

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

A376/15

In the matter of
THE STATE
vs
J M S MALOMA

Review Case Number: 209/15

(1) ~~REPORTERBAAR, JAMES~~

(2) VAN DELANG VIR ANDER RECHTER, JAMES

(3) HERSIEN.

27/5/2015

DATUM

HANDTEKENING

11/6/2015

Accused

REVIEW JUDGEMENT

BAM J

1. This matter, accompanied by a comprehensive memorandum, was submitted on special review, in terms of section 304(4) of the Criminal Procedure Act, Nr. 51 of 1977, ("CPA"), by the regional court magistrate of Lydenburg.
2. The issue turns upon the question whether it is correct in law that an interpreter in a criminal trial may administer the oath to witnesses. For obvious reasons the adjudication of this issue is of cardinal importance to all criminal courts.
3. In the matter under review the oath was administered to the witnesses by the interpreter in the presence of the judicial officer.
4. The presiding regional court magistrate requested this Court to rule upon the question whether this procedure constituted an irregularity as found in a recent (presently unreported) decision of the full bench of the North West Division of the High Court, *Pilane v The State*; CA 10/2014, delivered on 5 March 2015. This case came before that Court on appeal from a regional court where the issue in question was specifically raised.
5. Concerning this question it however appears from the judgment that the Court was called upon to only consider section 162 of the Criminal Procedure Act, Nr. 51 of 1977, ("CPA"). In this regard paragraphs [5] and [6] of that judgment, reflecting the appellant's contentions, read as follows:

- [5] *"The Appellant contends that the manner in which the oath was administered constitutes an irregularity that vitiates the proceedings."* (Added to this Section 162 of The CPA was quoted verbatim.)
- [6] *"Furthermore, the oath must be administered by a judicial officer and not the interpreter. In the event the oath is not administered by the judicial officer as prescribed by section 162, the witnesses were not properly sworn in and there evidence is therefore inadmissible."*
6. In paragraph [8] of the judgment, the Court indicated that it relied on *Matshiva v The State* (656/12) [2013] ZASCA 124 (23 September 2013) in which case it was stated that in terms of the provisions of section 162 of the CPA *"it is peremptory for all witnesses in criminal trials to be examined under oath."*
7. Obviously, and with the necessary respect, it is trite and abundantly clear, and indeed peremptory, in terms of the mandatory provisions of section 162, subject to the provisions of sections 163 and 164, that the oath has to be administered to every witness.
8. In conclusion the North West Court agreed with the appellant's contentions and found that if the oath was not administered by the presiding judicial officer in compliance with Section 162 of the CPA, the evidence of the particular witness to whom the oath was administered by the interpreter was inadmissible and an irregularity vitiating the entire proceedings.
9. What, however, the North West Court, with respect, did not consider, are the provisions of section 165. This may be due to the fact that counsel appearing for the appellant and the State, for an unknown and inexplicable reason, failed or neglected to draw the Court's attention to that section, and for that matter, the country wide long standing practice of the application thereof in all our criminal courts.
10. For the sake of completeness and easy reference the applicable sections are quoted.

Section 162: Witness to be examined under oath

- (1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings, unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of the superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:-

"I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God."

- (2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

Section 163: Affirmation in lieu of oath

- (1) Any person who is or may be required to take the oath and-
- (a) who objects to taking the oath;
 - (b) who objects to taking the oath in the prescribed form;
 - (c) who does not consider the oath in the prescribed form to be binding on his conscience; or
 - (d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief, shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:-
 "I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth".
- (2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.
- (3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

Section 164: When unsworn or unaffirmed evidence admissible

- (1) Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.
- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

Section 165 Oath, affirmation or admonition may be administered by or through interpreter or intermediary

Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or

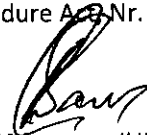
under the eyes of the presiding judge or judicial officer, as the case may be.
(Emphasis added.)

11. Interpreters are usually officially appointed by the Department. It goes without saying that any interpreter must be duly sworn in.
12. Subsequently, in the matter of *Machaba and Another v The State* (20401/2014) [2015] ZASCA 60 (8 April 2015), the Supreme Court of Appeal, in paragraphs [8] and [9] of the judgment, with reference to *Pilane*, confirmed that it is peremptory in terms of section 162 that either the presiding judge, or the registrar in the case of a superior court should administer the oath to witnesses. The question whether it was justified in law that the interpreter was empowered to administer the oath, was not addressed and the Court was clearly not called upon to consider Section 165. The Court merely referred to the provisions of section 162. Accordingly the decision in *Machaba*, with respect, did not solve the problem.
13. It follows, with respect, that the North West Division's conclusion, whilst the Court did not consider Section 165, cannot be supported.
14. What really concerned the regional magistrate, arises from the application of that part of the doctrine of *stare decisis* providing that all lower courts are bound by decisions of any High Court of the country on a specific point of law where no decision of the Constitutional Court, the Supreme Court of Appeal, or of the High Court of its own division, exists. (In view thereof that the doctrine is trite and that it has been referred to and discussed in several decisions of the Constitutional Court and the Supreme Court of Appeal, it is not deemed necessary or expedient to discuss or refer to it in any detail. See *Camps Bay Ratepayers and Resident's Association v Harrison* 2011 (4) SA 42 CC, paragraphs [28] and [29]; and *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 179, paragraphs [78] to [81].)
15. It follows, in view thereof that the decision in *Pilane* is the only High Court decision concerning the issue that could be located, all lower courts in this division, and for that matter in all other divisions, are bound by the said ruling until the Constitutional Court or the Supreme Court of Appeal overturns it, or another High Court delivers a different decision.
16. Accordingly, in conclusion, it is found that the administration of the oath by the interpreter in this matter was consistent with the provisions of section 162, read with section 165, and that no irregularity was committed.

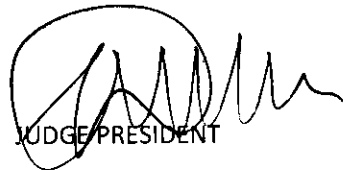
17. The comment furnished by the representatives of the Director of Public Prosecutions, Advocates Roos and Meintjes SC, supporting the aforesaid conclusion, is appreciated.

Order.

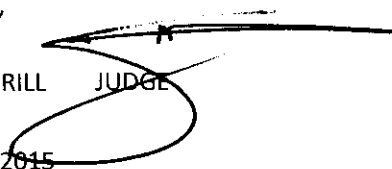
The oaths administered to the witnesses by the interpreter in case SHL108/10, Lydenburg, was correct in law, consistent with the provisions of sections 162 and 165 of the Criminal Procedure Act Nr. 51 of 1977.


A J BAM JUDGE

I concur,


D MLAMBO JUDGE PRESIDENT

I concur,


S POTTERILL JUDGE

27 May 2015