



Reportable:	YES/ NO
Circulate to Judges:	YES/ NO
Circulate to Magistrates:	YES/ NO
Circulate to Regional Magistrates:	YES/ NO

HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: **1104/16**

Heard: **28/10/2016**

Delivered: **10 /02/2017**

In the matter between:

JACQUES BENJAMIN MARINGA

Applicant

And

**THE DIRECTOR OF PUBLIC PROSECUTIONS
OF THE NORTHERN CAPE**

Respondent

Coram: Matlapeng AJ

JUDGMENT

Matlapeng AJ

1. The applicant is Mr Jacques Benjamin Elester Maringa who is currently a sentenced prisoner. The respondent is the Director of the Public Prosecutions of the Northern Cape. Initially the respondent filed its notice of intention to oppose this application. This was as a result of a

certain ground of relief that the applicant sought. Upon the applicant withdrawing such a ground, the respondent also withdrew its opposition and the matter is now unopposed.

2. After the matter was heard, I requested Mr Eillert for the applicant and Mr Cloete from the respondent's office to provide me with heads of argument and they have kindly done that. I am indebted to them for their assistance.
3. The relief applied for by the applicant is that a special entry be noted in terms of s 317(2) of the Criminal Procedure Act, 51 of 1977 in respect of proceedings heard under Case No. KS594/2004.
4. Section 317 (1) and (2) of the Criminal Procedure Act provides:

If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the trial or, if he is not available, or, if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the provincial or local division of which that judge was a member when he so presided.

5. In order to understand the nature of the relief sought, the following background facts are provided. During November 2004, the applicant together with his co-accused were charged and tried for robbery, murder, unlawful possession of firearms and ammunition in the Circuit Court held at Upington. At the conclusion of the trial, the applicant was found guilty and sentenced as follows: 15 Years imprisonment in respect of robbery; life imprisonment in respect of murder and for possession of fire arm and ammunition the counts were taken as one for purposes of sentence and he was given three years imprisonment.
6. During the trial the applicant was represented by an attorney from Pretoria, Mr R.J Van Der Merwe, who has since been struck from the roll of the attorneys. After conviction and sentence, the applicant instructed the said attorney to apply for leave to appeal which was duly done but leave was refused by the court.
7. The applicant began to serve his sentence and during October 2015, he requested his mother to obtain the services of an attorney with the request to assist him to be placed under correctional supervision or to be released on parole. It was during consultation with this new attorney that it came to the fore that the applicant's previous attorney Van Der Merwe, appeared in the High Court whilst not in possession of a certificate authorising him to do so in terms of s 4(2) of Right of

Appearance in Courts Act, 62 of 1995. This was as a result of the investigations instituted by the new attorney who made inquiries at the Law Society of Northern Provinces, the Registrar of the High Court, Gauteng Division, the senior Registrar of the High Court, Northern Cape. He received the results of these enquiries on 09 May 2016.

8. The Judge who presided over the trial is no longer available to entertain this matter. However s317 (2) covers this eventuality in that any Judge of the Provincial Division of which the unavailable Judge was a member when he so presided, may hear the application. It is clear that this application was brought way beyond the prescribed time period. The reason is so why this is so not hard to find. The applicant was not aware after he was sentenced that his rights may have been infringed. He explained that he gained this knowledge by happenstance. It was only when he consulted with his current attorney with the view of applying for parole or converting his sentence to correctional supervision, that he was informed that his rights may been infringed.

9. The right to legal representation is one of the most sacrosanct rights in our Bill of Rights. See s 35(2)(b) of Constitution of the Republic of South Africa, 108 of 1996. In **S V Halgryn [2002] 4 All SA 157(SCA)** it was stated at par 14 that "the constitutional right to counsel must be real effective or competent defence". In my mind, this can only follow if the accused is represented by a properly qualified legal representative who has a right to appear in the court at issue. To appear in such a court, such a practitioner necessarily will apply the court or the Registrar of such a court holding himself out to possess the necessary skills and ability to appear in that a court. Then on that

basis, will the Registrar issue a certificate certifying that such a person is properly qualified.

10. In **S V Mkhisa; S V Mosia; S V Jones; S V Le Roux 1988(2) SA 868 (A)** it was held to be a fundamental irregularity where a person, who had not been admitted as an advocate, represented accused in a criminal trial. Furthermore, in **Olivier en Ander V Prokureur General, Kaapse Provinsiale Afdeling en Andere 1995(1) SA 455 (C)** it was stated to be an irregularity where a candidate attorney appeared in the Regional Court on behalf of accused without a required certificate entitling him to appear in such a court.
11. The applicant bitterly complains that his defence was handled with ineptitude thus rendering his trial unfair. This however, is "*a factual question that does not depend upon the degree of ex post facto dissatisfaction of the litigant*". Furthermore, at this stage of the proceedings, it is not my duty to make a finding whether there is merit in the applicant's contention or the result of such irregularity see **S v Botha 2006 SARC 105 (SCA)**. I am merely called upon to introduce the alleged irregularity.
12. Notwithstanding the inordinate delay in bringing this application to court, I am of the view that condonation for the late filing of the application should be granted. Having regard to the explanation given by the applicant, I am of the opinion that the application satisfies the test laid down in s317 of the Criminal Procedure Act in that it is made *bona fide*, it is not frivolous or absurd and by granting it would not be an abuse of the process of court.

13. Both Counsel have without being prescriptive, suggested an order to be made. I am of the view that the suggested order is couched in acceptable terms.

14. In the circumstances I make the following order:

1. *dat kondonasie aan die applikant toegestaan word vir die liasering van die aansoek buite die tydperk soos voorsien in Artikel 317 (1) van die Strafproseswet 51 van 1977*
2. *Dat die volgende spesiale anntekening in terme van Artikel 317(1) van die Wet op die rekord van die strafverringtinge onder saaknommer K/S94/2003 van hierdie hof gemaak word:*

Gedurende die verhoor is Beskuldigde Twee verteenwoordig deur ene Roelof Johannes van der Merwe, terwyl van der Merwe nie ooreenkomstig die bepalinge van die "Right of Appearance in Courts Act", Wet 62 van 1995 oor die reg op verskyningsbevoegdheid in die Hooggeregshof beskik het nie. Beskuldigde 2 beweer dat die verrigtinge onreelmatig was en dat geregtigheid nie geskied het nie.



D I MATLAPENG

ACTING JUDGE

Northern Cape High Court, Kimberley

Counsel:

For the Applicant:	<u>Adv A Eillert</u>
Instructed by:	Andre Potgieter Attorneys

For the Respondent:	<u>Adv JJ Cloete</u>
Instructed by:	DPP Kimberly