Well-armed, in my view, includes having full and proper instructions obtained through proper consultations with the relevant accused person, all with a view to securing enough ammunition to ensure that the latter, as a client, gets a fair trial.

[21] All that was required in the circumstances of the present matter was for the trial court to explain the situation to the accused, in consultation with the relevant practitioner, before the latter could be excused. In this regard it should be noted that the accused insisted that he required the services of the same representative and only needed to consult with her properly before trial. Practical experience and common sense indicate that in most, if not all, cases Legal Aid SA- provided legal representatives first have to make deliberate or extra efforts to win the trust and confidence of accused persons before they may hope to get full and proper

instructions simply because they are not necessarily the choice of and are often unknown to such accused persons.

[22] I am, further, convinced that there existed reason for the accused to desire legal representation before his former co-accused could testify in the light of the nature of the latter's testimony as his former co-accused.

[23] In my judgment it cannot be said that the accused was guilty of abusing his constitutional right to legal representation in the circumstances of the instant matter. His exercise of the right in question was not unreasonable. The delay in commencing the trial was clearly not attributable to his exercise of that right regard being had to the fact that it is not apparent *ex facie* the record that the matter was ever postponed, in the main, for the purposes of allowing him legal representation. On many occasions the trial was postponed because not all of the accused were before the trial court. It is, further, clear from the record that the accused was in custody as at the date of trial following refusal of bail. He had been so in custody for almost 2 years when trial was concluded. In my view it could, therefore, on a balance of probabilities, not have been easy and comfortable, to the extent of being reasonably impossible, for him to decide to delay commencement and finalisation of the trial regard being had to human experience.

[24] The trial court appears to have been motivated by the desire to reach finality in the matter regard being had to the need for expeditious finalisation of matters of the present nature, the costs of protracted trials on the State and the decision the court had

already taken in terms of section 342 A of the CPA to the effect that the matter should proceed to trial without further delays. The trial court, thus, failed to strike a healthy balance between the right to speedy trial and the interests of society, on the one hand, and the right to legal representation on the other hand with the result that he placed undue emphasis on the former to the prejudice of the latter. In denying the accused legal representation the trial court, in fact, committed gross irregularity which rendered the trial unfair and, as such, vitiated the proceedings.

[25] The proceedings were, therefore, not in accordance with justice and, as such, fall to be set aside. The accused has already served the sentence in full and it would, therefore, not serve any purpose whatsoever in law and equity to remit the matter to the trial court.

ORDER

[26] In consequence the conviction and sentence imposed on accused number 2, Molifi Sokoi are set aside.

pp L.J. LEKALE, J

I concur

NM MBHELE, J